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*Public Policy*

## **The Checkered Impact of US Compensatory Education Policies on Educational Inequality**

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### **Abstract**

Against the backdrop of a nation reckoning with its deeply rooted racial inequities, the 1960s and 1970s saw the dawn of new US federal compensatory education policies aimed at minority communities. Intended to support disadvantaged students by targeting the lack of opportunities and resources, compensatory education policies aimed to address the deeply entrenched barriers that resulted from intergenerational poverty and oppressive policies against minority groups. Following the Civil Rights Act of 1964, compensatory programs tackled a pervasive disparity in the grade-level achievements of students of color in comparison to their white counterparts, which came to be known as the black-white achievement gap. The newfound national desire to address racial inequality catalyzed education reforms to close the achievement gap. Federal funding for disadvantaged students had a notable impact on the short-term achievements, but the implementation of the policies was deficient and lacked a holistic understanding of cultural and psychological factors. This essay examines the extent to which compensatory education policies addressed long-term educational inequalities and how they influenced modern education policy. Using qualitative and quantitative findings from primary sources, the paper analyzes the experiences of minority communities in compensatory programs. The analysis illustrates that while compensatory education policies failed to fully address intergenerational disparities, they were influential in setting a precedent of working toward educational equality and provided constructive lessons for future policies.

## History of Educational Inequalities

In the mid-20th century, rising awareness of socioeconomic inequality led to the conclusion that a major factor precluding minority communities from achieving the “American dream” of merit-based affluence were chronic wealth disparities, often stemming from inequalities in the education system. Decades of racial segregation and discriminatory Jim Crow policies created substantial setbacks in wealth equality for people of color. The income disparity between Black and white Americans was significant; in 1968, a typical middle-class white family earned \$64,000 more than a middle-class Black family.<sup>1</sup> The racial wealth gap and its associated socioeconomic problems were especially pronounced among less-educated Americans, with a white high-school graduate earning almost 10 times the income of a Black American with the same background.<sup>2</sup> Even as discriminatory policies were lifted, wealth inequality continued to persist in the American economy because children of color had fewer educated role models and decreased access to resources needed to succeed in education and the workforce. Because public school districts were funded by property taxes within the attendance zone, housing as a resource was particularly intertwined with education. Districts also became stratified through the federally sanctioned process of redlining, which conditioned access to home loans based on factors such as race and perceived wealth, essentially creating racial and economic ‘segregation’ of school districts even after legal segregation ended.<sup>3</sup> The dearth of resources experienced by low-income and minority communities led to severe inequalities in education, which ultimately affected their long-term economic prosperity and ability to achieve the “American dream.”

The issue of educational inequality had previously been acknowledged by the federal government, but the ultimate catalyst for federal action was the 1964 Equality of Education Report by James Coleman. Coleman was a Johns Hopkins sociologist who had been sanctioned by the Office of Education to assess the state of public

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<sup>1</sup> Kriston McIntosh, Emily Moss, and Nunn Ryan, “Examining the Black-white Wealth Gap,” Brookings, last modified February 27, 2022, <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

<sup>2</sup> Liz Mineo, “Racial wealth gap may be a key to other inequities,” The Harvard Gazette, last modified June 3, 2021, <https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/>.

<sup>3</sup> Lindsay M. Burke and Jude Schwalbach, *Housing Redlining and Its Lingering Effects on Education Opportunity. Background. No. 3594*, 15, March 11, 2021, 4.

education in the US.<sup>4</sup> The results exposed a disturbing pattern of racial and socioeconomic inequality in academic performance. Coleman found a consistent disparity between the academic achievement of students of color and their white counterparts, which came to be known as the black-white achievement gap.<sup>5</sup> The idea that the achievement gap was due to socioeconomic inequalities was a progressive concept that contradicted the popular belief that students of color were innately academically disadvantaged. These findings were what ultimately prompted the federal government to initiate programs that compensated for the socioeconomic inequalities causing the achievement gap.<sup>6</sup>

In 1965, the increasing national attention on educational inequality led to the introduction of the Elementary and Secondary Education Act (ESEA). The law was a crucial element of President Lyndon B. Johnson's War on Poverty and his mission to utilize public education as a means for reducing wealth inequality. The significance of the ESEA as the first federal compensatory education program was markedly notable. To this day, the law remains one of the most expensive pieces of federal legislation affecting education. The main purpose of the act was to close achievement gaps in reading, writing, and mathematics for low-income public-school students. The most crucial section of the ESEA was Title I, which mandated the distribution of funding to school districts with a high percentage of students from low-income families and accounted for ⅘ of the total funds granted by the ESEA. The ESEA was notable in marking a federal interest in solving socioeconomic inequalities in education and would serve as the basis for several more compensatory education policies.<sup>7</sup>

The ESEA not only recognized the educational disadvantages of low-income students but also those of limited-English proficient (LEP) and special needs students. A huge migrant influx following immigration reform policies in 1965 combined with a new wave of activism by Mexican-American students ultimately led Texas Senator Ralph Yarborough, a former rural educator who saw the struggles of bilingual students, to introduce Title VII of the ESEA in 1968.<sup>8</sup> Also known as the Bilingual Education Act (BEA), Title VII provided federal grants to

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<sup>4</sup> Johns Hopkins University, "Coleman Report Set the Standard for the Study of Public Education," The Hub (HUB, December 2, 2016), <https://hub.jhu.edu/magazine/2016/winter/coleman-report-public-education/>.

<sup>5</sup> Office of Education, *Equality of Educational Opportunity*, by James S. Coleman, 1964, 256.

<sup>6</sup> Johns Hopkins University, "Coleman Report," The Hub, 2016.

<sup>7</sup> Elementary and Secondary Education Act, H.R. 2362 (Apr. 7, 1965).

<sup>8</sup> Gloria Stewner-Manzanares, "The Bilingual Education Act: Twenty Years Later," 1988, 42, [https://ncela.ed.gov/files/rcd/BE021037/Fall88\\_6.pdf](https://ncela.ed.gov/files/rcd/BE021037/Fall88_6.pdf).

school districts to establish education programs for students with limited English-speaking abilities. It was the first federal effort to ensure that LEP students received assistance in their first language and with the standardized English curriculum.<sup>9</sup> Compensatory education policy also began to address the academic challenges faced by special needs students in 1975, when Congress enacted the Education for All Handicapped Children (EHA). Before the EHA was passed, special needs students faced significant barriers in education; in 1970, US schools only educated one out of every five children with disabilities, creating a significant education gap that would continue to affect them later in life.<sup>10</sup> The law aimed to build on the successes of the ESEA by specifically addressing the individual needs of toddlers and youth with disabilities and their families.<sup>11</sup> Both the BEA and the EHA specifically protected the rights of children with disabilities and provided funding for special needs services, marking a significant improvement in the ability of federal education policy to affect change upon underserved populations.

### **Successes of Compensatory Education Programs**

The introduction of compensatory education policies was successful in the short term, creating uptakes in both IQ and standardized testing scores for educationally disadvantaged students. In the early years of compensatory education, one of the struggles identified by lawmakers was the ability to effectively measure the outcome of policies. While no perfect answer was determined, the research conducted in the Coleman Report directed the Department of Education to use the outputs of education, often evaluated through achievement-based testing, to measure the impact of funding inputs.<sup>12</sup> IQ testing and standardized testing in reading and mathematics showed that compensatory education was incredibly impactful in the short term. National evaluators from the American Institute of Research (AIR) found initial gains of 15 or more IQ points within the span of a few months.<sup>13</sup> Compensatory policies also had an impact on the education grade curve, bringing disadvantaged students closer to a reading and mathematics level expected for their grades. The increase in reading

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<sup>9</sup> Bilingual Education Act, H.R. 3229 (Jan. 2, 1968).

<sup>10</sup> Barbara K. Keogh. "Celebrating PL 94-142: The Education of All Handicapped Children Act of 1975." *Issues in Teacher Education* 16, no. 2 (2023): 65–69. <https://eric.ed.gov/?id=EJ796253>.

<sup>11</sup> Education for All Handicapped Children Act, H.R. 7217, 94th Cong. (July 29, 1975).

<sup>12</sup> Christopher Jencks and Meredith Phillips, *The Black-White Test Score Gap*, Brookings Institution Press, 1998, 42-53.

<sup>13</sup> "Closing the Gap: A Historical Perspective on the Effectiveness of Compensatory Education on JSTOR," Jstor.org, 2023, 3, <https://www.jstor.org/stable/20387003>.

scores was especially profound; between 1971 to 1975, average reading scale scores for Black and Hispanic 13-year-olds increased by 10 points.<sup>14</sup> The uptakes in IQ, reading, and mathematics scores demonstrated the capability of federal compensatory education policies to help close the racial achievement gap and affect societal change.

Compensatory education programs often produced these results due to unique and effective approaches to implementing federal programs at the local level, which is epitomized by the efficacious execution of federal policies in Oregon. While the ESEA and Head Start provided general guidelines for compensatory funding, states such as Oregon were able to deploy specific programs to effectively address achievement gaps and earned federal recognition for their efforts. Oregon utilized the Model Schools program in cities such as Portland to address racial imbalances in schools with particularly low achievement rates. The program allowed voluntary administrative transfers for students within certain districts to decrease administrative burdens, increase teacher-to-student ratios where needed, and allowed students of color to gain access to historically white schools which received more public funding. The Oregon policies were so unique and effective that the Portland Board of Education Directors won an award from the National Education Association for the most creative educational accomplishments. The successes of the Oregon Model School system exemplified how federal compensatory education policies could be enacted on the state or city levels to affect massive changes.<sup>15</sup>

The advent of compensatory education policies not only provided broadly effective education programs but also addressed the needs of specific underserved populations such as bilingual and special needs students. The 1968 Bilingual Education Act was notably influential in increasing enrollment and achievement for LEP students. In the early years of the Bilingual Education Act, for instance, funding for 76 projects across the nation doubled the number of students enrolled in bilingual classrooms.<sup>16</sup> The program not only increased enrollment for LEP students but also benefited their learning in the classroom. By the 6th grade, LEP students were achieving at or near grade level in reading and mathematics when tested in English while continuing to increase

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<sup>14</sup> “Standardized Test, SRA Reading and Arithmetic Indices,” National Museum of American History, 2018, [https://americanhistory.si.edu/collections/search/object/nmah\\_1213730](https://americanhistory.si.edu/collections/search/object/nmah_1213730).

<sup>15</sup> Dolores Pappas, “Early Childhood Education and Compensatory Education in the Portland, Oregon, Public Schools, 1965-1984,” January 1, 2000, 24, <https://doi.org/10.15760/etd.5298>.

<sup>16</sup> “The Condition of Bilingual Education in the Nation: A Report to the Congress and the President,” Ed.gov, June 30, 1991, 113, <https://eric.ed.gov/?id=ED335945>.

their proficiency in their native language, which was often Spanish.<sup>17</sup> Kathy Escamilla, a first-grade bilingual teacher in rural Colorado, remarked how the symbiosis of Spanish and English instruction helped her students: “Teaching reading in Spanish and observing how literacy in Spanish benefitted learning English and navigating content areas in English affirmed my belief in the potential of bilingual education even under less than optimal conditions.”<sup>18</sup> The Education for All Handicapped Children Act had similar impacts in improving education for special needs students. In the 1967-77 school years, the EHA served over three million primary, secondary, and college students, increasing enrollment for students with disabilities who were previously excluded from education.<sup>19</sup> Though the program served a vast array of students, it still aimed to address the needs of individuals through Individual Education Plans (IEPs) that granted learning accommodations such as extra time on testing or learning aides.<sup>20</sup> The provisions of the BEA and EHA were impactful in increasing accessibility for underserved students and ensuring they enrolled and learned at the same rates as their peers.

The successes of compensatory policies in education such as the ESEA were seen to be effective in increasing test scores, expanding local administrative programs, and addressing the needs of LEP and special needs students. The progress made by these policies effectively demonstrated that compensatory education was in part able to close achievement gaps and benefit educationally disadvantaged students.

### **Ineffective Implementation of Compensatory Education Policies**

Though compensatory policies were significant in signaling a new federal focus on educational inequality, their overall success was nonetheless undermined by several factors. Ineffective resource allocation and insufficient administrative guidance meant that federal funding was not used effectively to close the achievement gap. Additionally, biases in standardized testing and issues with topic retention prevented the short-term successes of compensatory policies from realizing long-term changes in socioeconomic education inequality.

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<sup>17</sup> *Assessing Evaluation Studies* (Washington, D.C.: National Academies Press, 1992), 52, <https://doi.org/10.17226/2014>.

<sup>18</sup> Kathy Escamilla, “Growing up with the Bilingual Education Act: One Educator’s Journey,” *Bilingual Research Journal* 41, no. 4 (2018): 369–87, <https://eric.ed.gov/?id=EJ1202433>.

<sup>19</sup> Peter W.D. Wright and Pamela Wright, *Wrightslaw: Special Education Law* (n.p., 2007), 123.

<sup>20</sup> “Project MUSE - the History of Inclusion in the United States,” Jhu.edu, 2023, 65, <https://muse.jhu.edu/book/13164/>.

One of the critical issues undermining the effectiveness of compensatory education programs was ineffective resource allocation. When these policies were first introduced at the federal level, there was a severe dearth of research on what strategies would be most effective at improving educational achievement for underserved students and how the funding provided by Title I of the ESEA should be used. This problem was compounded by the vague guidelines around the allocation of federal funding; much of the decision-making power in the use of funds lay at the state or even local level and thus varied greatly from district to district.<sup>21</sup> Some states were able to effectively allocate resources, provide incentives, and form unique programs that addressed not only education but factors surrounding it, such as the aforementioned program in Oregon. However, most states poured money into statistically ineffective policies and did not provide sufficient instruction or training for teachers when implementing remedial curriculums.<sup>22</sup> Qualitatively effective measures were not emphasized because funding was solely linked to the quantitative results of schools, such as class size reductions. Reducing class sizes was an important method of improving performance, but could not be truly effective if content and teaching methods were not changed as well. Similarly, increased funding for disadvantaged districts would not close achievement gaps if the school did not hire more effective personnel.<sup>23</sup> The lack of administrative guidance and ineffective resource allocation meant an uneven distribution of gains from compensatory programs. A California evaluation report on compensatory education found the greatest improvement in achievement in medium-sized urban districts, whose students performed far better on standardized testing than their counterparts in the state's largest cities. This is because the administrative structure in large cities was often waterlogged with tedious bureaucratic procedures and overworked staff, creating massive delays in the expected progress of compensatory programs.<sup>24</sup> With billions of dollars being spent on these compensatory policies, many constituencies found the losses due to unsuccessful resource allocation to be a serious issue for the continuity of the program.

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<sup>21</sup> Diane Ravitch, ed, *Brookings Papers on Education Policy*. N.p.: Brookings Institution Press, 1998, 78.

<sup>22</sup> Maris A Vinovskis, "Do Federal Compensatory Education Programs Really Work? A Brief Historical Analysis of Title I and Head Start," *American Journal of Education* 107, no. 3 (1999): 187–209. <http://www.jstor.org/stable/1085662>.

<sup>23</sup> "Closing the Gap," 6.

<sup>24</sup> Wilson Riles, "Educating Inner City Children: Challenges and Opportunities Historical Documents," 2009, 37, <https://www.cde.ca.gov/nr/re/hd/documents/yr1969hd.pdf>.

Another crucial shortcoming in implementation was the methods of evaluating compensatory programs. Commonly used metrics, such as monthly achievement standards, made federally granted funding for school districts contingent solely on standardized testing. This not only encouraged teachers to “teach to the test” rather than pursue real comprehension and understanding for their students but also created an inherently racist and misogynistic standard to measure educational achievement.<sup>25</sup> Subsequent research has revealed the extent of problematic evaluations through standardized testing. In general, most tests were fitted to normal curve equivalents using the scores of majority group populations, ignoring cultural and linguistic differences. For instance, vocabulary words tested on national evaluations often used words associated with white communities that Black students were less likely to know. Even nonverbal or visual tests offered to preschool and elementary level students were based on white, American cultural norms. A study conducted on the scores of Liberian and American students on an object-sorting test similar to the ones offered to American primary school students in the 1970s found that American students sorted objects into separate categories of food and implements while Liberian students paired them together due to cultural associations of those objects.<sup>26</sup> These types of cultural biases, which often appeared in reading comprehension and visual tests, were detrimental to the success of students of color. Ibram X. Kendi of the Antiracist Research and Policy Center at Boston University pointed out that the flawed metrics of standardized testing were antithetical to closing the achievement gap. “We still think there’s something wrong with the kids rather than recognizing there’s something wrong with the tests,” said Kendi. “Standardized tests have become the most effective racist weapon ever devised to objectively degrade Black and Brown minds and legally exclude their bodies from prestigious schools.”<sup>27</sup> Standardized tests were not only biased against students of color but also towards female students. According to a study by the Stanford Graduate School of Education, female students tended to perform better on standardized tests with open-ended questions while male students scored higher on tests with multiple-choice questions. The test format was often more favorable to male students, creating gender disparities in test scores that

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<sup>25</sup> National Education Association, “History of Standardized Testing in the United States | NEA,” Nea.org, 2020, <https://www.nea.org/professional-excellence/student-engagement/tools-tips/history-standardized-testing-united-states>.

<sup>26</sup> Hee Kyung, Darya Kim, and Zabelina, “Cultural Bias in Assessment: Can Creativity Assessment Help?,” 2015, 2, <https://uscseps.org/wp-content/uploads/2020/07/standardized-testing.pdf>.

<sup>27</sup> John Rosales, “The Racist Beginnings of Standardized Testing | NEA,” Nea.org, 2021, <https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing>.

did not accurately reflect student achievement. Other reasons for the gender score gap were reading comprehension questions that included mostly male characters, questions surrounding societally gendered topics such as sports and politics, penalties for not answering, and time constraints that favored the way male students took tests (female students tended to follow the instructions and leave the question blank, penalizing them when graded).<sup>28</sup> These patterns perpetuated sexist thinking patterns and punished female students for traits that often were beneficial in postsecondary education and the workforce. The inherent biases in the metrics of standardized testing seriously undermined the ideas of compensatory education by favoring white male students and creating false achievement disparities.

One of the major issues with compensatory policies was the retention of material. Ideally, changes made at the childhood development or elementary school level would follow a student throughout their primary and secondary years; perfect retention of achievement would mean that a decreased achievement gap at the preschool level would maintain itself through high school.<sup>29</sup> However, compensatory education policies often failed in this regard. Programs like the ESEA created an immediate boost in test scores but would fade over the course of secondary education, lacking substantive long-term impacts. The Perry Preschool Project was a study conducted from 1962-1967 in Ypsilanti, Michigan measuring the impact of compensatory preschool education on a group of children throughout their school years. The project found that childhood development programs had an average positive impact on meeting federally mandated standards up until third grade. Researcher David Weikart concluded that achievement gains made in preschool education were not enough if later education was not on par; similarly, compensatory secondary education could not be effective without building on earlier gains.<sup>30</sup> Additionally, administrative transfers and postsecondary education opportunity programs thrust educationally disadvantaged students into rigorous learning environments without bridging the gap between their past education and their new schools; this led the national school dropout rate to reach an all-time high. The combined issues of retention and

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<sup>28</sup> “Question Format May Impact How Boys and Girls Score on Standardized Tests, Stanford Study Finds,” Stanford Graduate School of Education, March 29, 2018, <https://ed.stanford.edu/news/question-format-may-impact-how-boys-and-girls-score-standardized-tests-stanford-study-finds>.

<sup>29</sup> “Closing the Gap,” 5.

<sup>30</sup> David Weikart, “High/Scope Perry Preschool Project” in “High/Scope Perry Preschool Project | Office of Juvenile Justice and Delinquency Prevention,” Office of Juvenile Justice and Delinquency Prevention, 2022, <https://ojjdp.ojp.gov/library/publications/highscope-perry-preschool-project>.

dropout rates meant that while the average test scores of students of color were increasing, they were nowhere near those of their white peers.<sup>31</sup> Compensatory education was helping ease the achievement gap, but it could not entirely close it.

The failures of resource allocation, biased testing, and retention were serious detriments to the success of compensatory policies. While the programs were found to improve the education of disadvantaged students in some regards, they were ultimately still a long way from achieving Lyndon B. Johnson's original goal of eradicating poverty and educational inequality.

### **Lack of Holistic Approach to Education Reform**

Compensatory programs also failed to affect long-term changes and they often ignored the larger cultural, racial, and economic contexts behind the achievement gap. For many students of color, pervasive racism and xenophobia continued to impact their everyday educational experiences because federal policies did not address the underlying causes of racial achievement disparities. Similarly, federal funding for schools did nothing to improve the lifestyle factors of low-income students that affected education, such as nutrition, home life, and transportation. The lack of a holistic view of the root causes behind educational disparities ultimately led to the failure of compensatory policies to fully address the achievement gap.

While policies such as the Bilingual Education Act and the ESEA attempted to address the struggles of students of color, they often used methods of assimilation rather than empowerment to integrate them into existing education structures. Federal education support for students of color, especially those who were bilingual, focused on providing funding and resources for English learning and largely ignored the cultural context that was integral to these students' education. In particular, Mexican-American student activists saw English-language-learner programs resulting from the BEA as a way to extinguish their heritage and undermine the political presence of Spanish-language students and their families.<sup>32</sup> In an interview with journalist Dolores Delgado Bernal,

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<sup>31</sup> George Morrow, "Standardizing Practice in the Analysis of School Dropouts - George Morrow, 1986," *Teachers College Record*, 2022, 5, <https://journals.sagepub.com/doi/abs/10.1177/016146818608700306?journalCode=tcza>.

<sup>32</sup> "Petition to District Court of Orange County on Gonzalo Mendez et al. v. Westminster School District of Orange County et. al," 1945.

Chicano student Rosalinda Mendez Gonzales recalled the everyday struggles she faced in academic settings:

Some teachers would say, “You dirty Mexicans, why don’t you go back to where you came from?” So there was a lot of racism we encountered in the school. We had severely overcrowded classrooms. We didn’t have sufficient books. We had buildings that were barrack-style buildings that had been built as emergency shelters during World War II.<sup>33</sup>

Gonzales’ experiences illustrated that despite federal efforts and funding, the benefits provided by compensatory education did not extend to students of color. The failure to fully address cultural and racial disparities thus undermined the successes of compensatory programs and perpetuated cycles of inequality for students of color.

Another reason why compensatory education policies experienced long-term failure was that they saw education merely in terms of test scores and funding rather than in a holistic way. While standardized testing could be an important metric in the effectiveness of these policies, instruction on the content being tested is not the only factor in closing achievement gaps and decreasing educational inequalities.<sup>34</sup> Home and family influences were often a crucial component of education disparities; low-income families tended to have parents with lower educational attainment, providing fewer educated role models and fewer academic resources within the household.<sup>35</sup> Additionally, a lack of consistent and nutritious food supply as well as healthcare, especially at crucial ages of development, could have a huge impact on academic performance. A 2001 study found that children who did not receive enough iron in their diet received lower math scores than children with normal iron levels, illustrating the impact of nutrition on education.<sup>36</sup> Transportation was also a crucial issue, especially for low-income students that were transferred to higher-funded districts. Without affordable, safe, and timely means of transportation to school, many administrative transfers struggled to get to the school they had

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<sup>33</sup> Dolores Delgado Bernal, “Grassroots Leadership Reconceptualized: Chicana Oral Histories and the 1968 East Los Angeles School Blowouts,” *Frontiers: A Journal of Women Studies* 19, no. 2 (1998): 113–42, <https://doi.org/10.2307/3347162>.

<sup>34</sup> Jencks and Phillips, *The Black-White Test Score Gap*, 147.

<sup>35</sup> *Ibid.*, 152.

<sup>36</sup> Jill S. Halterman et al., “Iron Deficiency and Cognitive Achievement among School-Aged Children and Adolescents in the United States,” *Pediatrics* 107, no. 6 (June 1, 2001): 1381–86, <https://doi.org/10.1542/peds.107.6.1381>.

been allowed to attend.<sup>37</sup> These external influences on academic achievement demonstrated that compensatory education alone was not enough to fully address inequalities in schooling; increased federal support for programs addressing issues such as food insecurity and transportation that had a huge impact on education was also necessary to truly close achievement gaps.<sup>38</sup>

The failure of compensatory policies to address a broader set of cultural, racial, and lifestyle factors on academic performance ultimately undermined their success in closing achievement gaps.

### **Lasting Significance of Compensatory Education Policies**

The advent of compensatory education represented a huge leap forward in addressing racial disparities in society and providing reparations for systems of oppression that had long suppressed people of color. Policies such as the ESEA attempted to continue the trend of educational equality started by desegregation and ensure that disadvantaged students had the available resources and funding to close the generational achievement gap. While these programs were ultimately unable to create long-term retention and address a variety of holistic factors that affected educational achievement, the impact of compensatory education on American history was nonetheless long-lasting. Since the inception of the policy in 1964, several other federal programs have improved upon the failures of their predecessors and continued the legacy of compensatory education. The ESEA has continued to be renewed over the years by Republican and Democratic administrations alike, with critical changes made to increase its efficacy; for instance, the adoption of criterion-based testing in the 1980s increased test-based accountability for standardized testing, directly increasing the effectiveness of federal funding. Furthermore, long-range education strategies such as the Bush Administration's America 2000 expanded the focus of education policies beyond testing and addressed factors such as school violence, drug policies, graduation rates, and citizenship.

While the evolution of compensatory education over the years has improved upon its original failures and addressed educational equality, there is still work to be done to maximize its effect on

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<sup>37</sup> Jeffrey M Vincent et al., "Beyond the Yellow Bus: Promising Practices for Maximizing Access to Opportunity through Innovations in Student Transportation," Center for Cities & Schools, 6, <https://eric.ed.gov/?id=ED558542>, 6.

<sup>38</sup> Jerome G. Delaney, *Education Policy: Bridging the Divide between Theory and Practice* (n.p.: Brush Education, 2017), 27.

disadvantaged students. Some lifestyle factors of low-income families have been largely ignored in the research and development of compensatory education policies. School transportation is one area that must be addressed in the future as it particularly impacts low-income students; even if school-choice policies allow disadvantaged students to attend higher-quality schools, low-income families still struggle in covering the costs and time of transportation. Similarly, more accessible meal plans, supplementary services, and support in higher education would help close achievement gaps and address the issues that low-income students often face in primary and secondary education.

The compensatory education policies of the 1960s and 1970s were influential in establishing the positive effects of federal education equality reform and setting a precedent for programs that promoted equality. These programs raised awareness of the disparities in the lack of opportunities and resources for minority communities and created policy tools to address the severe barriers arising from intergenerational poverty. More than six decades after the first imperfect compensatory programs, the US has continued to evolve a variety of education policies that aim to achieve educational equality, a foundational tenet that powers the “American dream” of merit-based affluence.

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## **The Cold War and Civil Rights: How International Pressure Affected the Pre-Brown Civil Rights Movement**

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### **Abstract**

In 1954, after many years of civil rights activism, the Supreme Court ruled that school segregation was unconstitutional in *Brown v. Board of Education*. This ruling was championed by civil rights activists as a major victory for the domestic civil rights movement, and historians have generally focused on this aspect of the *Brown* case. However, behind the scenes, President Truman and the State Department pressured the Supreme Court to rule as it did not because of a desire to advance civil rights, but rather to preserve America's image overseas. The recently uncolonized peoples of the world judged America's racial problems harshly and, Executive Branch officials feared, were more likely to side with the Communists because of these judgments. Conventional thinking suggests that Truman's actions in support of civil rights were driven by organizations such as the NAACP and the National Emergency Against Mob Violence. Yet international pressure in direct response to American foreign policy during the Cold War substantially contributed to the Truman administration's civil rights reform, culminating in the *Amicus Brief* submitted to the Supreme Court in the *Brown v. Board* decision that ultimately informed the decision's final ruling. This paper examines the foreign pressures that prompted the Executive Branch to exert pressure on the Supreme Court and significantly affected the *Brown* decision.

## Background

In 1911, the same year he turned 27, President Harry S. Truman said to his future wife Bess, “I think one man is just as good as another so long as he’s honest and decent and not a n\*\*\*\*\* or a Chinaman. Uncle Will says that the Lord made a white man from dust, a n\*\*\*\*\* from mud, then He threw up what was left and it came down a Chinaman.”<sup>1</sup> Paradoxically, this man was the first president to champion civil rights since Abraham Lincoln. He desegregated the military and the federal government and presided over much of the *Brown v. Board of Education* Supreme Court case. While it is unlikely that Truman himself had any personal conversion on the moral necessity of civil rights for African Americans, the criticism from the international community against America’s racial segregation and discrimination during the Cold War influenced the Executive Branch’s response to civil rights reform, culminating in the *Amicus Brief* submitted to the Supreme Court in the *Brown v. Board* decision that ultimately informed the decision’s final ruling.

## The Cold War, the Vets Coming Home, and the Beginning of the Civil Rights Movement

Over 900,000 African Americans returned home from Europe and Asia in 1946 to face intense racism and discrimination unchanged from before the war. They had expected the nation to be grateful for their service. As early as December 1941, they had embraced the promise of “the double VV for a double victory:” victories over fascism and American racism.<sup>2</sup> Originally published by the *Pittsburgh Courier*, the Double V Campaign defined the belief that since African Americans had been dying for democracy overseas, they rightfully deserved democratic ideals at home.<sup>3</sup> This expectation was generally not met. Two of the most poignant examples feature George Dorsey and Isaac Woodard. Dorsey was a veteran who fought in World War II for five years and survived battles in the Pacific. After returning to America, he and his

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<sup>1</sup> Harry S. Truman, “Truman to Wallace,” *Archives of the Seattle Times* (The Seattle Times, November 3, 1991),

<https://archive.seattletimes.com/archive/?date=19911103&slug=1314805>.

<sup>2</sup> Euell A. Nielsen, “THE DOUBLE V CAMPAIGN (1942-1945),” Black Past, July 1, 2020, [https://www.blackpast.org/african-american-history/events-african-american-history/the-double-v-campaign-1942-](https://www.blackpast.org/african-american-history/events-african-american-history/the-double-v-campaign-1942-1945/#:~:text=The%20Double%20V%20campaign%20was,African%20Americans%20in%20the%20military.)

[1945/#:~:text=The%20Double%20V%20campaign%20was,African%20Americans%20in%20the%20military.](https://www.blackpast.org/african-american-history/events-african-american-history/the-double-v-campaign-1942-1945/#:~:text=The%20Double%20V%20campaign%20was,African%20Americans%20in%20the%20military.)

<sup>3</sup> Ibid.

closest friend were killed along the roadside.<sup>4</sup> The killers were never identified, even though many knew their identities; white people were complicit, and Black people were too worried about their safety to speak.<sup>5</sup> While this case drew national attention, it garnered little action on the federal government's part. Similarly, the beating of Isaac Woodard was left unsolved. Woodard, who served in the Pacific theater for three years, was on a bus in the South returning to his home after being honorably discharged several days earlier. The driver of the bus called the police after he and Woodard argued when Woodard asked to stop so he could use the restroom.<sup>6</sup> Still in uniform, Woodward was ordered out of the bus by Lynwood Shull, the sheriff, who beat him. By his admission, the sheriff clubbed Woodard across the eyes, blinding him.<sup>7</sup> Woodard's attackers were tried but declared not guilty by an all-white jury.<sup>8</sup>

Truman had not supported racial equity before the war. For example, as a senator from Missouri in 1940, he gave an address to the National Colored Democratic Association in which he stated that "I wish to make it clear that I am not appealing for social equality of the Negro."<sup>9</sup> Yet as president, he was forced to confront the crisis facing African Americans during a meeting with the National Committee Against Mob Violence, which formed out of religious and legal institutions as a response to the increase in lynchings and other civil rights abuses African American soldiers faced upon their return home. Truman reportedly sat through the meeting with "clenched hands,"<sup>10</sup> exclaiming, "My God! I had no idea it was as terrible as that. We've got to do something."<sup>11</sup> The next day, Truman instructed the attorney

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<sup>4</sup> Susan Bragg, "THE MOORE'S FORD LYNCHING (July 1946)," Black Past, December 2, 2015, <https://www.blackpast.org/african-american-history/moore-s-ford-lynching-july-1946/>.

<sup>5</sup> Ibid.

<sup>6</sup> Olivia B. Waxman, "How a 1946 Case of Police Brutality Against a Black WWII Veteran Shaped the Fight for Civil Rights," *TIME*, March 30, 2021, <https://time.com/5950641/blinding-isaac-woodard/>.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Jon Bauer, "Truman and Executive Order 9981: Idealistic, Pragmatic, or Shrewd Politician?," Truman and Executive Order 9981: Idealistic, Pragmatic, or Shrewd Politician? | Harry S. Truman, accessed August 22, 2022, <https://www.trumanlibrary.gov/education/lesson-plans/truman-and-executive-order-9981-idealistic-pragmatic-or-shrewd-politician>.

<sup>10</sup> Mary L. Dudziak, "Desegregation as a Cold War Imperative," *Stanford Law Review* 41, no. 1 (1988): pp. 61-120, <https://doi.org/10.2307/1228836>, 78.

<sup>11</sup> "Truman's Racist Talk Cited by Historian," *The Seattle Times*, November 3, 1991, <https://archive.seattletimes.com/archive/?date=19911103&slug=1314805>.

general to create the President's Committee on Civil Rights<sup>12</sup> to report on the state of civil rights in the US and offer policy solutions.<sup>13</sup> The Committee's final publication, *To Secure These Rights: The Report of the President's Committee on Civil Rights*, proposed various measures: desegregation of the federal government, the increased representation of African Americans in ambassadorial positions, and federal protection against lynching.<sup>14</sup> The Committee came to these conclusions as a result of international pressures, arguing that "Discrimination against, or mistreatment of, any racial, religious or national group in the United States is not only seen as our internal problem... We cannot escape the fact that our civil rights record has been an issue in world politics."<sup>15</sup> This publication helped persuade Truman to issue Executive Orders 9980 and 9981, which desegregated the armed forces and the federal government's workforce.<sup>16</sup> In addition, he sent a message to Congress on February 2, 1948, suggesting several of the Committee's recommendations be implemented.

The idea that discrimination was not simply a domestic issue was not new. During World War II, the Japanese broadcast American racial practices to its conquered territories,<sup>17</sup> accusing America of forming a "negro corps officered by whites" which would "be rapidly drafted into the Service to be used as shields to save the lives of white Americans." lowering the United States to the level of European colonial powers in the eyes of the newly conquered south-east Asian and Oceanian countries.<sup>18</sup> Japan's ultimate goal was to make its conquered territories see the United States as an enemy, allowing Japan to control conquered areas more easily.<sup>19</sup>

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<sup>12</sup> Harry S. Truman, "Truman to Clark," *Truman Library* (National Archives), accessed August 11, 2022, <https://www.trumanlibrary.gov/library/research-files/letter-harry-s-truman-attorney-general-tom-clark-attached-memo-david-niles?documentid=NA&pagenumber=2>.

<sup>13</sup> "Records of the President's Committee on Civil Rights Record Group 220," Truman Library (National Archives), accessed September 6, 2022, <https://www.trumanlibrary.gov/library/federal-record/records-presidents-committee-civil-rights-record-group-220>.

<sup>14</sup> President's Committee on Civil Rights, "To Secure These Rights" § (1947).

<sup>15</sup> *Ibid.*

<sup>16</sup> "Executive Order 9981: Desegregation of the Armed Forces (1948)," Keystone Documents (National Archives and Records Administration), accessed September 5, 2022, <https://www.archives.gov/milestone-documents/executive-order-9981>.

<sup>17</sup> Dudziak, *Desegregation as a Cold War Imperative*, 67.

<sup>18</sup> Jane M.J. Robbins (1997), "Tokyo Calling: Japanese Overseas Radio Broadcasting 1937-1945," <https://core.ac.uk/download/pdf/77022998.pdf>, 205.

<sup>19</sup> *Ibid.*, 206.

After the war, America's new Cold War enemy, the Soviet Union, also aimed racial inequality in the United States. Soon after Woodard was blinded, the *Daily Worker*, an organ of the Soviet-controlled American Communist Party, asserted, "Woodard tells a story in affidavits matching tales of horror from Nazi torture chambers...sheer brutality and fascist terror..."<sup>20</sup> In another instance, the Russian newspaper *Trud* published an article titled, "Position of Negroes in the USA," decrying America's "increasing frequency of terroristic acts against negroes,"<sup>21</sup> echoing other Soviet publications on US race relations.<sup>22</sup> Reports of the enormous volume of racial violence in America and the lack of justice for the perpetrators of that violence spread quickly across the globe. This was particularly embarrassing to the United States because it was still prosecuting Nazi war criminals at Nuremberg.<sup>23</sup>

### **No More Difference between International and Internal Policy**

Soon after World War II, the federal government realized segregation harmed American international relations. In 1950, the Department of State published a report commissioned by President Truman asserting that there was "no longer any real distinction between 'domestic' and 'foreign' affairs."<sup>24</sup> Consequently, "[p]ractically everything we do, ... what we say in our newspapers, over the air and on public platforms, our attitudes towards each other and other people—all these things affect... our influence abroad."<sup>25</sup> The competition for global influence between the Soviet Union and the United States meant that the Department of State became an oft-consulted authority for what internal policy changes would be appropriate for the United States. This was most pronounced in the correspondence of Secretary of State Dean Acheson, who served in that position from January 1949 until January 1953. Even before Acheson became Secretary of State in 1946, the Chairman of the President's Committee of Fair Employment Practice requested a statement from him regarding how racial discrimination is a "handicap in foreign relations." Acheson responded that "[i]t is true...

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<sup>20</sup> Michael Berkowitz, "Blinding of Isaac Woodard: 1946 Racist Police Violence Case Gets Fresh Attention," *People's World*, March 10, 2022.

<sup>21</sup> "Position of Negroes in the USA," *Trud*, August 1946.

<sup>22</sup> Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2011), 20.

<sup>23</sup> "Resonant Ripples in a Global Pond: The Blinding of Isaac Woodard," Isaac Woodard Conference Paper, accessed August 19, 2022, <http://faculty.uscupstate.edu/amyers/conference.html>.

<sup>24</sup> "Our Foreign Policy," *Our Foreign Policy* § (1950).

<sup>25</sup> *Ibid.*

that the existence of discrimination against minority groups... has an adverse effect upon our relations with other countries.”<sup>26</sup>

Acheson’s letter came against the backdrop of an increasing American commitment to the Cold War and worries over the effect of racism in the United States on relations with newly independent and developing nations in Africa and Asia. Referring to this issue, Truman stated in a message to Congress in 1947 that “[a]t the present moment in world history nearly every nation must choose between alternative ways of life,” i.e., American capitalism or Soviet communism.<sup>27</sup> The contest was fiercest in the developing world for two main reasons. First, as Truman noted, “[t]he seeds of totalitarian regimes are nurtured by... want. They spread and grow in the evil soil of poverty.”<sup>28</sup> Because centuries of European colonization had left most of the Third World<sup>29</sup> incredibly poor, there was abundant poverty to nurture the “seeds” of communism. Secondly, the post-colonial world harbored a latent distrust of white Europeans. America had initially escaped this anti-imperialist bias because it was not perceived as a major colonial power in most regions outside the Philippines and Cuba. But domestic racial violence made the United States seem hypocritical to these nations at best and imperialist at worst.

Under the Zhdanov Doctrine, the USSR began to exploit this connection, painting the choice facing the world as one, not between capitalism and communism, but between the ideologically right camp of racist imperialism led by the United States and the ideological left camp of racial inclusivity led by the Soviets.<sup>30</sup> Soviet propaganda depicted the United States as simply another colonizer, boosting the USSR’s attempts at gaining a sphere of influence in Asia and Africa. The global attention paid to American racial violence after World War II and segregation under Jim Crow handed the Soviet Union its data. For example, the Muscovite publication *New Times*, describing the “thralldom” of African Americans in the United States, simply reported examples of African Americans being paid less for the same work, barred from public

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<sup>26</sup> Dean Acheson, “Acheson to Malcom,” (Washington D.C., May 8, 1946).

<sup>27</sup> Harry Truman, “Truman Doctrine,” 1947. US Capital Building: Milestone Documents, National Archives, <https://www.archives.gov/milestone-documents/truman-doctrine>.

<sup>28</sup> Ibid.

<sup>29</sup> Unlike its modern and common usage, the Third World referred to the unaligned countries during the Cold War, while the First World was American allies, and the Second World, Soviet allies. Hence why Second World is almost never heard nowadays.

<sup>30</sup> Jonathon Green, *The Encyclopedia of Censorship* (New York u.a.: Facts on File, 1990), 668.

accommodations, prevented from voting in many states, and suffering lynchings and other acts of violence that the United States government was unable to prevent or successfully prosecute.<sup>31</sup> American racial violence was essentially free propaganda for the Soviet Union.

Nowhere was the competition for the loyalty of the Third World more intense than in India, where racism in America garnered much criticism according to John Skrentny, a prominent civil rights scholar.<sup>32</sup> Recently independent from the British, India recognized the United States as the leader of the Western world who would drive the bloc's response to communism. Indians also recognized that the attitude of the United States towards its minorities would affect its ability to be an effective proselytizer of the values of capitalism. One popular Western Indian newspaper stated that if America continued to ignore the effects of segregation, it "would lose the support of the colored races."<sup>33</sup> The *Allahabad Leader* wrote that the "racist spirit in the USA is not consistent with America's claim to be the moral leadership of the world." It was with cruel irony that one paper advised the United States to take a "refresher course in the truths which General Jefferson once held to be self-evident."<sup>34</sup> The Sri Lankan (only two years independent from India) *Observer* noted that "in Washington, the seated figure of Abraham Lincoln broods over the capital of the US where Jim Crow is the rule," adding that "the colour bar is the greatest propaganda gift any country could give to the Kremlin in its persistent bid for the affections of the coloured races of the world...."<sup>35</sup> The American ambassador could always counter by pointing the finger at India's caste system. One American ambassador reportedly stated in response to Indian questions about a recent lynching in the United States, "Yes, it's almost as bad as it is in India," referring to the caste system.<sup>36</sup> But India was not vying to lead the world in freedom and democracy.

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<sup>31</sup> [https://ia903001.us.archive.org/12/items/HistoryOfTheoriesAndIdeologiesThatGotUsInTheTurmoil/%5BKenneth\\_Osgood%5D\\_Total\\_Cold\\_War\\_-\\_Eisenhower%E2%80%99s\\_Se%28z-lib.org%29.pdf](https://ia903001.us.archive.org/12/items/HistoryOfTheoriesAndIdeologiesThatGotUsInTheTurmoil/%5BKenneth_Osgood%5D_Total_Cold_War_-_Eisenhower%E2%80%99s_Se%28z-lib.org%29.pdf).

<sup>32</sup> John D. Skrentny, "The Effect of the Cold War on African-American Civil Rights: America and the World Audience, 1945-1968," *Theory and Society* 27, no. 2 (April 1998): pp. 237-284, [https://doi.org/10.1163/2468-1733\\_shafr\\_sim270020220](https://doi.org/10.1163/2468-1733_shafr_sim270020220), 248.

<sup>33</sup> Frenise A. Logan, "Racism and Indian-US Relations, 1947-1953: Views in the Indian Press," *Pacific Historical Review* 54, no. 1 (January 1985): pp. 71-79, <https://doi.org/10.2307/3638866>, 73.

<sup>34</sup> *Ibid.*

<sup>35</sup> Dudziak, *Cold War Civil Rights*, 18.

<sup>36</sup> *Ibid.*, 34.

## Increasing International Outcry and American Response

As the Cold War matured during the late 1940s and early 1950s, attention to American discrimination increased not only in the Third World, but also among America's post-World War II allies, including Great Britain and France, and throughout Europe, particularly in Germany and Italy. Under the Marshall Plan, the United States was providing Europe with food and aiding its economic and political recovery. In addition, Western Europe was dependent on the United States for defense under the newly formed NATO. Because European governments could not risk losing this support, criticism of the United States was dulled. For example, when a Dutch government official complained to the American ambassador about racial violence in the United States, he stated that "the Soviet Union possess[ed] one propaganda theme which is extremely effective throughout Europe... criticism of American racial attitudes."<sup>37</sup> He immediately noted that he meant no insult by this statement, reassuring the ambassador that the "Netherlands is very unreceptive to anti-American propaganda."<sup>38</sup> Yet the dual concerns of defense and recovery only affected the response of the European *governments*. The European *press* regularly criticized violence against African Americans in the United States. This negative press damaged the average European's opinion of the United States, despite the political motivation to remain friendly to the United States provided by the Marshall Plan and other forms of foreign assistance. Secretary of State Dean Acheson commented that the "damage to our foreign relations attributable to [American racism] ... [became] progressively greater,"<sup>39</sup> as the Cold War matured.

The Europeans that America liberated were especially critical of American racism, as they witnessed firsthand the irony of sending a Jim Crow army to war against the Aryan Third Reich. The European press published articles with titles like "America's Untouchables,"<sup>40</sup> "Odor or Burning Flesh,"<sup>41</sup> and "Lincoln or Lynch?"<sup>42</sup> that focused on American hypocrisy: espousing liberal ideals against the Soviet Union, while designating African Americans "untouchables," burning their flesh (referring to one particularly violent lynching), and practicing segregation

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<sup>37</sup> John D. Skrentny, "The Effect of the Cold War on African-American Civil Rights: America and the World Audience, 1945-1968," *Theory and Society* 27, no. 2 (April 1998): pp. 237-284, [https://doi.org/10.1163/2468-1733\\_shafr\\_sim270020220](https://doi.org/10.1163/2468-1733_shafr_sim270020220), 248.

<sup>38</sup> *Ibid.*

<sup>39</sup> Dean Acheson, "Acheson to McGranery," (Washington D.C., December 3, 1952).

<sup>40</sup> James W. Ivy, "American Negro Problem in The European Press," *The Crisis*, July 1950, 57 edition, pp. 413-420, 417.

<sup>41</sup> *Ibid.*, 418.

<sup>42</sup> *Ibid.*

in the shadow of the Lincoln Memorial in Washington DC. One Swiss newspaper summarized the feeling: “America has a caste chiefly interested in maintaining and spreading racism as an economic arm of her great trusts, and the inferior position of the Negro keeps him a docile and ill-paid worker.”<sup>43</sup>

Moreover, many Europeans considered the United States hypocritical for preaching about the evils of colonialism while maintaining strict segregation in the United States.<sup>44</sup> The London *News Review* wrote that “[n]ow the country which has always shut its eyes to the inequalities of the American way of life for the Negro, while exclaiming in hypocritical horror at persecution in Europe and allegedly the British colonies, has had its housekeep-ing publicly exposed.”<sup>45</sup> Moreover, this brand of anti-Americanism also appealed to the portion of Europeans who still believed America to be a culturally backward country.<sup>46</sup> Americans were viewed by some, even after World War II, as “technological barbarians lacking in all notions of human values,” a phrase borrowed from a popular French paper and a prejudice that was inflamed by American racial discrimination.<sup>47</sup> Regarding criticism of the United States, the English philosopher C. E. M. Joad even went so far as to claim that American influence “corrupts, infects, and pollutes whatever it touches.”<sup>48</sup> Not only was American hypocrisy damaging its relations with left-leaning and moderate Europeans, but also with right-wing Europeans who missed the colonial era.

One of the most embarrassing race-related incidents for the United States in the pre-*Brown* Cold War happened during the first meeting of the United Nations Subcommittee on the Prevention of Discrimination. This subcommittee worried the United States, since the UN, which the United States had used to criticize other nations that did not support the rights of all their citizens, was now going to be able to discuss an internal American issue. A high-ranking State Department official wrote on November 4<sup>th</sup>, 1947:

United States’ problems concerning relationships with minority groups have been fully treated in the press of other countries. This Subcommittee was established on the initiative of the USSR, and there is every indication

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid., 417.

<sup>46</sup> Ibid., 416.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

that the country and others will raise questions concerning our domestic problems in this regard.<sup>49</sup>

As the official's reference to the USSR makes clear, the State Department's concern about the subcommission's findings reflected its larger concerns about the Soviets weaponizing America's racial injustice for propaganda.

Eclipsing the threat of other countries raising issues about domestic problems in the United States, an internal American group, the NAACP, submitted *An Appeal to the World* to the Subcommittee.<sup>50</sup> In this document, W.E.B Du Bois, the primary author, accused segregation of creating a "nation within a nation" and credited American prosperity in large part to slavery.<sup>51</sup> In a stinging jab at American prestige, Du Bois wrote that:

[Racism] has repeatedly led the greatest modern attempt at democratic government to deny its political ideals...[and] falsify its philanthropic assertions. A nation which boldly declared "That all men are created equal," proceeded to build its economy on chattel slavery... [and] finds itself continuously making common cause with race-hate, prejudiced exploitation, and oppression of the common man. Its high and noble words are turned against it because they are contradicted in every syllable by the treatment of the American Negro for three hundred and twenty-eight years.<sup>52</sup>

Du Bois argued that America did not live up to its ideals, and thanks to this document's usefulness to countries that wanted to criticize the United States, it was widely circulated among foreign ambassadors.

The Soviet Ambassador seized the opportunity to publicly criticize America, reportedly wielding a copy of the petition.<sup>53</sup> The State Department worried that the United States was about to be attacked by the Soviets "at its most vulnerable points" and to be outed as a "nation of hypocrites."<sup>54</sup> Indeed, the Soviet delegation to the UN launched a very "severe attack on US discrimination practices."<sup>55</sup> To defend against

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<sup>49</sup> Skrentny, "The Effect of the Cold War on African-American Civil Rights," 247.

<sup>50</sup> Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (Cambridge, UK: Cambridge University Press, 2009), 109.

<sup>51</sup> W E B Du Bois, *An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress* (New York City, New York, 1947), 1.

<sup>52</sup> *Ibid.*, 6.

<sup>53</sup> Anderson, *Eyes Off the Prize*, 108-111.

<sup>54</sup> *Ibid.*, 109.

<sup>55</sup> *Ibid.*

this embarrassment, the United States claimed that it was already addressing the issue, pointing to the President’s Committee on Civil Rights and other measures that appeared to solve the “negro problem.”<sup>56</sup> It was largely irrelevant if they helped African Americans; to prevent debate over *An Appeal to the World*, the United States simply had to be able to claim that it was already fixing the issue internally, and thus the UN had no jurisdiction.<sup>57</sup> The United States succeeded, proving how useful federal efforts to end racism could be in defending American prestige in the United Nations.

Despite its slight victory at the UN, the government recognized the danger of losing the Cold War if it did not counter anti-Americanism. It directed the efforts of the United States Information Service (USIS), the subagency of the United States Information Agency (USIA) that handled overseas operations, to counter these notions.<sup>58</sup> Essentially the propaganda arm of the United States overseas, the USIS published articles in foreign newspapers, distributed leaflets, and even paid for notable African Americans to travel overseas to speak to Third World audiences about their experiences with American democracy.<sup>59</sup> Initially, especially in parts of the world where race did not pose an issue, such as in the Middle East, the two agencies published what we today think of as traditional Cold War propaganda, painting capitalism as a boon and Communism as a failure based on economic standards. For example, in Tehran, the USIS distributed 10,000 copies of *From Whom Is Help Coming For Me?*, a four-page leaflet that contrasts the exploitation of workers in the Soviet Union with the training and humanitarian aid given to the world by the United Nations (really representing the United States).<sup>60</sup> But to counter the “widespread misunderstanding of the United States”<sup>61</sup> because of American racism and launch a “campaign of

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<sup>56</sup> Ibid., 110.

<sup>57</sup> Ibid.

<sup>58</sup> “Records of the United States Information Agency (RG 306),” Foreign Policy (National Archives and Records Administration), accessed August 29, 2022, [https://www.archives.gov/research/foreign-policy/related-records/rg-306#:~:text=USIS%20began%20operation%20as%20the,States%20Information%20Agency%20\(USIA\).](https://www.archives.gov/research/foreign-policy/related-records/rg-306#:~:text=USIS%20began%20operation%20as%20the,States%20Information%20Agency%20(USIA).)

<sup>59</sup> Ibid.

<sup>60</sup> Embassy, Tehran, “Attaching Memorandum Entitled “Report on the Use of Anti-Soviet Material Within Iran During Period Covered by Last Two Years,”” *NSA Archive 2* (National Security Agency), accessed January 2022, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB78/propaganda%20096.pdf>, 5.

<sup>61</sup> Harry Truman, “Address on Foreign Policy at a Luncheon of the American Society of Newspaper Editors.” April 20, 1950, Washington DC: Truman Library, National Archives, <https://www.trumanlibrary.gov/library/public-papers/92/address-foreign-policy-luncheon-american-society-newspaper-editors>.

truth,”<sup>62</sup> the USIS needed to develop *defensive* propaganda—propaganda that defended the racial reality of the United States. To that end, the Department of State began to reframe the narrative around racial discrimination and push internally for civil rights reform.

This reframing argued that African Americans had made immense progress since their emancipation, showing the superiority of American democracy.<sup>63</sup> In this way, the USIS did not deny the past: it simply portrayed African Americans’ success in advancing their civil rights as a triumph of democracy, even though there was much more to fix. In addition, the service consciously identified newsworthy achievements by Black Americans, such as records set in athletics, as evidence of racial progress.<sup>64</sup> One example is an article for a Burmese newspaper by Fredrick C. Jochem, who worked with the American embassy in Burma, entitled *Negro Problem* in which he suggested that the Burmese did not have all the facts about the racial problems in the United States.<sup>65</sup> He revealed that more than 50 African Americans held teaching positions at American colleges and conceded that while there still was a racial issue in the United States, it was largely contained to the South and was becoming less prevalent, both hallmarks of USIS propaganda.<sup>66</sup>

Despite the USIS narrative overseas, the fact remained that the average African American earned \$14,216 while the average white earned \$27,807, and African Americans in most of the South were only half as likely as their white counterparts to register to vote and even less likely to vote.<sup>67</sup> Lynch mobs still killed African Americans with impunity.<sup>68</sup> To silence accurate criticism of American racial issues, the United States needed to get serious about civil rights. President Truman tried to implement various reforms, such as an anti-lynching bill or a bill to abolish the poll tax, but most civil rights bills were “bottled up” in committees chaired by powerful Southern democrats.<sup>69</sup> New tactics were needed.

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<sup>62</sup> Ibid.

<sup>63</sup> Osgood, *Total Cold War*, 71.

<sup>64</sup> Ibid., 278.

<sup>65</sup> Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2011), 47.

<sup>66</sup> Ibid.

<sup>67</sup> Steven F. Lawson, *Running for Freedom: Civil Rights and Black Politics in America since 1941* (Chichester, West Sussex: Wiley Blackwell, 2015), 89.

<sup>68</sup> “History of Lynching in America,” NAACP, February 11, 2022, <https://naacp.org/find-resources/history-explained/history-lynching-america>.

<sup>69</sup> “STILL BOTTLED UP,” *New York Times*, January 23, 1950.

Since they could not influence Congress to pass civil rights reform, the Justice Department, State Department, and President Truman turned to the courts, and began, without precedent, to submit *amicus* briefs announcing the Federal Government's support for African American civil rights. The first brief was submitted by the Department of Justice to the Supreme Court regarding *Shelley v. Kraemer*. In 1948 this case, Shelly challenged the constitutionality of racially restrictive land covenants. The brief argued that racial covenants were an international embarrassment and caused problems in international affairs.<sup>70</sup> It maintained that the State Department found it "next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged."<sup>71</sup> The brief also posed the question: how could America lead other nations by example towards freedom, while it was not free itself? Essentially, to win the Cold War, America needed to 'practice what it preached.' Continuing this tactic, the State Department submitted similar briefs for *Henderson v. United States* and *Sweatt v. Painter*.

### ***Brown v. Board of Education of Topeka***

African Americans in the United States were not treated equally. Even if the United States had made progress, the Soviet Union could still claim that the United States did not live up to its ideals. By 1953, despite the efforts of the USIS, USIA, and the federal government, America's international record of racial injustice had significantly diminished its global reputation, especially in the Third World. Congressman Adam Clayton Powell stated that the United States was "the most hated nation in the world today," warning that "communism must win the global cold war by default" if the United States did not issue serious civil rights reform.<sup>72</sup> Truman was looking for a way to push civil rights forward when a group of thirteen parents complained about segregated schooling and *Brown v. Board of Education* was born.

The State Department and Justice Department submitted a joint *amicus* brief to the Supreme Court in *Brown v. Board* advocating for the end of segregation primarily because of its negative impact on

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<sup>70</sup> Osgood, Total Cold War, 112.

<sup>71</sup> Dean Acheson, "Foreign Policy and Domestic Discrimination," *Foreign Policy and Domestic Discrimination* (National Archives, March 5, 2015), <https://text-message.blogs.archives.gov/2015/03/05/foreign-policy-and-domestic-discrimination/>.

<sup>72</sup> Postwar Foreign Policy and African-American Civil Rights §, accessed August 1, 2022, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Postwar-Foreign-Policy-Civil-Rights/>.

international relations, claiming, “Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.”<sup>73</sup> The brief spent six of its eight pages opposing segregation because of its negative effect on America’s ability to promote democracy over communism.<sup>74</sup> It included the letter by Dean Acheson mentioned above, which stated his concerns over how the United States was constantly attacked in foreign media and by international bodies, such as the United Nations, because of racial discrimination.<sup>75</sup>

Although the court’s decision did not directly mention the international context of the case, there is no doubt that *Brown* was powerfully affected by the international opinion of American racial practices. The justices of 1953 were not like the earlier justices in the *Plessy v. Ferguson* case who believed separate but equal was possible; they understood that the world was watching American racial practices, and to fix America in the eyes of the world, they would need to take serious action. Chief Justice Earl Warren was particularly conscious of the issues that racial discrimination caused for the United States. He stated that “[o]ur American system like all others is on trial both at home and abroad. The way it works;...The extent to which we maintain the spirit of our constitution with its Bill of Rights, will in the long run do more to make it both secure and the object of adulation than the number of hydrogen bonds we stockpile.”<sup>76</sup>

In a time when US racism was ever-present in foreign headlines, America’s Supreme Court Justices were aware that the international community was concerned about civil rights abuses in America according to Dudziak, a Cold War Civil Rights historian.<sup>77</sup> For example, when Justice William O. Douglas traveled to India in 1950, the first question he was asked upon his arrival was “[w]hy does America tolerate the lynching of the Negroes?”<sup>78</sup> The *Brown* Supreme Court justices were well-schooled in the international connotations of their decision. The *amicus* brief would have resonated clearly.

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<sup>73</sup> “Oliver Brown, et al., Appellants v. Board of Education of Topeka, Shawnee County, Kansas, et al.” Accessed August 29, 2022. [http://archive.oah.org/special-issues/teaching/2008\\_12/sources/ex1src2.pdf](http://archive.oah.org/special-issues/teaching/2008_12/sources/ex1src2.pdf).

<sup>74</sup> *Ibid.*, 6.

<sup>75</sup> *Ibid.*

<sup>76</sup> Dudziak, *Cold War Civil Rights*, 106.

<sup>77</sup> *Ibid.*

<sup>78</sup> Mary L. Dudziak, “Brown as a Cold War Case,” *Journal of American History* 91, no. 1 (January 2004): pp. 32-52, <https://doi.org/10.2307/3659611>, 4.

On May 17, 1954, *Brown v. Board* declared school segregation unconstitutional. Within the hour, the USIS began to broadcast the decision around the world on *The Voice of America*.<sup>79</sup> Almost 40,000 copies of “The Negro in American Life” and other pamphlets were distributed in India reporting on the *Brown* decision, while in Eastern Europe, the *Voice of America* broadcast the decision for weeks.<sup>80</sup> USIS propaganda films were reviewed and edited, and many were broadcast around the world depicting white and black school children together. Showing the critical importance *Brown* held for the information agencies of the United States, the decision was exploited “to the fullest” on all broadcasts and included in almost every USIS publication for almost a month after the decision.<sup>81</sup>

There was an outpouring of support for the decision from across the world, especially in Asia and Africa. The *Hindustan Times of India* praised the ruling, saying that, “The practice of racial segregation in schools ... has been a long-standing blot on American life and civilization.”<sup>82</sup> In Nigeria, the *West African Pilot* reported that:

It is no secret that America is today hailed as the leader of the democratic world. This carries with it a great deal of moral responsibility. Firstly, it entails that the American concept and practice of democracy within its territories should acknowledge the necessity of equal opportunity for all citizens, no matter their racial origin. Secondly, it implies that the United States should set an example for all other nations by taking the lead in removing from its national life all signs and traces of racial intolerance, arrogance, or discrimination for which it criticizes some other nations.<sup>83</sup>

Like in Nigeria, the ruling was also significant in Westernized nations. The *Sydney Morning Herald* hailed *Brown* as a “blow to communism.”<sup>84</sup> America also recognized the international significance of *Brown*. The *San Francisco Chronicle* printed that “[g]reat as the impact of the antisegregation ruling will be upon the states of the South..., still greater, we believe, will be its impact on South America, Africa, and Asia, to this country’s lasting honor and benefit.”<sup>85</sup>

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<sup>79</sup> Dudziak, *Cold War Civil Rights*, 107.

<sup>80</sup> *Ibid.*

<sup>81</sup> Osgood, *Total Cold War*, 280.

<sup>82</sup> Dudziak, “Brown as a Cold War Case,” 3.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, 5.

<sup>85</sup> “Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary,” Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary § (1959), 2782.

## Conclusion

International pressure throughout the early years of the Cold War focused on the supposed hypocrisy of the United States. Internationally, the United States promoted the benefits of democracy and capitalism while at home, African Americans were denied the same basic constitutional and human rights supposedly guaranteed by democracy. Truman recognized that this hypocrisy diminished the United States' moral leadership of the world and attempted to promote civil rights through Congress. Facing resistance, he chose to influence the courts instead, and he ultimately found success in the *Brown v. Board* ruling.

International criticism of American racial discrimination began to decline after the ruling. The Little Rock Nine and the assassination of Martin Luther King notwithstanding, international pressure never reached pre-1954 levels. Although the Soviet Union ran propaganda campaigns such as “And You Are Lynching Negroes?” until its dissolution in 1991, most Soviet propaganda dropped discussions about American racial discrimination. This was a considerable accomplishment in US international relations.

While international pressure during the Cold War is not often studied for the effect it had on US civil rights, it was a significant factor that contributed to establishing *Brown v. Board* as the tipping point in the civil rights movement.

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## **Lethal Injections Gone Awry: Unmasking America's Capital Punishment System**

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### **Abstract**

For much of human history, capital punishment has been regularly conducted, usually reserved for the severest of criminal acts. While execution methods have evolved and changed over time, one factor has remained consistent – the occurrence of botched executions. Since 1982, when the first execution using lethal injection was carried out in Texas, executions in the United States have largely been carried out by lethal injection, a procedure that has faced controversy in recent years, especially as American states adopt new and experimental methods of lethal injection due to shortages of established lethal injection drugs. While prior research has typically focused on the social and judicial consequences of botched lethal injections, this paper focuses on the multitude of factors that have shaped the ongoing controversy surrounding lethal injections, providing context for the issues plaguing the legal and effective enforcement of the death penalty. Further, it traces the evolution of the procedures and controversies relating to lethal injections, allowing for a greater understanding of the complexities and controversies of the lethal injection procedure. The analysis provided by this paper demonstrates the shortcomings of the modern American capital punishment system while offering a critical discussion of the underlying political motivations that lead to partisan interference in the modern American death penalty system.

## Introduction

In Stephen Trombley's 1993 book, *The Execution Protocol*, the author interviewed Lloyd Schlup, a convicted murderer on Missouri death row, for his thoughts on how the public perceived lethal injection, a newer method of execution that was rapidly being adopted at the time.<sup>1</sup> Lloyd commented, "They keep hearing about this electric chair and that electric chair, not getting it on the first try, and breaking down. And the gas... How you gasp for ten, fifteen minutes, or whatever, and go through all this agonizing pain... you know it's cruel and unusual... Putting a shot in your arm and just laying there, then a few minutes later, *that's it*, and supposedly no pain or suffering. That's how we do our dogs, you know... it's just too easy."<sup>2</sup>

The national media has given a great deal of attention to several executions performed with a lethal injection that has gone wrong within the past decade, such as the botched execution of Clayton Lockett that occurred in 2014.<sup>3</sup> However, while much of the attention has focused on the deaths of the condemned, there has been little coverage of the greater implications of these executions.<sup>4</sup> These bungled executions are significant because they uncover the flawed state of America's modern capital punishment system.

This paper focuses on the following issues that prove the faulty state of America's contemporary capital punishment system. Foremost, shortages of approved sodium thiopental have forced prisons to use ethically questionable methods to procure alternative drugs that are unsafe, unauthorized for use in executions, and that lack anesthetic properties. Largely, prisons facing shortages of sodium thiopental for anesthesia in lethal injections have turned to alternatives such as pentobarbital from less-regulated compounding pharmacies or midazolam, a drug with no proven value in preventing an unconstitutional degree of pain during executions.<sup>5</sup> Furthermore, incompetence and oversight from all facets of state government have

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<sup>1</sup> Trombley, Stephen, *The Execution Protocol* (London: Century, 1993), 14, 72, 329-330.

<sup>2</sup> *Ibid.*, 329-330.

<sup>3</sup> Austin Sarat, "Botched Executions Are Just Part of a Broken System," U.S. News and World Report, last modified July 28, 2014, Accessed April 28, 2023.

<https://www.usnews.com/debate-club/do-botched-executions-make-the-case-for-abolishing-the-death-penalty/botched-executions-are-just-part-of-a-broken-system>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Michael R. Merz, *DECISION AND ORDER ON MOTION FOR STAY OF EXECUTION AND PRELIMINARY INJUNCTION*, 147-148, January 14, 2019, Accessed February 25, 2022.

<https://drive.google.com/file/d/1jCgl50sVPEXvpZ6hbuBF31GrcLGwVnZm/view>.

contributed to the rising number of botched executions. The increasing politicization and political polarization of the death penalty have also impacted states' responses to botched executions. Facing political pressure and meddling, many states and courts of law have continued to administer the death penalty, while shielding it from criticism and examination by compromising judicial independence and limiting the free flow of information through secrecy laws.

### Execution Drug Shortage

Before 2010, most states applying the death penalty had used a three-drug cocktail to execute condemned prisoners.<sup>6</sup> This lethal injection drug cocktail consisted of:

- (1) sodium thiopental, a “fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection”;
- (2) pancuronium bromide, “a paralytic agent that inhibits all muscular-skeletal movements and... stops respiration”; and
- (3) potassium chloride, which “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.”<sup>7</sup>

In 2010, the only company licensed to sell sodium thiopental in the United States, Hospira, had to shut down its manufacturing plant due to an issue at the plant.<sup>8</sup> At the time, Hospira was the only company that the US Food and Drug Administration (FDA) approved to produce any legal forms of thiopental, including sodium thiopental.<sup>9</sup> With Hospira halting all production of sodium thiopental, a shortage of the drug carpeted the entire United States.<sup>10</sup> This prompted states to find alternative suppliers to procure sodium thiopental.<sup>11</sup>

Many states, including Georgia, California, and Arizona, soon began to purchase and use sodium thiopental from Dream Pharma, a British company operated out of a driving academy.<sup>12</sup> Similarly,

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<sup>6</sup> *Glossip v. Gross*, 576 U. S. 863, 3 (2015)

<sup>7</sup> *Ibid.*, 3.

<sup>8</sup> Alper, Ty. “The United States Execution Drug Shortage: A Consequence of Our Values.” *The Brown Journal of World Affairs* 21, no. 1 (2014): 30, Accessed February 4th, 2022. <http://www.jstor.org/stable/24591028>.

<sup>9</sup> *Ibid.*, 30.

<sup>10</sup> *Ibid.*, 30.

<sup>11</sup> *Ibid.*, 30.

<sup>12</sup> Stern, Jeffrey E. “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.” *The Atlantic*, June 2015, Accessed February 5, 2022. <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>.

Nebraska purchased sodium thiopental from a Swiss pharmaceutical company called Naari, through a middleman in India.<sup>13</sup> The middleman told Naari that he needed free samples of the anesthetic to test out in Zambia.<sup>14</sup> Instead, he sold the free samples to Nebraska for \$5,411 to use in executions.<sup>15</sup> Naari's CEO was "shocked and appalled" that drugs produced by his company had been obtained by prisons for use in executions.<sup>16</sup> He told the Chief Justice of the Nebraska Supreme Court that Naari was "deeply opposed to the use of the drugs in executions."<sup>17</sup> The CEO attempted to make Nebraska return the drugs; however, the drugs were never returned.<sup>18</sup> In 2010, the British Government, and in 2011, the European Union, initiated controls on the exportation of sodium thiopental.<sup>19</sup> These newly passed export controls halted the exportation of sodium thiopental from Europe to US prisons.<sup>20</sup>

As this occurred, "the federal Drug Enforcement Administration (DEA) was about to start raiding prisons... Prisons had become... drug smugglers" due to their illegal importation of unapproved sodium thiopental.<sup>21</sup> The FDA had never approved the imported sodium thiopental for use within the United States.<sup>22</sup> Therefore, states were using unregulated and unapproved drugs in executions, a violation of US laws.<sup>23</sup> Later, in 2013, almost all global importation of sodium thiopental into the US was halted following a ruling by the US Court of Appeals for the District of Columbia Circuit which found that "the importation of unapproved thiopental from overseas was illegal."<sup>24</sup> However, in 2015, the FDA seized lethal injection drugs that Arizona, Texas, and Nebraska

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<sup>13</sup> Associated Press, "Swiss Company Demands Nebraska Return Drug Intended For Use In Lethal Injections," *Business Insider*, last modified November 30, 2011, Accessed April 29, 2023. <https://www.businessinsider.com/nebraska-swiss-naari-ag-sodium-thiopental-2011-11>.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Alper, "The United States Execution Drug Shortage: A Consequence of Our Values." 34.

<sup>17</sup> *Ibid.*, 34.

<sup>18</sup> Eric Berger, "Lethal Injection Secrecy and Eighth Amendment Due Process," *Boston College Law Review* 55, no. 5 (November 25, 2014): 1381-1382, Accessed April 29, 2023. <http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/2>.

<sup>19</sup> Alper, "The United States Execution Drug Shortage: A Consequence of Our Values." 30.

<sup>20</sup> *Ibid.*, 30.

<sup>21</sup> Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

<sup>22</sup> *Ibid.*

<sup>23</sup> Alper, "The United States Execution Drug Shortage: A Consequence of Our Values." 30.

<sup>24</sup> *Ibid.*, 30.

still tried to smuggle into the US.<sup>25</sup> In October 2015, FDA spokesman Jeff Ventura reminded state governments that, “Courts have concluded that sodium thiopental for the injection in humans is an unapproved drug and may not be imported into the country...”<sup>26</sup>

After Hospira shut down its manufacturing plant, some states also turned to a new drug, pentobarbital, to anesthetize inmates during lethal injection procedures.<sup>27</sup> Several states turned to a Danish company called Lundbeck for pentobarbital; however, in July 2011, Lundbeck announced that it would be implementing “comprehensive distribution controls” on its medicine to stop prisons from using it in executions.<sup>28</sup> Most other manufacturers of pentobarbital followed suit and implemented tight controls on their products, thereby restricting states’ access to pentobarbital.<sup>29</sup> This issue prompted several states, including Oklahoma, to switch to a new drug that was easier to obtain, called midazolam.<sup>30</sup> However, midazolam has faced controversies regarding its effectiveness, and scientific evidence, accepted by the legal system, does not support that it can effectively anesthetize inmates during executions.<sup>31</sup>

Other states, including Texas, turned to compound pharmacies to fulfill their need for pentobarbital because compounding pharmacies did not need to follow the same federal standards as large manufacturers of drugs.<sup>32</sup> Drugs produced by these pharmacies do not need to be reviewed, tested, and approved by the FDA for safety and effectiveness.<sup>33</sup> Instead, statewide pharmacy boards are responsible for regulating their in-state compounding pharmacies, and regulations can

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<sup>25</sup> Breyer, Stephen G., and John D. Bessler, *Against the Death Penalty* (Washington: Brookings Institution Press, 2016), 70.

<sup>26</sup> *Ibid.*, 70.

<sup>27</sup> Alper, “The United States Execution Drug Shortage: A Consequence of Our Values.” 30.

<sup>28</sup> *Ibid.*, 30-31.

<sup>29</sup> *Ibid.*, 31.

<sup>30</sup> Owen Dyer, “Botched Execution Could Lead to Legal Challenges in Death Penalty States,” *BMJ: British Medical Journal* 348 (2014): 1, Accessed February 24, 2022. <https://www.jstor.org/stable/26514619>.

<sup>31</sup> Merz, *DECISION AND ORDER*, 147-148.

<sup>32</sup> McDaniel, Chris. “Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.” BuzzFeed News. Last modified November 28, 2018, Accessed February 14, 2022. <https://www.buzzfeednews.com/article/chrimcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas>.

<sup>33</sup> “Compounding and the FDA: Questions and Answers,” Food and Drug Administration, Accessed April 28, 2023. <https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers>.

vary by state.<sup>34</sup> Simultaneously, many states have passed laws protecting compounding pharmacies from state regulatory boards when assisting in state-sanctioned executions.<sup>35</sup> However, after Texas started using compounded pentobarbital in executions, several controversial executions took place.<sup>36</sup> During the execution of Texas inmate Anthony Shore, he said: “I can feel that it does burn. Burning!”<sup>37</sup> Death row prisoner William Rayford also “writhed and shook on the gurney...”<sup>38</sup> Of the 11 Texas inmates executed through lethal injection in 2018, five of them said that they felt a burning sensation during their execution.<sup>39</sup> A 2016 affidavit written by Dr. David Waisel, a Harvard and Yale Medical School professor of anesthesia, explained that improperly compounded and inspected drugs could contain non-visible contaminants and particles that “can cause great irritation to the vein, resulting in extraordinary pain...” after injection.<sup>40</sup> Additionally, pentobarbital produced by compounding pharmacies can slowly degrade in potency and expire, thereby reducing its effectiveness, and putting death-row inmates “at risk of a painful death that would amount to torture.”<sup>41</sup>

One of the sources of pentobarbital for Texas executions was Greenpark Compounding Pharmacy in Houston whose license was on probation because it made the wrong drug for three children, causing one to be hospitalized.<sup>42</sup> The pharmacy also was found to be using forged quality control documents.<sup>43</sup> From 2010 to 2018, FDA investigators cited Greenpark Pharmacy 48 times for quality control and sterility issues.<sup>44</sup> Furthermore, in 2021, the FDA cautioned healthcare providers to immediately quarantine and cease administration of products from Greenpark Compounding Pharmacy which was originally marked as sterile.<sup>45</sup> Moreover, government regulators have discovered

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<sup>34</sup> Kelly A. Mennemeier, “A RIGHT to KNOW HOW YOU’LL DIE,” *The Journal of Criminal Law and Criminology* (1973-) 107, no. 3 (2017): 452, <https://www.jstor.org/stable/48572684>.

<sup>35</sup> Andrew Shi, “REVIEWING REFUSAL: LETHAL INJECTION, THE FDA, AND THE COURTS,” *University of Pennsylvania Law Review* 168, no. 1 (2019): 247, <http://www.jstor.org/stable/45389500>.

<sup>36</sup> McDaniel, “Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.”

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Food and Drug Administration. “FDA alerts patients and health care professionals not to use compounded products intended to be sterile from Prescription Labs Inc.

unsanitary conditions in compounding pharmacies nationally.<sup>46</sup> In September 2012, a fatal meningitis outbreak originated from a compounding pharmacy located in Massachusetts which infected at least 500 people.<sup>47</sup> After the outbreak, the FDA inspected thirty different compounding pharmacies and discovered unhygienic environments in all but one.<sup>48</sup>

Similarly to Texas, Missouri also utilized compounded drugs in executions.<sup>49</sup> In three separate executions, Missouri utilized drugs from a compounding pharmacy that received 1,892 infringements of state guidelines.<sup>50</sup> State inspectors observed pharmacy employees arbitrarily modifying expiration dates on drugs and regularly storing medications in an Igloo cooler instead of the pharmacy's refrigerator, solely because the refrigerator was located in another room.<sup>51</sup> This pharmacy, located in Oklahoma, was also “not licensed to do business in Missouri, and its interstate sale of controlled substances without a valid prescription may have violated both Missouri and federal law... To evade disclosure, Missouri also failed to file the required 1099 tax form with the Internal Revenue Service.”<sup>52</sup>

Many states consistently turned to illegal, deceitful, and potentially dangerous methods to acquire execution drugs with diminished or unknown effectiveness, and that carry a high risk of contamination. States using these drugs have been unable to shield inmates from the pain that the other drugs in the lethal injection cocktail can cause, creating a constitutionally-incompatible environment for executions performed by lethal injection.<sup>53</sup> In its ruling in *Baze vs. Rees* in 2008, the Supreme Court found indisputably, “that absent a ‘proper dose of sodium thiopental,’ there would be a ‘substantial, constitutionally

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dba Greenpark Compounding Pharmacy.” News release. September 29, 2021, Accessed February 16, 2022. <https://www.fda.gov/drugs/drug-safety-and-availability/fda-alerts-patients-and-health-care-professionals-not-use-compounded-products-intended-be-sterile>.

<sup>46</sup> Jennifer Gudeman et al., “Potential Risks of Pharmacy Compounding,” *Drugs in R&D* 13, nos. 1-8 (March 23, 2013): 4-5, Accessed April 29, 2023.

<https://doi.org/10.1007/s40268-013-0005-9>.

<sup>47</sup> *Ibid.*, 5.

<sup>48</sup> Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

<sup>49</sup> Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, ed. Robert Dunham and Ngozi Ndulue, 40, November 20, 2018, Accessed April 29, 2023. <https://documents.deathpenaltyinfo.org/pdf/SecrecyReport-2.f1560295685.pdf>.

<sup>50</sup> Konrad, *Behind the Curtain*, 40.

<sup>51</sup> *Ibid.*, 40.

<sup>52</sup> *Ibid.*, 40.

<sup>53</sup> *Glossip*, 576 U. S. at 2.

unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride [the two other drugs commonly used in lethal injections].”<sup>54</sup> The absence of legal sodium thiopental for use in executions has created a predicament where executions are still being conducted despite previous Supreme Court rulings that the drugs used in them are not approved for use in constitutionally-tolerable executions.<sup>55</sup> These issues with execution drugs have undermined the implementation of safe, constitutional, and scientifically supported executions.

### **Negligence and Incompetence by Government Officials**

After the supplier of pentobarbital, the barbiturate used for executions in Oklahoma decided to halt shipments following negative public attention, the Oklahoma Department of Corrections assigned their General Counsel, Mike Oakley, to find an alternative drug for use in executions.<sup>56</sup> Oakley had no formal medical training or experience in the field of medicine.<sup>57</sup> Oakley conducted research by looking at testimony given by expert witnesses during litigation related to executions using midazolam in Florida.<sup>58</sup> In 2013, Florida executed William Happ with midazolam.<sup>59</sup> Experts argued that midazolam could not induce a sufficient level of anesthesia for a painless execution.<sup>60</sup> A witness reported that during Happ’s execution, “Happ remained conscious longer and made more body movements after losing consciousness than other people executed recently by lethal injection.”<sup>61</sup> Around the same time, in Ohio, witnesses reported that during the execution of Dennis McGuire using midazolam, he “snorted, heaved, clenched one of his fists, and gasped for air.”<sup>62</sup> Later, Oakley recommended that Oklahoma utilize midazolam in the state’s upcoming

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<sup>54</sup> *Ibid.*, 2.

<sup>55</sup> *Ibid.*, 2.

<sup>56</sup> Laura Finley, “Death Penalty as State Crime: Examining the Physical and Mental Health Concerns with Capital Punishment in the U.S.,” *In Factis Pax* 16, no. 1: 52, Accessed April 29, 2023. <http://www.infactispax.org/wp-content/uploads/2015/06/IFP-V-16-Laura-Finley.pdf>.

<sup>57</sup> *Ibid.*, 52.

<sup>58</sup> Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

<sup>59</sup> Finley, “Death Penalty,” 52.

<sup>60</sup> Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

<sup>61</sup> Megan McCracken and Jennifer Moreno, “Through the Glass Darkly: What Oklahoma’s Lethal Injection Regime Tells Us about Secrecy, Incompetence, Disregard, and Experimentation Nationwide,” *Human Rights* 42, no. 2 (2017): 9, Accessed March 10, 2022. <http://www.jstor.org/stable/26423433>.

<sup>62</sup> Finley, “Death Penalty,” 52.

executions after officials in Ohio, who had a conflict of interest in defending their usage of midazolam, informed him that McGuire's struggles were exaggerated by the media, and because midazolam was easily obtainable in the United States.<sup>63</sup>

However, medical experts testified that midazolam was ineffective in keeping inmates sedated and anesthetized during executions. Midazolam had never been approved as an anesthetic by the FDA, and it had never been used "as the sole agent to produce insensation in a procedure that involves any noxious stimuli."<sup>64</sup> For example, in hospitals, midazolam had never been used as the only drug to ensure that patients were anesthetized for surgical procedures.<sup>65</sup> Furthermore, several studies conducted in 2000 and 2001, almost 15 years before Oakley began his research into midazolam, concluded that "Midazolam's limited effects mean that it cannot produce the level of unconsciousness of a general anesthetic."<sup>66</sup>

In 2017, Judge Michael R. Merz ruled that the use of midazolam in Ohio's lethal injection process would "create a substantial and objectively intolerable risk of serious harm in violation of the Eighth Amendment."<sup>67</sup> In 2008, in *Baze vs. Rees*, the Supreme Court ruled that a capital punishment protocol would be considered unconstitutional if it posed a "substantial risk of serious harm" or an "objectively intolerable risk of harm."<sup>68</sup>

Before Oklahoma switched to using midazolam following Oakley's recommendation, leaked email exchanges between state officials in Oklahoma, following a 2011 execution in which pentobarbital was used, suggested that state officials were aware that the prisoner had stayed conscious and experienced a high degree of pain throughout the execution, even after being declared unconscious.<sup>69</sup> Despite this information, a month after the email exchange, the same officials

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<sup>63</sup> *Ibid.*, 52.

<sup>64</sup> Merz, *DECISION AND ORDER*, 66, 78.

<sup>65</sup> *Glossip*, 576 U. S. at 5.

<sup>66</sup> Merz, *DECISION AND ORDER*, 90.

<sup>67</sup> "Federal Magistrate Judge Rules Ohio Lethal Injection Protocol Unconstitutional," Death Penalty Information Center, last modified January 26, 2017, Accessed February 5, 2022. <https://deathpenaltyinfo.org/news/federal-magistrate-judge-rules-ohio-lethal-injection-protocol-unconstitutional>.

<sup>68</sup> *Glossip*, 576 U. S. at 2.

<sup>69</sup> Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

purchased \$10,400 worth of pentobarbital for Oklahoma prisons and spent another \$40,000 on pentobarbital a year later.<sup>70</sup>

In 2014, Oklahoma performed the execution of Clayton Lockett using midazolam.<sup>71</sup> Oklahoma execution protocol dictated that executions were to be performed with two IVs attached to the inmate, a primary and a backup line, in case of any issues with the main line.<sup>72</sup> However, against state protocol, prison staff conducted Lockett's execution with only a single IV line.<sup>73</sup> During Lockett's execution, it was discovered that the single IV line had dislocated because Lockett's vein had "exploded."<sup>74</sup> After Lockett's vein blew, part of the injected solution escaped into his tissue or out of his body.<sup>75</sup> After waking up in the middle of his execution, Clayton Lockett took 43 minutes to die, while shaking so violently against his restraints that medical examiners later found that the restraints had left "blunt impact injuries" on his body.<sup>76</sup> Later, a state investigation revealed that the executioners were not provided with any training before Lockett's execution.<sup>77</sup> Furthermore, after the execution, the paramedic responsible for inserting Lockett's IV line was asked about her difficulties inserting the line.<sup>78</sup> The paramedic said, "People who are very fair complected [sic], their veins are deep because – I don't know why. And black people have small veins."<sup>79</sup> The paramedic's "race-based misconception" about human anatomy led to

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<sup>70</sup> Ibid.

<sup>71</sup> McCracken and Moreno, "Through the Glass," 7.

<sup>72</sup> Oklahoma Department of Corrections, *Execution of Inmates Sentenced to Death*, 25, Accessed January 23, 2022.

<https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-04/op040301.pdf>.

<sup>73</sup> Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

<sup>74</sup> Corinna Barrett Lain, "THE POLITICS OF BOTCHED EXECUTIONS," *Richmond Law Review* 49 (March 7, 2015): 832, Accessed February 23, 2022.

<https://lawreview.richmond.edu/files/2015/04/Lain-493.pdf>; Dyer, "Botched Execution," 1.; Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

<sup>75</sup> Lain, "THE POLITICS," 832.

<sup>76</sup> Dyer, "Botched Execution," 1.; Joseph I. Cohen, *Independent Autopsy Examination of Clayton Lockett (P14-0514)*, 1, June 12, 2014, Accessed February 24, 2022.

<https://s3.documentcloud.org/documents/1198181/clayton-lockett-autopsy.pdf>.

<sup>77</sup> Oklahoma Department of Public Safety, *The Execution of Clayton D. Lockett*, 22, Accessed January 23, 2022.

<https://files.deathpenaltyinfo.org/legacy/documents/LockettInvestigationReport.pdf>.

<sup>78</sup> Konrad, *Behind the Curtain*, 58.

<sup>79</sup> Ibid., 58.

questions about the selection process and qualifications of Oklahoma’s execution team.<sup>80</sup>

A few months after Lockett’s botched execution, Oklahoma executed Charles Warner.<sup>81</sup> On January 15th, 2015, execution personnel marked in their logs that they had injected Warner with 240 milliequivalents (mEq) of potassium chloride.<sup>82</sup> However, execution personnel had injected Warner with an entirely different drug that had no role in lethal injection protocols.<sup>83</sup> Before he died, Warner was heard saying “It feels like acid.”<sup>84</sup> His last words were “My body is on fire.”<sup>85</sup> This oversight, which occurred again nine months later during Oklahoma’s next scheduled execution, when the state almost proceeded with using the wrong drug again under false advice from several prison officials, caused Oklahoma’s attorney general to order an investigation of the consistent issues plaguing Oklahoma executions.<sup>86</sup> The investigation reported that Oklahoma state officials “failed to perform their duties with the precision and attention to detail the exercise of state authority in such cases demands...” Its report detailed failures at every level and recommended that [Oklahoma Department of Corrections] again revise its execution procedures and follow the law and its’ protocol when performing executions.<sup>87</sup> A lack of oversight and general negligence on the part of government officials and execution personnel directly led to the botched execution of Charles Warner.<sup>88</sup>

Similarly, in Arizona, during the July 2014 execution of Joseph Wood, the execution staff reported four minutes into the execution that he was sedated.<sup>89</sup> However, immediately after the executioner’s announcement, witnesses described Wood as “gasping for air, taking deep, long breaths ‘like he was drowning...’ It happened over 640

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<sup>80</sup> Ibid., 58.

<sup>81</sup> Breyer and Bessler, *Against the Death Penalty*, 6.

<sup>82</sup> Oklahoma Department of Corrections, *Correctional Service Log*, report no. 5:14-cv-00665-F, 4, August 8, 2015, Accessed February 25, 2022. <https://s3.documentcloud.org/documents/2454045/223-3-exh-3-warner-exec-timeline.pdf>.

<sup>83</sup> Breyer and Bessler, *Against the Death Penalty*, 6.

<sup>84</sup> Ibid., 6.

<sup>85</sup> Ibid., 6.

<sup>86</sup> Mccracken and Moreno, “Through the Glass,” 7; MULTICOUNTY GRAND JURY, STATE OF OKLAHOMA, *INTERIM REPORT NUMBER 14*, report no. 14, 67, May 19, 2016, Accessed April 28, 2023. <https://files.deathpenaltyinfo.org/legacy/files/pdf/MCGJ-Interim-Report-5-19-16.pdf>.

<sup>87</sup> Ibid., 7; Ibid., 1.

<sup>88</sup> Breyer and Bessler, *Against the Death Penalty*, 6.

<sup>89</sup> Lain, “THE POLITICS,” 833.

times.”<sup>90</sup> Wood died almost two hours after he was pronounced unconscious, and execution records showed that Wood had received fifteen times the amount of lethal injection drugs that state protocol called for.<sup>91</sup>

Furthermore, in 2006, a United States Federal District Court found that the negligence of California’s execution team in handling executions violated the Eighth Amendment.<sup>92</sup> The court discovered that the employee responsible for California’s execution drugs was previously punished for smuggling drugs into the prison and that the execution team leader was “diagnosed with and disabled by post-traumatic stress disorder” due to his work in the prison.<sup>93</sup> The execution team leader also felt that conducting executions was the “most stressful” job a prison worker could experience.<sup>94</sup> Furthermore, the judge found that almost none of California’s execution personnel knew the properties or risks of California’s execution drugs and that the execution team failed to keep complete or legible records of the sodium thiopental, some of which was taken for claimed use in training, but never returned, while members of the execution team claimed to not be given any training.<sup>95</sup> Questions also arose around whether inmates were fully anesthetized, as injection records were missing, and testimony disclosed that not all the necessary sodium thiopental was injected in several executions.<sup>96</sup> The court concluded that the execution teams’ “implementation of California’s lethal-injection protocol lack[ed] both reliability and transparency. In light of the substantial questions raised by the records of previous executions, the Defendants’ actions and failures to act have resulted in an undue and unnecessary risk of an Eighth Amendment violation. This is intolerable under the Constitution.”<sup>97</sup>

As evidenced above, in recent years, states have had frequent issues with negligence and oversight when planning for, and conducting executions, and as a result, prisoners face improperly conducted executions that violate legal protocols, safety measures, and the Constitution. However, state governments have done little to bring themselves and their employees to accountability, instead shielding negligent employees and unconstitutional execution procedures through

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<sup>90</sup> *Ibid.*, 833-834.

<sup>91</sup> *Ibid.*, 834.

<sup>92</sup> Michael Angelo Morales v. James E. Tilton (Fed. Cir.), Accessed April 29, 2023. <https://casetext.com/case/morales-v-tilton>.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

secrecy laws. The widespread negligence, disregard for the Constitution, and implementation of unsafe execution procedures, intentional or otherwise, exercised by both state governments and execution personnel, exposes the shortcomings of the modern American death penalty system as it cannot reliably conduct constitutional executions.

## Secrecy Laws

As states turned to new and controversial execution procedures in the past few years, government officials in many states, such as governors and legislatures, have passed a multitude of secrecy laws, shrouding much of the execution process in secret.<sup>98</sup> Between January 2011 and November 2018, thirteen out of the seventeen states that actively conducted executions during this period passed new secrecy laws, and all seventeen states actively concealed information related to their executions.<sup>99</sup>

Many states have adopted measures that conceal the identity of execution personnel, and other organizations and people involved in the execution process.<sup>100</sup> In Georgia, state law classifies the identity of execution personnel and any individual or organization related to the procurement of medical supplies for executions as a “confidential state secret.”<sup>101</sup> In Missouri, a similar secrecy law was implemented after a court case in 2006.<sup>102</sup> This court case revealed that Missouri’s supervisory doctor in fifty-four lethal injection procedures had faced over twenty malpractice suits, had his credentials revoked at two hospitals, and had admitted to suffering from dyslexia, “So it’s not unusual for me to make mistakes,” the doctor explained.<sup>103</sup> The doctor also admitted to “improvising” and administering a lower dosage of sodium thiopental during executions than state policy dictated.<sup>104</sup> After the doctor’s identity and previous controversies were published by the

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<sup>98</sup> Konrad, *Behind the Curtain*, 4, 5.

<sup>99</sup> *Ibid.*, 4.

<sup>100</sup> *Ibid.*, 16.

<sup>101</sup> Title 42 - Penal Institutions, Ga. Code Ann. §§ 42-5-36, Accessed April 29, 2023. <https://law.justia.com/codes/georgia/2022/title-42/chapter-5/article-2/section-42-5-36/>.

<sup>102</sup> Ellyde Roko, “Executioner Identities: Toward Recognizing a Right To Know Who Is Hiding Beneath the Hood,” *Fordham Law Review* 75, no. 5 (2007): 2791-2792, Accessed April 29, 2023. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4272&context=flr>.

<sup>103</sup> Monica Davey, “Missouri Says It Can’t Hire Doctor for Executions,” *The New York Times* (New York City), July 15, 2006, Accessed April 29, 2023. <https://www.nytimes.com/2006/07/15/us/15lethal.html>.; Roko, “Executioner Identities,” 2791-2792.

<sup>104</sup> Davey, “Missouri Says,”.

media, Missouri was “prompted” to introduce secrecy laws concealing the identities of execution staff.<sup>105</sup> Secrecy laws allow states to conduct executions while keeping execution personnel and suppliers from being held responsible for their mistakes. Moreover, these laws prevent public knowledge and oversight of the full qualifications of execution staff.

States have also begun to limit recording and photography/ videography devices in execution chambers, with many states banning them outright.<sup>106</sup> In some states, the viewing of the execution is further restricted.<sup>107</sup> In Georgia, only a single media witness may view the inmate being led into the execution chamber and the initial IV insertion.<sup>108</sup> Other states completely prevent witnesses from viewing the execution chamber until the prisoner is on the gurney and the IV line is attached.<sup>109</sup> Furthermore, in most states, the executed prisoner is covered by a sheet, and many states also remove the microphone from the execution chamber.<sup>110</sup> During the execution of Clayton Lockett, witnesses also reported that immediately after Lockett began to struggle on the execution gurney, execution staff closed the viewing room curtains, preventing witnesses from viewing the rest of the execution, including the last several minutes of Lockett’s life.<sup>111</sup>

In 2002, in *California First Amendment Coalition v. Woodford*, the Ninth Circuit Court of Appeals established that “Independent public scrutiny – made possible by the public and media witnesses to an execution – plays a significant role in the proper functioning of capital punishment. An informed public debate is critical in determining whether execution by lethal injection comports with ‘the evolving standards of decency which mark the progress of a maturing society.’ *Trop v. Dulles*...”<sup>112</sup> However, the widespread implementation of state secrecy laws stands in opposition to this ruling.<sup>113</sup> Moreover, according to a report from the Death Penalty Information Center, “Secrecy has enabled states to obtain drugs by any means necessary – sometimes

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<sup>105</sup> Roko, “Executioner Identities,” 2791-2792.

<sup>106</sup> Oklahoma Department of Corrections, *Execution of Inmates*, 12.

<sup>107</sup> Konrad, *Behind the Curtain*, 22.

<sup>108</sup> *Ibid.*, 22.

<sup>109</sup> *Ibid.*, 22.

<sup>110</sup> *Ibid.*, 22.

<sup>111</sup> *Ibid.*, 59.

<sup>112</sup> California First Amendment Coalition; Society of Professional Journalists, Northern California Chapter v. Jeanne Woodford (9th Cir.), Accessed April 29, 2023. <https://casetext.com/case/california-first-amendment-coal-v-woodford/case-summaries>.

<sup>113</sup> “State-by-State Execution Protocols,” Death Penalty Information Center, Accessed April 29, 2023. <https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols>.

illegally and sometimes in breach of contract – without checks and balances by legislatures, courts, or the public. States have used secrecy to avoid accountability for problematic executions... Ultimately, state secrecy laws have prevented the public from knowing the extremes to which its state governments are resorting to carrying out the most severe and irreversible punishment.”<sup>114</sup>

Secrecy laws make the job of journalists, lawyers, and watchdogs difficult, and help states and their personnel avoid public responsibility in all parts of the execution process, from the ordering of execution drugs to the final injection. A lack of accountability and transparency means that there is little pushback and few consequences for states, their drug suppliers, and their personnel if they conduct executions negligently, or hire unqualified staff. At the same time secrecy laws cause more botched and problematic executions.<sup>115</sup> Secrecy laws discourage safe, effective, and constitutional executions by thwarting public accountability and transparency.

### **The Politics of Capital Punishment**

Politicians and the courts have allowed partisan politics and public opinion to shape their views on the death penalty instead of science. According to Stephen Smith, Professor of Law at the University of Virginia and Notre Dame, and former Supreme Court clerk, politicians, prosecutors, and judges are all strongly incentivized to issue and conduct death sentences with greater frequency due to broad public support for capital punishment.<sup>116</sup> For example, after 9/11, the Virginia Legislature passed a law making “murder in furtherance of terrorism” a capital crime.<sup>117</sup> However, this new law ignored the fact that murders like the ones committed by the terrorists on 9/11 were already crimes punishable by death in Virginia.<sup>118</sup> What mattered to the state legislators was that through this law, they could signal to their constituents that they were taking a tough stand against crime and terrorism through the death penalty.<sup>119</sup>

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<sup>114</sup> Konrad, *Behind the Curtain*, 24.

<sup>115</sup> *Ibid.*, 6.

<sup>116</sup> Stephen F. Smith, *The Supreme Court and the Politics of Death* (n.p.: Virginia Law Review, 2008), 94:294, <https://www.jstor.org/stable/25470560>.

<sup>117</sup> *Ibid.*, 295.

<sup>118</sup> *Ibid.*, 295-296.

<sup>119</sup> *Ibid.*, 295-296.

In America's legal system, state judges can face immense pressure from their constituents and voters to impose the death penalty.<sup>120</sup> Many state judges have lost elections because their constituents perceived them as not being vigorous enough in applying the death penalty.<sup>121</sup> Furthermore, state judicial campaigns involve large donors, and research shows that judges can be influenced by their donors, often interest groups or political parties, when making judicial decisions.<sup>122</sup> Between 2015-2016, interest groups made up 40 percent of state supreme court election spending, while being "almost entirely nontransparent concerning their funding, maneuvering around lax state and federal laws to the point where they rarely disclose their donors."<sup>123</sup> An analysis of outside donors in state supreme court elections during the 2015-2016 election cycle found that "82 percent of all outside spending was nontransparent."<sup>124</sup> This opacity around judicial election donations makes it harder for public oversight of where judges get their campaign funding and allows non-neutral, partisan groups to more easily influence judicial rulings, with little public awareness.

Federal judges are also not immune to political pressure as politicians and partisan groups lobby for and appoint Federal Judges and Supreme Court Justices.<sup>125</sup> According to the Virginia Law Review, several candidates for federal judgeships have encountered issues during Senate confirmation proceedings for being seen as "soft" on capital punishment.<sup>126</sup>

Moreover, statistics have shown a trend of judges handing out more death sentences in states where the death penalty enjoys high approval from the public.<sup>127</sup> In several states, trial judges can overrule a jury's ruling in cases, including when it comes to life sentences versus the death sentence.<sup>128</sup> In all but one of these "override" states, trial judges

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<sup>120</sup> Jeffrey Fagan et al., *Getting to Death: Fairness and Efficiency in the Processing and Conclusion of Death Penalty Cases After Furman, Final Technical Report*, 64, February 2004, Accessed April 30, 2023. <https://www.ojp.gov/pdffiles1/nij/grants/203935.pdf>.

<sup>121</sup> Smith, *The Supreme*, 94:329.

<sup>122</sup> Douglas Keith, Patrick Berry, and Eric Velasco, *The Politics of Judicial Elections, 2017–18*, 1-2, December 11, 2019, Accessed April 29, 2023. <https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2017-18>.

<sup>123</sup> *Ibid.*, 1-2, 10.

<sup>124</sup> *Ibid.*, 10.

<sup>125</sup> Gerard J. Fitzpatrick, "Appointing Federal Judges: Law, Politics, and Democracy," *Polity* 40, no. 3 (2008): 402, <http://www.jstor.org/stable/40213488>.

<sup>126</sup> Smith, *The Supreme*, 94:330.

<sup>127</sup> *Ibid.*, 330.

<sup>128</sup> Fagan et al., *Getting to Death*, 99.

are elected and capital punishment overrides are common.<sup>129</sup> For example, in Florida, a state that consistently polls highly in support of the death penalty, it was revealed that twenty percent of Florida's death-row inmates had their presiding judge override a recommendation of life imprisonment by the jury.<sup>130</sup> Furthermore, as pointed out by Jeffrey Fagan, a professor at Columbia Law School, and his co-authors, data shows that "the disproportionate use of jury override to impose death sentences" is more prominent in states with elected judges.<sup>131</sup> Elected officials from all facets of government have considerable political incentives to conduct executions, and as pointed out by Smith, fighting against the death penalty, or calling out botched executions, can be "politically risky."<sup>132</sup>

While conducting his search for new execution drugs to be used in Oklahoma's upcoming execution of Clayton Lockett, Mike Oakley eventually settled upon midazolam, a controversial drug that is not scientifically proven to effectively anesthetize inmates during executions.<sup>133</sup> During his research into midazolam, Oakley recalled being called many times a day by the attorney general, and both Oakley and his boss reported facing "political pressure."<sup>134</sup> Oklahoma's attorney general and Governor Fallin were both facing reelection and according to *The Atlantic*, "there were rumors that a Tea Party candidate might outflank Fallin on the right."<sup>135</sup> Oakley believed that the attorney general and Governor Fallin were worried about appearing to be "soft on crime" with elections coming up.<sup>136</sup> "The attorney general's office, being an elective office, was under a lot of pressure... there was a definite push to make the decision, get it done, hurry up about it," Oakley later recalled about the decision to use midazolam in Oklahoma executions.<sup>137</sup>

In addition, before their executions, death row inmates Clayton Lockett and Charles Warner jointly filed a case challenging Oklahoma's

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<sup>129</sup> Smith, *The Supreme*, 94:330.

<sup>130</sup> *Ibid.*, 330.

<sup>131</sup> Fagan et al., *Getting to Death*, 100.

<sup>132</sup> Smith, *The Supreme*, 94:319.

<sup>133</sup> Merz, *DECISION AND ORDER*, 66, 78.

<sup>134</sup> Katie Fretland, "Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess,'" *The Guardian*, December 13, 2014, Accessed April 29, 2023.

<https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>; Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

<sup>135</sup> Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

<sup>136</sup> *Ibid.*

<sup>137</sup> Fretland, "Scene at botched".

secrecy law.<sup>138</sup> The plaintiffs argued that state secrecy laws masking Oklahoma’s supplier of execution drugs were unconstitutional because it prevented them from knowing the types of execution drugs used in their executions and if the drugs were in compliance with the Eighth Amendment.<sup>139</sup> On April 21st, 2014, the Oklahoma Supreme Court granted the plaintiffs a stay of execution, voting 5-4 for the stay.<sup>140</sup> The Atlantic later reported that “The justices made clear that they intended to seriously contemplate the issues...” raised by the plaintiffs.<sup>141</sup> However, hours later, Oklahoma Governor Mary Fallin announced through an executive order that her office “did not recognize the Oklahoma Supreme Court’s authority to grant the stay.”<sup>142</sup> Governor Fallin’s executive order overturning a court’s ruling was unprecedented, and “It looked as though the state’s judicial system had collapsed.”<sup>143</sup> The day after the executive order, a Republican state lawmaker from Governor Fallin’s party filed articles of impeachment against all five of the Oklahoma Supreme Court justices who had voted to grant a stay to the plaintiffs.<sup>144</sup> The threats of impeachment put political pressure on the Oklahoma Supreme Court, and two days after voting for a stay to debate the constitutionality of the secrecy law, the Oklahoma Supreme Court changed course and ruled that the secrecy law was acceptable and lifted the stay of execution for Lockett and Warner.<sup>145</sup>

By prioritizing political agendas, elected officials across the nation have permitted botched executions to occur under their watch. Courts have ruled in favor of execution protocols that have been constitutionally and scientifically controversial, in response to political pressure and partisan political interests.<sup>146</sup> State governments have also pressured the independent judiciary to conduct executions, as in the case of Oklahoma where the Governor’s party threatened Oklahoma Supreme Court Judges with impeachment if they did not lift Clayton

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<sup>138</sup> Martin McKown, “Unconstitutional Killing The Deadly Dilemma Surrounding Oklahoma’s Lethal Injection Secrecy Statute,” *Duquesne Law Review* 53, no. 2 (2015): 611-612, Accessed April 29, 2023.

<https://dsc.duq.edu/cgi/viewcontent.cgi?article=1825&context=dlr>.

<sup>139</sup> *Ibid.*, 614.

<sup>140</sup> Katie Fretland, “Oklahoma high court stays executions amid questions over drug secrecy,” *The Guardian*, April 21, 2014, Accessed April 29, 2023.

<https://www.theguardian.com/world/2014/apr/21/oklahoma-stays-executions-questions-drug-secrecy>.

<sup>141</sup> Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> Fagan et al., *Getting to Death*, 68.

Lockett's stay of execution.<sup>147</sup> In addition, political intrusion in capital punishment has made it harder for negligence to be held accountable, as shown by the recent trend of botched executions where secrecy laws, drafted and passed by politicians, limit accountability and protect negligent staff and execution procedures from public oversight. Political concerns instead of ethical or legal concerns have been at the forefront of recent executions, and elected officials have considerable incentives to capitalize on the death penalty's popularity by conducting more executions.<sup>148</sup> According to Smith, capital punishment exists in a "politicized death penalty system in which the life-or-death decision is skewed in favor of death. Death is all too often used, not as the ultimate sanction, but rather as the ultimate slogan, a signal to voters of how 'tough' politicians, prosecutors, and elected judges can be on crime."<sup>149</sup>

## Conclusion

In conclusion, recent executions have highlighted alarming issues in the modern American death penalty system. Unsafe and unconstitutional executions have been conducted with unapproved foreign drugs, and many executions have also been carried out with ineffective drugs such as midazolam, or potentially contaminated drugs from compounding pharmacies. Moreover, incompetent execution staff and government personnel have been negligent and irresponsible during executions, creating an unconstitutional environment around executions. However, state governments have not acted to remove the risk of a botched or unconstitutional execution, and many states have instead limited the flow of information surrounding executions, through secrecy laws, shrouding the execution process in mystery, and shutting down public oversight and accountability. Government officials have played a large role in this issue by utilizing the capital punishment system for their political agendas in response to underlying political pressures. The analysis and consideration of these underlying political motivations in causing political intrusion into the capital punishment process is a unique contribution of this paper as this aspect is rarely discussed in existing publications. When the capital punishment system can no longer carry out legal, safe, and scientifically-supported executions, and instead relies on authoritarian and illegal measures to continue conducting unconstitutional executions, influenced by external political pressures, it has shown itself to be a flawed system.

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<sup>147</sup> Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

<sup>148</sup> Stephen F. Smith, *The Supreme Court and the Politics of Death* (n.p.: Virginia Law Review, 2008), 94:294, <https://www.jstor.org/stable/25470560>.

<sup>149</sup> *Ibid.*, 334.

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## **Jewish Centrality in Ben Shahn's Murals: An American Leftist Artist in the New Deal Era**

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### **Abstract**

Ben Shahn was a Lithuanian-born American artist of Jewish descent during the early to mid-20th century. Shahn was known for his impressive technicality, vast knowledge pool, and acute sense of socio-political contextual awareness, which he utilized extensively throughout his illustrious career. This paper examines Shahn's Jersey Homesteads Mural and the importance of his Jewish identity as reflected in this mural. It delves into the dominance of his Jewishness in his art production by comparing the final Jersey Homesteads Mural with the preliminary documents he made for the mural. They focus on the distressing experiences of the Jews in Europe, reflecting Shahn's Jewishness to a striking extent that was not as accessible to the audience of the final mural. The paper also analyzes the final mural's Jewish-related elements, as a narrative and his choices of subjects – the uncommon lack of heroic figures, which presents the momentum in Jewish Americans' history and the design of character's bodies, gestures, and poses. Taken together, they emphasize the sordid process, the trials, and tribulations of the hard-working populace, instead of glorifying their success story of rapidly integrating into American society. The analysis aims to offer a multi-faceted understanding of the complexity of Jewish American history that Shahn's murals rendered, along with the reasons and impacts on his art and, thus, his strong connection with his Jewish heritage.

## Introduction

Ben Shahn was a 20th-century American artist who was born in Lithuania and immigrated to America with his Jewish parents at age eight. Though Shahn was known as one of the greatest masters of the century, he is best known for his works of social realism and his political views, which were actively expressed throughout his illustrious career. It is important to study Shahn's role as a New Deal muralist as he once publicly claimed that he "wouldn't be interested in an exhibit of Jewish artists," has a Jewish identity that is as important as, if not more important than, his American identity in his art production.<sup>1</sup> While most scholars are inclined to take Shahn at his word, this paper examines his art, specifically the Jersey Homesteads Mural, in the context of his Jewish identity, thus showing the Jewish centrality in the mural.

In 1906, Shahn and his other family members joined the large-scale Russian Jewish immigration to the United States due to the growing anti-Semitic climate in Europe. During the New Deal era, Shahn encountered many artists who shared the same social, political, and artistic views as him. Shahn claimed that he felt "completely in harmony with the times" and never thought he "had felt that way before or since."<sup>2</sup> In 1935, Shahn joined the Resettlement Administration and the Farm Security Administration, which then assigned him to roam southwards and document the American South photographically. This working experience gave Shahn a new perspective of the United States: a less idealized but more realistic one, displacing his abstract ideology of the American dream with the privation after the Great Depression. In 1936, Shahn started the Jersey Homesteads Mural as the architect Alfred Kastner invited him to create a fresco.<sup>3</sup> The mural's location, the Jersey Homesteads, was a government's experiment on the decentralization of industry and crucial in understanding its Jewish motif. The residents who relocated to Jersey Homesteads were mainly garment workers who served in needle trades in New York. According to the proposal for the community by the U.S. Department of the Interior, Jersey Homestead provided a "semi-rural life" in which "neighbors and community [are]

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<sup>1</sup> Ben Shahn and Frances Kathryn Pohl, *Ben Shahn: With Ben Shahn's Writings* (San Francisco: Pomegranate Artbooks, 1993), 28.

<sup>2</sup> Ben Shahn, interview with Richard K. Doud, April 14, 1964. Archives of American Art, Smithsonian Institution, Washington, D.C. As cited in Diana L. Linden and Ben Shahn, *Ben Shahn's New Deal Murals: Jewish Identity in the American Scene* (Detroit, Michigan: Wayne State University Press, 2015), 19.

<sup>3</sup> Ben Shahn. *Jersey Homesteads Mural*, 1936-1938, fresco mural, 36 feet x 45 feet. New Jersey.

strongly emphasized.”<sup>4</sup> The Jersey Homesteads mural was Shahn’s artistic project that most mobilized his Jewishness. It rendered the strong ties between Shahn and the Jewish community, enabling audiences to explore his understanding and expression of the modern Jewish American experience.

### **Preliminary Documents**

Shahn made several preparatory documents for the Homesteads mural, including a list of ideas, a manuscript, and a study, which, after pieced together, presented a panorama of the modifications he made in the whole process and helped viewers develop a better understanding of Shahn’s connection with his Jewish cultural heritage. All the pre-established documents reflected Shahn’s Jewishness to a striking extent that was not as accessible to the audience in the final mural. For the mural’s subject, Shahn initially focused on the distressing experiences of the Jewish population in Europe instead of their lives after emigration to the United States, as shown in the final mural. One could infer that the ultimate dissipation of those Jewish Europeanness resulted from censorship and intervention of American government officials who only desired America-related elements.

In 1936, Shahn created a list of preliminary ideas for the Homesteads mural, with the structure of three subdivision themes: ‘background,’ ‘immigration,’ and ‘unionization.’<sup>5</sup> Although the tripartite narrative structure did remain in the final mural, the contents within the narrative did not. According to the list, Shahn tried to include many details of the trials and tribulations of the Jewish people in Europe; he wrote down the Menachem Mendel Beilis case and Dreyfus affair in the list, representing the anti-Semitic miscarriage of justice in Europe. Terms such as “Ghetto in Russian,” “Poland,” “persecution,” and “the accusation of blood ritual” were also listed in the ‘background’ section. In the ‘immigration’ section, Shahn then focused on the tension between the old and new generations of Jewish immigrants, notably how the older generation refused to assimilate, whereas the new generation welcomed changes. Finally, he included scenes of garment strikes that he had witnessed in his childhood and the Triangle Shirtwaist Factory Fire of 1911 in the section on ‘Unionization.’ Shahn advanced his idea further

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<sup>4</sup> United States Department of the Interior, Press Release, March 10, 1935, Ben Shahn Papers, Archives of American Art, Smithsonian Institution, Washington, D.C. As cited in Linden and Shahn, *Ben Shahn’s New Deal Murals*, 38.

<sup>5</sup> Ben Shahn, notations (verso of list), c. 1936. Smithsonian Institution, Archives of American Art, Washington, D.C. As cited in Linden and Shahn, *Ben Shahn’s New Deal Murals*, 48.

with a longer description in an undated manuscript, starting with “The mural should begin with the life of the Jews in [a] Russian Ghetto...”<sup>6</sup> The domination in Shahn’s analysis of the Jewish experience in Europe over that in the United States was even more evident in the manuscript, where Shahn discussed adding the disparities between the old and new generations as the central theme. Shahn’s study for the Homesteads mural also suggested this domination.<sup>7</sup> Worth noting is that all three documentary sources did not mention any elements regarding the New Deal, contrary to the final version. Shahn’s strong inclination to present both the tension between two Jewish generations and their experience in Europe instead of the New Deal emphasized his Jewishness over his Americanness.

Art historian Diana Linde believes that Shahn’s connection with the United States was more potent for his artistic process than his Jewish heritage, a contrary argument to the one in this paper. As one of the scholars who discusses his preparatory documents, Linde provides a close visual analysis that points out shifts Shahn made between his initial concepts and the final mural. She suggests that Shahn was initially inclined to present more of Jewish vulnerability to bloodshed by depicting pogroms during the arrival of the holiday Passover instead of the actual practice of prayer.<sup>8</sup> However, Linde leaves us with fragments of factual analysis instead of an explanation of why Shahn shifted the content and the meaning of his artistic changes. On the other hand, historian Susan Noyes Platt interprets those preliminary documents, especially the long manuscript, as exposing Shahn’s desire to separate from Jewish tradition and embrace American culture. She interprets Shahn’s inclusion of the contradiction between the old and new generations of Jewish immigrants to show his great expectation of “leaving Jewish life behind.”<sup>9</sup>

However, those factual elements regarding the theme of old and new Jewish immigrant generations in the preliminary documents could also indicate Shahn’s deep investigation into Jewish identity and history. Through the discussion in the manuscript and list regarding the

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<sup>6</sup> “We are the People.” typescript, Shahn Papers, 1991, Archives of American Art. As cited in Susan Noyes Platt, “The Jersey Homesteads Mural: Ben Shahn, Bernarda Bryson, and History Painting in the 1930s,” in *Redefining American History Painting*, ed. Patricia M. Burnham and Lucretia Hoover Giese (Cambridge: Cambridge University Press, 1995), 30.

<sup>7</sup> Ben Shahn, study for the Jersey Homesteads fresco, 1936, tempera, 20 inches x 29 inches. Private collection. As cited in Linden and Shahn, *Ben Shahn’s New Deal Murals*, figure 22.

<sup>8</sup> Linden and Shahn, *Ben Shahn’s New Deal Murals*, 3, 47-51.

<sup>9</sup> Platt, “The Jersey Homesteads Mural,” 17.

distinction between the two generations, Shahn tried to build his definition of Jewish-Americanness and analyze both advantages and disadvantages of assimilation, guiding his audience to delve deeper into the topic of Jewishness. For instance, according to his notes on the list, Shahn suggests that the idea of union-organizing practices had not yet solidified across the new generation in the 1930s, perhaps because Americanization had weakened the new generation's radical spirits to fight against injustice. Shahn's examination within the Jewish community, instead of between the Jewish community and the larger American society, gives scholars an even more comprehensive iconography of Jewish American history.

### First Panel

The final 45-foot mural was divided into three panels: immigration, unionization, and the New Deal planned community. The most prominent element in the first panel is a pastiche of a group of immigrants, all wearing badges that represented their identities on the ship and walking toward the audience through a red steel bridge.<sup>10</sup> The identifiable characters within the group all came to the United States in different periods. Shahn's mother, Gittel, the leading figure, immigrated to the United States in 1906. With a blue cloak that represented the Virgin's purity in a traditional Catholic context, her figure has been interpreted as the Virgin Mary.<sup>11</sup> Then on the right, Albert Einstein, perhaps the most well-known character on the mural, came to the United States in 1933. Echoing Gittel's Madonna figure, Einstein represents Moses among the group. Some scholars have proposed that the man standing at Gittel's right was the Jewish artist Raphael Soyer, while others suggested it was his identical twin Moses Soyer who was also an intellectual artist. Shahn might have purposefully used the singular figure in the mural to symbolize Raphael and Moses, demonstrating his respect toward the artistic pursuits of these two brothers, who focused on working-class struggles and worked with the Federal Art Project in the 1930s. As Shahn was interested in physics, Charles Proteus Steinmetz, a German American mathematician, and socialist, is also depicted amid the group. However, Shahn's background location for this entrance depicted in the mural, Ellis Island, was not built when Steinmetz immigrated in 1889. Intermixing with the identifiable leading characters is an anonymous crowd of Jewish immigrants. Shahn intentionally overlapped the different eras of

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<sup>10</sup> Ben Shahn, left-hand panel of the *Jersey Homesteads Mural*, 1936-1938, fresco mural, 12 feet x 15 feet. New Jersey. As cited in Linden and Shahn, *Ben Shahn's New Deal Murals*, figure 12.

<sup>11</sup> Linden and Shahn, *Ben Shahn's New Deal Murals*, 56.

immigration to address how “immigrants made major contributions to the society to which they came,” according to his wife Bernarda Bryson, and thus to represent the broader community of all Jewish refugees who came to the United States for a better life.<sup>12</sup>

On the crowd’s left was the Registry Hall at Ellis Island, with several men on the benches and one isolated family, accurately depicting that most male immigrants were separated from their families when entering the United States. An American flag and a miniature Statue of Liberty were also painted inside the Registry Hall episode, hanging on the back of the hall elusively. The way Shahn placed them at such a distance from the immigrants could be interpreted as a reflection of the closure of the American immigration system after the Johnson-Reed Act of 1921. The statue’s and the flag’s inaccessibility were Shahn’s analogy to the inaccessibility of the United States, which intensified around the time the mural was created. On the upper left and right of the immigrant crowd in the final mural are two small vignettes that changed most compared to Shahn’s initial study. The original sketch, as the list and manuscript mentioned before, indicates that Shahn’s connection toward Jewish culture in the initial version was greater than that in the final version.<sup>13</sup>

Three main changes were made in the first panel. First, on the uppermost left corner of the mural is a Nazi holding a sign in German which reads: “Germans beware: don’t buy from Jews.” Next to this Nazi standing in front of a dress shop window is another sign in German hanging on the brick wall, warning: “Attention Jews, visit forbidden (verboten).”<sup>14</sup> Although this was the only mural in the New Deal Art program that used the figure of a Nazi, it is still reasonable to infer that the artist intentionally made the artistic choice to minimize the figure to an unnoticeable size, blended within the dark, and mainly covered by his sign. Whether Shahn had purposely blurred it or not, this figure was not in the original plan of the study.<sup>15</sup> Instead, it was replaced by a pogrom that arose in the Pale of Settlement in Europe, which would have been

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<sup>12</sup> Bernarda Bryson Shahn, interview by Susan Noyes Platt, July 16, 1993. As quoted in Platt, “The Jersey Homesteads Mural,” 27.

<sup>13</sup> Ben Shahn, study for the Jersey Homesteads fresco, 1936, tempera, 20 inches x 29 inches. Private collection. As cited in Linden and Shahn, *Ben Shahn’s New Deal Murals*, figure 22.

<sup>14</sup> Ben Shahn, detail of the Nazi soldier in the Jersey Homesteads mural, 1936-1938, fresco. Roosevelt, New Jersey. Photograph by Gabrielle Louise Balon. As cited in Linden and Shahn, *Ben Shahn’s New Deal Murals*, figure 25.

<sup>15</sup> Ben Shahn, study for the Jersey Homesteads fresco, 1936, tempera, 20 inches x 29 inches. Private collection. As cited in Linden and Shahn, *Ben Shahn’s New Deal Murals*, figure 22.

marked as inappropriate by the New Deal Art program's officials due to its violent elements.<sup>16</sup>

Second, in the study under the pogrom in Pale of Settlement were two Jewish men slaughtered during the tsarist pogrom, lying inside caskets, and two mourning women standing beside them. However, as the final mural was made, Shahn displaced the two memorial figures from two Jews into martyrs Nicola Sacco and Bartolomeo Vanzetti, two Italian American anarchists. Shahn had made and exhibited a series on Sacco and Vanzetti at Edith Halpert's gallery around 1931.<sup>17</sup> The death of these two martyrs represented America's fallacious justice system due to the nation's anti-immigrant and nationalist sentiment. His choice of Italian Americans as subjects also emphasized the idea of unity's significance between different immigrant groups, especially under the prevalent systematic oppression. Shahn detached the Jewish identities of the corpses and gave them more Americanized identities to echo more prominent themes of the importance of unification between minorities against racial discrimination in America. However, as the mural's only direct critique of American society, the scene of those two coffins is again hidden in the dark, fading out of the frame to a certain degree. The subtle presentations of both this and the Nazi scene indicate Shahn's nuanced expression when conveying his critical attitude toward his adopted nation or the larger world, perhaps to refrain from inciting public controversy or censorship.

Third, in the final mural, on the upper right of the immigrant crowd is a vignette of immigrant families sleeping in the park outside New York City's tenements. However, this section was filled with much more purposeful Jewish scenes in the study. It was originally divided into two small sets: people praying in front of the Western Wall in Jerusalem, Israel, and people gathering around a table for a Passover seder, a Jewish holiday. In Shahn's manuscript, he connected the term Western Wall with the 1929 Palestine riots in which Arabs attacked Jews over access to the Western Wall. The man at the head of the table in the study reclines on his pillow, a posture indicating the traditional practice required during the Passover seder. Yet when making the final mural, Shahn removed the motifs that lacked strong connections with the agenda of America and could be unfamiliar to American audiences. He shifted the vignette from several religious or memorial ceremonies gatherings to a comparative unintentional and objectless gathering. Nonetheless, the

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<sup>16</sup> Linden and Shahn, *Ben Shahn's New Deal Murals*, 50.

<sup>17</sup> Ben Shahn, *The Passion of Sacco and Vanzetti*, 1932, tempera on canvas, 84 1/2 inches x 48 inches. New York, Whitney Museum of American Art. As cited in Linden and Shahn, *Ben Shahn's New Deal Murals*, figure 8.

original inclusion of Jewish elements validates how Shahn mobilized his Jewishness in depicting history.

### Central Panel

Turning to the central panel of the final mural, Shahn depicted several small thematic vignettes that narrated the story of unionization, starting with a garment factory filled with working immigrant needleworkers on the assembly line.<sup>18</sup> Next to them are a group of pressers, and above are three home piece workers. In the middle of those sweatshop workers, who uniformly expressed a sense of dullness, is a line of workers walking toward the union hall on the right, in contrast to the stasis of those sweatshop workers. Across the door, this line of workers queued is dominated by a crowd of pensive people gathering and listening to the union leader's speech, as a leader carries signage quoted from activist John Lewis' speech that says, "One of the great principles for which labor and America must stand in the future is the right of every man and woman to have a job, to earn their living if they are willing to work."<sup>19</sup> The quotation was in Yiddish instead of English in the original study of the unionization section, named *East Side Soapbox*.<sup>20</sup> The translated message of the quote said: "Nature has given everyone an appetite, but our bosses have stolen the bowl."<sup>21</sup> Again, this initial version presents Shahn's strong connection to Jewish culture by using a West Germanic language that Ashkenazi Jews historically spoke. The linguistic switch could be interpreted as a compromise for his patrons, New Deal officials, or Americanized audiences. In the background of this union practice are buildings where past sweatshop workers' tragic events took place, marked with signs of businesses who fought against unionization, including but not limited to the manufacturers in the Asch Building, where the Triangle Shirtwaist Factory fire occurred.

Next to the crowd is a doorway, similar to the one connecting the queue and speech, representing a transition to prospects on the right,

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<sup>18</sup> Ben Shahn, center panel of the Jersey Homesteads mural, 1936-1938, fresco, 12 feet x 15 feet. Roosevelt, New Jersey. As cited in Linden and Shahn, *Ben Shahn's New Deal Murals*, figure 13.

<sup>19</sup> Speech by John Lewis at closing CIO conference in Atlantic City, New Jersey, Oct. 15, 1937, letter Ben Shahn to Adrian Dornbush, Feb. 15, 1938, Ben Shahn Papers, 1991, Archives of American Art, Smithsonian Institution, unfiled. As cited in Platt, "The Jersey Homesteads Mural," 28.

<sup>20</sup> Ben Shahn, *The Passion of Sacco and Vanzetti*, 1932, tempera on canvas, 84 1/2 inches x 48 inches. New York, Whitney Museum of American Art.

<sup>21</sup> Ezra Mendelsohn, *On Modern Jewish Politics* (New York: Oxford University Press, 1993), 81.

separated into scenes of a classroom and a utopian agricultural cooperative. Immigrants gathered in the room, which was most likely a reference to Veblen College – a college that Shahn had also created a montage brochure on – are learning American labor history based on the mind map on the blackboard presenting the relationship between specific labor movements and various organizations. Below them is a group of workers doing agricultural work, echoing the location of this mural, the agricultural planned community Jersey Homesteads.

### **Final Panel**

Shahn concluded the mural and his depiction of contemporary Jewish American history with a New Deal panel. The New Deal officials in formal dress gather around the table, working on the blueprints of the Jersey Homesteads community with vivid white lines.<sup>22</sup> Among the group are John Brophy, Sidney Hillman, and David Dubinsky, all leaders of different garment or industrial worker union organizations.<sup>23</sup> New York senator Robert F. Wagner, journalist Heywood Bound, and assistant of Secretary of Agriculture Rexford Tugwell are the other three characters in the group. The table with their plan is rendered as askew and unrealistic, enabling the audience to censor the content simultaneously. Around the men is a family, standing next to the blueprint and witnessing the plan with the men, and a thriving background with factories and fertile land. After the oppressive immigration panel and invigorating unionization panel, the mural ends here with a hopeful prospect.

No matter when comparing the difference between the final mural and the study, the manuscript, or the preparatory list, one can see the tweaks that Shahn made to his content. The editing of the pogrom in Eastern Europe, the two Jewish descendants, the Western Wall, the Passover seder gathering, the Yiddish signage, the ‘background’ section, the tension between the old and new generations of Jewish immigrants, other elements of Jewishness and the newly added panel of New Deal all bring out a more Americanized final version, a version that Shahn’s patrons wanted. Censorship from the Federal Art Project’s officials was likely the leading cause of Shahn’s rapid removal of those Jewish elements. Investigation of Shahn’s preliminary documents indicates that deeper connections between him and his cultural heritage are hidden under the final mural. I will introduce how and where these Jewish

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<sup>22</sup> Ben Shahn, right-hand panel of the Jersey Homesteads mural, 1936-1938, fresco, 12 feet x 15 feet. Roosevelt, New Jersey. As cited in Linden and Shahn, *Ben Shahn's New Deal Murals*, figure 14.

<sup>23</sup> Mendelsohn, *On Modern Jewish Politics*, 81.

connections were employed and showcased in the final mural through Shahn's technical skills, composition, and choices of objects.

### The Spatial Design

The spatial design of the Jersey Homesteads mural, in a subtle way that audiences might not consciously notice, automatically pushes the audience into a world brimming with both dynamicity and staticity. Under the three main panels were the more miniature scenes of Jewish Americans' experiences. Shahn used montage to maximize the visual effects of each of those subordinate spaces. According to Platt, besides utilizing Renaissance's linear perspective, Shahn also combined "the shallow space of some photographic portraits, the three-dimensionality of theatrical sets, and the arrested action of film frames."<sup>24</sup> All of these represented the momentum and dramatic shift, both geographically and temporally, in Jewish Americans' experiences, which contrasted with what is represented by other New Deal murals. For example, Shahn's designs of the postures of the immigrants who walk through the bridges make the figures look as if captured in the middle of their action. Elements such as Albert Einstein's leg in the air and the suitcase carried up on the shoulders by the man with the blue hat among the crowd all deliver the message of dynamism. In the last mural scene, however, Shahn changed to the traditional narrative approach without using montage but with a sense of spatial stasis, indicating his longing for crafting stability of the new community with the New Deal Administration.

Shahn had used the art of montage to represent the idea of mobility numerous times in the 1930s, including in his brochure *Veblen College: a cooperative school dealing with problems of social change* of 1937, established during the middle of his creation of the Jersey Homesteads mural. This brochure was for a homestead's proposed college and depicted a young student walking with hope toward the bigger world from college.<sup>25</sup> Besides conveying a sense of rapid change, Shahn's use of dynamism also encouraged the audience to actively participate in interacting with the mural and thus create positive social change. Because the mural deviated from the chronological, conventional narrative order, Shahn compelled audiences to think deeply through each scene instead of passively receiving the messages.

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<sup>24</sup> Platt, "The Jersey Homesteads Mural," 1.

<sup>25</sup> Ben Shahn, *Veblen College: a cooperative school dealing with problems of social change* (1937), brochure, 19 cm x 26 cm. In Ben Shahn Papers, Archives of American Art, Smithsonian Institution, Washington, D.C. As cited in Linden and Shahn, *Ben Shahn's New Deal Murals*, figure 24.

## The Narrative of Passover Haggadah

Another strategy that Shahn used also contributed to his goal of awakening the spectators from an indolent acceptant perspective: the analogy of Haggadah, the religious text read at the beginning of the Jewish Passover seder dinner.<sup>26</sup> This parallelism with the Haggadah, again, emphasized the Jewish culture and identity that pervaded the Homesteads mural. As a central Jewish tradition, the Haggadah recounts the story of God's redemption of Israelites from enslavement in Biblical Egypt and commemorates the Exodus. The Passover seder is subdivided into three parts, corresponding to Shahn's contemporary tripartite narrative: 'slavery' matched with the first panel of immigration, 'deliverance' matched with the second panel of unionization, and 'redemption' matched with the last panel of utopian New Deal housing communities.<sup>27</sup>

Shahn's manuscript of the preliminary content of the Homesteads mural, in which he intended to include a feast of Passover scene, displayed his understanding of this religious holiday: "The Passover symbolizes the departure of the Jews from Egypt, the land of bondage. So, with the feast of the Passover, and out of the background of Ghettos and pogroms comes a stream of immigrants to America with hope in their faces"<sup>28</sup> Shahn used metaphor to connect the darkness of ancient Egypt and modern tsarist Russia, as well as of monopolistic trusts' wage-slaves system. Redemption, as Shahn painted in the mural, was found in the transition from urban wage workers to farmers in the newly-established Jersey Homesteads. Here again, Shahn forced the spectators to actively decipher the corresponding new characters and new settings in the biblical history of Exodus under the context of modernity in his mural.

Both by using the montage technique and the metaphor as a secularized Haggadah, Shahn created an experiential mural that encouraged audiences to actively join the conversation of the mural and thus demanded their involvement in social reform efforts to confront the reemerged oppression in the 1930s.<sup>29</sup> The analogy of two exoduses, one away from the despotic pharaohs and one away from the tyrannic tsars, connected the past and the present, presented a mirror of the

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<sup>26</sup> Linden and Shahn, *Ben Shahn's New Deal Murals*, 61-62.

<sup>27</sup> Yosef Hayim Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (Seattle: University of Washington Press, 2002), 44-45.

<sup>28</sup> "We are the People." typescript, Shahn Papers, 1991, AAA. As cited in Platt, "The Jersey Homesteads Mural," 30.

<sup>29</sup> Linden and Shahn, *Ben Shahn's New Deal Murals*, 63.

ancient religious text pictorially and should be marked as evidence of Shahn's expression of his Jewishness due to his delicate design of the parallelism. Shahn used the Passover Haggadah – a traditional and central Jewish religious narrative – as the guiding structure for his mural, leading his viewers to decipher his narrative founded on the relationship between him and his Jewish identity.

### Choices of Objects

Shahn's avant-garde approach toward the figures of the Homesteads mural could be interpreted as a mode to censor the dominance of his Jewish cultural heritage over Americanized identity in his art production. Contrary to most New Deal murals, Shahn's mural did not have a heroic figure or leader that dominated the scene. Shahn's characters all functioned to narrate an ongoing process rather than a decisive moment with heroic images that others applied. All the characters in the mural, even those identifiable like Albert Einstein and those New Deal Administration officials, emerged from groups. They did not appear isolated nor symbolize a sense of individuality. Their specificities were not designed to commemorate their great hardships or accomplishments but to better represent the group they were in, consummating to depict the history of Jewish Americans. One might argue that the Union leader is outstanding and heroic because of his figure's comparatively large scale. However, he remains unidentified. With so many other renowned characters in the mural, it was reasonable to infer that the artist intentionally filled this seat of designated character with an anonymous figure, creating a sense that he had emerged from the group and was a part of the extended public. By fusing the objects with the bigger frame of showing the 'process,' the artist presented the momentum in Jewish Americans' history from Europe to the new world, from oppression to the hopeful prospect.<sup>30</sup>

Shahn also arranged his characters' bodies, gestures, and poses in a way that contradicted the artistic ideology of 1930s America. The most representative artist he stood against was the pioneer of Regionalist Thomas Hart Benton. Although Benton and Shahn were contemporaneous, Benton already stood as a representative figure of American murals in the 1930s and declared that he was dedicated to creating the truly-American art form. The title of the New Deal Federal Art Project, "American Scene," was even inspired by Benton. In his well-known artwork *America Today*, created in 1931, Benton used "heroically scaled foreground figures," representing individuality.<sup>31</sup> His murals had

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<sup>30</sup> Platt, "The Jersey Homesteads Mural," 20.

<sup>31</sup> Ibid.

the specialty of their optimistic hues and the clarity of the characters' muscles' outlines, underscoring the power of modern American citizens. Benton's romanticized images greatly contrasted with Shahn's characters which exposed the authentic reality and thus necessitated the audiences' critical censorship of the content, both in the mural and in the course of American history. Besides Benton's mural, other New Deal murals typically promoted the singular imagery of motivational Americans, especially its past heroes, in the 1930s.<sup>32</sup> Shahn ran counter to those agendas by capturing his characters in less idealized and romanticized ways. While other New Deal muralists provided idealized frames, the consummate conclusion gained by process, Shahn emphasized the sordid process before that grateful conclusion – the life of hard-working Jewish laborers.<sup>33</sup> His distinction with others under the discussion of objects and content was established because of his cultural heritage of Jews and his special access toward the unpublicized or hidden side of authentic Jewish experiences. Here again, Shahn stood on the opposite side of the “Americanized” on the balance of self-identity, manifesting his strong ties with his Jewishness.

Shahn's unidealized approach strongly used his memories, exposing the connection between his Jewishness and the mural's realism. Many portraits in the mural were from the anonymous images of others photographs such as the new arrivals within the crowds in the first scene of Ellis Island, and others were from his photographs, such as the figure of the outstanding union leader, who was based on a “soapbox orator” from his Lower East Side photographs and eventually “metamorphosed into a union leader.”<sup>34</sup> Shahn also designed his characters from his family albums and his memory, such as the figure of his mother. His original intention to focus on the persecution of Jews in Russia could also indicate the essentiality of Shahn's continuous recollection of his Jewish experiences in the past. Murals, as Shahn explained, could be artists' “intimate revelations.”<sup>35</sup> When creating the Homesteads mural that chronicled Jewish history, Shahn depended on his memories regarding his Jewishness. In turn, the mural became a part of his Jewishness in the end and a strong piece of evidence for his Jewish identity.

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<sup>32</sup> Linden and Shahn, *Ben Shahn's New Deal Murals*, 52.

<sup>33</sup> *Ibid.*

<sup>34</sup> Platt, “The Jersey Homesteads Mural,” 6; Ben Shahn, *The Shape of Content* (Cambridge, MA: Harvard University Press, 1958), 29.

<sup>35</sup> Ben Shahn, *The Shape of Content*, 34.

## Conclusion

As mentioned at the beginning of this paper, when an audience asked Shahn during a speech at a New Jersey synagogue if he considered himself a Jewish artist, Shahn resolutely tore off the Jewish tag that had long been attached to him: “I am a human artist. I don’t like categorization into groups. I wouldn’t be interested in an exhibit of Jewish artists.”<sup>36</sup> Although many scholars interpret this as a sign of Shahn’s refusal to admit or embrace his Jewish identity, I suggest that Shahn’s dismissal of the label as a Jewish artist should not be misunderstood as proof of the repudiation of his Jewish identity. Shahn’s denial of his Jewish label could be a way of emphasizing his universalism instead of a specific definition. In his book *Shape of Content*, Shahn further showed his dislike toward the phenomenon of labeling artists: “If it were left to artists to choose their labels, most would choose none.”<sup>37</sup> Shahn saw accepting labels as a way of relinquishing the interpretation of one’s art to the hand of the other and saw labels as limitations instead of categorization. As evidenced throughout this paper, elements of Jewishness blended into every single edge of his art production, from his choice of subject matter to his artistic composition and narratives. While some scholars proclaim that the late-1930s was a period in which Shahn broke away from the Jewish community, this paper argues that the agenda of Jewishness was still the main element in his artistic production during this period, according to the potent symbols and complex narratives in his mural.

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<sup>36</sup> Shahn and Pohl, *Ben Shahn*, 28.

<sup>37</sup> *Ibid.*

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