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ARTICLE

TEACHING TO THE TEST
DETERMINING THE APPROPRIATE TEST FOR FIRST AMENDMENT CHALLENGES TO “NO PROMO HOMO” EDUCATION POLICIES

Kameron Dawson

Abstract

Under the current tests set out in Pickering and its progeny, teachers—particularly LGBT and LGBT allies—are being censored in the classroom with “no promo homo” education policies and laws. Although citizens are granted free speech protections through the First Amendment, public employees such as public school teachers generally receive less protection. The Supreme Court has yet to determine a distinct test for public school teachers, leaving discretion to school districts. Currently, in seven states, legislators explicitly prohibit teachers from positively speaking about or correcting misconceptions on homosexuality. In this current age, these policies negatively impact the teacher’s effectiveness inside of the classroom by distributing sometimes false or

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misleading information and contributing to a hostile environment for both teachers and students. This article suggests one standard that accounts for the new recognition of same-sex rights as a matter of public policy and prohibits viewpoint discrimination.

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I. Introduction

Currently, seven states have enacted “no promo homo” laws that restrict any school-based instruction or activity that could be interpreted as pro-homosexuality.¹ Some of these laws prohibit teachers from positively acknowledging homosexuality by stressing that “homosexuality is not a lifestyle acceptable to the general public.”² Others limit teachings of homosexuality as source material for AIDS prevention or unhealthy sexual habits.³ In doing so, schools relegate homosexuality to a

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³ Id.
taboo status. These policies are a matter of strong concern for LGBT supporters and families. Many teachers feel compelled to teach material that contradicts their beliefs and identities.

“No promo homo” policies were initially created to supplement sexual health education in prevention of AIDS. Many of the laws were created in the late ‘80s or ‘90s, yet have not been updated to match the technological advancements and legal decisions in light of Obergefell and Lawrence.4 Texas’s policy teaches “that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under Section 21.06, Penal Code.”5 In Lawrence v. Texas, the Supreme Court held criminalizing homosexuality under Section 21.06 unconstitutional.6 Other states demean homosexuality as a means to prevent contraction of AIDS. However, these practices invoke a fallacy and stigma within students. The curriculum negates the fact that heterosexual individuals may also contract AIDS and, generally, LGBT individuals will not all contract the disease. “No promo homo” laws should be repealed because they teach students outdated curriculum and instigate unconstitutional practices.

“No promo homo” laws also raise serious First Amendment concerns for teachers and students alike. The First Amendment of the United States Constitution states, “Congress shall make no law . . . abridging the freedom of speech.”7 As a matter of policy, courts defer to school districts to have broad authority in writing curriculum and encouraging social norms unless there is

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6 Lawrence, 539 U.S. at 578–79.
7 U.S. CONST. amend. I.
a lack of sufficient justification for the restriction. The Supreme Court has recognized students’ right to receive ideas and has barred explicit regulations—such as removing books from the school’s library—that constitute viewpoint discrimination without legitimate justification. “No promo homo” laws violate both teacher and students’ rights, but this article will discuss the ramifications for teachers.

Unfortunately, the Court has not clearly designated protection for teacher speech discussing sexual orientation in schools. School districts reason that allowing teachers to discuss homosexuality in a positive light is inappropriate because it will encourage students to become gay and disrupt school operations. This justification is insufficient because recent data has shown that “no promo homo” laws create an environment of intolerance that causes disorder in school. The harmful effects of “no promo homo” laws on all aspects of school operations reveal the necessity for a clear test to determine teachers’ First Amendment rights. It is unclear as to whether teacher speech regarding this topic is subjected to analysis under Connick-Pickering, Garcetti, or Tinker. Part II of this article will discuss the three tests. Part III will analyze the facts under each test and predict the likely outcome of LGBT teachers’ claims. Finally, Part IV will conclude with the appropriate test for these claims.

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II. “No Promo Homo” Laws and their Effects on Schools

Anti-gay education policies facilitate an intolerant culture by barring teachers from speaking positively of homosexuality. In 2015, a national survey from GLSEN, an organization dedicated to facilitating safe school environments for all students, reported that “57.6% of LGBTQ students felt unsafe at school because of their sexual orientation, and 43.3% because of their gender expression.”10 Students turn to staff for counseling and guidance to rectify their situations. However, the report also stated that “63.5% of the students who did report an incident said that school staff did nothing in response or told the student to ignore it.”11 “No promo homo” laws exacerbate these problems by creating a hostile environment for students. When students attempt to report harassment, teachers are prohibited from acting in a way that advocates for LGBT students.

“No promo homo” laws leave teachers feeling helpless and unable to do their job effectively. Some teachers refuse to mention homosexuality altogether. This leaves LGBT supporters paralyzed to effectively facilitate productive conversations that promote a more tolerant student body. Kimberlee Irvine, an 8th grade teacher, described an instance in 2013 where “her class was discussing a passage in which a character has two dads.”12 One student thought that this was a typo which created a moment that sidetracked the lesson.

11 Id.
teacher noted that “if I could just answer this, it would create understanding.”\textsuperscript{13} Fast change is needed for the sake of students and teachers to solve the tension between the legality of addressing homosexuality and effectively teaching the curriculum.

Due to “no promo homo” laws, both straight and LGBT teachers fear retaliatory action from schools for speaking positively about LGBT identities. In 2014, Brett Bigham, “the first openly gay educator to be named Oregon Teacher of the Year” was fired months later after he “used the role as a platform to discuss gay rights, bullying and suicide prevention.”\textsuperscript{14} His “district saw it as an act of war” and refused his request “to meet with a Gay Straight Alliance (GSA) club at the local high school about suicide prevention . . . because ‘meeting with those students has no value to this district.’”\textsuperscript{15} However, after his speech, Bigham attended another GSA meeting where a participant said to him “I feel like what you did, you did for me.”\textsuperscript{16} Although students would benefit from reassurance by teachers, “no promo homo” laws outlaw any form of positive speech regarding homosexuality. Ultimately, “no promo homo” laws criminalize positive behavior towards homosexuality by leaving teachers open to retaliatory action.

“No promo homo” laws help to foster hostility towards LGBT students. In 2015, “56.2\% of students reported hearing homophobic remarks from their teachers or other school staff, and 63.5\% of students

\textsuperscript{13} Id.
\textsuperscript{16} Id.
reported hearing negative remarks about gender expression from teachers or other school staff.” By legalizing hate, teachers are permitted to discriminate against students of all ages for their self-expression without facing recourse. On the other hand, teachers attempting to reaffirm students and confront their peers or other students are unfairly treated or fired. Comforting harassed students or mentioning positive aspects of homosexuality would constitute promoting homosexuality in contrast to the school district’s policies. Anti-gay laws transform schools from safe, tolerant spaces for learning into hostile, close-minded arenas for torment.

Current “no promo homo” policies are too general and imprecise to legitimately achieve the district’s purpose in educating students without disruption because they do not specifically instruct teachers on what they can and cannot say about homosexuality. Most recently, the court in Utah discussed this argument as the plaintiff’s sought a repeal of Utah’s anti-gay education law. The plaintiffs claimed that “[t]hese restrictions constitute[d] impermissible content and viewpoint discrimination and also impose[d] an overbroad and impermissibly vague restriction on protected speech.” Both parties dismissed the complaint in return for amended legislation that erased the prohibition of positive speech regarding homosexuality. Liberals and conservatives supported the act, “noting that the revised law continues to promote abstinence

17 Kosciw et al., supra note 10, at xvi.
19 Id.
outside of marriage in sex education classes.”20 By creating a narrowly tailored education policy that does not prohibit positively discussing LGBT identities, school districts can still carry out their operations.

Efforts to amend “no promo homo” laws without litigation have been met with reluctance. In the past, Alabama’s law referenced “an anti-sodomy law that ha[d] never been repealed, despite a federal ruling.”21 In 2013, many LGBT supporters pushed for amending or repealing the state policy.22 After four years, “[t]he Alabama Department of Education removed this language from its curriculum in July, defying the state law and deleting it from the department’s content standards.”23 It is uncertain whether the same success can occur in the other seven states due to limited supporters’ resources and tense political climates. Litigation would put more pressure on legislative agents to quickly create change.

III. The Potential Legal Tests That Apply to “No Promo Homo” Laws

A. Connick and Pickering

Under the Connick-Pickering test, the employee, speaking as a citizen, must be commenting on a matter of public concern to be entitled to First Amendment protection.24 A matter of public concern relates to “issues of ‘political, social, or other concern to the community.’”25 The context, content, and form of the statements determine whether the employee is speaking on a matter

20 Id.
21 Ala. Code § 16-40A-2; Segal, supra note 12.
22 Segal, supra note 12.
23 Id.
25 Id. at 146.
of public concern. Courts utilize a balancing test when applying this standard.

During the late 1960s, the U.S. Supreme Court addressed the First Amendment rights of public employees to prevent public employers from circumventing the Constitution. A public employee is employed by the government. In *Pickering v. Board of Education*, the Court held that a teacher’s First Amendment rights were violated when he was fired for releasing a letter criticizing the use of school board funds. In that case, the school board organized a public vote to approve proposals for new school buildings. After several letters were published and the proposal was defeated twice, the employee, Mr. Pickering, submitted a newspaper article describing the negative effects of the board’s indecision on students. In response, the school board fired Mr. Pickering. The board determined the letter contained false statements that undermined the school’s operations.

The Court defined the general guidelines for public employee speech. Under the *Pickering* test, the employee must speak on a matter of public concern as a citizen to be entitled to protection under the First Amendment. A matter of public concern relates to “issues of ‘political, social, or other concern to the community.’” Due to the public nature of the board’s

26 Id.
27 Id.
30 Id. at 566.
31 Id.
32 Id.
33 Id. at 567.
34 Id. at 565.
vote, the Court considered Pickering’s speech a matter of public concern. Next, the public employee must be speaking as a citizen to be entitled to First Amendment protection. When the teacher’s speech is not knowingly or recklessly false, the speech is treated as that of a member of the general public.\(^{36}\) The board provided no evidence that showed the teacher made his allegedly false statements recklessly or knowingly.\(^{37}\) In this case, the employee was speaking on a matter of public concern as a citizen and was entitled to First Amendment protection.

The school district attempted to argue that public employees gave up their First Amendment rights completely while at work. The Court rejected the notion that teachers would relinquish their First Amendment rights commenting on matters that they would otherwise freely exercise as citizens.\(^{38}\) In doing so, the Court utilized a balancing test to weigh the school administration’s interest in limiting the teacher’s opportunities to speak in a public forum with the teacher’s interest in making a contribution as a member of the general public.\(^{39}\) The Supreme Court recognized that the state has a strong interest in maintaining operations through its employees.\(^{40}\) The Court noted that in some contexts “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions.”\(^{41}\) Therefore, teachers’ interest in speaking at their workplace was an important interest. The Court also acknowledged the importance of a teacher’s freedom in speaking on such matters without retaliation.\(^{42}\)

\(^{36}\) Pickering, 391 U.S. at 583.
\(^{37}\) Id.
\(^{38}\) Id. at 568.
\(^{39}\) Id.
\(^{40}\) Id.
\(^{41}\) Id. at 572.
\(^{42}\) Id.
Ultimately, the Court held that the state’s interest did not outweigh the public citizens’ speech.\textsuperscript{43}

For at least 15 years, teachers’ speech had been universally protected under the First Amendment.\textsuperscript{44} In \textit{Connick v. Myers}, the Court modified the \textit{Pickering} analysis and held that the public employee was not entitled to protection.\textsuperscript{45} In \textit{Connick}, Ms. Myers, an Assistant District Attorney, opposed her transfer to another location.\textsuperscript{46} Upon seeing that others did not share her same views, Myers released “a questionnaire soliciting the views of her fellow staff members concerning the office transfer policy.”\textsuperscript{47} Myers later refused to transfer.\textsuperscript{48} The District Attorney, Connick, fired Myers for insubordination that interfered with working relationships.\textsuperscript{49} Myers argued that her First Amendment rights had been violated and won in the District Court pursuant to \textit{Pickering}.\textsuperscript{50} The Supreme Court granted certiorari after it was affirmed by the court of appeals.\textsuperscript{51}

The Court reversed, holding that Myers’ speech was primarily a matter of private interest, not a matter of public concern subject to protection under the First Amendment.\textsuperscript{52} Myers’ speech was a matter of public concern “in only a most limited sense” based on a determination from the “content, form, and context of a given statement, as revealed by the whole record.”\textsuperscript{53} The Court held that speech that is purely personal and does

\textsuperscript{43} \textit{Id.} at 571–72.
\textsuperscript{44} \textit{Connick v. Myers}, 461 U.S. 138, 142 (1983).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 140.
\textsuperscript{47} \textit{Id.} at 141.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 142.
\textsuperscript{52} \textit{Id.} at 154.
\textsuperscript{53} \textit{Id.} at 147, 154.
not include public concern is not protected speech. On the other hand, Connick’s actions were reasonable due to the “disruptive potential” of at least one question. Although aspects of the questionnaire concerned matters of public concern, the employer was given deference because close-working relationships were vital to “fulfilling [the] public responsibilities” of the job.

The Connick Court’s analysis of the statement’s context unfairly restricted the employee’s speech. Justice Brennan reasoned in his dissent that the Court incorrectly weighed the context of Myers’ statement against the employer’s need to restrict her speech. Myers released the questionnaire at her job, so it created the potential for disturbing the work environment. Justice Brennan reasoned that Connick’s fear was enough to outweigh the employee’s speech protections. In doing so, the holding arguably robbed the public of information crucial to assess elected officials, such as operations regarding transfers. The Court held that Myers’ speech was not protected under the First Amendment.

B. Garcetti

Furthermore, the Court continued its restriction on the First Amendment rights of public employees in Garcetti v. Ceballos. In Garcetti, the Court held that the First Amendment does not protect public employees’

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54 Id. at 147.
55 Id. at 167 (Brennan, J., dissenting).
56 Id. at 168.
57 See id.
58 Id. at 157.
59 Id. at 153 (majority opinion).
60 Id. at 168 (Brennan, J., dissenting).
61 Id. at 170.
62 Id. at 154 (majority opinion).
speech made on the job while serving a duty. In *Garcetti*, the plaintiff alleged that he suffered “retaliatory employment actions” in response to incriminating testimony that he gave while on the job. As deputy prosecutor, the plaintiff wrote a disposition memorandum recommending the dismissal of a case on the basis of purported governmental misconduct in obtaining a search warrant. The Court reasoned that *Garcetti* had no First Amendment protection due to the memorandum being written while in his official capacity as a public employee. Therefore, he was not protected from punishment by his supervisors.

Unlike private citizens, the opinions of public employees may interrupt the efficiency or effectiveness of government operations. The Government has a “heightened interest[] in controlling speech made by an employee in his or her professional capacity.” Under *Garcetti v. Ceballos*, three conditions must be met to determine whether a public employee’s purported speech is protected under the First Amendment. First, the matter must be of public concern. Second, the employer’s interests in effectively rendering services to the public must outweigh the private citizen’s interest in commenting on the matter. Third, the employee cannot make comments while performing their official duties.

The majority declined to decide whether or not to apply this test to teachers because “[w]e need not, and for that reason do not, decide whether the analysis we

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64 Id. at 426.
65 Id. at 414–15.
66 Id.
67 Id. at 421.
68 Id. at 418.
69 Id. at 422.
70 Id. at 418.
71 Id. (quoting Pickering v. Bd. of Educ., 391 U.S. 566, 568 (1968)).
72 Id. at 419.
conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”\(^7\) Three dissenting opinions in *Garcetti* opposed the idea of expanding this view to educators in support of a concept called “academic freedom.”\(^4\) Academic freedom is the concept where “teachers necessarily speak and write ‘pursuant to . . . official duties.’”\(^5\) In a moment of possible foreshadowing to the present issue, Justice Souter’s dissent noted that private and public interests in addressing . . . threats to health and safety can outweigh the government’s stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.\(^6\)

The issue of whether teachers are protected by the First Amendment when speaking on public matters while on the job is still open.

**C. Tinker**

The Court had previously addressed the appropriate test for instances when the employer’s fear or hesitation leads to an employee’s speech restriction.\(^7\) In accordance with the *Connick-Pickering* balancing test, the Court may later apply the standard found in *Tinker v. Des Moines Independent Community School District* to analyze speech in school.\(^8\) Under *Tinker*, the Court held that the interest to protect employees from retaliation

\(^7\) *Id.* at 425.
\(^4\) *Id.* at 438 (Souter, J., dissenting).
\(^5\) *Id.* at 438.
\(^6\) *Id.* at 428.
\(^8\) 393 U.S. 503 (1969).
after expressing critiques of public importance will be weighed against the employer’s fears of disruption.\textsuperscript{79} Unlike \textit{Garcetti}, the Court will only defer to school officials when there is substantial evidence to support that the censored speech contradicts the school’s mission.\textsuperscript{80} Additionally, the speech must create a material interference with the school’s activities.\textsuperscript{81} School districts may attempt to defend their actions when there is a reasonable expectation for disruption by students or faculty.\textsuperscript{82} Speech restrictions will be justified with a showing that the prohibition is based on more than a “mere desire to avoid the discomfort or unpleasantness [of an] unpopular viewpoint.”\textsuperscript{83} The Constitution prohibits viewpoint discrimination that specifically targets one side of an opinion that is unaccepted by society.\textsuperscript{84}

A prohibition singling out a particular viewpoint is impermissible under the First Amendment.\textsuperscript{85} In \textit{Tinker}, the school allowed other students to wear different types of political and religious symbols.\textsuperscript{86} Only the students who were protesting with armbands were suspended.\textsuperscript{87} This indicated that the prohibition was only for a certain political opinion.\textsuperscript{88} Provided there is no evidence justifying restrictions on speech, students and teachers are entitled to freely express their views.\textsuperscript{89}

\begin{flushright}
\textsuperscript{79} \textit{Id.} at 509.
\textsuperscript{80} \textit{Id.} at 513; see \textit{Garcetti}, 547 U.S. at 422–23 (noting that in general, supervisors must ensure employees’ official communications promote the employer’s mission).
\textsuperscript{81} \textit{Tinker}, 393 U.S. at 513.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 509.
\textsuperscript{84} \textit{Id.} at 508–09
\textsuperscript{85} \textit{Id.} at 511.
\textsuperscript{86} \textit{Id.} at 510.
\textsuperscript{87} \textit{Id.} at 510–11.
\textsuperscript{88} \textit{Id.} at 511.
\textsuperscript{89} See \textit{id.}
\end{flushright}
must be viewpoint neutral and equally administered to all public employees.

In *Tinker*, a school district banned students from protesting against the Vietnam War because it feared the protests would cause disruptions to school’s activities. The *Tinker* Court held that a mere fear of disruption is not enough to restrict the students’ or teachers' constitutionally-protected speech. The school district suspended all the students. The children and their parents argued that the suspension violated their First Amendment rights. The district court ruled for the school district. On appeal, the Supreme Court reversed the decision.

The problem remains regarding *Tinker*’s application to teachers. The Court held that neither students nor teachers lose their First Amendment rights once they enter a school. However, the plaintiffs were solely students. Many of the facts and analysis applied to students’ speech. Without an explicit limitation to students, other courts may use *Tinker* to analyze teacher speech regarding viewpoint discrimination over public matters. On the other hand, courts may read this decision as narrowly applied to students.

**IV. Analysis of “No Promo Homo” Laws Under Each Test**

**A. Connick and Pickering**

LGBT teachers could claim that the standard for evaluating their speech needs to be the two-prong
Connick-Pickering test. Following the reasoning in Pickering, teachers, especially those that identify as LGBT, are able to be well-informed on areas of sexual orientation. Teachers have a close relationship with students and interact with them on a daily basis, so being able to speak positively about homosexuality will increase their effectiveness. Anti-gay laws threaten teachers with retaliation for non-compliance. This is exactly the opposite outcome that Justice Marshall and the Pickering Court wanted because teachers are legally fired for speaking on the matter at their workplace.

The freedom to speak positively about homosexuality is a matter of public concern. Under the Connick-Pickering test, the employee, speaking as a citizen, must be commenting on a matter of public concern to be entitled to First Amendment protection. A matter of public concern relates to “issues of ‘political, social, or other concern to the community.’” The context, content, and form of the statements determine whether the employee is speaking on a matter of public concern. Recent political and legal events have designated homosexuality as a matter of public concern. Cases like Obergefell v. Hodges recognized the historical developments that have addressed the political and social concerns of LGBT citizens in both positive and negative ways. In Obergefell, the Supreme Court noted the attitude shifts that have led more LGBT citizens to live an open and public lifestyle. As a result of Obergefell,

98 Tinker, 393 U.S. at 568.
100 Id. at 147.
102 Id.
103 Id.
society has afforded LGBT citizens the same marital rights as heterosexual individuals.\textsuperscript{104}

Instead, school districts may argue that this speech reflects private matters. However, the ability to speak positively on homosexuality would not be limited to LGBT teachers. There is also no indication that LGBT teachers would share intimate information with their students when speaking positively about homosexuality. Many heterosexual teachers are able to talk positively about heterosexual relationships or friendships without sharing intimate details. Increasing numbers of students come from homosexual families or have LGBT friends. Students’ perspectives on issues surrounding family, work, and political matters concern public interests, regardless of sexual orientation. All teachers should be able to speak positively about homosexuality in an objective way that separates their personal life from their professional job to create a more holistic and empathetic understanding in students.

Next, the public employee must be speaking as a citizen to be entitled to First Amendment protection.\textsuperscript{105} As long as teachers do not make knowingly or recklessly false statements about homosexuality, their speech is treated as that of a member of the general public.\textsuperscript{106} If teachers make knowingly or recklessly false statements, they are not speaking as a member of the general public and no longer enjoy constitutional protection. The repeal of “no promo homo” laws would allow teachers to speak truthfully about issues of homosexuality. Similarly to \textit{Pickering}, teachers could claim that they should enjoy protection for speech that they would otherwise enjoy as a public citizen.\textsuperscript{107}

Lastly, the court must weigh the school administration’s interest in limiting the teacher’s

\textsuperscript{104} Id.
\textsuperscript{106} See \textit{id.} at 574.
\textsuperscript{107} \textit{Id.} at 565.

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opportunities to speak in a public forum with the teacher’s interest in contributing as a member of the general public.\footnote{108} The state has a strong interest in maintaining school operations by regulating its teachers.\footnote{109} However, teachers would have a stronger interest in being able to speak on matters without fear of retaliation.\footnote{110} Additionally, teachers could provide evidence that they have interests in educating and comforting students. It would be difficult for schools to show that speaking positively on homosexuality would have catastrophic or substantial effects on the operations of schools.

Generally, if LGBT teachers were to undergo analysis under Connick-Pickering test, the courts would recognize that teachers’ First Amendment rights are protected.\footnote{111} Currently, teachers who directly contradict the anti-gay statutes in place suffer retaliatory action or harassment from their peers. These actions would not withstand scrutiny under Connick-Pickering because the interests of the state do not outweigh the interest to protect employees from retaliation for voicing critiques that could benefit the community.\footnote{112} School districts must become more tolerant as the rights and privileges of LGBT individuals become recognized.

\textbf{B. Garcetti}

The Court’s decision in \textit{Garcetti v. Ceballos} left the question of teacher speech made on school grounds open to interpretation. Most circuits have abstained from addressing whether teachers are subjected to \textit{Garcetti}’s

\footnote{108} Id. at 568. \footnote{109} Id. \footnote{110} Id. at 572. \footnote{111} \textit{Pickering}, 391 U.S. 563. \footnote{112} Id.
Yet, some circuits have applied *Garcetti* to hold that teachers’ First Amendment rights were not violated. The Supreme Court has not resolved this dispute amongst circuits as to whether teachers have First Amendment protection when speaking among students in their work capacity. A case regarding teachers’ rights to positively discuss homosexuality in “no promo homo” states could provide a solid affirmative answer if the Court proceeds to use either the *Connick-Pickering* or *Tinker* test.

However, there is a possibility that the Court will extend *Garcetti* to teacher speech. If so, the Court will likely hold that teachers do not have First Amendment protection while speaking on the job, regardless of whether the matter is of personal concern. The teachers would likely lose because they are speaking on the job. This prong would restrict protection for every statement made during school hours and within the school building. School districts would reason that they have a heightened interest in controlling speech made by employees in their official capacity because it directly affects their operations. Teachers may present evidence that their speech would address misconceptions or supplement the curriculum rather than negatively affect their operation. However, teachers are unlikely to succeed because schools are essentially “hiring speech” that must succumb to their perspectives on curriculum.

Courts could restrict the implementation of *Garcetti*’s analysis to limited situations where it is

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114 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011); see *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).


116 *Mayer*, 474 F.3d at 479.
essential to restrict teacher’s speech due to the topic’s nature.\(^{117}\) However, this need does not apply to homosexuality in “no promo homo” states. Restrictions on teacher speech that relegate them to only speak negatively about homosexuality render teachers ineffective in the classroom by damaging the positive environment in schools, perpetuating a culture of intolerance, and often disseminating outdated and misleading information to students. The \textit{Garcetti} holding enables communities to quietly “promote intolerance of homosexuality and strip teachers of their constitutional right to discuss homosexuality with their students in certain situations.”\(^{118}\)

\textbf{C. Tinker}

Teachers would meet more success if the Supreme Court used the \textit{Tinker} analysis.\(^{119}\) Under \textit{Tinker}, school districts may not restrict speech surrounding sexual orientation merely because it may cause a disruption.\(^{120}\) There must be substantial evidence that supports the school districts’ belief that the speech conflicts with the schools’ mission and that it will cause a material disturbance in school activities.\(^{121}\) This is a higher burden on school districts to meet. In doing so, the Court may determine that some school districts simply do not agree with homosexuality. However, the Constitution and legal precedent protect speech that may be disliked by the masses.\(^{122}\) Teachers may counteract school districts’ claims by bringing data that shows the positive

\(^{117}\) See \textit{Johnson}, 658 F.3d at 966; \textit{Mayer}, 474 F.3d at 479.


\(^{120}\) \textit{Id.} at 509.

\(^{121}\) \textit{Id.} at 513.

\(^{122}\) \textit{Id.} at 509.
sentiment towards homosexual enfranchisement or the negative impact “no promo homo” policies have on the academic, mental, and emotional state of LGBT students.

The strongest claim for teachers against “no promo homo” laws are those that allege viewpoint discrimination. Teachers may assert that “no promo homo” laws are not neutral. These policies do not punish those who refuse to talk about homosexuality or only talk negatively about the topic. Instead, they punish those who speak positively about homosexuality, which amounts to viewpoint discrimination. This has the harmful effect of stifling students’ growth and understanding of a controversial topic. On the other hand, school districts may counter-argue that the policy is nevertheless justified because it is “narrowly tailored to further a ‘substantial’ state interest in preventing a disruption.”123 Schools may also argue that this restriction applies to all teachers and that it does not discriminate one viewpoint. However, schools are likely to fail this requirement because it only punishes those that speak positively about homosexuality.

Teachers should be allowed to discuss sexual orientation as it pertains to the curriculum to support LGBT students because “there is no precedent that LGBT advocacy . . . would ever create a disruption sufficient to justify this limitation.”124 The Tenth Circuit has recognized that speech that “substantially addresses LGBT issues” by making “statements aimed at legal and political change” are core protected speech under the First Amendment.125 This is not to say that teachers should be allowed to talk freely about homosexuality at any time. Teachers’ speech must be reasonably related to

125 Id.
the schools’ mission and for the purpose of effectively running school operations to be protected.

V. Conclusion

Whether teacher speech is entitled to constitutional protection has yet to be addressed by the U.S. Supreme Court. Currently, the Supreme Court has not designated a test to apply for teacher speech in school. “No promo homo” laws restrict teacher speech advocating homosexuality. Without guidance from the Supreme Court, lower courts have broad discretion in upholding these discriminatory policies.

In evaluating public employees’ First Amendment rights, the Court has recognized three tests: the Connick-Pickering test,126 the Garcetti test,127 and the Tinker test.128 The Court declined to assess teacher speech under the Garcetti test because the question in that case did not call for it. As it stands, two of the three choices would result in a win for teachers, while one would grant deference to school districts without much regard to the public nature of the speech. The Supreme Court should stand by their original decision and not apply Garcetti to “no promo homo” laws.

Furthermore, “no promo homo” laws are written to impermissibly discriminate against one viewpoint. The Garcetti test does not address this issue. On the other hand, the Tinker test enables speech that dignifies all students by protecting “unpopular” speech that is targeted by unjustified restrictions. Currently, teachers only face disciplinary action for advocating on behalf of their LGBT students. This reasoning strays from the Court’s original intention of protecting public employees.

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from retaliation due to their criticisms and circumvents prior Supreme Court decisions.

As stated by Equality Utah’s Executive Director Troy Williams at the organizations’ annual fundraiser, “[t]he time has come to end the stigma and strike ‘no promo homo’ from state law.”129 States should allow teachers to present ideas on both sides and allow students to come to their own conclusions to avoid viewpoint discrimination. Teachers should work as facilitators to the conversation and attempt to mitigate any misconceptions without imposing their own personal beliefs upon students to prevent overstepping their First Amendment protection. The level of teacher control should be dependent on the grade level with more guidance being implemented for elementary and more facilitation and mediation given in high school courses. School districts will survive court scrutiny by implementing viewpoint-neutral regulations that enable teachers to control the discussion in classrooms while validating student identities.

ARTICLE

PLEADING GUILTY
INDIGENT DEFENDANT PERCEPTIONS OF THE PLEA PROCESS

Jeanette Hussemann*
Jonah Siegel**

Abstract

Public defenders and other court actors most often engage in behind-the-scene plea negotiating to manage overwhelming workloads and to dispose of cases as quickly and efficiently as possible. In prior work, scholars have documented an increased reliance on plea bargaining and the deleterious impact of the practice on the legal process and the rights of individuals accused of a crime; however, this research has not systematically analyzed the decisions made, and the perspectives of justice of society’s most disadvantaged and arguably most important actors of the court, the defendants. Relying on data collected in a Midwestern public defense system, this

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article focuses attention to the intersection of indigent defense and plea bargaining by shedding light on the decision-making processes and perceptions of justice among indigent defendants. Our findings indicate that regardless of innocence, defendants plead guilty because it offers the quickest pathway out of court and with little risk; however, misunderstanding and fear often mediate decisions to plead guilty. Also, while the majority of defendants perceive the plea outcome to be fair, they do not always perceive the plea process as fair.

I. Introduction

The United States formalized the provision of public defense through the passage of the 6th Amendment in 1789 and the unanimous ruling by the
Supreme Court in *Gideon v. Wainwright* in 1963.\(^1\) Since this time, attorneys assigned to provide public defense services to individuals who are accused of a crime, but unable to afford legal counsel, have struggled with demanding caseloads and a lack of funding to support their work.\(^2\) To manage overwhelming workloads, defense attorneys and prosecutors engage in behind-the-scene negotiating to dispose of cases as quickly and efficiently as possible.\(^3\) Because negotiations result in pleas of guilty in over ninety percent of cases, a large body of research has considered the implications of plea

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negotiations on criminal justice actors, including attorneys, prosecutors, and the judiciary.\textsuperscript{4} Very little research, however, has considered the impact of plea negotiations on the individuals whose lives are most affected by the practice: the defendants.

The goal of this research is to examine how the practice of plea-bargaining influences indigent defendant decision-making, court experiences, and perspectives of justice. Research on plea bargaining dates back to the 1920s and 1930s, prior to the passage of the 6th Amendment. Scholarly works by Miller and Moley in 1927 and 1928, and the publication of the Wickersham Commission report in 1931, for example, are highly regarded for their early considerations of plea bargaining on the legal doctrine of criminal court procedures.\textsuperscript{5} Notably, in the first published issue of \textit{Southern California Law Review}, Miller opens an article entitled, “The Compromised of Criminal Cases” with the statement, “In theory there should be no compromise of criminal cases,” but “[i]n practice, [] the condonation and compromise of criminal cases is frequent and the methods of evading the clear purpose of the written law are varied.”\textsuperscript{6}

Since these early publications, scholars have documented an increased reliance on plea bargaining and the deleterious impact of the practice on the legal process and the rights of individuals accused of a crime. Legal advocates argue that because pleas of guilty are


\textsuperscript{5} See 4 Nat’l Comm’n on Law Observance and Enf’t (Wickersham Comm’n), Report on Prosecution 95–97 (1931); Raymond Moley, The Vanishing Jury, 2 S. Cal. L. Rev. 97 (1928); Justin Miller, The Compromise of Criminal Cases, 1 S. Cal. L. Rev. 1 (1927).

\textsuperscript{6} Miller, supra note 5, at 1–2.
negotiated and agreed to outside of the courtroom and in advance of sentencing, the plea process reallocates control over sentencing decisions from the judiciary to the prosecution. Because cases are so quickly resolved through pleas of guilty, evidentiary and legal issues are often suppressed and case investigation ceases to exist. The formulaic agreements on which plea bargains rely often overlook the identity of those who are accused of a crime, and thereby eliminate individualized mitigation and consideration of rehabilitative responses. Moreover, those accused of a crime find themselves pressured into admitting guilt for fear of missing an opportunity to decrease punishment versus extending the work of the court which may result in harsher sentences down the road. In 1978, Langbein went so far as to compare plea bargaining to torture, stating that although our means may be politer—“we use no rack, no thumbscrew, no Spanish boot to mash his legs”—we still make it costly for an individual accused of a criminal offense to claim their constitutional rights.

These concerns call attention to the importance of understanding the impact of plea bargaining on the experiences and perspectives of defendants and, in

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8 Feeley, supra note 3.
particular, those defendants who cannot afford to retain legal counsel. Today, indigent defendants compose the majority of the criminal justice system, with research indicating that between 60 percent and 90 percent of defendants rely on court-appointed attorneys.\textsuperscript{11} In an effort to highlight the experiences of the defendants who most frequently interact with the criminal courts and the plea process, this research utilizes semi-structured interview data with defendants and administrative court data collected in a Midwestern urban public defense system between the years of 2008 to 2011. In the following pages, we outline research related to the intersection of public defense and plea bargaining, and the decision-making process of indigent defendants and perceptions of justice, in an effort to better understand how criminal court processes are perceived by the individuals who are most directly affected by their outcomes. Our findings indicate that regardless of innocence, defendants plead guilty because it offers the quickest pathway out of court and with little risk; however, misunderstanding and fear often permeate decisions to plead guilty. While the majority of defendants perceive the plea outcome to be fair, they do not always perceive the plea process as fair.

\textbf{II. Plea Bargaining in Public Defense}

It is well-documented that the plea process has become a cornerstone of the criminal justice system in the decades since its introduction and indoctrination in the late 1700s and 1800s. During this era, criminal justice

grew into a professional institution, incorporating formal police departments and court officials who became “repeat players” in criminal cases. Accordingly, the court workgroup became accustomed to the routine disposition of cases, and to the outcomes and sentences associated with taking a case to trial versus negotiating a plea deal. Once outcomes and sentences of pleas and trials became familiar to court actors, a “going rate” of the expected sentence developed such that the system became routine and bureaucratic and, in doing so, increased its capacity to process more cases and at a quicker rate.

Today, well over 90 percent of criminal cases are disposed through pleas of guilty. Most court actors, including prosecutors, defense attorneys, and judiciary, argue that plea bargaining is a necessary tool in the criminal courts, and particularly for those systems that are overwhelmed by cases and depleted in resources. Arguably, attorneys who are assigned to represent indigent defendants are one of the primary groups of court actors who are reliant on and benefit from the gains afforded by the plea process. Since the inception of

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14 Feeley and other scholars have argued that the plea process is “a mixed-strategy game” in which prosecution and defense “share in gains and losses.” Feeley, supra note 3, at 27. For instance, “prosecutor[s] gain[] by securing convictions.” Id. Also, “defense gains certainty of outcome, and a reduction of
public defense following the Supreme Court’s ruling in *Gideon*, the system has struggled with considerable challenges that shape the ability of public defenders to provide effective defense.\(^{15}\) High caseloads and a lack of funding constrain the amount of time that public defenders can spend with defendants and conducting case investigation.\(^{16}\) Even when attorneys are available to meet with defendants, stress related to overwhelming workloads may lead public defenders to encourage defendants to accept pleas of guilty in order to facilitate case resolution.\(^{17}\) In some cases, defendants may be approached with plea deals and plead guilty to misdemeanor offenses before ever meeting attorneys. A significant implication of these practices is that many defendants are pleading guilty to a crime without full knowledge or understanding of their rights, options, or the collateral consequences of the decision.

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the sentence.” *Id.* Further, “the state is also a beneficiary because it secures an admission of guilt, punishes the guilty, and yet saves the expense of a trial.” *Id.*

\(^{15}\) *See generally Gideon v. Wainwright*, 372 US 335 (1963) (holding that indigent defendants are entitled to representation, without indicating an infrastructure to allow for such defense); *THE CONSTITUTION PROJECT*, *supra* note 2, at 50–101.

\(^{16}\) *JUSTICE POLICY INST.*, *supra* note 11, at 6. For example, although the American Bar Association (ABA) recommends that public defenders not exceed national caseload standards, many public defenders and, in particular those working in urban areas, typically manage double that amount of cases annually. *SUZANNE M. STRONG*, U.S. DEP’T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 at 5 (2016).

III. Deciding to Plead Guilty

With approximately 6 million indigent individuals receiving public defense services annually, and the majority pleading guilty to a crime, it is critically important to consider why individuals who are accused of a crime decide to accept pleas of guilty. There is little theoretical guidance on the decision-making processes of defendants; however, there is some support to suggest that theories of court worker decision-making may be applicable to the decisions that defendants make.

The extent research on court worker decision-making offers three theories by which to interpret court worker decisions to employ plea bargaining strategies. First, organizational efficiency theories argue that disparities in sentencing are the result of court actors rewarding behavior and attitudes that are valued by the institution—because court actors value the time and resource-savings afforded by quick pleas of guilty, defendants who accept plea bargains are rewarded with less severe sentences.\(^\text{18}\) Albonetti, for example, states, “Defendant cooperation exemplified by a willingness to plead guilty is viewed, by the sentencing judge, as an indication of the defendant’s willingness to ‘play the game’ in a routine, system defined manner.”\(^\text{19}\) Second, theories of uncertainty avoidance argue that defendants


\(^{19}\) Celesta A. Albonetti, Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision-Making in Felony Cases, 24 Criminology 623 (1986).
are rewarded for pleading guilty because trials are an inherently uncertain and stressful event for court actors—decisions to pursue trials require prosecutors, defenders, and judiciary to manage unreliable or disreputable witnesses, questionable testimony, and/or the use of less-direct evidence which may or may not influence a decision of guilt. Plea deals are therefore encouraged to reduce the uncertainty of decisions and outcomes. A final theory, and one that is highlighted by the sentencing guidelines, argues that the decision to plead guilty as opposed to taking a case to trial is associated with differences in perceived blameworthiness.20 The federal guidelines state that defendants should receive guideline-based sentencing discounts or departures for “acceptance of responsibility” and “substantial assistance to law enforcement.”21 Thus, defendants who plead guilty, and therefore accept responsibility, are rewarded with lighter sentences than those who may not be perceived as accepting responsibility and showing remorse for behavior.

In contrast to arguments that plea bargaining is a coercive practice, there is some scholarly discussion to suggest that a defendant’s decision to accept a plea of guilty is arrived at through a rational decision-making process that is not dissimilar to the process by which court actors decide to employ plea bargaining. More specifically, advocates of plea bargaining argue that the process affords the defendant the opportunity to participate in a rational decision-making process whereby the costs associated with extending a case are weighed against the possibility of reduced sentencing or acquittal.22 Research in misdemeanor courts, in

20 U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2009).
21 Id.
particular, has shown that defendants care less about the outcome of the case and more about the efficiency provided by the plea process, which can offset financial costs and time investment associated with extending the length of cases.\textsuperscript{23} However, it might also be the case that an efficiency theory may only apply to defendants charged with less severe offenses. In other words, defendants who are charged with a misdemeanor offense that carries less severe sentencing outcomes might be more inclined to plead guilty to “get it over with”; whereas defendants charged with a felony offense that carries more severe sentencing outcomes might be more invested in the outcome of the case and, particularly if they believe they are innocent. Another argument suggests that defendants decide to enter a plea of guilty in an effort to decrease the uncertainty of verdicts that might be made by a jury or a judge at a later point in time. In this regard, theories of uncertainty avoidance argue that the plea process provides both defendants and court actors with respite from the stress associated with trial work. Finally, defendant decision-making may be driven by blameworthiness. The decision to accept a plea of guilty, therefore, is made in an effort to accept responsibility and express remorse for the offense.

\textbf{IV. Perceptions of Justice}

Scholars often cite decision-making as an important contributing factor to overall perceptions of fairness and justice. Indeed, the most common criticism of plea bargaining is that the process limits the defendant’s ability to be involved in the procedures and decisions made in their case. This criticism, however, is

\textsuperscript{23} Feeley, \textit{supra} note 3, at 187–89.
juxtaposed by scholars who argue that the plea process should be positively associated with perceptions of justice because the process requires defendants to make the decision about whether or not to accept a plea bargain, which is associated with the outcome of their case.\(^\text{24}\)

Despite the arguments on both sides, a relatively small body of research has actually considered the implications of plea bargaining on defendant experiences and perspectives of justice and fairness. The studies that do exist are more than thirty years old and rely on data collected in very different court settings than the ones defendants encounter today.\(^\text{25}\)

Classical work on how defendants perceive court experiences has focused on theories of *distributive justice*

\(^{24}\) **JONATHAN D. CASPER,** *American Criminal Justice: The Defendant’s Perspective* 94 (1972).

\(^{25}\) For example, previous influential work on plea bargaining by CASPER, *supra* note 13, *supra* note 24, by Tom Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of their Courtroom Experience,* 18 LAW & SOC’Y REV. 51 (1984), and by FEELEY, *supra* note 3, in the 1970s and 1980s predate mandatory sentencing laws and “tough on crime” policies that have reshaped courtroom justice and increased the stakes for defendants. The effect of these laws can be seen most directly in today’s record high jail and prison populations; however, “tough on crime” policies have also increased both the number of low-level, petty offenders charged in misdemeanor courts and increased the amount of time and cost necessary to defend criminal cases charged in felony courts, BORUCHOWITZ, *supra* note 2 at 7, 25. In addition, defendants today face more civil sanctions as a result of criminal convictions, including the loss of legal immigration status, public benefits, housing, driver’s license, and employment. BORUCHOWITZ, *supra* note 2 at 7, 25; CASPER, *supra* note 13; CASPER, *supra* note 24; FEELEY, *supra* note 3; Tyler, *supra* note 25; Becky Pettit & Bruce Western, *Mass Imprisonment and Life Course: Race and Class Inequality in U.S. Incarceration,* 69 AM. SOC. REV. 151, 153 (2004); Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later,* 60 FED. PROBATION 10 (1996).
which extend early formulations of Adam’s equity theory to argue that individuals assess satisfaction with outcomes when they are perceived as comparable to the outcomes incurred by others.\textsuperscript{26} Research in a variety of contexts, including the courts, shows that distributive justice is an influential factor in determining individuals’ perception of outcome fairness.\textsuperscript{27} For example, Casper’s research in the 1970s shows that male defendants who consider their outcome to be fair are most likely to indicate that they perceive their sentence as a “good break,” or a reasonable sentence relative to the going rate for the offense.\textsuperscript{28}

In 1975, Thibaut and Walker moved beyond the basic assumptions of distributive justice by hypothesizing that satisfaction with court outcomes is independently influenced by perceptions of \textit{procedural justice}—judgments about the fairness of the resolution process.\textsuperscript{29} Theories of procedural justice argue that evaluations of justice and outcome fairness are influenced by the opportunities that defendants have to be involved in the decisions made in their case (decision control) and the opportunities that defendants have to participate in the proceedings of their case by expressing


\textsuperscript{28} Casper, \textit{supra} note 13.

their side of the story and presenting personal information and evidence that is relevant to their case (process control). One of the most striking discoveries of the research completed by Thibaut and Walker was the finding that satisfaction and perceived fairness are affected by factors other than whether the defendant “won” or “lost” their case.\textsuperscript{30} In this regard, Thibaut and Walker’s research was the first to suggest that it is possible to enhance defendant’s perceptions of fair treatment without focusing explicitly on distributive fairness.

More recently, scholars have extended theories of procedural justice to include the behaviors of the actors who implement legal processes, and to argue that perceptions of fairness are closely tied to legitimacy and the likelihood that individuals will obey the law.\textsuperscript{31} In this regard, if defendants perceive court processes and the behaviors of court actors, including publicly assigned defense attorneys, prosecutors, and judges, as fair, they will be more likely to view courts as legitimate and cooperate with their efforts and decisions. However, if defendants perceive the processes and the behaviors of court actors as unfair, they will be less likely to view courts as legitimate and subsequently less likely to cooperate with their efforts and decisions. Research on policing practice indicates that when police treat citizens


fairly and with respect, police legitimacy is enhanced, as well as citizen cooperation and support of police officers, although limited research has focused specific attention to the association between perceptions of criminal court processes and actors, and legitimacy and law-abiding behavior.32

V. Race and Class

Particularly important to understanding how individuals accused of a crime make decisions to accept a plea of guilty and their perceptions of justice is the impact of race and class. When this research was conducted, black defendants accounted for 37 percent of adults aged 40 or older and 55 percent of juveniles charged with a criminal offense in urban courts.33 Today, black individuals account for approximately 13 percent of the U.S. population,34 yet black men represent approximately 40 percent of incarcerated individuals.35 In addition, at least 40 percent of individuals imprisoned cannot read, and over two-thirds are either unemployed

33 REAVES, supra note 4, at 5.
or underemployed when arrested. Decades of research on racial disparity and criminal justice, in conjunction with the most recent deadly encounters between law enforcement and black citizens, highlights the need to be cognizant of the impact of relentless policing efforts and harsh sentencing practices on the daily experiences of poor, black individuals who are accused of a crime.

Crime policies in the 1980s and 1990s increased the presence of the criminal justice system in the lives of poor communities; the war on drugs, in particular, increased the frequency and type of police-citizen encounters in urban city areas. As a result, the criminal justice system has not only become a primary source of civic education for the poor but has led to distrust and disillusionment with the “system.” Previous research shows that this distrust has typically been directed towards law enforcement and is shaped by race. Zero-tolerance policing and the use of aggressive police tactics


have prompted accusations of racial profiling and contributed to tense relationships between law enforcement and residents of high-crime areas.

Yet, the extent to which class and race are associated with negative attitudes towards criminal courts remains the subject of debate. It seems probable that negative perceptions of law enforcement would extend to the entire legal system. Bobo and Johnson, for example, argue that black individuals “are far more likely to believe” that the administration of criminal justice is “riddled with systematic bias” based on negative encounters with law enforcement.\(^{38}\) Hurwitz and Peffley argue that because legal perspectives are based predominantly on personal experiences with criminal justice actors in communities, negative interactions with law enforcement heavily contribute to an overall perception that the justice system as inherently unfair.\(^{39}\) Moreover, Lind and Tyler assert that people who believe the justice system to be unfair tend to evaluate the entire political system as less legitimate—for much of the poor, the justice system is as close as individuals come to the government.\(^{40}\) Thus, low levels of support for police may bridge across institutions, undermine support for the broader system, and influence decision-making and perceptions of justice related to court processes and plea bargains.

VI. The Current Study

This study focuses attention to the intersection between public defense and plea bargaining, and the decision-making process of indigent defendants and

\(^{38}\) Lawrence D. Bobo & Devon Johnson, A Taste For Punishment: Black and White Americans’ Views on the Death Penalty and the War on Drugs, 1 DU BOIS REV. 151, 156–157 (2004).

\(^{39}\) Hurwitz & Peffley, supra note 37, at 767.

\(^{40}\) LIND & TYLER, supra note 27, at 70.
perceptions of justice. The overarching goal of this research is to raise awareness of and increase knowledge on the experiences of the individuals who are accused of a crime and, in particular, those who are financially unable to retain private counsel and therefore are reliant on the legal services of a public defender. In doing so, we rely on the theories of decision-making and perceptions of justice presented in the previous pages to guide our analysis but shift the prior application of these theories away from court actors and police to indigent defendants and the courts. The key research questions that guide this study include:

1. Why do defendants plead guilty?

2. How does the decision to accept a plea influence perspectives of case outcomes?

3. Do defendants perceive the plea process as fair and why or why not?

VII. Data and Methods

The findings of this study are guided by qualitative and administrative data collected between the years of 2008 and 2011 in the Fourth Judicial District Court, located in Hennepin County, Minneapolis, Minnesota. When this study was completed, Hennepin County was the largest county in Minnesota with a population of slightly over 1 million, or approximately 25 percent of the state population.[41] Hennepin County is one of ten judicial districts in Minnesota, and one of two judicial districts with a full-time public defender office. Over forty percent of the total number of adult criminal

cases in the state were processed through the Hennepin County court. Black individuals comprised fifty percent of defendants who received the services of a public defender in Hennepin County; twenty-four percent were female (see Table 1 for a description of defendants).

Administrative data was obtained for all cases that were referred to Hennepin County between the years of 2008–2011. Qualitative data was collected in 2010 and 2011 and relies on observational data collected in over 250 misdemeanor and felony cases across six public defenders and semi-structured interviews with 40 defendants. Observations included defender-client interviews and meetings held in jail, custody, court, and defender offices, and defender-prosecutor negotiations held in judges’ chambers and in and outside of the courtroom. Cases observed for this study were not randomly selected, but rather, were dependent on the public defender’s calendar and the defendants that were assigned to the defender on a particular day. All defendants included in this research consented to the study during their first appearance with the public defender. Cases were tracked as they progressed through disposition, unless the case was dismissed, the defendant was rearrested, the case was transferred to a specialty court, or the defendant failed to appear.

Informal defendant interviews were conducted throughout the case, and forty defendants were formally interviewed following case disposition. Informal interviews with defendants typically occurred in court hallways while the defendants were waiting for their cases to be called and were used to collect data on what they understood to be happening in their cases, desired outcomes, perceptions of interactions with their public defender and the plea bargains that had been offered, as well as considerations for accepting or rejecting a plea offer. Formal interviews occurred in a designated, confidential space, including libraries, parks, and correctional institutions. Formal interviews lasted
anywhere from 30 minutes to 3 hours and included questions about defendants’ understanding of the procedures and outcome of their cases, the fairness of their outcomes, decisions made in their cases, experiences with their public defenders, and whether they felt as if race/ethnicity impacted their court experiences. Interviews also included questions taken from prior research with defendants by Tyler and Casper to collect data on procedural justice, including perceptions of the processes and outcomes of their cases, their ability to participate in the decisions made in their case, and whether they felt as if they had a voice and were respected.42

A. Analytic Strategy

Detailed notes were taken and recorded throughout this research. Formal interviews were audio recorded and transcribed for data analysis. To answer the research questions of this study, analysis of formal interviews on defendant decision-making included responses to the following questions: Why did you accept a plea of guilty instead of pursue a trial?; What factors did you consider when you were making the decision to plead guilty?; Did you originally intend or want to plead guilty?; and, Did you understand the plea-bargaining process and the outcome? All responses are coded into one of three themes, following the theoretical literature on plea bargain decision-making—Efficiency, Uncertainty Avoidance, and Blameworthiness. Analysis of perceptions of justice included responses to the following questions: Do you think that the outcome of your case was fair?; Do you think that the procedures were fair?; Were you satisfied with the use of plea bargaining in your case?; Did you feel as if you had the ability to participate in the decisions made in your case?; Did you feel that you had a

42 Tom R. Tyler, Why People Obey the Law (2006); Casper, supra note 24, at 90–91.
voice, and that you were listened to?; Do you feel that you were respected?; Did you feel as if your lawyer wanted you to plead guilty?; Did you feel that your lawyer was on your side?; and, Did you feel that your lawyer was fair to you?

In the following pages, we first present findings on why defendants decide to plead guilty and then consider perceptions of the plea outcome and process. Because data was collected across varying levels of case severity, we consider how perceptions differ among individuals charged with felonies and less serious charges. Past research has not considered how both defendant characteristics and case severity interact with and influence differences in court experiences; however, it is possible that defendants who face more severe sanctions, including imprisonment, loss of employment, and loss of housing, may be more concerned with the outcomes of their case and inclined to more actively participate in the procedures and decisions made in their case. In contrast, defendants who are confronted with less severe sanctions may articulate less concern with the procedures and outcomes of their case and, therefore, not be as inclined to participate in their case. It is also likely that defendants who are solely charged with misdemeanors have fewer opportunities to participate in the procedures of their case. Because misdemeanor courtrooms often have many cases to consider in a relatively short amount of time, attorney-client interactions are quick and succinct.

VIII. Results

The characteristics of all Hennepin County defendants, defendants who received legal services through the public defender’s office, and the defendants interviewed for this study are reported in Table 1. Similar to courts across the U.S., Hennepin County defendants are disproportionately poor, young, and male.
Black defendants represent thirty percent of the total population but fifty percent of defendants who received legal services through the public defender’s office. Over sixty percent of both the total sample and the defendants who received legal services through the public defender’s office were charged with a misdemeanor offense—an offense that carries a sentence of up to a maximum of ninety days in jail and/or a $1000 fine. The demographics of defendants interviewed for this study are representative of those who received legal service through the public defender’s office; however, defendants charged with a felony are overrepresented compared to the number of felony cases represented by public defenders (sixty percent and seventeen percent, respectively). All defendants who were interviewed for this study and who were convicted and sentenced accepted an offer to plead guilty. Six defendants interviewed had their case dismissed, but five out of the six attended several court dates and entertained plea offers until their cases were dismissed.

<p>| Table 1. Selected Characteristics of Defendants (D’s) in Hennepin County, the Public Defender’s Office, and the Interview Sample (2009, Most Serious Charge Per Case) |
|---------------------------------|----------------|----------------|----------------|</p>
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<th>Defendants in the Interview Sample</th>
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### PLEADING GUILTY


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Data obtained from Hennepin County Research Division; Data contains all adult criminal cases filed; Data includes only one charge per criminal case.

1 Includes Native American (3%), Asian (2%), Hawaiian (<1%), and defendants whose race is missing.

2 Includes defendants charged with disorderly conduct, trespassing, loitering, solicitation, obstructing justice, etc.

3 Includes defendants charged with land, housing, boating, animal violations, etc.

4 Includes cases that were dismissed for mental incompetence (<1%) and cases that were acquitted (<1%).

5 A stay of imposition (SOI) or stay of execution occurs when an imposition is pronounced but delayed to a further date. If the offender complies with the conditions of the court, a felony conviction will be reduced to a misdemeanor conviction. If the offender fails to comply with the conditions of the court, the court may hold a hearing and impose/execute the sentence.

6 Includes cases with a disposition of stay of adjudication (SOA) or continued without prosecution (CWOP). SOAs and CWOPs occur when a defendant pleads guilty and the case is continued for dismissal. SOAs and CWOPs do not result in a conviction unless the defendant violates conditions of the court. SOAs and CWOPs include cases that are diverted through probation and/or diversion programs.

### A. Deciding to Plead Guilty—Efficiency, Avoiding Uncertainty, and Blameworthiness

Table 2 presents the proportion of defendants who pled guilty for reasons associated with efficiency, avoiding uncertainty, and blameworthiness. The smallest proportion of defendants (11 percent) indicated that they pled guilty because they committed the crime and felt that they needed to take responsibility for their behaviors. The largest proportion (50 percent) of defendants indicated that they pled guilty because of the efficiency offered by the plea process. The second largest group of defendants (38 percent) indicated that they pled
guilty because they did not want to risk taking their case to trial and receiving a more severe sentence.

<table>
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* Results do not include those defendants whose case was dismissed (N = 6)

Black and white defendants, and those with and without prior convictions, indicated that they pled guilty because of the time and money savings associated with accepting a plea deal. Two-thirds of defendants who were facing a less severe charge than a felony pled to “get it over with,” and half of those charged with a felony made the same decision. The finding that individuals charged with a felony enter pleas of guilty because of the
efficiency offered by the plea process is somewhat surprising. Research in the lower courts indicates that defendants who are charged with misdemeanors are most concerned about how quickly the case can be resolved, versus the outcome of the case.\textsuperscript{43} For individuals who are charged with more severe offenses, we often assume that there will be an increased concern with the procedures and outcome of the case, versus the efficiency of the process. Our finding, however, indicates that individuals who are charged with a felony are not dissimilar from individuals who are charged with less severe offenses when making decisions about whether to enter a plea of guilty.

Over half of the individuals who indicated that they accepted a plea of guilty for reasons associated with efficiency and uncertainty avoidance were incarcerated pretrial. This finding is supported by prior research on the impact of pretrial custody which indicates that prosecutorial offers to “get out of jail” typically trumps defendants’ interest in pursuing a trial because of the time required to take a case to trial and the risks associated.\textsuperscript{44} This finding is articulated through the following statements made by defendants:

\textit{Personally, I would just go with whatever they give me so I can hurry up and get out of there. I just went on and told them yep, yep, whatever, anything as long as it’s going to get me out of here.} (male, black, felony)

\textsuperscript{43} Feeley, supra note 3.
Nah, I ain’t taking nothing to trial. Plead, give them what they want, get out. A lot of people can’t take it to trial because they got family shit at home. (male, black, felony)

While the majority of defendants articulated support for an efficiency perspective of decision-making, how they arrived at their final decision was nuanced and contextualized by considerations of guilt and risk. Defendants indicated that they decided not to take their case to trial because it would require too much time and money. However, this decision was often juxtaposed by defendants stating that they were guilty—so why fight it?—or that they did not want to risk the outcome of a trial—so why spend the time on taking it to trial?

It’s too emotionally and physically draining for somebody to have to go through that [trial]. And then, you know, that means I have to take more time off work, more time finding someone to watch my kids, more time to do this. It’s just not worth it overall. I’ll take my responsibility. I’m in trouble, I’ll take my year of probation, I’ll do my fines and then it’s done. It just seemed like an easier way to go. Less fines. No jail time . . . I know I did something wrong. (female, white, misdemeanor)

They was offering me six years, you know what I’m saying, so I fought it. I fought it for like four and a half months. I’m sitting down in the county [jail] just fighting it. Like no way, I’m not taking this. I didn’t do nothing and I shouldn’t even be here. But, like the deals are getting worse and worse and worse. They first offered me 48
months and then they went to 52 and then they went to 57, so they kept climbing the deals…No I didn’t take it to trial because they said if I don’t take it to trial they’ll just give me four more months. Just do four more months because I already did four more months. So they made it seem so sweet to me, but it hurt me in the long run, you know, because I’ve never been in jail before. So I’m panicking, I’m in jail for four months and I’m like oh my goodness seems like I’ve been gone for like two years just sitting in a little cage, cell by yourself is crazy. I’ve never been in that position so I’m like freaking out. I wanted to take it to trial, but I just couldn’t handle the jail, you know, and what if I did lose because, you know, I don’t know. I would never want to use it as an excuse, but you know I just felt that I might have lost. If I would have lost, I would have been sitting in prison for six years. (male, black, felony)

B. Deciding to Plead Guilty—Misunderstanding and Fear

While theories of efficiency, uncertainty avoidance, and blameworthiness are associated with defendants’ decisions to plead guilty, the most commonly articulated factors that mediated decisions to accept a plea of guilty were misunderstanding and fear. The observational and interview findings of this study suggest that defendants do not understand the charges to which they are pleading guilty, the sentence, and the consequences of entering a plea of guilty. Stemming from misunderstandings about the plea process and the legal language associated with plea bargains, defendants entered pleas of guilty to exit a situation that they do not
understand and have little control over.

I believe like at court when they brought it up it was kind of like a deal saying that I would have been on probation for two years—felony probation. And you know, I do kind of have a little experience with court . . . but not really as an adult. So I didn’t really know what was going to happen. And I . . . you know I really didn’t want to go through that whole process so I took the first thing that was handed to me. And that’s kind of what got me in this situation . . . well not exactly this situation but got me on probation. But you know I really don’t, you know. And . . . ah . . . yeah, I just feel like the decisions that was made was a part of me being tired of dealing with things, and not understanding what was going on . . . I just felt like I didn’t want to deal with it. (male, black, felony)

Particularly when it’s your first time in there, it’s scary. Everything is moving quickly. A lot of people they talk like they get very frustrated by that and they get more scared because they have no idea what’s going on, and then you’re asked to make pretty quick decisions. And most people like me myself personally I would just go with whatever they give me so I can hurry up and get out of there. Sometimes I just agree just to get out of jail or to get out of the court room. Like the day we were there for the pre-trial [conference] I was already ready to take whatever they were going to give me. (male, black, misdemeanor)
I don’t even want to risk it. I’m not too—I don’t know too much about the system or the law or too much about that. I never really had to deal with it like that. So taking them to court, I think it would be a waste of time because I don’t get it. I’ll just move on. (male, black, misdemeanor)

Defendants often considered not accepting a plea of guilty and taking their case to trial, but out of fear, ended up accepting a plea of guilty. This finding is particularly relevant as scholarly interest in wrongful convictions in the U.S. has garnered increasing attention over the past decade due in large part to a growing public awareness of wrongful convictions, and the increasing number of individuals whose sentences are vacated because they were convicted of a crime that they did not commit. Since 1989, more than 2,100 people have had their sentences vacated.\textsuperscript{45} In 2017 alone, more than 130 individuals were identified as convicted for a crime that they did not commit.\textsuperscript{46} Although estimates of the rate of wrongful convictions vary, and typically focus on capital charges and cases in which charges have been vacated, observational and interview data collected in this study suggest that defendants who are charged with misdemeanor and felony offenses and whom claim innocence do plead guilty.

*I took a plea agreement without even knowing what I was going to get. Like not*

\textsuperscript{45} NAT’L REGISTRY OF EXONERATIONS, UNIV. OF CAL. IRVINE, EXONERATIONS IN 2017, at 3(2017).

\textsuperscript{46} Id. This number does not include approximately 96 individuals whose drug-related convictions were found to be the result of systematic framing on the part of police officers in Baltimore and Chicago. Id. at 1. At the time of publication, 176 sentences have been vacated and more are expected to occur in 2018.
even a full understanding, I just, I don’t know. Like my public defender wanted me to keep the plea as not guilty. Like he told me that a couple times and like I just wanted out. I’d rather, I guess I’d rather have my plea as not guilty if I could have stayed out and gone to trial. If I knew I was going to be out then I pled not guilty because I don’t think they could have proved beyond reasonable doubt that I did this because there was no evidence—there is absolutely nothing . . . . Obviously, I think I would win, but the whole “what if I don’t.” What if I don’t, then I’m dead. Because I’ve never been through the courts before. I’ve never been to the jail before, so I didn’t know anything. I had no idea what was going on, like I’m just sitting there not knowing if I’m going to get out and not knowing if I needed to see the judge or what was going on. And so, then that’s when I’m just like well I just want to take the plea. I just want to get out of here. I guess there was another plea and I didn’t understand the other one. I guess like I know that’s not why, like you’re not supposed to take a plea to get out of jail. Like you can’t do it I guess, but I would say that’s pretty much what I did just because I wanted it done with—so I could move on. I guess I just kind of misunderstood. (male, white, misdemeanor)

I didn’t want to take the plea. I said, “No. I don’t want to.” But now when it gets all the way to this point and I got out and I got all my jobs back. Fuck it. Now I got out I might as well take it and get it over with.
When I was in jail I said, let’s do something right now. But no. Nobody wanted to do nothing. But they gave me this opportunity to get out and . . . I don’t want to take it to trial now. (female, black, felony)

C. Perceptions of the Plea Outcome as Fair

Given the findings associated with defendant decisions to accept a plea of guilty, it is compelling to consider whether defendants perceive the outcomes and procedures of their case as fair. Table 3 provides information on the association between defendant characteristics and the indicators of procedural fairness, outcome fairness, and case participation. Over 60 percent of defendants interviewed for this study expressed positive perceptions of the procedures and outcomes of their case while 72 percent expressed negative perceptions of their ability to participate in their case. Defendants charged with both felony and lesser charges articulated positive perceptions of the plea process (62 percent) and outcome (62 percent and 81 percent, respectively). Those individuals whose cases were dismissed overwhelmingly agreed that the court process and outcome was fair (100 percent); only one defendant whose case was dismissed felt that he did not have input in the process. Defendants who received a disposition other than dismissal were still most likely to express positive perceptions of the plea process (between 50 and 64 percent), but overwhelmingly expressed concern about their ability to participate in the procedures and outcomes of their case (between 66 and 92 percent).
Table 3. Defendant Perceptions of Plea Bargaining

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The two factors that were most strongly associated with defendant perceptions of outcome fairness was the belief that the outcome received was a "good break" or that the outcome was "deserved." This result supports our finding that defendants weigh considerations of blameworthiness and uncertainty avoidance when deciding to accept a plea of guilty. It is also supported by theories of distributive justice and prior research on outcome satisfaction. For example, Casper found that the majority of male defendants describe their sentence as fair, and that perceptions of outcome fairness was based on the belief that the
sentence receives was less severe than was anticipated—or at least the “going rate”—and appropriate to the crime. Defendants interviewed for this study articulated similar perceptions:

Yeah, I'm happy with the outcome. I was really happy. I was hoping for what I was offered, so I pretty much got what I was expecting. (female, white, felony)

I thought that they were going to put me on some type of probation for a certain amount of time where I would have to keep coming back to my probation officer. A lot of other things like that, you know, for like six months or something, and I won't be able to get my driver’s license until I'm 21 or something, that's what I thought was going to happen. You know, so it was much of a relief when they said—when she said she might be able to switch it over to a disorderly conduct. Since I had already been in jail for two days and the police officer maced me, I have had enough punishment I guess. So I was really relieved when that happened. I'm glad I didn't have to pay no ticket. That would have been even worse. . . . At the end of the day I'm happy with my outcome, yeah. (male, black, misdemeanor)

Defendants—both those who were interviewed and those whose cases were observed—who openly discussed their guilt perceived the plea process as a means to obtain an outcome that they felt they deserved. In this sense, defendants who indicated satisfaction with

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47 Casper, supra note 13.
their outcome adopted a just deserts approach to their outcome. As one defendant put it, “you do the crime, you do the time.” Another defendant charged with three felony counts of theft stated that he was “happy” with his court experience:

*Because of the outcomes that I received . . . I face consequences for what I did and if I wouldn’t have faced anything, if they had just said, “Okay you can go on with your business. Don’t ever do that again,” I never would have learned from my mistakes. So I believe that justice was served in my case. I deserved my consequences. I have to take part in what I did, pay for what I did.*

(male, white, felony)

Particularly in DWI and property cases where evidence is easily obtained through breathalyzers, blood tests, video surveillance, and fingerprinting, the question that loomed over defendants was not whether they would take their case to trial to dispute guilt, but what plea offer they would receive from the prosecutor. One defendant who was ultimately convicted of felony check fraud recounts, “Basically the deal that I got—there’s no other better way that you could have ever put it, you know what I mean? I didn’t have to go to jail and got the same probation officer. To be honest with you, I probably should have gotten a little bit worse punishment than I did considering the fact of what I did.”

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D. Perceptions of the Plea Process as Fair

Over 90 percent of the defendants who were interviewed for this study and who perceived their outcome as fair also perceived the court process leading to their outcome as fair. A defining measure of procedural fairness in this study was whether defendants felt that they were treated the same as other defendants, and whether they felt fairly treated by the public defender—conclusions arrived at by observing other cases and talking to other indigent defendants. In most cases, the considerable amount of waiting time required for a defendant’s case to be called allows plenty of opportunities to talk and mingle with other indigent defendants in hallways, elevators, and smoking areas. These interactions offer defendants a way to “blow off steam” and “kill time,” but it also provides them with information about others’ experiences, which they use to assess their own situation. As one defendant stated after stepping out of court, “They treat everyone the same, so yeah, I would consider it fair, or fair enough.”

For this same reason, however, some defendants perceive their treatment as unfair. In these cases, defendants articulated concern that their case was being handled the same as all other cases and not given individual consideration. Defendants expressed concern that they never had a conversation with their public defender before pleading guilty and did not understand the plea process that resulted in their outcome. One defendant who was charged with a felony count of property theft indicated that he was satisfied with his outcome but dissatisfied with the process:

No, I don’t feel that I was treated fairly going through the process, but, I mean, what choice did I have. . . . He [the public defender] never communicated with me. Maybe he did do something, but I don’t
know what he did. He never told me anything. I was on my own. He said, “here is what’s going to happen. This is your case, so you go over here, go over there. Now you just come back and go see the judge and you’re on your way.” You know, and I’m like “okay.” But, I mean, yes, I am happy with the outcome. (male, black, felony)

This statement illustrates the frustration that many defendants articulated about their public defender, and how perception of public defenders’ behaviors can influence defendant perceptions of fairness. Legal scholars identify different and often competing conceptions of the role of criminal defense lawyers; however, most agree that zealous advocacy of defendants is necessary and justified.49 The American Bar Association Model Code of Professional Responsibility states that it is a lawyer’s responsibility to “represent a client zealously within the bounds of the law.”50 For indigent defendants, perceptions of enthusiastic and effective representation influence positive and negative judgments of public defenders. Those who perceived their public defender as an individual who is willing to fight for their case—i.e., put time and effort into the case—were most likely to talk positively about public defenders


50 MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (AM. BAR ASS’N 1998).
PLEADING GUILTY

and feel as if they were fairly treated. As one incarcerated black male stated, “I felt like she was great. She did everything in her power, everything that she could possibly do to give me the lesser charge possible or try to get me out of it. She did everything that she could do. So I felt she did her job really well.” Another white male charged with felony theft stated:

Oh, I liked my public defender, she’s a great attorney and I really appreciated her help. I feel like she did a better job than other public defenders I’ve ever had. It just seemed like she had an actual knowledge of the case, like she actually paid attention to it. Most public defenders don’t even know who you are until they look in your file when they see you. She seemed like she actually, you know, took the time and tried to find out the best results and get information. So, yeah, I was real appreciative. I liked her, she was a good person. (white, male, felony)

Defendants who perceived their public defender as an individual who was not willing to fight for their case were less likely to speak positively about their experience with their legal representation and their court experience:

Personally, to me, I want to have my own lawyer next time. Pay my own lawyer, ‘cause I know if I got my own lawyer that he’s gonna fight for me. The public defender is not gonna fight for you. (black, male, felony)

I think it’s just not fair, like the public defenders are bullshit. Like you can call a
real lawyer and he can get you less time, but call a public defender and he can get you the most time, you know what I’m saying? Like if a public defender is supposed to be a lawyer, right? So how come they can’t act like the lawyer? It’s like bullshit, you know. They’re supposed to try their hardest. I bet you if somebody was paying them, then they will try to go harder, know what I mean? A lot of them don’t care. They don’t care because they got so many cases. They get paid for so many cases, so they pretty much want to get you in and get you out of their face. (black, male, felony)

Research shows that the most common complaint received by public defenders concerns the lack of time and attention they give to defendants.\(^51\) Professional conduct rules require that public defenders keep clients informed of the status of their case and promptly respond to client requests for information.\(^52\) The reality, however, is that public defenders are often unable to comply with professional duties because of circumstances that include excessive caseloads and a failure to be appointed to a case in a timely manner.\(^53\) When public defenders have too

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51 Christopher Campbell et al., Unnoticed, Untapped, and Underappreciated: Clients’ Perceptions of Their Public Defenders, 33 BEHAV. SCI. & L. 751, 758–66 (2015); ROY B. FLEMMING ET AL., THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES (1992); cf. THE CONSTITUTION PROJECT, supra note 2, at 95 (discussing the inability of indigent defense attorneys to comply with their professional duties due to, among other things, excessive caseloads).


53 BORUCHOWITZ, supra note 2, at 22; THE CONSTITUTION PROJECT, supra note 2, at 95.
many cases, client contact suffers and sometimes becomes virtually non-existent. Defenders become unavailable to defendants because they are constantly in court, which often forces initial public defender-defendant meetings to take place in the courtroom.

Yeah, like the only reason that I would not have him to be my lawyer again is basically because of the miscommunication that we had. It’s not something that he did with my case wrong or anything. It’s just that I feel like if I call, if I call you two or three times a week and you don’t return any of my calls or give me any type of response, something’s wrong with that. Either you’re just ignoring me or you don’t really care about what’s going on with my case. You just want to get it over with. And, you know, he has a lot of other clients too, but that’s no reason. With Monday through Friday, there’s no reason that out of those days that I can’t get a response from you from calling you two or three times a week. (white, male, felony)

The hardest part is getting a hold of the public defender. I was trying to get a hold of the public defender, but they never call you back or talk with you or anything like that. So until your date, your next court date—that’s the first time I talked with my public defender. And all they do is come out and ask for a new court date because they haven’t had a chance to look over the case at all. (white, male, felony)

He talked with me one time and he told me the offer, that’s it. (black, male, felony)
I wasn’t treated fairly because being treated fairly is when you’re honest with your client and you put everything on the table and let them know what’s going on. (black, female, felony)

Research by Tom Tyler and colleagues suggests that defendants are most likely to report positive perceptions of court actors if they understand what motivates their behavior and decision-making. Authorities who act unexpectedly are not necessarily judged to be untrustworthy if people feel that they understand why they behave in the manner in which they do. Conversations with the defendants in this study confirm this finding. As articulated in the previous statements, defendants critique public defenders but also provide justification for their behaviors. For example, one black male who received a stayed sentence for a series of misdemeanor violations indicated that he was disappointed in his lawyer’s willingness to fight for a better plea negotiation—“He was alright, but he could have tugged a little harder to get it down a little more.” The defendant followed this statement with the following explanation for the defender’s behavior:

He was pressed for time ‘cause he got to be here, he got to be there. You can’t get mad at them because they are overloaded. You know, if you want to keep it real, they are all public defenders, pretenders, or whatever. They are all overloaded. They get


[500]
more and more every day. You know it’s a wonder that all of them ain’t half crazy. It’s not good. It’s not good. It’s not good. But, that’s basically what it is, you know. It’s bad because you—you ain’t have no faith in the system, you know, ‘cause you ain’t got nobody that’s gonna really fight for you. Half of them can’t even negotiate on a plea bargain, let alone on a trial. I guess that’s probably even how they are taught in college now-a-days, just to be a deal-maker.

(male, black, misdemeanor)

Another white female who received probation for a misdemeanor indicated that she was concerned during court because she expected to have more opportunities to talk with her attorney, but also indicated that “there are so many other cases and horrible things that happen, that they can’t worry about [her].” Also, a black male who was incarcerated for multiple misdemeanors stated,

*Those public defenders, you can’t even talk to them. It’s frustrating. You know that it’s six or seven other people to this one person. I mean like how many people can you actually juggle by yourself? I thought public defenders were supposed to be there to help so why isn’t there more of them?*  
(male, black, misdemeanor)

Previous research indicates that defendants express sentiments of distrust for public defenders. The findings of this research, however, indicate that defendants are not necessarily distrusting of public defenders, but of the system that public defenders work

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55 CASPER, supra note 24; Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. LAW SOC. ACTION 4, 6 (1971).
for. Public defenders are perceived by defendants as part of a larger system that prescribes their behavior.

I do not really feel like he was on my side. I'll be honest with you. Not really. I'm just another, you know, pawn on the chessboard. He's just doing his job. Just get 'em in, get 'em out, get 'em in, get 'em out, you know? It's just a job with the prosecutor. (male, black, misdemeanor)

When you're incarcerated they call them "public pretenders." But, you know, it's the truth because you know the prosecutors and the public defenders they eat lunch together, they go fishing together, you know they just hang out together, they're friends. You know, so while they're like eating ravioli, it's probably like, "Oh what do you want to do with him? Okay I'll give you him, just let me beat this case right here." You know what I'm saying? It's like chess and it's kind of messed up. (male, black, felony)

It's not fair because they work for the city. So, he started working with the prosecutors and seeing what they want to come up with, but he's not asking the client what's going on. It's not fair. It was all him, him and the prosecutor. The public defender is not fair; it's not justice because they do what they want to do. What them and the prosecutor want to do. (male, black, felony)

Statements such as these suggest that defendants do not necessarily view the behavior of public defenders as representative of the defenders themselves, but rather as a reflection of the circumstances of their position in the
criminal courts, which relies heavily on the plea process to ensure efficient case progress. Defendants did not perceive public defenders as apathetic but overextended. This account of the plea process parallels criticisms among scholars who argue that the criminal process has evolved into a system of assembly line justice which is most concerned with processing cases as quickly and efficiently as possible. For these reasons, many defendants are not provided with contact information for their public defenders and, if they are, are not able to reach the public defender or receive a return phone call. A defendant who was charged with driving with a cancelled license for the fifth time explained this experience:

Yeah, you know, it’s just like a process, like a processing plant. They just process you, like they processing cattle. They say, “Okay this is what they gonna do for you: so, so, so, so, so. Now if you don’t do this here, now the charge carries: so, so, so, so. Now I can get you this here. Right now, today, I can get you so, so, so, and then you go to jail.”

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know, it’s just a process. You know, they don’t have time to deal with no one individual, ‘cause they can’t put too much time in ‘cause they got so many. Like I say, it’s like, “Come on down, you’re the first contestant in The Price is Right!” It’s like Monty Hall in Let’s Make a Deal. (male, black, misdemeanor)

As this defendant articulates, the plea process can move rapidly. On days in which the court calendar is full—such as after the weekend or a holiday—or, in courts that see a particularly high volume of cases—such as property and drug courts—cases can move so quickly that there is not time for the defendant to meet or talk to their public defender. In conversations with defendants after their first appearance, defendants were often unable to state the name of their public defender, or how they may be able to reach the defender. As one black male defendant charged with 5th degree drug possession articulates:

The first time I went through it, I was terrified. I didn’t know what was going on. I felt like I was from Asia and it’s my third day here in America and I didn’t have no English classes or whatever, so I’m speaking a whole different language. And they’re just like talking a foreign language and I’m like, “What’s going on? I need to talk to my lawyer.” I’m like, “but look I don’t understand, like, you know, hold up.” I just felt ignorant, you know what I mean. The first time, I’m like “oh my.” I learned everything I know about the court system
being inside the jail and not from being in court, not from my lawyer, but by sitting there listening and watching other cases. (male, black, felony).

E. Perceptions of Participation and Self-Expression

Despite the finding that most defendants perceive the outcomes and procedures of their case as fair, over 70 percent of defendants did not feel like that they had adequately participated in their cases. Table 3 indicates that over half of all defendants who reported that the process and outcome of their case was fair also indicated that they did not have enough input in their case. This finding is somewhat surprising. As cited previously, the extant literature on perceptions of fairness argue that when defendants feel as if they are a part of the procedures of their case and have adequate opportunities to voice their side of the story, positive attitudes of the fairness of the outcome and procedures of their case increase.\(^57\) Empirical studies that consider the plea process, however, provide contradictory accounts of the effect of participation in plea bargaining on perceptions of fairness. For example, some scholars argue that plea bargaining provides more control and a heightened sense of efficacy because defendants are actively participating in their case by pleading guilty in return for an agreed upon sentence.\(^58\) In this regard, the process of plea bargaining can provide defendants with greater certainty over their outcome, leading to more positive evaluations

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\(^{57}\) LIND & TYLER, supra note 27, at 9; THIBAUT & WALKER, supra note 29.

of their process. Casper argues that in cases when defendants receive an outcome that is not expected, they are more likely to articulate limited participation in their case and perceive the process as less fair.\textsuperscript{59} The findings of our research also indicate that defendants who were caught off-guard by the decisions of the court were more likely to express negative attitudes. One defendant charged with 2nd degree assault describes her experience of receiving a more severe sentence than she anticipated:

\begin{quote}
No, we didn’t talk a lot. I left him [public defender] a few messages, spoke to him on the phone and asked him, you know different questions about where I was going. He said jail time was out of the picture. I knew for a fact that jail time wasn’t going to happen. I just knew that for a fact that it was no jail time. And then on the last day it’s jail time…it wasn’t an honest way to come and tell me I was doing jail time, to find out on the very last day when I go to court that I’m going to get sentenced to jail, and never heard it. Before any conversation that we had, any paperwork that I signed, he never said anything. So then I come to court and expect probation, monetary probation, strict probation, or whatever and then have to get locked up. I thought that was very unfair because that was the first time I heard of it before going into court. I just wished he would have talked to me more and prepared me a little bit more. When I
\end{quote}

\textsuperscript{59} CASPER, supra note 24.
expected no jail time and then when I got jail time it was like, “oh well, you got jail time.” It was like “case closed” for him. Like I know he had to know ahead of time before five minutes before court. So, oh well, I just got to live with it and do my time I guess. I would have felt good if I would have had a chance to speak more and explain myself. Then I would have been prepared for this, but like I said, it all hit me like five minutes before we went to court, so I wasn’t really expecting that. And the judge, the judge just agreed to everything that was going on and did not take time to listen to my side. So, I guess I get the shit end of the stick.

(female, white, felony)

In more serious felony cases, such as this one, defendants are less likely to be certain of the outcome of their plea agreement when they sign it. Unlike misdemeanor cases, in which most cases are settled on the first or second day in court, felony cases can be extended for over a year (as in this case), and often involve pre-plea agreements. In cases in which pre-pleas are signed, the defendants admit their guilt and consent to an interview and evaluation by probation that presumably guides the decision of the judge. In most cases, public defenders promote pre-plea evaluations as an opportunity to decrease defendant sentences because they offer the judge and other court members a more thorough understanding of the defendant’s history and the situation surrounding the case. However, defendants often become frustrated after reading these reports because they do not feel as if the probation officer adequately represents them—most articulated concern that the report contained negative information that was
not reported by the defendant, such as drug and alcohol use.

Differences in procedures between felony and misdemeanor cases may understandably influence the experience of defendants. Table 5 reports defendant perceptions of procedures, outcomes, and case participation by case severity. These results indicate that the most prevalent difference between individuals charged with felonies and less severe charges is the association that defendants draw between having a voice and fair procedures and outcomes. Individuals who are charged with felonies, compared to those who are charged with less severe offenses, are less likely to indicate that they adequately participated in their case (16 percent compared to 43 percent) and less likely to associate their participation with procedural and outcome fairness. Only 23 percent of felony defendants agreed that they participated in procedures that they experienced as fair (compared to 70 percent of misdemeanor/gross misdemeanor defendants); 26 percent agreed that they had participated in outcomes they perceived as fair (compared to 53 percent of misdemeanor/gross misdemeanor defendants). Prior examinations of the relationship between case severity and court experiences suggests that case severity can influence defendants’ interest in their case, particularly when the outcomes are more severe.60 This research provides support for such claims. Defendants in this study who were charged with lower-level offenses were more likely to express apathy towards the procedures and outcome of their case. For example, when asked whether defendants would prefer more opportunities to be involved in their case, one Hispanic male charged with a misdemeanor count of contempt of court responded that the courts can “do what they want.” When we subsequently asked if he felt that he was treated with respect, he indicated that he “has never really thought about it.” Statements such as these

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60 Heinz, supra note 58.
by defendants support observed differences in misdemeanor and felony courts. Defendants in misdemeanor courts more frequently “blow-off” court dates. They plead guilty without talking with their public defender about options other than the original plea offered by the state. Defendants charged with misdemeanors are also more likely to arrive to court alone without family or friends, whereas in felony courtrooms, family members, friends, and caseworkers provide a regular show of support, concern, and input into defendant decision-making.
### Table 5. Defendant Perceptions of Plea Bargaining, by Process, Outcome, Satisfaction, and Charge Level

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IX. Conclusion

Research indicates that the majority of individuals charged with a crime plead guilty. This study focuses on why defendants decide to plead guilty versus take their case to trial and their perceptions of the plea process and outcomes. Our findings suggest that defendants decide to plead guilty, regardless of innocence, because the process provides the quickest pathway out of court and with little risk. The decision to enter a plea of guilty is also influenced by confusion over court processes and outcomes, and fear of what may happen if the defendant does not accept a plea deal. While outcomes associated with plea bargaining are considered by defendants to be by and large fair—primarily because the outcome was expected and perceived as comparable to the outcomes that others receive—defendants do not always perceive the plea process as fair. Dissatisfaction with the legal representation and perceived lack of control and input in the decisions of their case are key factors that influence perceptions of procedural fairness and justice.

Scholars and legal practitioners often argue that defendants’ decisions to plead guilty reflects their guilt and a concern for taking responsibility for their behaviors. The courts—particularly federal courts—have supported the position that defendants should receive leniency in exchange for accepting blame for their actions.61 However, while defendant guilt may play a mediating effect in defendant decision-making, the findings of this research indicate that guilt has little direct effect on the decision to plead guilty. Rather, the efficiency that the plea process provides is a primary influence on defendant decision-making. Many scholars argue that as the number of individuals who intersect with the courts increases, plea bargaining provides a

61 See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2009).
quick, inexpensive way to handle growing dockets. The findings of this research suggest that the plea bargaining process is not only preferred by court actors, but also by the defendants, who are also influenced by a desire to “just get it over with.”

In addition to the time and money saved by pleading guilty, defendants indicated that they preferred the certainty of plea deals. Research shows that defendants who decide to take their case to trial and are found guilty frequently receive more severe sentences than they would if they had pled guilty. Plea-trial disparity research shows that some defendants receive a sentence at trial that is up to ten times more severe than defendants with similar charges and backgrounds who decide to plead guilty. The results of this study echo these findings, with defendants articulating concern for the risk associated with taking their case to trial. Many defendants felt as if they were receiving a “break” or a

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62 See sources cited supra note 18.
“good deal” and were not willing to take the chance that they may be acquitted or receive a more lenient sentence from a judge or jury at trial.

An important finding of this research is the influence that misunderstanding has on the decision-making process of defendants. The findings of this study illustrate that defendants arrive at the decision to plead guilty through a series of justifications that are influenced by the strain of making a quick decision and a lack of understanding about plea bargaining, court procedures, and the implications of sentencing outcomes. Although defendants’ decisions to plead guilty may be adequately described by an efficiency or uncertainty avoidance perspective, the final decision to accept a plea is influenced by a combination of factors that include guilt, time and financial concerns, and fear. These considerations are mediated by a lack of understanding of the legal procedures and language associated with the court system.

Notably, this study is the first to examine plea bargain decision-making through interviews with defendants. In doing so, the findings advance our understanding of how defendants arrive at the decision to plead guilty and contribute to knowledge about whether defendants perceive the plea process and outcome as fair. Prior research argues that individuals who perceive case proceedings as fair are more likely to view outcomes as fair and report overall satisfaction with their court experience.64 Also, procedures that provide defendants with the opportunity to have a voice and participate in the decisions made in their case are more likely to feel fairly treated, respected, and valued by court actors.65 In this study, however, most defendants did not report a sense of participation in their case; yet, over two-thirds of defendants perceived both the plea procedures

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64 CASPER, supra note 24; Casper, supra note 13.
65 Christopher Campbell et al., supra note 51, at 759; Casper, supra note 13.
and outcome of their case as fair. In fact, most defendants spoke positively about the outcomes of their case and believed that they received sanctions that were deserved and less severe than they had anticipated. Defendants perceived their court experience as fair because it mirrored other defendants’ experiences; for the most part, defendants felt that they were all treated the same, for the good and the bad.

Yet, defendants in this study did not necessarily feel that they were treated well or fairly by their public defenders. Defendants who expressed both positive and negative perceptions of public defender behavior, however, attributed the behavior to the social and situational circumstances of the courts. Attribution theories argue that people make distinctions between persons and their social situations. Social attributions occur when individual behavior is interpreted in terms of situational forces and, particularly, when an individual is a member of a group. For example, Vincent Yzerbyt and Anouk Rogier argue that “social attribution is especially likely to be at work when perceivers believe that they are confronted with a clear social entity, a coherent whole,” and that social attribution is “of paramount importance for the rationalization and justification function of stereotypes.” Defendants in this study attributed the behaviors of public defenders to the “system”—public defender behavior is therefore a consequence of being a worker in “The Public Defender’s Office” which is funded by “The State” or “The System.” The legitimacy of public defenders as figures of authority

is contextualized by defendant beliefs about the court system. Defendants viewed public defenders as acting legitimately or, at the very least, consistently in this social context—i.e., eager to plead defendants guilty, disinclined to give them much time, and not concerned about their welfare. In this regard, although defendants do not trust the motives of public defenders—because they are dictated by the system—they trust that they will receive the legal representation of an overburdened public defender.

Importantly, defendant attitudes toward the procedures and outcome of their case are not necessarily contingent on perceptions of fairness or trust of public defenders. Defendants do not feel as if they receive fair treatment or necessarily trust public defenders to represent their best interests, but they express satisfaction with the plea process and outcomes. Process-based models of regulation state that defendants who lack confidence in their lawyer are not only likely to harbor negative feelings about the law but are also more likely to resist the lawyer’s and court’s advice regarding the implications of future non-law-abiding behavior. 68 Past research notes that defendants often lay full blame for the faults of the system on their public defender. 69 The findings of this research, however, argue that defendants contextualize the behaviors of their public defender. Public defenders are criticized and often blamed by defendants, but they are also seen as part of a larger system that is out of both the public defender’s and the defendant’s control. Thus, the legitimacy of the criminal justice system is questioned by defendants more so than

68 Tyler & Huo, supra note 31; Tyler, supra note 31, at 311; Sunshine & Tyler, supra note 31, at 515; Tyler & Wakslak, supra note 31, at 259.
69 Casper, supra note 24, at 85; Roy B. Flemming, Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients, 11 Am. B. Found. Res. J. 253, 258 (1986); Casper, supra note 55, at 6.
the actual behaviors of public defenders and the relationships they establish with defendants.

Defendant evaluations of the courts are also not necessarily contingent on their experiences and evaluations of law enforcement. Research consistently finds that poor individuals, especially minorities, embrace negative attitudes about police, which is based on personal experiences and the experiences of others in their community. Many scholars argue that legal perspectives are created through interactions with law enforcement; negative perceptions of police practices spill over to other areas of the criminal justice and political systems. Yet, this may not always be the case. In this project, defendants spoke unexpectedly and at length about police misconduct. Defendants complained first and foremost about their treatment by police and the fairness of the charges against them. This is to say that, for the most part, defendants blamed law enforcement for their status as a defendant in a criminal case and subsequently viewed the courts as “just doing their job.” This finding may be negative or positive depending on how it is interpreted. On the one hand, defendants can differentiate between criminal justice institutions, their role in their criminal process, and their treatment by criminal justice personnel, indicating that the legitimacy of the criminal justice and political systems are not necessarily always overshadowed by the actions of law enforcement. On the other hand, this finding may indicate that the poor may be so disillusioned by police practices that they can only interpret court experiences

70 Elaine B. Sharp & Paul E. Johnson, Accounting for Variation in Distrust of Local Police, 26 JUST. Q. 157, 159–60 (2009); Hurwitz & Peffley, supra note 37, at 781; Weitzer & Tuch (2002), supra note 37, at 442–43; Weitzer & Tuch (1999), supra note 37, at 502; Scaglion & Condon, supra note 37, at 486, 489. 71 Tyler, supra note 42, at 95; Bobo & Thompson, supra note 32, at 447; Bobo & Johnson, supra note 38.
as more positive than their experiences with the police.

In generalizing these findings to the total population of defendants, we note that this research relies only on adult criminal defendants located in a mid-sized Midwestern town. Defendants in smaller or larger areas may have different court experiences. Sentencing guidelines also vary by state, and, as the first state to implement determinate sentencing, Minnesota may not reflect the practices of states that still rely on indeterminate sentencing practices. Sentencing rules and guidelines may, in turn, significantly affect defendant experiences and decisions. For example, defendants in Hennepin County speak openly about situating their decisions and experiences within the boundaries of the Minnesota Sentencing Guidelines (i.e. “the grid”). Therefore, while defendants may not feel satisfied with their outcome, they feel fairly treated because they assume that guidelines guarantee that similar defendants receive similar outcomes.

At the same time, this research includes only those defendants who are represented by a public defender. Individuals represented by public defenders are the largest and most socially disadvantaged population of defendants in the criminal courts. Unlike indigent defendants, affluent defendants may be more likely to hire a private attorney and afford the costs of childcare and time away from work, which defendants in this study indicated as key considerations to accepting a plea of guilty. More affluent individuals are also less reliant on governmental assistance, which often stipulates that an individual may not receive assistance if they have a criminal conviction. Due to these differences in circumstances, it is likely that the decision-making considerations and processes of defendants in this research are different than the population of defendants who are not represented by public defenders.

Despite the limitations of this research, the implications are significant. This research shows that
defendants plead guilty because they are confused, scared, and feel coerced. Since plea bargaining was first implemented over a century ago, scholars have argued that the process creates a coercive atmosphere for defendants—defendants feel that they have to plead guilty or risk receiving a more severe sentence at trial, even if they are innocent.\textsuperscript{72} The findings of this research support this argument, with defendants expressing fear of taking their case to trial. Even those defendants who originally enter a plea of not guilty with the intention to pursue a trial ultimately plead guilty out of fear that the outcome at trial might result in more significant consequences. While Minnesota does not have a strict guideline rule that reduces sentences for those who plead guilty, public defenders rely heavily on sentencing guidelines and grids to illustrate minimum and maximum sentences to defendants. Public defenders may not insist that defendants take a plea bargain; however, they do adamantly remind defendants that if they do not accept a plea, they may go to trial and receive the maximum sentence. In the most direct situations, defenders openly inform defendants that the judge has indicated that if they take the case to trial, that they will be given the maximum sentence allowed by law.

Our findings also indicate that fairness is not monolithic and can take on different meanings across individuals who are accused of a crime. For example, defendants in this study were most likely to associate the even distribution of justice—outcomes and procedures—with fairness. This finding is contrary to research by Tyler and colleagues that found that defendants did not define their experience based on their ability to participate and have input in the procedures of their

\textsuperscript{72} Bowers, supra note 22, at 1120; McCoy, supra note 22, at 69; Bibas, supra note 7, at 2531; Langbein, supra note 10, at 16 (citing People v. Byrd, 162 N.W.2d 777, 787 (Mich. Ct. App. 1968) (Levin, J., concurring)).
case. Most frequently, defendants relied on the fair application of the law in their case. This result is particularly compelling when considered in light of research showing disparity in arrests and sentencing severity between black and white individuals and, particularly, those charged with drug and property offenses. This finding may be less surprising, however, when we consider that the poor are far more likely to be the subject of unfair and discriminatory treatment on a daily basis and in their own communities. As Merry argues, most lower-class Americans believe that society is unfair, unjust, and that everyone’s rights are not equally protected. Therefore, when poor defendants receive unsatisfactory treatment from the courts, they are not alienated—they are perhaps not even aware of being treated unfairly—because the experience is similar to experiences with other state actors and institutions. As some of the most socially marginalized individuals in our society, poor defendants do not expect to have a voice or to receive the same treatment as individuals with more social status. They do not have the expectation that law officials will give them and their story adequate consideration, and they do not consider criminal courts as a space in which their self-value and identity is defined.

Perhaps the most important implication of this

73 LIND & TYLER, supra note 27, at 216; Tyler & Bies, supra note 54, at 89.
74 DORIS MARIE PROVINE, UNEQUAL UNDER THE LAW: RACE IN THE WAR ON DRUGS (2007); WESTERN, supra note 36, at 50.
75 Sally E. Merry, Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture, 9 LEGAL STUD. F. 59, 68–69 (1985).
research, therefore, is that criminal justice reforms are needed to ensure the rights of indigent defendants. Once indigent defendants are swept into the criminal courts, they are required to navigate a system that they do not understand. Defendants are required to make quick decisions that have significant implications on their lives, families, and communities; however, their decisions are bounded by limited information and an incomplete comprehension of the procedures and meanings of sentences. Plea bargaining allows agents of the court to move through cases quickly and rationalize that plea bargains are fair because defendants make the decision to plead guilty. This research shows that we should not presume such a simplistic and idealistic conclusion. Future research should consider how we can strengthen the position of defendants by providing defendants access to dispositional advisors, or staff that are available to counsel defendants about their decision-making processes. If courts are not capable of providing defendants adequate representation and informed decision-making, this research suggests that we need to reconceptualize the meaning of “fairness” in the court system.

Finally, this research speaks to the current state of our criminal courts and their reliance on the plea process. Over the past few decades, scholars have focused on sentencing, incarceration, and the reentry of prisoners, to the neglect of investigations into indigent defense representation and the processes of criminal courts. The lack of attention to and investment in ensuring the rights of defendants and the quality of legal representation is startling considering the continued support for “tough on crime” policies that increase the stakes for a staggering number of individuals whose lives are affected by the courts. Yet, and in despite of these changes, this research offers evidence that indicates that defendant attitudes have remained relatively stable over time. In particular, the results of this research complement early studies of defendants. In the 1970s,
Casper noted that not only did defendants speak positively about the plea process, but that most defendants preferred to “cop out” and accept a plea: “the defendant doesn’t see himself as giving up anything of great value: he is simply speaking words, and they don’t seem to mean very much.” Although interactions with the criminal justice system and the severity of sanctions have increased, it does not appear to be the case that defendant experiences or expectations of what the courts can offer has changed much at all.

Future research and policy reforms should focus attention to increasing defendants’ understanding of their court experiences. We should also consider how defendant attitudes towards the fairness of their procedures and outcomes vary over time. As time passes, defendants may learn new information about court processes or experience the ramifications of their disposition in different ways. Consequences of criminal cases that have additional impacts over time may lead people to reconsider their fairness evaluations. As one defendant indicated, “At the time it was really about being fair. I mean, I don’t really know looking back on it if I consider it to be a fair deal. But at the time, it was just kinda like . . . what I get is what I get type of thing.”

This research offers a unique and important perspective of our courts. In doing so, it begs the question whether we should be expecting more from our courts or be satisfied to know that most defendants perceive their treatment as “fair enough.” In many regards, it is possible that most defendants cannot even conceptualize what “justice” might look like in the court system, given that the majority are represented by attorneys who are overworked, underpaid, and have little time to give adequate attention to each case. Given the infrequency of trials, most defendants have no point of comparison to the plea process. This is difficult to assess, but it is

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77 CASPER, supra note 24, at 85.
conceivable that if we increased our expectations of fair treatment by law enforcement and other institutional actors, the standards of court experiences would not be set so low. This research asserts that most defendants are satisfied with the procedures and outcomes of their cases, but it does not imply that defendants perceive the court system to care about their well-being or the implications of court sanctions on their lives.
Abstract

Over the last decade or so, federal and state education policymakers embraced the use of value-added models (VAMs) to evaluate teachers’ performance and make high-stakes employment decisions (e.g., tenure, merit pay, ...
termination of employment). VAMs are complicated statistical models that attempt to estimate a teacher's contribution to student test scores, particularly those in mathematics and reading. Educational researchers, as well as many teachers and unions, however, have objected to the use of VAMs noting that these models fail to adequately account for variables outside of teachers’ control that contribute to a student’s education performance. Subsequently, many teachers challenged the use of VAMs through the courts. This article assesses those challenges.

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I. Introduction

In March of 2017, William “Bill” Sanders passed away in Tennessee.\(^1\) To most policymakers outside of education (and many within it) he was a relatively unknown statistician. His work in education policy started far away from schoolhouses. Indeed, after he received his degree in statistics at the University of Tennessee, he began assessing the impact of radiation on farm animals.\(^2\)

But his career trajectory changed markedly. In 1982, after reading a newspaper article about how Tennessee Governor Lamar Alexander sought a model of teacher compensation that would pay teachers for performance, Mr. Sanders concluded he had the answer.\(^3\) He wrote to Alexander explaining that he developed a statistical model that could determine who the “best” teachers were—a so-called “value-added” model (e.g., the Tennessee Value-Added Assessment System (TVAAS)

\(^2\) Id.
\(^3\) Id.
which is more generally known as the Education Value-Added Assessment (EVAAS)). This model estimates a teacher’s contribution to student achievement on standardized tests, and it formed the basis for his private company that developed algorithms for the models. Tennessee ultimately incorporated value added models into policies and laws, linking high-stakes employment decisions and evaluation to student test scores.

Mr. Sanders’s models—sparked by this random collision of events—has had profound impact on national educational policy. In 2009, President Obama’s Race to the Top (RttT) program conditioned state receipt of federal education dollars on states’ use of VAMs to evaluate and make employment decisions for teachers. States seeking much-needed federal money during the

4 Id. VAMs have a policy history that precede Mr. Sanders’s adoption of the term in education. They had been used in economics since the 1960s. See, e.g., Douglas Harris, Would Accountability Based on Teacher Value Added Be Smart Policy? An Examination of the Statistical Properties and Policy Alternatives, 4 J. EDUC. FIN. & POL’Y 319, 321 (2009). Yet Sanders is widely credited as the one who popularized the use of VAMs for educational accountability. E.g., Carey supra note 1.


7 TENN. CODE ANN. §§ 49-1-302(a)(2)(C), 49-5-503(4) (2016); TENN. STATE BD. OF EDUC., TEACHER AND ADMINISTRATOR POLICY § 5.201 (2017) (statutory and regulatory framework delegating authority to state department of education to develop policy for evaluation and further linking that evaluation to tenure determinations).
“Great Recession” eagerly complied. As a consequence, VAMs became codified in state teacher evaluation and employment laws across the country.

Despite their widespread adoption, the use of these statistical models in improving public schools is a source of considerable debate in law and policy. Some scholars applaud their use, arguing that they provide a clear measure of a teacher’s worth and address a persistent policy dilemma: How to improve the quality of our public school teachers. Detractors insist that a teacher’s value is much more than the measure of test scores and, more importantly, that VAMs are statistically flawed. Critics note that VAMs fail to account for the complexity of teaching and cannot accurately control for the impact of other variables (e.g., students’ individual

8 See generally Rhoda Freelon et al., Overburdened and Underfunded: California Public Schools Amidst the Great Recession, 2 MULTIDISCIPLINARY J. EDUC. RES., 152 (2012) (documenting the impact of the Great Recession on public schools in California, but also noting the broader impact of the recession on schools and institutions beyond California).

9 KATHRYN M. DOHERTY & SANDI JACOBS, STATE OF THE STATES 2013: CONNECT THE DOTS: USING EVALUATIONS OF TEACHER EFFECTIVENESS TO INFORM POLICY AND PRACTICE 10 (2013) (noting that in 2013 at least 31 states had adopted the use of standardized test in their teacher evaluation protocols); see also MARK A. PAIGE, BUILDING A BETTER TEACHER: UNDERSTANDING VALUE-ADDED MODELS IN THE LAW OF TEACHER EVALUATION 15, 16 (2016) (describing the links between teacher evaluation systems and teacher employment statutes, such as tenure, and warning against such use for high-stakes decisions).

10 See, e.g., Eric A. Hanushek, Conceptual and Empirical Issues in the Estimation of Educational Production Functions, 14 J. HUM. RESOURCES 351, 353 (arguing for the adoption of production function models to evaluate teachers).

11 E.g., Linda Darling-Hammond, Can Value-Added Add Value to Teacher Evaluation?, 44 EDUC. RESEARCHER 132, 133 (placing the use of value added models in the larger policy debate about how to improve teacher quality).
motivation) that impact student achievement. Because of these issues, commentators cautioned against the use of VAMs in high-stakes employment decisions (e.g. termination), noting such use would invite legal action.

Notwithstanding these warnings, many states embraced VAMs. Florida, for example, amended their teacher evaluation statutes to ensure that VAMs played a controlling role in teacher employment status, including tenure decisions. Teachers and unions almost immediately challenged the use of VAMs through legal means. Lawsuits ranged from violations of the Federal Constitution to assertions that requirements to use VAMs violated the non-delegability doctrine. Many of these received widespread attention in the popular press.

12 Id.; see also SEAN P. CORCORAN, CAN TEACHERS BE EVALUATED BY THEIR STUDENTS’ TEST SCORES? SHOULD THEY BE? THE USE OF VALUE-ADDED MEASURES OF TEACHER EFFECTIVENESS IN POLICY AND PRACTICE 22 (2010).
13 PAIGE, supra note 9, at 22 n.28; see also Preston C. Green III et al., The Legal and Policy Implication of Value-Added Teacher Assessment Policies, 2012 BYU EDUC. & L.J. 1, 15–16 (2012).
14 E.g., FLA. STAT. ANN. § 1012.22(1)(c)(5) (West 2013) (connecting teacher salary to an evaluation system that requires use of VAMs).
15 E.g., Cook v. Bennett, 792 F.3d 1294, 1298 (11th Cir. 2015) (alleging use of VAMs violated substantive and procedural due process clauses, as well as the Equal Protection Clause of the 14th Amendment).
It has been almost ten years since Race to the Top brought Mr. Sander’s idea of VAMs from Tennessee to a national scale, and it seems an appropriate moment to assess their legal and policy ramifications. Indeed, as we note, the use of VAMs has triggered a wave of litigation and policy change that continues today. Many states continue to use VAMs, while others have reduced their use under new federal laws. Thus, assessing the legal and policy landscape forms the basis of this article.

Generally speaking, three lines of legal challenges have emerged. First, some are grounded in the substantive Due Process Clause and Equal Protection Clause of the 14th Amendment, arguing that the laws do not pass rational basis scrutiny. Second, a line of cases challenges the authority or jurisdiction of a particular agency (e.g., state Department of Education) to enact evaluation regulations or laws that use VAMs. Third, some cases advance what we refer to as “process” arguments. These contend that the use of VAMs violates some agreed-upon or standing procedural terms found in the Procedural Due Process Clause or collective bargaining agreements (CBAs). As we note, plaintiffs have captured the most success (although not always) on this third line of argument.

That litigants have experienced more success arguing VAMs offend certain procedural protections comports with common understanding of procedural due

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See infra Part III.

See, e.g., Cook, 792 F.3d at 1298, 1300.
process. At its core, procedural due process ensures “fundamental fairness” when the government moves to take away a protected interest, such as employment. While courts generally have not overruled a legislature’s policy choice to use VAMs as violative of the substantive due process, they (including a federal appeals court case) have questioned the wisdom of the legislature’s decision. Where they have overturned the use of VAMs, they have done so on procedural grounds. This allows courts to stay within “their lane” and avoid jurisdictional overreach into the policy area.

The article is organized as follows. Part I overviews VAMs, their link to teacher evaluation and employment, and the controversy surrounding their use, especially as a factor in high-stakes employment decisions. Part II provides the most current assessment of cases where the statistical controversy has led to legal action. Part III discusses the recent policy and legal developments with respect the use of VAMs in evaluation that have occurred because changes in federal education law. In conclusion, we note that VAMs have receded, somewhat, in terms of their role in evaluation and employment matters.

II. VAMs: Promise and Controversy

A. A Brief History of VAMs in Educational Policy

In the simplest of terms, VAMs (e.g., Tennessee’s TVAAS) are statistical models used to measure the predicted and the actual “value” a teacher “adds” to (or detracts from) student achievement from the point at which students enter a teacher’s classroom to the point students leave. This is typically done using student
achievement growth as measured by large-scale standardized test scores (i.e., the tests mandated by the No Child Left Behind (NCLB) Act of 2001). The models attempt to statistically control for outside variables, including students’ prior test performance, and student-level background variables (e.g., whether students are eligible for free-and-reduced lunches).\textsuperscript{22}

The most widely used VAM is the EVAAS, developed and used in Tennessee.\textsuperscript{23} EVAAS comes in different versions for different states (e.g., the EVAAS in Ohio, North Carolina, and South Carolina, the PVAAS in Pennsylvania, the TVAAS in Tennessee, and the TxVAAS in Texas) and different ones based on large and small school districts (e.g., located within Arkansas, Georgia, Indiana, Texas, and Virginia). For each consumer, EVAAS modelers choose one of two sophisticated statistical models.\textsuperscript{24}

Using these models, student growth scores are aggregated at the teacher or classroom level to yield teacher-level value-added estimates. Depending on where

\textsuperscript{22} See e.g., Sean Corcoran & Dan Goldhaber, Value Added and Its Uses: Where You Stand Depends on Where You Sit, 8 EDUC. FIN. & POL’Y 418, 421 (2013). Other variables include things such as, English language learners (ELLs), gifted, receiving special education services, and classroom and school-level variables (e.g., class sizes, school resources, school leadership).

\textsuperscript{23} The EVAAS is advertised as “the most comprehensive reporting package of value-added metrics available in the educational market” in that the EVAAS offers states, districts, and schools “precise, reliable and unbiased results that go far beyond what other simplistic [value-added] models found in the market today can provide.” SAS® EVAAS ® FOR K-12, https://www.sas.com/en_us/software/evaas.html [https://perma.cc/76AY-G47W].

\textsuperscript{24} For a comprehensive statistical summation of the various models and options available, see WHITE PAPER: SAS® EVAAS® FOR K12 STATISTICAL MODELS, https://www.sas.com/content/dam/SAS/en_us/doc/whitepaper1/sas-evaas-k12-statistical-models-107411.pdf [https://perma.cc/F5EW-WCB6].
teachers’ EVAAS estimates fall, as compared to similar teachers to whom they are compared (e.g., within districts) at the same time, teachers’ value-added determinations are made. Thereafter, EVAAS modelers make relativistic comparisons and rank teachers hierarchically along a continuum. Teachers whose students grow significantly more than the average and/or surpass projected levels of growth are identified as “adding value”; teachers whose students grow significantly less and/or fall short of projected levels are identified as “detracting value.” Teachers whose students grow at rates that are not statistically different from average (i.e., falling within one standard deviation of the mean) are classified as Not Detectibly Different (NDD).

1. The Rise of VAMs in National Education Policy: Race to the Top

In 2007, TVAAS/EVAAS entered the national education policy discussion when developer Dr. William L. Sanders shared his research with Congress. Specifically, he testified before the U.S. House of Representatives Committee on Education and the Workforce on how TVAAS could improve teacher

25 For a general overview of the use of VAMs and the concepts noted herein, see WILEY, supra note 5.
26 Id.
28 WILEY, supra note 5; Amrein-Beardsley & Collins, supra note 27, at 7 n.2; see, e.g., WILLIAM L. SANDERS, COMPARISONS AMONG VARIOUS EDUCATIONAL ASSESSMENT VALUE-ADDED MODELS 18 (2006).
accountability and promote educational reform.29 His testimony spurred the U.S. Department of Education’s piloting of VAMs.30

The use of VAMs nationally grew under the Race to the Top program. By way of background, RttT was a competitive federal grant program that amounted to an injection of $4.35 billion to selected states to support educational reform efforts.31 Receipt of the grant was conditioned on states developing teacher evaluation laws and policy that used VAMs.32 States that attached relatively more serious consequences (e.g., employment status) to teachers’ VAM-based output were viewed more favorably than those that did not.33 High-stakes consequences included, but were not limited to: teachers’ permanent files being flagged, thus preventing teachers from changing jobs within states; the revocation of teacher licenses; teacher tenure; salary increases, decreases, and merit pay; and teacher probation and termination.34

Beyond RttT, the federal government used other mechanisms to embed VAMs in state evaluation and employment matters as a matter of law and policy. In 2011, the federal government required that states adopt the accountability practices discussed above

30 Id.
32 Id.
34 See generally PAIGE, supra note 9 (noting that VAMs became required factors for employment decisions).
(notwithstanding if a state applied or received RttT funds) to secure waivers from the penalties that they would incur for non-compliance with the No Child Left Behind Act of 2001.\textsuperscript{35} NCLB, passed with bipartisan support in 2001, required 100 percent of students to attain proficiency in math and reading state standardized tests.\textsuperscript{36} The utopian goal has been widely criticized as impractical.\textsuperscript{37} Nevertheless, the federal government required states to submit waivers to escape the punitive measures of non-compliance (e.g., intervention of state authorities in the operation of local schools). More specifically, these waivers buttressed the core policy drivers of RttT by continuing to incorporate student test scores as a means to hold teachers accountable for their “value added,” or lack thereof.\textsuperscript{38}

The cumulative impact of RttT and federal waivers on the use of VAMs in teacher evaluations was substantial. By 2014, 40 states and Washington, D.C.,


\textsuperscript{38} CLOSE ET AL., supra note 35, at 8.
(80%) were using or still developing some type of VAM for increased teacher accountability purposes. While state department of education leaders recognized and encouraged the use of VAMs, they did not develop support mechanisms and resources to help teachers understand and subsequently use their VAM-based data to improve their effectiveness. Put differently, information from VAMs was not actionable. This disconnect has been the source of serious contention and concern about the VAM-based teacher and educational reform enterprise.

B. Statistical and Practical Controversies

Significant statistical and practical concerns surround VAMs, and these are best understood with reference to the professional guidelines that govern education and psychological professions, the Standards for Educational and Psychological Testing (hereinafter “Standards”). These issues include, but are not limited to: (1) reliability, (2) validity, (3) bias, (4) transparency, and (5) fairness, with emphasis also on (6) whether VAMs are being used to make consequential decisions using concrete (e.g., not arbitrary) evidence, and (7) unintended consequences. These are discussed below.

1. Reliability

Reliability is the degree to which test- or measurement-based scores “are consistent over repeated applications of a measurement procedure (e.g., a VAM) and hence and inferred to be dependable and consistent”

39 Id.
40 Id. at 14.
41 AM. EDUC. RESEARCH ASS’N, AM. PSYCHOLOGICAL ASS’N & NAT’L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (2014) [hereinafter STANDARDS].
for the individuals (e.g., teachers) to whom the scores pertain.\textsuperscript{42} VAMs are reliable when within-group (same school or district) VAM estimates of teacher effectiveness are more or less consistent over time, from one year to the next, regardless of the type of students and subject areas teachers teach. Consistency over time is typically captured using particular statistical tools such as standard errors, reliability coefficients per se, and generalizability coefficients, among others.\textsuperscript{43} These situate and make explicit VAM estimates and their (sometimes sizeable) errors and, importantly, help others understand the errors that come along with VAM estimates.

Research has documented serious concerns with respect to VAM reliability (or intemporal stability). Indeed, teachers classified as “effective” one year might have a 25–59\% chance of being classified as “ineffective” the next year, or vice versa, with other permutations possible.\textsuperscript{44} If a teacher who is classified as a “strong” teacher this year is classified as a “weak” teacher next year, and vice versa, this casts doubt on the reliability of VAMs for the purpose of identifying and making high-stakes decisions regarding teachers. Accordingly, across VAM, reliability is a hindrance, especially when unreliable measures are to be used for consequential purposes like decisions to terminate or deny tenure.

\textsuperscript{42} Id. at 222–23.
\textsuperscript{43} Id. at 33.
\textsuperscript{44} For a comprehensive overview of these concepts, see José Felipe Martínez et al., Approaches for Combining Multiple Measures of Teacher Performance: Reliability, Validity, and Implications for Evaluation Policy, 38 EDUC. EVALUATION & POL’Y ANALYSIS 738-56 (2016); see also Peter Z. Schochet & Hanley S. Chiang, What are Error Rates for Classifying Teacher and School Performance Using Value-Added Models?, 38 J. EDUC. & BEHAV. STAT. 142-71 (2013).
2. Validity

Validity is “the degree to which evidence and theory support the interpretations of test scores for [the] proposed uses of tests.” It is measured by “the degree to which all the accumulated evidence supports the intended interpretation of [the test-based] scores for [their] proposed use[s].” Put another way, validity asks: Does the model assess what it is supposed to assess? Accordingly, one must be able to support validity arguments with quantitative or qualitative evidence that the data derived allows for accurate inferences.

There are various means to assess validity, but of particular focus for researchers is validity as it concerns “concurrent-related evidences.” This helps to assess, for example, whether teachers who post large and small

45 STANDARDS, supra note 41, at 11.
46 Id. at 14.
47 There are sub areas of validity that have been the subject of considerable research as it relates to VAMs. These are: (1) content-related evidence of validity; (2) concurrent-related evidence of validity; (3) predictive-related evidence of validity; and (4) consequence-related evidence of validity. See Michael T. Kane, Validating the Interpretations and Uses of Test Scores, 50 J. EDUC. MEASUREMENT 1, 2, 8 (2013); see generally Samuel Messick, Validity, 3 J. EDUC. MEASUREMENT 1, 8–103 (1989). However, while all these evidences of validity help to support construct-related evidence of validity, in VAM research most researchers rely on gathering concurrent-related evidence of validity.
48 E.g., Edward Sloat, Audrey Amrein-Beardsley & Jessica Holloway, Different Teacher-Level Effectiveness Estimates, Different Results: Inter-Model Concordance Across Six Generalized Value-Added Models (VAMs), 30 EDUC. ASSESSMENT EVALUATION & ACCOUNTABILITY 367, 372 (2018); see also Pam Grossman et al., The Test Matters: The Relationship Between Classroom Observation Scores and Teacher Value Added on Multiple Types of Assessment, 43 EDUC. RESEARCHER 293, 293-303 (2014).
value-added gains or losses over time are the same teachers deemed effective or ineffective, respectively, over the same period using other independent quantitative and qualitative measures of teacher effectiveness. Other measures might include supervisors’ observational scores. If all measures line up and theoretically validate one another, then confidence in them as independent measures increases. If all indicators point in different directions, something may be wrong with either or both indicators (the VAM tool or observational scores, or both).

Researchers have questioned whether measures of teacher value-added are substantively related to at least one other criterion of teacher effectiveness (e.g., teacher observational or student survey indicators). Moreover, they question whether the concurrent-related evidence of validity that does exist is strong or substantive enough to warrant valid inference-making.

3. Bias

Bias pertains to the validity of the inferences that stakeholders draw from test-based scores. Specific to

49 Kane, supra note 47, at 6–8, 37, 40, 64.
50 Id.
52 The Standards define bias as follows: as the “construct underrepresentation of construct-irrelevant components of test scores that differentially affect the performance of different groups of test takers and consequently the . . . validity of interpretations and uses of their test scores.” STANDARDS, supra note 41, at 216. Biased estimates, also known as
VAMs, unpredictable characteristics (variables outside of the control of a teacher or school) of students can bias estimates about teachers’ contributions. Student characteristics include: students’ individual motivation, capability to learn, and levels of academic achievement.\textsuperscript{53} Because schools do not randomly assign teachers, these variables are not controlled in a way to mitigate bias.\textsuperscript{54} Biased results are quite possible, especially when relatively homogeneous sets of students (e.g., English Language Learners (ELLs), gifted and special education students, or free-or-reduced lunch eligible students) are non-randomly concentrated into schools, purposefully placed into classrooms, or both.

Statistical models—even the most sophisticated—cannot control for such bias.\textsuperscript{55} One influential study illustrated VAM-based bias when it found that a systematic error as concerning “[t]he systematic over- or under-prediction of criterion performance” are observed when said criterion performance varies for “people belonging to groups differentiated by characteristics not relevant to the criterion performance” of measurement. STANDARDS, supra note 41, at 216, 222.


\textsuperscript{54} See, e.g., Charles T. Clotfelter, Helen F. Ladd, & Jacob L. Vigdor, Teacher-Student Matching and the Assessment of Teacher Effectiveness, J. HUM. RESOURCES 778, 779–82 (2006) (noting the various ways teachers are assigned to schools). Class assignments in schools are historically a function of a host of factors, including: pressure from parents for particular class placement and pressure from teachers for placement of particular students, especially those who may tend to be considered “high-achieving.” Id. at 781. Additionally, placement among schools within a district is similarly subject to other variables, such as housing patterns. Id.

\textsuperscript{55} See, e.g., Paufler & Amrein-Beardsley, supra note 53, at 335.
student’s 5th grade teacher was a better predictor of a student’s 4th grade growth than was the student’s 4th grade teacher.\textsuperscript{56} The absurdity of that finding raises serious questions about the ability of VAMs to control for bias. Notwithstanding, the primary debate raging across articles concerns whether statistically controlling for potential bias by using complex statistical approaches to account for non-random student assignment makes bias negligible, or rather “strongly ignorable.”\textsuperscript{57}

4. Transparency

Transparency is defined as the extent to which something is accessible and understandable.\textsuperscript{58} In terms of VAMs, this relates to the extent to which VAM-based estimates may not make sense to those receiving the information. In education, teachers and principals may not understand the models being used to evaluate their performance. Because of this, they are generally unlikely to use the VAM-generated information for formative purposes (i.e., as a tool to gather information and change practice as soon as possible).\textsuperscript{59} Practitioners often


\textsuperscript{58} STANDARDS, supra note 44.

describe value-add data reports as confusing, not comprehensive in terms of the key concepts and objectives taught, ambiguous regarding teachers’ efforts at both the student and composite levels, and often received months after students leave teachers’ classrooms.

For example, teachers in Houston, Texas, expressed that they are learning little about what they did effectively or how they might use their value-added data to improve their instruction. Teachers in North Carolina reported that they were “weakly to moderately” familiar with their value-added data. Tennessee teachers maintained that there was very limited support or explanation helping teachers use their value-added data to improve upon their practice.

Quite apart from the statistical concerns noted above, the “black-box” nature of VAMs raises additional questions in the field. Indeed, the purported strength of VAMs is that they will improve instruction by providing a wealth of positive diagnostic information. The models are supposed to give practitioners useful, actionable information. Yet, if practitioners have problems understanding the models, the value (if you will) of VAMs is greatly diminished. Unfortunately, statisticians that have developed the models make “no apologies for the


60 Clarin Collins, Houston, We Have a Problem: Teachers Find No Value in the SAS Education Value-Added Assessment System, 22 EDUC. POL’Y ANALYSIS ARCHIVES 1, 4, 15, 22 (2014).


62 See Eckert & Dabrowski, supra note 59, at 90.
fact that [their] methods [are] too complex for most of the teachers whose jobs depended on them to understand.”63

5. Fairness

General questions of fairness have been raised concerning the use of VAMs, especially in the context of high-stakes employment decisions. Fairness is the impartiality of “test score interpretations for intended use(s) for individuals from all relevant subgroups.”64 But issues of fairness arise when a test or test use impacts some more than others in unfair or prejudiced, yet often consequential ways.65

Fairness issues are amplified as VAMs are applied in the field. Indeed, VAMs are generally only directly applicable to teachers who instruct in areas that are subjected to standardized tests (typically, math and reading).66 States and districts can only produce VAM-based estimates for approximately 30–40% of all teachers.67 The other 60–70%, which sometimes includes entire campuses of teachers (e.g., early elementary and high school teachers) or teachers who do not teach the core subject areas assessed using large-scale standardized tests (e.g., mathematics and English/language arts), cannot be evaluated or held accountable using teacher-level value-added data.68 Importantly, when districts use this information to make

63 Carey, supra note 1, at 13; see also Gabriel & Lester, supra note 59, at 20.
64 STANDARDS, supra note 41, at 219 (emphasis added).
65 This concern is consistent with the general argument of this paper. To wit, courts have sustained objections to the use of VAMs where they violate procedural due process, the basic “fundamental fairness.” See Cook v. Bennett, 792 F.3d 1294, 1301 (11th Cir. 2015).
66 E.g., Green et al., supra note 13 (noting that the models only apply to 30–40% of teachers).
67 Id.; see also Gabriel & Lester, supra note 59, at 7.
consequential, high-stakes employment decisions the unfairness can have considerable consequences. Some teachers in certain grades or subject areas experience the negative or positive consequences of these VAM-based data more than their colleagues.69

6. Consequential Use

Assessing the appropriate use of tests must consider the social and ethical concerns70 in addition to more sterile concerns about statistical methodology.71 The Standards recommend ongoing evaluation of both the intended and unintended consequences of any test as an essential part of any test-based system, including those based upon VAMs.72

Typically, ongoing evaluation of social and ethical consequences rests on the shoulders of the governmental bodies that mandate such test-based policies.73 In this case, local and state education departments would be the agencies in charge of assessing the social costs and ethical issues associated with the use of VAMs in high-stakes contexts. This is because they “provide resources for a continuing program of research and for dissemination of research findings concerning both the

69 This has formed the basis of substantive due process claims against school districts. E.g., Cook, 792 F.3d 1294 (agreeing that the system of Florida that adopted VAM ratings that apply to all teachers, including those in non-tested subject areas, was unwise and unfair but upholding it under rational basis test).
70 E.g., Messick, supra note 47, at 8 noting that “[t]he only form of validity evidence [typically] bypassed or neglected in these traditional formulations is that which bears on the social consequences of test interpretation and use.”
71 See also Kane, supra note 47.
72 STANDARDS, supra note 41.
73 Id.
positive and the negative effects of the testing program.”

However, this rarely occurs. The burden typically rests on the research community who must provide evidence about the positive and negative effects and explain these effects to external constituencies, including policymakers. This group must collectively determine whether VAM use, given the consequences and issues identified above, warrant the financial, time, and human resource investments. Local and state departments of education typically have not (perhaps for political reasons) acknowledged or sought to examine the consequences of their policy actions.

7. Intended Consequences

As noted, the primary intended consequence of VAM use is to improve teaching and help teachers (and schools/districts) become better at educating students by measuring and then holding teachers accountable for their effects on students. The stronger the consequences, the stronger the motivation leading to stronger intended effects. Secondary intended consequences include

75 Arguably, some “reformers” assume that their ideas are inviolable and opposition is simply a reflection of a recalcitrant system, at best, or teachers’ unions at worst. See e.g., Michelle Rhee, Opting Out of Standardized Tests? Wrong Answer, WASH. POST (Apr. 4, 2014) https://www.washingtonpost.com/opinions/michelle-rhee-opting-out-of-standardized-tests-wrong-answer/2014/04/04/37a6e6a8-b8f9-11e3-96ae-f2c36d2b1245_story.html [https://perma.cc/JD5L-6APK] (suggesting that an organization she founded always keeps students’ interests first and also implying that teachers’ unions do not, especially in regards to the use of standardized tests).
replacing the nation’s antiquated teacher evaluation systems which have been criticized by all corners of the education research.76

Yet, in practice, research evidence supporting whether VAM use has led to these intended consequences is suspect. Indeed, numerous studies have noted that there is a lack of evidence linking VAMs to improved teacher quality. First, VAM estimates have not produced useable information for teachers about how teachers, schools, and states might improve upon their instruction, or how all involved might collectively improve student learning and achievement over time.77 Likewise, recent evidence suggests the use of VAMs has not led to improvements in teacher evaluation systems.78 In sum, strong evidence suggest that VAMs have not promoted the intended benefits of providing actionable information for teachers to improve instruction or teacher evaluation systems.

8. Unintended Consequences

Simultaneously, ethical and research standards require that the use of testing data must also recognize VAMs’ unintended consequences.79 Policymakers must present evidence on whether VAMs cause unintended effects and if those effects outweigh their intended impact. This means that the educative goals at issue (e.g., increased student learning and achievement) should be

76 See, e.g., DANIEL WEISBERG ET AL., THE WIDGET EFFECT (2009) (criticizing the evaluation models that treat teachers as “widgets” and fail to recognize their differences and value).
79 See AM. EDUC. RES. ASS’N, supra note 74; STANDARDS, supra note 41.
examined alongside the positive and negative implications for both the science and ethics of using VAMs in practice.\(^{80}\)

Researchers have produced an exhaustive list of these unintended consequences.\(^{81}\) First, the use of VAMs leads to teacher isolation whereby teachers “literally or figuratively ‘close their classroom door’ and revert to working alone.”\(^{82}\) Sadly, teacher isolation is at cross-purposes with collaboration among colleagues, something that is an essential part to improving schools.\(^{83}\) Second, the use of high-stakes testing causes teachers to leave the profession and avoid high-needs schools that most need the best teachers.\(^{84}\) Because of the very nature of VAM-based teacher evaluation which rewards testing achievement, teachers avoid teaching high-needs students. This is rational: if they perceive themselves to be at greater risk of teaching students who may be more likely to hinder their value-added\(^{85}\) they “seek safer [grade level, subject area, classroom, or school] assignments, where they can avoid the risk of low VAMS scores.”\(^{86}\) Of course, the flip side of this, teachers avoid challenging assignments or leave the profession all together.\(^{87}\) Third, and most troubling perhaps, is the dehumanization that high-stakes testing causes. Indeed, under such regimes, teachers view and react to students as “potential score increasers or score compressors,” not children.\(^{88}\)

\(^{80}\) Messick, supra note 47.


\(^{82}\) Id. at 120.

\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id.

\(^{86}\) Id.

\(^{87}\) Id.

\(^{88}\) Hewitt, supra note 61, at 32.
III. The Cases

This section discusses cases where the central issue was the role VAMs played in adverse employment actions. It first traces those cases related to arguments grounded in the substantive Due Process and Equal Protection clauses of the U.S. Constitution. It then highlights the series of cases where plaintiffs challenged the use of VAMs on jurisdictional grounds (i.e., that a particular government agency superseded its authority or other statutes in requiring the use of VAMs). The final subsection assesses the cases where process arguments have been advanced by the plaintiffs.

A. Federal Substantive Due Process Rights & Equal Protection Arguments: VAMs May Be Unwise But Still Constitutional

1. Cook v. Bennett

In 2015, a group of teachers challenged Florida’s use of student test scores to evaluate their job performance.89 As part of that state’s application for Race to the Top funds, the state legislature enacted a new teacher performance evaluation regimen in their law of teacher evaluation.90 Specifically, the legislature required that at least 50% of a teacher’s performance evaluation be based on student growth on state standardized tests in math and English (the Florida Comprehensive Assessment Test, or FCAT).91 The remaining portion of the teacher’s evaluation was

89 Cook v. Bennett, 792 F.3d 1294 (11th Cir. 2015).
90 FLA. STAT. ANN. § 1012.34 (West 2011).
91 Id. A teacher’s final evaluation was based on the student test growth (the VAM rating) on the FCAT (50%) and a VAM rating based on the school’s contribution to a student’s growth. Cook, 792 F.3d at 1297.

[547]
calculated based on a school-wide VAM rating. Not all students take the math and English tests. In fact, students took the English FCAT exam in grades 3 through 10 and the mathematics FCAT exam in grades 3 through 8.

Under the evaluation law, Florida teachers fell under one of three types of categories. “Type A” teachers were those that taught the tested subjects (math and English) in the years that the FCAT was administered for those subjects. In effect, as the Eleventh Circuit Court of Appeals noted, the model adopted by the state education commissioner only worked as designed in evaluating teachers of English in grades 4 through 10 and math in grades 4 through 8. The rest of Florida’s public school teachers fell into two groups. “Type B” teachers taught students in grades 4 through 10, but in subjects other than English or math. “Type C” teachers taught students in grades below 4 or above 10 or their students did not take standardized tests (e.g., art).

The thrust of the legal problem, according to the teachers challenging the evaluation scheme, related to the evaluation of Type B and C teachers. As a practical matter, school districts evaluated Type B teachers using student FCAT scores for math and English, notwithstanding the fact that those teachers did not instruct the students in those subjects. Type C teachers’ VAM scores were calculated based on school-wide FCAT scores derived from student scores in subjects they did not teach. Under this scenario, for example, a second

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92 Id.
93 The district court designated the classification set forth in this discussion and, for ease of reference, the appeals court adopted it in its analysis.
94 Cook, 792 F.3d at 1297.
95 Id.
96 Id.
97 Id.
98 Id. at 1298.
grade art teacher’s VAM rating could be calculated based on a 3rd grade student’s math and English test growth.

The plaintiff-teachers argued that the evaluation laws violated the Substantive Due Process and Equal Protection clauses of the Fourteenth Amendment. Because no fundamental right was at issue, the court applied the rational basis test to determine whether the government’s actions had a legitimate purpose and whether the chosen methods were rationally related to that purpose. Ultimately, the court sided with the government, finding that there was a legitimate interest which was to “increase student academic performance by improving the quality of instructional, administrative, and supervisory services in the public schools of the state.”

The court also concluded that there was a rational relationship between this purpose and the use of the FCAT VAMs. The court concluded—and the plaintiffs conceded at oral argument—that the government “could have reasonably believed that (1) a teacher can improve student performance through his or her presence in a

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99 U.S. CONST. amend. XIV provides, in relevant part, that: “No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

100 Cook, 792 F.3d at 1300 (citing Fresenius Med. Care Holdings, Inc. v. Tucker, 704 F.3d 935, 945 (11th Cir. 2013); FCC v. Beach Comm’ns, Inc., 508 U.S. 307, 314 n.6 (1993)).

101 Id. at 1301 (citing FLA. STAT. § 1012.34(1)(a) (2013)); see also Houston Fed’n of Teachers, Local 2415 v. Houston Indep. Sch. Dist., 251 F. Supp. 3d 1168, 1182 (S.D. Tex. 2017) (concluding that plaintiff’s substantive due process claims failed because “[e]ven accepting plaintiffs’ criticisms at face value, the loose constitutional standard of rationality allows governments to use blunt tools which may produce only marginal results.”).

The Houston court, however, ruled that the plaintiff’s allegations of procedural due process violations survived summary judgment dismissal. Id. at 1183.

102 Cook, 792 F.3d at 1301.
school and (2) the FCAT VAM can measure those school-wide performance improvements, even if the model was not designed to do so.”103 To be sure, both the appellate and district courts criticized the chosen model.104

The court similarly applied the rational basis review to dismiss the equal protection claims.105 Under this claim, the teachers argued that the evaluation law created a separate class of teachers: “those whose evaluations are based on student growth data for students assigned to the teacher in the subjects taught by the teacher, and those whose evaluations are based on student growth data for students and/or subjects they do not teach.”106 However, because this classification did not implicate a suspect class (e.g., race, gender) rational basis applied and, under the same line of reasoning of the substantive due process claim, the equal protection claim was dismissed.107

103 Id.
104 Id. at 1301 (noting that “[w]hile the FCAT VAM may not be the best method—or may even be a poor one—for achieving this goal, it is still rational to think that the challenged evaluation procedures would advance the government’s stated purpose.”).
105 The district court in finding for the government concluded, in dicta, that “[t]he unfairness of the evaluation system as implemented is not lost on this Court” and that “this Court would be hard-pressed to find anyone who would find this evaluation system fair to non-FCAT teachers, let alone be willing to submit to a similar evaluation system.” Cook v. Stewart, 28 F. Supp. 3d 1207, 1215–16 (N.D. Fla. 2014), aff’d sub nom. Cook v. Bennett, 792 F.3d 1294 (11th Cir. 2015).
106 Stewart, 28 F. Supp. 3d at 1213.
107 Cook, 792 F.3d at 1301 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (internal citations omitted)).
2. Trout v. Knox County Board of Education

Plaintiff teachers in Trout v. Knox County Board of Education brought substantive and procedural due process claims based on their evaluations that used VAMs for purposes of teacher evaluations. In Trout, the teachers challenged the use of Tennessee’s VAM rating (the EVAAS). Specifically, two teachers (one a math teacher and the other a science teacher) were denied bonuses based on their VAM rating.

Both teachers involved (Trout and Taylor, respectively) argued that the use of the VAMs was arbitrary and capricious and, therefore, could not be sustained under the rational basis test. Echoing criticisms of the reliability and validity of VAMs, the plaintiffs argued that the VAMs were too imprecise to be used to assess their effectiveness and therefore violated substantive due process rights.

The federal district court ruled in favor of the government. It began its analysis by noting that the plaintiffs failed to state a substantive due process claim. By way of background, a substantive due process claim requires that there be some property interest at stake. Here, under an analysis of property interest rights in the Sixth Circuit Court of Appeals, the court concluded that the plaintiffs did not have an interest in bonuses.

For sake of argument, however, the court went on to apply the rational test and found that the government’s use of the VAMs in this case satisfied that

109 Id.
110 See supra Part I.
111 Trout, 163 F.Supp. 3d at 500.
112 Id.
113 Id at 501.
test.\textsuperscript{114} The use of VAMs to identify and support instruction to lead to increased student achievement was not in dispute as a legitimate government interest.\textsuperscript{115} The plaintiffs, similar to \textit{Cook v. Bennett},\textsuperscript{116} argued that various statistical infirmities made reliance on VAMs irrational, however.\textsuperscript{117} In rejecting these arguments, the district court noted, among other things, that there was no legal authority requiring the court to apply a standard with respect to the confidence level of a test.\textsuperscript{118}

To be sure, the \textit{Trout} court was sympathetic to the plaintiffs’ complaints regarding the statistical inadequacy of the VAMs.\textsuperscript{119} Yet, at bottom, there was no legal authority that required the court to apply a certain level of statistical confidence with respect to the government’s chosen method for purposes of measuring teacher effectiveness.\textsuperscript{120}

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\textsuperscript{114} \textit{Id.}.
\textsuperscript{115} \textit{Id.} at 503.
\textsuperscript{116} \textit{Cook}, 792 F.3d at 1297.
\textsuperscript{117} For example, the plaintiffs took issue with the confidence level of the statistical test (68%). \textit{Trout}, 163 F.Supp. 3d at 503.
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.} at 504 (writing that the Court notes that Plaintiffs’ criticisms of the statistical methods of TVAAS are not unfounded.)
\textsuperscript{120} \textit{Id.} at 504–05. The court wrote that while “[p]laintiffs bemoan the statistical imprecision of TVAAS,” no legal authority “support[s] the proposition that the United States Constitution requires legislative decision making regarding the use of statistics to require ‘statistically significant’ results. Absent controlling authority to the contrary, this Court refuses to extend the rational basis test this far—where no suspect class or fundamental right is at issue, the Constitution requires a rational basis, not a statistically significant basis, for the law in question.” \textit{Id.}
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3. Wagner v. Haslam

Another set of teachers in Tennessee challenged the use of VAMs in Wagner v. Haslam.121 Pursuant to state and district evaluation policies, teachers of non-tested subjects were evaluated based on school wide data of student performance on test subjects.122 Similar to Cook v. Bennett, the teachers claimed that this practice violated the substantive Due Process and Equal Protection clauses of the U.S. Constitution.123

The federal court, however, echoing the decisions of other federal courts assessing similar claims, rejected the teachers’ arguments. With respect to the substantive due process claim, the court enumerated several reasons why the policies at issue passed constitutional muster. It noted that “the State Board could rationally believe that a school-wide score provides some measure (albeit a crude one) of evaluating an individual teacher’s performance.”124 The court also added that the legislature had continued to amend its teacher evaluation laws to address some of the concerns raised by the plaintiffs.125

While the Wagner court concluded that the use of VAMs was constitutional, it expressed concerns over fairness similar to those found in Cook and Trout. Indeed, the Wagner court wrote that although the current evaluation processes may produce “unfair results” for certain teachers, it did not rise to the level of being irrational.126 At the same time, the court was explicit about its use of judicial restraint, especially with respect to education policy questions. Indeed, subject to limited

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121 112 F. Supp. 3d 673 (M.D. Tenn. 2015).
122 Id.
123 See Cook, 792 F.3d at 1297.
124 Wagner, 112 F. Supp. 3d at 694 (emphasis added).
125 Id.
126 Id. at 695.
exceptions, the states have “unfettered” discretion to regulate education, and state legislators can make both “excellent decisions and terrible decisions,” so long as there is some “modicum of rationality.” Put another way, a court may disagree with the policy choice of a governing body, but it is not the role of the courts to second-guess policy judgments of elected officials.

4. Matter of Lederman v. King

The one extant case that succeeded in demonstrating the government’s use of VAMs rose to the high bar of arbitrary and capricious is found in Matter of Lederman v. King. In this case, a well-regarded veteran teacher who had previously had positive evaluations received an “ineffective” review under New York’s new evaluation system. This new system required the use of VAMs. The teacher, Sheryl Lederman, submitted “overwhelming” and ample evidence from experts in the field that the court concluded satisfied her burden in the record before the court.

In contrast, the court noted that state defendants left numerous statistical issues unaddressed, including the potential VAM biases against teachers with high-

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127 Some exceptions, of course, would include the use of race to segregate schools. See generally Brown v. Bd. of Educ., 373 U.S. 483 (1954).
128 Id. at 692.
129 Id. at 693.
130 But see PAIGE, supra note 9 (arguing that for scholars of educational policy the appropriate question is determining which institutions—courts, legislatures, or markets—have the capacity to best address a particular policy need in education, like teacher evaluation).
132 Id. at 888.
133 Id. at 897–98.
performing students.\textsuperscript{134} Critically, how Mrs. Lederman’s scores swung so wildly from the second-highest level of effective all the way to the lowest level of ineffective in a single year with statistically similar scoring students, among others.\textsuperscript{135} In sum, the court was constrained to the record before it and, on that evidence, found Ms. Lederman satisfied her burden.\textsuperscript{136}

B. Legislative State Agency Authority Questioned

Litigants have also challenged the use of VAMs in teacher evaluation on jurisdictional grounds. In these cases, organizations (typically unions) have argued that a legislative or executive agency exceeded their respective authority in requiring VAMs for purposes of evaluation or high-stakes employment decisions. These cases are discussed below.

1. \textit{Leff v. Clark County School District}

At issue in \textit{Leff v. Clark County School District} was the constitutionality of changes made to state laws governing teacher evaluation and post-probationary (or continuing contract) status.\textsuperscript{137} By way of background, up until 2011, a teacher who completed a probationary period of employment (three years) and was subsequently rehired by a school district received post-probationary status.\textsuperscript{138} Post-probationary status conferred to a teacher certain procedural protections should they face termination and required that termination be “for

\begin{footnotesize}
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 898.
\textsuperscript{138} Id. at 1245.
\end{footnotesize}
cause.” In contrast, probationary teachers could be non-renewed without cause and did not have similar procedural protections.

In 2011, the Nevada legislature changed its teacher evaluation and post-probationary statutes. In particular, it required that VAMs be used as part of teacher evaluations. The legislature also required that if a post-probationary teacher achieved two negative evaluations, they would revert back to probationary teacher status. Put another way, a teacher could lose the protections (e.g., a teacher’s termination could only be for “cause”) because of the changes to the state statutes.

Teachers contested the changes based on the federal Constitution’s Contracts Clause. That clause, in relevant part, reads as follows: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” In essence, the post-probationary teachers claimed that they had a binding contract with the state once they achieved post-probationary status. In exchange for meeting the demands of satisfactory performance, the state had agreed to give them procedural protections and the only grounds for termination were cause. By passing the 2011 amendment that tied teacher contract status to teacher evaluations (that incorporated VAMs), the state breached the contract, something not permitted under the U.S. Constitution.

The federal court declined to adopt the teachers’ position and held that the statute prior to 2011 did not create a contractual obligation between the state and teachers. In its analysis, the court determined that there is a strong presumption in law against the idea that a

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139 Id.
140 Id.
141 Id. at 1244.
142 U.S. CONST. art. I, § 10.
legislative action creates a private contract.\textsuperscript{143} Absent any expression of the legislature that they were creating a contract, it is generally assumed that typical legislative activity simply reflects a policy determination that can be changed.\textsuperscript{144} Accordingly, the teachers’ claim that the state legislature exceeded its authority with the statutory amendments failed.

\textbf{2. Stapleton v. Skandera}

In \textit{Stapleton v. Skandera}, teachers challenged the use of VAMs in teacher evaluation on several jurisdictional grounds related to statutory and agency authority.\textsuperscript{145} By way of brief background, the New Mexico legislature attempted—but failed—to make several amendments to its existing teacher evaluation laws in 2012. Notwithstanding this, the New Mexico Department of Education Secretary (through the Department) promulgated new regulations relative to the evaluation of teachers.\textsuperscript{146} The teachers sought judicial relief in that the court would suspend the use of the regulations.\textsuperscript{147}

The teachers argued that the Secretary exceeded her authority—that, in effect, she acted in a legislative capacity. They raised particular objection to the incorporation of VAMs in teacher evaluation, arguing that such a move could only be done by way of legislative action because it represented a shift in public policy under exclusive legislative purview.\textsuperscript{148} However, the New Mexico Court of Appeals sided with the Department on

\begin{footnotesize}
\begin{tabular}{l}
\textsuperscript{144} \textit{Id}.
\textsuperscript{145} \textit{Stapleton v. Skandera}, 346 P.3d 1191, 1194 (N.M. App. 2015).
\textsuperscript{146} \textit{Id}. at 1193 (citing N.M. CODE R. § 6.69.8).
\textsuperscript{147} \textit{Id}.
\textsuperscript{148} \textit{Id}. at 1194.
\end{tabular}
\end{footnotesize}
this issue. It noted that the enabling statute required only that the Department enact evaluation regulations that were “uniform statewide” and “highly objective.” Accordingly, the legislature left the Secretary “broad authority” to enact regulations reflecting these requirements and, in the view of the court, including VAMs in teacher evaluation protocol did not exceed her authority.

The teachers in Stapleton raised other claims related to agency authority. In particular, they raised two additional objections. They contended the new departmental regulations permitted “assistant principals” to observe teachers which violated the state evaluation law that only gave such authority to “principals.” Similarly, they argued that the provisions in the regulations that exempted charter schools from coverage of the evaluations violated the state law requirement that the Department enact a system of “uniform” evaluation.

The court of appeals rejected both of the arguments. With respect to the first claim (that only principals could observe teachers), the court read the state statute as allowing others to observe teachers, including assistant principals. The court wrote, “We agree with the district court that the regulation does not necessarily conflict with the statute because the statute ‘mandates the participation of school principals [but] does not limit the persons who may [also] observe [teachers].’” Regarding the claim that the regulations inappropriately exempted charter schools, the state court of appeals noted that the state Charter School Act specifically allowed the Department to waive certain

149 Id. at 1195 (citing N.M. STAT. ANN. § 22-10A-19(A) (1978)).
150 Id.
151 Id. at 1196.
152 Id.
153 Id. (alterations in original).
regulations normally applicable to public schools.\textsuperscript{154} Because the teachers could not cite to any other legal authority that suggested the waiver was not permitted under the Charter School Act, this theory was also rejected.\textsuperscript{155}

3. \textit{Louisiana Federation of Teachers v. State}

In \textit{Louisiana Federation of Teachers v. State}, a teacher’s union challenged Louisiana’s enactment, amendment, and repeal of multiple state laws related to public education, including those related to teacher evaluation requirements.\textsuperscript{156} During the 2012 legislative sessions, the state legislature amended and re-enacted nine different statutes, enacted two new distinct statutes, and repealed twenty-eight statutes all related to education.\textsuperscript{157}

The plaintiffs alleged that these actions, which all occurred through one legislative act, violated the state constitution’s “single object” requirement.\textsuperscript{158} That requirement stipulates that the legislature enacts bills that have “one object” and that various pieces of a bill must have a relationship to one another.\textsuperscript{159} The teachers argued that the bill contained unrelated subjects, such as the changes to teacher evaluation, reduction in force issues, rules governing contracts with superintendents, among others.\textsuperscript{160}

Louisiana’s supreme court rejected the plaintiffs’ arguments.\textsuperscript{161} The court began its assessment by noting

\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 1196–97.
\textsuperscript{156} \textit{La. Fed’n of Teachers v. State}, 171 So. 3d 835, 841 (La. 2014).
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 838.
\textsuperscript{159} \textit{Id.} at 841.
\textsuperscript{160} \textit{Id.} at 842.
\textsuperscript{161} \textit{Id.} at 851.
that there is a general presumption that a legislature’s acts satisfy the “one object” rule. 162 It also noted that the purpose of the rule was to prevent “logrolling,” or the practice of packaging many measures into one bill because any of those measures, alone, would not pass the legislature. 163 The court noted that under such a “grave and palpable” scenario, the legislature would violate the single object rule. 164 Yet, in this case, the court concluded that the object of the act at issue “is improving elementary and secondary education through tenure reform and performance standards based on effectiveness.” 165 The court concluded that various components of that bill could be broadly related to this objective. 166

4. Robinson v. Stewart

Another Florida case, Robinson v. Stewart, 167 also involved a challenge to the authority of the state Board of Education to implement teacher evaluation regulations using VAMs. 168 In Robinson, the plaintiffs sought to declare the 2011 Student Success Act unconstitutional on the grounds that it impermissibly delegated legislative control over public education to the executive branch. 169 The act revised teacher evaluation procedures and required the use of “student learning growth measures” (or VAMs) to evaluate teachers and make significant employment decisions, such as tenure. 170 The act left it to the Department of Education

162 Id. at 845.
163 Id. at 845–46.
164 Id. at 851.
165 Id. at 850.
166 Id.
168 Id. at 590–91.
169 Id.
170 Id. at 591.
Commissioner (the executive branch) to develop the formula to achieve these goals and required the use of standardized test scores. The Florida District Court of Appeals rejected the plaintiffs’ argument that the legislature, in requiring the Commissioner to develop the formula, violated the non-delegability doctrine of the state constitution that ensures a separation of powers. Its analysis noted that the plaintiffs carried a high burden of proof: that the legislature’s action violated the doctrine “beyond a reasonable doubt,” the highest standard of proof under the law. The court further interpreted the act as simply requiring the Commissioner to provide technical implementation support, as opposed to allowing the executive to make policy determinations.

5. Filed but not Adjudicated

Another case that deserves some attention as it also related to a claim that a state agency exceeded its authority by incorporating VAMs in evaluating teachers. In Texas Teachers Association v. Texas Education Agency, the Texas Department of Education adopted teacher

\[\text{171 Id.}\]
\[\text{172 Id. at 592.}\]
\[\text{173 Id. at 590–91.}\]
\[\text{174 Id. at 591.}\]
\[\text{175 Id. at 592. But see id. at 597 (Benton, J., dissenting) (noting that the legislature “has conferred on the State Board of Education power to designate some of them—perhaps nearly all of them—professionally ‘unsatisfactory,’ and therefore, among other things, subject to being laid off, for reasons that are so unclear and indefinite that the Legislature has abandoned its responsibility to set public policy in this important area, and delegated legislative authority it should have exercised itself to the State Board of Education, an executive branch agency.”)}\]
evaluation regulations requiring the use of VAMs.\textsuperscript{176} Numerous plaintiffs, including teachers’ unions, sought to enjoin the use of VAMs on the grounds that the regulations exceeded the power vested in the state Department of Education.\textsuperscript{177} The case settled and the state ultimately agreed to eliminate the required use of VAMs in teacher evaluation regulations.\textsuperscript{178}

In \textit{New Mexico ex rel Stewart v. New Mexico Public Education Department}, a group of plaintiffs consisting of legislators, unions, and teachers filed a complaint on the grounds that the state Department of Education improperly infringed other state laws when it promulgated its teacher evaluation regulations.\textsuperscript{179} Plaintiffs argued that the School Personnel Act provides for the processes associated with teacher evaluation and termination.\textsuperscript{180}

Similarly, plaintiffs allege that the Department’s regulation conflicts with New Mexico’s Public


\textsuperscript{177} Id.


\textsuperscript{180} See e.g., N.M. STAT. ANN. § 22-10A-19(D) (2010) (providing that evaluations should be determined in part by how well professional development was carried out).}
Employment Bargaining Law (the state’s enabling collective bargaining statute) that governs “the terms and conditions of employment.” More specifically, that law provides that local school districts must negotiate terms and conditions of employment with the representative union. The case is pending with various motions before the court.

C. Process & “Fundamental Fairness” Cases

1. Houston Federation of Teachers

A group of Houston teachers sought declaratory and injunctive relief in the case of Houston Federation of Teachers v. Houston Independent School District. At issue for the court was the constitutional protections afforded teachers in the instance where the Houston public school districts used VAMs to rate and make employment decisions for its teachers. The Houston Independent School District (HISD) had contracted with a third-party vendor who had created certain algorithms to classify and rate teachers based on their students’ test performance. This third party vendor, citing trade secrecy, refused to reveal the algorithms when they were requested for review by the teachers. Therefore, teachers who faced adverse employment consequences

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182 See generally N.M. STAT. ANN. § 10-7E-17 (New Mexico’s Public Employment Labor Relations Statute).
185 Id. at 1171.
186 Id.
187 Id. at 1172.
could not review the underlying formulas that contributed to these decisions.\textsuperscript{188}

The teachers claimed that the use of the value added models constituted violation of the substantive and procedural due process clauses of the Constitution.\textsuperscript{189} Repeating a line of reasoning in \textit{Cook v. Bennett}, and other cases, the federal district court ruled that the district’s use of VAMs did not amount to a substantive due process violation.\textsuperscript{190} The court concluded the following: “Even accepting plaintiffs’ criticisms at face value, the loose constitutional standard of rationality allows governments to use blunt tools which may produce only marginal results. HISD’s motion for summary judgment on this substantive due process claim is granted.”\textsuperscript{191}

Yet the court found in favor of the plaintiffs’ procedural due process claims.\textsuperscript{192} The court’s analysis is instructive because it relied heavily on procedural due process as ensuring fundamental fairness.\textsuperscript{193} The court wrote:

“[The] purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, \textit{as well as to minimize the risk of mistaken deprivations of protected interests.”} \textsuperscript{194} In short, due process is designed to foster government decision-making that is both fair and accurate.\textsuperscript{194}

\textsuperscript{188} \textit{Id.} at 1172–73.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 1181–82.
\textsuperscript{191} \textit{Id.} at 1182.
\textsuperscript{192} \textit{Id.} at 1180.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} at 1176 (alteration in original) (quoting Carey v. Piphus, 435 U.S. 247, 262 (1978)).
The court then listed the factors required for procedural due process to be satisfied in the case of a teacher termination in Texas. Of particular note was that a teacher facing termination must “be advised of the cause for his termination in sufficient detail so as to enable him to show any error that may exist.”

Teachers contended—and the court agreed—that they were not being afforded due process protections because the school district violated the requirement that afforded a teacher “sufficient detail” to show that there may be an error in the government’s decision. Because the district’s third party vendor would not release the underlying formulas, teachers could not possibly assess the accuracy of the district’s value-added rating.

The court listed numerous potential errors that could be revealed if inspection of the formulas was permitted. As the court stated: “The [] score “might be erroneously calculated for any number of reasons, ranging from data-entry mistakes to glitches in the computer code itself... HISD has acknowledged that mistakes can occur in calculating a teacher’s EVAAS score....” The court was troubled by the district’s stipulation that it could not correct a single teacher’s score, even if an error was found, because correcting one score would alter the results of all other teachers.

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195 Id.

196 Id. The court also noted that a teacher facing termination must be afforded: “the names and testimony of the witnesses against him; [] a meaningful opportunity to be heard in his own defense within a reasonable time; [] and a hearing before a tribunal that possesses some academic expertise and an apparent impartiality toward the charges.” Id. (citing Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

197 Id. at 1176–77 (citing Levitt v. Univ. of Tex. at El Paso, 759 F.2d 1224, 1228 (5th Cir. 1985)).

198 Id.

199 Id. at 1177.

200 Id.

201 Id. at 1178.
Indeed, it is worth recalling that value added scores are comparative in nature, assessing one teacher against others.\(^{202}\) This means that, if one teacher’s score is adjusted for an error, it alters all others.\(^{203}\) The court characterized the underlying foundation of the VAM ratings as built upon a “house of cards.”\(^{204}\) Accordingly, it denied the school district’s summary judgment claim with respect to procedural due process.\(^{205}\)

2. Washington Teachers’ Union v. D.C. Public Schools

The collective bargaining forum has also been another forum wherein teachers have successfully appealed the use of VAMs in teacher evaluations. By way of background, collective bargaining agreements (CBAs) provide for a process (grievance arbitration), to redress violations of the contract. This arbitration process can be important, especially when a contract calls for certain specifications concerning how teacher evaluations can be conducted. Indeed, districts’ decisions to non-renew or terminate a teacher for performance have been called into question because a district fails to follow contractually mandated processes.\(^{206}\) With some limited

\(^{202}\) Id. at 1172.
\(^{203}\) Id. at 1177.
\(^{204}\) Id. at 1178.
\(^{205}\) Id. at 1180. To be sure, procedural due process claims made in Wagner v. Haslam, see supra notes 121129 and accompanying discussion, did not survive. However, at issue in that case was whether the teachers’ bonuses could be linked to their VAM scores. Wagner v. Haslam, 112 F. Supp. 3d 673, 688 (M.D. Tenn. 2015). In that context, the court concluded that bonuses were not a property interest sufficient to trigger due process protections. Id. at 698.
\(^{206}\) See, e.g., Dennis Yarmouth Teachers v. Dennis Yarmouth Reg’l Sch. Dist, 360 N.E.3d 883, 884–885 (1977) (reversing a school district’s decision to non-renew a probationary teacher

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exceptions, scholarship has omitted consideration of the value and importance of collective bargaining agreements in relation to legal challenges to the use of VAMs in teacher evaluations.207

Cases emerging from Washington, D.C., illustrate this theme. In Washington, a teacher’s union grieved the public district’s performance ratings based on VAMs of hundreds of teachers. As an initial matter, the school district challenged whether the issue could, in fact, be subject to the grievance arbitration procedures in the contract. Indeed, as a general matter, disputes are subject to the grievance process only if both parties agreed to arbitrate the dispute under the CBA.208

In Washington Teachers’ Union, a lower court had concluded that the district’s final evaluation decisions made under the evaluation systems were not arbitrable but the district’s use of evaluation procedures under the collective bargaining was, in fact, arbitrable.209 Put another way, the parties did not, under the CBA, agree to arbitrate disputes over the judgment of the teachers’ final performance, but they did agree to arbitrate whether or not the evaluation procedures outlined were

because school district violated terms of the collective bargaining agreement that specified evaluation processes).

207 But see PAIGE, supra note 9, at 63–73 (arguing the use of VAMs is susceptible to the grievance arbitration process and the failures of VAMs to accurately assess teacher effectiveness could be remedied through the collective bargaining process.); see also Mark A. Paige, Applying the Paradox Theory: A Law and Policy Analysis of Collective Bargaining Rights and Teacher Evaluation Reform From Selected States, 2013 BYU Educ. & L.J. 21, 41–42 (highlighting the benefits of a more collaborative collective bargaining process understood as “interest-based” bargaining particularly with respect to teacher evaluation).


209 Id. at 444.
followed. On appeal, the District of Columbia Court of Appeals upheld the decision that the district’s final judgments were not arbitrable. However, the school district did not challenge the lower court’s determination that the issue of whether the district followed evaluation procedures was subject to evaluation.

In at least one other well-publicized case, the Washington Teachers’ Union succeeded in frustrating the D.C. Public Schools use of the IMPACT evaluation system. In this case, the union alleged that the school district violated various evaluation procedures when they terminated a seventeen year veteran teacher, Thomas O’Rourke, under the district’s evaluation procedures. As noted above, the controlling courts in the District of Columbia have concluded that “process arguments” under the collective bargaining agreement are arbitrable, although the school district’s final judgment with respect to evaluation categorization (e.g., ineffective, satisfactory, etc.) is not.

In the District of Columbia Public Schools matter, the arbitrator found that the district violated evaluation procedures governing the length of observation visits, which, according to the contract, should be “at least 30 minutes.” In this case, the administrators evaluating the teacher exceeded that length by substantial amounts (e.g., observations lasted 80 minutes), which, in the eyes of the arbitrator, amounted to a procedural violation of evaluation processes. Importantly, the arbitrator noted

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210 *Id.*

211 *Id.*


213 *D.C. Pub. Schs.*, AAA No. 16-20-1300-0499 AVH.

214 *Id.* at 26–28.

215 *Id.* at 18.

[568]
two other significant factual findings to his decision. He concluded that the administrator evaluating the teacher had a reputation of using the observation system to penalize teachers “he did not like.” A school district administrator, as well, testified that an observation that exceeded or did not meet the thirty minute threshold would amount to a process violation. In sum, and under these circumstances, therefore, procedural violations could be seen as simply pretext for terminating a teacher.

In arbitration cases, the remedy for a bargaining violation can be a contested issue. In Washington, D.C., an arbitrator cannot issue a remedy in the form of recategorizing a teacher’s evaluation from ineffective to effective. Reinstatement and back pay, however, are typical arbitration remedies, and these were, in fact, used in the case.

IV. Current Policy Landscape in Wake of ESSA

This section discusses the current policy landscape following the reauthorization of the Elementary and Secondary Education Act of 1965 by Congressional passage of the Every Student Succeeds Act (ESSA) of 2015. It illustrates that the ESSA reauthorization allowed for more state-level flexibility with regards to VAM use. It then highlights how the new policies have essentially shifted the emphasis from VAMs

216 Id. at 19.
217 Id. at 7.
218 Id. at 19.
220 See e.g., DISCIPLINE AND DISCHARGE IN ARBITRATION ch. 13.I.A. (Norman Brand & Melissa Birens, eds., 3d ed.) (noting that back-pay and reinstatement are two essential remedies for making an employee whole).
in high stakes decision making to, perhaps, other ways of measurement.

A. ESSA Reauthorization

In 2015, Congress passed a reauthorization of the Elementary and Secondary Education Act under a new name, the Every Student Succeeds Act.\textsuperscript{221} In general, ESSA reduced some federal mandates and incentives tied to accountability system effectively limiting some of the federal control promoted by RttT and other waiver requirements.\textsuperscript{222} Specifically, ESSA allowed state departments of education two main changes: (a) ESSA gave state departments leniency to interpret key terms like, “including, as a significant factor, data on student growth for all students,” and (b) ESSA gave state departments more control to determine state goals and measures for success with a federal framework.\textsuperscript{223} Put simply, ESSA allowed more flexibility.

To break down the policy changes further, the first main change, allowing states to interpret “data on student growth” differently, allowed state departments of education to step back from the statistically-based measures of student growth such as VAMs. ESSA allowed states to use some measures which could include qualitative measures as data showing student growth, such as student learning objectives (SLOs), which are objectives for the growth of students developed at the beginning of the year by teachers (sometimes in conjunction with others).\textsuperscript{224} SLOs still rely on evidence which can still include VAM scores, but the evidence can also include course

\textsuperscript{224} CLOSE ET AL., supra note 35, at 18.
exams, performance demonstrations, and other types of evidence. In short, ESSA allowed states to incorporate more nuanced and qualitative measures of student growth without removing the requirement that states must use evidence of student growth. The distinction is small but significant. It signals a redefinition of “data” to include information beyond large standardized testing (although, importantly, it can still include these test scores).

The second main change, allowing states to set their own goals and measures for success, marks a backing away from the strict adequate yearly progress (AYP) goals established by NCLB. Although states still must meet AYP for certain subgroups of students, the consequences and the interventions that must be imposed can be decided by the states themselves. Essentially, ESSA removes the punitive bite demonstrated previously by NCLB, the bite that encouraged many states to apply for waivers and adopt VAMs in the first place, and replaces it with flexibility. States choose their own bite now. The standards remain, but the consequence, the type of intervention required for a failure to meet AYP, is decided by state departments of education.

These two changes, though small, rolled back some of the features that encouraged, or forced, states to use large standardized statewide systems that leaned on VAM results to measure teacher achievement.225 The new policy meant states did not need to create large-scale comparable data about teacher achievement. States no longer needed to structure their systems top-down and could allow for more bottom-up control, essentially handing more control to local educational authorities such as school districts. ESSA marked a shift of power. The federal government loosened reigns on state

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departments of education, who, in turn, had the freedom to deviate from establishing one-size-fits-all teacher evaluation systems across their state, handing more of the power to make decisions to local educational authorities, such as districts.

B. State Plans

Though ESSA allowed for many of the changes stated above, it did not require or guarantee these changes. The work of exercising the flexibility was for the states, not the federal government. Hence, this section on state plans reveals how state teacher evaluation plans changed as a whole after the passage of ESSA through state legislative and regulatory action. The changes, as expected, trend toward less use of VAMs in high-stakes decision making, though the trend is somewhat muted.

In general, less states are currently using growth models or VAMs for teacher evaluation. The percentage dropped from 42% in 2014 to 30% in 2018. However, that percentage drop fails to highlight the magnitude of change. The study showing that the percentage decreased measured whether some states currently use or, importantly, endorse statewide use of VAMs. Some of these states endorse VAMs but allow for local educational authorities to avoid VAMs completely. For example, Maine, encourages the use of VAMs, but offers two models from which local education authorities can choose, one of which measures student growth with SLOs, not VAMs. In this case, VAMs play a role in the state’s teacher evaluation process, but, ultimately, the choice is made locally. This represents a major departure from the trend of heavy-handed state teacher evaluation systems before the passage of ESSA.

Additionally, some states have maintained their VAMs but use them in novel ways. North Carolina still

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226 Close et al., supra note 35, at 12.
227 Id. at 13.
uses a VAM, called EVAAS, which featured heavily in many of the lawsuits.\footnote{228}{See Hewitt, supra note 61, at 32.} However, the state does not use the results to make high-stakes decisions. Rather, North Carolina uses and reports the scores to foster professional development.\footnote{229}{CLOSE ET AL., supra note 35, at 14.} In other words, the state does not shy from using VAM data as a part of their system, but they do shy from using VAMs for consequential decisions such as tenure decisions and others.

Additionally, and of note, recent state plans demonstrate increased focus on formative feedback practices compared to state plans collected in 2012, with 31 of 51 education plans stating that their evaluation systems use formative data.\footnote{230}{Id.} This shift indicates a significant change in the stated values present in this new set of state documents.

V. Conclusions

Quite apart from what education scholars and policymakers believe with respect to the merits of added models, all would likely agree that their introduction has had significant consequences. Of course, there is widespread disagreement with respect to how these statistical models should be used. Teachers and unions seeking to block the use of VAMs in high-stakes employment decisions have sought judicial relief with mixed success. That said, while courts may uphold the use of VAMs under a rational basis test, they are suspect about the wisdom of using VAMs to make significant decisions with respect to teacher employment status.

But that does not mean that VAMs should be relegated to the dustbin of educational policy history. They may have important contributions to improving teacher quality. They may be important “flags” for

\footnote{228}{See Hewitt, supra note 61, at 32.}
\footnote{229}{CLOSE ET AL., supra note 35, at 14.}
\footnote{230}{Id.}
teachers, alerting them to investigate their practice a bit further. VAMs may, someday, play an important role in helping teachers.

Importantly, however, the use of VAMs must be judicious, especially in light of their severe limitations. VAMs cannot tell a teacher what causes a particular result (the type of robust and actionable feedback a teacher would want) and they are highly sensitive to demographics and variables outside of a teacher’s control. Yet, because VAMs were incorporated in high-stakes decisions with such haste, especially with the impetus of the Race to the Top, they were brought to scale, warts and all.

Thankfully, states have a rare opportunity in educational policy to take a bit more control over their destiny under the Every Student Succeeds Act. They can—and are—placing VAMs as a piece of a puzzle to solve teacher quality issues. Many are beginning to adopt laws and policies that minimize or eliminate their use in high-stakes employment. That is a step in the right direction, one that recognizes a relative value to VAMs in the larger quest to improve public education.