Same Crime, Different Time: Sentencing Disparities in the Deep South & A Path Forward Under the Fourteenth Amendment

*Hailey M. Donovan**

To Prisoners

I call for you cultivation of strength in the dark.
Dark gardening
in the vertigo cold.
in the hot paralysis.
Under the wolves and coyotes of particular silences.
Where it is dry.
Where it is dry.
I call for you
cultivation of victory Over
long blows that you want to give and blows you are
going to get.

Over
what wants to crumble you down, to sicken
you. I call for you
cultivation of strength to heal and enhance
in the non-cheering dark,
in the many many mornings-after;
in the chalk and choke.

—Gwendolyn Brooks[1]

Here is a land that never gave a damn
About a brother like me and myself
Because they never did

—Public Enemy[2]

* Hailey Miranda Donovan, Seattle University School of Law, Class of 2024.

1. GWENDOLYN BROOKS, *To Prisoners*, *in* TO DISEMBARK 45 (Third World Press, 1981).
2. PUBLIC ENEMY, BLACK STEEL IN THE HOUR OF CHAOS (Def Jam Recordings 1988).

CONTENTS

INTRODUCTION

The United States has the highest incarceration rate of any country in the world.[3] The American obsession with crime and punishment can be tracked over the last half-century, as the nation's incarceration rate has risen astronomically. Since 1970, the number of incarcerated people in the United States has increased more than sevenfold to over 2.3 million, outpacing both crime and population growth considerably.[4] While the rise itself is undoubtedly bleak, a more troubling truth lies just below the surface. Not all states contribute equally to American mass incarceration.[5]

Rather, states have vastly different incarceration rates.[6] Unlike at the federal level, where courts are bound by uniform sentencing guidelines, state courts have no such mandatory measures in place; this allows for states to implement sentencing systems and criminal codes that are entirely independent of other states' procedures nationwide.[7] Data published on

3. Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (Aug. 10, 2012), https://www.prb.org/resources/u-s-has-worlds-highest-incarceration-rate/ [https://perma.cc/7XAV-7KWW].

4. AM. C.L. UNION, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES: SUBMISSION TO THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS 1 (2015), https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf [https://perma.cc/KGZ6-VFM7].

5. *See generally* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/D7R7-RCUG].

6. *Id.*

7. For a detailed analysis of the Federal Courts' Uniform Sentencing Guidelines, see generally U.S. SENT'G COMM'N, INTRA-CITY DIFFERENCES IN FEDERAL SENTENCING PRACTICES: FEDERAL DISTRICT JUDGES IN 30 CITIES, 2005–2017 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190108_Intra-City-Report.pdf [https://perma.cc/6CH3-D9DF] [hereinafter, U.S. SENTENCING COMMISSION REPORT] (analyzing

states' laws concerning criminal punishment shows that legislatures have adopted widely varying statutory approaches to both defining and determining criminal sentencing.[8] One focus of this Note is to elucidate the varying state legislative approaches that result in arbitrary sentencing of the same crimes under similar circumstances, and by similar individuals, even amongst states that border one another.[9] This Note further focuses on how this problem extends to the states' judiciaries, given the data showing that state judges are afforded high levels of autonomy in determining sentencing.[10] This self-governing judicial framework allows for deviations from state sentencing guidelines, which proves to be highly problematic in regions of the U.S., such as the Deep South, that are statistically proven to employ much harsher criminal sentences than other regions.[11] Deep South states' deviation from sentencing system guidelines contributes heavily to the overall rise in mass incarceration across the United States when looking at the national average.[12]

This Note first explores the Deep South's contribution to mass incarceration in the United States, specifically, the national average. To accomplish this end, this Note provides an in-depth analysis of state prison

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findings of Sentencing Commission's study—encompassing more than 140,000 cases, over thirteen years, and across thirty U.S. cities—finding that the length of a defendant's sentence could vary up to 63% depending on the judge). *See also* Jamiles Lartey, *US Prison Sentences Could Vary by up to 63% Depending on Judge*, GUARDIAN (Jan. 10, 2019) (citing U.S. SENTENCING COMMISSION REPORT, *supra*), https://www.theguardian.com/law/2019/jan/10/prison-sentence-discrepancy-judge-courts [https://perma.cc/YCS8-NL47] ("[T]he fact that a prison sentence could vary by years or even decades on what is essentially the flip of a coin, is difficult to square with a legal system that aspires to be 'blind' and offer 'equal protection.'").

8. ALISON LAWRENCE, NAT'L CONF. OF STATE LEGISLATURES, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 1, 3–5 (June 2015), https://leg.mt.gov/content/Committees/Interim/2015-2016/Sentencing/Committee-Topics/Study-Resources/ncsl-pew-july-2015-sentencing.pdf [https://perma.cc/9NLU-VM99] ("While each state's system is unique, they share common objectives. . . . Effective sentencing systems strive for fairness, consistency, certainty and opportunity.").

9. Avoiding arbitrariness is foundational to legal theory, and is often summarized in the maxim, "like cases should be treated alike." For an in-depth analysis of this theory and its criticisms, see Benjamin Johnson & Richard Jordan, Why Should Like Cases Be Decided Alike? A Formal Model of Aristotelian Justice 1–2 (Mar. 1, 2017) (unpublished manuscript), https://scholar.princeton.edu/sites/default/files/benjohnson/files/like_cases.pdf [https://perma.cc/N5TP-CBR8].

10. *See* U.S. SENTENCING COMMISSION REPORT, *supra* note 7.

11. S. POVERTY L. CTR., LONG ROAD TO NOWHERE: HOW SOUTHERN STATES STRUGGLE WITH LONG-TERM INCARCERATION 5 (2021), https://www.splcactionfund.org/sites/default/files/Long-Road-to-Nowhere.pdf [https://perma.cc/M89P-KCSF] [hereinafter LONG ROAD TO NOWHERE]. This Note's Author refers to the following states as "Deep South" states: Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. *See infra* note 22.

12. ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 6 (May 3, 2017), https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf [https://perma.cc/A6XC-Y98U] (citing data on Louisiana, where one in three state prisoners are serving either life or "virtual life" sentences; similarly, in Alabama, one in four).

incarceration data collected, synthesized, and analyzed by this Note's author. Next, this Note discusses how the variation in criminal sentencing between states contributes to "geographic discrimination"[13] and how such discrimination threatens individuals' rights to equal protection under the Fourteenth Amendment.[14] This Note then provides a modern take on possible solutions provided by the Fourteenth Amendment whereby individuals may challenge disparate sentencing in the Deep South on the basis that such disparities are a form of geographic discrimination that fails the Rational Basis Test.[15]

Conversely, it is important to highlight a topic that this Note does not discuss at great length but is fundamental to understanding the problem of mass incarceration in the U.S.: racial discrimination. It is essentially impossible to disentangle discussions of mass incarceration in the Deep South from discussions about racial inequities in the American legal system. The two are so closely intertwined that this Note's scholarly dialog would be deficient without an acknowledgment that mass incarceration in the U.S. is predicated on carceral inequalities. The links between slavery and the carceral state should come as no surprise to the reader, as the bond between the two is quite literally written into the Thirteenth Amendment to the United States Constitution.[16]

Although racial discrimination in the Deep South is not the outright focus of this Note—many other scholars have tackled this subject—it remains an underlying ugly truth that is woven into the conversation throughout. Rather than illuminate an already expansive area of jurisprudence, the Author has sought to address racial disparities in sentencing through an alternative lens—one that might be more palatable to state courts unwilling to reflect honestly about racial inequities in criminal sentencing. That approach is through arguing an alternative method of challenging convictions: not on the basis of racial discrimination, but instead based on geographic discrimination.

If cases like *McCleskey v. Kemp* have taught us anything, it is that courts—even our nation's highest Court—are uncomfortable with and ill-equipped to handle the presentation of data showing disparate treatment of

13. "Geographic discrimination" is a term uniquely coined by the Author for the purposes of this Note. The use of this phrase is not indicative of an existing protected class of individuals recognized by the Court, or by local legislatures discussed herein.

14. U.S. CONST. amend. XIV.

15. Broadly, the Rational Basis Test is a judicial review test that courts employ to determine the constitutionality of a law; this topic will be discussed at length in this Note, in a forthcoming Section.

16. Ratified on December 6, 1865, the Thirteenth Amendment states, "Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (emphasis added).

Black Americans during sentencing.[17] This Note seeks to resolve that discomfort by taking race out of the conversation, at least in part. Consider the possibility of attenuated protests from state court judges in the Deep South presented with data on discriminatory sentencing practices and policies that are predicated not on racial bias but instead on some other more neutral form of discrimination, such as geographic discrimination. This raises the question this Note's Author encourages the reader to grapple with: would courts respond more positively to such appeals?

I. ARBITRARY PRACTICES & THEIR IMPACTS

A. Below the Mason-Dixon, Above the National Average: The Effect of the Deep South on National Incarceration Statistics

The Deep South has long been considered the epicenter of mass incarceration in the United States.[18] To date, a handful of southern states have spearheaded the charge, bolstering unprecedented rates of adult incarceration, lengthy prison sentences, harsh mandatory minimum penalties, and refusal of parole, amongst other factors.[19] Crime and punishment have led to mass incarceration becoming a dominant industry in the Deep South. By 2008, the top five states with the highest adult incarceration rates were in the South: Louisiana led the way, with a staggering one out of every fifty-five residents incarcerated;[20] then Mississippi, Georgia, Texas, and Alabama rounded out the top five.[21]

To begin, this Section explains the extent to which the above-enumerated Deep South states contribute to mass incarceration in the U.S. This explanation centers around an in-depth analysis of data collected by the Author, presenting a comparison between the U.S. average and the analyzed states' totals.[22] This Section further provides explanations for the data provided in the Tables and then details and analyzes the uniquely

17. McCleskey v. Kemp, 481 U.S. 279 (1987). Warren McCleskey, a black man, was sentenced to death for the murder of a white police officer in Georgia; McCleskey appealed his sentence on Equal Protection grounds, relying on a statistical study that showed black defendants who killed a white victim were four times more likely to be sentenced to death than white defendants who killed black victims. *Id.* at 283–87. In a 5-4 majority, the Court ruled against McCleskey and refused to apply the study, holding that no constitutional violation existed because McCleskey could not prove any decision-makers in his case acted with racially discriminatory purpose that resulted in a discriminatory effect against him. *Id.* at 297–98.

18. LONG ROAD TO NOWHERE, *supra* note 12, at 5.

19. *Id.*

20. Desiree Evans, *Doing Time in the South*, FACING S. (March 5, 2009), https://www.facing-south.org/2009/03/doing-time-in-the-south.html [https://perma.cc/4GUC-4F7H].

21. *Id.*

22. The Author's methodologies are described in further detail in the footnotes accompanying the data metrics provided in Tables 1 and 2.

problematic practices of each Deep South state. Finally, this Section provides a broad outlook on the lasting effects of the states' practices on the national incarceration rate and the compelling urgency of this matter.

1. Figures Don't Lie: Deep South & National Mass Incarceration Statistics[23]

Prison Incarceration Rates (Per 100,000 People)[24]

Table 1.1: Prison Incarceration Rates—Including Federal Jurisdiction[25]

Region	Incarceration Rate	Difference to National Average (%)
U.S. Average	355	100%
Alabama	390	109.86%
Florida	377	106.20%
Georgia	435	122.54%
Louisiana	596	167.89%
Mississippi	661	186.20%
Texas	452	127.32%

23. Based on 2022 Census data. State and national data were compiled from two main sources: The Sentencing Project and the U.S. Bureau of Justice Statistics. For a breakdown of state-by-state data, see *U.S. Criminal Justice Data*, SENT'G PROJECT, https://www.sentencingproject.org/research/us-criminal-justice-data/#map?dataset-option=SIR [https://perma.cc/85JR-FT2G] (last visited Jan. 12, 2024) (follow "Download the Data" hyperlink to download full report on state-by-state data and comparisons to national and federal averages); ANN E. CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2022—STATISTICAL TABLES 1, 15–16 (2023), https://bjs.ojp.gov/document/p22st.pdf [https://perma.cc/5N6U-E3KH] (providing additional in-depth information on both 2021 and 2022 statistics; this data additionally serve as the basis upon which The Sentencing Project relies when compiling its statistics).

24. Incarceration rate is defined by this Note's Author as the number of prisoners sentenced to more than one year, in prison, per 100,000 U.S. residents. All tables' metrics include sentences under state jurisdiction. Some tables include federal jurisdiction metrics; please refer to each table's header, individually. It should be noted that the Author's definition of "incarceration rate" has been adapted from the definition of "imprisonment rate" used by the Department of Justice's Bureau of Justice Statistics. *See* CARSON, *supra* note 23, at 2 (referring to source "Terms and Definitions"). Where applicable, decimal values have been rounded to the nearest hundredth.

25. *Id.* at 15–16 (source Table 7).

Table 1.2: States' Incarceration Rates—Not Including Federal Jurisdiction[26]

Region	Incarceration Rate	Difference to National Average (%)
U.S. Average	311	100%
Alabama	390	125.40%
Florida	377	121.22%
Georgia	435	139.87%
Louisiana	596	191.64%
Mississippi	661	212.54%
Texas	452	145.34%

Table 1.3: States' Adult Incarceration Rates[27]**—Not Including Federal Jurisdiction**[28] **(Adult Population Only)**

Region	Incarceration Rate	Difference to National Average (%)
U.S. Average	397	100%
Alabama	500	125.94%
Florida	446	112.34%
Georgia	565	142.32%
Louisiana	775	195.21%
Mississippi	859	216.37%
Texas	601	151.39%

26. *Id.*

27. "Adult incarceration rate" is defined by the Author as the number of prisoners sentenced to more than one year in prison, per 100,000 residents ages 18 or older. Though this term can apply to both state and federal jurisdiction, this Table analyzes only individuals convicted and sentenced under state jurisdiction. It should be noted that the Author's definition of "adult incarceration rate" has been adapted from the definition of "adult imprisonment rate" used by the Department of Justice's Bureau of Justice Statistics. *See id.* at 2 (referring to source "Terms and Definitions").

28. *Id.* at 15–16.

Prison Incarceration Totals[29]

Table 2.1: Prison Incarceration Total—Including Federal Jurisdiction[30]

Region	Incarceration Total	Contribution to Total (%)
U.S. Total	1,185,648	—
Alabama	19,877	1.68%
Florida	84,678	7.14%
Georgia	47,813	4.03%
Louisiana	27,296	2.30%
Mississippi	19,442	1.64%
Texas	137,035	11.56%
States' Sum	336,141	28.35%

Table 2.2: Prison Incarceration Total—Not Including Federal (Adult Population Only)[31]

Region	Incarceration Total	Contribution to Total (%)
U.S. Total	1,039,540	—
Alabama	19,877	1.91%
Florida	84,678	8.15%
Georgia	47,813	4.6%
Louisiana	27,074	2.60%
Mississippi	19,442	1.87%
Texas	137,035	13.18%
States' Sum	335,919	32.31%

2. Decoding the Data

When looking at the data provided above, the reader should consider the following. On the most basic level, the tables above exemplify the malleable nature of statistical data once it is filtered. Table 1.1 represents the largest set of data: people of all ages, including individuals sentenced in state or federal courts. Table 1.2 represents people of all ages, but only those who were convicted and sentenced in state courts. Table 1.3

29. "Incarceration total" is defined by the Author as the total number of individuals sentenced to long-term confinement facilities (prisons) for terms of at least one year.

30. CARSON, *supra* note 23, at 10–11 (source Table 4). It should be noted that federal data includes individuals aged seventeen or younger who are held in privately operated facilities.

31. *Id.*

similarly provides only state jurisdiction data but has additionally been filtered to reflect only the adult population. The same methods are employed in Tables 2.1 and 2.2. One broad takeaway for the reader might be that although the census data remains the same throughout all five Tables, the way the data is filtered has a significant impact on the results. Foundationally, though, the data reflected in these Tables—measuring variations of the incarceration rate and incarceration total—is offered to provide a perspective on how many people are incarcerated nationwide. To best understand what these values mean, it is first necessary to define "people."

Because data can be refined in a variety of ways to reflect a desired subset of the population, it is important to clarify which individuals are represented in the data set.[32] For example, the incarceration rate detailed in Table 1.1—355 out of every 10,000—represents all people in the United States, meaning people of all ages, not just adults. The Author of this Note has opted to give the reader a complete picture of mass incarceration in the U.S. today. Accordingly, Tables 1.1 and 1.2 have been included to provide data on both adult and youth offenders, filtering out only federal jurisdiction in Table 1.2.

However, by including all people accounted for in the U.S. census, even juveniles, the incarceration rate is necessarily skewed downwards because youths are significantly less likely to be incarcerated than adults.[33] It should be noted that the national incarceration rate is significantly higher when filtered to include only adults—453 out of every 100,000 adults, compared to 355 for people of all ages.[34] The same is true of the incarceration rate when federal convictions are filtered out, as indicated by comparing Tables 1.2 and 1.3.

Understanding that no one table gives the full picture of incarceration in the U.S., the Author nonetheless suggests that the reader direct their attention primarily to Tables 1.3 and 2.2. That is because this Note focuses on specific states' contributions to the national mass incarceration crisis, and on potential remedies available to adult citizens. Accordingly, this Note's analysis primarily centers around Table 1.3 for the discussion of incarceration rates and Table 2.2 for the discussion of incarceration totals

32. It is also important to clarify who is *not* encompassed in this data. Notably, the data provided analyzes only individuals who are incarcerated in prisons. Jail data has not been factored into the Author's analysis because it represents a different subset of the population to whom the proposed remedies—discussed later in this Note—might not apply.

33. As of 2021, juveniles made up only 0.02% of the prison population. ZHEN ZENG, ANN CARSON & RICH KLUCKOW, JUST THE STATS: JUVENILES INCARCERATED IN U.S. ADULT JAILS AND PRISONS, 2002–2021 1 (2023) https://bjs.ojp.gov/document/jiusajp0221.pdf [https://perma.cc/K335-6RMH].

34. CARSON, *supra* note 23, at 15 (referencing source Table 7).

because those tables are filtered to show only data pertaining to state jurisdiction amongst the U.S. adult population.

3. Imparting the Importance: Why the National Incarceration Rate Matters

Comparing the national rate to the individual rates of states in the Deep South, it is clear that the Southern states analyzed are skewing the national average. Compared to the overall U.S. prison incarceration rate, Mississippi tops the list, bolstering a rate that is 116% higher than the national average. Louisiana then follows with a rate that is roughly 95% higher; Texas's rate is 51% higher; Georgia's rate is 42% higher. Alabama and Florida fall at the bottom of the analyzed states, with Alabama's rate being nearly 26% higher than the national average, and Florida coming in at roughly 12% above the national average. Thus, every state in the Deep South exceeds the national incarceration rate average by at least double digits. Moreover, as of December 31, 2022, the top two states with the highest imprisonment rates were Mississippi and Louisiana, respectively.[35]

More important, perhaps, than the comparison between each state's individual incarceration rate and the national average is the percentage that each state contributes to that average. Tables 2.1 and 2.2 outline the six states analyzed and compute each state's individual contribution to the national incarceration rate.[36] Notably, the far-right column of Table 2.2 lists the percentage sum of the six Deep South states. That value indicates the six states' contribution percentage to the national total. The data shows that these six states encompass 32.31% of all adult prisoners in state penitentiaries across the U.S. While this metric might not appear facially remarkable, its significance takes form when considering what exactly constitutes that number. At its core, the data shows that six states comprise nearly one-third of the incarcerated individuals in the nation's state prisons. Expressed differently, six states—comprising only 12% of the fifty U.S. states—incarcerate over 32% of the nation's total of individuals in state prisons.

B. Habitual Offender Laws

Arbitrary sentencing is further exacerbated by judges and juries, whose sentencing decisions revolve around statutory schemes that seek

35. *Id.* at 15 (see "Jurisdiction-specific imprisonment rates" text accompanying Table 7).

36. Similar to the analysis for the incarceration rate section, the focus of the incarceration total section will also revolve around data that is filtered for the adult population and state jurisdiction. Because Table 2.2 focuses on the state jurisdictional data of adults, that table is the primary focus of this Section.

purely punitive or retributive results, such as Louisiana's Habitual Offender Statute.[37] The Habitual Offender Statute requires that individuals convicted of two or more felony crimes be subjected to longer and harsher sentences with each subsequent felony conviction.[38] The law is premised upon the idea that individuals with multiple convictions cannot be rehabilitated, and higher incarceration rates make communities safer. This law, like many others enacted in the Deep South, is the product of decades-long bolstering of "tough-on-crime" attitudes that have led to sentencing approaches focused solely on punishment, rather than redemption or rehabilitation.[39]

Yet, research shows enactments of these hard-on-crime tactics often do not have the desired effects and can sometimes lead to devastating unintended consequences. For instance, a study conducted by the U.S. Department of Justice (DOJ) on Alabama's Habitual Felony Offender Act[40] showed that the prospect of Life Without Parole (LWOP)[41] removed all incentive for good behavior; instead of deterring crime, many surveyed individuals voiced concerns that the Act would encourage offenders to kill witnesses to avoid a fourth conviction equating to LWOP.[42] Similar to the issues surrounding Alabama's Habitual Felony Offender Act, Louisiana faces setbacks due to its Habitual Offender Law.[43] Of the two, Louisiana's habitual offender law is notably stricter because it only allows for only two offenses before imposing LWOP: one prior and one current, whereas Alabama's law is a "three-strikes" law. Akin to Louisiana, Mississippi has implemented a habitual offender law that similarly singles out repeat offenders, subjecting them to the same disadvantages intrinsically tied to the

37. LA. STAT. ANN. § 15:529.1 (2019).

38. *Id.*

39. LOUISIANANS FOR PRISON ALTS., REMOVE NONVIOLENT OFFENSES FROM HABITUAL OFFENDER STATUTE (2019), https://uploads-ssl.webflow.com/5a9462f6b010650001b8d7bd/5ca38fafaf774a08c82a1905_CJR_LPA%20Habitual%20Offenders%202019.pdf [https://perma.cc/73MX-YR5F] (arguing that the Habitual Offender Statute provides unbalanced power to prosecutors who can, and often do, use the threat of harsh sentencing to coerce plea agreements, regardless of an individual's guilt).

40. ALA. CODE § 13A-5-9 (2015) (requiring LWOP for a person convicted of a class-A felony after having previously been convicted of any three felonies).

41 Life without parole, or LWOP, is the penultimate penalty in criminal sentencing—second only to the death penalty in terms of severity—and is defined as the incarceration of a convict for the rest of their natural lives, without the possibility of release from prison. *Life without possibility of parole*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/life_without_possibility_of_parole [https://perma.cc/D99K-XWHL] (June, 2020).

42. Dennis L. Peck & Ron Jones, *The High Cost of Alabama's Habitual Felony Offender Act: A Preliminary Assessment*, 29 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 251, 252–53 (1985).

43. LA. STAT. ANN. § 15:529.1 (2019); *see also id.* § 15:571.3(C)(1) (2023) (disallowing for the diminution of an inmate's sentence if they have been deemed a "habitual offender").

habitual offense laws.[44] Repeat offenders are often maligned despite many not being violent offenders, making it one of the harshest habitual offender laws in the nation. For example, the Mississippi Criminal Code authorizes the sentencing of habitual criminals to "maximum term[s] of imprisonment,"[45] including life imprisonment after committing two felony offenses and other archaic criminal punishment enhancements.[46] Specifically, this portion of the Code states every person convicted in Mississippi of a felony with two prior felony convictions "shall be sentenced to the maximum term of imprisonment prescribed for such felony . . . , and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation."[47]

Georgia has also adopted a similar scheme.[48] Its Habitual Offender Statute provides increased lengths of sentencing for repeat offenders, effectively increasing punishment despite the severity of the crime, severely limiting the eligibility for parole with each added offense, and striking the possibility of parole for individuals convicted of a fourth felony offense.[49] Finally, as with previously discussed states, Texas adheres to a strict "three strikes" law for repeat and habitual felony offenders.[50] Like Mississippi's law, under Texas's habitual offender statute, judges are forced to impose harsh sentencing enhancements upon individuals convicted of three felonies, regardless of whether they are violent felonies.[51]

C. Sentencing Credits: Olive Branches or Empty Promises?

1. "Earned Time" versus "Good Time" Defined

Sentence credit policies vary by state;[52] information on the applicability of sentencing credits for individuals incarcerated in state prisons is

44. *See* MISS. CODE ANN. § 99-19-81 (2018) (requiring habitual criminals to be sentenced to the maximum term of imprisonment); *see also id.* § 99-19-83 (2014).

45. *Id.* § 99-19-81 (2018).

46. *See id.* § 99-19-83 (2014).

47. *Id.* § 99-19-81 (2018).

48. GA. CODE ANN. § 17-10-7 (2015).

49. *Id.*

50. TEX. PENAL CODE ANN. § 12.42 (West 2017).

51. OFF. OF THE ATT'Y GEN., PENAL CODE OFFENSES BY PUNISHMENT RANGE 4–6 (March 2018), https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/criminal-justice/Penal Code-Offenses-byRange.pdf [https://perma.cc/TR4B-RGYX] (including updates from the eighty-fifth Legislative Session).

52. Information provided on each state has been compiled by the National Conference of State Legislatures and comes directly from each state's criminal codes. *See generally* NAT'L CONF. OF STATE LEGISLATURES, GOOD TIME AND EARNED TIME POLICIES FOR PEOPLE IN STATE PRISONS (AS ESTABLISHED BY LAW) (2020), https://documents.ncsl.org/wwwncsl/Criminal-Justice/Final-Sentence_Credit_50-State_Chart_2020.pdf [https://perma.cc/3MVS-ZEFZ] [hereinafter GOOD TIME AND

explicitly written in each state's statutes.[53] The National Conference of State Legislatures delineates two separate divisions of sentencing credit policies: "earned time" and "good time."[54] Earned time is a credit against a sentence or period of incarceration—unless otherwise denoted by the state legislature—that the individual earns for participating in or completing various productive activities.[55] Earned time credits are distinguished from and can be offered in addition to good time credits, which are awarded for participating in required activities and following required prison rules.[56] As such, the main difference between good time and earned time is that good time is awarded for obeying mandatory requirements, whereas earned time is awarded for going above and beyond what is required.

2. Restrictions

Although most states have incorporated good time and earned time sentencing credits into their criminal statutes, each state's statutory scheme is unique. Where states in the Deep South are particularly individualistic is in their decisions to restrict or limit the availability or circumstances of these credits offered.

a. Let the Good Times Roll. . . Up to a Point (Florida, Louisiana, & Mississippi)

Louisiana allows for both good time and earned time.[57] However, Louisiana restricts good time based on the kind of conviction.[58] For example, good time does not apply to sentences of individuals presently serving terms for violent crimes or sex offenses and inmates categorized as "habitual offenders."[59]

Similarly, although Mississippi allows for both good time and earned time, it places a unique limitation on good time by requiring that individuals have "trusty status."[60] This limitation means incarcerated individuals

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EARNED TIME POLICIES] (denoting each states' policies on lessening the sentences of individuals incarcerated in state prisons). *See also State Good Time and Earned Time Laws*, NAT'L CONF. OF STATE LEGISLATURES. (June 6, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-good-time-and-earned-time-laws.aspx [https://perma.cc/CTK3-Z5BG] [hereinafter *State Time Laws*] (synthesizing data in the aforementioned source).

53. *See* GOOD TIME AND EARNED TIME POLICIES, *supra* note 52, at 1.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 4.

58. *Id.*

59. LA. STAT. ANN. § 15:571.3 (2023).

60. MISS. CODE ANN. §§ 47-5-138.1, -142 (2014); GOOD TIME AND EARNED TIME POLICIES, *supra* note 52, at 4.

are only eligible for earned time if their participation in various programs is deemed satisfactory.[61] Further, despite falling within trusty status, various individuals are ineligible for a reduction in their sentences if the offender: (1) was sentenced to life imprisonment;[62] (2) was convicted as a habitual offender;[63] or (3) was convicted of a sex crime; or has not served the mandatory time required for parole eligibility.[64] Mississippi's high incarceration rate and strict limitations on good time also exacerbate some of Mississippi's most glaring issues, such as its felony disenfranchisement rate, which is the highest in the nation at roughly 11%.[65]

Florida allows for both good time and earned time;[66] however, Florida places restrictions on both forms of sentence credits.[67] Such restrictions come in various statutory forms, such as capping participation in two of the three categories of possible earned time—education and vocation—to one-time awards.[68] These restrictions have proven to be a massive encumbrance upon incarcerated individuals' abilities to lessen the burdens of their sentences due to their application with Florida's "Truth in Sentencing" procedures—sometimes also called the 85% rule—which mandates that incarcerated individuals serve at least 85% of their sentence.[69] The 85% rule applies regardless of the severity of the crime.[70] The result is that any credits earned that would ordinarily reduce an individual's sentence beyond 15% effectively have no benefit, meaning no additional sentence reduction.[71] When coupled with Florida's parole abolition for crimes occurring after 1983, decarceration of the state's prison population is nearly impossible.[72]

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61. MISS. CODE ANN. § 47-5-138.1 (2014).

62. Sometimes also called "capital offenders."

63. For more information on Mississippi's habitual offender laws, see MISS. CODE ANN. §§ 99-19-81 to -87 (1972) (requiring habitual criminals to be sentenced to the maximum term of imprisonment).

64. MISS. CODE ANN. § 47-5-138.1 (2014).

65. *See U.S. Criminal Justice Data*, SENT'G PROJECT, *supra* note 23 (referencing the "Felony Disenfranchisement Rate" Column on the main page); *see also* SENT'G PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 1, 14, https://www.sentencingproject.org/app/uploads/2024/02/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf [https://perma.cc/KY7J-YAEH].

66. GOOD TIME AND EARNED TIME POLICIES, *supra* note 52, at 2.

67. FLA. STAT. §§ 944.275, .801 (2022); *see also* LONG ROAD TO NOWHERE, *supra* note 11, at 10.

68. GOOD TIME AND EARNED TIME POLICIES, *supra* note 52, at 2.

69. LONG ROAD TO NOWHERE, *supra* note 11, at 5, 10.

70. *Id.* at 10.

71. *Id.* at 12.

72. *Id.* at 5.

b. Here for a Good Time, Not for Earned Time (Alabama)

Alabama allows for good time but not earned time.[73] Further, individuals may not receive correctional incentive time if the incarcerated individual: (1) has been convicted of a class A felony; (2) has been convicted of any crime that caused the death of another person by means of a deadly weapon; (3) has been sentenced to life, sentenced to death, or received a sentence of more than fifteen years; or (4) has been convicted of a sex offense involving a child.[74] These exceptions are especially problematic because they exacerbate Alabama's existing issues with prison overcrowding and overlap with the state's rigid three-strikes law.[75]

c. Earned Time's Not a Good Time (Georgia)

Georgia does not allow for the award of any good time and has further opted to allow for only minimal earned time under its current laws.[76] Such earned time awards are seriously constrained by the various limitations that bar individuals from ever accumulating meaningful sums of sentence reduction earned time. Amongst these limitations is the cap on earned time, which confines the accrual to "up to one day per one day of participation," and it can only be earned through education or work.[77] Georgia is unique in this regard.

d. Where Time Stands Still (Texas)

Texas is also unique in its stringent application of sentencing credits. Texas allows both good time and earned time.[78] Yet, both forms of good conduct credits apply only to the eligibility of parole and do not otherwise lessen the term of a Texas inmate's sentence.[79] Ultimately, this means that inmates who are ineligible for parole—including those on death row and those serving LWOP or life sentences for capital felony offenses—cannot and will not ever benefit from accrued credits.[80] Where Texas encounters significant obstacles is in relation to the sheer number of inmates who are ineligible for these sentencing credits—as represented by the enormous

73. *Id.*

74. ALA. CODE § 14-9-41(e)(1) (2023).

75. *See* LONG ROAD TO NOWHERE, *supra* note 11, at 6–8.

76. GOOD TIME AND EARNED TIME POLICIES, *supra* note 52, at 2.

77. *Id.*; GA. CODE ANN. § 42-5-101 (2022).

78. GOOD TIME AND EARNED TIME POLICIES, *supra* note 52, at 7.

79. TEX. GOV'T CODE ANN. § 498.002–.003 (West 2021).

80. For more information on Texas inmates' eligibility to receive "good time" in accordance with parole eligibility, see *id.* § 508.145.

mass of individuals in Texas state prisons[81]—and particularly, the large number of those inmates serving LWOP and death sentences.[82] Further, the abundance of individuals ineligible for such credits is especially onerous on Texas's already maladaptive criminal carceral system, primarily due to its enforcement of sentencing enhancements.

Texas is one of only a handful of states in the U.S. that has enacted enhanced mandatory penalties for felonies.[83] Enhancements are provisions that raise the minimum sentence based on various aspects of both the crime and the individual. With increased mandatory sentences, judges have little autonomy to correct overly harsh penalties for those found guilty of even minor offenses. For example, a recent news story detailed the conviction of Larry Dayries, a Texas man who was sentenced to seventy years in prison for stealing a sandwich from Whole Foods.[84] This sentence length is standard procedure under Texas's current sentencing scheme due to Dayries's prior convictions for burglary and theft.[85] In this way, Texas perfectly embodies the way in which the Deep South states' differing approaches lead to blatantly arbitrary enforcement and results. Stories such as Mr. Dayries's also humanize the issue, giving it greater depth than what statutory language alone conveys.

II. HUMANIZING THE DATA: THE PROBLEMATIC PRACTICES FESTERING IN THE DEEP SOUTH

Although data can prove remarkably helpful when identifying the degree to which an issue is problematic, numbers alone fail to fully explain both why the data is skewed a certain way and how the data developed to

81. The most recent data shows that there are roughly 137,035 individuals currently incarcerated in Texas state prisons. CARSON, *supra* note 23, at 11. Significantly, there are almost as many individuals incarcerated in Texas state prisons as there are in the entirety of the U.S. Federal prison system, with roughly 146,108 individuals incarcerated in federal prisons. *Id.* at 10. Data also shows that between 2021 and 2022, Texas had the highest prison population rise (up 5,900 prisoners year-over-year), followed by two other Deep South states: Florida (up 4,300) and Mississippi (up 2,500). *Id.* at 6.

82. The Texas Department of Criminal Justice reported in their Fiscal Year 2020 Statistical report a total of 3,387 individuals ineligible for release. This category included inmates serving LWOP, inmates serving mandatory minimum offenses, and death row inmates. *See* TEX. DEP'T OF CRIM. JUST., TEXAS DEPARTMENT OF CRIMINAL JUSTICE STATISTICAL REPORT 2020 17 (2020), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2020.pdf [https://perma.cc/6LHW-5EM3].

83. *Id.* Texas has also enacted enhanced penalties for certain misdemeanors, a nearly unheard-of practice elsewhere nationwide.

84. *See* Alex Hannaford, *No Exit: Under Texas's Harsh Sentencing Laws, People Convicted of Relatively Minor Crimes—Such as Stealing a Sandwich—Can Get Life in Prison*, TEX. OBSERVER (Oct. 3, 2016), https://www.texasobserver.org/three-strikes-law-no-exit/ [https://perma.cc/VMK2-K8E2].

85. *Id.*

this point.[86] A deeper dive into the individual practices of each of the analyzed Deep South states provides a more human component to the research, one that elaborates on how exactly these states became the epicenter of mass incarceration in the U.S. and provides a framework for addressing the damage that has already been done. The primary focus of this Section is to highlight the problematic practices of each of the six states analyzed and then explain why such practices produce arbitrary sentencing results.

Black's Law Dictionary defines "arbitrary" in two ways:

> 1. Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures.
>
> 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact.[87]

While analyzing each state's unique—and often grievous—incarceration practices is central to understanding the problem, questioning whether these practices conform to or deviate from standard procedure across the United States is paramount. The following Section explores this quandary in greater detail, focusing on the arbitrary nature of each Deep South state's incarceration procedures. The analysis in this Section is centered around Louisiana, the state most widely recognized for its arbitrary sentencing practices.[88] To supplement, this Section also analyzes other states' adoption of similarly harsh schemes as well as their own uniquely arbitrary sentencing practices.

A. Tour de Trouble: Major Issues Arising in the Deep South

1. Louisiana: Incarceration Capital of the World[89]

Louisiana is frequently referred to as the "incarceration capital of the world."[90] This is primarily attributed to the fact that Louisiana incarcerates

86. Emphasis mine.

87. *Arbitrary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

88. In recent years, many national organizations, such as the National Association of Criminal Defense Lawyers, have taken measures to both educate the public on Louisiana's excessive sentencing laws and practices, as well as propose steps forward to change the laws and culture in Louisiana surrounding excessive criminal prison sentences. *See, e.g.*, *Excessive Sentencing Project—Louisiana: Policies and Rulings on Lengthy Prison Terms in Louisiana*, NAT'L ASS'N OF CRIM. PUB. DEF. LAWS. ("NACDL") (Oct. 16, 2014), https://www.nacdl.org/mapdata/ExcessiveSentencingProject-Louisiana [https://perma.cc/YM49-F8LJ] [hereinafter NACDL, *Excessive Sentencing Project—Louisiana*].

89. *Id.*

90. LONG ROAD TO NOWHERE, *supra* note 11, at 5.

more individuals for non-violent crimes than any other state in the nation.[91] Another critical factor in Louisiana's hefty incarceration rate is the proliferation of sentence durations for nonviolent crimes.[92] A prime example is that of twenty-two-year-old Brian Martin, who received a twenty-four-year sentence—without the possibility of parole—for the burglary of a vehicle's stereo and steering wheel.[93] Martin initially faced life without parole, a sentence his attorney vehemently argued against, noting that other states would issue vastly shorter sentences, if any, for petty crimes.[94] In Louisiana, Martin's case is no outlier. Rather, it exemplifies the norm. His case is a prime example of the arbitrariness of Louisiana's criminal sentencing because it highlights how other states do not follow similar procedures. In fact, many U.S. states take the opposite approach, refusing to dispense prison sentences for non-violent crimes. This trend follows a surfeit of recent studies highlighting the benefits of not prosecuting non-violent crimes at both the misdemeanor and felony levels.[95] Yet, Louisiana does not ascribe to these modern trends in criminal justice research.

Instead, research shows Louisiana's lofty incarceration rate is both explained and exacerbated by the vast number of people serving LWOP and "virtual life"[96] sentences.[97] In Louisiana, this accounts for a staggering one out of every five people incarcerated.[98] Given the arbitrariness of LWOP statutes, such as mandatory LWOP and other minimum sentencing requirements, the sheer number of individuals serving LWOP is especially concerning.[99]

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91. The Times-Picayune Editorial Board, *Louisiana Must Stop Locking Up So Many People*, NOLA.COM (July 7, 2021), https://www.nola.com/opinions/louisiana-must-stop-locking-up-so-many-people-editorial/article_7a725935-0e5b-5ca6-8e93-f664a5e5203e.html [https://perma.cc/SM3C-3QG4].

92. *Id.*

93. *See, e.g.*, Cindy Chang, *Tough Sentencing Laws Keep Louisiana's Prisons Full*, NOLA.COM (May 16, 2012), https://www.nola.com/news/crime_police/tough-sentencing-laws-keep-louisianas-prisons-full/article_3457643a-1a6b-5e7f-9b45-9263556f878a.amp.html [https://perma.cc/YA5K-HT24].

94. *Id.*

95. *See, e.g.*, Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 3–22 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2022), https://www.nber.org/system/files/working_papers/w28600/w28600.pdf [https://perma.cc/7NJ4-B7SQ] (finding that in Massachusetts, where the study was conducted, "nonprosecution of a nonviolent misdemeanor offense leads to a 53% reduction in the likelihood of a new criminal complaint, and to a 60% reduction in the number of new criminal complaints, over the next two years").

96. Indicating sentences of fifty years or more.

97. LONG ROAD TO NOWHERE, *supra* note 11, at 5, 14.

98. *Id.* at 14.

99. NACDL, *Excessive Sentencing Project—Louisiana*, *supra* note 88 (noting that juveniles may be transferred to adult court at age fourteen).

For example, Louisiana is one of only two states in the nation to impose mandatory LWOP for second-degree murder convictions.[100] This practice is uniquely troublesome because Louisiana law does not distinguish between the individual who actually committed the killing and another involved party; both would be charged with second-degree murder.[101] As such, many individuals convicted of second-degree murder and sentenced to LWOP have never killed anyone or even committed a violent act.[102] The magnitude of this issue is encompassed in the statistics showing that roughly 53% of inmates are serving LWOP for second-degree murder convictions.[103]

2. Alabama: Most Overcrowded Prisons in the Nation

Alabama is home to the most overcrowded prisons in the country, currently at 151% capacity.[104] In recent years, Alabama has garnered an onslaught of media attention over various prison crises, eventually drawing the attention of the DOJ.[105] The DOJ conducted two separate investigations within a fifteen-month period and ultimately filed a lawsuit against the state of Alabama, alleging "constitutional deficiencies" within its state prisons.[106] The lawsuit specifically addressed the DOJ's concerns about how Alabama's severely overcrowded prisons contribute to unsafe, unsanitary, and increasingly violent conditions.[107] However, even after sentencing reforms were passed in 2017, recent legislation concerning the

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100. LONG ROAD TO NOWHERE, *supra* note 11, at 15. The other state is Pennsylvania. *See* PA. CONS. STAT. § 2502(b) (1978). As of the date of this Note's publication, all other states' statutory schemes have since been reformed.

101. LONG ROAD TO NOWHERE, *supra* note 11, at 14 (noting that in Louisiana, for example, in a second-degree murder case, both the getaway driver and the person pulling the trigger of the gun used in the killing will be charged with the offense, and both would receive the same penal outcome: a mandatory LWOP sentence).

102. *Id.*

103. *Id.* (representing more than three times the number of individuals serving LWOP for first-degree murder).

104. *Id.* at 5, 8–9.

105. *See*, *e.g.*, Michael Sainato, *Alabama Prisoners Strike Over 'Horrendous' Conditions*, GUARDIAN (Oct. 6, 2022), https://www.theguardian.com/us-news/2022/oct/06/alabama-prison-strike-work-conditions [https://perma.cc/M4AF-A7GR]; Isaac Chotiner, *The Stunning Neglect and Racist Politics Behind Alabama's Prison Strike*, NEW YORKER (Oct. 6, 2022), https://www.newyorker.com/news/q-and-a/the-stunning-neglect-and-racist-politics-behind-alabamas-prison-strike [https://perma.cc/J7TZ-EFMT] ("[P]risoners in Alabama began a work stoppage to protest their living conditions and several of the state's tough sentencing and parole laws.").

106. *Justice Department Files Lawsuit Against the State of Alabama for Unconstitutional Conditions in State's Prisons for Men*, U.S. DEP'T. OF JUST. (Dec. 9, 2020), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-alabama-unconstitutional-conditions-states [https://perma.cc/5DRP-BY9X].

107. *Id.*

Alabama Board of Pardons and Paroles has severely diminished the parole chances of currently incarcerated people.[108]

3. Florida: Oldest Prison Population in the South

Florida still adheres to a "Truth in Sentencing" rule,[109] which requires incarcerated people to serve at least 85% of their sentences, regardless of any demonstration of rehabilitation.[110] Florida's abolishment of parole for crimes after October 1983 also makes it nearly impossible to decarcerate in the manner of other states.[111] As a result, Florida has the oldest prison population in the South, a group whose care is increasingly expensive.[112]

Furthermore, Florida adheres to a criminal statute colloquially called the "10-20-life" law that imposes lengthy mandatory minimum sentences upon its population;[113] its application results in exceedingly stringent sentencing that is not implemented by the vast majority of other U.S. states. Florida's "10-20-Life" law requires judges to order mandatory minimum sentences of ten years, twenty years, or twenty-five years to life for the commission of certain convictions for felonies involving the use or attempted use of a firearm.[114] The penalties become harsher if the firearm used is an assault weapon or machine gun.[115] In those cases, judges must impose a sentence of fifteen years, twenty years, or twenty-five years to life.[116]

4. Georgia: The Nation's Capital Punishment Capitol

Georgia similarly adheres to a handful of problematic criminal sentencing policies that have plagued the state's prisons and produced arbitrary sentences for decades. Among those factors most responsible for exacerbating lengthy imprisonment terms is Georgia's parole system, which disallows discretionary parole for the majority of violent offenders and for habitual offenders.[117] Further issues arise out of Georgia's practice of

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108. *See* LONG ROAD TO NOWHERE, *supra* note 11, at 5–9.

109. *See id.* at 10.

110. *See* Katherine J. Rosich & Kamala Malik Kane, *Truth in Sentencing and State Sentencing Practices*, NAT'L INST. JUST., no. 252, 2005, at 18, 20 (2005), https://www.ojp.gov/pdffiles1/jr000252.pdf [https://perma.cc/3VSX-4H8F] (noting that the federal government incentivized states to adopt Truth in Sentencing laws, dangling millions of dollars in federal grants to states willing to participate in this newest tough on crime regime).

111. *See* LONG ROAD TO NOWHERE, *supra* note 11, at 10.

112. *Id.*

113. FLA. STAT. § 775.087 (2023).

114. *Id.* § 775.087(2)(a) ¶ 1–3 (2023).

115. *Id.* § 775.087(3)(a) ¶ 1–3 (2023).

116. *Id.*

117. GA. CODE ANN. § 17-10-6.1 (2012).

allowing for discretionary LWOP for both adults and juveniles.[118] Further issues arise due to a lack of structure for judges and juries, given Georgia's absence of a formal sentencing guidelines system.[119] The result is similar to that of states such as Louisiana that have a guideline system, yet the system is inherently deferential to judicial opinion. Without a sentencing guideline system, the capacity for arbitrary and capricious sentencing is enormous. Although Georgia has no formal sentencing guideline system, the state still maintains sentencing statutes, such as the Habitual Offender Statute discussed previously.[120]

5. Texas: Largest Incarceration Population Anywhere in the World

If each state in the United States were its own country, Texas would have the largest number of incarcerated people of any country in the world. The sheer number of individuals incarcerated in the state's prisons is astronomical, totaling 137,035 people.[121] Though the state has a significant population, the number of individuals incarcerated in Texas is high both in relation to its population size and in relation to the rest of the world. Given the large portion of the U.S. state prison population that comes from Texas, it should come as no surprise that Texas's sentencing practices have a severe effect on the U.S. state prison population.

For instance, the state's policy of providing enhanced punishments for offenders with both prior misdemeanor and felony convictions is a policy that is unique to Texas, yet widely problematic for the national rate of incarceration.[122] More specifically, this practice is unique because Texas is the only state to provide enhanced punishments—meaning harsher sentences—for repeat misdemeanor offenders.[123] Texas employs two separate sentencing statutes that cover repeat or habitual felony and misdemeanor offenders. For habitual felony offenders, Texas allows for sentence enhancements, including the possibility of life imprisonment.[124] Additionally, for repeat misdemeanor offenders, Texas allows for sentence

118. *See, e.g.*, *Excessive Sentencing Project—Georgia: Policies and Rulings on Lengthy Imprisonment Terms in Georgia*, NAT'L ASS'N OF CRIM. PUB. DEF. LAWS. ("NACDL") (Oct. 16, 2014), https://www.nacdl.org/mapdata/ExcessiveSentencingProject-Georgia [https://perma.cc/VQF8-K9YF].

119. *Id.*

120. GA. CODE ANN. § 17-10-7 (2012).

121. CARSON, *supra* note 23, at 11.

122. *See Excessive Sentencing Project—Texas: Policies and Rulings on Lengthy Imprisonment Terms in Texas*, NAT'L ASS'N OF CRIM. PUB. DEF. LAWS. ("NACDL") (May 14, 2013), https://www.nacdl.org/mapdata/ExcessiveSentencingProject-Texas [https://perma.cc/XH5G-9QT5].

123. *See id.*

124. TEX. PENAL CODE ANN. § 12.42 (West 2020).

enhancements when it is shown an offender has a prior misdemeanor of the same class level or higher or a previous felony on their record.[125]

6. Mississippi: Highest Life Without Parole Rate for Children in the U.S.

While also employing methods similar to other states previously analyzed, Mississippi poses its own unique sentencing challenges, such as its allowance of discretionary LWOP for adult and juvenile LWOP.[126] Mississippi additionally faces related issues to those in states such as Georgia in that, like Georgia, Mississippi does not have a sentencing guideline system.[127] Further, though Mississippi does have a vast array of sentencing statutes available for judges and juries to reference and rely upon, Mississippi has some of the strictest and most comprehensive sentencing statutes in the nation.

B. A Recognized Right or Simply a Suggestion? Sentencing Guidelines that Allow for Arbitrary Judicial Discretion

Arbitrary sentencing is deeply influenced by judges and juries. Although Louisiana has a sentencing guideline system in place, it is fundamentally flawed. Despite sentencing report requirements, judges have wide latitude to impose any proportionate sentence within a given statutory range.[128] However, this is of little accord because judges may depart from the guidelines if they state a reason for the departure on the record.[129] This gives judges vast discretion to choose longer sentences as they see fit. Further, judges' departures from the sentencing guidelines cannot be appealed.[130] It is not difficult to imagine how the potential for arbitrary sentencing decisions is greatly magnified by including such limitations in a state's statutory sentencing scheme. Thus, judges wield immense power over defendants' futures. Yet judges are not the only parties with great influence; until recently, Louisiana's juries were also uniquely powerful.

The final example of Louisiana's draconian sentencing procedures—which was only recently overturned—was its practice of permitting criminal convictions in felony cases where a jury does not unanimously find

125. *Id.* § 12.43.

126. *See Excessive Sentencing Project—Mississippi: Policies and Rulings on Lengthy Imprisonment Terms in Mississippi*, NAT'L ASS'N OF CRIM. PUB. DEF. LAWS. ("NACDL") (May 14, 2013), https://www.nacdl.org/mapdata/ExcessiveSentencingProject-Mississippi [https://perma.cc/428U-9P6D].

127. *Id.*

128. LA. CODE CRIM. PROC. ANN. art. 894.1 (2012).

129. *Id.*

130. *See id.*

the defendant guilty.[131] In the 2020 case of *Ramos v. Louisiana*, the U.S. Supreme Court ended Louisiana's vestige to Jim Crow-era laws by deeming non-unanimous jury verdicts unconstitutional.[132] Before this decision, though, Louisiana was one of only two states in the nation to employ a non-unanimous jury rule when deciding the outcomes at trial; the other was Oregon.[133] Though the holding in *Ramos* has since nullified these laws, they are worth mentioning, at least in part, because of a more recent U.S. Supreme Court holding.

In the 2021 case of *Edwards v. Vannoy*, the U.S. Supreme Court concluded that the holding in *Ramos* does not apply retroactively, meaning earlier convictions by non-unanimous juries do not merit collateral review.[134] The highest courts in both Louisiana and Oregon have since been faced with the issue of whether their states will independently choose to review past convictions decided by non-unanimous juries retroactively. This is where Louisiana and Oregon depart. In a recent decision by the Louisiana Supreme Court—which relied on the U.S. Supreme Court's holding in *Vannoy*—the highest court in the state decided that the jury-unanimity holding in *Ramos* does not retroactively apply in Louisiana on collateral review.[135] In an even more recent decision, the Oregon Supreme Court came to the opposite conclusion, holding that the requirement of unanimous jury verdicts in serious criminal cases merits retroactive application.[136]

Where Louisiana and Oregon further differ is in the history behind each state's decisions to enact conviction via non-unanimous jury laws in the first place. In Louisiana, the non-unanimous jury law was enacted by admitted white supremacist lawmakers in 1898 as a direct response to the then recently enacted Fourteenth Amendment, which not only guaranteed African Americans the right to vote but also the right to serve on juries.[137] The lawmakers' rationale—seeking to nullify Black votes on juries and generally disenfranchise Blacks after the Civil War—remains a

131. Andrew Cohen, *A Vestige of Bigotry: The Supreme Court and Non-Unanimous Juries*, THE MARSHALL PROJECT: CASE IN POINT (Sept. 26, 2017), https://www.themarshallproject.org/2017/09/25/a-vestige-of-bigotry [https://perma.cc/62TN-27R7].

132. Ramos v. Louisiana, 140 S. Ct. 1390, 1394–97 (2020).

133. Cohen, *supra* note 131.

134. Edwards v. Vannoy, 141 S. Ct. 1547, 1553–62 (2021).

135. State v. Reddick, No. 2021-KP-01893, 2022 WL 12338521, at *1, *17 (La. Oct. 21, 2022).

136. Watkins v. Ackley, 523 P.3d 86, 102–03 (Or. 2022); *see also* Media Release, Oregon Department of Justice, Oregon Supreme Court Determines Unanimous Jury Requirement Applies to Older Cases (Dec. 30, 2022), https://www.doj.state.or.us/media-home/news-media-releases/oregon-supreme-court-determines-unanimous-jury-requirement-applies-to-older-cases/ [https://perma.cc/N5NF-58RU].

137. Cohen, *supra* note 131.

documented fact.[138] The non-unanimous jury law was proposed at the 1898 Constitutional Convention in Louisiana, a convention whose documented purpose was to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana."[139]

Conversely, Oregon's non-unanimous jury rule was enacted in direct response to the exact phenomenon that Louisiana sought to protect: racial and religious ethnocentrism. Due to the deep recession in the 1920s and 1930s, Oregon found its state laws and culture especially vulnerable to "the growing menace of organized crime and the bigotry and fear of minority groups" such as the Ku Klux Klan.[140] The pervasive racism and religious bigotry fueled by the presence of Protestant members of the Klan in Oregon, as well as a controversial jury verdict in a murder trial that sparked widespread public outrage,[141] were the driving forces behind the decision to enact the non-unanimous jury vote law, an effort to avoid religiously and racially-biased jury decisions.[142] Though no state's criminal practices are perfect, considering the juxtaposition between two states' practices—such as is emblematic in the comparison of Oregon and Louisiana—can provide valuable insight into examples of how states like Louisiana continue to enact and uphold laws that often have blatantly arbitrary results.

In summary, Louisiana's framework of problematic policies and practices set the standard for criminal sentencing issues in the United States. Though no other state is as widely beleaguered as Louisiana, other states—many of which are further analyzed in this Note—have adopted practices akin to those in Louisiana with similarly arbitrary and disastrous results.

C. Lasting Effects and Additional Considerations

What does all of this mean, and why might someone care? The extremity of the Deep South states' varying practices provides certainty that without their inclusion in the U.S. total, the national mass incarceration average would differ significantly. Moreover, outside of combating the mass incarceration movement, making systemic changes to the current methods of incarcerating individuals in the Deep South would re-afford residents their constitutional rights that have been infringed upon by those

138. *Id.*

139. *Id.*

140. Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 4 (2016).

141. *See* State v. Silverman, 36 P.2d 342, 343 (1934).

142. Kaplan & Saack, *supra* note 140. This metric reflects the most current data available at the time of this Note's publication.

states' arbitrary imposition of inordinately harsh and lengthy prison sentences that do not reflect the national average.

III. POTENTIAL REMEDIES: THE INTERSECTION OF CONSTITUTIONAL LAW & MASS INCARCERATION

A. Injury via Geographic Discrimination: How Mass Incarceration in the Deep South Violates Equal Protection Guarantees under the Fourteenth Amendment

The main issue arising out of the differentiation in sentencing between Deep South states and other U.S. states is that this variation produces what this Note's Author calls "geographic discrimination." In the field of law, broadly, geographic discrimination is understood to be discrimination based on a person's location or country of origin.[143] While geographic discrimination is not a new concept on its own, this Note's use of the phrase is "new" in that it does not comport with the phrase's more traditionally recognized use affiliated with employment law.[144] Rather, this Note's use of the phrase seeks to indicate the disparate treatment of U.S. citizens residing in a certain region, by that region's government, and on the basis of those citizens' residency in that region.

There is a strong argument in favor of courts recognizing geographic discrimination in the manner employed in this Note. Because other areas of law implicitly recognize geographic discrimination,[145] it is not unimaginable that modern criminal courts might consider protection against geography-based discrimination a protected right in the future. Nonetheless, as the law currently stands, geographic discrimination is neither a procedurally protected right nor an enumerated right under the Bill of Rights; thus, parties claiming the infringement of this right would have to do so by asserting an equal protection violation. Such is the premise of this Note's main argument.

The disparities in sentencing—including length of sentence—administered by Deep South states, as opposed to other U.S. states—as quantified by the U.S. average metric—produce arbitrary sentencing results. The central theory of this Note postulates that these wildly varying sentencing practices between states in the Deep South and the larger majority of the U.S. states are tantamount to a violation of Southern citizens' rights under

143. This Note's use of the phrase departs from its traditional use.

144. Ordinarily, geographic discrimination is used to reference, for example, employers discriminating against job candidates. This can be exemplified by considering candidates or employees being excluded, denied opportunities, or treated unfairly because of region or location-based factors.

145. As noted abvoe, geographic discrimination is a recognized concept in such as employment law; it its also recgocnized in judicial procedure. *See* 28 U.S.C. § 1714.

the Fourteenth Amendment's Equal Protection Clause. This Note argues that the arbitrary sentencing of individuals in the Deep South is a clear indicator of government discrimination, which is prohibited under the Equal Protection Clause.

1. How Geographic Discrimination Rises to the Level of Being an Equal Protection Violation

First, consider the language of the Fourteenth Amendment, "[N]or shall any State 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."[146] This portion of the Fourteenth Amendment establishes the equal protection of citizens of the several states against the unequal application of laws, thus preventing state governments from enacting criminal laws that discriminate in an unreasonable or unjustifiable manner.[147] Further, this portion of the Fourteenth Amendment requires states to comply with the constitutional notion of equal protection.[148] As it applies to incarcerated individuals in the Deep South states, the argument this Note proposes is that citizens of these states face harsher sentencing penalties as a result of the geographic location where they live. Accordingly, citizens experiencing geographic discrimination are not afforded equal protection, as is their constitutional right under the Fourteenth Amendment. For these reasons, this Note posits that citizens might find solace under the protections of the Fourteenth Amendment's Equal Protection Clause by challenging harsh and arbitrary sentences on the basis of geographic discrimination.

a. The Framework for Equal Protection

As noted above, the central tenet of the equal protection clause is protection from unreasonable or unjustifiable government discrimination, but the prohibition on government discrimination is not absolute.[149] Rather, it depends on the class of individuals targeted or treated differently by the government. Accordingly, all equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose? Many government laws draw distinctions among specific groups of people and, thus, are potentially susceptible to an equal protection challenge. However, if laws or government actions are challenged based on equal protection, the issue is whether the government can identify a

146. U.S. CONST. amend. XIV, § 1.
147. *Id.*
148. *Id.* (emphasis added).
149. *See* City of Cleburne, Tex. v. Cleburn Living Ctr., 473 U.S. 432, 441 (1985).

sufficiently important objective for its discrimination.[150] What constitutes a "sufficient justification" depends entirely on the type or classification of discrimination.[151] The government may use certain discriminatory classifications under specific circumstances, but only if it proves that they are necessary to achieve a compelling government purpose.[152] This is known as strict scrutiny. Conversely, parties may also prevail by proving that the law was not rationally related to a legitimate government purpose.[153] This is known as rational basis review.

Different levels of scrutiny are applied depending on the type of discrimination. For example, race or national origin discrimination are subject to strict scrutiny;[154] gender discrimination is subject to intermediate scrutiny;[155] all other discrimination not falling under those categories is subject to rational basis review. Because geographic discrimination is not a currently recognized form of discrimination by the Court, it would automatically be subjected to the minimum standard of review, which is rational basis review. While the modern canon of rational basis review that is taught in most law schools provides the view that rational basis is a weak, if not almost entirely ineffective means of bringing an equal protection claim, this Note seeks to dispel that notion.

The level of scrutiny is the rule of law that is applied to the government action being challenged as denying equal protection. For rational basis, there must be a legitimate purpose. In other words, a law meets rational basis review if it is rationally related to a legitimate government purpose. As previously mentioned, the widespread modern teaching of rational basis review suggests that any conceivable government purpose would meet this level of scrutiny. The implication here is that the rational basis test provides no hope for parties seeking to challenge laws that are discriminatory in less widely recognized manners than gender or racial discrimination, for example. Yet this is not true.

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150. *Id.*

151. For example, the Court has declared it is extremely suspicious of racial discrimination; but is less suspicious of other types of discrimination. *See, e.g.*, Loving v. Virginia, 338 U.S. 1, 12 (1967) (holding that a state law restricting the freedom to marry based solely on racial classification violates the Equal Protection Clause of the Fourteenth Amendment).

152. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)

153. U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) ("Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate government interest.").

154. *Adarand Constructors*, 515 U.S. at 227 (holding all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny; accordingly, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest).

155 *See generally* Craig v. Boren, 429 U.S. 190 (1976). This case is widely recognized for its development of the intermediate scrutiny standard.

While the Court has enunciated that "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality,"[156] this holding does not encapsulate the entire outlook of rational basis review. Unlike legal scholars who argue that the rational basis test has not been consistently applied, or that there exists a stronger or more rigorous underlying rational basis test that the Court sometimes applies,[157] this Note does not ascribe to that belief. Instead, this Note argues that the Court has consistently applied the rational basis test and that the Court has simply determined that certain laws lack a legitimate purpose or are so arbitrary as to be unreasonable.

B. An Ultra-Modern Interpretation of Rational Basis Review

Various legal scholars have recently argued that rational basis review is far from ineffective as a means of challenging equal protection violations.[158] One such author, Nicholas Walter, points to recent landmark Supreme Court decisions that invalidated same-sex marriage bans,[159] and struck down the Trump administration's travel bans,[160] all of which were done under rational basis review standards.[161]

While most paladins of the effectiveness of rational basis review have focused on Supreme Court cases to best exemplify their position,[162] there are also notable examples of the rational basis test being utilized successfully at the lower court levels.[163] Because the Supreme Court grants certiorari in so few cases, scholars have argued that a better measure of the

156. McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

157. Aptly coined "rational basis with 'bite,'" various scholars have argued for this theory. *See* Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 936–42 (2000); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–24 (1972).

158. *See, e.g.*, Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 80 (2019) (noting that despite rational review allegedly being "hyper-lenient," cases do flunk the rational basis test, and notable cases at that).

159. *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 660–72 (7th Cir. 2014) (striking down the Indiana and Wisconsin same-sex marriage bans under both rational basis review and heightened scrutiny), *aff'd by* Obergefell v. Hodges, 576 U.S. 644 (2015).

160. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (2017) (remanding for mootness because the underlying Executive Order expired).

161. *See* Walter, *supra* note 158.

162. *See generally* Walter, *supra* note 158; James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751 (2018); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018).

163. *See generally, e.g.*, Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (invalidating, on rational basis grounds, Tennessee's law that allowed only state licensed funeral directors and embalmers to sell caskets).

importance of the rational basis review is the level of success at the lower court level.[164] Perhaps the best recitation of this view comes from Professor Katie R. Eyer,[165] who argues that constitutional change is an "amorphous, complicated [process]" and that "rational basis review—as deployed in the lower and state courts, as well as within the political branches—has often afforded one of the most plausible openings for social movements to create space for constitutional change."[166]

Further, the cases nullifying state laws under rational basis review and straying from the traditional notion of the test's rigidity or impossibility of success fall into various categories. Such categories are much more wide-reaching than the current constitutional law canon purports.[167] This perfunctory analysis present in the modern constitutional law canon overlooks major successes in the realm of challenging laws under rational basis of review. For such reasons, this Note suggests a new and more modern approach to analyzing rational basis review.

1. Applying the Ultra-Modern Rational Basis Test to Geographic Discrimination

Historically, rational basis review has been highly deferential to state legislatures. A statutory classification comports with the Equal Protection Clause if it is "rationally related to a legitimate state interest."[168] The party challenging the statute bears the burden of proving the challenged statute is irrational or arbitrary.[169] State legislatures are given significant leeway in asserting the ends that such challenged statutes seek to achieve. As such, the challenging party not only has the burden of proving that the motivation behind enacting the statute was irrational but also must negate any "conceivable basis which might support it[s] [enactment]."[170] In other words, if the legislature could rationally decide that the classification could promote a legitimate state purpose, then the statute should be upheld, even when there is an imperfect fit between means and ends.[171]

However bleak and implausible as it may seem, the Supreme Court has invalidated a host of cases that exemplify the validity of rational basis

164. McGoldrick, Jr., *supra* note 162, at 751–52.

165. Professor Katie Eyer, of Rutgers Law School, is recognized as a luminary in the intersection of legal history and social psychology.

166. Eyer, *The Canon of Rational Basis Review*, *supra* note 162, at 1355.

167. For a deeper analysis of deficiencies in the constitutional law canon as it applies to rational basis review, see generally *id.*

168. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

169. *See id.* (stating that the Court, at the outset, presumes the constitutionality of the alleged discriminatory statute).

170. Madden v. Kentucky, 309 U.S. 83, 88 (1940).

171. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464–66 (1981).

review. Far from being a weak and ineffective means of challenging discriminatory laws, rational basis review has undeniably acted as the springboard upon which plaintiffs have successfully challenged state discriminatory laws.

This is evidenced by the plenitude of data outlined in the prior Sections of this Note when analyzed in relation to various factors that the Court repeatedly emphasized in its decisions to invalidate laws under rational basis review. Various legal scholars have opined on the factors most important to the Court when conducting rational basis review of a challenged law. Still, one scholar's work best encapsulates the breadth of relevant factors considered by the Court, citing nine that frequently recurred in rational basis review cases.[172] Holoszyc-Pimental reviewed every Supreme Court case decided during the 1971 through 2014 terms where the Court invalidated a law for violating the Equal Protection Clause under rational basis review.[173] This audit produced the finding of nine recurrent factors in the Court's holdings.[174] Though this Note diverges from Holoszyc-Pimental's stance,[175] the nine factors remain relevant and central to the Court's determination of whether a law will be invalidated under rational basis review. For this reason, all nine factors are analyzed here. The list includes (1) history of discrimination; (2) political powerlessness; (3) capacity to contribute to society; (4) immutability; (5) burdening a significant right; (6) animus; (7) federalism concerns; (8) discrimination of an unusual character; and (9) inhibiting personal relationships.[176]

Given the Court's reliance on such factors in determining to strike down discriminatory state laws, each factor bears significant weight. Further, in considering the factors in totality, cases challenging laws under the rational basis test where multiple factors are found to be present appear to pass muster. Similarly, because numerous factors listed are relevant to incarcerated individuals' potential geographic discrimination claims, this strongly evidences the success of such claims should they be brought.

a. History of Discrimination

The Court has recognized on numerous occasions that the history of discrimination against groups is a relevant factor in its rational basis

172. *See generally* Raphael Holoszyc-Pimental, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015) (purporting that nine factors recur in the Court's analysis of whether a law fails the rational basis test).

173. *Id.* at 2076–78 (outlining the Author's methodologies).

174. *Id.* at 2077.

175. Holoszyc-Pimental posits that the only cases where parties truly succeeded in bringing claims under rational basis review are those in which the Court employed "rational basis with bite." *See id.* at 2070–74, 2076.

176. *Id.* at 2077.

review analysis. For example, in *Weber v. Aetna*, the Court invalidated a law because it discriminated against nonmarital children, directly citing the history of such discrimination.[177] Further, though not addressed directly by the majority, concurrences in *Doe v. Plyler* addressed the history of discrimination against undocumented immigrant children.[178] Similarly, even a shallow analysis of U.S. history provides a plethora of instances in which incarcerated individuals have historically faced discrimination. Repeat felony offenders in Deep South states have historically been subjected to discrimination throughout the criminal justice system, as is evidenced by the "tough-on-crime" laws which are unambiguous in their purposes. One example is Louisiana's Habitual Offender Statute,[179] which was enacted upon the foundational belief that individuals with multiple convictions cannot be rehabilitated and that communities are safer and better without these individuals.[180]

b. Political Powerlessness

Increased judicial protection of the politically powerless is frequently hearkened back to *United States v. Carolene Products Co.*[181] The basis of this theory is that groups deficient in political power are unable to protect themselves through ordinary political processes like voting and, as such, should be afforded greater judicial protections. The Court has discussed the importance of this factor in various cases, including *Frontiero v. Richardson*,[182] where women's political powerlessness was at issue. More significantly, however, the issue also arose in *Doe v. Plyler*, relating to undocumented immigrant children's future inability to vote.[183] Incarcerated persons in the Deep South suffer the same consequences. For example, consider Mississippi, the state with the highest felony disenfranchisement rate in the U.S.[184] Mississippi is a prime example of how sentencing laws

177. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972).

178. *See* Doe v. Plyler, 628 F.2d 448, 458 (5th Cir. 1980) (noting that undocumented immigrant children have long been scorned throughout this nation's history, oft subjected to intentionally unfair treatment), *aff'd*, 457 U.S. 202 (1982).

179. LA. STAT. ANN. § 15:529.1 (2019).

180. *See* LOUISIANANS FOR PRISON ALTS., *supra* note 39.

181. U.S. v. Carolene Products Co., 304 U.S. 144, 152 (1938) (finding heightened judicial inquiry necessary to protect politically powerless groups who otherwise could not otherwise participate in the democratic process in a manner that would protect their own interests).

182. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (noting the broad, sweeping underrepresentation of women on decision-making councils across the United States and throughout all levels of the state and federal government).

183. *See Plyler*, 457 U.S. at 202 (denoting that undocumented immigrant children are poignantly affected by their lack political power due to the implication that each child may one day be denied the right to vote due to their status as "aliens.").

184. *See* CARSON, *supra* note 23.

in the U.S. discriminate against incarcerated people in the Deep South by denying them the right to vote and leaving them politically powerless.

c. Capacity to Contribute to Society

Frontiero also enunciated that characteristics that "frequently bear[] no relation to ability to perform or contribute to society" may be viewed as a suspect basis for classification.[185] Though the Court has recognized this factor, it has only once invalidated a law on such a basis. A strong argument can be made that incarcerated individuals serving longer and harsher sentences in Deep South states are almost certainly disparaged due to their incapacity to contribute to society, as they are partitioned apart from society at large. This is most glaringly exemplified in the stringent manner in which Deep South states award "good time" and "earned time," if any at all.[186]

d. Burdening a Significant Right

Courts have also invalidated laws under the rational basis test on the grounds that such laws burden a significant right. The Court's analysis has encapsulated both instances of infringements upon recognized fundamental rights and "quasi-fundamental" rights.[187] In such circumstances, the alleged infringed-upon right may—in the eyes of the Court—be sufficiently substantial to warrant a careful review of the questioned law's rationality, even if strict scrutiny is not implicated.[188] For example, in *Lubin v. Panish*, the Court invalidated unreasonable restrictions on ballot access on the grounds that such restrictions unduly burdened the right to vote.[189] Similarly, individuals experiencing geographic discrimination in Deep South states can make the argument, as stated above, that felony disenfranchisement is a burden on a significant right: the right to vote. Further, a stronger argument could be made that the arbitrary nature of the sentencing laws in each of the Deep South states infringes upon the most substantial human rights: the rights to freedom and justice, as is reiterated in the Equal Protection and Due Process Clauses of the U.S. Constitution.[190] The Court has previously recognized arguments such as this, as was the case in *Jackson*

185. *Frontiero*, 411 U.S. at 686 (plurality opinion).

186. See generally the laws outlined in GOOD TIME AND EARNED TIME POLICIES, *supra* note 52.

187. *See generally* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (finding infringements to fundamental rights are subject to strict scrutiny).

188. *Plyler*, 457 U.S. at 223–24 (finding a law that imposes substantial burdens on its abused "can hardly be considered rational unless it furthers some substantial goal of the State").

189. *See* Lubin v. Panish, 415 U.S. 709, 718 (1974). *But see* Quinn v. Millsap, 491 U.S. 95, 107 (1989).

190. U.S. CONST. amend. XIV, § 5.

v. Indiana,[191] and *Logan v. Zimmerman Brush Co.*[192] In both *Logan* and *Jackson*, the Court found actual violations of plaintiffs' right to due process, aside from any equal protection issues.[193] The major takeaway from the holdings in these cases is the significance that the Court places on one's fundamental rights; challenged laws can appear far less rational to the Court when such laws burden a fundamental right or interest without persuasive justifications.[194]

CONCLUSION

Mass incarceration in the United States is a serious issue. Upon further inspection, it is not difficult to see that the Deep South is a major contributor to the blight of mass incarceration nationwide. While the harsh and often arbitrary sentences that judges and juries employ undoubtedly paint a bleak picture of the outlook for incarcerated individuals in the Deep South, all hope is not lost. In fact, one of the strongest arguments in favor of incarcerated individuals' ability to succeed in their challenges is the argument that their sentences are arbitrary. The vast amount of data available—both described in this Note and beyond—provides abundant support for this claim. Though history indicates change does not happen overnight, that does not mean change is out of the question. Rather, it implores the next generation of legal practitioners to come up with creative solutions to these problems. Such solutions might include challenging sentencing as discriminatory on new grounds, like geographic discrimination, or rethinking the utility of the rational basis test.

The potential for a successful challenge to the existing state sentencing schemes in the Deep South is nonetheless available to individuals interested in pursuing radical change and testing new challenges—such as challenges on the basis of geographic discrimination—before the courts. Individuals who are serious about finding solutions to the infringements of their rights can find reprieve by arguing they have suffered a deprivation of equal protection under the law, and such an infringement cannot survive rational basis review. Successful appeals of individuals' sentences can be made possible by re-framing the issue of arbitrary incarceration to better comport with the recognized factors the Court has deemed valid grounds to invalidate laws under rational basis review. That is, by re-framing the conversation around the utility of the rational basis test and other modern

191. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

192. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434–37 (1982).

193. *See generally id.*; *Jackson*, 406 U.S. 715 (1972).

194. *See* Plyler v. Doe, 457 U.S. 202, 232–34 (1982) (opining that a law that imposes severe burdens on its victims can "hardly be considered rational unless it furthers some substantial goal of the State").

challenges, individuals can find a legitimate means of pursuing their claims.