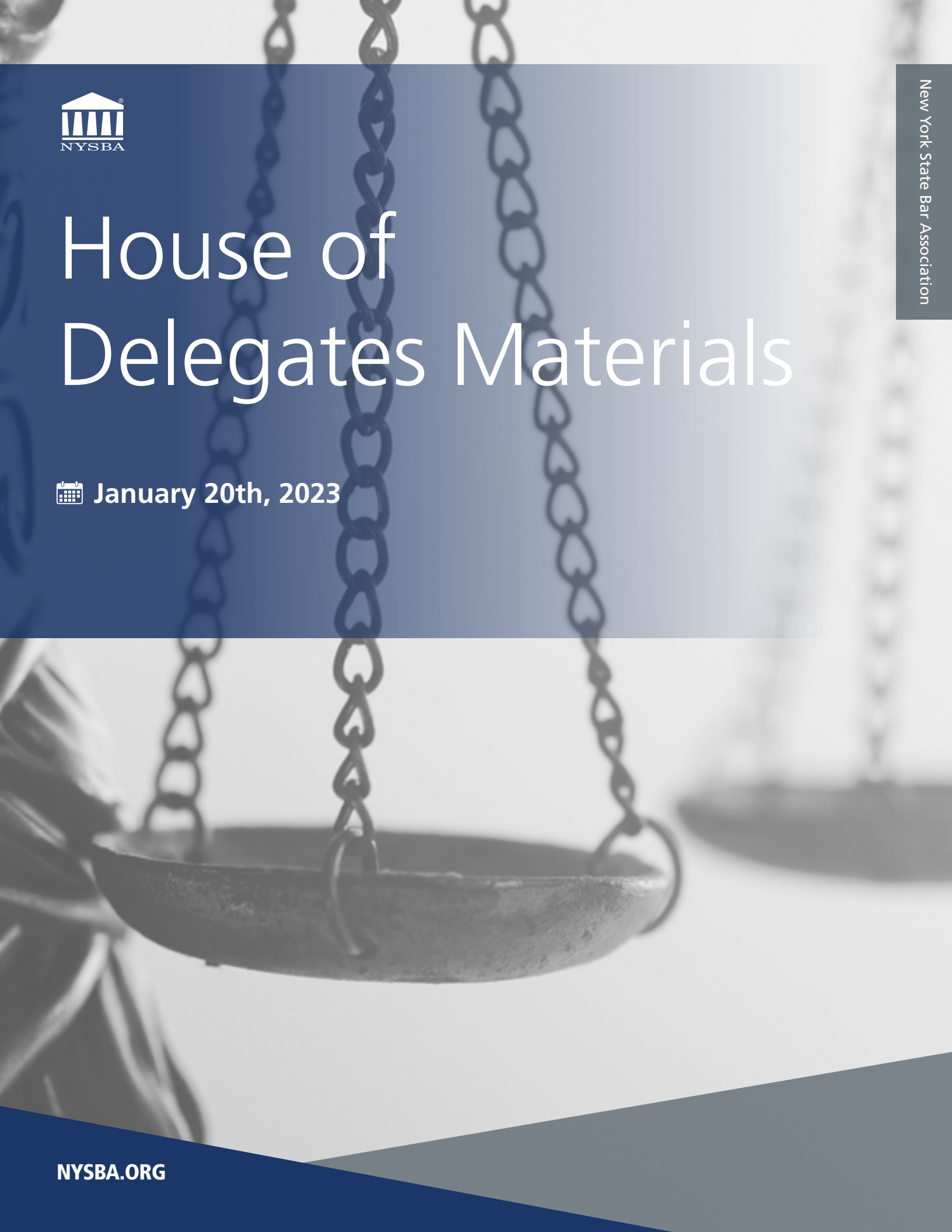

NYSBA

New York State Bar Association

House of Delegates Materials

January 20th, 2023

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NEW YORK STATE BAR ASSOCIATION

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THE NEW YORK BAR FOUNDATION

GENERAL ASSEMBLY
FRIDAY, JANUARY 20, 2023 – 8:30 A.M.
TRIANON BALLROOM, THIRD FLOOR
NEW YORK HILTON MIDTOWN

AGENDA

ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION **8:30 a.m.**
Sherry Levin Wallach, Esq.
President, presiding

1. Call to order and National Anthem – Sherry Levin Wallach, Esq.

2. Approval of the minutes of the January 22, 2022, Annual Meeting

3. Report of Nominating Committee and election of elected delegates to the House of Delegates

4. Report of President – Sherry Levin Wallach, Esq.

5. Report of Treasurer – Domenick Napoletano, Esq.

6. Report and recommendations of Committee on Bylaws – Robert T. Schofield, IV, Esq.

7. Special Orders

8. Adjournment

THE NEW YORK BAR FOUNDATION ANNUAL MEETING **9:45 a.m.**
(The members of the House of Delegates also serve as members of The New York Bar Foundation)
Carla M. Palumbo, Esq.
President, presiding

1. Approval of the minutes of the January 22, 2022, Annual Meeting

2. Report of the officers, and ratification and confirmation of the actions of the Board of Directors since the 2022 Annual Meeting – Carla M. Palumbo, Esq.

3. Report of the Nominating Committee – Hon. Cheryl E. Chambers

4. Other matters

5. Adjournment

HOUSE OF DELEGATES MEETING **10:00 a.m.**

Richard C. Lewis, Esq.
Chair, presiding

1.	Approval of minutes of November 5, 2022, meeting	10:03 a.m.
2.	Report and recommendations of Nominating Committee and election of officers and members-at-large of the Executive Committee	10:05 a.m.
3.	Report and recommendations of LGBTQ Law Section – Samuel W. Buchbauer, Esq.	10:10 a.m.
4.	Remarks by Deborah Enix-Ross, Esq., President of the American Bar Association	10:25 a.m.
5.	Presentation of Ruth G. Schapiro Award to Hon. Elizabeth A. Wolford – Sherry Levin Wallach, Esq.	10:40 a.m.
6.	Report and recommendations of Committee on the New York State Constitution – Christopher Bopst, Esq., and Alan Rothstein, Esq.	10:55 a.m.
7.	Report of Task Force on Mental Health and Trauma Informed Representation – Joseph A. Glazer, Esq., and Sheila E. Shea, Esq.	11:25 a.m.
8.	Report of Task Force on Emerging Digital Finance and Currency – Jacqueline J. Drohan, Esq., and Dana V. Syracuse, Esq.	11:35 a.m.
9.	Report and recommendations of Task Force on Racism, Social Equity, and the Law – Taa R. Grays, Esq., and Lillian M. Moy, Esq.	11:45 a.m.
10.	Administrative items – Richard C. Lewis, Esq.	12:25 p.m.
11.	New business	12:30 p.m.
12.	Date and place of next meeting: Saturday, April 1, 2023 Bar Center, Albany, and Remote Meeting	

NEW YORK STATE BAR ASSOCIATION
RULES OF THE HOUSE OF DELEGATES
ADOPTED JANUARY 24, 1973; AMENDED APRIL 13, 1991; AMENDED NOVEMBER 5, 2022

1. Chair of the House of Delegates

(a) The President-Elect shall be the Chair of the House of Delegates. In the absence of the President-Elect, the President shall preside, and in the absence of the President and President-Elect, the Vice-President with seniority of membership shall preside. In the absence of the President, the President-Elect, and all Vice-Presidents, the senior member of the House shall preside.

(b) The Chair of the House of Delegates shall:
(1) Ensure that meetings are conducted in an orderly manner.
(2) Decide questions of order and procedure.

(c) The Chair of the House of Delegates may:
(1) Change the order of business at any meeting.
(2) Limit the time of debate or discussion on any matter of business.
(3) Call for a vote on any matter before the House.

2. Meetings of the House of Delegates

(a) Unless otherwise ordered by the House, regular meetings shall be held at the time and place designated by the Chair of the House of Delegates, but in no event less than four times in each year including one meeting to be held in conjunction with the Annual Meeting of the Association.

(b) Any meeting of the House of Delegates may be called at any time, subject to the notice requirements of the Bylaws and subsection c below, by:
(1) The President-Elect
(2) The President
(3) The Executive Committee
(4) The Secretary upon the written request of at least 25% of the delegates; provided, however, that the Secretary shall not be required to call such meeting to consider any matter which was considered and acted upon at a meeting of the House held within the previous twelve meetings.

(c) Notice of any meeting of the House of Delegates shall be sent by the Secretary not less than 15 days prior to the time fixed for such meeting. Notice of any meeting shall be deemed sufficient when written notice of the time and place thereof is given by mail, email, or other electronic transmission by the Secretary to each member of the House of Delegates on or before the 15th day prior to such meeting.

3. Order of Business

(a) The Chair of the House of Delegates shall determine the order and priority of business at a meeting. A written agenda shall be sent by mail, email, or other electronic transmission by the Secretary to each delegate not less than 15 days prior to the time fixed for the meeting, but additions or deletions may be made to the agenda by the President-Elect, the President, or the Executive Committee.

(b) Unless permitted by the Chair of the House of Delegates, no resolution may be proposed by a delegate for action at a meeting unless such resolution has been submitted in writing to the Chair of the House of Delegates and the delegates at least 15 days prior to such meeting.

(c) Delegates shall notify the Chair of the House of Delegates, in writing, by the end of the business day Wednesday prior to the meeting should they intend to introduce a matter of new business or make a motion to table a report or resolution, unless the Chair of the House of Delegates determines that the motion will be heard without such notice.

(d) If no member has risen in opposition or requested to speak in opposition to a report or resolution, then the Chair of the House of Delegates may invoke the rules of limited debate, limiting comments to no more than three speakers.

(e) With the exceptions noted below, no delegate shall speak more than three minutes at one time or more than once at the same session upon the same question unless such member obtains the consent of the Chair of the House of Delegates, or a majority of the delegates present at the meeting. The main motion and amendments shall be deemed separate questions. The person presenting the matter under discussion shall have the right to close the debate on that matter. The Chair of the House of Delegates may adjust the length of time for making oral presentations if in his or her judgment the conduct of the business of the House so requires, but such limitations may be removed by majority vote of the delegates present at the meeting.

(f) Without limitation on the other powers of the House, the House may by majority vote refer any matter coming before it to the Executive Committee or other committee, section, or task force of the Association for further consideration.

(g) Voting shall be by voice vote, unless the Chair of the House of Delegates directs a division of the House, or, if the delegate is participating remotely, by polling through the videoconference software.

(h) Robert's Rules of Order, Newly Revised shall govern meetings of the House, except as otherwise provided in these Rules or the Bylaws.

4. Persons in attendance at meetings of the House of Delegates

Meetings of the House shall be open to attendance by members of the Association unless the Executive Committee or the delegates vote to exclude non-delegates from a specified meeting. The Chair of the House of Delegates in his or her discretion may permit attendance at meetings of the House of Delegates by members of the press or members of the public. No non-delegate shall be heard by the House unless requested to speak by the Chair of the House of Delegates or upon the vote of two-thirds of the delegates present at the meeting, provided that such non-delegate shall first disclose the representative nature of his or her appearance, including the name of any client or principal whose interests the non-delegate may represent.

5. Amendments

The Rules of the House of Delegates may be amended at any meeting of the House by a vote of two-thirds of those present, provided that 15 days previous notice in writing of the proposed amendment shall have been given to the delegates.

NEW YORK STATE BAR ASSOCIATION
MINUTES OF ANNUAL MEETING
REMOTE MEETING
JANUARY 22, 2022

PRESENT: Abneri; Ahern; Ahn; Alcott; Alomar; Altman; Bahn; Barone; Barrie; Bascoe; Battistoni; Baum; Bechtel; Beltran; Berlin; Berman; Bierman; Bikel; Bladykas; Bond; Boston; Brafman; Brandow; Braunstein; Braverman; Bray; Braymer; Brilling; A. Brown; S. Brown; Burke; Burns; Buzard; Byun; Cameron; Carbajal-Evangelista; Carter; Chandrasekhar; Chang; Choi; Clouthier; B. Cohen; D. Cohen; O. Cohen; S. Cohen; Coreno; D'Angelo; DeFio Kean; Degnan; Doerr; Dubowski; Durocher; Eaddy; Edwards; Effman; Ehrlich; Engel; England; Eustaquio; Feal; Fellows; Fenichel; Filemyr; Finerty; Fish; Fox; R. Friedman; M. Friedman; Gallinari; Geldenhuys; Gentile; Gerstman; Getnick; Gilbert; Gilmartin; Gold; Goldfarb; Gomez-Velez; Good; Gould; Grady; Grays; Green; Griffin; Groppe; Gross; Gutekunst; Guzman-Diaz; Haig; Hatcher; Hayes; Heath; Hecker; Hedden; Heiskell; Hill; Himes; Holder; Islam; Jackson; Jaglom; James; Jamieson; Jimenez; Johnson; Joseph; Kamins; A. Katz; J. Katz; Kaufman; Kaye; Kehoe; K. Kelly; M. Kelly; Kendall; Kenney; Kenworthey; King; Kobak; Kotin; Kougasian; Kreismann; Kretzing; LaBarbera; Lara; Lau-Kee; Law; Lawrence; Leo; Leventhal; N. Levin; T. Levin; Levin Wallach; J. Levy; P. Levy; Lewis; Lindenauer; Ling; Lisi; Loyola; Lucas; Lugo; Karson; MacLean; Madigan; Mallo; Marinaccio; Markowitz; Maroney; Martin; Mastroianni; Matos; Matthews; Mazur; McGinn; McGrath; C. McNamrara; M. McNamara; Middleton; C. Miller; M. Miller; Milone; Minkowitz; Moreno; Moretti; Morrissey; Mukerji; Mulry; Napoletano; Newman; Nieves; Noble; Nowotarski; O'Connell; O'Connor; O'Kelly; Ostrer; Owens; Pace; Palermo; Palumbo; Pandolfo; Parker; Peretz; Perez; Perlman; Powers; Quaye; Quinones; Radick; Radman; Rahman; Reavis; Reed; Richman; Richter; Roberts; Rochelson; Rosen; Rosenthal; Roxland; Rubtchinsky; Russ; Russell; Ryan; Safer; Saini; Santiago; Schall; Schofield; Schram; Schraver; Schwartz-Wallace; Sciocchetti; Scott; Segal; Seiden; Sen; Sewell; Shafiqullah; J. Shapiro; S. Shapiro; Sharkey; Sheehan; Shoenthal; Shukoff; Siegel; Silkenat; Simon; Sise; Slavit; A. Smith; R. Smith; Soller; Sonberg; Starkman; Steinberg; Stong; Strom; Swanson; Tambasco; Taylor; Torrey; Treff; Triebwasser; Tsigounis; Tully; Udler-Meier; Ustin; Van Aken; van der Meulen; Venkatraman; Walker; Ward; Warner; Watanabe; Waterman-Marshall; Webb; Wessel; Wesson; Wolff; Woodley; Yaeger; Yeung-He; Young; Younger; Zuckerman

Mr. Brown presided over the meeting as President of the Association.

1. The meeting was called to order and the Pledge of Allegiance recited. Mr. Brown conveyed on behalf of the Association deepest condolences to past president Vincent E. Doyle III and family upon the passing of Mr. Doyle's mother, Joan W. Doyle.

2. Approval of minutes of the January 30, 2021, meeting. The minutes, as previously distributed, were accepted.

3. Report of the Nominating Committee and election of elected delegates to the House of Delegates. Michael Miller, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election as elected delegates to the House of Delegates for the 2022-2023 Association year:

First District: Bridgette Y. Ahn, James B. Kobak, and Stephen Charles Lessard, all of New York City;

Second District: Arthur I. Aidala, Aimee L. Richter, Anthony Vaughn, all of Brooklyn;

Third District: Jane Bello Burke, Hermes Fernandez, and Mishka Woodley, all of Albany;

Fourth District: M. Elizabeth Coreno and Margaret E. Gilmartin of Saratoga Springs, and Nicole L. Clouthier of Schenectady;

Fifth District: John T. McCann and Stuart Larose of Syracuse, and Jean Marie Westlake of East Syracuse;

Sixth District: Andria R. Adigwe and Alyssa M. Barreiro of Binghamton, and Jeri Ann Duvall of Cortland;

Seventh District: Duwaine T. Bascoe of Penfield, Stephen M. Kelley of Geneseo, and Amy E. Schwartz-Wallace of Rochester;

Eighth District: Sophie I. Feal of Buffalo, and Norman P. Effman and Leah Nowotarski of Warsaw;

Ninth District: Karen Beltran, Claire J. Degnan, and Hon. Linda S. Jamieson, all of White Plains;

Tenth District: Ilene S. Cooper of Uniondale, John H. Gross of Happauge, and Steven G. Leventhal of Roslyn;

Eleventh District: Karen Dubowski and Arthur N. Terranova of Queens, and Hon. Karina E. Alomar of Kew Gardens;

Twelfth District: Samuel Braverman, Renee Corley Hill, and Steven E. Millon of the Bronx;

Thirteenth District: Allyn J. Crawford, Edwina Frances Martin, and Sheila T. McGinn, all of Staten Island.

There being no further nominations, a motion was made and carried for the Secretary to cast a single ballot for the elected delegates to the House of Delegates.

4. Address by Hon, Janet DiFiore, Chief Judge of the State of New York. Chief Judge DiFiore updated the members with respect to the status of Unified Court System initiatives with a particular focus on the administration of the court system throughout the COVID-19 crisis, including virtual proceedings and court reopening, efforts to implement equal justice recommendations within the New York courts, a proposal for court simplification, and comments on the proposed judiciary budget. Mr. Brown thanked her for her report.

5. Remark by Hon. Elizabeth R. Fine, Counsel to the Governor. Counsel Fine, on behalf of Governor Kathy C. Hochul, updated the members with respect to items of interest from the 2022 State of the State and the Executive Budget proposal, and efforts to improve workplace practices and increase transparency within state government. Mr. Brown thanked her for her report.

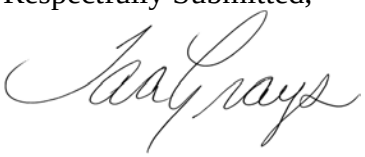
6. Report of President. Mr. Brown highlighted the items contained in his written report, a copy of which is appended to these minutes.

7. Report of Treasurer. Domenick Napoletano, Treasurer, reported on the 2021 operating budget through December 31, 2021, noting that through December 31, 2021, the Association's total revenue was $18.7 million, a decrease of approximately $1.65 million from the previous year, and total expenses were $15.9 million, a decrease of approximately $2.9 million over 2020, for a surplus of $2.73 million, an increase of approximately $1.25 million compared to 2020. The report was received with thanks.

8. Report and recommendations of Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, presented the Committee's proposals bylaws amendments to remove gender-specific language from the Bylaws. After discussion, a motion was adopted to approve the bylaws amendments.

9. Adjournment. There being no further business, the Annual Meeting of the Association was adjourned.

Respectfully Submitted,



Taa R. Grays
Secretary

Staff Memorandum

ANNUAL MEETING
Agenda Item #3

REQUESTED ACTION: A) Closure of nominations and B) that a single, unanimous ballot be cast by the Secretary for the election of the elected delegate nominees to the House of Delegates.

Article XI of the Bylaws requires that the elected delegates to the House of Delegates shall be elected at the Annual Meeting. (The number of such delegates is fixed at three from each judicial district by Article V, Section 3 of the Bylaws. Terms of office begin on June 1, 2023).

The list of candidates for the office of elected delegate from each of the thirteen judicial districts is attached.

Nominating Committee chair Henry M. Greenberg or his designee will present the report.

ANNUAL MEETING
Agenda Item #3

Election of 2023-2024
Elected Delegates to the House of Delegates

1st District	James B. Kobak, New York City Stephen Charles Lessard, New York City Diana S. Sen, New York City
2nd District	Hon. Barry Kamins, Brooklyn Aimee L. Richter, Brooklyn Anthony Vaughn, Brooklyn
3rd District	Mara Afzali, Albany Hermes Fernandez, Albany Colleen R. Pierson, Albany
4th District	Mary Elizabeth Coreno, Saratoga Springs Margaret E. Gilmartin, Saratoga Springs Connor Reale, Saratoga Springs
5th District	Stuart LaRose, Syracuse John T. McCann, Syracuse Jean Marie Westlake, East Syracuse
6th District	Alyssa M. Barreiro, Binghamton Jeri Ann Duvall, Cortland Rachel Ellen Miller, Binghamton
7th District	Duwaine T. Bascoe, Penfield Stephen M. Kelley, Geneseo Amy Schwartz-Wallace, Rochester
8th District	Norman P. Effman, Warsaw Sophie I. Feal, Buffalo Leah Nowotarski, Warsaw
9th District	Clare J. Degnan, White Plains Hon. Linda S. Jamieson, White Plains John A. Pappalardo, White Plains

10th District	Harvey B. Besunder, Islandia
	Justin M. Block, Central Islip
	Peter H. Levy, Jericho
11th District	Hon. Karina E. Alomar, Kew Gardens
	Kristen J. Dubowski, Queens
	Arthur N. Terranova, Queens
12th District	Samuel Braverman, Bronx
	Renee Corley Hill, Bronx
	Steven E. Millon, Bronx
13th District	Allyn J. Crawford, Staten Island
	Hon. Edwina Frances Martin, Staten Island
	Sheila T. McGinn, Staten Island

NYSBA

Staff Memorandum

ANNUAL MEETING
Agenda Item #4

REQUESTED ACTION: None, as the report is informational.

Association president Sherry Levin Wallach will report to the membership with respect to her presidential initiatives, the governance of the Association, and other developments of interest. A copy of the written report will be distributed during the meeting.

NYSBA

Staff Memorandum

ANNUAL MEETING
Agenda Item #5

REQUESTED ACTION: None, as the report is informational.

Attached are the Operating Budget, Statement of Financial Position, Statements of Activities, Statements of Activities (continued) and Capital Items Approved and Purchased for the period ending December 31, 2022.

The report will be presented by Association treasurer Domenick Napoletano.

NEW YORK STATE BAR ASSOCIATION
2022 OPERATING BUDGET
TWELVE MONTHS OF CALENDAR YEAR 2022

REVENUE

	2022 BUDGET	UNAUDITED RECEIVED 12/31/2022	% RECEIVED 12/31/2022	2021 BUDGET	UNAUDITED RECEIVED 12/31/2021	% RECEIVED 12/31/2021
MEMBERSHIP DUES	9,372,690	9,056,794	96.63%	8,764,295	9,335,487	106.52%
SECTIONS:						
Dues	1,219,400	1,112,055	91.20%	1,200,000	1,175,901	97.99%
Programs	2,841,555	1,247,580	43.90%	1,733,315	699,904	40.38%
INVESTMENT INCOME	486,225	608,641	125.18%	494,420	503,868	101.91%
ADVERTISING	218,000	290,497	133.26%	183,000	306,637	167.56%
CONTINUING LEGAL EDUCATION	2,950,000	2,202,826	74.67%	2,950,000	2,715,526	92.05%
USI AFFINITY PAYMENT	1,912,000	2,000,000	104.60%	2,154,000	2,143,644	99.52%
ANNUAL MEETING	400,000	444,011	111.00%	276,225	489,977	177.38%
HOUSE OF DELEGATES & COMMITTEES	47,500	160,057	336.96%	27,000	27,291	101.08%
PUBLICATIONS, ROYALTIES AND OTHER	213,500	298,371	139.75%	210,700	233,545	110.84%
REFERENCE MATERIALS	1,247,000	1,180,362	94.66%	1,300,000	1,262,049	97.08%
TOTAL REVENUE	**20,907,870**	**18,601,194**	**88.97%**	**19,292,955**	**18,893,829**	**97.93%**

EXPENSE

	2022 BUDGET	UNAUDITED EXPENDED 12/31/2022	% EXPENDED 12/31/2022	2021 BUDGET	UNAUDITED EXPENDED 12/31/2021	% EXPENDED 12/31/2021
SALARIES & FRINGE	8,588,946	8,529,348	99.31%	8,334,264	6,917,249	83.00%
BAR CENTER:						
Rent	-	-	0.00%	284,000	283,623	99.87%
Building Services	342,000	441,988	129.24%	365,000	407,094	111.53%
Insurance	190,000	218,575	115.04%	164,000	197,354	120.34%
Taxes	167,250	148,796	88.97%	180,250	186,645	103.55%
Plant and Equipment	862,000	848,552	98.44%	893,500	780,373	87.34%
Administration	610,750	862,951	141.29%	526,100	619,072	117.67%
SECTIONS	4,039,155	2,141,219	53.01%	2,920,715	703,398	24.08%
PUBLICATIONS:						
Reference Materials	121,500	100,808	82.97%	248,800	135,263	54.37%
Journal	265,000	238,686	90.07%	245,700	228,021	92.80%
Law Digest	47,000	46,298	98.51%	75,000	46,416	61.89%
State Bar News	100,300	99,044	98.75%	85,500	67,947	79.47%
MEETINGS:						
Annual Meeting	360,100	37,545	10.43%	24,250	13,811	56.95%
House of Delegates, Officers and Executive Committee	561,550	600,314	106.90%	309,000	280,663	90.83%
COMMITTEES:						
Continuing Legal Education	370,400	147,778	39.90%	435,000	102,573	23.58%
LPM / Electronic Communication Committee	35,150	-	0.00%	1,400	-	0.00%
Marketing / Membership	909,450	836,363	91.96%	850,000	652,574	76.77%
Media Services	290,000	267,671	92.30%	269,450	210,784	78.23%
All Other Committees and Departments	2,925,875	2,772,639	94.76%	2,590,135	2,696,000	104.09%
TOTAL EXPENSE	**20,786,426**	**18,338,575**	**88.22%**	**18,802,064**	**14,528,860**	**77.27%**
BUDGETED SURPLUS	**121,444**	**262,619**		**490,891**	**4,364,969**	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF DECEMBER 31, 2022

ASSETS	UNAUDITED 12/31/2022	UNAUDITED 12/31/2021	UNAUDITED 12/31/2021
Current Assets:			
General Cash and Cash Equivalents	20,208,775	19,902,457	19,902,457
Accounts Receivable	62,738	39,878	39,878
Prepaid expenses	1,766,419	680,393	680,393
Royalties and Admin. Fees receivable	710,214	748,640	748,640
Total Current Assets	22,748,146	21,371,368	21,371,368
Board Designated Accounts:			
Cromwell Fund:			
Cash and Investments at Market Value	2,778,996	3,366,406	3,366,406
Accrued interest receivable	0	0	0
	2,778,996	3,366,406	3,366,406
Replacement Reserve Account:			
Equipment replacement reserve	1,118,049	1,117,938	1,117,938
Repairs replacement reserve	794,709	794,629	794,629
Furniture replacement reserve	220,044	220,022	220,022
	2,132,802	2,132,589	2,132,589
Long-Term Reserve Account:			
Cash and Investments at Market Value	28,840,999	34,513,008	34,513,008
Accrued interest receivable	163,465	124,042	124,042
	29,004,464	34,637,050	34,637,050
Sections Accounts:			
Section Cash and Investments at Market Value	3,846,571	4,022,992	4,022,992
Cash	218,416	1,172,408	1,172,408
	4,064,987	5,195,400	5,195,400
Fixed Assets:			
Building - 1 Elk	3,566,750	0	0
Land	283,250	0	0
Furniture and fixtures	1,480,650	1,463,037	1,463,037
Leasehold Improvements	874,272	1,470,688	1,470,688
Equipment	3,243,942	4,053,020	4,053,020
	9,448,864	6,986,745	6,986,745
Less accumulated depreciation	4,149,448	4,680,627	4,680,627
Net fixed assets	5,299,416	2,306,118	2,306,118
Operating Lease Right-Of-Use Asset	129,472	0	0
Finance Lease Right-Of-Use Asset	21,208	0	0
	150,680 0	0 0	0
Total Assets	66,179,491	69,008,931	69,008,931
LIABILITIES AND FUND BALANCES			
Current liabilities:			
Accounts Payable & other accrued expenses	764,840	861,399	861,399
Deferred dues	6,170,570	6,095,477	6,095,477
Deferred income special	(1)	(1)	(1)
Deferred grant revenue	(1,959)	29,906	29,906
Other deferred revenue	1,121,838	369,627	369,627
PPP Loan Payable	0	0	0
Payable To TNYBF - Service Agreement	3,586,061	0	0
Payable To The New York Bar Foundation	12,250	480	480
Operating Lease Obligation	101,506	0	0
Finance Lease Obligation	14,221	0	0
Total current liabilities & Deferred Revenue	11,769,326	7,356,888	7,356,888
Long Term Liabilities:			
LT Operating Lease Obligation	27,966	0	0
LT Finance Lease Obligation	7,102	0	0
Accrued Other Postretirement Benefit Costs	8,516,910	8,156,910	8,156,910
Accrued Defined Contribution Plan Costs	329,484	398,670	398,670
Total Liabilities & Deferred Revenue	20,650,788	15,912,468	15,912,468
Board designated for:			
Cromwell Account	2,778,996	3,366,406	3,366,406
Replacement Reserve Account	2,132,802	2,132,589	2,132,589
Long-Term Reserve Account	19,994,605	25,957,428	25,957,428
Section Accounts	4,064,987	5,195,400	5,195,400
Invested in Fixed Assets (Less capital lease)	5,299,416	2,306,118	2,306,118
Undesignated	11,257,897	14,138,522	14,138,522
Total Net Assets	45,528,703	53,096,463	53,096,463
Total Liabilities and Net Assets	? 66,179,491	69,008,931	69,008,931

New York State Bar Association
Statement of Activities
For the Twelve Months Ending December 31, 2022

	December 2022	***December 2021***	***December 2021***
REVENUES AND OTHER SUPPORT			
Membership dues	9,056,794	9,335,487	9,335,487
Section revenues			
Dues	1,112,055	1,175,901	1,175,901
Programs	1,247,580	699,904	699,904
Continuing legal education program	2,202,826	2,715,526	2,715,526
Administrative fee and royalty revenue	2,294,629	2,408,451	2,408,451
Annual meeting	444,011	489,977	489,977
Investment income	1,393,587	1,386,890	1,386,890
Reference Books, Formbooks and Disk Products	1,180,362	1,262,049	1,262,049
Other revenue	609,187	314,123	314,123
Total revenue and other support	19,541,031	19,788,308	19,788,308
PROGRAM EXPENSES			
Continuing legal education program	1,194,057	796,840	796,840
Graphics	957,624	1,172,896	1,172,896
Government relations program	288,940	324,497	324,497
Lawyer assistance program	134,444	52,865	52,865
Lawyer referral and information services	-	(63)	(63)
Law practice management services	-	36,455	36,455
Media / public relations services	623,116	577,256	577,256
Business Operations	2,464,594	2,231,386	2,231,386
Marketing and Membership services	1,820,077	1,538,319	1,538,319
Pro bono program	94,863	145,000	145,000
House of delegates	529,911	266,997	266,997
Executive committee	70,403	13,666	13,666
Other committees	238,331	76,452	76,452
Sections	2,141,219	703,398	703,398
Section newsletters	254,609	245,723	245,723
Reference Books, Formbooks and Disk Products	604,174	692,853	692,853
Publications	384,028	342,384	342,384
Annual meeting expenses	37,545	13,811	13,811
Total program expenses	11,837,935	9,230,735	9,230,735
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	3,165,292	2,871,832	2,871,832
Pension plans and other employee benefit plan costs	682,663	(181,808)	(181,808)
Rent and equipment costs	824,904	1,187,626	1,187,626
Consultant and other fees	749,672	680,709	680,709
Depreciation and amortization	768,980	687,038	687,038
' Operating Lease	102,913	-	-
Other expenses	121,869	52,308	52,308
Total management and general expenses	6,416,293	5,297,705	5,297,705
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS	**1,286,803**	**5,259,868**	**5,259,868**
Realized and unrealized gain (loss) on investments	(8,718,423)	3,445,877	3,445,877
Realized gain (loss) on sale of equipment	(136,142)	-	-
Loan forgivness		1,482,957	1,482,957
CHANGES IN NET ASSETS	**(7,567,762)**	**10,188,702**	**10,188,702**
Net assets, beginning of year	53,096,463	42,907,761	42,907,761
Net assets, end of year	45,528,701	53,096,463	53,096,463

Staff Memorandum

ANNUAL MEETING
Agenda Item #6

REQUESTED ACTION: Approval of Bylaws amendments proposed by the Committee on Bylaws.

Attached is a memorandum from the Committee on Bylaws proposing amendments to the association Bylaws in three parts. First, as outlined in Part One of the report, to implement the resolution of the Committee on Diversity, Equity, and Inclusion as adopted by the House of Delegates on June 18, 2022, directing the addition of a new Section 2 to Article II and amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1). Second, as outlined in Part Two of the report, to incorporate requests made by the Committee on Membership for amendments to Article III, Section 1(D)(1) and Article III, Section 6. Third, as outlined in Part Three of the report, to correct an internal citation error at Article IV, Section 7.

Under procedures established in the Bylaws, the proposed amendments were subscribed to by a majority of all members of the House of Delegates at the November 2022 meeting. They are now before you for approval and addition to the Bylaws.

The report will be presented at the January 20th meeting by Robert T. Schofield, IV, Chair of the Committee on Bylaws.

NEW YORK STATE BAR ASSOCIATION
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COMMITTEE ON BYLAWS

ROBERT T. SCHOFIELD, IV
Chair
Whiteman Osterman & Hanna LLP
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October 27, 2022

To: Members of the House of Delegates

Re: AMENDED Report on Proposed Bylaws Amendments

INTRODUCTION

The stated purpose of the Committee on Bylaws is to examine and report on proposed amendments to the Bylaws of the Association and to observe the activities of the Association under the present Bylaws and, from time to time, report to the Executive Committee and the House of Delegates on such amendments as, in its opinion, will promote the efficiency of the Association.

This report proposes amendments to the Bylaws in three parts. First, as outlined in Part One, to implement the resolution of the Committee on Diversity, Equity, and Inclusion as adopted by the House of Delegates on June 18, 2022, directing the addition of a new Section 2 to Article II and amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1). Second, as outlined in Part Two, to incorporate requests made by the Committee on Membership for amendments to Article III, Section 1(D)(1) and Article III, Section 6. Third, as outlined in Part Three, to correct an internal citation error at Article IV, Section 7.

PART ONE – DIVERSITY, EQUITY, AND INCLUSION AMENDMENTS
Addition of new Section 2 to Article II and proposed amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1).

The Association Bylaws presently provide for the President to appoint twelve members "from a range of racial and ethnic minority groups identified by the National Association for Law Placement" to the House of Delegates each year (Article V, Section 3(H)). The Bylaws also provide that two members-at-large of the Executive Committee shall be selected to further ethnic and racial diversity (Article VII, Section 1(F)(1)). The provisions providing for these positions will expire and be removed from the Bylaws on May 31, 2025 (the "sunset clauses"), without further action by the Association.

At its June 18, 2022, meeting, the House of Delegates adopted a resolution from the Committee on Diversity, Equity, and Inclusion recommending that the sunset clauses be removed from Article V, Section 3(H) and Article VII, Section 1(F)(1), thereby permanently providing for the twelve diversity delegates and two diversity member-at-large positions. The Committee on

Diversity, Equity, and Inclusion's report and resolution, as adopted by the House of Delegates, is attached as Exhibit "A" to the report.

The Committee on Bylaws was subsequently charged to develop Bylaws amendments to implement this House action. After considering the issues, we have recommended several changes to the Bylaws to express more fully the Association's commitment to Diversity, Equity, and Inclusion.

First, our committee's prior communications to the House in June 2022,[1] and the Special Committee on Association Structure and Operations in December 2019, noted that the Association's Diversity Plan[2] and the history of the Association's efforts to grow and sustain diversity within all aspects of its existence, have not been carried into the Bylaws. While the Association has adopted and repeatedly restated a strong policy in favor of diversity, that policy is not adequately reflected in bylaw text. Our committee feels that amending the Bylaws to do so would constitute an important demonstration of the Association's focus on this critical goal.

An amendment to accomplish this is proposed in the form of a new Section B of Article II, to incorporate a written commitment to diversity in the Bylaws. This new language, proposed to be added to the Purposes Article, is drawn from the current and prior reports of the Committee on Diversity, Equity, and Inclusion and its predecessor, the Committee on Diversity and Inclusion. It adds a clear statement of commitment to diversity directly into one of the first articles a reader confronts when reviewing the Association's Bylaws.

Second, in accordance with the resolution of the House passed at the June 2022 meeting, it is incumbent upon this committee to propose modifications to remove the sunset provisions of Article V, Section 3(H) and Article VII, Section 1(F)(1). While the goals of both amendments are consistent, the approach to each differs.

Article V, Section 3(H) includes (and has, for many years) a reference to "racial and ethnic minority groups" identified by the National Association for Law Placement in defining who is eligible to hold one of the twelve diversity seats. Since the Bylaws language first made reference to the NALP standard in 2004, the understanding and scope of the concept of diversity has evolved in public discourse. The current NALP definition, last amended in 2021, reads:

> "*There shall be no barriers to full participation in the Association on the basis of sex, actual or perceived gender, age, race, color, religion, creed, national or ethnic origin, disability, sexual orientation, gender identity and expression, genetic information, parental, marital, domestic partner, civil union, military, or veteran status. Diverse members, for purposes of this policy, shall include, but not be limited to, individuals who identify as Black, Indigenous, and People of Color (BIPOC); LGBTQ+; people with disabilities; neuro-diverse; and active military and veterans." https://www.nalp.org/diversitywithinnalp*

[1] Attached as Exhibit "B" to the report.
[2] Adopted by the House of Delegates on January 31, 2020. Attached as Exhibit "C" to the report.

The committee reviewed the presence of the NALP standard in the Association's Bylaws. We found its continued use appropriate and concluded that incorporation of the most recent NALP language was consistent with the Association's current Diversity Plan. We therefore initially recommended adoption of the current NALP definition, updated to reflect this current, broader view of diversity.

After further discussion with the Committee on Diversity, Equity, and Inclusion, caused by our receipt of comments from them in opposition to this aspect of our work, we concluded the use of the current standard was actually inconsistent with the intent of the bylaws language establishing these positions for members of "racial and ethnic minority groups." Indeed, the broader language was a definition of "diversity," and not a definition that reflected the Association's long-standing policy of advancing membership in the House and on the Executive Committee by representatives of racial and ethnic minority groups. Both Committees found that the intent of the House would be better reflected by amending the provision to utilize NALP's definition of "lawyers of color," which includes Asian, Black or African American, Latinx, Native American or Alaska Native, Native Hawaiian or other Pacific Islander, and multiracial lawyers.

We believe this definition is consistent with our Association's long-standing commitment to diversity and the original intent for the inclusion of the diversity seats in the Bylaws. We also recognize that the inclusion of the definition within the Bylaws, in the form of a footnote, serves to remind the reader of this important policy, consistent with the Association's current Diversity Plan. The remaining portion of the amendment to this section is simply the deletion of the second sentence of the sub-section, which served to sunset the twelve diversity seats on May 31, 2025. By deleting that sentence, the provision creating the diversity seats becomes permanent.

Third, concerning the two diversity member-at-large positions, the committee takes a slightly different approach to its proposed amendment of Article VII, Section 1(F)(1) because the current language of that provision does not contain a definitional reference to the NALP Standard. In the absence of such a reference, our proposed revision is more limited. We merely suggest use of the now defined term Racial and Ethnic Minority Groups and the deletion of the final two sentences of the subsection, which served to sunset the two diversity member-at-large positions on May 31, 2025. By deleting these sentences, the provision creating the two diversity member-at-large positions becomes permanent.

The Bylaws Committee recognizes the evolving nature of the definitions used in the legal community's on-going efforts to enhance Diversity, Equity, and Inclusion. As such, we recommend that those definitions be reviewed regularly in the future.

Based on the foregoing, the committee proposes the Bylaws amendments set forth below:

Article II:

II. PURPOSES

Section 1. The purposes of the Association are to cultivate the science of jurisprudence; to promote reform in the law; to facilitate the administration of

justice; to elevate the standard of integrity, honor, professional skill and courtesy in the legal profession; to cherish and foster a spirit of collegiality among the members of the Association; to apply its knowledge and experience in the field of the law to promote the public good; to promote and correlate the same and similar objectives in and among the Bar organizations in the State of New York in the interest of the legal profession and of the public and to uphold and defend the Constitution of the United States and the Constitution of the State of New York.

Section 2. The Association holds an unwavering and longstanding commitment to diversity within its membership and leadership ranks based upon its firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large. The Association is made stronger and more capable of implementing positive change through the law when its membership reflects the diversity of the individuals and communities served by the legal profession. Accordingly, the Association will promote and advance the full and equal participation of diverse attorneys in the profession and the Association, including diversity based on gender, race, color, ethnic origin, national origin, religion, sexual orientation, gender identity and expression, age, and disability.

Article V, Section 3(H):

V. HOUSE OF DELEGATES
Section 3. Composition. The House of Delegates shall be composed of:

* * *

H. Twelve delegates to be appointed by the President then in office from the range of ~~racial and ethnic minority groups~~Racial and Ethnic Minority Groups identified by the National Association for Law Placement.[1] At least two and no more than four of such delegates shall be appointed from each Judicial Department, and all appointments shall be subject to confirmation by the Executive Committee. ~~This subsection shall expire ten years from the date of amendment (January 31, 2014) and shall be removed from these Bylaws without further action of the Association. Notwithstanding such expiration, the final term authorized under this provision shall be for a full year, concluding May 31, 2025.~~

[1] *Following NALP's definition of "lawyers of color," Racial and Ethnic Minority Groups include Asian, Black or African American, Latinx, Native American or Alaska Native, Native Hawaiian or other Pacific Islander, and multiracial lawyers. See, NALP 2021 Report on Diversity in U.S. Law Firms available at: https://www.nalp.org/reportondiversity (last accessed on October 27, 2022)*

Article VII, Section 1(F)(1):

VII. EXECUTIVE COMMITTEE

Section 1. Composition. The Executive Committee shall be a committee of the House of Delegates and shall consist of:

* * *

F. 1. Eight members-at-large who shall be Active members of the Association. Not less than two of the members-at-large shall be selected from the First Judicial District. Two of the members-at-large shall be selected ~~to further ethnic and racial diversity~~from Racial and Ethnic Minority Groups and may not be drawn from the same Judicial District. ~~Ten years from the date of amendment (January 31, 2014), the provision for the two members-at-large selected to further ethnic and racial diversity shall expire and be removed from these Bylaws without further action of the Association, and the number of these members-at-large on the Executive Committee shall revert to six. Notwithstanding such expiration, the final term authorized under this provision shall be for a full two-year term, concluding May 31, 2025.~~

PART TWO – MEMBERSHIP
Proposed amendments to Article III

At the request of the Committee on Membership, the Bylaws Committee reviewed several provisions of Article III of the Bylaws on Members and Affiliates. These efforts were driven by a memo, dated September 30, 2021, from the Committee on Membership to the chair and vice-chair of our committee, and an inquiry made regarding the membership termination process resulting from questions initially raised by the Committee on Professional Discipline. The Committee on Membership's memo, articulating the rationale and scope of its request, is attached as "Exhibit D" to the report.

The Committee on Membership asked for our committee to address three topics within the membership articles of the Bylaws: (1) the transition of law student members into full paying members, (2) a further adjustment to the membership provisions for paralegals as non-attorney affiliate members, and (3) a clarification in the process for termination of membership for nonpayment of dues. Having studied the requests and the existing language closely, our committee has proposed language on the first and third items but declined to recommend any changes in connection with the second item.

With respect to the requested change relating to law student membership transitions, the Committee on Membership wrote:

> "Law students typically graduate in December/May and take the Bar Exam in July/February. As law students prepare for the Bar Exam, they require continued membership with NYSBA to access certain member benefits such as Kaplan Bar Prep and Casebriefs, which is an open platform of law school case briefs designed for law students to use to assist with their case analysis and briefing. If NYSBA drops law students as members upon graduation from law school, the Association is dropping them when they need membership the most. It is important for the law students to have continued membership for at least 12 to 18 months post-graduation to allow them to study, pass the Bar Exam, and become admitted to the practice of law." Memo to Bylaws Committee, September 30, 2021.

Our committee concurred with this rationale, but our examination of the existing Bylaws provision revealed that the Bylaws also contemplate other transitions that could benefit from the extension proposed by the Committee on Membership. Those include service in the armed forces. As such, our committee proposes a different approach to the amendment which addresses these other events, already contemplated by the Bylaws, in a similar manner.

The Membership Committee also proposed revisions to the bylaw provisions on non-attorney affiliates to loosen the definition of paralegals. Having extensively studied this issue in our September 2019 report, we viewed the Committee on Membership's proposed changes as inconsistent with our 2019 findings and recommendations, as well as the action of the House regarding paralegal membership in June 2019. As such, we have declined to recommend additional changes to these bylaw provisions.

Last, the Membership Committee asked us to review the Bylaws and consider new language relating to termination of membership upon the failure of a member to pay dues. The Committee observed:

> "The membership renewal season runs from early October through March. Throughout this period, NYSBA assesses renewal results and anticipates the number of additional invoices needed to achieve membership goals for the year. Typically, NYSBA sends 6 print invoices and 6 email invoices to members as part of the renewal membership campaign. Members who have not renewed are dropped from the membership rolls on or around April 1st. Bylaws III.6.A. specifies drops to occur "within one month after receipt of the second dues notice" should dues not be paid during that time. In light of the timeline of the membership campaign season, and the practical consideration of what is "notice" in an era of electronic communications and solicitations, the membership provisions of the Bylaws should be amended to offer flexibility with membership drops given activity in the marketplace." Memo to Bylaws Committee, September 30, 2021.

We concurred with the Committee on Membership's assessment of the issue with the current bylaw language and, as we studied the matter, concluded that there was an overall weakness in the provisions of the Bylaws relating to membership termination. Our work was also informed by questions raised by the Committee on Professional Discipline that, while not specifically referred to us, drew our attention to the fact that additional clarification of the subsections of Section 6 was needed.

The outcome of this more comprehensive review is a significant rewrite of many of the subsections in Article III, Section 6, which focuses on the various events upon which membership in the Association will be terminated, and how it can be restored.

In Section 6(A), we addressed the issue raised by the Committee on Membership by changing the termination event to one driven by a Notice from the Treasurer. It is no longer specifically a "second" notice, giving staff more flexibility in how they want to engage in dues collection activities before the Treasurer notifies the member that their membership is about to be terminated for non-payment. The new language now provides that membership terminates if

payment is not made within 30 days of the Treasurer's notice. An identical approach is incorporated into Section 6(B), which is the provision dealing with termination of membership for failing to pay an assessment.

Our committee's study of Section 6(C) led to the conclusion that it was addressing two different potential events and could benefit from edits treating those events separately. It was therefore split into subsections (C) and (D), the former dealing with removal of members by the House upon the recommendation of the Committee on Professional Discipline after a hearing held by that committee, and the latter dealing with termination of membership following disbarment or suspension by a disciplinary authority.[3] In both places, we further recommended the addition of language to clarify how a membership ended under the provision could be restored, either by a vote of the House (in the case of removals under subsection (C)) or by the end of a suspension/readmission (in the case of a removal under subsection (D)).

Our last revision was to Section E and merely adds that a termination of membership caused by the member's resignation is effective when delivered to the Executive Director or Secretary. This was implied by the existing language, but not expressly stated anywhere.

Based on the foregoing, the committee proposes the Bylaws amendments set forth below:

Article III, Section 1(D)(1):

III. MEMBERS AND AFFILIATES

* * *

D. Law Student Members.

1. Any law student in good standing, if not otherwise eligible for membership in this Association, may become a Law Student member by written application to the Executive Director, endorsed as to the applicant's good standing as above prescribed on behalf of the applicant's law school, and by payment of the annual dues of the current year, provided that the law school is an approved law school under the Rules of the Court of Appeals. A Law Student member shall cease to be such at ~~the end of any calendar year in which, for any reason other than graduation or service in the Armed Forces of the United States or in any statutory substitute for such service, the law student cases to be enrolled in good standing in an approved law school, provided that continuance of such membership because of service in the Armed Forces on the United States or in any statutory substitute for such service shall cease one year after the termination of such service if the Law Student member has not by that time again become a law student and met all qualifications for becoming a Law Student member~~: (a) the end of the eighteenth month after graduation; (b) the end of the eighteenth month after the end of service

[3] The Committee identified, but did not address, the circumstance of an attorney that is admitted in more than one jurisdiction, and, therefore, may be entitled to hold membership in another category under Article III even after their removal from Active Membership upon disciplinary action in New York. Under the Bylaws as written and proposed, an attorney suspended or disbarred in New York remains ineligible for Association membership until readmitted in New York.

in the Armed Forces of the United States or in any statutory substitute for such service, provided that the individual shall be eligible to continue as a Law Student Member if the individual again becomes a law student and meets all qualifications for becoming a Law Student Member; (c) such time as the individual becomes eligible for membership in the Association as an Active or Associate Member; or (d) such time as the law student ceases to be enrolled in good standing in an approved law school and does not continue to qualify as a Law Student member under (a) or (b) above. A Law Student member shall be exempt from dues while in service of the Armed Forces of the United States or in any statutory substitute for such service.

Article III, Section 6:

III. MEMBERS AND AFFILIATES

* * *

Section 6. Termination of Membership.

A. If any member fails to pay yearly dues within ~~one month after receipt of the second dues notice~~ the period designated by the Association for payment of dues, it shall be the duty of the Treasurer to send a ~~letter and~~ notice to the member stating that unless said dues are paid, ~~within one month thereafter~~ the member shall cease to be a member of the Association ~~and forfeit all rights in respect thereof~~. If the dues are not paid by the member within 30 days of the date of the Treasurer's notice, the member's membership shall thereupon terminate.

B. If any member fails to pay any assessment within ~~one month after receipt of the second notice~~ the period designated by the Association for payment of such assessment, it shall be the duty of the Treasurer to send a ~~letter and~~ notice to the member stating that unless said assessment is paid ~~within one month thereafter~~, the member shall cease to be a member of the Association ~~and shall forfeit all rights in respect thereof~~. If the assessment is not paid by the member within 30 days of the date of the Treasurer's notice, the member's membership shall thereupon terminate.

C. The House of Delegates may suspend or expel any member for misconduct in the member's relations to the Association, or to the profession, upon the recommendation of the Committee on Professional Discipline after a hearing held by that committee upon reasonable notice to such member to appear and present a defense. Any member suspended or expelled from membership under the terms of this paragraph may be reinstated as a member only by vote of the House of Delegates.

D. Any member shall automatically be removed from membership in the event of a final court order of disbarment or suspension of the member from the practice of law in New York State. ~~Any member suspended or expelled from~~

~~membership under terms of this paragraph may be reinstated as a member by vote of the House of Delegates, without any adjustment of dues.~~Any member suspended or expelled from membership under the terms of this paragraph may not be reinstated to any class of membership until the end of such suspension or upon their readmission to the practice of law in New York.

~~D~~E. Any member may resign from membership in the Association by submitting a resignation in writing to the Executive Director or Secretary of the Association, without any adjustment of dues. The resignation shall be effective upon receipt by the Executive Director or Secretary.

~~E~~F. All interest in the property of the Association of persons ceasing to be members by expulsion, resignation or otherwise shall thereupon vest absolutely in the Association.

PART THREE – ERRATA
Correction to Article IV, Section 7

An internal citation error was discovered by staff at Article IV, Section 7 in reference to the House of Delegates' role in the election of officers and vice-presidents should be there a vacancy in those positions. Specifically, Article IV, Section 7 currently references Article V, Section 3(K), which reads "Each member of the House of Delegates must be a member of the New York State Bar Association in good standing." A reading of the provision strongly suggests that the reference was intended to be to Article V, Section 3(L), which governs the filling of vacancies in the positions of elected delegates, the President-Elect, Vice-Presidents, Secretary, Treasurer, and the members-at-large of the Executive Committee.

To correct this internal citation error, a correction to Article IV, Section 7 of the Association's Bylaws is proposed as follows:

Article IV, Section 7:

IV. OFFICERS

* * *

Section 7. Death, Disability or Resignation. In the event of the death, resignation or total disability of the President, the President-Elect shall automatically succeed to the office of President for the unexpired term and the term next following. In the event of the death, resignation or total disability of the President-Elect, or in the event the President-Elect succeeds to the presidency as provided in this section, the President shall serve as Acting Chair of the House of Delegates until the vacancy in the office of President-Elect shall be filled by election of the House of Delegates following nomination of a candidate by the Nominating Committee. In advance of making such nomination, the Nominating Committee shall give appropriate notice of the vacancy and of the House of Delegates meeting at which the election is to be

held. The Nominating Committee shall file its report of a nominee with the Secretary at least 30 days in advance of the House of Delegates meeting at which the election is to be held, and the report shall be open to inspection by any member of the Association. Any 50 members of the Association may also nominate candidates for President-Elect by filing a petition signed by such members with the Secretary not later than ten days before the meeting at which the election is to take place. Nominations not made by the Nominating Committee or the membership in the manner prescribed shall not be considered or voted upon. The determination of total disability of the President or President-Elect shall be made by the House of Delegates and its decision thereon shall be final. Except as provided in Article V, ~~Section 3(K)~~ Article V, Section 3(L), a vacancy in any other office shall be filled by appointment of the House of Delegates.

CONCLUSION

Our committee proposes the foregoing amendments to the Association to implement the changes previously requested by the House of Delegates and the Committee on Diversity, Equity, and Inclusion, and to address other matters identified by the Membership Committee and this committee. We commend them to you for your consideration and subscription at the November 5, 2022, meeting of the House of Delegates. If subscribed, the above amendments will be presented for discussion and adoption at the 2023 Annual Meeting of the Association.

Respectfully submitted,

COMMITTEE ON BYLAWS
Robert T. Schofield, IV, Chair
Anita L. Pelletier, Vice Chair
Eileen E. Buholtz
David A. Goldstein
LaMarr J. Jackson
Steven G. Leventhal
A. Thomas Levin*
Joshua Charles Nathan
David M. Schraver
Justin S. Teff
Dena J. Wurman
Oliver C. Young
Executive Committee liaison: Richard C. Lewis
Staff liaison: Thomas J. Richards

*A. Thomas Levin dissented from that portion of the report implementing removal of the sunset clauses from the diversity seat provisions.

Exhibit A - Resolution and Report of the Committee on Diversity, Equity, and Inclusion - Adopted by the House of Delegates on June 18, 2022

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

COMMITTEE ON DIVERSITY, EQUITY & INCLUSION

Mirna M. Santiago
Co-Chair, Committee on Diversity, Equity & Inclusion

Violet E. Samuels
Co-Chair, Committee on Diversity, Equity & Inclusion

May 19, 2022

T. Andrew Brown, Esq., President
New York State Bar Association
1 Elk Street
Albany, NY 12207

Dear President Brown and members of the Executive Committee:

Committee on Diversity, Equity and Inclusion

Bylaws Resolution and Report

Bylaws V. House of Delegates. Section 3. Composition. H. Twelve delegates to be appointed by the President then in office from a range of racial and ethnic minority groups identified by the National Association for Law Placement. At least two and no more than four of such delegates shall be appointed from each Judicial Department, and all appointments shall be subject to confirmation by the Executive Committee. This subsection shall expire ten years from the date of amendment (January 31, 2014) and shall be removed from these Bylaws without further action of the Association. Notwithstanding such expiration, the final term authorized under this provision shall be for a full year, concluding May 31, 2025.

Bylaws VII. Executive Committee. Section 1. Composition. F. 1. Eight members-at-large who shall be Active members of the Association. Not less than two of the members-at-large shall be selected from the First Judicial District. Two of the members-at-large shall be selected to further ethnic and racial diversity and may not be drawn from the same Judicial District. Ten years from the date of amendment (January 31, 2014), the provision for the two members-at-large selected to further ethnic and racial diversity shall expire and be removed from these Bylaws without further action of the Association, and the number of these members-at-large on the Executive Committee shall revert to six. Notwithstanding such expiration, the final term authorized under this provision shall be for a full two-year term, concluding May 31, 2025.

NOW THEREFORE, IT IS

RESOLVED, that the New York State Bar Association reaffirms its unwavering and longstanding commitment to increase racial and ethnic diversity within its leadership ranks based upon its firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large.

FURTHER RESOLVED, that the mission of the New York State Bar Association's Committee on Diversity, Equity and Inclusion is to promote the full and equal participation of attorneys of color and other diverse attorneys in the Association and in all sectors and at every level of the legal profession.

FURTHER RESOLVED, that the Association is made stronger and more capable of implementing change through the law when its membership reflects the diversity of the individuals and communities served by the legal profession.

FURTHER RESOLVED, that the subject bylaws provisions institutes a deliberate and thoughtful process to identify and recruit diverse members whose perspectives help inform and strengthen the Association's decisions and policies.

FURTHER RESOLVED, that the increased participation of attorneys of color in leadership positions also helps foster a welcoming environment for and serves as an incentive to diverse lawyers considering membership within the Association.

FURTHER RESOLVED, that the subject bylaws provisions promote the objectives approved by the Association in its adoption of the 2020 Diversity Plan which commits the Association to require diversity as an emphasis in all leadership nomination processes, including diversity among the decision-makers on the Nominating Committee.

RESOLVED, that consistent with these stated principles and commitments, the Association hereby approves the continuation of the bylaws provisions, without any sunset clause, to ensure that at least 12 members of the Association will be appointed by the President from underrepresented racial and ethnic groups to serve in the House of Delegates and that two

members-at-large of the Executive Committee of the Association shall be selected to further ethnic and racial diversity.

The mission of the New York State Bar Association's Committee on Diversity, Equity and Inclusion is to promote the full and equal participation of attorneys of color and other diverse attorneys in the Association and in all sectors and at every level of the legal profession. This resolution presented is consistent with the New York State Bar Association's unwavering and longstanding commitment to increase diversity within its membership and leadership ranks. Specifically, as stated in this Association's Diversity Plan adopted by the House of Delegates in January 2020, the NYSBA aims to "promote and advance the full and equal participation of attorneys of color and other diverse attorneys (including diversity based on gender, race, color, ethnic origin, national origin, religion, sexual orientation, gender identity and expression, age, and disability) in NYSBA."

The Diversity Plan specifically commits this Association to promote diversity within its leadership positions and its leadership development processes. Our Association made the commitment to require diversity as an emphasis in all leadership nomination processes, including diversity among the decision-makers on the Nominating Committee. The Association also committed to following the Mansfield Rule to ensure that at least 30% of leadership roles be filled by women and people of color.

The Association is made stronger and more capable of implementing change through law when its membership reflects the diversity of the individuals and communities served by the legal profession. The subject bylaws provisions have enabled the Association to successfully create pathways to increase the number of members from underrepresented racial and ethnic groups serving in leadership positions, which is consistent with this Association's firm belief that diversity, equity, and inclusion must be fostered within the legal community and in society at large.

The bylaws provisions promote a deliberate and thoughtful process to identify and recruit diverse members whose perspectives help inform and strengthen the Association's decisions and policies. Permanently ensuring the increased participation of attorneys of color in leadership positions also helps foster a welcoming environment for and serves as an incentive to diverse lawyers considering membership within the Association.

The New York State Bar Association's commitment and hard work in the area of increasing diversity within its leadership ranks has strengthened our Association's decision-making processes and is responsive to the needs of our membership and the clients we serve. We have miles to go to truly embody the diversity principles that the Association stands for and to honor our commitment to ensure an equitable legal system. The continuation and permanency of these bylaws provisions is a necessary step to meet these objectives and to promote the future viability of our Association.

Respectfully Submitted,

Mirna M. Santiago & Violet E. Samuels

Mirna M. Santiago and Violet E. Samuels

Co-Chairs, Committee on Diversity, Equity,

and Inclusion

On behalf of the Committee

cc: Lillian M. Moy, Committee on Diversity, Equity and Inclusion
Hon. Helena Heath, Committee on Diversity, Equity and Inclusion
Duane G. Frankson, Committee on Diversity, Equity and Inclusion
Richard J. Washington, Committee on Diversity, Equity and Inclusion
Randye Bernfeld, Committee on Diversity, Equity and Inclusion
Peter John Herne, Committee on Diversity, Equity and Inclusion
Ernesto Guerrero, NYSBA Staff Liaison

Exhibit B - Committee on Bylaws - Comments on Resolution Proposed by the Committee on Diversity, Equity, and Inclusion - June 14, 2022

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

COMMITTEE ON BYLAWS

ROBERT T. SCHOFIELD, IV
Chair
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
518/487-7616
FAX 518/487-7777
rschofield@woh.com

June 14, 2022

Richard Lewis, Esq., Chair
House of Delegates
Hinman, Howard & Kattell, LLP
80 Exchange Street, PO Box 5250
Binghamton, New York 13902-5250

Re: Comments on Resolution Proposed by the Committee on Diversity, Equity, and Inclusion

Dear Dick:

On behalf of the Committee on Bylaws, I commend the efforts of the Committee on Diversity, Equity, and Inclusion in preparing a comprehensive report on this issue of paramount importance to the Association.

In reviewing the proposed resolution of being recommended to the House, our committee wishes to confirm the process that will be followed should the Resolution proposed by the Committee on Diversity, Equity and Inclusion be adopted. In the ordinary course, if the House of Delegates approves the final resolved paragraph of the resolution as presented by the Committee, our committee would undertake efforts to prepare the language of a proposed bylaws amendment to be presented to the House for subscription at its November meeting. Should that amendment be subscribed by a majority of the members of the House, the proposed amendment would be presented to the Membership of the Association at the Annual Meeting in January. We offer this summary to confirm that: (1) action on the resolution before the House in June does not, in and of itself, constitute an amendment of the bylaws, and (2) our committee may suggest other and/or additional language in consideration of this effort as part of its process.

For example, our committee previously shared its view, with the Special Committee on Association Structure and Operations, that a review of the Association's Diversity Plan and the history of the Association's efforts to grow and sustain diversity within all aspects of its existence shows that, while the Association has adopted and later restated a strong policy in favor of diversity, that policy is not adequately reflected in the bylaws. We feel that amending the bylaws to do so is an important recognition of the Association's focus on this critical goal. An amendment

to accomplish this would be relatively simple[1] and could be included as part of or in tandem with any revisions to the bylaws that the House recommends.

In conclusion, our committee stands ready to perform its role to study and propose amendments to the Bylaws should the proposed Resolution of the Committee on Diversity, Equity and Inclusion be adopted by the House. Our committee's work would then be presented to the House for the November meeting.

Very truly yours,

Robert Schofield

Robert T. Schofield
Chair

cc: Committee on Diversity, Equity, and Inclusion

[1] Although the Bylaws Committee has not yet fully studied the issue, the inclusion of a clearly stated commitment to diversity in Article II Purposes, perhaps as a second, standalone paragraph, would be one suggestion for a potential amendment.

Exhibit C - NYSBA Diversity Plan - Adopted by the House of Delegates on January 31, 2020

New York State Bar Association

Diversity Plan

Approved by the New York State Bar
Association House of Delegates on Jan 31, 2020

Commitment

The New York State Bar Association continues its commitment to enhancing diversity at every level of participation. The Association strives to reflect the diversity of our profession and our society within its membership, leadership, program involvement and outreach to the community at large.

History

The Association's House of Delegates adopted a diversity policy on November 8, 2003, which was amended by passage at the House of Delegates on January 31, 2020, to read:

> The New York State Bar Association is committed to diversity in its membership, officers, staff, House of Delegates, Executive Committee, Sections and Committees and their respective leaders. Diversity is an inclusive concept, encompassing gender, race, color, ethnic origin, national origin, religion, sexual orientation, gender identity and expression, age and disability. We are a richer and more effective Association because of diversity, as it increases our Association's strengths, capabilities and adaptability. Through increased diversity, our organization can more effectively address societal and member needs with the varied perspectives experiences, knowledge, information and understanding inherent in a diverse relationship.

The Committee on Diversity and Leadership Development in 2005 conducted a seminal Section Diversity Survey. The survey was designed to evaluate the level of diversity in Section leadership, membership and activities, and to inform the Association of ongoing Section initiatives to enhance diversity. The Committee transposed the results of that survey into a Diversity Report Card, which the Executive Committee considered as an informational item at its June 23 and 24, 2005 meeting. Since that first survey and report in 2005, subsequent data-gathering efforts and resulting reports have been issued, with project oversight moved to the Committee on Diversity and Inclusion in 2011. With each report, more detailed data have allowed a more comprehensive analysis of how far the Association has come in raising the awareness of diversity issues within its own organization and the profession. After publication of the 2011 report, committee leadership agreed that that year's format would serve as a benchmark for subsequent reports, with only minimal references to earlier editions of the report as needed. This agreement was made to coincide with the start of the presidential Section Diversity Challenge in 2011 – 2012, followed by a second yearlong challenge in 2012 – 2013. We recognize the leadership of Presidents Vincent E. Doyle III and Seymour W. James Jr. in issuing the Diversity Challenges.

The summary below provides a brief history of the Diversity Report Card's development and its expanding scope – it initially covered only Sections but now includes NYSBA executive voluntary leadership, including governance and its Nominating Committee. The report continues to highlight the need for raising the level of diversity awareness within the profession and increase opportunities for attorneys to serve in leadership positions.

2005 (First Edition) Diversity data reported gender, ethnicity/race and disability status. Nearly half of all Sections appointed a diversity chair and/or formed a diversity committee and developed a diversity plan.

2007 (Second Edition) The report was circulated at the Section Leaders Conference to foster increased diversity awareness. It was also posted on the Association's Web site and the report narrative published in the *State Bar News*. The report recommended developing a strategic plan, with the aid of the Association's Office of Bar Services, to encourage collaboration between Sections and minority bar associations as a way to enhance Section diversity; and convening a joint conference of all Section diversity committees and/or leaders for the purpose of fostering collaboration among the Sections themselves.

2009 (Third Edition) Sexual orientation status was added to diversity data reporting. The report recommended collecting diversity data from Section publications editors, CLE program chairs and faculty, with plans to promote increased self-reporting from Section members. It also requested additional administrative staff support (in the form of an intern or law student).

2011 (Fourth Edition) Diversity data on House of Delegates and membership of NYSBA's Executive and Nomination Committee added. The report recommended the Association promote enhanced communications and relationship building with its members and Section leaders and governance leaders regarding the importance of accurate self-reporting for purposes of collecting diversity data.

2013 (Fifth Edition) Diversity data in NYSBA governance, broken down by Judicial District, added.

2015 (Sixth Edition) Age data of overall Association membership added.

2017 (Seventh Edition) The report spotlights eight Sections of the Association in order to highlight improvements and provide specific recommendations.

To date, some but not all, of the recommendations presented within the reports have been carried out. For example, expanding coverage of diversity data to governance groups and continued self-reporting of diversity status has taken place. However, significant resistance to diversity data collectibles continues. Fully one third of the Association 's House of Delegates fails to provide their data; 54 % of all NYSBA members decline to answer all demographic questions. The survey is being updated to make it easier to answer all questions, but we need to encourage response and timely data analysis and visualization.

Purpose and Goals

Purpose

For the purposes of the Diversity Plan (the "Plan"), the term "diversity" generally represents both diversity and inclusion. Diversity often pertains to the numbers – ensuring sufficient numbers of targeted populations are represented. Inclusion addresses how well the diverse individuals are included in all aspects of the organization. Diversity is often associated with recruitment; inclusion plays a pivotal role in retention. As such, this Plan is designed to achieve not just diversity – the presence of lawyers and law students from all backgrounds – but inclusion as well – their full and equal participation in the Association.

Goals

The Plan will promote and advance the full and equal participation of attorneys of color and other diverse attorneys (including diversity based on gender, race, color, ethnic origin, national origin, religion, sexual orientation, gender identity and expression, age and disability) in the New York State Bar Association and in all sectors and at every level of the legal profession through research, education, fostering involvement and leadership development in NYSBA and other professional activities, and to promote knowledge of and respect for the profession in communities that historically have been excluded from the practice of law. The Committee shall also foster the development of, monitor progress of and report on diversity initiatives of the Association, as well as partner with the Sections to continue to pursue enhanced diversity and inclusion in the Association, including among the leadership of the Association.

The Diversity Plan sets forth numerous objectives and broad goals. In addition, certain implementation recommendations are set forth as specific actions the New York State Bar Association is urged to undertake in the immediate future.

A. Require wide dissemination of the Diversity Plan within the New York State Bar Association, and public availability of the Diversity Plan, including:
    1. Membership-wide dissemination of the Diversity Plan after adoption, with a cover letter or email from the NYSBA President.
    2. Continuous availability of the Diversity Plan through pertinent pages on the NYSBA website.
    3. Distribution of the Diversity Plan, or emailing a link to the Diversity Plan, to all new NYSBA members.
    4. Reference to the Diversity Plan in member solicitation materials.
    5. Ensuring accessibility of the Diversity Plan to members with visual or other disabilities.

B. Promote and track diversity within the NYSBA's leadership, including:
    1. The Association's Officers (President, President-Elect, etc.);
    2. Executive Committee;
    3. Standing Committees, Administrative Committees, Special Committees, Task Forces, Commissions, and other presidentially appointed positions;
    4. House of Delegates;
    5. Practice Sections, including top leaders, their executive committees and committee chairs;

6. Special emphasis on diversity among the Nominating Committee membership (see item "C" below).

C. Promote and track diversity in the NYSBA's leadership nominations and leadership development processes.
   1. Require diversity as an emphasis in all leadership nominations processes, including diversity among the decision-makers on the Nominating Committee.
   2. Require diversity as an emphasis in the Presidential appointments process, including diversity among the appointments committee members (such diversity to be measured, at least in part, by consideration of data that indicates the diversity of Association membership).
   3. Urge Sections to emphasize diversity in leadership training and development programs.
   4. Build diversity-related sessions into the annual Section Leaders Conference and all leadership training efforts.

D. Urge adoption by all entities within the NYSBA of entity-specific diversity plans that are consistent with the objectives of this Diversity Plan, or their review and appropriate modification of existing diversity plans.
   1. Strongly encourage periodic review and updating of entity diversity plans.
   2. Recommend designation of an officer or other entity leader with responsibility for ensuring implementation of diversity plans.
   3. Advocate wide dissemination of entity diversity plans, as with the NYSBA Diversity Plan.
   4. Urge the compiling of uniform statistics and information on diversity participation by each entity and member. Association leadership shall encourage each leader and member to update their demographics here: https://members.nysba.org/MyNYSBA/Profile/Profile.aspx?ProfileCCO=6#/ProfileCCO.

E. Promote diversity in NYSBA membership. Marketing and membership solicitation materials should be welcoming to diverse populations, including showing adequate representation of diverse populations in such materials

   1. The NYSBA should compile and disseminate uniform statistics and other information on lawyers and law students – both NYSBA members and non-members – for each of the major diversity categories and target non-NYSBA members for membership solicitations. The membership committee shall consider introductory joint memberships with diverse specialty associations.
   2. With assistance from the Association's Office of Bar Services, NYSBA entities are urged to engage in active marketing, recruitment and outreach efforts to affinity bars and other professional organizations, legal communities, and law schools to promote diversity.
   3. NYSBA entities shall have liaison relationships with the diversity-focused entities of the Association (such as the Standing Committee on Diversity and Inclusion) and appoint persons who will be active liaisons.

F. Promote diversity in CLE and other programming, both live and virtual.

1. Implement strategic actions to improve diversity among program chairs, speakers, moderators, and attendees.
2. Ensure program content appeals to diverse communities, consistent with the sponsoring entities' subject matter specialties, if any.
3. Urge NYSBA entities to explore partnering or co-sponsoring opportunities with affinity bars and other organizations that can contribute to diversity.
4. Ensure program venues and materials are accessible to participants with disabilities.
5. Urge NYSBA entities to use program locations and venues, as well as social media, to enhance opportunities for participation by diverse lawyers and law students (e.g., locations that may minimize cost barriers; venues that may increase diverse community participation, like law schools with a diverse student body, affinity bar association locations; and social networking sites that may increase marketing efforts to diverse communities).

G. Promote diversity in NYSBA publications (hard copy and electronic).
1. Implement strategic actions to increase diversity in NYSBA members responsible for editorial policy and content of publications.
2. Ensure content of publications appeals to diverse communities, consistent with the sponsoring entities' subject matter specialties, if any.
3. Ensure content of publications is accessible to persons with disabilities.

H. Promote diversity in NYSBA entities' "marquee" events (e.g., annual awards dinners, luncheons, receptions), including diversity of:
1. Speakers,
2. Award recipients,
3. Planning and award nominations committees.
4. Report in Section and Committee success in diversity of speakers annually to the Executive Committee.

I. Enhance the current tracking and reporting of progress in diversity efforts, including:
1. Enhanced and accurate reporting of NYSBA diversity members in leadership roles in the biennial Diversity Report Card, which will urge more robust participation and tracking by NYSBA entities; encourage greater promotion of the reporting process by NYSBA leadership and accountability for entities that require significant improvement in their diversity efforts.
2. Ensure widespread dissemination of the biennial Diversity Report Card among NYSBA leadership and throughout NYSBA entities, providing accessible formats for persons with disabilities and through posting on the NYSBA website.

J. Urge NYSBA entities to develop or enhance mentoring programs that target young lawyers and law students and are designed to advance diversity within the Association.

K. Urge NYSBA entities to develop, encourage and participate in "pipeline" events and organizations, designed to introduce young and/or diverse students (other than law students) to the law and increase diversity within the profession.

L. Promote NYSBA's diversity accomplishments, including the following:
   1. Develop and prominently post on the NYSBA website information about successful diversity programs and activities of the Association and its entities.
   2. Invest in a regular presence in pertinent legal and diversity publications to showcase NYSBA diversity accomplishments.
   3. Urge NYSBA members and staff with an expertise in diversity areas to regularly write and speak on behalf of the NYSBA.

M. Create a Diverse Speakers Bureau/Database, in conjunction with the standing Committee on Diversity and Inclusion.

N. Follow the Mansfield Rule (see https://www.diversitylab.com/pilot-projects/mansfield-rule/) with respect to leadership positions in all NYSBA entities, e.g. consider at least 50% diversity candidates for all positions, with the goal of ultimately reaching 30% diversity in leadership across the board.

Recommendations

Implementation Recommendation 1: *That the Association designate a principal staff person to provide oversight of the implementation of this Diversity Plan. Each year, that person will develop and secure approval of specific annual implementation steps with a corresponding timeline, budget and assessment procedure.*

The Association should also consider a presidentially appointed member on its Executive Committee as a diversity liaison on behalf of the Committee.

The Association shall take action as discussed above to improve submission of all demographic information by 10% more members and 25% more Association leaders at every level (section, committee, HOD, Executive committee) by January 31, 2021.

Implementation Recommendation 2*: That the NYSBA review the composition of the House of Delegates and its Nominating Committee, including the number of positions reserved for women, minorities, lesbian, gay, bisexual and transgender individuals, and persons with disabilities, and the manner of selecting the individuals for those positions, to ensure that the purpose of this Diversity Plan is being served in the nominations process.*

Implementation Recommendation 3: *That the NYSBA consider creating an event, award or other form of recognition to honor on an annual basis the NYSBA entity that has shown outstanding leadership in diversity-related membership initiatives and other diversity efforts.*

Implementation Recommendation 4*: That the NYSBA present at least one Presidential Showcase CLE program focused on diversity at each Annual Meeting.*

Implementation Recommendation 5: *That the NYSBA prepare a Diversity Impact Statement as recommended in the 2010 ABA Presidential "Next Steps" Report (recommendation E.2. for Bar Associations) for every Executive Committee action item.*

Implementation Recommendation 6: *That the NYSBA coordinate a centralized and accessible data collection and reporting center for diversity information that can be readily used to assess diversity data with stated goals. See above re: our goals for improved data collection.*

Implementation Recommendation 7: *That NYSBA leadership and Sections Caucus leadership express to Sections the necessity of incepting Diversity Committees for all sections and appointing liaisons to the standing NYSBA Committee on Diversity and Inclusion.*

Implementation Recommendation 8: *That all NYSBA entities create and submit personalized diversity plans by January 31, 2021.*

Exhibit D - Letter from Committee on Membership to Committee on Bylaws - September 30, 2021

FROM: The Membership Committee
TO: Robert T. Schofield, IV, Esq., Chair
Anita L. Pelletier, Esq., Vice Chair
CC: Kathy Baxter
RE: Membership Bylaws Updates
DATE: September 30, 2021

The Committee on Membership met on July 15, 2021, to review and discuss the membership provisions of the Bylaws. With a unanimous vote, the Committee identified certain provisions of the Bylaws which warrant review and amendment given current Association operating practices. The reviewed provisions and recommendations are as follows:

III. Members and Affiliates - Section 1.D. - Law Student Members (page 2)
Law students typically graduate in December/May and take the Bar Exam in July/February. As law students prepare for the Bar Exam, they require continued membership with NYSBA to access certain member benefits such as Kaplan Bar Prep and Casebriefs, which is an open platform of law school case briefs designed for law students to use to assist with their case analysis and briefing. If NYSBA drops law students as members upon graduation from law school, the Association is dropping them when they need membership the most. It is important for the law students to have continued membership for at least 12 to 18 months post-graduation to allow them to study, pass the Bar Exam, and become admitted to the practice of law. The Membership Committee proposes the following change in Bylaws text:

> *Any law student in good standing, if not otherwise eligible for membership in this Association, may become a Law Student member by written application to the Executive Director, endorsed as to the applicant's good standing as above prescribed on behalf of the applicant's law school, and by payment of the annual dues of the current year, provided that the law school is an approved law school under the Rules of the Court of Appeals. A Law Student member shall cease to be such <u>at the end of the eighteenth month</u> after graduation or service in the Armed Forces of the United States or in any statutory substitute for such service, the law student ceases to be enrolled in good standing in an approved law school, provided that continuance of such membership because of service in the Armed Forces of the United States or in any statutory substitute for such service shall cease one year after the termination of such service if the Law Student member has not by that time again become a law student and met all qualifications for becoming a Law Student member. A Law Student member shall be exempt from dues while in service of the Armed Forces of the United States or in any statutory substitute for such service.*

Section 2. A. 2. - Non-attorney Affiliates (page 3)
Beginning in 2022, NYSBA will recruit paralegal members. Amendment of the Bylaws is necessary to allow NYSBA to recruit paralegal members with ease and efficiency. Additionally, NYSBA will assess paralegal membership dues, which fall under the Affiliate dues category, to ensure we are pricing membership appropriately to increase NYSBA's membership numbers and overall dues revenue. The Membership Committee proposes the following amendment to better clarify the parameters of paralegal membership:

A. Any person:

1. holding a law degree but not admitted to practice in any state, territory or possession of the United States or another country who is employed by a law school approved under the rules of the Court of Appeals or who is employed by a bar association, or

2. who is a legal assistant or paralegal, qualified by education, training or work experience, and who performs specifically delegated substantive legal work for which an attorney is responsible,

May become a Non-attorney Affiliate of the Association by submitting any required application form and supporting documentation to the Executive Director. Upon payment of the applicable dues following such submission, the applicant shall immediately be entitled to all of the rights and subject to all of the responsibilities as if such person were a member, except those of voting, being an officer of the Association, being a member of the House of Delegates or Executive Committee, or being Chair of a Section or Committee. Non-attorney Affiliates are not entitled to hold themselves out as members and their status as Non-attorney Affiliate does not authorize them to practice law unless they otherwise have standing to do so.

Section 6. A. and B. - Termination of Membership (page 4)

The membership renewal season runs from early October through March. Throughout this period, NYSBA assesses renewal results and anticipates the number of additional invoices needed to achieve membership goals for the year. Typically, NYSBA sends 6 print invoices and 6 email invoices to members as part of the renewal membership campaign. Members who have not renewed are dropped from the membership rolls on or around April 1st. Bylaws III.6.A. specifies drops to occur "within one month after receipt of the second dues notice" should dues not be paid during that time. In light of the timeline of the membership campaign season, and the practical consideration of what is "notice" in an era of electronic communications and solicitations, the membership provisions of the Bylaws should be amended to offer flexibility with membership drops given activity in the marketplace. The Membership Committee proposes the following amendment in Bylaws text:

Section 6. Termination of Membership.

A. If any member fails to pay yearly dues by the end of the designated renewal period, they will receive notice that their membership has been terminated, and they will forfeit all rights in respect thereof.

B. If any member fails to pay any assessment within the designated renewal period, they will receive notice that their membership has been terminated, and they will forfeit all rights in respect thereof.

The Committee on Membership requests that the Committee on Bylaws review and amend the provisions of the Bylaws identified above to better reflect current Association operating practices.

***

THE NEW YORK BAR FOUNDATION
One Elk Street, Albany, NY 12207 (518) 487-5650

The New York Bar Foundation
Annual Meeting
MINUTES

REMOTE MEETNG
January 22, 2022

PRESENT: Abneri; Ahern; Ahn; Alcott; Alomar; Altman; Bahn; Barone; Barrie; Bascoe; Battistoni; Baum; Bechtel; Beltran; Berlin; Berman; Bierman; Bikel; Bladykas; Bond; Boston; Brafman; Brandow; Braunstein; Braverman; Bray; Braymer; Brilling; A. Brown; S. Brown; Burke; Burns; Buzard; Byun; Cameron; Carbajal-Evangelista; Carter; Chandrasekhar; Chang; Choi; Clouthier; B. Cohen; D. Cohen; O. Cohen; S. Cohen; Coreno; D'Angelo; DeFio Kean; Degnan; Doerr; Dubowski; Durocher; Eaddy; Edwards; Effman; Ehrlich; Engel; England; Eustaquio; Feal; Fellows; Fenichel; Filemyr; Finerty; Fish; Fox; R. Friedman; M. Friedman; Gallinari; Geldenhuys; Gentile; Gerstman; Getnick; Gilbert; Gilmartin; Gold; Goldfarb; GomezVelez; Good; Gould; Grady; Grays; Green; Griffin; Groppe; Gross; Gutekunst; Guzman-Diaz; Haig; Hatcher; Hayes; Heath; Hecker; Hedden; Heiskell; Hill; Himes; Holder; Islam; Jackson; Jaglom; James; Jamieson; Jimenez; Johnson; Joseph; Kamins; A. Katz; J. Katz; Kaufman; Kaye; Kehoe; K. Kelly; M. Kelly; Kendall; Kenney; Kenworthey; King; Kobak; Kotin; Kougasian; Kreismann; Kretzing; LaBarbera; Lara; Lau-Kee; Law; Lawrence; Leo; Leventhal; N. Levin; T. Levin; Levin Wallach; J. Levy; P. Levy; Lewis; Lindenauer; Ling; Lisi; Loyola; Lucas; Lugo; Karson; MacLean; Madigan; Mallo; Marinaccio; Markowitz; Maroney; Martin; Mastroianni; Matos; Matthews; Mazur; McGinn; McGrath; C. McNamrara; M. McNamara; Middleton; C. Miller; M. Miller; Milone; Minkowitz; Moreno; Moretti; Morrissey; Mukerji; Mulry; Napoletano; Newman; Nieves; Noble; Nowotarski; O'Connell; O'Connor; O'Kelly; Ostrer; Owens; Pace; Palermo; Palumbo; Pandolfo; Parker; Peretz; Perez; Perlman; Powers; Quaye; Quinones; Radick; Radman; Rahman; Reavis; Reed; Richman; Richter; Roberts; Rochelson; Rosen; Rosenthal; Roxland; Rubtchinsky; Russ; Russell; Ryan; Safer; Saini; Santiago; Schall; Schofield; Schram; Schraver; Schwartz-Wallace; Sciocchetti; Scott; Segal; Seiden; Sen; Sewell; Shafiqullah; J. Shapiro; S. Shapiro; Sharkey; Sheehan; Shoenthal; Shukoff; Siegel; Silkenat; Simon; Sise; Slavit; A. Smith; R. Smith; Soller; Sonberg; Starkman; Steinberg; Stong; Strom; Swanson; Tambasco; Taylor; Torrey; Treff; Triebwasser; Tsigounis; Tully; Udler-Meier; Ustin; Van Aken; van der Meulen; Venkatraman; Walker; Ward; Warner; Watanabe; Waterman-Marshall; Webb; Wessel; Wesson; Wolff; Woodley; Yaeger; Yeung-He; Young; Younger; Zuckerman
President Carla M. Palumbo called the meeting to order.

Approval of minutes: On a motion duly made and carried, the minutes of the Annual Meeting of the New York Bar Foundation of January 30, 2021 were accepted.

Report of Officers: President Carla M. Palumbo noted the distribution of the 2021 Annual Report of the New York Bar Foundation, included with the House of Delegates materials. The Annual Report sets forth in detail the operations and activities of the Foundation during 2021. Ms. Palumbo shared highlights including:

- Through partnerships with several NYSBA Sections and with the support of our donors, the Foundation offered $228,500 in scholarship and fellowship opportunities to 87 law students and law-

related organizations. The fellowships provide valuable summer law office experiences for students and provide these students with real life experience in a legal setting.

- Under the auspices of the Hon. Judith S. Kaye Children and the Law Scholarship Fund, the Foundation helped bridge the gap to a successful future for young adults aging out of foster care. Seventeen young adults were assisted by this program to attain life and educational essentials including books, laptops, and food.

- More than $700,000 was allocated in grants to organizations to support numerous unmet legal needs across New York State. The Foundation helped support 106 grant programs, assisting more than 160,700 people and impacting more than 5.3 million of our neighbors in need of legal services throughout New York State.

Ms. Palumbo reported on the progress of the transfer of 1 Elk Street.

Following the conclusion of the report on the activities of the Foundation, a video was shown demonstrating the collaborative impact of the Foundation and its donors.

Ms. Palumbo reported on the Annual Meeting Campaign, a joint initiative with the Association focusing on the issue of attorney wellness. Ms. Palumbo closed her report reminding everyone that the Annual Meeting and Assembly of the Fellows will be held on January 27, 2022 and that Dean John D. Feerick will be presented the Foundation's Lifetime Award.

Ratification and confirmation of actions of the Board: A motion was adopted ratifying, confirming, and approving the actions of the Board of Directors since the 2021 Annual Meeting.

Report of Nominating Committee: Reporting on behalf of the Nominating Committee, Chair David M. Schraver placed in nomination the following slate of nominees presented by the Committee for the position of Director for terms commencing June 1, 2022 and concluding May 31, 2025:

- John Christopher, Glen Head
- C. Bruce Lawrence, Rochester
- David Singer, New York City
- David Schraver, Rochester

A motion was adopted electing said Directors.

Adjournment: There being no further business, the Annual Meeting of the Foundation was thereupon adjourned.

Respectfully submitted,

Pamela McDevitt
Secretary

THE NEW YORK BAR FOUNDATION
One Elk Street, Albany, NY 12207 (518) 487-5650

TO: Members of The New York Bar Foundation

FROM: Nominating Committee of The New York Bar Foundation
David M. Schraver, Chair
Hon. Cheryl E. Chambers
Gioia Gensini
John Gross
Lucia Whisenand

DATE: January 20, 2023

RE: Report of the Nominating Committee

The Nominating Committee of The New York Bar Foundation is pleased to submit the following slate of incumbent Directors of The Foundation Board of Directors as recommended by the Nominating Committee to begin their next 3-year term:

Directors to begin their second term to commence June 1, 2023 concluding May 31, 2026

- June Castellano, Rochester
- James Kobak, New York City
- Ellis Mirsky, Nanuet

Directors to begin their third term to commence June 1, 2023 concluding May 31, 2026

- William T. Russell, New York City
- Mirna Santiago, Pawling

NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY, NEW YORK, AND REMOTE MEETING
NOVEMBER 5, 2022

PRESENT: Adigwe, Ahn, Alcott, Alomar, Arenson, Barreiro, Bascoe, Baum, Beltran, Berlin, Block, Bond, Braiterman, Bray, Brown, Buckley, Buholtz, Bunshaft, Burke, Buzard, Campbell, J. Carter, R. Carter, Chambers, Chandrasekhar, Chang, Christian, B. Cohen, Cohn, Cooper, Coreno, D'Angelo, Davidoff, Degnan, Doerr, Donaldson, D'Souza, Dubowski, DuVall, Effman, Emborsky, Feal, Fellows, Fennell, Fernandez, Filemyr, Finerty, Fogel, Fox, French, Galler, Gauntlett, Gerstman, Getnick, Gilbert, Gilmartin, Gold, Good, Graber, Greenberg, Gross, Haig, Harper, Harwick, Heath, Hill, Hoffman, Holder, Houth, Islam, Jackson, Jaglom, James, Jamison, Jimenez, Johnston, Jones, Joseph, Kamins, Karson, Katz, Kaufman, Kean, Kelley, Kenney, Kiernan, Klugman, Ko, Kobak, Koch, Kodjoe, Kolhmann, Kossover, LaMancuso, LaRose, LaTrop, Lau-Kee, Leo, Lessard, Levin, Levin Wallach, Lewis, Lisi, Loyola, Mack Madigan, Makofsky, Marinaccio, Markowitz, Maroney, May, Mazur, McCann, McElwreath, McFadden, McGinn, McKeegan, McNamara, Merriman, Messina, Middleton, C. Miller, M. Miller, Milone, Minkoff, Minkowitz, Moreno, Moretti, Morrissey, Mukerji, Muller, Murphy, Napoletano, Noble, Nowotarski, Palermo, Parker, Petterchak, Quaye, Quinones, Randall, Riano, Richter, Riedel, Rosenthal, Rothberg, Russ, Russell, Ryan, Safer, Santiago, Sargente, Schofield, Schraver, Schwartz-Wallace, Sciocchetti, Seiden, Sen, Sharkey, Silkenat, Skidelsky, Sonberg, Spring, Starkman, Stephenson, Stoeckman, Stong, Sweet, Syracuse, Teff, Terranova, Treff, Triebwasser, Vaughn, Vigdor, Ward, Warner, Waterman-Marshall, Wesson, Westlake, Wolff, Woodley, Yeung-Ha.

Mr. Lewis presided over the meeting as Chair of the House.

The meeting was called to order and the Pledge of Allegiance was recited.

1. Approval of Minutes of June 18, 2022, meeting. The minutes were deemed accepted as distributed.

2. Report and recommendations of the Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, outlined proposed bylaws amendments: first, to implement the resolution of the Committee on Diversity, Equity, and Inclusion as adopted by the House of Delegates on June 18, 2022, directing the addition of a new Section 2 to Article II and amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1); second, to incorporate requests made by the Committee on Membership for amendments to Article III, Section 1(D)(1) and Article III, Section 6; and, third, to correct an internal citation error at Article IV, Section 7. The proposed amendments received the required subscriptions to permit their consideration at the 2023 Annual Meeting

3. Report and recommendations re the Rules of the House of Delegates. Justin S. Teff, a member of the Committee on Bylaws subcommittee tasked with reviewing the Rules of the House of Delegates, outlined proposed amendments to the Rules. After discussion, a motion was made to approve the report and recommendations, after which a motion to

amend Rule 3(g) to read "Voting shall be by voice vote, unless the Chair of the House of Delegates directs a division of the House, or, if the delegate is participating remotely, by polling through the videoconference software." was duly carried. The main motion to approve the report and recommendations was then adopted.

4. Reports of Treasurer. Domenick Napoletano, treasurer, reported that through September 30, 2022, the Association's total revenue was $16,051,439, a decrease of approximately $295,278 from the previous year, and that the Association's total expenses were $13,751,497, an increase of $2,786,075 from the previous year. The report was received with thanks.

5. Report of President. Ms. Levin Wallach highlighted items contained in her written report, a copy of which is appended to these minutes.

6. Report and recommendations of Finance Committee re proposed 2023 income and expense budget. Michael J. McNamara, chair of the Finance Committee, reviewed the proposed budget for 2023, which projects revenue of $20,521,643, expenses of $20,472,563, and a projected surplus of $49,080. After discussion, a motion was adopted to approve the proposed 2023 budget.

7. Memorial for Hon. Richard D. Simons. Hon. Howard A. Levine presented a memorial in honor of Hon. Richard Duncan Simons, former associate judge of the Court of Appeals from 1983 to 1997 and acting chief judge in late 1992 and early 1993, who passed on July 17, 2022.

8. Report of Nominating Committee. Henry M. Greenberg, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2023-2024 Association year: President-Elect – Domenick Napoletano of Brooklyn; Secretary – Taa R. Grays of New York City; Treasurer – Susan Harper of New York City; District Vice-Presidents: First District – Bridgette Ahn of New York City and Michael McNamara of New York City; Second District –Pauline Yeung-Ha of Brooklyn; Third District – Jane Bello Burke of Albany; Fourth District – Nancy Sciocchetti of Saratoga Springs; Fifth District – Hon. James P. Murphy of Syracuse; Sixth District – Michael R. May of Ithaca; Seventh District – Mark J. Moretti of Rochester; Eighth District – Kathleen M. Sweet of Buffalo; Ninth District – Karen Beltran of Yonkers; Tenth District – Michael A. Markowitz of Hewlitt; Eleventh District – David Louis Cohen of Kew Gardens; Twelfth District – Michael A. Marinaccio of White Plains; Thirteenth District – Orin J. Cohen of Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2023: LaMarr J. Jackson of Rochester (Diversity Seat); Thomas J. Maroney of New York City; and Christopher R. Riano of New York City. Nominated as Young Lawyer Member-at-Large was Lauren E. Sharkey of Schenectady. Nominated as Section Member-at-Large was Barry D. Skidelsky of New York City. The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2023- 2025 term: Claire P. Gutekunst, Yonkers; Scott M. Karson, Melville; Michael Miller, New York City; Domenick Napoletano, Brooklyn; and Sherry Levin Wallach, White Plains. The report was received with thanks.

9. Report of Task Force on Emerging Digital Finance and Currency. Jackie Drohan and Dana Syracuse, co-chairs of the Task Force on Emerging Digital Finance and Currency, presented on the Task Force's ongoing work and programming. The report was received with thanks.

10. Report of Task Force on Modernization of Criminal Practice. Catherine Christian and Andy Kossover, co-chairs of the Task Force on Modernization of Criminal Practice, presented on the mission, composition, and goals of the Task Force. The report was received with thanks.

11. Report and recommendations of Committee on Procedures for Judicial Discipline. Justin S. Teff, chair of the Committee on Procedures for Judicial Discipline, reviewed the Committee's report and recommendations concerning suspension as a mode of judicial discipline. After discussion, a motion was duly carried to table consideration of the report until a future meeting of the House.

12. Presentation of 2022 Root/Stimson Award to Samantha I.V. White. President Levin Wallach presented the Root-Stimson Award, which honors members of the profession for outstanding community service, to Samantha I.V. White, a staff attorney in the Criminal Defense Unit at the Legal Aid Bureau of Buffalo, Inc., where she works as a Public Defender in Buffalo City Court.

13. Report and recommendations of Committee on Legal Aid and President's Committee on Access to Justice. Hon. Edwina F. Martin, immediate past co-chair of the President's Committee on Access to Justice, outlined the groups' report on access to justice during the COVID-19 pandemic and its recommendations to address the impacts of the pandemic in the long term on the administration of justice in New York State. After discussion, a motion was adopted to approve the report and recommendations.

14. Report and recommendations of Task Force on the U.S. Territories. Mirna Martinez Santiago, co-chair of the Task Force on the U.S. Territories, presented on the Task Force's report calling on the Association to support efforts to overrule the *Insular Cases*, including through the filing of *amicus curiae* briefs in appropriate litigation. After discussion, a motion was adopted to approve the following resolution:

> NOW, THEREFORE,
>
> IT IS RESOLVED, that the New York State Bar Association supports efforts to overrule the Insular Cases and the territorial incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of *amicus curiae* briefs in appropriate litigation; and it is further
>
> RESOLVED, that the President of the Association is authorized to take such other and further action as may be required to implement this resolution.

One member abstained from the vote.

15. Report and recommendations of Women in Law Section. Susan Harper and Terri Mazur, past chairs of the Women in Law Section, presented the Section's resolution and accompanying report entitled "Resolution Supporting Reproductive Health-Care Rights and Reproductive Autonomy and the New York State Equal Rights Amendment." After discussion, a motion was adopted to approve the following resolution:

NOW, THEREFORE,

IT IS RESOLVED, that the New York State Bar Association supports the rights of individuals to choose legal reproductive health care, including abortion; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the amendments to New York State Public Health Law, Education Law, and Penal Law, as enacted in New York State by the signing of S.240/A.21 in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports N.Y. Public Health Law Article 25-A as enacted in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the June 13, 2022, Legislative Package, as enacted by New York State and supports the policies and intent of the legislative package enacted; and it is

FURTHER RESOLVED, that the New York State Bar Association supports S.51002 of 2022, as passed by the New York State Senate and Assembly, and as policy the proposal codified in this concurrent resolution to amend Section 11 of Article 1 of the New York State Constitution in relation to equal protection; and it is

FURTHER RESOLVED, that the New York State Bar Association supports passage of the Women's Health Protection Act of 2022, and supports the policies and intent of this bill; and it is

FURTHER RESOLVED, that the New York State Bar Association opposes passage of laws that would ban abortion nationwide and/or diminish the current protections under New York law; and it is

FURTHER RESOLVED, that the New York State Bar Association approves the report and recommendations of the Women in the Law Section; and it is

FURTHER RESOLVED, that the officers of the Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

Hon. James P. Murphy abstained from the vote.

16. Report of The New York Bar Foundation. Hon. Cheryl E. Chambers, vice president of The New York Bar Foundation, updated the House members on the ongoing work and mission of The Foundation. The report was received with thanks.

17. Administrative items. Mr. Lewis asked members to register for the 2023 Annual Meeting, advised of the ongoing Member Referral Program, and encouraged members to attend a Continuing Legal Education program on implicit bias scheduled for December 1, 2022.

18. New Business. House member Scott M. Karson, co-chair of the International Section's Ukraine Task Force, proposed a motion in two parts. First, to ratify the Section's report and resolution entitled "Regarding Investigation and Prosecution of the Russian Federation and its Culpable Officials Arising from Its Illegal Military Invasion of Ukraine," as adopted by the Executive Committee on July 16, 2022, which reads:

WHEREAS, NYSBA, the nation's largest voluntary state bar association, has a long, consistent and proud tradition of defending the rule of law, both domestically and internationally; and

WHEREAS, NYSBA's defense of the rule of law has included support for the establishment of the Permanent Court for Arbitration at The Hague and the ICC; and

WHEREAS, Russia's unlawful invasion of Ukraine is a direct attack on the rule of law, in that it violates the prohibition of the use of force against the territorial integrity and political independence of another state as proscribed by Article 2(4) of the Charter of the United Nations and most fundamental peremptory norms of international law, and is contradictory to the mission of the United Nations to end war and promote peace; and

WHEREAS, the actions by Russia in launching its prolonged armed attack on Ukraine constitutes a direct violation of the 1994 Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, whereby Russia reaffirmed its obligation to refrain from the threat or use of force against the territorial integrity and political independence of Ukraine, and also agreed to refrain from any form of economic coercion designed to subordinate to its own interest the exercise by Ukraine of the rights inherent in Ukraine's sovereignty and thus to secure advantages of any kind at Ukraine's expense; and

WHEREAS, the invasion of Ukraine by Russia constitutes an "act of aggression" and, by virtue of its sustained military presence and offensive within the borders of Ukraine, "a war of aggression" and, therefore, a "crime against peace," all as defined in the Declaration of the United Nations General Assembly on Principles of International Law Concerning Friendly Relations and Cooperation Among States (Resolution 2625 (XXV) and the General Assembly's Resolution 3314 (XXIX) on the Definition of Aggression; and

WHEREAS, the reported actions by Russia, including, wantonly attacking and decimating cities, towns and villages of Ukraine; in targeting civilian institutions, buildings, and property, resulting in the deaths of thousands of civilians; deporting civilians to the Russian territory, imposing Russian political control over occupied parts of Ukraine, among other acts, which if proven, would constitute war crimes and crimes against humanity committed in connection with the crime of a war of aggression, and therefore are worthy of investigation, prosecution, and upon conviction, punishment under the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal; and

WHEREAS, these reported actions of Russia, while it calls into question Ukraine's legitimacy and its inherent right to independence and sovereignty, would constitute genocide within the meaning of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, which is also a crime against international law and punishable thereunder; and

WHEREAS, Russia's war of aggression has caused untold damage to the people and property of Ukraine, resulting in immense economic loss and privation, for which Russia has state responsibility as a matter of customary international law as most recently articulated in the Articles proposed by the International Law Commission on Responsibility of States for Internationally Wrongful Acts, for which Ukraine is entitled to reparation by Russia in the form of restitution, compensation and satisfaction; and

WHEREAS, NYSBA is encouraged that democratic nations around the world are standing together to assist Ukraine in fighting Russia's aggression and taking appropriate legal actions to support Ukraine; and

WHEREAS, NYSBA is also encouraged that, among other organizations, the Council of Europe Parliamentary Assembly and the Parliament of the European Union have condemned Russia's War Crimes, including the crime of aggression, committed in and against Ukraine, and have called for appropriate legal actions to support Ukraine; and

WHEREAS, NYSBA supports the United Nations General Assembly's condemnation of the invasion of Ukraine by Russia and Russia's alleged violations of international law; and

WHEREAS, there already exists strong legal and diplomatic precedent, supported by well settled jurisprudence, for the establishment of a justice mechanism to investigate, indict, and prosecute the leadership of Russia and its armed forces and agents for violations of international law such as the crime of aggression, crimes against the peace, crimes against humanity, and acts constituting genocide; and

WHEREAS, the jurisdiction of the ICC over Russia for the crime of aggression is uncertain but, nevertheless, Russia's aggression against Ukraine must be fully investigated and prosecuted by the international community through some other appropriate tribunal in accordance with the rule of law; and

WHEREAS, the United Nations General Assembly, in its very first session, in the aftermath of World War II, in Resolution 3, called on member and non-member states to take all necessary measures to cause the arrest of those war criminals who have been responsible for or taken a consenting part in such crimes and to cause them to be returned to the countries where they committed their crimes "that they may be and punished according to the law of those countries"; and

WHEREAS, the United Nations General Assembly, in Resolution 3074, enunciated Principles of International Cooperation in the Detection, Arrest, Extradition & Punishment of Persons Guilty of War Crimes & Crimes Against Humanity, including that States shall cooperate with each other in the collection of information and evidence which would help to bring to trial persons against whom there is evidence that they have committed international crimes; and

WHEREAS, the United Nations General Assembly, has played a leading role in establishing judicial mechanisms and commissions to investigate and prosecute criminal violations of international law, including Resolutions 52/135 and 57/228 calling for the formation of the Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, and in Resolution 63/19, endorsing the International Commission Against Impunity in Guatemala;

IT IS THEREFORE RESOLVED THAT:

NYSBA hereby deplores and condemns Russia's unlawful invasion of Ukraine, causing untold harm to the people of Ukraine; and it is further resolved that

> NYSBA hereby supports any and all international and domestic efforts to investigate, prosecute, and hold Russia's armed forces and officials accountable for acts committed by Russia, its military and its agents, in the prosecution of its unlawful war of aggression; and it is further resolved that
>
> NYSBA hereby calls upon those members of the international community with deep, actual experience in the investigation and prosecution of war crimes, to investigate, prosecute, and bring to justice Russia and its culpable officials, its military and its agents; and it is further resolved that
>
> NYSBA calls upon the United Nations General Assembly to take action by authorizing the Secretary General of the United Nations to establish, at an appropriate time and place, such tribunals – e.g., a hybrid international war crimes tribunal involving Ukraine, similar to those established to investigate and prosecute war crimes in Sierra Leone, Rwanda, and Cambodia – as he shall deem appropriate to exercise jurisdiction and hear and determine whether Russia and its culpable officials violated international law, including but not limited to the crime of aggression against Ukraine, and hold to account those responsible.

Second, to ratify ABA Resolution 22A405, as adopted by the American Bar Association House of Delegates on August 9, 2022, which reads:

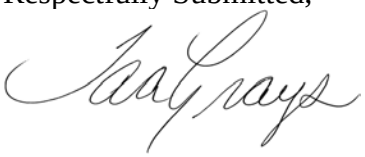
> RESOLVED, That the American Bar Association condemns the Russian Federation's unlawful invasion of Ukraine; and
>
> FURTHER RESOLVED, That the American Bar Association calls upon the United Nations General Assembly to authorize the Secretary General of the United Nations to expeditiously report to the General Assembly on what further measures are needed to ensure that those who committed war crimes, crimes against humanity, genocide and crimes of aggression during the Russian Federation's unlawful invasion of Ukraine are held accountable.

After discussion, a motion was duly carried to ratify both resolutions.

19. Date and place of next meeting. Mr. Lewis announced that the next meeting of the House of Delegates would take place on Friday, January 20, 2023, at the New York Hilton Midtown in New York City.

20. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Taa R. Grays
Secretary

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Report of President Sherry Levin Wallach to the
House of Delegates of the New York State Bar Association
November 5, 2022

Dear Colleagues:

It is my privilege to be with so many of you this morning here at our Bar Center in Albany. As many of you know the theme of my presidency is Investing in the Future of the Profession, and in my remarks today I will highlight how we are collectively positioning NYSBA and ourselves as members and attorneys for a bright, exciting, and impactful future.

Let me start by saying that being here at the Bar Center is refreshing and reinvigorating. This is the first in person meeting of the House of Delegates held at the Bar Center since November 2019. It is good to be here at our Association's home. Being here allows us to use the technology and space offered by our building to produce a modern and engaging hybrid meeting of the House of Delegates. I am so very pleased to tell you that thanks to the hard work and cooperation of leaders of NYSBA and The Foundation that the Bar Center at One Elk will remain our home into the future. Together in our building and using our resources we can grasp new opportunities and create new experiences and new memories in this wonderful historic place where we have already spent an incredible fifty years. Now we can begin the important work we must do to update and renovate our Bar Center. I can assure you that we are moving forward with the same vigor and passion that our leaders did fifty years ago when they brought us to the Bar Center that we are still proud to call home today.

The process of transferring One Elk has strengthened the bonds between NYSBA and our sister organization, The New York Bar Foundation. The members of the House of Delegates also serve as the members of The Foundation, and the connections between our organizations are powerful and mutually beneficial. I am also confident that The Foundation will continue to support the New York State Bar Association to Invest in the Future of our Profession and Build our Future Together as well as the work of NYSBA's public-focused programs, including attorney wellness, the Lawyer Assistance Program, the Law, Youth, and Citizenship program, and our pro bono projects. Financial support of these programs and our expanding attorney wellbeing services helps deliver real results for our members, the legal community, and the public.

Leadership, staff, and the Finance Committee are working diligently on launching the initial phase of construction on our building and a committee has been formed to explore opportunities for productive future uses for our building to support the legal community and our membership. The initial phase will use monies already approved by this House to make the necessary repairs, upgrades, and renovations required to structurally maintain our building. We anticipate launching

a capital fundraising campaign to provide us with the necessary financial basis to execute future renovations.

It has been a pleasure to see so many members at NYSBA events and section meetings over the last few months, including just a few weeks ago at the Partnership Conference here in Albany which brought close to four hundred legal services and pro bono attorneys in person to Albany. I have a legal services background and was humbled to join civil legal aid attorneys, paralegals, support staff, court personnel, and pro bono attorneys for two days of educational programming, networking, and celebration of the work done to advance access to justice for all New Yorkers. Each of the twenty-two sessions were recorded, and the videos will soon be available on demand on the NYSBA website. Conferences like Partnership can truly serve as unifying moments for our members, especially after the last few years of uncertainty and disconnection.

Registration is now open for the 2023 Annual Meeting. For the first time since 2020, the Annual Meeting will be held in person at the New York Hilton Midtown, with a limited number of virtual meetings and events to supplement the in-person programming in the days following the live meeting. The Presidential Summit, which will be sponsored by the Task Force on Mental Health and Trauma-Impacted Representation, will focus in three parts on the challenges of representing people living with Trauma and Mental Illness and the intersection with attorney well-being within the legal profession including a look at the mental health and the criminal justice system. I am also proud to announce that the President's Reception will be a "Celebration of Diversity" held immediately after the Constance Baker Motley Symposium and Diversity Awards Program.

I am also thrilled to partner with The Foundation on the upcoming Presidential Gala, scheduled for Friday, January 20th, at the Rainbow Room in Manhattan as part of our 2023 Annual Meeting. I want to thank my dear friends John Gross, Kailyn Whitingham, and Winnie Martin for leading our ticket and table sales committee and planning committee for all of their hard work in making this event possible. I want to thank Hon. Cheryl Chambers for being a part of the leadership team planning this event. Finally, I want to thank the Bar Foundation Board of Directors and President Carla Palumbo and the NYSBA and Foundation staff for their support. The highlight of the evening will be the presentation of the Gold Medal Award, the highest honor bestowed by the Association, to Sherrilyn Ifill, senior fellow at the Ford Foundation and former president and director-counsel of the NAACP Legal Defense Fund. I hope that you will show your support of NYSBA by joining us for great music, and an exciting auction. It promises to be an amazing night spent in celebration of the law and Building a Better Future!

As we return to in-person programming, we also continue to expand our Virtual Bar Center. NYSBA has produced thousands of CLE webinars and other remote events since the onset of the pandemic in March 2020. Through the Virtual Bar Center, our sections, task forces, and committees can hold remote meetings and handle pressing business at rates unprecedented before the pandemic. This impressive feat would be impossible without the dedicated efforts of our members, sections, committees, and staff, and I would like to acknowledge the incredible strides that we have made here in delivering high-quality and convenient online programming and content to our members. The meeting today also highlights the potential of the Bar Center as a hybrid meeting venue – and I encourage our Sections and other groups to make full use of the facility in the years to come.

We continue to remain on the forefront of technology and legal issues – the New York Sate Bar Association is entering the Metaverse. In a short while, you will hear an informational report from the co-chairs of the Task Force on Emerging Digital Finance and Currency. This Task Force is focused on the regulatory and legal issues affecting practitioners and their clients as they transact with cryptocurrencies and engage in this stimulating and constantly evolving Web3 space. Crypto currencies, non-fungible tokens (NFTs), digital assists and the metaverse is disrupting the way we do business, create art, buy, purchase and own products, world finance and the practice of law in New York, around the country, and worldwide. It is the future whether we want to face it or not. The Task Force will lead us into Web3 by educating us and making recommendations as to how NYSBA can position itself in the digital world and offer innovative benefits to its members. I am pleased to announce our partnership with the NYU Metaverse Collaborative to join together our prestigious institutions to educate and explore Web3 and the Metaverse and all it has to offer including issues and opportunities. I am excited to provide you with exciting updates in the months to come.

Concerning my other presidential initiatives, the Task Force on the Ethics of Public Sector Lawyering, which will give an informational report at an upcoming meeting of the House, is examining the difficult challenges faced by public sector lawyers who represent government entities. The co-chairs of the Task Force on Modernization of Criminal Practice will give an informational report today highlighting the mission of this group and the work of its three subcommittees on justice courts, sentencing, and technology.

Today you will also be addressed by the Task Force on the U.S. Territories, which is working hard to educate on and work to eliminate inequalities and inequities faced by the people of the U.S. Territories and their second-class citizenship status which are founded in biased and racist beliefs and values. You will be asked to ratify a resolution passed by the NYSBA Executive Committee and the ABA House of Delegates calling for the *Insular Cases* to be overruled and the dissolution of the territorial incorporation doctrine which must happen for all U.S. Citizens to be equal. Although it is disappointing that the Supreme Court declined to grant *certiorari* in *Fitisemanu v. United States* and remove the stain of the *Insular Cases* from jurisprudence once and for all, we will continue our effort to seek justice for people of the territories. Part of that initiative includes the important work we are doing with the Virgin Islands Bar Association with whom we signed a Memorandum of Understanding this past June and the Puerto Rican Bar Association, the Colegio de Abogado y Abogada de Puerto Rico, a relationship we plan to formally recognize next week with the signing of a Memorandum of Understanding. We have also formed a chapter in the Virgin Islands and are working on the formation of a chapter in Puerto Rico. By way of these efforts, we are expanding our footprint and reach to the U.S. Territories as well and fostering diversity, equity, and inclusion with our members and the issues we address.

I also wish to acknowledge the many other groups within our Association that are hard at work developing important reports and policy recommendations, including the Task Force on Racism, Social Equity, and the Law, the Task Force on the Post-Pandemic Future of the Profession, and our twenty-eight sections, including the Women in Law Section, whose members have been hard at work developing programming and the report they will present to you today in response to the *Dobbs* decision and the laws that were enacted in this state in response that decision. Make no mistake about it – we are at a pivotal moment in American History where rights that we have fought for are being stripped from us while still others are at risk.

We have policy that inspired and aspires for us to be a diverse, equitable, and inclusive organization. Our work must reflect these values. We must lead by example and fight for the rule of law and access to justice. I have formed my initiatives with a view toward showing our association's commitment to a more inclusive and dynamic future.

NYSBA is a shining star in the world of bar associations, and our own work here at NYSBA becomes more influential when we collaborate with other organizations. Look no further than the 2022 Annual Meeting of the American Bar Association held in Chicago this August, where NYSBA sponsored four successful resolutions. The resolutions are Resolution 402, reaffirming the ABA's commitment to the law that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring ownership or control over entities practicing law to non-lawyers; Resolution 404, declaring that the "territorial incorporation doctrine" established by the U.S. Supreme Court in the Insular Cases in 1901 is contrary to the principles of the U.S. Constitution and civil rights jurisprudence; Resolution 405, calling upon the United Nations General Assembly to authorize the secretary general to establish international war crime tribunals to determine whether the Russian Federation and its officials violated international law in Ukraine; and Resolution 601, urging federal, state, local and tribal governments to enact laws to give police reasonable time to complete a background check of a gun buyer. NYSBA commands a powerful presence within the American Bar Association House of Delegates, and I look forward to bringing forward other significant resolutions at the ABA 2023 Midyear Meeting. I also wish to acknowledge my friend and fellow New Yorker ABA President Deborah Enix-Ross, who I have invited to address our House at the Annual Meeting this January.

On the international stage, NYSBA is the recognized leader, and our preeminent position is largely due to the dedicated efforts and esteemed reputation of our International Section, whose international conferences are a "must attend" for lawyers worldwide. The International Section continues to steadfastly pursue memoranda of understanding with bar associations from around the globe which connect attorneys no matter where they might work and practice. I especially wish to commend the work of the International Section's Ukraine Task Force, including partnership with international stakeholders like the Global Accountability Network, to help the people of Ukraine and hold the Russian Federation accountable for the atrocities brought by this horrific war. I want to acknowledge the Section leaders who have done so much good work here, including International Section chair Azish Filabi, past president of the Association and Ukraine Task Force chair Scott Karson, and immediate past chair of the International Section Ed Lenci. I also wish to acknowledge the incredible impressive and tireless leader of the Ukrainian Bar Association, my friend, Anna Orgenchuk, who I have had the pleasure and honor to serve with this year. Our role in the international community is increasingly important especially with virtual capabilities and the expansion of Web3 and use of cryptocurrencies across the world. The international legal community considers our voice incredibly important and wants to partner with us on many issues in the law. I have made a concerted effort to raise our visibility in the international legal community and I promise to continue this mission.

Advancing access to justice in law and society is a core purpose of our Association and is a value that I and many others collectively share as lawyers. Access to justice is a statewide issue, as the seminal report of our Task Force on Rural Justice so masterfully demonstrated, but we can hope that lessons learned during the COVID-19 pandemic can help in developing solutions to bridge

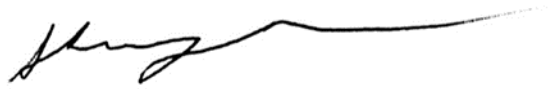
the justice gap. After all, lawyers are innovators. I want to acknowledge the Committee on Legal Aid and President's Committee on Access to Justice, who you will hear from later this morning concerning their report on access to justice during the COVID-19 pandemic. I urge all stakeholders to thoroughly review this report and the voluminous testimony supporting it and I trust that the document will be a great resource to the Commission to Reimagine the Future of New York Courts as it continues its important work to guide our New York State justice system into the future.

In looking to next year, I look forward to our continued partnership with the Unified Court System, the Acting Chief Judge Anthony Cannataro, and the next Chief Judge. I am also confident that the voice of the Association and its thousands of members will be clearly heard in our advocacy efforts both here in Albany and in Washington, D.C., as we steadfastly advance our legislative priorities.

A foremost priority is a statewide increase to assigned counsel rates to ensure adequate compensation for the private bar and safeguard the continued participation of highly qualified attorneys who are willing to accept these assignments. This is a matter not just of money, but a constitutional and statutory obligation of the State towards those children and indigent people who rely on counsel mandated by law. On October 25th, the Executive Committee authorized the commencement of litigation against the State of New York to bring about a statewide state-funded increase in assigned counsel rates, set retroactively from February 2nd, 2022, and subject to periodic review to ensure that compensation remains adequate. I will continue to update you on our efforts here.

This is an exciting time for the New York State Bar Association, and an exhilarating time to be a leader. I am beyond pleased to note that we have seen a steady increase in membership this year, and to acknowledge that our sections and committees continue to produce high-quality CLE programs and events at an astounding rate. I also commend our collective efforts to increase engagement with law students and new lawyers, including as members of our sections, task forces, and committees, with many thanks to our Young Lawyers Section for the significant role they play in representing the future of our profession.

In September, leaders of our sections and statewide local, county, specialty, and affinity bar associations convened here at the Bar Center for two days of workshops. The conference was an inclusive and collaborative forum, and the broad diversity of our profession was well represented. It was extremely inspiring to be part of such a free exchange of ideas to ensure the long-term health and success of our bar association. My professional success is in large part due to my experience with the New York State Bar Association, and I will not waver in my commitment to help other attorneys grow as leaders here at NYSBA. I know that you, the members of our House of Delegates, feel the same. When we last met in June, I announced the launch of our Member Referral Program, which will close on March 31st of next year. If not already participating, I encourage you to refer your colleagues and associates to join NYSBA There is no better way to offer colleagues a lasting gift than getting them involved in an organization that will change their lives in profound and unexpected ways. And just think of the impact we can make if every one of us participates.



Sherry Levin Wallach
President

NEW YORK STATE BAR ASSOCIATION

In Memoriam

RICHARD D. SIMONS

RICHARD D. SIMONS

MEMORIAL
To

RICHARD D. SIMONS

Presented by

Howard A. Levine

New York State Bar Association

at the

House of Delegates Meeting

November 5, 2022

Albany, New York

RICHARD D. SIMONS
1927-2022

I am grateful for this opportunity to speak in celebration of the life of Richard D. Simons – before the leaders of the New York State Bar Association. Dick passed away last July at age 95. He was appointed an Associate Judge of our State's highest court, the Court of Appeals, in 1983 and served a full 14-year term. It was my privilege to serve with him and thereby observe his extraordinary judicial talent while also enjoying his close friendship, during his last five years on the Court.

One of his singular contributions to the Court was his service as Acting Chief Judge, chosen as such by the other members of the court following the resignation of Chief Judge Sol Wachtler, as a result of a criminal investigation which cast doubt upon the reputation of the Court and the soundness of its decisions in the last several years of Wachtler's leadership. It was Dick's calm and strong presence, and intellectual and moral leadership that enabled the Court to survive those troubled times essentially unscathed.

Richard D. Simons, upon my observation, was a superb common law judge and also a superb human being. He was kind, generous to a fault and open-minded. He was idolized by his law clerks for having a profound influence,

not only upon their legal careers, but on how they lived their lives.

One of those clerks, David McCraw, who attained great success, as Senior Vice President and Deputy Counsel of the New York Times, spoke at Dick's funeral and had this to say: "But to talk only about Richard Simon's brilliant career as a jurist would be to miss so much – to miss out, really on the essence of who he was as a man. He didn't just change the law. He changed lives. In saying that, I speak not just for myself, but for all of his former clerks.

David McCraw also related a conversation he had with Dick after he had retired in which he asked him "what made a great judge, and he said "honesty, patience, industry' and then he paused and added 'courage'."

I would add to those qualities one more trait that Richard Simons possessed as a great judge, "Rectitude." Dick agreed with Cardozo that important decisions, decisions of long-lasting influence and guidance, would also have a moral dimension, reflecting the best values of society.

To illustrate those qualities of Dick's greatness, I will briefly discuss two of his judicial writings. The first is Brown v State of New York[1]*, a case of blatant racial profiling by local and State Police. An elderly white woman reported being robbed at knife point on a public street in the City of Oneonta by a black man whose hand*

[1] 89 NY2d 172 (1996)

was cut during the incident. The police had no more detailed description nor other clues leading to the assailant. So, they rounded up everyone of the black students at the Oneonta State College and confronted every black male encountered on the City streets for interrogation and display of their hands, all to no avail.

A class action for damages on behalf of all of those black males was commenced under the theory of Constitutional Tort, based on the violation of their rights under the New York State Constitution to equal protection and to be free from unreasonable searches and seizures.

Damages for a Constitutional Tort was not recognized in New York at that time unless linked to a traditional tort, so new law had to be created, in the common law process.

Dick, writing for a five to one Court of Appeals majority, created that new law, in what I consider to be a textbook writing in the common law tradition. The undisputed facts are succinctly marshalled. The opposing positions are respectfully addressed, and cogent reasons are given for rejecting the losing side's position, in this case that of the State's opposition to the new tort.

The analysis follows a logical progression, to the extent that the outcome appears to be inevitable. Richard Simons's conclusion reflects that moral dimension:

> *"The point is that no government can sustain itself, much less flourish, unless it affirms and*

reinforces the fundamental values that define it by placing the moral and coercive powers of the State behind those values."

The second writing was before his appointment to the Court of Appeals, while he was still a Justice of the Appellate Division, Fourth Department. The case was Matter of Jacob D. Fuchsberg, who was then an elected Associate Judge of the Court of Appeals. It was before a five-judge Court on the Judiciary.[2] *The judges were selected by then Chief Judge Charles Breitel. They were among the most highly respected Justices of the Appellate Division coming from all major parts of the State. Dick was chosen from the Fourth Department.*

Fuchsberg's most serious charges arose out of his trading in multi-millions of dollars in New York City short-term notes and Municipal Assistance Corp bonds during the City's extreme financial crisis of the 1970's, issued in part to avoid bankruptcy, along with other emergency measures, including a moratorium on redemption of those notes.

Many of those measures became the subject of legal challenges which foreseeably would ultimately reach the Court of Appeals. Fuchsberg did not dispute that the value of his New York debt securities would be affected by the Court's dispositions of those challenges. Nonetheless, he

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[2] 53 NY2d A (1978)

did not recuse in most of the appeals, in clear violation of ethical canons relating to judicial conflicts of interest.

A majority of members of the Court on the Judiciary informally reprimanded Judge Fuchsberg for those ethical violations but declined to institute formal proceedings to remove or otherwise discipline him.

Judge Simons's strong dissent manifested his courage – that quality of character he described in retirement years later as one of the qualities of a great judge, and also his rectitude, addint to his greatness.

In 1978, when the Court on the Judiciary met to consider the Fuchsberg matter, Dick had already achieved a reputation as one of the ablest appellate jurists in the State. He made no effort to hide his aspiration to someday sit on the Court of Appeals.

Jacob Fuchsberg was not only very wealthy, but he was also quite powerful with well-known close connections to groups and associations in the personal injury and criminal defense bar who furthered their political agenda with generous donations to candidates for high State Office.

Nonetheless, Richard Simons dissented, alone, and I will close my remarks here with his eloquent closing remarks in Matter of Fuchsberg:

> *"The evidence presented raises issues going directly to the heart of the judicial system, the impartiality of its judges and the integrity of the court's decisions. The public interest requires that neither be compromised in appearance or in fact for the public must respect the courts, and the Judges of the court must deserve the respect of the public. That is the bedrock upon which our system of law is built for the courts have little else to enforce compliance with their judgements other than to acceptability of them borne of public respect."*

That is the Richard Simons for whom I had the highest admiration, and whose friendship I treasured.

May his memory always be a blessing.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #2

REQUESTED ACTION: A) Closure of nominations and B) that a single, unanimous ballot be cast by the Secretary for the election of the officers and members-at-large of the Executive Committee for terms beginning June 1, 2023.

The list of candidates for the officer and members-at-large positions is attached.

Nominating Committee chair Henry M. Greenberg or his designee will present the report.

HOUSE OF DELEGATES
Agenda Item #2

ELECTION OF 2023-2024 OFFICERS AND MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

PRESIDENT-ELECT
Domenick Napoletano, Brooklyn

SECRETARY
Taa R. Grays, New York City

TREASURER
Susan Harper, New York City

DISTRICT VICE PRESIDENTS

FIRST:
Michael McNamara, New York City
Bridgette Ahn, New York City

SECOND:
Pauline Yeung-Ha, Brooklyn

THIRD:
Jane Bello Burke, Albany

FOURTH:
Nancy Sciocchetti, Saratoga Springs

FIFTH:
Hon. James P. Murphy, Syracuse

SIXTH:
Michael R. May, Ithaca

SEVENTH:
Mark J. Moretti, Rochester

EIGHTH:
Kathleen M. Sweet, Buffalo

NINTH:
Karen Beltran, Yonkers

TENTH:
Michael A. Markowitz, Hewlett

ELEVENTH:
David Louis Cohen, Kew Gardens

TWELFTH:
Michael A. Marinaccio, White Plains

THIRTEENTH:
Orin J. Cohen, Staten Island

AT-LARGE MEMBERS OF THE EXECUTIVE COMMITTEE

Thomas J. Maroney, New York City
Christopher R. Riano, New York City
LaMarr J. Jackson, Rochester (Diversity Seat)
Lauren E. Sharkey (Young Lawyers Seat)
Barry D. Skidelsky, New York City (Section Seat)

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #3

REQUESTED ACTION: Approval of the resolution offered by the LGBTQ Law Section.

Attached is a report and resolution prepared by the LGBTQ Law Section in support of the "New York State Unified Court System's UCS Bench Card and Best Practices for Judges 'Using LGBTQ+ Inclusive Language and Pronouns'" (the "Bench Card"), as adopted by the Office of Court Administration.

The Bench Card, a copy of which is appended to the report, provides information and guidance to judges on use of LGBTQ+ inclusive language and pronouns, including how to interact with transgender, non-binary, and gender expansive court users in accordance with the Judicial Rules of Conducts.

The resolution reads as follows:

> WHEREAS, judges have a duty to foster an environment free of bias, prejudice, and harassment.
>
> WHEREAS, our profession must be vigilant in protecting the LQBTQ+ community, and especially transgender individuals, within the New York State Courts and require all judges to adhere to the Rules of Judicial conduct, the Bench Card both fosters a more welcoming, gender-inclusive space while simultaneously assisting judges in removing one form of bias from the administration of justice.
>
> NOW, THEREFORE, IT IS RESOLVED, that the New York State Bar Association supports the respectful treatment of all persons in the courtroom; and it is
>
> FURTHER RESOLVED, that the New York State Bar Association supports the Rules of the Chief Administrative Judge that judges have a duty to foster an environment free of bias, prejudice, and harassment; and it is
>
> FURTHER RESOLVED, that the New York State Bar Association supports the use of LGBTQ+ inclusive language and pronouns; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the adoption of the "Using LGBTQ+ Inclusive Language and Pronouns" Bench Card;

FURTHER RESOLVED that the New York State Bar Association approves this report and the recommendations of the LQBTQ Law Section; and it is

FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

This report was submitted to the Reports Group in November 2022. The Committee on Legal Aid has submitted comments in support of the resolution.

The report will be presented to the House of Delegates by Section member Samuel W. Buchbauer.

NEW YORK STATE BAR ASSOCIATION

Report and recommendations of the New York State Bar Association **LGBTQ Law Section in Support of the New York State Unified Court System's UCS Bench Card and Best Practices for Judges "Using LGBTQ+ Inclusive Language and Pronouns"**

January 2023

The views expressed in this report are solely those of the sponsoring section and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates

Report and Resolution of the NYSBA's LGBTQ Law Section In Support of the New York State Unified Court System's UCS Bench Card and Best Practices for Judges "Using LGBTQ+ Inclusive Language and Pronouns"

Executive Summary:

- The LGBTQ Law Section submits this report in support of its request that NYSBA adopt as an association-wide policy use of the UCS's Bench Card and Best Practices for Judges entitled "Using LGBTQ+ Inclusive Language and Pronouns" (the "Bench Card").
- The Bench Card provides information and guidance to Judges to use LGBTQ+ inclusive language and pronouns, including how to interact with transgender, non-binary, and gender expansive court users in accordance with the Judicial Rules of Conduct.
- The Bench Card was developed by the Ninth Judicial District Access to Justice Committee's LGBTQ+ Subcommittee and was adopted by the Office of Court Administration ("OCA").

Report:

The Bench Card serves as a practical guide for members of the judiciary across New York State on how to use inclusive language and pronouns in compliance with Judicial Rules of Conduct. The Bench Card includes definitions of important terms relevant to LGBTQ+ communities as well as examples of gender-inclusive language to use in the courtroom to help in avoiding misgendering people of all genders. The Bench Card demonstrates compliance with the recent changes to the ethical and professional rules that govern the conduct of attorneys and judges.[1]

Judges have a duty to foster an environment free of bias, prejudice, and harassment.[2] The Rules of the Chief Administrative Judge require that:

[1] Hyer, Wallach and Browde *Examining Judicial Civility in New York Courts for Transgender Persons in the Wake of United States v. Varner* (NYSBA Latest News 8.18.2020)
[2] 22 NYCRR 100.3(B)(3-5)

> (4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.[3]

Judges act in accordance with this rule by respecting an individual's requested pronouns. Failure to refer to someone using their preferred pronouns manifests bias and prejudice as to the individual's gender identity and gender expression. This is further expounded upon in the Judicial Ethics Opinion, where a party or attorney has advised the court that their preferred gender pronoun is "they," a judge may not require them to instead use "he" or "she."[4] As an ethical matter, permitting a judge to force someone to pick an ill-fitting gender pronoun would make people feel unwelcome, distract from the adjudicative process, and undermine public confidence in the judiciary's impartiality.

The LQBTQ Law Section strongly supports the adoption of the Bench Card to make New York State's courthouses more welcoming and safe spaces for members of the LQBTQ+ community. With NYSBA's adoption of the Bench Card, the LQBTQ Law Section hopes that the Bench Card will serve as a statewide resource and an example of judicial practice that can be adopted nationwide.

Resolution:

WHEREAS, NYSBA is committed to promoting equality in the law for LQBTQ+ people, and supports the previous adoption of the Unified Court System's Bench Card and Best

[3] *See* 22 N.Y.C.R.R. § 100.3.
[4] NY Advisory Committee on Judicial Ethics, Op. 21-09 (2021)

Practices for Judges in “Using LGBTQ+ Inclusive Language and Pronouns” (the “Bench Card”) as NYSBA policy. The Bench Card, which was developed by the Ninth Judicial District Access to Justice Committee’s LGBTQ+ Subcommittee, is a guide for judges on the requirement to use inclusive language in the courtroom in the courtroom, in accordance with New York State ethical and judicial rules. It has since been adopted by the Office of Court Administration.

WHEREAS, judges have a duty to foster an environment free of bias, prejudice, and harassment.

WHEREAS, Our profession must be vigilant in protecting the LQBTQ+ community, and especially transgender individuals, within the New York State Courts and require all judges to adhere to the Rules of Judicial conduct, the Bench Card both fosters a more welcoming, gender-inclusive space while simultaneously assisting judges in removing one form of bias from the administration of justice.

NOW, THEREFORE, IT IS RESOLVED, that the New York State Bar Association supports the respectful treatment of all persons in the courtroom; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the Rules of the Chief Administrative Judge that judges have a duty to foster an environment free of bias, prejudice, and harassment; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the use of LGBTQ+ inclusive language and pronouns; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the adoption of the “Using LGBTQ+ Inclusive Language and Pronouns” Bench Card;

FURTHER RESOLVED that the New York State Bar Association approves this report and the recommendations of the LQBTQ Law Section; and it is

FURTHER RESOLVED that the officers of the New York State Bar Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

The New York State Unified Court System

USING LGBTQ+ INCLUSIVE LANGUAGE AND PRONOUNS

UCS Benchcard and Best Practices for Judges

Judges have an obligation to foster a judicial environment free of bias, prejudice, and harassment.[1] It is "misconduct" to discriminate based on sexual orientation, gender identity, or gender expression.[2] Where a party or attorney has advised the court that their preferred *[chosen]* gender pronoun is "they," a judge may not require them to instead use "he" or "she."[3]

WHAT DOES "LGBTQ+" MEAN?

The term "LGBTQ+" refers to lesbian, gay, bisexual, transgender, and queer or questioning people. LGBTQ+ is a widely used and reasonably inclusive term, including those of non-heterosexual sexual orientations and transgender people. Other shorthand terms used with some frequency include the letters "I" for "intersex," "A" for "asexual" or "ally," "2S" for "two-spirit" (in Native American culture) and possibly others.

GENDER VARIANT/NEUTRAL PRONOUNS

Some persons may have a pronoun choice other than he/him/his/himself, she/her/hers/herself, or they/them/their/themself. The pronoun list that follows is not an exhaustive list:

- **sie** (or ze, or zie)/hir/hirs/hirself
- **e**/em/es/eself
- **hi**/hem/hes/himself
- **na**/nan/nas/naself
- **per**/per/pers/perself
- **ze**/zim/zee's/zeeself

"TRANSGENDER" AND PRONOUN USE

"Transgender" is a broad term that includes people who do not identify with their assigned birth sex and may not conform to traditional gender expression. The term "trans*"—with or without the asterisk—is commonly used shorthand. There are others who may choose another term such as non-binary, genderqueer, or queer. Judges and court personnel should keep in mind that being transgender, regardless of a person's gender expression, is entirely unrelated to sexual orientation, Transgender individuals, like others, may be attracted to partners of any gender.

A key point: there is no precise measure of when the process of changing one's gender or sex is complete. Surgery of any kind is not a prerequisite to being transgender, but for some it is a necessity. A transgender person may have some surgery, many surgeries, or no surgeries.

The process of confirming gender is sometimes referred to as transition, of which **Gender Confirmation Surgery ("GCS")** may be just a part. GCS, sometimes referred to as bottom surgery, was once called "sex change surgery" a term now disfavored. Transition often includes social and legal components as well.

If unsure of which pronoun to use to refer to a person, **ask the person** – it is not considered rude, indeed, asking is seen by most as a sign of respect. When referring to past events of a transgender person, maintain the individual's chosen pronouns presently in use for the historical narrative. For example, "Defendant lived with her wife until separation."

1 22 NYCRR 100.3(B)(3-5)
2 NY RULES OF PROF'L CONDUCT r. 8.4(g) (NYS BAR ASS'N 2021).
3 NY Advisory Committee on Judicial Ethics, Op. 21-09 (2021).

The New York State Unified Court System

USING LGBTQ+ INCLUSIVE LANGUAGE AND PRONOUNS

UCS Benchcard and Best Practices for Judges

INCLUSIVE LANGUAGE IN COURT

Inclusive language in the courtroom conveys the message that all people, regardless of orientation, gender identity or gender expression, will be treated with dignity and respect. Gender-inclusive language helps in avoiding misgendering people in the courtroom. When judges and lawyers share/volunteer their own pronouns, it reduces the perception that pronouns are only relevant for gender-diverse persons. If a judge becomes aware that a party is or may be transgender, the judge should consider asking questions such as:

- **What name do you usually go by?**
- **Is your birth/legal name different?**
- **Which name do you want me to use with you?**
- **How would you like to be addressed? For example, I use [the judge's pronouns].**

This shows compliance with the recent changes to the ethical and professional rules that govern the conduct of attorneys and judges.[4] Further,

- **Judges and attorneys can volunteer their chosen pronoun during appearances and jury introductions.**
- **Judge's pronouns can be included on courthouse/ room signage.**
- **Use the name of the person or gender-neutral words such as, "folks," "guests," "jurors" and "counsel."**
- **Avoid terms and phrases that are gender-specific such as "ladies and gentlemen of the jury," "sir" and "ma'am."**
- **Realize a person's chosen pronouns may change, and that some people may have pronouns that are fluid or interchangeable (such as "she/they").**
- **Honorifics: in addition to Mr./ Ms./ Miss/ Mrs., there are gender-neutral choices, such as M. or Mx.**

4 Hyer, Wallach and Browde *Examining Judicial Civility in New York Courts for Transgender Persons in the Wake of United States v. Varner* (NYSBA Latest News 8.18.2020)

IMPORTANT TERMS TO KNOW

AFAB/AMAB: Assigned female at birth/ Assigned male at birth. Acronyms indicating that the individual's assigned sex at birth was in error.

Gender Confirmation Surgery ("GCS"): sometimes referred to as "bottom surgery," was once called "sex change surgery" a term now disfavored.

Gender expression: the way a person demonstrates their gender through outward manifestations such as clothing, mannerisms, style, etc.; this may not match gender identity.

Gender identity: an individual's perception of their own gender.

Gender non-binary: Identifying as neither male nor female.

Gender nonconforming: Not identifying with a recognized gender.

Intersex: A term used to describe natural differences in sexual development/traits that affect approximately 1.7% of the population.

MBT/WBT: man born trans/ woman born trans

DISFAVORED TERMS

FTM (female to male) and MTF (male to female): acronyms indicating that a person has transitioned from one sex to the other.

Transsexual: A person that has transitioned medically from one sex or gender to another (disfavored due to the "change" implication).

TERMS TO AVOID

hermaphrodite, she-male, he-she, tranny, transvestite.

Within the LGBTQ+ community there has been a reclamation of some words historically used pejoratively against LGBTQ+ persons. Ex. Some folks use "queer" and "dyke" as positive, respectful terms. Although LGBTQ+ people may use these terms, they are often seen as derogatory when used by others. **Exercise extreme caution with respect to such words.**

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January 3, 2023

TO: NYSBA Reports Group

Cc: NYSBA LGBTQ Law Section

FROM: NYSBA Committee on Legal Aid

RE: Comment on Report and Resolution of the NYSBA's LGBTQ Law Section In Support of the New York State Unified Court System's UCS Bench Card and Best Practices for Judges "Using LGBTQ+ Inclusive Language and Pronouns"

The NYSBA Committee on Legal Aid (COLA) submits this comment to express strong support for the Report and Resolution of the NYSBA's LGBTQ Law Section In Support of the New York State Unified Court System's UCS Bench Card and Best Practices for Judges "Using LGBTQ+ Inclusive Language and Pronouns". COLA lauds the Office of Court Administration for adopting the Bench Card, "Using LGBTQ+ Inclusive Language and Pronouns" as a guide to ensure that LGBTQ individuals, whether lawyers, litigants, jurors, or others, are treated with respect and dignity throughout their experience in the courts. The NYSBA Committee on Legal Aid's membership consists of leaders of legal service providers across the state, law schools and those committed to equal access to justice for all and therefore to the provision of free legal aid in the essentials of life to those in need. These legal services organizations serve New York's most vulnerable persons and, by number of employees, function as the largest front-line law firms in New York State. Within these organizations, we have LGBTQ individuals represented at all levels of staffing from Executive Directors to intake staff. All of our organizations serve LGBTQ

individuals, and many of our organizations have programs that specifically focus on the legal needs of LGBTQ individuals, especially those who have faced discrimination or persecution due to their sexual orientation or gender identity. It is with this background that we firmly state our support for the LGBTQ Law Sections Report and Resolutions regarding the Bench Card.

While discrimination based on sexual orientation has been prohibited in New York State since 2002, and discrimination based on gender identity and expression as been prohibited since 2019, it has been the experience of many of our lawyers and clients that the application of these laws in the Court Room has been inconsistent. Our own attorneys have experienced and witnessed mis-gendering in the Court room by judges and have witnessed such behavior used as a harassment and intimidation tool by opposing parties. The Office of Court Administration has taken leadership to modify Section 100.3 of the Rules of the Chief Administrative Judge to explicitly include sexual orientation and gender identity and gender expression in the judicial rules against bias in the courtroom, but sadly discrimination based on sexual orientation and gender identity have not been eradicated from the court houses. Therefore, it is critical that further steps be taken to educate Judges and their staff regarding the appropriate use of inclusive language and pronouns.

COLA supports the Unified Court System's Bench Card as a good guide for inclusive and respectful treatment of LGBTQ and especially transgender and gender non-binary individuals. We believe it should be used as a guide not only in the court room, but also in NYSBA's policies and practices.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #4

REQUESTED ACTION: None, as the report is informational.

Deborah Enix-Ross, President of the American Bar Association, and senior advisor at Debevoise & Plimpton LLP in New York City, will address the House on matters of interest to the members of the New York State Bar Association.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

REQUESTED ACTION: None, as the report is informational.

The Women in Law Section's Ruth G. Schapiro Memorial Award honors a male or female member of the Association who has made a noteworthy contribution to the concerns of women through pro bono services, writing, service to bar associations or community organizations or other such endeavors.

The 2023 Ruth G. Schapiro Award recipient is Hon. Elizabeth A. Wolford.

Association president Sherry Levin Wallach will present the Ruth G. Schapiro Award to Hon. Elizabeth A. Wolford.

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #6

REQUESTED ACTION: Approval of report and recommendations of the Committee on the New York State Constitution.

Attached is a report with recommendations entitled "Gubernatorial Selection in New York: Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and Inability."

In April 2022, the Committee on the New York State Constitution formed a Subcommittee on the Lieutenant Governor to review and make recommendations on amendments to the state constitution concerning the process by which a lieutenant governor could be appointed or otherwise selected.

The attached report surveys the constitutional and statutory provisions governing gubernatorial succession in New York State, including succession to the governorship by the lieutenant governor, replacement of the lieutenant governor, scenarios in which the Temporary President of the Senate or Speaker of the Assembly would succeed to the governorship, and the current constitutional mandate that the lieutenant governor acts as governor should the governor be absent from the state, and proposes a series of recommendations addressing these issues. The report also proposes a procedure to address gubernatorial inability to serve in office, comparable to the Twenty-Fifth Amendment to the U.S. Constitution.

The recommendations proposed in the report are summarized as follows:

- Absence from the state. The constitutional provision that the Lieutenant-Governor act as Governor when the Governor is absent from the state should be repealed.

- Filling a Lieutenant-Governor vacancy. In the event of a vacancy in the office of Lieutenant-Governor, the Governor should have the authority to appoint the Lieutenant-Governor, subject to confirmation by separate majority votes in each house of the Legislature.

- Timeline for filling vacancy. The Governor should have 60 days to nominate a successor Lieutenant-Governor, and the Legislature should have 60 days to vote on whether to confirm the nominee. If one house of the Legislature

were to vote against confirmation, the Governor's clock should restart, with the Governor having 30 days from the date of rejection to submit a new nominee and the Legislature having 30 days to vote on the new nominee. If the Governor were to fail to nominate a person within either the 60-day or 30-day limit, the Legislature should be authorized to fill the position for the remainder of the Lieutenant-Governor's term, following the procedure currently provided by statute for vacancies in the offices of Attorney General and Comptroller. If the Legislature were to fail to either confirm or reject a nominee within 60 days after it receives a nomination (or 30 days in the case of a second or subsequent nominee), the nominee should be deemed appointed for the remainder of the gubernatorial term.

- Whoever succeeds to governorship assumes the office. The constitution should provide that, when the Governor ceases to act as Governor, either temporarily or permanently, the officer who succeeds discharges the powers and duties of Governor during the time of that succession to the same extent as if that official had been elected Governor.

- Succession by Temporary President of the Senate or Speaker. The current order of succession to the governorship, namely Lieutenant-Governor, Temporary President of the Senate, and Speaker of the Assembly, should be continued. If the Temporary President of the Senate or Speaker of the Assembly permanently assumes the office of Governor, that official must resign from legislative office. However, if the succession is temporary due to an impeachment or inability of the Governor to serve, the Temporary President or Speaker need not relinquish legislative office until they have held the governorship for sixty consecutive days. During the sixty consecutive days of incumbency, that officer may not exercise his or her powers and duties as a legislator.

- If the Temporary President of the Senate and Speaker Decline to Serve. If the Temporary President of the Senate and Speaker of the Assembly both decline to assume the office of Governor, the Attorney-General, Comptroller and certain commissioners from executive departments who have been confirmed by the Senate, as provided by law, should be next in line to serve as Governor.

- Gubernatorial Inability to Serve. There should be a procedure to declare the inability of a Governor to serve which parallels the procedure in the federal Constitution's Twenty-Fifth Amendment. A Governor could voluntarily declare an inability to serve. In addition, a committee on gubernatorial inability, consisting of the Lieutenant-Governor, Attorney General, Comptroller and six executive department heads confirmed by the Senate, as provided by law, could declare an inability by a vote of a majority of the members designated to that committee. Each house of the Legislature must confirm the Governor's inability by a two-thirds vote of the

elected members of the house. A Governor could then declare at any time in the future an ability to resume the duties of office, unless the committee on gubernatorial disability declares otherwise and each house of the Legislature agrees by two-thirds vote.

Proposed draft language to effectuate these constitutional amendments may be found in the Appendix starting at page 25 of the report.

This report was submitted to the Reports Group in November 2022. No comments have been submitted concerning the report as of January 6, 2023.

The report will be presented by Christopher Bopst, chair of the Committee on the New York State Constitution, and Alan Rothstein, chair of the Committee's Subcommittee on the Lieutenant Governor.

NEW YORK STATE BAR ASSOCIATION

Report and recommendations of the New York State Bar Association **Committee on the New York State Constitution**

January 2023

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

New York State Bar Association

Committee on the New York State Constitution

GUBERNATORIAL SUCCESSION IN NEW YORK

Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and Inability

Report Approved by the Committee on Thursday, October 27, 2022

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1. INTRODUCTION

The Lieutenant-Governor position in New York seldom draws public attention. However, it has moved to center stage in the past 18 months. The position is normally filled through the elective process, with the Governor and Lieutenant-Governor running jointly in the general election. However, in August 2021, Andrew Cuomo resigned as Governor, elevating Lieutenant-Governor Kathy Hochul to the governorship. Under New York law, Governor Hochul was free to appoint unilaterally whomever she chose as Lieutenant-Governor. That person, though not vetted by the electorate or the Legislature, would accede to the governorship if she left office. Governor Hochul selected state Senator Brian Benjamin, an ill-fated choice since Benjamin was indicted

eight months later and resigned. Hochul again exercised unfettered discretion to appoint a Lieutenant-Governor, and appointed Congressman Anthony Delgado. Delgado won the Democratic primary, securing his place on the ballot with Governor Hochul in the general election.[1]

Having two Lieutenant-Governors chosen exclusively by the Governor within such a brief period of time has reignited concerns over whether this is an appropriate way to select a person who is a heartbeat from the governorship. Whether the procedure itself has ever gained the legitimate consent of the governed is debatable. The procedure is not clearly spelled out in New York's constitution or statutes; it arose out of necessity. The state constitution provides when a vacancy exists in the office of Lieutenant-Governor, the duties of that office are discharged by the Temporary President of the Senate. Historically, intra-term vacancies in the Lieutenant-Governor office remained unfilled. Sixteen months after Lieutenant-Governor David Paterson became Governor following Eliot Spitzer's resignation in March 2008, he faced an evenly divided Senate with both major parties claiming leadership of the house and no Lieutenant-Governor (or Temporary President acting as Lieutenant-Governor) to break the tie.[2] Paterson appointed Richard Ravitch as Lieutenant-Governor, ostensibly to provide the tie-breaking vote. In doing so, he relied on Section 43 of the Public Officers Law, which provides that the Governor has the power to fill vacancies not covered in other statutes. This appointment was challenged, and a closely divided Court of Appeals, in *Skelos v. Paterson*, agreed with Paterson. This interpretation prevails today, but is it the best way to select someone who might become Governor?

NYSBA's Committee on the New York State Constitution decided to address the topic of who serves as Lieutenant-Governor if that office becomes vacant. It formed a Subcommittee which considered scenarios about how to fill the vacancy, including one in which both the Governor and Lieutenant-Governor positions are vacant. That led to consideration of how to deal with other gubernatorial succession issues and how to address the inability of a Governor to serve. The federal government addressed the issue of presidential inability and vacancies in the office of Vice President with the Twenty-Fifth Amendment, but New York does not have a comparable law.

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[1] As the deadline for Benjamin to decline the nomination to be on the primary ballot had passed by the time of his resignation, a swift change in the law had to be adopted to allow him to remove his name from the ballot.

[2] Under New York law, the Lieutenant-Governor has a casting vote in the state senate on procedural matters.

This report will set forth its recommendations and the reasons supporting them, with an appendix proposing constitutional and statutory language changes.

2. SUMMARY OF RECOMMENDATIONS

- **Absence from the state.** The constitutional provision that the Lieutenant-Governor act as Governor when the Governor is absent from the state should be repealed.

- **Filling a Lieutenant-Governor vacancy.** In the event of a vacancy in the office of Lieutenant-Governor, the Governor should have the authority to appoint the Lieutenant-Governor, subject to confirmation by separate majority votes in each house of the Legislature.

- **Timeline for filling vacancy.** The Governor should have 60 days to nominate a successor Lieutenant-Governor, and the Legislature should have 60 days to vote on whether to confirm the nominee. If one house of the Legislature were to vote against confirmation, the Governor's clock should restart, with the Governor having 30 days from the date of rejection to submit a new nominee and the Legislature having 30 days to vote on the new nominee. If the Governor were to fail to nominate a person within either the 60-day or 30-day limit, the Legislature should be authorized to fill the position for the remainder of the Lieutenant-Governor's term, following the procedure currently provided by statute for vacancies in the offices of Attorney General and Comptroller. If the Legislature were to fail to either confirm or reject a nominee within 60 days after it receives a nomination (or 30 days in the case of a second or subsequent nominee), the nominee should be deemed appointed for the remainder of the gubernatorial term.

- **Whoever succeeds to governorship assumes the office.** The constitution should provide that, when the Governor ceases to act as Governor, either temporarily or permanently, the officer who succeeds discharges the powers and duties of Governor during the time of that succession to the same extent as if that official had been elected Governor.[3]

[3] This should be true even if the Governor who left office eventually returns to the position, as after an impeachment not resulting in removal from office or after an inability to serve ceases.

- **Succession by Temporary President of the Senate or Speaker.** The current order of succession to the governorship, namely Lieutenant-Governor, Temporary President of the Senate, and Speaker of the Assembly, should be continued. If the Temporary President of the Senate or Speaker of the Assembly permanently assumes the office of Governor, that official must resign from legislative office. However, if the succession is temporary due to an impeachment or inability of the Governor to serve, the Temporary President or Speaker need not relinquish legislative office until they have held the governorship for sixty consecutive days. During the sixty consecutive days of incumbency, that officer may not exercise his or her powers and duties as a legislator.

- **If the Temporary President of the Senate and Speaker Decline to Serve.** If the Temporary President of the Senate and Speaker of the Assembly both decline to assume the office of Governor, the Attorney-General, Comptroller and certain commissioners from executive departments who have been confirmed by the Senate, as provided by law, should be next in line to serve as Governor.

- **Gubernatorial Inability to Serve.** There should be a procedure to declare the inability of a Governor to serve which parallels the procedure in the federal Constitution's Twenty-Fifth Amendment. A Governor could voluntarily declare an inability to serve. In addition, a committee on gubernatorial inability, consisting of the Lieutenant-Governor, Attorney General, Comptroller and six executive department heads confirmed by the Senate, as provided by law, could declare an inability by a vote of a majority of the members designated to that committee. Each house of the Legislature must confirm the Governor's inability by a two-thirds vote of the elected members of the house. A Governor could then declare at any time in the future an ability to resume the duties of office, unless the committee on gubernatorial disability declares otherwise and each house of the Legislature agrees by two-thirds vote.

Draft language to effectuate these changes can be found in the Appendix. We recommend that these changes be made by constitutional amendment except for proposed statutes to create an order of gubernatorial succession and a committee on gubernatorial inability.

We recognize there is substantial complexity in these recommendations. We expect these recommendations to be submitted to the Legislature in several separate proposals.

3. BACKGROUND

New York has had a Lieutenant-Governor since before its first constitution was adopted in 1777.[4] Although there have been at least twelve vacancies in that position over the decades, no Governor attempted to appoint a Lieutenant-Governor until 2009. Among the prior vacancies, all remained unfilled except for special elections held in 1847, for which the Legislature passed a special statute, and in 1944 when, after the death of Lieutenant-Governor Thomas Wallace, the state Democratic Party chair sued to force a special election. The courts agreed that the constitutional and statutory provisions then in effect required such an election.

Then-Governor Thomas Dewey, concerned that a special election could lead to the election of a Lieutenant-Governor from a different political party than that of the Governor, urged constitutional and legislative changes, which included requiring the Governor and Lieutenant-Governor of the same party to run on a joint ticket in the general election—the first state to do so—and providing that no election for Lieutenant-Governor could occur unless an election to fill a vacancy in the office of Governor was also held. These changes were eventually adopted in a 1953 constitutional amendment. A prior constitutional amendment in 1945 clarified that the Temporary President of the Senate serves as Lieutenant-Governor if that position is vacant, and an amendment a year earlier to the Public Officers Law removed the offices of Governor and Lieutenant-Governor from that section of the law [section 42] requiring a special election to fill a vacancy occurring in an elected office.

Lieutenant-Governor David Paterson assumed the governorship in March 2008 after Eliot Spitzer resigned. In mid-2009, he was faced with the unusual circumstance of two groups of state Senators, each with thirty-one votes, claiming to control the Senate, with each group claiming to include the rightful Temporary President of the Senate. As this dispute dragged on, it became impossible to conduct legislative business (if a Lieutenant-Governor had been in place, he or she

[4] NYS Law Revision Commission, Memorandum: Relating to Gubernatorial Inability and Succession, Absence from the State and Filling a Vacancy in the Office of Lieutenant Governor (Senate No. 8365; Assembly No. 10454) (1986) (hereinafter "1986 Law Revision Commission Report") at 15. Found at HeinOnline.

would have had a tie-breaking vote on procedural matters, but that office was vacant.[5] Governor Paterson appointed Richard Ravitch as Lieutenant-Governor in July of that year, relying on section 43 of the Public Officers Law, which provides:

> If a vacancy shall occur otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such office shall expire with the calendar year in which the appointment shall be made, or if the office is appointive, the appointee shall hold for the residue of the term.

The Temporary President of the Senate challenged the appointment, and the Court of Appeals, by a 4-3 vote in *Skelos v. Paterson*, upheld the appointment.[6] The Court reasoned there was no statutory or constitutional provision explicitly providing for filling the Lieutenant-Governor vacancy, and therefore section 43 applied. The Court held the Public Officers Law could be read in harmony with Article IV, Section 6 of the constitution, which provided for the Temporary President to "perform all the duties of lieutenant-governor during such vacancy or inability." The Temporary President would perform those functions, the Court reasoned, until the Governor filled the vacancy under section 43.

The dissent reasoned that Article IV controlled, providing that the Temporary President perform the duties of Lieutenant-Governor until the next election, and that no such election could be held unless and until there was a vacancy in the offices of both the Governor and the Lieutenant-Governor. Section 43 was never meant to fill the Lieutenant-Governor position, the dissent said, and the Legislature, by excluding the Lieutenant-Governor from those offices that required an intervening election under section 42 of the Public Officers Law, demonstrated that the sole recourse for filling a vacancy in the Lieutenant-Governor position could be found in Article IV.

Under *Skelos,* the Governor has the authority to appoint a Lieutenant-Governor should a vacancy occur. As no Lieutenant-Governor had been appointed before 2009, and that specific appointment was made in the midst of unique legislative gridlock, it was conceivable that when

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[5] For a discussion of the events of 2009, *see* Patrick A. Woods, Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock Without Sacrificing the Elective Principle, 76 Albany Law Review 4 (2013) at 2301-2.

[6] 13 N.Y. 3d 141; 915 N.E. 2d 1141 (NY 2009). https://casetext.com/case/skelos-v-paterson-7

the situation next arose a Governor would revert to pre-2009 practice. However, with *Skelos* as support, Governor Hochul twice appointed Lieutenant-Governors—while at the time not having been elected Governor herself. Should Governor Hochul have left office before that term ended, the Lieutenant-Governor would have become Governor without having stood for election to either office or having been confirmed by the Legislature. We believe this is an unsatisfactory devolution of the highest office in the state. Below, we set forth our recommended approach and the reasoning behind the recommendations.

In addition, in reviewing Governor/Lieutenant-Governor succession, we have identified a number of issues which should be addressed in the constitution and accompanying statutes.

- Article IV, Section 5 of the constitution provides that the Lieutenant-Governor, in addition to succeeding the Governor if impeached or otherwise unable to serve, shall act as Governor if the Governor "is absent from the state." This appears to be an anachronistic rule in the current age of worldwide, instant communication, and has been a source of mischief in other states.

- The constitution does not clarify the role of a successor to the Governor. For example, Article IV, Section 6, provides that the Temporary President of the Senate or Speaker of the Assembly shall "act as governor" if there be no Governor or Lieutenant-Governor. What does that mean? The same language is found in Section 5, where the Lieutenant-Governor acts as Governor during a Governor's impeachment, absence from the state, or when the Governor is unable to discharge the office's duties. The status of the person serving as Governor should be clarified.

- Though the Temporary President of the Senate or the Speaker of the Assembly may "act as governor" or "perform the duties of lieutenant-governor," nothing in the constitution or statute appears to bar them from simultaneously exercising their duties as a legislator. Thus, a Temporary President might be able vote on a measure as a senator and then, if there were a tie vote, vote to break that tie as acting Lieutenant-Governor. Holding executive and legislative positions simultaneously poses a serious separation of powers issue.

- There is lack of clarity as to who succeeds to the governorship if the Lieutenant-Governor, Temporary President and Speaker are unable or unwilling to serve, which may become more of a

distinct possibility if the Temporary President and Speaker cannot hold executive and legislative positions simultaneously.

- New York has no provision similar to the federal Twenty-Fifth Amendment to deal with the situation in which the Governor has an inability preventing the Governor from discharging the duties of the office.

This report addresses these issues and proposes constitutional and statutory language to deal with them. While we attempt to encompass additional situations not currently or adequately addressed by existing law, we do not attempt to solve for all permutations, or to anticipate every situation that might arise in the future. The events of 2009, for example, were a confluence of unusual factors, with a Governor who was not elected to that office, no Lieutenant-Governor, and an even split in the Senate with two Senators claiming to lead the body. However, we hope our recommendations provide a roadmap for a variety of situations and clarify the roles and authority of the involved officials.

4. GOVERNOR'S ABSENCE FROM THE STATE

Article IV, Section 5 of the constitution provides:

> In case the governor is impeached, absent from the state or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

The phrase "absent from the state" also appears three times in Section 6, regarding other succession procedures. The exception was logical when a Governor's leaving the state meant the Governor was unable to maintain contact with developments and could not be an effective decision-maker if the need arose. However, in the Internet age, a Governor need never be out of touch, and is able to convey decisions instantaneously**. We see no reason to maintain the "absent from the state" language in Article IV.**

This provision is not harmless. While there is no reported instance in New York of a Lieutenant-Governor using the Governor's absence to make decisions that run counter to the

Governor's policies, such has happened in other states.[7] Most recently, in Idaho, Lieutenant Governor Janice McGeachin used Governor Brad Little's absence from the state as an opportunity to issue an order banning COVID-19 mask mandates in schools, reversing Governor Little's order.[8] Although members of the same political party, McGeachin was a political rival of Governor Little; a similar situation could arise in New York, because the Lieutenant-Governor runs separately from the Governor in party primaries. In the 2022 election, Lieutenant-Governor Delgado, preferred by Governor Hochul, could have lost the primary to one of two challengers who had been critical of the Governor. Having a Lieutenant-Governor at odds with the Governor has happened before in New York[9] and even a Lieutenant-Governor elected with a Governor's support could become disaffected. It is better to remove an unnecessary provision of the constitution than to retain a superfluous provision that could lead to political mischief and a governing crisis.

Admittedly, there may be instances in which a Governor is absent and out of communication. One well-publicized incident involved Governor Mark Sanford of South Carolina, who disappeared for nearly six days in 2009, not responding to communications, reportedly involving a personal matter.[10] If a Governor does not want to be found, the Governor could also disappear within the state, though this would be an exceedingly rare occurrence. This situation can be addressed through the language in Article IV, Section 5, as the Governor would be "unable to discharge the powers and duties" of the office. Here, if necessary, the use of a declaration of inability that we propose [see section 7 of this report] would allow for a temporary transition of power.

An additional concern with the existing language, flagged by the New York Law Revision Commission, is that there is some disagreement among other states over the meaning of the term "absent from the state."

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[7] *See* Fordham Law School Rule of Law Clinic (Ian Bollag-Miller, Stevenson Jean, Maryam Sheikh, & Frank Tamberino), Changing Hands: Recommendations to Improve New York's System of Gubernatorial Succession, at 8-9 (June 2022) (hereinafter "Fordham Rule of Law Clinic Report"). https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=rule_of_law_clinic

[8] Id. at 9.

[9] *See* Peter J. Galie and Christopher Bopst. Cleaning the New York Constitution, Part I, in Peter J. Galie, Christopher Bopst and Gerald Benjamin (eds.), New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness (SUNY Press 2016) at 56, n. 40.

[10] Fordham Rule of Law Clinic Report, supra note 5, at 9.

Some courts have construed "absent from the state" to mean physical non presence within the boundaries of the state, and others to mean presence outside the state to the extent there is an inability to govern.[11]

One example arose in California, in 1979, when the Lieutenant Governor appointed a judge when the Governor was out of state. The California Supreme Court allowed the Governor to withdraw the nomination but ruled that absence meant physical absence.[12] On the other hand, the Nevada Supreme Court ruled that absence meant "effective absence", citing other court decisions as precedent.[13] This uncertainty should not remain in New York's constitution.

The Law Revision Commission and the Temporary Commission on the Revision and Simplification of the Constitution,[14] among others, have recommended this provision be removed from the constitution. We believe this should be done promptly.

5. GOVERNOR/LIEUTENANT-GOVERNOR SUCCESSION

a. Replacing a Lieutenant-Governor

For close to a year and a half immediately preceding the swearing in on January 1, 2023, of the Lieutenant-Governor elected in November 2022, the Lieutenant-Governor of the state was neither elected by the people to that position nor confirmed by any government body. Yet, he could have had all the enormous power of the Governor if Kathy Hochul were to have resigned or otherwise been unable to serve. We believe that giving the Governor sole authority to install anyone the Governor wants as Lieutenant-Governor, with no checks, is unwise. We are joined in this view by the New York Law Revision Commission[15] and others.[16] This office is too important

[11] 1986 Law Revision Commission Report, supra note 1, at 12.
[12] In re Governorship, 26 Cal. 3d 110, 113 (1979).
[13] *Sawyer v. First Judicial District Court*, 82 Nev. 53, 410 P.2d 748 (1966).
[14] 1986 Law Revision Commission Report at 46. See also Fordham Rule of Law Clinic Report at 8-10.
[15] *See* 1986 NYS Law Revision Commission Report. supra note 1, at 95.
[16] *See, e.g.*, New York City Bar Association, Committee on Election Law, Letter to the Governor's Office urging reforms to the succession rules in New York State (July 2008) https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/succession-rules-for-new-york-state-governors-office; New York County Lawyers Association, Report of the New York County Lawyers Association for the Establishment of a Task Force on Lieutenant Gubernatorial Succession (April 27, 2022),

to leave to one person to fill, a view underscored by the events of the last few years, when substantial powers were placed in the Governor's hands, or otherwise invoked, to deal with the COVID-19 pandemic.

In considering proposals for reform, a threshold issue is whether a Lieutenant-Governor who leaves office mid-term (either through elevation to the governorship, resignation, or otherwise) should be replaced at all. Despite having at least nine prior Lieutenant-Governors leave office without being replaced, David Paterson appointed Richard Ravitch in 2009 to fill the vacancy created when he assumed the office of Governor as he was faced with a deadlocked Senate unable to function. When there is a vacancy in the office of Lieutenant-Governor, the state constitution provides that the Temporary President of the Senate will assume the duties of the Lieutenant-Governor. This raises a basic issue of whether that individual may exercise a tie-breaking vote in the Senate, as he or she would already have had a vote as a sitting senator in that body. In addition, legislative leaders have an entirely different focus than a Governor or Lieutenant-Governor, and an all-consuming job of their own to run a house of the Legislature. They are not in a position to both manage the business of a legislative body and immerse themselves in executive decision-making and administration, which could be thrust upon them immediately should they become Lieutenant-Governor or Governor.

The logistical problems that counsel removal of the "absence from the state" language above could similarly exist when a Temporary President of the Senate serves as Lieutenant-Governor. The Temporary President may not agree with the Governor's policies and may even be from a different party. And although the Temporary President is an elected official, that person is elected from only one senate district, representing less than two percent of the state's population. If the Temporary President is unable to assume the duties of Lieutenant-Governor, the Speaker of the Assembly serves in that role, which raises the same concerns but reduces to 0.67% the size of the state's population that has actually voted on the Acting Lieutenant-Governor.

A Lieutenant-Governor, in contrast to a legislator, must be ready to succeed the Governor in acting on behalf of the entire state. By virtue of serving as second-in-command, a Lieutenant-

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https://www.nycla.org/pdf/NYCLA%20Report%20on%20Lt.%20Gubernatorial%20Succession%20Task%20Force.pdf.

Governor will have been directly exposed at some level to the administration's decision-making and governing strategy. In the case of David Paterson, he had virtually no notice that he would be taking on the responsibilities of governing and he was confronted with a governance crisis soon after taking office. Doubtless his ability to observe up close the inner workings of the Governor's office helped him when he assumed the office of Governor.

We believe that the Governor should be able to fill a Lieutenant-Governor vacancy by appointing a person of the Governor's choice, subject to checks and balances. The Governor should be able to have a second-in-command of the Governor's own choosing who agrees with the Governor's policies and manner of governing. The Governor was elected presumably because the electorate approved of the Governor's approach to governing. Allowing the Governor to appoint a Lieutenant-Governor who shares the same views serves the interests of the electorate and avoids the inevitable conflicts of interest that arrive when the duties of that office are executed by one of the leaders of the legislature.

b. **Other States and Territories**

The large majority of states and territories have some method to replace a Lieutenant-Governor. Twenty-one states and territories, as of last count, have explicit succession procedures. Other replacement mechanisms are implicit or the result of court decisions, such as in New York. Most states with explicit procedures provide for the Governor to appoint a new Lieutenant-Governor, subject to some form of legislative confirmation.[17] Of those, most require confirmation by both houses of the Legislature. Similarly, the Twenty-Fifth Amendment provides for the President to appoint a Vice President, subject to confirmation by both houses of Congress.

Six states and territories allow the Legislature to fill a vacancy in the office of Lieutenant-Governor, and three states—Florida, Montana, and New Jersey—expressly permit the Governor to appoint a new Lieutenant-Governor without confirmation.[18] Alaska requires the Governor to identify someone from a list of cabinet members at the beginning of the Governor's term (subject to legislative confirmation), so that person would be in place should the Lieutenant-Governor

[17] Information on other states and territories is from T. Quinn Yeargain, Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant-Gubernatorial Succession, 84 Albany Law Review ___ (2021) at 20. (Hereinafter "Recasting the Second Fiddle")
[18] Recasting the Second Fiddle, supra note 15, at 19-27.

position become vacant. The Fordham Rule of Law Clinic report suggests that procedure for New York, with such person then subject to legislative confirmation.

c. **Our Recommendation**

In considering our recommendation, we sought a procedure that provides appropriate checks and balances, efficiency of government, and continuity of the outgoing Governor's policies. This approach best reflects the electorate's wishes and would build public credibility.

We believe that the Governor should be able to select the Lieutenant-Governor nominee (who must have the constitutional qualifications to serve as Governor). We oppose leaving the replacement decision entirely to the Legislature. The Governor, as the head of the executive branch, must be able to decide initially who to nominate. A Governor should be able to work with a Lieutenant-Governor of the Governor's own choosing and have confidence that, should the Governor leave office, the successor would continue the Governor's policies. Although harmony between the two officials cannot be guaranteed, the likelihood of harmony is higher when the Lieutenant-Governor is selected by the Governor. But the Governor's discretion to appoint should not be unfettered, as it is today.

We do not favor limiting the Governor to choosing from only certain officials, as some have proposed. None of the allowable officials may align with the Governor's views and approach to governing. In addition, selecting the person ahead of time, as in Alaska, would unduly limit the Governor in appointing someone appropriate for the moment when a vacancy occurs. Allowing the Governor a full choice of nominees, subject to legislative confirmation, strikes the proper balance.

We recommend that the Governor's nominee for Lieutenant-Governor be subject to confirmation by a separate majority vote of the elected members of each house of the Legislature. This recommendation aligns with the Law Revision Commission's recommendation. We believe the importance of the office necessitates a confirmation process that involves both houses. If two elected legislative bodies review and approve the nominee the public will have confidence that the Governor's appointment is properly vetted.[19] Similar to the requirements to

[19] We note that the majority in *Skelos* made clear they were not favoring gubernatorial appointment without review as a policy: "Before us, however, is not the abstract question of whether it would be better in the case of a vacancy in the office of the Lieutenant Governor to fill the vacancy by election or by

pass legislation, approval in each house must be by a majority of the elected members of that house (as opposed to a majority of those voting on the nomination).

In choosing the process, we have considered and specifically reject changing the law to require filling a vacancy in the office of Lieutenant-Governor by a special election. Three states fill Lieutenant-Governor vacancies through special elections.[20] While using a special election to fill a vacancy involves the voters, such an election does not enhance the state's governance. The voters may elect someone from a different party than the Governor or someone who is at odds with the Governor. Indeed, concern about this possibility in New York after the court-ordered special election for Lieutenant-Governor in 1943 led to the amendment eliminating the possibility of a Lieutenant-Governor special election.[21] A special election would also likely draw a low turnout of voters to select someone who might eventually be Governor. We believe gubernatorial appointment and legislative confirmation will provide the Governor with someone the Governor can work with, subject to scrutiny by two bodies of duly elected representatives. If, however, both the Governor and Lieutenant-Governor positions are vacant, then an election should be held at the earliest feasible general election, as the constitution currently requires.

d. **Timeline**

We recommend that deadlines be set to require that the Lieutenant-Governor position be filled and to reduce some of the political gamesmanship that could follow a vacancy. **The Governor should have 60 days to nominate a person to fill the vacancy**. While 60 days may seem like a long time, it would allow the Governor's office, the State Police, and other authorities to screen candidates properly. Unlike the lengthy election process, which affords the public and the media ample time before voting to "vet" candidates, the shorter window before a nominee assumes office makes screening even more important—especially because the Lieutenant-Governor may assume the governorship. Approximately two weeks after she became Governor, Kathy Hochul selected Brian Benjamin as Lieutenant-Governor despite reported issues concerning

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gubernatorial appointment subject to legislative confirmation or by gubernatorial appointment alone." 13 N.Y.3d at 153.

[20] Recasting the Second Fiddle, supra note 15, at 27.

[21] 1986 Law Revision Commission Report, supra note 1, at 19. A special election would in principle be in conflict with the constitutional requirement that the governor and lieutenant-governor run jointly in the general election.

his fitness for office. He was eventually indicted and resigned. More rigorous vetting may have avoided such a blunder.[22]

We propose that once the Governor submits the nominee to the Legislature, the Legislature would have 60 days to act. The Legislature's failure to either confirm or reject a nominee within that 60-day window would result in the nominee being deemed confirmed for the office of Lieutenant-Governor for the remainder of the term. If one house of the Legislature rejects a Lieutenant-Governor nominee, the Governor's appointment clock starts again, with 30 days to name a subsequent nominee. If the Legislature does not confirm or reject any subsequent nominee within 30 days, the Governor's nominee would be deemed confirmed. On the other hand, if the Governor fails to nominate someone within either the 60-day or 30-day timeframe (which we believe would be extremely unlikely), the Legislature would fill the position as it fills vacancies in the Attorney-General and Comptroller position (a joint vote of the two houses).[23]

Giving the Governor 30 days to nominate a second person after a legislative rejection would move the process along swiftly if a second nominee is needed. Sixty days is a significant period for the Governor to initially nominate a Lieutenant-Governor, and during that period the Governor would have ample opportunity to identify other nominees.

We recognize that any confirmation procedure may lend itself to political strategizing. There could be gaming of the approach we recommend, such as a Legislature that keeps rejecting a governor's nominees. If either house is controlled by a party opposed to the Governor, there may be a temptation to block multiple Lieutenant-Governor nominees. However, experience with the replacement of a Lieutenant-Governor in other states has not led to that result, even in controversial situations.[24] The Governor and Legislature have an interest in working together and have many issues to address in any legislative session. We believe disputes regarding who should serve as Lieutenant-Governor would be resolved as have other disagreements, through negotiation.

Requiring legislative confirmation necessarily builds a time into the process. The constitution provides that the Temporary President of the Senate, and failing that, then the Speaker

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[22] *See, e.g.*, Gothamist, "Hochul: We were told Benjamin's background check came up 'clean'", April 13, 2022. https://gothamist.com/news/hochul-we-were-told-benjamins-background-check-came-up-clean.
[23] NY Public Officers Law §41.
[24] *See* Recasting the Second Fiddle, supra note 15, at 59.

of the Assembly, shall assume the duties of Lieutenant-Governor when the latter office is vacant. There is a possibility that one of these legislative leaders may become Acting Governor during that time. We believe the importance of having a Lieutenant-Governor who is vetted in a significant way by the Legislature outweighs the small risk of a legislative leader serving as Governor. And, as noted in Article IV, Section 6(c), in the event the Governor and Lieutenant-Governor positions both become vacant, there would be a general election be held as soon as feasible to fill both positions.

6. TEMPORARY PRESIDENT/SPEAKER SUCCESSION TO GOVERNORSHIP

a. What Does It Mean to "Act" as Governor

Article IV, Section 6 provides:

> In case of a vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until the governor shall be elected.
>
> In case of a vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of office, the temporary president of the senate shall perform all the duties of the lieutenant-governor during such vacancy or inability.

If the Temporary President is unable to serve either as acting Governor or acting Lieutenant-Governor, the Speaker of the Assembly would assume the designated role.

There are two problems posed by the current language. First, what does it mean that the Temporary President "shall act as governor"? Does this mean the Temporary President *is* the Governor? What authority, if any, is missing if the Temporary President simply "acts" as Governor? If the Temporary President simply acts as Governor, and during that period the Senate elects another Temporary President, does the Temporary President then serving as Governor lose the position because that individual no longer serves as Temporary President? In other words,

does the source of the power rest with the person or the office? A similar issue has arisen in other states.[25]

We believe that a legislative leader, and indeed anyone in the line of succession, who succeeds to the governorship—even temporarily--should be empowered to discharge the powers and duties of the office of Governor as if that individual had been elected as Governor. This makes clear that the officer has the full authority of the governorship. This also would insulate the succeeding Governor from challenges as to validity of the Governor's actions.

b. Holding Gubernatorial and Legislative Positions Simultaneously

A second problem is posed because, in serving as Governor, the Temporary President would have decisive roles in both the executive and legislative branches of government. This undermines the principle of the separation of powers between the branches. Even if the Temporary President is serving as Lieutenant-Governor, that officer theoretically would have a tie-breaking vote in the Senate in addition to casting a vote as a Senator.

In addition, the Temporary President has been the Majority Leader and shapes the agenda of the Senate. The Temporary President would then also be exercising the powers of Governor, including shaping policy, presenting and negotiating the budget, signing or vetoing bills and exercising other uses of executive authority. The state has not experienced the situation where the Temporary President has taken on the role of Governor for an extended term, with both executive and legislative authority, but twice in the past two years (and many longer periods in the past) there was no Lieutenant-Governor.

We believe the constitution must make clear that the Temporary President or Speaker cannot possess gubernatorial and legislative authority at the same time. **Should the Temporary President or Speaker be required to exercise the powers and duties of the Governor, that official should have to resign from both the legislative seat and the legislative leader position. For certain situations, such as temporary inability or an impeachment procedure, the resignation requirement would trigger if the officer acts as Governor for more than 60 days, but during those 60 days, the legislative leader acting as Governor would be unable to**

[25] *See* Fordham Rule of Law Clinic Report, supra note 5, at 18.

exercise the powers and duties of any legislative position. In addition, a Temporary President serving as Lieutenant-Governor should not also be able to have a casting vote in the Senate.[26]

We recommend a further minor change to Section 6 to conform two sections. Currently, if the Governor is unable to discharge the responsibilities of the office, with no Lieutenant-Governor, the Temporary President of the Senate acts as Governor until the "inability shall cease or until a governor shall be elected." When the Temporary President is unable to act as Governor and the Speaker does so, the Speaker acts as Governor "during such vacancy or inability." We do not see a reason why the two sections are different, and so we recommend combining aspects of both and changing both to read: "until the earlier of the cessation of the vacancy/inability or the election of a new governor," though also acknowledging that the Speaker would no longer act as Governor once the Temporary President is able to undertake the duties of Governor.

c. Who Should be Next in Line?

Having to relinquish a Senate or Assembly leadership position to become Governor might cause both leaders to decline to serve – particularly if the tenure as Governor is anticipated to be relatively short**.** The 60-day provision attempts to address that situation by only requiring relinquishment if the service is longer term. **To further address this situation, the constitution should acknowledge explicitly that there may be such a declination and the Legislature should provide by statute that the Attorney General and Comptroller, in that order, would take the office of Governor.** Under this scenario, there would not be a fundamental separation of powers issue if another statewide elected official in the executive branch takes the office. **Beyond that, there should be an order of succession, again created through an act of the Legislature, of certain heads of executive departments who have been confirmed by the Senate.**

[26] Other than removing the authority to vote as Lieutenant-Governor, we do not recommend any changes in the current constitutional framework for the Temporary President of the Senate or Speaker of the Assembly assuming the duties of Lieutenant-Governor. Therefore, these legislative leaders would retain their seats and leadership positions while assuming the duties of the Lieutenant-Governor.

The Legislature has already provided for succession involving heads of departments in the Defense Emergency Act of 1951.[27] This statute was enacted in the early years of the Atomic Age, out of concern that an attack could severely disable the ability to govern. Therefore, the statute only applies "as a result of an attack or a natural or peacetime disaster." We propose to have a succession statute that covers all situations and suggest in the Appendix a different line-up than in the Defense Emergency Act, which currently includes heads of departments that no longer exist. A proposed succession order is provided, but we do not express a strong position about which Senate-confirmed heads of departments are in the line of succession, or their ordering; the most important thing is that the Legislature establish a line of succession.

We note that in proposing this approach, we have left in place the long-standing procedure of the Temporary President and Speaker being next in line of succession after the Lieutenant-Governor. We acknowledge the possible merits of succession devolving to other statewide officials in the first instance. Having executive department succession, relying on the Attorney General and Comptroller, avoids separation of powers issues should a legislative leader succeed to executive office. In addition, the Attorney General and Comptroller already have been subject to a statewide election, while a legislative leader represents one district. And beyond the two statewide officials, succession would devolve to department heads, as is true now in certain circumstances, and those officers are more likely than legislative leaders to be in sync with the policies and politics of the former Governor.

[27] Unconsolidated Laws 9105-6, Defense Emergency Act of 1951 (section 5): https://www.nysenate.gov/legislation/laws/DEA

7. INABILITY OF GOVERNOR TO SERVE

a. The Twenty-Fifth Amendment

The state constitution (Article IV, §§ 5 and 6) refers to the Lieutenant-Governor and others as taking over as Governor if the Governor is "unable to discharge the powers and duties" of the office. However, it is unclear how that determination is made. The federal government wrestled with this question in the 1960s, after one President had serious surgeries and the next was assassinated. Following years of careful work, Congress approved, and the states ratified, the Twenty-Fifth Amendment to the federal Constitution. The amendment, in addition to providing a mechanism for a President appointing a Vice President should that position become vacant, set out a procedure to declare the inability of a President to serve.

Essentially, the Twenty-Fifth Amendment provides that a President can declare an inability to perform the powers and duties of the office, in which case the Vice President assumes those powers and duties until the President declares the inability no longer exists.[28] The amendment also provides for the situation in which the President is unable to discharge the powers and duties of the office but has not so declared. The Vice President and a majority of the cabinet may then declare the President's inability to serve, and the Vice President assumes the authority unless the President contests, in which case Congress must decide, by a two-thirds vote of each house.

New York does not have a procedure for determining when a Governor is unable to serve, which risks a governmental crisis. At this point, at least half the states have a procedure to address inability,[29] and New York should have one as well. Too many issues, including emergencies, face New York's Governor to risk having no procedure for resolving whether and how to deal with gubernatorial inability to serve.

b. A Procedure for New York

We believe the federal model should be adapted to New York. This model sets out a clear process for determining inability while setting a high bar for making the determination absent the consent of the chief executive, involving an extensive number of officers in the executive branch

[28] The text of the Twenty-Fifth Amendment can be found here: https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-26.pdf.

[29] NYS Law Revision Commission, Memorandum: Relating to Gubernatorial Inability and Succession (Senate No. 3619; Assembly No. 5669) (1985) at 3. (Found at HeinOnline).

as well as the Legislature. The model also should provide for a relatively smooth transition of power in what would certainly be a fraught situation, maintaining public credibility and having the court system available to resolve legal issues.

We propose that the Legislature establish by law a committee on gubernatorial inability, to be composed of the Lieutenant-Governor, Attorney General, Comptroller and six heads of executive agencies who have been confirmed by the Senate. If a majority of this committee declares that the Governor is unable to discharge the powers and duties of the office, the Lieutenant-Governor would assume those responsibilities. However, if the Governor contests the declaration, it would be up to the Legislature to decide promptly. The Governor could at any time in the future assert the ability to function as Governor and would resume the powers and duties of the office. However, if the committee on gubernatorial inability, by majority vote, again declares the Governor unable to serve, the Legislature would decide whether the Governor could continue to exercise those responsibilities, again on a two-thirds vote of each house. If there is any vacancy on the committee on gubernatorial disability at the time a decision on gubernatorial inability is made, then a two-thirds vote of the remaining members of the committee would be required to declare an inability.

If there is no Lieutenant-Governor at the time a gubernatorial inability is declared by the committee, the Temporary President of the Senate or Assembly Speaker is called upon to succeed the Governor. The procedures discussed in the section on succession would apply, such as when the legislative leaders would have to either relinquish their legislative roles or resign from their position.

While this proposal is similar to the federal model, it departs from models used in a number of states. A review of other states shows no consensus as to which officials trigger the procedure for declaring inability. Some states require the votes of a number of executive department officials, others involve legislative leaders or the Legislature in some way, and some permit one or two officials to begin the process. However, while most states leave the final decision to the state's highest court, several give the Legislature the final say.[30] We note the Law Revision Commission

[30] *See* Ballotpedia, Vacancy Procedures by State: https://ballotpedia.org/How_gubernatorial_vacancies_are_filled#:~:text=Whenever%20the%20governor%20is%20unable,or%20until%20the%20next%20election.

proposed a process in which the legislative leaders and Lieutenant-Governor would declare an inability and the Court of Appeals would make the determination on inability.[31]

Our approach relies on the executive branch to declare an inability and the legislative branch to decide, as the Twenty-Fifth Amendment provides. An argument for New York not following the Twenty-Fifth Amendment model is that the state does not have a body analogous to the presidential cabinet. However, the state does have heads of executive agencies who have been confirmed by the Senate. They can function much like federal cabinet members should the need to determine inability arise. In addition, New York has two officials elected statewide, independent of the Governor, who can provide additional perspectives. The proposed composition of the committee on gubernatorial inability thus provides a mix of elected executive officers and appointees with a presumed loyalty to the Governor to consider a declaration of inability. Unlike the federal model, which allows the Vice President to quash a declaration even if the entire cabinet disagrees, we would not give the Lieutenant-Governor such a veto; rather we would make the Lieutenant-Governor one of the members of the committee, with a majority needed to determine inability.

We are concerned about having the Court of Appeals determine disability. The Court may need to decide legal questions that may be posed during the process, and its credibility would be clouded if it were making such decisions while also having the responsibility for determining the Governor's disability. We are further concerned because the Court's decision to declare a Governor unable to serve is different from the type of determinations courts are called upon to make and is not based on an interpretation of law (for example, there is no definition of inability).

In addition, involving the Court in a determination of disability would inject it directly in a political process. The Twenty-Fifth Amendment reflects the understanding that a determination of inability inevitably will be perceived as political. As all Court of Appeals judges are gubernatorially appointed (a process we fully support), there could be a perception that could taint the decision.[32]

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[31] *See* 1986 Law Revision Commission Report", supra note 1, at 81. See also Fordham Rule of Law Clinic Report, supra note 5, at 6. As of 1986, according to the Law Revision Commission, 17 of the 28 states with inability procedures relied on the courts to decide inability and only six called upon legislatures. 1986 Law Revision Commission Report at 82.

[32] We also note that the Court of Appeals sits on the court for the trial of impeachment, along with the State Senate, which could add a further complication. (N.Y. Const., Art. VI, §24).

Our approach does not include a definition of "inability" or of being "unable to exercise the powers and duties of the office." The Twenty-Fifth Amendment does not include such a definition, nor has Congress enacted one. As explained by John Feerick, who was instrumental in drafting the Twenty-Fifth Amendment:

> [A]ny attempt to define such terms would run the risk of not including every contingency that could give rise to a presidential inability. It was also felt that a detailed definition could lead to problems of interpretation at a time of an inability crisis, when the country could least afford debate and controversy.[33]

We are convinced with the difficulty of trying to define these terms. The process is designed to set an appropriately high bar for declaring an inability to serve, and any such decision will not be made lightly. We contemplate that the committee on gubernatorial inability will consult medical authorities as appropriate, though the exigencies of a situation should not compel them to do so. The plain language of the amendment requires the declaration that the Governor is unable to serve, not that the committee would simply rather replace the Governor. The Commissioners of Health and of Mental Hygiene should be on the committee, so that they can bring expertise in these areas. In the Appendix we recommend which department heads should be on the committee.

New York should no longer ignore the potential crisis that would develop should a Governor lack the physical or mental competence to continue to serve as Governor. A procedure must be adopted to provide for an orderly determination of inability and transfer of power.

8. CONCLUSION

There are too many concerns and omissions in the current state constitution to ignore with regard to Governor/Lieutenant-Governor succession. In this report, we provide recommendations for:

- Eliminating the "absent from the state" provision
- Establishing a constitutional procedure for replacing a Lieutenant-Governor

[33] John D. Feerick, The Twenty-Fifth Amendment: Its Complete History and Applications, Third Edition (Fordham University Press 2014), at 278.

- Assuring that a succeeding Governor discharge all the powers and duties of the office, and providing for an orderly succession process
- Requiring legislative leaders to relinquish their legislative roles upon becoming governor
- Establishing a procedure to address gubernatorial inability

The constitutional amendment process requires passage of an amendment by two consecutively elected Legislatures prior to its submission to the voters. We urge the Legislature to give the attached amendments first passage during the current legislative session.

APPENDIX

Language Implementing Lieutenant-Governor Recommendations

New language is in bold; deleted language is in brackets

I. Removing Provision re: Absence from the State

NY Const. Article IV, Section 5, shall be amended as follows:

In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor-elect shall become governor for the full term.

In case the governor is impeached [, is absent from the state] or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his or her term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath.

II. Vacancy in Office of Lieutenant-Governor; Simultaneous Vacancies in Office of Governor and Lieutenant Governor; Succession

A. *NY Const. Article IV, Section 6, shall be amended as follows:*

Text of Section 6:

Duties and Compensation of Lieutenant-Governor; Succession to the Governorship

The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. The lieutenant-governor shall be the president of the senate but shall have only a casting vote therein. The lieutenant-governor shall receive for his or her services an annual salary to be fixed by joint resolution of the senate and assembly.

Upon a vacancy in the office of lieutenant-governor other than by expiration of the term of office, the governor shall, within sixty days from the date of creation of the vacancy, nominate an individual to hold the office of lieutenant-governor for the remainder of the term. This individual shall be required to satisfy the qualifications of eligibility for office as the governor. The governor shall convey the nomination to the temporary president of the senate and the speaker of the assembly and shall make public the nomination. Said nominee shall take office upon confirmation by a vote in each house of the legislature by a majority of all members elected to such house taken within sixty days of receiving the nomination. If either house of the legislature shall vote to reject the nomination within said time period, the nomination shall be deemed rejected and the governor shall have thirty days from the date of the first vote of rejection to nominate another individual to serve as lieutenant-governor, who shall then be subject to the confirmation procedure described in this paragraph except that the legislature shall have thirty rather than sixty days to act. If the legislature fails to either confirm or reject any nomination for lieutenant-governor within sixty days of receiving the first nomination or thirty days for any subsequent nomination to fill a specific vacancy, the nominee shall assume the office of lieutenant-governor.

If the governor shall not nominate an individual to hold the office of lieutenant-governor within sixty days of the creation of the vacancy or within thirty days of the rejection of a nomination by a house of the legislature, the legislature shall fill the position in accordance with the procedure provided by law for filling vacancies in the office of the attorney general and comptroller.

In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election

happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant- governor or if both of them shall be impeached[, absent from the state] or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the **earlier of the cessation of the vacancy**/inability or until a **new** governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached[, absent from the state] or otherwise unable to discharge the duties of office, the temporary president of the senate shall perform all the duties of lieutenant- governor during such vacancy or inability**, except the temporary president of the senate shall not have a casting vote in the senate during the period of time in which he or she is acting as lieutenant-governor**.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be [absent from the state or otherwise] unable to discharge the duties of governor, the speaker of the assembly shall act as governor **until the earlier of the cessation of the vacancy/inability or the election of a new governor, or until the temporary president of the senate is able to discharge the duties of governor.**

Whenever the temporary president of the senate or the speaker of the assembly shall act as governor, that officer shall be required to vacate that officer's seat in the legislature and the temporary president or speaker position. Notwithstanding the foregoing, if the temporary president of the senate or the speaker of the assembly shall assume the office of governor in the case of impeachment of the governor or in the case the governor is unable to discharge the powers and duties of the office, under section 9 of this Article, the temporary president or speaker shall not be required to vacate that officer's seat in the legislature and the temporary president or speaker position unless provided below, but that person shall not be permitted to discharge any powers and duties of that officer's seat in the legislature or any powers and duties of that temporary president or speaker position until that person no longer holds the office of governor. However, if the temporary president of the senate or the speaker of the assembly acts as governor beyond sixty

consecutive days, that officer shall then be required to vacate that officer's seat in the legislature and the temporary president or speaker position.

The temporary president of the senate or speaker of the assembly may decline to act as governor, thus making them unable to act as governor. If there is a vacancy in the office of governor, and each of the lieutenant governor, temporary president of the senate and speaker of the assembly is unable to act as governor, the legislature shall provide for an order of succession to the office of governor from either statewide elected officers or heads of executive departments who have been confirmed by the senate, or a combination thereof.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.

In the event an official acts as governor under this section, that individual shall discharge all the powers and duties of the office of governor as if the individual had been elected governor.

B. *The Public Officers Law shall be amended to add a new Section 44, to read as follows:*

Persons eligible to succeed governor.

1. **For the purposes of sections six and nine of article IV of the constitution, if the office of governor becomes vacant and each of the lieutenant governor, the temporary president of the senate and the speaker of the assembly is unable to act as governor, then the officer of the state who is highest in order of the following list shall assume the office of governor: attorney general, comptroller, commissioner of transportation, commissioner of health, commissioner of financial services, secretary of state, commissioner of labor and commissioner of agriculture, provided that such officer otherwise meet the criteria set forth in this constitution to serve as governor.**

2. **In the event any officer listed in paragraph one of this section declines to act as governor or does not meet the criteria set forth in this constitution to serve as governor, the officer next highest in order who does meet the criteria set forth in this constitution to serve as governor shall act as governor until the earlier of the cessation of the vacancy/inability or**

the election of a new governor. Any official acting as governor under this section shall discharge all the powers and duties of the office of governor as if the individual had been elected governor.

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C. *Article 1-a of the Defense Emergency Act of 1951, Chapter 784, Laws of 1951, is hereby repealed.*

III. Gubernatorial Disability

*NY Const. Article IV shall be amended to add a **new** Section 9, as follows:*

1. **Governor's Declaration of Inability**

Whenever the governor transmits to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly a written declaration of inability to discharge the powers and duties of the office of governor, and until the governor thereafter transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the lieutenant-governor, or other person next in line of succession as provided by law, as acting governor.

2. **Committee on Gubernatorial Disability**

A committee on gubernatorial inability shall be comprised of the lieutenant-governor, the attorney general, comptroller and six commissioners of executive departments, divisions or offices, as provided by law, who shall have been confirmed by the senate.

3. **Lieutenant-Governor and Committee on Gubernatorial Inability's Declaration of Inability**

Whenever a majority of the committee on gubernatorial inability shall transmit to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly their written declaration that the governor is unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall immediately assume the powers and duties of the office as acting governor.

4. **Governor's Declaration of No Inability**

When, following a declaration of inability as provided in paragraph 3, the governor transmits to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly a written declaration that no inability exists, the governor shall resume the powers and duties of the office of governor unless a majority of the committee on gubernatorial inability shall transmit within four days to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly their written declaration that the governor is unable to discharge the powers and duties of the office of governor.

5. **Legislative Determination of Gubernatorial Inability**

In the event there is a disagreement between the governor and a majority of the committee on gubernatorial inability concerning whether the governor is unable to discharge the powers and duties of the office of governor, the legislature shall decide whether the governor is unable to discharge the powers and duties of the office of governor, assembling within forty-eight hours from the expiration of the four days described above for that purpose if not in session. If the legislature, within twenty-one days after being required to assemble for that purpose, determines by two-thirds vote of all members elected to each

house of the legislature that the governor is unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall continue to exercise the powers and duties of the office of governor; otherwise, the governor shall resume the powers and duties of that office.

6. Procedure if Office of Lieutenant-Governor is Vacant

If there is a vacancy in the office of lieutenant-governor when the legislature makes its determination under paragraph 5 of this section, the person next in line of succession as determined by law shall act as governor under the procedures set forth in this Section. For the purposes of paragraphs 3 and 4 of this Section, should there be a vacancy in the committee on gubernatorial inability, a written declaration required under those sections shall require a two-thirds vote of the committee on gubernatorial inability. Should the temporary president of the senate or speaker of the assembly decline to serve as acting governor under this section and if as the result of such a declination, there is a vacancy in the office of governor, the legislature shall provide for an order of succession to the office of governor from either statewide elected officers or heads of state executive departments who have been confirmed by the senate, or a combination thereof.

7. Composition of Committee on Gubernatorial Inability

A. The Public Officers Law shall be amended by creating a new Section 45, to read as follows:

1. There shall be a committee on gubernatorial inability, consisting of the lieutenant-governor, attorney general, comptroller, and heads of the following departments and officers, provided they have been confirmed by the senate:

Division of Criminal Justice Services

Department of Health

Division of Human Rights

Department of Labor

Office of Mental Hygiene

Department of State

The committee on gubernatorial inability shall perform the functions set forth in Article IV, Section 9 of the constitution. If there are one or more vacancies on the committee, or if any of the commissioners listed above shall not have been confirmed by the senate and thus not able to serve on the committee, the procedure set forth above for determining the inability of the governor to discharge the powers and duties of the office of governor shall require a two-thirds vote of the committee.

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Kristin Sullivan, Methods of Electing Lieutenant Governors (OLR Research Report; no date specified) https://www.cga.ct.gov/2015/rpt/2015-R-0021.htm

Patrick A. Woods, Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock Without Sacrificing the Elective Principle, 76 Albany Law Review 4 (2013).

T. Quinn Yeargain, One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform, 75 U. Miami Law Review 3 (2021) – which surveys the history of New York's 1945 and 1953 constitutional amendments and the special election during Governor Dewey'T. Quinn Yeargain, Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant- T Gubernatorial Succession, 84 Albany Law Review ___ (2021).

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NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #7

REQUESTED ACTION: None, as the report is informational.

Joseph A. Glazer and Sheila E. Shea, co-chairs of the Task Force on Mental Health and Trauma Informed Representation, will present on the mission, composition, and goals of the Task Force, which was formed by President Sherry Levin Wallach in June 2022.

The mission of the Task Force is as follows:

The Task Force on Mental Health and Trauma Informed Representation is created to explore, study, and evaluate the intersection between the mental health crisis and our civil and criminal justice systems. There is a well-documented crisis of mental health care in the United States that has failed to meet the needs of people with mental health challenges and/or histories of trauma. People living with mental health challenges or trauma histories are increasingly incarcerated, homeless, or boarded in hospital emergency rooms. They often bear additional burdens and stigma of racial discrimination, sex or gender identity discrimination, and poverty. The Task Force will focus on the need for the Bar to better serve individuals with mental health challenges and/or trauma histories, both adults and children, through trauma-informed practice, such as informing attorneys and the judiciary of available resources to assist in the representation of clients, by raising awareness of intersectional stigma and trauma, and by recommending education on best practices in the representation of these clients. Criminal diversion and civil processes will be examined to ensure that people living with mental health challenges and/or trauma histories are able to fully participate in legal proceedings that impact their liberty and well-being. State policy and budget priorities will be examined, and appropriate recommendations made.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #8

REQUESTED ACTION: None, as the report is informational.

Jackie Drohan and Dana Syracuse, co-chairs of the Task Force on Emerging Digital Finance and Currency, will present on the work of the Task Force and review recent and upcoming programming.

By way of background, the Task Force was formed by President Sherry Levin Wallach in June 2022 to study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital assets, digital finance, and digital currency industries in New York State, including technological innovations with the Metaverse.

The Task Force has prepared an interim report, a copy of which is attached to this memo. The interim report provides a primer on blockchain and digital assets, identifies the key regulatory frameworks that currently apply to digital assets, and outlines the Task Force's intended areas of focus.

N.B. – This item is informational only. The interim report is not scheduled for formal consideration at the January 2023 meetings of the Executive Committee and House of Delegates.

Informational Report - Task Force on Emerging Digital Finance and Currency

I. INTRODUCTION

Fourteen years ago, Satoshi Nakamoto released a white paper entitled "Bitcoin: A Peer-to-Peer Electronic Cash System."[1] Nakamoto proposed a protocol that would allow an individual to transfer Bitcoin—a digital and decentralized alternative to fiat currency—directly to another individual without the need to involve a bank or other financial institution.[2] Unlike prevailing payment ecosystems, which relied on trust between individuals and financial institutions, the Bitcoin protocol relied on cryptography.

Bitcoin's innovation was not the creation of a digital-only alternative to fiat currency; proposed substitutes for government-issued money predated Bitcoin. Instead, Bitcoin's innovation was the creation of a blockchain: a type of distributed ledger in which a group of computers programmatically reach agreement on the state and changes to certain shared data.

Blockchain technology has the potential reshape how we transact: it decreases the need to trust centralized parties—who charge rent for their services and represent a single point of failure—by creating immutable and auditable records that no single person controls. Rather than being reliant on financial institutions to carry out instructions faithfully, individuals have the capability, through blockchain technology, to digitally transact with one another directly and then cryptographically prove that the transaction occurred (not just trust that it did).

The launch of the Ethereum network, for example, extended a blockchain's utility by introducing embedded software applications—commonly called "smart contracts"—onto the blockchain ledger itself.[3] Smart contracts have enabled decentralized finance (referred to colloquially as "DeFi") applications through which financial services like borrowing, lending, and trading take place on the blockchain without intermediary financial institutions. Non-fungible tokens ("NFTs"), which are unique blockchain-based digital assets that often link to other digital or real-world assets, enable claims of ownership of specific items—everything from concert tickets to property titles—to be directly and transparently proven. The Web3 ecosystem seeks to utilize blockchain technology to decrease some of the reliance on centralized third parties and democratize commerce by empowering developers, operators, and users of a platform to own or directly benefit from their efforts.

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[1] Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, https://bitcoin.org/bitcoin.pdf. The name Satoshi Nakamoto is believed to be a pseudonym for an individual or group of individuals. *Who is Satoshi Nakamoto?* COINDESK (Aug. 5, 2022), https://www.coindesk.com/learn/who-is-satoshi-nakamoto/.

[2] Nakamoto, *supra* note 1.

[3] Vitalik Buterin, *Ethereum: A Next-Generation Smart Contract and Decentralized Application Platform (2014)*, at 13, https://ethereum.org/669c9e2e2027310b6b3cdce6e1c52962/Ethereum_Whitepaper_-_Buterin_2014.pdf.

These innovations have also introduced new challenges. The ability to engage in peer-to-peer, pseudonymous transfers of digital assets with real-world value has resulted in digital assets becoming the preferred payment method on darknet marketplaces[4] and in ransomware schemes.[5] Bad actors have taken advantage of the hype around digital assets to defraud consumers, with the U.S. Department of Treasury estimating that $7.8 billion in digital assets were stolen in 2021 through scams.[6] The smart contracts underlying DeFi applications have been exploited, leading to billions of additional dollars in lost assets.[7] Most recently, FTX, previously one of the world's largest digital asset exchanges, filed for bankruptcy after reports of shaky financials led to the blockchain-equivalent of bank run on the exchange[8] and ultimately resulted in civil and criminal charges against its founder and former CEO that centered around allegations that he fraudulently misappropriated funds that customers had deposited with the exchange[9].

As the home of the world's largest financial center, New York State and, by extension, members of the New York State Bar Association ("NYSBA") have played key roles in the emerging digital asset ecosystem. NYSBA members have guided innovators and entrepreneurs seeking to launch new products and services utilizing digital assets. NYSBA members at the New York State Department of Financial Services, recognizing the limitations of existing regulatory frameworks, shaped the department's BitLicense regulations, a first-of-its kind regulatory regime tailored to the risks associated with digital asset activities. And NYSBA members have held bad actors to account when they sought to misuse digital assets for illicit purposes.

NYSBA members who have not already encountered blockchain-related issues in their legal practices likely will soon. The technology is not just relevant to financial services lawyers: it has the potential to broadly impact everything from how elections are held to how the supply chain is managed. Anywhere that is reliant upon whether information or data is trustworthy has the potential to be impacted by the technology. Where such change occur, NYSBA members will have to advise on, advocate for, and decide (in the case of judges) how the existing laws apply and, where change is needed, help draft new laws.

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[4] *Advisory on Illicit Activity Involving Convertible Virtual Currency*, FINCEN ADVISORY, FIN-2019-A003 (May 9, 2019), https://www.fincen.gov/sites/default/files/advisory/2019-05-10/FinCEN%20Advisory%20CVC%20FINAL%20508.pdf.

[5] *Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments*, FINCEN ADVISORY, FIN-2021-A004 (Nov. 8, 2021), https://www.fincen.gov/sites/default/files/advisory/2021-11-08/FinCEN%20Ransomware%20Advisory_FINAL_508_.pdf.

[6] *Crypto-Assets: Implications for Consumers, Investors, and Businesses*, U.S. DEPT. OF TREASURY, at 27-28, https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf.

[7] The U.S. Department of Treasury estimates that $2.3 billion worth of digital assets were stolen from DeFi applications in 2021. *Id.* at 28.

[8] *FTX creditors may number over 1 million as regulators seek answers*, REUTERS, Nov. 15, 2022, https://www.reuters.com/technology/ftx-officials-contact-with-us-regulators-filing-2022-11-15/.

[9] *See SEC v. Bankman-Fried*, No. 22-cv-10501 (S.D.N.Y. 2022); *CFTC v. Bankman-Fried*, No. 22-cv-10503 (S.D.N.Y. 2022); *United States v. Bankman-Fried*, No. 22-cr-00673 (S.D.N.Y. 2022).

Applying the law to blockchain-technologies is frequently difficult, raising risks for those attorneys who provide blockchain-related legal services. NYSBA members have an ethical obligation to provide "competent representation."[10] Because the blockchain ecosystem is quickly evolving and the legal questions that arise are often novel, attorneys risk violating their ethical obligations when they merely dabble in blockchain-related legal issues. Attorneys also face "gatekeeper liability" risks, in which attorneys may be liable for their client's violations of law where the attorney's services facilitated the violation. Officials from the Securities and Exchange Commission ("SEC") have highlighted the duty of attorneys, as gatekeepers to U.S. capital markets, to prevent clients from engaging in digital asset activities that violate the securities laws[11] and warned that enforcement against gatekeepers is a priority for the agency[12].

NYSBA's mission is to "shape the development of law, educate and inform the public," and "respond to the demands of [a] diverse and ever changing legal profession."[13] In line with that mission, NYSBA's Task Force on Emerging Digital Finance and Currency (the "Task Force") has been directed to "study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State."[14]

The Task Force's mission has three components:

1. Develop and educate members on best practices for attorneys representing clients on digital finance and digital currency matters.

2. Study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State.

3. Promote the appropriate use of digital assets and Web3 resources to keep pace with the industry and expand global membership.

This interim report represents the beginning of the Task Force's work and has three parts. First, we provide a primer on blockchain and digital assets. Second, we identify the key regulatory frameworks that currently apply to digital assets. Third, we outline the Task Force's intended areas of focus.

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[10] 22 N.Y. C.R.R. Part 1200.0, Rule 1.1.

[11] *See. e.g.*, Jay Clayton, Chairman, SEC, Opening Remarks at the Securities Regulation Institute (Jan. 22, 2018).

[12] Gurbir Grewal, Director, Division of Enforcement, SEC, Testimony on "Oversight of the SEC's Division of Enforcement" Before the United States House of Representatives Committee on Financial Services Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets (July 21, 2022) https://www.sec.gov/news/statement/grewal-statement-house-testimony-071922.

[13] *About*, NEW YORK STATE BAR ASSOCIATION, https://nysba.org/about/#:~:text=Our%20mission%20is%20to%20shape,access%20to%20justice%20for%20all.(last visited Nov. 15, 2022).

[14] *Task Force on Emerging Digital Finance and Currency*, NEW YORK STATE BAR ASSOCIATION, https://nysba.org/committees/task-force-on-emerging-digital-finance-and-currency/ (last visited Nov. 15, 2022).

II. BACKGROUND

A. Overview of Blockchain Technology

A blockchain is a type of digital ledger consisting of time-stamped blocks—i.e., groups of transactions—that are chained (hence, the term "blockchain") together in chronological order through cryptography. Blockchains have three key components:

1. A peer-to-peer network of computers (commonly called "nodes");

2. A consensus protocol, which is a preprogrammed mechanism by which nodes reach agreement on the state of, and updates to, the ledger; and

3. Certain shared data, often embodied as a digital token.

In a typical blockchain transaction, a node broadcasts the proposed transaction to other nodes. The nodes then combine the proposed transaction, along with other proposed transactions, into a proposed block. The underlying protocol's consensus mechanism determines which node will mine the next block and receive compensation (often in the form of block rewards—i.e., newly created digital assets—and/or transaction fees) for adding a new block to the ledger. However, before the block is actually mined to the blockchain, the other nodes—using cryptography—check whether the miner's block is valid. If the nodes agree, the accepted block is added to the ledger.

Bitcoin was the first blockchain-based digital asset and was intended as a general-purpose medium of exchange, but a recent report by the Bank for International Settlements estimated that there are over 10,000 distinct types of blockchain-based digital assets.[15] Digital asset features and functionality can vary significantly, but they broadly fall into five categories:

1. **Virtual Currencies.** Virtual currencies are fungible digital assets designed to be used as a general-purpose medium of exchange. Under this framework, Bitcoin would be considered a virtual currency.

2. **Stablecoins.** Stablecoins are fungible digital assets whose value is intended to be pegged to another asset (commonly, fiat currency). USD Coin ("USDC") is an example of a stablecoin that is pegged to the U.S. dollar.

3. **Utility Tokens.** Utility tokens are fungible digital assets designed for use within a particular application or platform. An example of a utility token is VCOIN. VCOIN was designed by IMVU, the asset's issuer, as a way for users of IMVU's virtual world platform to buy goods and services from vendors within that platform.

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[15] *The Future Monetary System*, BIS ANNUAL ECONOMIC REPORT 2022, at 78, https://www.bis.org/publ/arpdf/ar2022e3.pdf.

4. **Security Tokens.** Security tokens are digital assets that expressly (or implicitly or indirectly) represent equity in a company.

5. **Non-fungible Tokens ("NFTs").** NFTs are unique blockchain-based digital assets with metadata that, as most commonly used today, link to or embody one or more physical or digital items. The NFT functions as a verifiable and transferable digital record that evidences the holder's right to access and use these items. NFTs can represent rights to everything from digital artwork and concert tickets to real property.

Developers have built upon Bitcoin's protocol to launch new blockchains that incorporate new features. The most important innovation has been the blockchain-based smart contract, first implemented in the Ethereum protocol.[16] A blockchain-based smart contract is computer code—written to the blockchain itself—that is capable of running automatically and autonomously based upon the occurrence or nonoccurrence of a specified condition or conditions (e.g., delivery of an asset, change in a reference rate, or weather conditions).[17] If the smart contract is triggered, the code's output is written onto the ledger.

B. The Emerging Digital Asset Ecosystem

Blockchain technology has spurred significant initiatives to reshape commerce through decentralization. This subsection seeks to define key aspects of the emerging digital asset ecosystem.

1. Web3

Many observers view blockchain technology as being a key component of a new era of the internet called Web3.[18] The first iteration—Web1—enabled consumers to connect to the internet and access mostly static, noninteractive content.[19] Web2 enabled social media, removing most barriers for end users to publish their own content to the internet.[20] The tradeoff was that, in order to do so, consumers placed control of personal data in the hands of centralized providers.[21]

Web3 is frequently defined as a decentralized version of the internet that decreases end-user reliance on centralized, often noninteroperable platforms.[22] Optimists view blockchain, in its role as a part of Web3, as ultimately returning some control over personal data to the end user and

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[16] Broadly defined, the smart contract predated the blockchain by at least 15 years, comprising computerized transaction protocols that execute terms of a contract. *See* Nick Szabo, *Formalizing and Securing Relationships on Public Networks*, FIRST MONDAY, https://firstmonday.org/ojs/index.php/fm/article/view/548/469 (last visited Nov. 15, 2022).

[17] Buterin, *supra* note 3.

[18] *What is Web3?*, ETHEREUM.ORG, https://ethereum.org/en/web3/ (last updated Nov. 14, 2022).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

democratizing commerce by enabling both platform developers and users to directly benefit from their contributions with less intermediation.[23]

2. Decentralized Finance

DeFi applications are the most visible arm of the current Web3 ecosystem. DeFi is an umbrella term for financial services deployed on and accessible via public blockchains.[24] Using smart contracts, DeFi applications are intended to enable users to earn interest, borrow, lend, buy insurance, trade derivatives, trade assets, and more without intermediaries. Frequently, DeFi developers provide a front-end website through which end users can access the DeFi application (albeit in an intermediated way).[25] However, because these smart contracts often exist on a public, often permissionless blockchain, many DeFi application contracts can be accessed directly by those with sufficient technical skills.[26]

3. Metaverses

Over the longer term, Web3 proponents expect metaverses to be a key component of the decentralized internet by providing digital analogs to the real world. Although definitions vary, at a high level, a metaverse is a virtual- or augmented-reality environment in which users interact on a peer-to-peer basis.[27] Virtual reality environments are not new, but incorporation of blockchain-based digital assets within the metaverse itself is. Bringing these assets into the metaverse allows individuals to transact on a peer-to-peer basis in assets that have real-world value.[28]

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[23] *The web3 Landscape*, A16Z (Oct. 2021), https://a16z.com/wp-content/uploads/2021/10/The-web3-Readlng-List.pdf.

[24] *What is Blockchain Technology?*, CBINSIGHTS (Nov. 9, 2021), https://www.cbinsights.com/research/what-is-blockchain-technology/.

[25] *How DeFi Platforms are Using Data from TRM Labs to Respond to Tornado Cash Sanctions*, TRM Labs (Aug. 15, 2022), https://www.trmlabs.com/post/how-defi-platforms-are-using-data-from-trm-labs-to-respond-to-tornado-cash-sanctions.

[26] *Id.*

[27] *The Metaverse in 2040*, PEW RESEARCH CENTER (June 30, 2022), https://www.pewresearch.org/internet/2022/06/30/the-metaverse-in-2040/ ("In today's terms, the metaverse is the realm of computer-generated, networked extended reality, or XR, an acronym that embraces all aspects of augmented reality, mixed reality and virtual reality (AR, MR and VR)").

[28] *The Block 2022 Digital Asset Outlook*, GSR (Dec. 2022) ("The term metaverse dates back to Neal Stephenson's 1992 novel, Snow Crash, in which he refers to the metaverse as a persistent virtual world. The idea is that the metaverse is a real-time 3D social medium where people collaborate and participate in an economy. . . . One of the common aspects is about how the metaverse will also be integral to digital economies. And if this is the case, asserting ownership, proving digital scarcities will be vital attributes of the metaverse. Imagining a metaverse without blockchains and NFTs is difficult as they already have the characteristics of the metaverse.").

4. Decentralized Autonomous Organizations

Blockchain has also spurred efforts to decentralize organizational governance. So-called decentralized autonomous organizations ("DAOs") are organizations with (purportedly) no central authority (e.g., no board of directors or executive officers).[29] Instead, governance decisions are made by the holders of governance tokens—digital assets that represent a right to participate in the organization's governance—who vote on proposals made by community members.[30] Commonly, portions of the organization's governance structure are enforced through smart contracts, enhancing the transparency and auditability of governance decisions and, in some cases, allowing the outcomes of those decisions to automatically and autonomously execute on the blockchain.[31] DAOs are generally not incorporated, creating uncertainty as to the organization's proper legal classification.

III. KEY FRAMEWORKS APPLICABLE TO DIGITAL ASSETS

Regulators have largely sought to apply existing financial services regulatory frameworks to digital assets, where the applicable regulatory framework depends on the digital asset involved and the activity being performed. There are notable exceptions, including New York's BitLicense framework, which was developed by the regulators at the New York State Department of Financial Services to provide a regulatory framework tailored to digital asset activities.

Federal regulators have been active in enforcing the application of statutes within their authority to digital asset activities. However, those regulators with supervisory authority—such as the SEC which oversees securities broker-dealers and exchanges, and the Office of the Comptroller of the Currency, which supervises national banks—have been reluctant to register or charter new entities seeking to engage in digital asset activities. The result is that supervision of persons engaged in regulated digital asset activities has largely been left to the states, typically pursuant to state money transmitter and/or trust company statutes. Because these statutes do not authorize regulated digital asset service providers to operate nationwide, digital asset service providers are supervised by dozens of state regulators. By contrast, the European Union ("EU") is developing an overarching supervisory framework for digital asset activities that will provide a passporting mechanism to avoid country-by-country licensing within the EU.[32]

Initial regulatory and enforcement efforts have focused on centralized providers of digital asset services, such as exchanges that facilitate the trade of digital assets on internal, non-

[29] Although DAOs aim to operate in a decentralized manner, the U.S. Government has warned that many purportedly decentralized services are "decentralized more in name than in fact." *The Report of the Attorney General Pursuant to Section 5(b)(iii) of Executive Order 14067: The Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets*, U.S. DEPT. OF JUSTICE (Sep. 6, 2022), https://www.justice.gov/ag/page/file/1535236/download.

[30] What is Web3?, *supra* note 18.

[31] *Id.*

[32] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and Amending Directive (EU) 2019/1937, COM (2020) 593 final (Sep. 24, 2020).

blockchain-based orderbooks and ledgers. More recently, regulators and law enforcement have sought to apply financial services laws to persons that the government believes are operating or controlling DeFi applications. The premise underlying these recent actions is that if DeFi protocols perform regulated financial activities, those in control of the protocols are responsible for complying with applicable laws.[33]

Below, we provide an overview of the key financial services-related regulatory frameworks that currently apply to digital assets.

A. Bank Secrecy Act

The Bank Secrecy Act ("BSA") is the principal federal statute aimed at preventing money laundering. The BSA and its implementing regulations (the "BSA Regulations"), adopted by the Financial Crimes Enforcement Network ("FinCEN"), impose a wide range of anti-money laundering ("AML") obligations on financial institutions, including:

- State or federally chartered banks;
- Broker-dealers registered with the SEC and persons required to be registered as broker-dealers (i.e., unregistered broker-dealers);
- Futures commission merchants registered with the Commodity Futures Trading Commission ("CFTC") and persons required to be registered with the CFTC as futures commission merchants (i.e., unregistered futures commission merchants); and
- A class of nonbank financial institutions called "money services businesses" ("MSBs").[34]

As applied to digital assets, FinCEN guidance and enforcement efforts have focused on MSBs. MSBs are persons "wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States" acting in one of seven enumerated capacities, including as a "money transmitter."[35] A "money transmitter" is a person that (i) accepts "currency, funds, or other value that substitutes for currency

[33] *See, e.g., Action Plan to Address Illicit Financing Risks of Digital Assets,* U.S. DEP'T OF TREASURY, , https://home.treasury.gov/system/files/136/Digital-Asset-Action-Plan.pdf, (last visited Nov. 11, 2022) ("Frequently, DeFi services purport to run autonomously without the support of a central company, group, or person, despite having a controlling organization—through a decentralized autonomous organization, concentrated ownership or governance rights, or otherwise—that provides a measure of centralized administration or governance. When such an entity accepts and transmits currency, funds, or value that substitutes for currency, it may be operating as a money transmitter and have AML/CFT obligations, and may be decentralized only or partly in name.").

[34] 31 C.F.R. § 1010.100(t).

[35] *Id.* § 1010.100(ff).

from one person" and transmits "currency, funds, or other value that substitutes for currency to another location or person by any means" or (ii) is "engaged in the transfer of funds."[36]

Among other requirements, MSBs must (i) register with FinCEN; (ii) develop, implement, and maintain an effective AML program; and (iii) adhere to recordkeeping and reporting obligations (including filing suspicious activity reports). Operating as an unlicensed MSB may result in civil and potentially criminal penalties under federal law.

FinCEN has published guidance outlining which blockchain-related activities it interprets as being regulated money transmission and, thus, render an entity an MSB under the BSA. Specifically, in March 2013, FinCEN released the "Virtual Currency Guidance,"[37] in which FinCEN interpreted the definition of a money transmitter to cover transactions involving "convertible virtual currency" ("CVC").[38] FinCEN defines CVC as a "type of virtual currency [that] either has an equivalent value in real currency, or acts as a substitute for real currency."[39]

FinCEN reiterated in the guidance that "[a]ccepting and transmitting anything of value that substitutes for currency makes a person a money transmitter."[40] FinCEN then concluded that persons are engaging in "money transmission services"—and thus are MSBs—when (1) they accept and transmit CVC or (2) they buy and sell CVC *and* they are either

- An "exchanger," which is a person engaged as a business in the exchange of CVC for real currency, funds, or other CVC; or

- An "administrator," which is a person engaged as a business in issuing CVC, and who has the authority to redeem such CVC.[41]

On May 9, 2019, FinCEN issued guidance that explained how it interprets the BSA Regulations as applying to certain CVC business models.[42] Most notably, FinCEN concluded that some "decentralized applications" ("dApps") are engaged in money transmission. As defined by FinCEN, dApps are software programs that run on the blockchain and are "designed such that they are not controlled by a single person or group of persons."[43] FinCEN analogized dApps to Bitcoin ATMs, stating that "[t]he same regulatory interpretation that applies to mechanical agencies" like Bitcoin ATMs—which accept cash and then typically transfer CVC to the purchaser—applies

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[36] *Id.* § 1010.100(ff)(5).

[37] *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FinCEN, FIN-2013-G001 (Mar. 18, 2013), https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf.

[38] *Id.*

[39] *Id.* at 1.

[40] *Id.* at 3.

[41] *Id.* at 2, 3.

[42] *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FinCEN, FIN-2019-G001 (May 9, 2019), https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20 CVC%20FINAL%20508.pdf.

[43] *Id.* at 18.

equally to "[d]Apps that accept and transmit value, regardless of whether they operate for profit."[44] In other words, FinCEN's guidance indicates that a dApp might be engaged in money transmission if it accepts and transmits value and the operator of the dApp may be an MSB.[45] FinCEN clarified that developing a dApp is not money transmission, "even if the purpose of the [d]App is to issue a CVC or otherwise facilitate financial activities denominated in CVC."[46] But if a person uses or deploys the dApp to conduct money transmission, then that person will generally be an MSB.[47]

B. State Money Transmitter Statutes

Every U.S. state, except Montana, regulates "money transmission" as a licensable activity, in some fashion. These statutes are primarily consumer protection statutes that aim to protect consumers by ensuring that licensees can meet their outstanding financial obligations to their customers.[48] If a person engages in money transmission as defined by a particular state, that person likely would need to obtain a license in order to lawfully offer services to customers within that state.

State money transmission statutes generally define money transmission to include three often overlapping categories of activity:

1. Receiving money or monetary value for transmission.[49]

2. Selling or issuing stored value. "Stored value" is generally defined as money or monetary value that is evidenced by an electronic record.[50] A closed-loop prefunded card/certificate/code issued by a seller for the future provision of goods or services is commonly exempt from regulation as stored value.

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[44] *Id.*
[45] *Id.*
[46] *Id.* at 27.
[47] *Id.*
[48] RCW 19.230.005 ("It is the intent of the legislature to establish a state system of licensure and regulation to ensure the safe and sound operation of money transmission and currency exchange businesses, to ensure that these businesses are not used for criminal purposes, to promote confidence in the state's financial system, and to protect the public interest."); *see also The State of State Money Services Businesses Regulation & Supervision*, CONFERENCE OF STATE BANK SUPERVISORS & MONEY TRANSMITTERS REGULATORS ASSOCIATION (May 2016), https://www.csbs.org/sites/default/files/2017-11/State%20of%20State%20MSB%20Regulation%20and%20Supervision%202.pdf (identifying "customer protection, safety and soundness and adherence to Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") requirements" as the principal goals of the state regulatory requirements for money transmitters and other money services businesses).
[49] *See, e.g.*, Cal. Fin. Code § 2003(s); Iowa Code Ann. § 533C.201; Kan. Rev. Stat. § 286.01; Ariz. Rev. Stat. Ann. § 6-1201.
[50] *See, e.g.*, A.C.A. § 23-55-102(12)(A); Cal. Fin. Code § 2003(x); Conn. Gen. Stat. § 36a-596(12).

3. Selling or issuing payment instruments. The term "payment instrument" is typically defined as "a check, draft, warrant, money order, travelers check or other instrument or payment of money, whether or not negotiable."[51]

"Money" is frequently defined as "a medium of exchange that is authorized or adopted by a domestic or foreign government."[52] Notably, Texas has advised that a digital asset backed by a sovereign currency (i.e., currency-backed stablecoins) constitutes "money."[53] Many states define "monetary value" as "a medium of exchange, whether or not redeemable in money."[54] A few states have amended their statutes to expressly cover digital asset activities, although most have not.[55] Several states that have not done so have nonetheless construed their existing money transmission statutes to cover digital asset activity, concluding that fungible digital assets like Bitcoin are monetary value.[56]

State regulators often have varying views regarding into which money transmission prong a given activity falls—i.e., one regulator will consider selling Bitcoin to be the sale of stored value while another might consider that activity to involve the sale of a payment instrument. Broadly speaking, state regulators take the position that an entity is engaged in money transmission when it exercises custody or control over money or monetary value owned by or owed to another.

C. BitLicense Regulations

New York has implemented a separate regulatory regime, commonly called the BitLicense, that—unlike state money transmitter regulations—is specific to "virtual currency" activities. Under the BitLicense regulations, "virtual currency" is generally defined to mean "any type of digital unit that is used as a medium of exchange or a form of digitally stored value," irrespective of whether the digital units have a centralized repository or administrator.[57]

The regulations require any entity providing one or more of the following services to New York residents to obtain a BitLicense: (1) receiving virtual currency for transmission or transmitting virtual currency; (2) storing, holding, or maintaining custody or control of virtual

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[51] *See, e.g.*, Florida Statutes § 560.103(29).

[52] *See, e.g.*, Ariz. Rev. Stat. § 6-1201; Iowa Code § 533C.102; Kan. Rev. Stat. § 286.11-003(16).

[53] Texas Dep't of Banking, Supervisory Memorandum 1037, Regulatory Treatment of Virtual Currencies Under the Texas Money Services Act (April 1, 2019), https://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf (stating that a sovereign-backed stablecoin constitutes "money" if the stablecoin provides the holder with a redemption right for sovereign currency and thus is subject to regulation under the Texas Money Services Act).

[54] *See, e.g.*, Cal. Fin. Code § 2003(m); Conn. Gen. Stat. § 36a-596; Fla. Stat. Ann. § 560.103; Iowa Code Ann. § 533C.102; Kan. Stat. Ann. § 9-508(f).

[55] *See, e.g.*, RCW 19.230.010(18); Conn. Gen. Stat. § 36a-596(9), (18).

[56] *See. e.g.*, *General FAQs*, NEW MEXICO REGULATION & LICENSING DEPT., https://www.rld.nm.gov/financial-institutions/about-us/faqs/, (last visited Nov. 11, 2022); *Digital or virtual currencies what are they?*, CONSUMER PROTECTION, OREGON.GOV, https://dfr.oregon.gov/help/Documents/5342-virtual-currencies.pdf (last visited Nov. 11, 2022).

[57] 23 N.Y. C.R.R. Part 200.2(p).

currency on behalf of others; (3) buying and selling virtual currency; (4) performing virtual currency exchange services; or (5) controlling, administering, or issuing a virtual currency.[58] The BitLicense regulations exempt from its licensing requirements persons engaging in the activities as (a) an entity chartered under New York Banking Law and approved by the New York State Department of Financial Services to engage in virtual currency business activities or (b) a merchant or consumer that uses virtual currency "solely for the purchase or sale of goods or services or for investment purposes."[59]

The BitLicense regulations impose several supervisory requirements that go beyond the requirements imposed pursuant to state money transmitter statutes. The regulations, for instance, authorize the Superintendent of the New York State Department of Financial Services to impose capital requirements that account for the BitLicense holder's particular safety and soundness risks.[60] In practice, this can mean that a BitLicense holder may be required to maintain a positive net worth in the tens of millions of dollars at all times if the Superintendent determines that circumstances warrant it. By contrast, capital requirements under state money transmitter statutes are considerably less flexible and, at the high end of the spectrum, require a positive net worth of a few million dollars. BitLicense holders must generally receive preapproval to launch materially new products and services, which differs from state money transmitter statutes which typically only require the license holders notify the regulator of the change. And the BitLicense regulations also impose specific AML and cybersecurity requirements on BitLicense holders.[61]

D. Trust Company Laws

Trust companies are non-depository financial institutions chartered under state law to offer fiduciary services to the public. Trust companies are subject to prudential regulation and supervision, meaning these institutions are commonly subject to supervisory requirements that go beyond the requirements imposed on money transmitter licensees, including, for example, (i) capitalization requirements that account and control for categories of risks, such as price risks, liquidity risks, and market risks; (ii) enhanced supervisory controls; and (iii) restrictions on business activities.

Trust companies are increasingly being used as a vehicle to custody digital assets, particularly the assets of institutional customers. The process for obtaining a trust charter is more involved than the process for obtaining a money transmitter license, as the state is effectively assessing whether there is a business case to issue a charter. However, obtaining a trust charter does offer several benefits, including the following:

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[58] *Id.* Part 200.2(q).
[59] *Id.* Part 200.2(q).
[60] *Id.* Part 200.9.
[61] *Id.* Part 200.15-16.

- Because state trust companies are subject to prudential regulation, they are frequently perceived as a safer vehicle for holding digital assets compared to a money transmitter licensee.

- A state trust company has a stronger legal argument than a money transmitter licensee that customer assets should not become part of a bankruptcy or receivership estate.

- Obtaining a trust charter potentially enables the entity to serve as a "qualified custodian" under the Investment Advisers Act of 1940. Status as a qualified custodian[62] allows the entity to custody funds on behalf of registered investment advisers, who are required to place client funds and securities with a qualified custodian[63]. The definition of a "qualified custodian" includes state trust companies but only to the extent "a substantial portion of the business" of such entities "consists of exercising fiduciary powers similar to those permitted to national banks."[64]

- If the state trust company seeks to engage in activities beyond custody (and is authorized to do so)—e.g., settlement or exchange services—the state trust company potentially would be able to avail itself of money transmitter license exemptions in ten or more states.[65]

Which activities a state-chartered trust company can engage in depends largely on which state issued the charter. South Dakota, for instance, has granted trust charters to digital asset service providers, but those charters generally limit the trust company to the provision of custodial services. By contrast, limited-purpose trust companies chartered by the New York State Department of Financial Services and authorized to engage in virtual currency business activity may also provide virtual currency exchange services with the department's approval.

E. Federal Securities Laws

The federal securities laws define the term "security" broadly to cover virtually all types of investment instruments. The laws generally cover digital assets that are intended to be securities—e.g., digital assets that are intended to represent equity in a company—and digital assets that qualify as "investment contracts." In determining whether digital assets are investment contracts under federal law, the "*Howey*" test typically applies. The *Howey* test requires an assessment of whether there is (i) an investment of money (ii) in a common enterprise (iii) with an

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[62] 17 C.F.R. § 275.206(4)-2(d)(6) (defining as "qualified custodian" to include an entity that meets the definition of a "bank" under 15 U.S.C. 80b-2(a)(2)); *see also* 15 U.S.C. 80b-2(a)(2)) (defining a bank to include a state chartered trust company if a "substantial portion of the business . . . consists of . . . exercising fiduciary powers").

[63] *Id.* § 275.206(4)-2(a).

[64] 15 U.S.C. 80b-2(a)(2))

[65] *See, e.g.*, Fla. Stat. § 560.104 (exempting trust companies from the provisions of the state's money transmitter statute).

expectation of profits (iv) derived from the entrepreneurial or managerial efforts of others.[66] Classification as a security has wide-reaching implications affecting, among other things, how the digital asset can be issued and where it can be traded on secondary markets.

In July 2017, the SEC issued a Report of Investigation (the "DAO Report") in response to the increasing use by "virtual organizations and associated individuals and entities [of] distributed ledger technology to offer and sell instruments such as DAO tokens to raise capital."[67] The SEC issued the report "to stress that the U.S. federal securities law may apply to various activities, including distributed ledger technology, depending on the particular facts and circumstances, without regard to the form of the organization or technology used to effectuate a particular offer or sale."[68] The DAO Report confirmed that, unless properly conducted, selling tokens that are transferable on a distributed ledger may violate the Securities Act of 1933 ("Securities Act"), the Securities Exchange Act of 1934 ("Exchange Act"), and other federal and state securities laws.[69]

After the SEC issued the DAO Report, it brought an enforcement action against Munchee, Inc., a token issuer, for issuing unregistered securities.[70] Munchee had issued a "utility token," but it had also made statements in its marketing materials such as the fact that it would ensure a secondary market for its tokens and guarantee high levels of returns.[71] Because the marketing materials contained such statements and were directed toward virtual currency investors rather than likely potential users of Munchee's product, the SEC determined that the Munchee token was a security under the *Howey* test.[72] In particular, the SEC focused on the prong of "reasonable expectation of profits," finding that it was reasonable to conclude that the marketing materials from Munchee gave potential investors certain expectations of a passive increase in value over time.[73]

On June 14, 2018, William Hinman, then-director of the SEC's Division of Corporation Finance, gave a speech at a conference in which he outlined that, in his view, the sale of digital assets may not be a securities offering under certain circumstances.[74] Such circumstances include

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[66] *S.E.C. v. Edwards*, 540 U.S. 389, 394 (2004).

[67] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 19434: The DAO, SEC, Exchange Act Release No. 81207 (July 25, 2017) [hereinafter DAO Report]; See also SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities, SEC (July 25, 2017), https://www.sec.gov/news/press-release/2017-131.

[68] DAO Report, *supra* note 67, at 10.

[69] *Id.* at 1-2.

[70] *In re Munchee Inc.*, Securities Act Release No. 10445 (SEC Dec. 11, 2017), https://www.sec.gov/litigation/admin/2017/33-10445.pdf.

[71] *Id.* at 3-7.

[72] *Id.* at 6.

[73] *Id.* at 5-7.

[74] William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, SEC (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418.

when the network is sufficiently decentralized that "purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts."[75]

Director Hinman emphasized that the economic substance of the transaction matters when determining whether a token is a security and outlined several factors that the SEC will consider when evaluating token sales.[76] These factors include, among other things, whether:

- a sponsor or promoter's efforts play a significant role in the development and maintenance of the token or token network;
- a sponsor or promoter retains a stake or interest in the token such that the person or entity is motivated to expend efforts to cause an increase in the value of the token;
- purchasers are motivated by a financial return when purchasing the token; and
- persons or entities other than the promoter or sponsor exercise governance rights or influence.[77]

On April 3, 2019, the SEC's Strategic Hub for Innovation and Financial Technology published a framework (the "SEC Framework") for analyzing whether a digital asset is offered and sold as a security under the federal securities laws.[78] The SEC Framework consolidated into one document previous SEC staff guidance, positions, and statements as to how digital assets may be covered under the *Howey* test for investment contracts.

According to the SEC Framework, "[u]sually, the main issue in analyzing a digital asset under the *Howey* test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others."[79] For this reason, the SEC Framework focused principally on these considerations, which are the third and fourth factors in the *Howey* test. The SEC Framework also introduced a new term, "active participant," which is broadly defined to include participants in a digital asset network whose efforts may form the basis of a purchaser's expectation of profits.[80]

The SEC Framework also emphasizes the SEC staff's view that even if a token has partial utility at launch, under certain circumstances, the token might still be a security at launch if the digital asset's functionality is still being developed or improved:

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[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Framework for "Investment Contract" Analysis of Digital Assets,* SEC, (Apr. 3, 2019), https://www.sec.gov/files/dlt-framework.pdf.
[79] *Id.* at 2.
[80] *Id.* at 3.

> Even in cases where a digital asset can be used to purchase goods or services on a network, where that network's or digital asset's functionality is being developed or improved, there may be securities transactions if, among other factors, the following is present: the digital asset is offered or sold to purchasers at a discount to the value of the goods or services; the digital asset is offered or sold to purchasers in quantities that exceed reasonable use; and/or there are limited or no restrictions on reselling those digital assets, particularly where an [active participant] is continuing in its efforts to increase the value of the digital assets or has facilitated a secondary market.[81]

To date, SEC staff have applied the *Howey* test to digital assets in three "no-action" letters (the "SEC Staff No-Action Letters").[82] In each of the SEC Staff No-Action Letters, SEC staff listed several facts that it found to be persuasive in determining that the digital assets involved were not securities. Of relevance is the weight that SEC staff gave to the following factors: (i) that the digital assets involved would be immediately usable; (ii) that the issuers would market the digital assets *exclusively* for their consumptive use; and (iii) that the issuers would build in restrictions on transfer or other price controls to limit the potential for purchasers to realize any capital appreciation.[83]

The SEC has also applied the securities laws to DeFi. In November 2018, the SEC settled charges against James Coburn for contributing to violations of Section 5 of the Exchange Act through his operation of a decentralized exchange—EtherDelta—which utilized a smart contract on the Ethereum network to allow buyers and sellers to trade tokens on a peer-to-peer basis.[84] The SEC concluded that EtherDelta traded in securities without first registering as an exchange or operating pursuant to an exemption from registration, in violation of the Exchange Act.[85] The SEC concluded that Coburn contributed to EtherDelta's violations because he "exercised complete and total control over EtherDelta's operations" and, as a result, he "should have known that his actions" would contribute to EtherDelta's violations.[86] Ultimately, the SEC and Coburn entered into an agreement whereby Coburn agreed to disgorge $313,000 and pay a $75,000 penalty.

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[81] *Id.* at 11.

[82] *TurnKey Jet, Inc., SEC Staff No-Action Letter* (Apr. 3, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm; *Pocketful of Quarters, Inc., SEC Staff No-Action Letter* (July 25, 2019), https://www.sec.gov/corpfin/pocketful-quarters-inc-072519-2a1; *IMVU, Inc., SEC Staff No-Action Letter* (Nov. 17, 2020), https://www.sec.gov/corpfin/imvu-111920-2a1.

[83] *In re Zachary Coburn*, Exchange Act Release No. 84553 (SEC Nov. 8, 2018), https://www.sec.gov/litigation/admin/2018/34-84553.pdf.

[84] *Id.* at 4-5.

[85] *Id.* at 8-9.

[86] *Id.* at 9.

F. Federal Commodities Laws

Transactions involving commodities are governed by the Commodity Exchange Act of 1936, as amended (the "CEA"), and regulations promulgated thereunder (collectively, "Commodities Laws") by the CFTC. The CEA broadly defines the term "commodity" to encompass virtually all goods, services, and interests.[87]

The CFTC has supervisory authority over three types of "commodity interest" transactions and various market participants involved in those transactions:

- **Futures Contracts.** Futures contracts are contracts for the future delivery of a commodity. Generally, futures contracts must be offered on a regulated exchange platform, known as a designated contract market ("DCM"), and through a regulated broker, known as a futures commission merchant ("FCM"). Futures contracts may only be offered on a DCM regardless of whether the contracts are marketed to retail investors or more sophisticated investors, known as "eligible contract participants" ("ECPs").

- **Swap Agreements.** The CEA broadly defines "swap" to include (i) an option of any kind[88] for the purchase or sale, or based on the value of, a financial or economic interest or property of any kind; (ii) a contract or transaction that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; and (iii) a contract that provides, on an executory basis, for the exchange of one or more payments based on the value of the commodity (or economic interests or property of any kind) and that transfers the financial risk associated with a future change in any such value without also conveying a current or future ownership interest in an asset or liability incorporating such financial risk.[89]

  Transactions involving a counterparty that is not an ECP must be executed on a DCM. However, swaps involving ECPs may be executed over-the-counter in most circumstances or on a swap execution facility.

- **Retail Commodities Transactions.** The CFTC also has supervisory jurisdiction over retail commodities transactions that are not technically futures or swaps but which are (1) offered to retail investors, (2) involve "leverage, margin, or financing," and (3) do

[87] 7 U.S.C. § 1a(9).

[88] The CEA defines the term "option" as, "an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty"', or 'decline guaranty.'" 7 U.S.C. § 1a(36).

[89] 7 U.S.C. § 1a(47)(A).

not result in actual delivery of the underlying commodity within 28 days.[90] All retail commodities transactions must be offered on a DCM.

Finally, the CFTC also has *enforcement* jurisdiction over the spot market for commodities to prevent fraud and market manipulation that could have an adverse effect on the prices of commodities.[91]

Since 2015, the CFTC by public comment, enforcement posture, and civil advocacy has taken the position that "virtual currencies" constitute "commodity transactions" for purposes of the CEA.[92] The CFTC has interpreted the term "virtual currency" broadly, to encompass any digital representation of value that functions as a medium of exchange, and any other digital unit of account used as a form of currency.[93]

In September 2022, the CFTC commenced enforcement actions against persons the CFTC believed were responsible for illegal, off-exchange trading that occurred through the bZx protocol, a DeFi application, in violation of the CEA.[94] The CFTC announced a settlement with bZeroX LLC and two principles, who initially developed and controlled the protocol's smart contracts before turning control of the protocol over to the bZx DAO (now called the Ooki DAO).[95] Additionally, the CFTC filed suit against the Ooki DAO, alleging that because the DAO was not incorporated it was as a general partnership that is amenable to suit.[96]

The CFTC alleges that the bZx protocol allowed individuals to engage in CEA-regulated margined or leveraged retail commodities transactions.[97] Even though the bZx protocol consisted of a series of smart contracts on the Ethereum network, the CFTC alleged that the persons in control of the protocol—first, bZeroX LLC and later the DAO—were responsible for ensuring that financial activities that occurred through the protocol were done in compliance with CEA.[98] Thus, because neither bZeroX LLC nor the Ooki DAO had registered with the CFTC in any capacity, they violated the CEA by unlawfully engaging in retail commodities transactions that could only be offered on a CFTC-registered DCM and acting as an unregistered FCM.[99] In addition, the CFTC

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[90] 7 U.S.C. § 2(c)(2)(D)(i).

[91] 7 U.S.C. § 9 (providing the CFTC with general anti-fraud and anti-manipulation enforcement authority relating to a "contract of sale of a commodity" in interstate commerce)

[92] *In re Coinflip, Inc.*, CFTC Docket No. 15-29, 2015 WL 5535736 (Sept. 17, 2015) (consent order).

[93] Retail Commodity Transactions Involving Certain Digital Assets, 85 Fed. Reg. 37734, (June 24, 2020) (to be codified at 17 C.F.R. pt. 1).

[94] Press Release, CFTC, CFTC Imposes $250,000 Penalty Against bZeroX, LLC and its Founders and Charges Successor Ooki Dao for Offering Illegal, Off-Exchange Digital-Asset Trading, Registration Violations, and Failing To Comply with Bank Secrecy Act (Sep. 22, 2022), https://www.cftc.gov/PressRoom/PressReleases/8590-22 [hereinafter Ooki DAO Press Release]

[95] *In the Matter of: bZeroX*, CFTC Docket No. 22-31, 2022 WL 4597664 (consent order).

[96] *Sarcuni v. bZx DAO*, 3:22-cv-00618 (S.D. Cal. 2022).

[97] Ooki DAO Press Release, *supra* note 94.

[98] *Id.*

[99] *Id.*

alleged that by failing to implement procedures for verifying the identity of users of the bZx protocol, bZeroX LLC and the Ooki DAO violated CEA regulations requiring FCMs—whether or not registered with the CFTC—to comply with the BSA's anti-money laundering requirements.[100]

G. U.S. Sanctions Laws

Sanctions are legal restrictions issued by the United States that target countries, governments, regions, entities, and individuals.[101] Sanctions may impose asset freezes and other financial prohibitions, controls, or requirements in order to advance national security or foreign policy objectives.[102]

The sanctions programs, which are administered by the U.S. Office of Foreign Assets Control ("OFAC"), are complex and range from targeted measures against individuals or entities designated for specific activities to comprehensive embargoes against entire countries or regions.[103] Some recent sanctions are "sectoral sanctions," targeting individuals and entities associated with specific sectors of a foreign country's economy.[104] Some sanctions designations, frequently referred to as "secondary sanctions," target non-U.S. individuals and entities for their dealings with persons already subject to U.S. sanctions.[105]

OFAC sanctions generally prohibit "U.S. persons" from transacting with or providing services to (or facilitating a transaction with or the provision of services to) individuals or entities subject to U.S. sanctions. The definition of "U.S. person" varies across individual sanctions programs, but generally covers:

- U.S. citizens or legal permanent residents (wherever located);
- U.S. entities (including foreign branches); and
- Any person in the United States.[106]

Some sanctions programs also define the term to include foreign-organized entities owned or controlled by U.S. persons.[107] Certain programs also apply to foreign persons in possession of

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[100] *Id.*

[101] *Financial Sanctions Frequently Asked Questions.* at No. 1, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1501 (last visited Nov. 11, 2022)

[102] *Id.*

[103] *Sanctions Compliance Guidance for the Virtual Currency Industry*, OFFICE OF FOREIGN ASSETS CONTROL (Oct. 2021), at 2-3, https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf.

[104] *Id.* at 3.

[105] *Economic Sanctions: Overview for the 117th Congress*, CONGRESSIONAL RESEARCH SERVICE (Jan. 15, 2021), https://sgp.fas.org/crs/row/IF11730.pdf.

[106] *Sanctions Compliance Guidance for the Virtual Currency Industry*, OFFICE OF FOREIGN ASSETS CONTROL (Oct. 2021), https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf.

[107] *Id.*

U.S.-origin goods.[108]

At a high level, U.S. persons are generally prohibited from the following activities:

- Transacting with or providing services to individuals or entities identified by OFAC as subject to U.S. sanctions. OFAC publishes a sanctions list that is publicly available on the OFAC website,[109] divided into a list of "Specially Designated Nationals and Blocked Persons," ("SDNs" and the "SDN List")[110] and a consolidated list of all non-SDN sanctions (the "Consolidated List").[111] These lists contain the names, known pseudonyms, and other identifying information of individuals, groups, and entities that have been *specifically* designated by the U.S. government as being subject to economic sanctions pursuant to one or more of the sanctions programs administered by OFAC.

- Transacting with or providing services to entities where one or more SDNs own, in the aggregate, more than 50% of the entity.[112]

- Transacting with or providing services to individuals or entities subject to U.S. blocking sanctions *but not listed on* an OFAC sanctions list.[113] For instance, U.S. persons are generally prohibited from transacting with a person that has acted, directly or indirectly, on behalf of the "Government of Venezuela," even if that person has not been designated by OFAC as an SDN.[114]

- Transacting with entities owned, in the aggregate, by one or more individuals or entities

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[108] *Id.*

[109] OFAC's sanctions list is available here: *Sanctions List Search*, OFFICE OF FOREIGN ASSETS CONTROL, https://sanctionssearch.ofac.treas.gov/ (last visited Nov. 11, 2022).

[110] *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists (last updated Nov. 9, 2022).

[111] Consolidated Sanctions List (Non-SDN Lists), U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/consolidated-sanctions-list-non-sdn-lists (last updated Aug. 2, 2022).

[112] *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked*, U.S. DEP'T OF THE TREASURY (Aug. 13, 2014), https://home.treasury.gov/system/files/126/licensing_guidance.pdf.

[113] *See, e.g.*, Exec. Order No. 13884, 84 Fed. Reg. 152, (Aug. 5, 2019). (blocking the property of the "Government of Venezuela," which the executive order defines as state and Government of Venezuela, any political subdivision, agency, or instrumentality thereof . . . , any person owned or controlled, directly or indirectly, by the foregoing, and any person who has acted or purported to act directly or indirectly for or on behalf of, any of the foregoing, including as a member of the Maduro regime.").

[114] *Frequently Asked Questions*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/680 (last visited Nov. 11, 2022) ("Please note that persons meeting the definition of Government of Venezuela and persons that are owned, directly or indirectly, 50 percent or more by the Government of Venezuela are blocked pursuant to E.O. 13884, regardless of whether the person appears on the Specially Designated Nationals and Blocked Persons list (SDN List), unless exempt or authorized by OFAC.").

subject to U.S. blocking sanctions *but not listed on* an OFAC sanctions list.[115]

- Transacting with individuals or entities ordinarily resident in a sanctioned region. OFAC's current sanctioned regions are Iran, Cuba,[116] North Korea, Syria, the Crimea region of Ukraine, and the so-called Donetsk People's Republic and Luhansk People's Republic regions of Ukraine.

In addition to generally prohibiting transactions with, and the provision of services to, individuals and entities subject to U.S. sanctions, certain sanctions programs require assets and accounts in which a sanctioned party has an interest be blocked—i.e., frozen—when such assets or accounts are located in the United States, are held by U.S. individuals or entities, or come into the possession or control of U.S. individuals and entities.[117]

Moreover, even if a U.S. person does not transact directly with a person subject to U.S. sanctions, U.S. persons may also violate U.S. sanctions laws if they approve or facilitate a transaction that a U.S. person would be prohibited from engaging in directly.[118]

U.S. sanctions operate on the basis of strict liability, i.e., a person or entity subject to U.S. jurisdiction may be held civilly liable for sanctions violations even if that person or entity did not know, or have reason to know, that it was engaging in a transaction prohibited under sanctions laws and regulations administered by OFAC.[119] Civil penalties can be higher than $330,000 per violation or twice the amount of the violative transaction.[120]

The Office's Framework for OFAC Compliance Commitments "strongly encourages" persons subject to U.S. jurisdiction to maintain a risk-based compliance program designed to mitigate potential sanctions violations.[121] The framework highlights what OFAC views as the five "essential components" of an appropriate sanctions program: (1) commitment by management to support a sanctions compliance program; (2) routine (or ongoing) assessments of potential sanctions risks; (3) the development and implementation of appropriate internal controls, as informed by the risk assessment, to "identify, interdict, escalate, report (as appropriate), and keep records" related to potential sanctions exposure; (4) a testing or audit function; and (5) an effective

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[115] Frequently Asked Questions, *supra* note 114; Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked, *supra* note 112.

[116] The Cuban sanctions also apply Cuban nationals outside of Cuba unless certain conditions are met (e.g., the Cuban national establishes permanent residence outside of Cuba). *Frequently Asked Questions*, U.S. Dep't of the Treasury, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/791 (last visited Nov. 11, 2022).

[117] *Office of Foreign Assets Control-Overview*, BSA/AML MANUAL, https://bsaaml.ffiec.gov/manual/OfficeOfForeignAssetsControl/01 (last visited Nov. 11, 2022).

[118] *Sanctions Compliance Guidance for the Virtual Currency Industry*, OFFICE OF FOREIGN ASSETS CONTROL (Oct. 2021), https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf.

[119] *Id.*

[120] 31 C.F.R. § Pt. 501, App. A § V(B)(2)(a)(v).

[121] *A Framework for OFAC Compliance Commitments*, OFFICE OF FOREIGN ASSETS CONTROL, https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf (last visited (Nov. 11, 2022).

sanctions training program.[122] In determining the proper response to a sanctions violation, OFAC has stated that it will "consider favorably subject persons that had effective SCPs [sanctions compliance programs] at the time of an apparent violation."[123]

OFAC has made clear that U.S. sanctions compliance obligations "apply equally to transactions involving virtual currencies and those involving traditional fiat currencies," noting that "the virtual currency industry including technology companies, exchangers, administrators, miners, wallet providers, and users, play[] an increasingly critical role in preventing sanctioned persons from exploiting virtual currencies to evade sanctions and undermine U.S. foreign policy and national security interests."[124] In its detailed guidance to the virtual currency industry, OFAC highlighted what it termed "sanctions compliance best practices" for U.S. virtual currency industry participants to comply with U.S. sanctions.[125]

Additionally, OFAC has designated individuals and entities based upon connections to illicit activity involving digital assets, in many cases including on the SDN list entry various blockchain addresses as "Identifications." For instance, in May 2022, OFAC imposed secondary sanctions on Blender.io, a virtual currency mixer that makes tracing bitcoin transactions more difficult, because Blender.io's services helped North Korean hackers to launder the proceeds of cybercrimes.[126]

Most recently, in August 2022, OFAC sanctioned Tornado Cash, a virtual currency mixer that, like Blender,io, had been used by malicious actors, including North Korean hackers, to launder the proceeds of illicit cyber activities.[127] But unlike Blender.io, which was a centralized mixing service, Tornado Cash operated automatically and autonomously on the Ethereum network using smart contracts, creating uncertainty about what exactly OFAC sanctioned—i.e., the smart contract code or some unidentified group of persons that OFAC believes are Tornado Cash and control the smart contract's code.[128] Following the designation, several lawsuits were filed challenging the legality of OFAC's designation of Tornado Cash.[129] On November 8, 2022, OFAC rescinded its prior designation of Tornado Cash and redesignated Tornado Cash. According to

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* For more details on OFAC's recommendations, please see *OFAC Releases New Detailed Guidance for the Digital Currency Industry*, PERKINS COIE (Oct. 19, 2021) https://www.perkinscoie.com/en/news-insights/ofac-releases-new-detailed-guidance-for-the-digital-currency-industry.html.

[126] *U.S. Treasury Issues First-Ever Sanctions on a Virtual Currency Mixer, Targets DPRK Cyber Threats*, U.S. DEP'T OF THE TREASURY (May 6, 2022), https://home.treasury.gov/news/press-releases/jy0768.

[127] *U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash*, U.S. DEP'T OF THE TREASURY (Aug. 8, 2022), https://home.treasury.gov/news/press-releases/jy0768.

[128] For a discussion of the issue, please see O*FAC Takes Action Against Virtual Currency Tornado Cash in Novel Application of Sanctions Authorities | Virtual Currency Report*, PERKINS COIE (Aug. 31, 2022), https://www.virtualcurrencyreport.com/2022/08/ofac-takes-action-against-virtual-currency-tornado-cashin-novel-application-of-sanctions-authorities/.

[129] *Coin Center v. Yellen*, 3:22-cv-20375 (N.D. Fla. 2022); *Van Loon v. U.S. Dept. of Treasury*, 6:22-cv-00920 (W.D. Tex. 2022).

OFAC, the delisting and redesignation was to add additional bases for designating Tornado Cash as an SDN.[130] In its press release, OFAC characterized Tornado Cash "as an *entity* that provides virtual currency mixing services through smart contracts that primarily operate on the Ethereum blockchain."[131] The same day, OFAC clarified that it considers Tornado Cash to be an entity consisting of:

> [I]ts founders and other associated developers, who together launched the Tornado Cash mixing service, developed new Tornado Cash mixing service features, created the Tornado Cash Decentralized Autonomous Organization (DAO), and actively promoted the platform's popularity in an attempt to increase its user base; and (2) the Tornado Cash DAO, which is responsible for voting on and implementing new features created by the developers. Tornado Cash uses computer code known as "smart contracts" to implement its governance structure, provide mixing services, offer financial incentives for users, increase its user base, and facilitate the financial gain of its users and developers.[132]

In redesignating Tornado Cash, OFAC attempted to stress that it was designating the *unincorporated entity* Tornado Cash as an SDN and that the Tornado Cash *smart contracts* were the mechanism used by *the entity* Tornado Cash provided mixing services.[133]

IV. EFFORTS OF THE TASK FORCE

In line with our directive to "study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State, [134] the Task Force's mission has three components:

1. Develop best practices for attorneys representing clients on digital finance and digital currency matters and provide member education resources on those practices.

2. Study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State.

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[130] *Treasury Designates DPRK Weapons Representatives*, U.S. Dept. of Treasury (Nov. 8, 2022). https://home.treasury.gov/news/press-releases/jy1087.

[131] *Id.* (emphasis added).

[132] *Frequently Asked Questions*, OFFICE OF FOREIGN ASSETS CONTROL, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1095 (last visited Nov. 15, 2022).

[133] *Treasury Designates DPRK Weapons Representatives*, OFFICE OF FOREIGN ASSETS CONTROL (Nov. 8, 2022). https://home.treasury.gov/news/press-releases/jy1087.

[134] Task Force on Emerging Digital Finance and Currency, *supra* note 14.

3. Promote the appropriate use of digital assets and Web3 resources to keep pace with the industry and expand global membership.

The Task Force has formed three subcommittees, each of which maps to a component of the Task Force's mission. The Education Subcommittee's focus is on developing programming designed to help attorneys spot the legal and ethical issues that may arise in connection with blockchain-related representation and help attorneys engage appropriately and effectively. The Task Force's Regulation and Legislation subcommittee will evaluate the legal and regulatory issues presented by the growth of the digital finance and digital currency industries in the state. Finally, the Blockchain, Web3, and Metaverse subcommittee will explore how Web3 technologies can be used to benefit NYSBA and its members.

V. CONCLUSIONS

Blockchain technology has the potential to reshape how we transact by decreasing the need to trust centralized parties, which necessarily carries wide-ranging legal implications. Because New York State is home world's largest financial center, NYSBA members have played and will continue to play key roles in shaping how the law applies to the emerging blockchain ecosystem. Through resolutions soon to be proposed, and in line with NYSBA's mission, [135] the Task Force seeks to respond to the opportunities and challenges posed by blockchain technologies and advance NYSBA members' and the public's understanding of how the law applies and promote the appropriate use of the technology within the legal profession.

In keeping with these goals, the Task Force is working in the near term to develop specific recommendations for the NYSBA Executive Committee and proposed resolutions for the NYSBA House of Delegates that would potentially include: (i) NYSBA positions on existing and pending New York legislation, executive order and enforcement posture supporting rational regulation balancing consumer and environmental protection with encouragement of digital currency and digital finance business in the state; (ii) feasibility studies on initiatives to expand global interest, membership and access to NYSBA and its resources, including income-generating activities, by expanding NYSBA's Web3 footprint and presence.

[135] *About – New York State Bar Association, supra* note 13 ("Our mission is to shape the development of law, educate and inform the public, and respond to the demands of our diverse and ever changing legal profession.").

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #9

REQUESTED ACTION: Approval of report and recommendations of the Task Force on Racism, Social Equity, and the Law.

The Task Force on Racism, Social Equity, and the Law was established by past president T. Andrew Brown in June 2021. The mission of the Task Force, as approved by the Executive Committee, reads that:

> The Task Force will examine how structural racism permeates and influences facets of daily life leading to injustice and inequality among New Yorkers. The Task Force will include six subcommittees – Criminal Justice, Economic Opportunity, Education, Environmental Justice, Health, and Housing – that will examine the key issues that cause structural racism to be entrenched and persistent. These subcommittees will enable the Task Force to explore changes in the law and public policy and deliver a report recommending action steps the NYSBA can take to attack structural racism and effectuate meaningful societal transformation.[1]

The Task Force held several public forums and CLE programs on topics germane to the mandate of the Task Force and presented informational reports on the status of the Task Force's work at the April and June 2022 meetings of the Executive Committee and House of Delegates. A draft report was submitted to the Reports Group in April 2022, and an executive summary circulated in June 2022 in advance of the June 2022 House of Delegates meeting.

The final report was submitted to the Reports Group in November 2022. The Task Force proceeded to host two informational sessions in December 2022 and January 2023 to review the report with delegates and Section and committee chairs. As of January 6, 2023, comments concerning the report have been submitted by the Health Law Section and past president A. Thomas Levin.

The final report reviews the history of racism and social inequity in New York State, surveys the current socioeconomic conditions for people of color in New York State, and offers twelve recommendations for the New York State Bar Association that, in the opinion

[1] *See* Task Force webpage, https://nysba.org/committees/task-force-on-racism-social-equity-and-the-law/.

of the Task Force, would address inequitable legal, regulatory, and societal structures currently affecting people of color in New York State.

The twelve recommendations offered in the report are summarized below.

The first eleven recommendations call on the Association to:

1. Advocate for rules that require timely and accurate collection, and public reporting, of data on racially disparate outcomes in certain criminal justice, education, and health areas to determine the ongoing impact of structural racism in these areas and to track and root out bias (page 66 of report).

2. Support rules requiring training on structural racism, bias, and equity for providers working in a number of different areas, including those working for healthcare providers and facilities, licensed appraisers and lenders, and educators and other teaching professionals, so that they are prepared to be responsive to cultural differences in order to eliminate barriers to equitable services for all. Educators should also receive coursework on trauma and its impact on child development, diversity, equity and inclusion, special education, and trauma-informed responses (page 70 of report).

3. Support the creation of a Wealth Gap Commission to study the wealth gap between whites and people of color, and to propose policies that would significantly reduce the disparities. This would include examining the feasibility of economic supports such as restitution, reparations (similar to those previously paid to Native Americans or Japanese Americans) or other legal remedies. The Commission should also consider whether proposed remedies will have the desired effect of reducing the racially disproportionate wealth gap beyond the current generation (page 77 of report).

4. Support changes in the law and rules for jury service and selection that would increase the number of people of color available for jury selection; and reduce the potential for implicit or explicit bias in the selection process (page 80 of report).

5. Support passage of the Universal Child Care bill which would amend the state finance law to establish funds to provide for the establishment and funding of universal childcare and provide competitive salaries to childcare workers as “educators” (page 85 of report).

6. Advocate for an increased part of the 2023 state budget be earmarked for underserved communities in New York for entrepreneurs and small businesses. The newly created Office of Financial Inclusion and Empowerment can and should spearhead the use of these funds for traditionally underrepresented communities and NYSBA should lobby that it do so (page 87 of report).

7. Support legislative and regulatory action to address disproportionality in public education, thereby making sustainable and lasting improvements to the outcomes for all children in the New York State public schools. The Legislature should amend the Education Law to adopt research-based reforms such as those proposed in the Solutions Not Suspensions bill previously before the legislature to address disproportionality in the discipline of students within New York. Disproportionality in academic outcomes for students can be reduced through early screening and intervention. The Education Department should expand the current developmental screening to require that all children be screened (but no more than once every two years): (1) upon entering the district or universal preschool or pre-K program as defined by 8 NYCRR § 100.3 regardless of the age at date of entrance; (2) if the student is performing below grade level in any academic or social emotional areas for more than two reporting periods and (3) upon teacher or administrator recommendation (page 90 of report).

8. Support the introduction of legislation that would establish an independent commission reporting on a recurring five-year basis to the Governor and the Legislature concerning the cost of educational funding necessary to fulfill the state's constitutional obligations on a per district basis (page 94 of report).

9. Support state actions to hold government agencies accountable for their actions or inactions on environmental justice issues through judicial review, executive and legislative scrutiny, and public oversight (page 95 of report).

10. Support requiring the NYS Department of Health to require property owners of multifamily buildings (specifically structures with four or more housing units that are not owner-occupied) to annually sample drinking water in their buildings for lead levels and to take preventive measures when the tests show lead levels above fifty percent of the federal threshold (page 97 of report).

11. Advocate that the NYS Department of State implement structural changes in appraiser recruitment training and licensing, and the appraisal model, in an effort to increase diversity in the appraisal profession and to eliminate devaluing of property based on the racial composition of the neighborhood in which the property is located (page 98 of report).

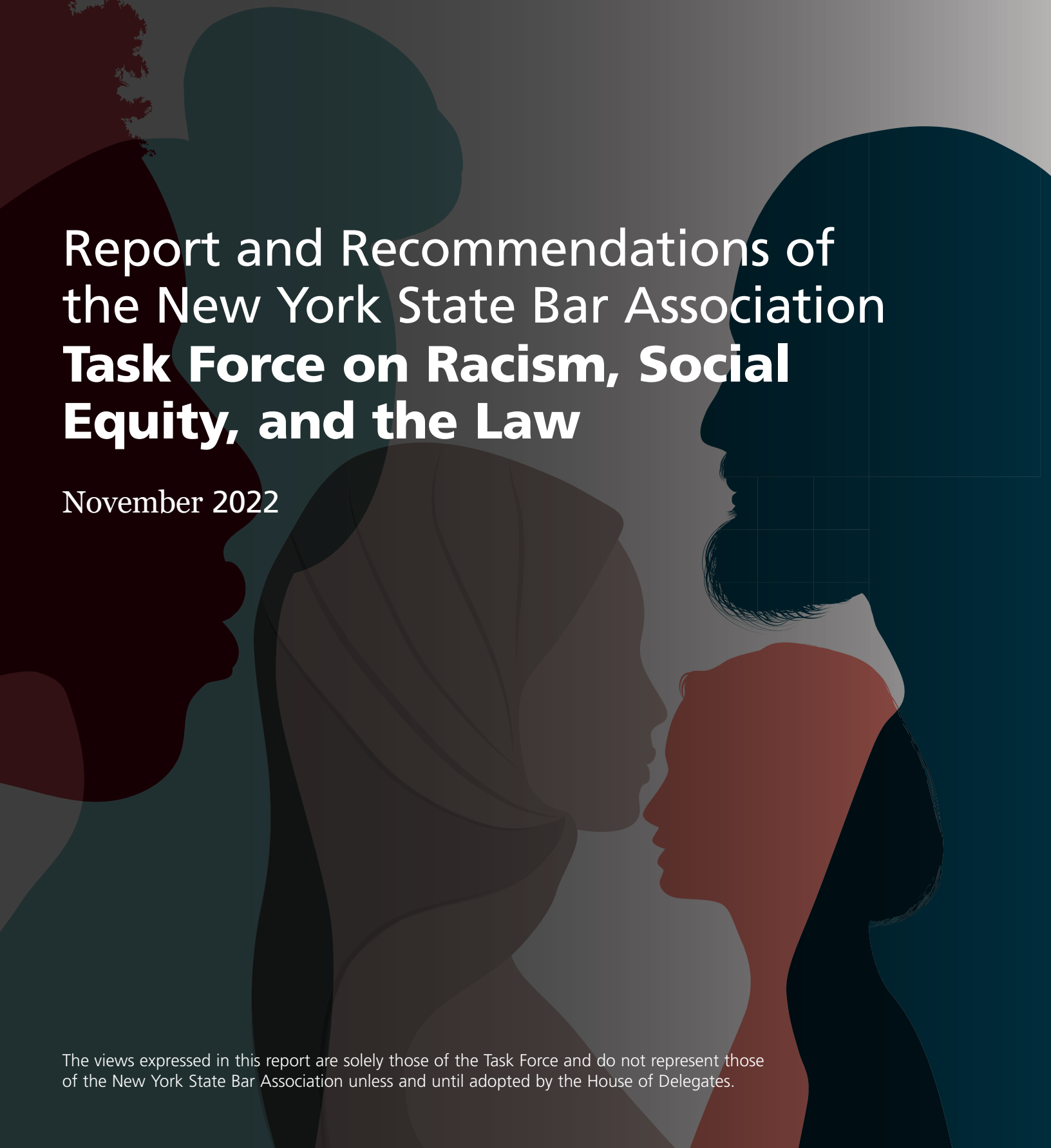
Finally, the Task Force recommends that appropriate entities within the Association consider avenues for future action by the Association (page 100 of report).

Taa R. Grays and Lillian M. Moy, co-chairs of the Task Force on Racism, Social Equity, and the Law, will present the report to the Executive Committee and the House of Delegates.

NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Task Force on Racism, Social Equity, and the Law**

November 2022



The views expressed in this report are solely those of the Task Force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

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INTRODUCTION

The United States was founded on principles of justice, liberty and the rule of law. At the time these principles were enshrined in our Declaration of Independence and Constitution, the only individuals in this country allowed to exercise the full rights of citizenship were approximately 20% of the population: white men with property. Everyone else was not allowed to exercise many, if not all, of the rights of citizenship.

Since that time, as a nation, we have worked to expand the principles of justice, liberty and the rule of law to those once excluded from exercising them. However, even with the addition of the 13th, 14th, 15th and 19th Amendments, Blacks, Latinx, Asians and Native Americans ("people of color") were consistently deprived of justice, liberty and the rule of law for another 100 years. Why? A significant number of white Americans held the belief that a person's "race was a fundamental determinant of human traits and capacities and those racial differences produced an inherent superiority of a particular race."[1] This racist belief led to the systemic oppression of people of color to the social, economic, and political advantage of whites.

The Civil Rights Acts of the 1960s addressed the policies, practices and state laws enacted to exclude people of color from being able to exercise their rights as US citizens. The Civil Rights Acts set the path forward – these groups were able to enjoy the privileges of citizenship and seek redress when deprived of these rights.

Nevertheless, the Acts could not undo the past: the deleterious effects of the 100 years of policies, practices and state and federal laws that minimized economic opportunities, created substandard schools, medical care, housing and infrastructure, and imposed greater criminal penalties on members of these communities. The Acts did not root out the belief that race was a fundamental determinant of human traits and capacities that guided the development of these policies, practices and state and federal laws creating inequitable outcomes. As such, people of color still fall short of obtaining true equitable outcomes in the United States. Thus, the promise of "unalienable rights, among these are life, liberty and the pursuit of happiness" belonging to all, as announced in the Declaration of Independence in 1776, has yet to be fulfilled.

The law has been a shield and sword in people of color's fight to exercise their rights. When unjust laws were passed to deprive them of their rights, the courts were the places where they sought redress and remedies. When just federal laws were passed but states passed laws to prevent people of color from exercising their rights, the courts were the places where they sought redress and remedies. They marched in the streets to press Congress to pass laws to protect their constitutional rights. The law has always had an integral role in addressing issues of race and inequity. To address

[1] Definition of racism, Merriam Webster Dictionary, https://www.vox.com/identities/2020/6/10/21286656/merriam-webster-racism-definition; see generally Harvard Library, Scientific Racism, https://library.harvard.edu/confronting-anti-black-racism/scientific-racism.

those issues that remain, we must look to the law. This understanding has been the focus of the work of the Task Force on Racism, Social Equity and Law.

This report details the work of the Task Force – its research, findings and recommendations – explaining how to use the law as a sword to combat the remnants of a racist belief that continues to create inequitable outcomes for people of color in New York State. Our report has five sections: (1) Executive Summary (including a summary of the Recommendations), (2) New York's History of Exclusion and Structural Racism, (3) Current Conditions, (4) Task Force Recommendations and (5) Conclusion.

I. EXECUTIVE SUMMARY

On June 12, 2021, President T. Andrew Brown stated, "I will convene a task force on racism, social equity and the law, with an eye toward building on the work the Association has undertaken to address some of the most intransigent regulations, laws, and structures that are collectively holding us back as a society from achieving true equality. We will strive to see every issue we tackle this year through the lens of equity, as we know all too well that racism and injustice pervades almost every aspect of our lives."

With that as our charge, the mission of the Task Force was to examine how structural racism permeates and influences facets of daily life leading to injustice and inequality among New Yorkers. The Task Force created six subcommittees – Criminal Justice, Economic Opportunity, Education, Environmental Justice, Health, and Housing – that examined the key issues that cause structural racism to be entrenched and persistent. These subcommittees enabled the Task Force to focus on the pivotal areas in which the Association can take meaningful action to attack structural racism and effect meaningful societal transformation.

The Task Force's mission is grounded in the Association's purposes as outlined in the Bylaws: "to promote reform in the law; to facilitate the administration of justice; … to apply its knowledge and experience in the field of the law to promote the public good." Our mission reflects this Association's deep commitment to examining the role that the law and this Association's members can play in seeking justice, equity and fairness promoting the public good.

In order to frame our findings and recommendations, we focused the start of our work on understanding structural racism. Paula Johnson, Professor of Law at Syracuse University, explained at our first Public Forum, held on October 25, 2021, that structural racism "is a system of laws, policies, and institutional practices that produce and perpetuate racial inequities and inequalities in the United States"

With her permission, Professor Johnson's comments flushing out this framing issue are provided below.

The impact of structural racism can operate in discrete, interconnected, and synergistic ways. Thus, individual issues like housing insecurity can be compounded by limited economic opportunity, inadequate educational opportunity, and overrepresentation in the criminal justice system, which in turn can cause or exacerbate deleterious health consequences in communities of color.

WHY INEQUITY?

The discussion of structural racism also must recognize the focus on "inequity" to reach justice goals. In this regard, debates as to principles of "equality" vs. principles of "equity" should be viewed thusly: Equality says that everyone should be treated the same, get the same, no matter their starting point or material conditions. However, equity demands that we realize that what is equal is not necessarily equitable. W.E.B. DuBois recognized this early when he stated:

> *From the day of its birth, the anomaly of slavery plagued a nation which asserted the equality of all men, and sought to derive powers of government from the consent of the governed. Within the sound of the voices of those who said this lived more than half a million slaves, forming nearly one-fifth of the population of a new nation[.]*

He continued regarding the circumstances of newly emancipated persons of African descent at Reconstruction, saying:

> *The Negro was freed and turned loose as a penniless, landless, naked, ignorant laborer[…] North as well as South, the Negroes have emerged from slavery into a serfdom of poverty and restricted rights.*

The observations still apply. Clearly, then, equality cannot be our starting point. There must be equitable solutions. Where the legacies of institutionalized racism continue to circumscribe opportunities and the very lives of individuals and groups of people of color, we must recognize that equity is prerequisite to equality, not the other way around.

LEGACIES OF INSTITUTIONAL RACISM

The legacies of institutional racism are myriad and their legal roots run very deep. Consider the citizenship of people of color, or sovereignty regarding Indigenous peoples. This concerns not only who is a citizen by birthright or naturalization, but often more importantly, who is perceived to be a citizen.

The reality and perception of citizenship has been influenced by determinations of law. For people of African descent, US citizenship required a war, an Emancipation Proclamation, three Reconstruction-era Constitutional Amendments, and federal enforcement statutes.

People of Asian descent who emigrated to the US were not permitted to legally become citizens until 1952, with passage of the McCarran-Walter Act, when the "free White persons" restriction was lifted from the Naturalization Act of 1790, thereby permitting Asian and other non-White immigrants to become naturalized US citizens. The Chinese were the only group who were categorically excluded from immigration by measures upheld by the US Supreme Court, including the Chinese Exclusion Law of 1882; national origins quotas limiting emigration from Asian and Asian Indian countries; exclusion via prohibitive alien land laws, and internment of Japanese Americans during WWII, fostered the continuing presumption of Asian Americans' foreignness rather than citizenship.

Foreignness also is presumed for people of Latinx descent, despite multiple generations of citizenship in the United States. Too little is known about the history of conquest and annexation that appropriated land from Mexico, including California, Texas, New Mexico, Arizona, Nevada, and parts of Colorado, Utah, and Kansas, that comprise roughly one-third of present-day America. The Treaty of Guadalupe Hidalgo in 1848 determined the boundary between the U.S. and Mexico, and also determined the conditions of citizenship of Mexicans who were now in US territory.

The Doctrine of Discovery, forcible acquisition of Indian lands, and Removal policies justified inhumane treatment of Native Americans. Ironically, Native Americans, the only indigenous peoples to the land, were not recognized as birthright citizens until the Indian Citizenship Act of 1924. Native Americans' citizenship rights came at great costs of loss of land, culture, and social systems.

While this is a truncated review at best, it is significant to realize that US citizenship – who belongs and who does not – who enjoys benefits and who bears burdens – who has access and who is shut out of American political, social, and economic systems – remains tethered to ideals of White supremacy and racial hierarchy, which law has either promulgated or perpetuated.

MANIFESTATIONS OF RACIAL HIERARCHIES AND INEQUITIES

Racial hierarchies of the sort that were entrenched by citizenship determinations preceded the Nation's birth. Enslavement, of course, was the abject denial of Black people's humanity, legal status, or rights. Post-Reconstruction, this racially-subordinated status was enforced through legal and extrajudicial means. Black Codes, which criminalized all aspects of Black activity; Jim Crow laws, which enforced racial segregation in all spheres of public and private life; political disenfranchisement, which prohibited electoral participation despite the 15th Amendment; and economic exclusion, precluded Black people from exercising agency over their labor, mobility, and economic independence. The terror of lynchings, which were committed with impunity often in collusion between private parties, law enforcement and judicial officers, led to mass Black migration from the South to North.

However less virulent, the North had its own brand of racial segregation, discriminatory laws, and harsh social conditions. Plessy [v. Ferguson] *established the separate-but-equal doctrine that proscribed public and private racial interactions. These delineations continue to adversely affect people of color in US society.*

Housing Segregation: Take housing segregation. One cannot overstate the importance of housing in its relationship to other basic human needs. While Black landownership grew after the Civil War, discriminatory and deceptive practices often resulted in the massive land loss that continues today. Upon arrival in the North, many Blacks found that racial segregation severely limited their residential options. In 1933, the federal government established the Home Owners' Loan Corporation (HOLC) as part of the recovery effort from the Great Depression. Determinations of mortgage-worthiness were based on HOLC's maps of over 200 U.S. cities. Racial demographics were key to the assessment, and HOLC staff literally drew red lines – hence "redlining" – around communities with large Black populations, designating them as forbidden investment areas whose residents would not receive HOLC loans.

Redlining made mortgages less accessible, fostering predatory terms for would-be Black homebuyers and reducing the number of Black homeowners. Homeownership is a primary means of transferring generational wealth, yet was largely unavailable to Blacks and other people of color.

Although government-sanctioned discrimination has been outlawed, the impact continues. Residential segregation formed a basis for broad social disinvestment, including in neighborhood infrastructure, services, and employment. Thus, the structural legal and policy determinations of housing segregation extend to access to public services and environmental factors. Prof. Jessica Trounstine points out these effects in her book, Segregation By Design: Local Politics and Inequality in American Cities.

With this understanding of how structural racism has perpetuated the inequities experienced by people of color, the Task Force set about its work. We conducted three more Public Forums to receive information from various subject matter experts about how racism impacted social equity and remedies available through the law in the six areas that were the focus of our subcommittees; the six subcommittees conducted more specific research on their respective issues and spoke to various subject matter experts; and, finally, the Task Force reviewed prior Association committee and Task Force reports on related topics.

After this examination, the Task Force made the difficult decision to limit the recommendations to those that the Association and its members could take action on. Though there were areas not covered, the Task Force and this report, as envisioned by Immediate Past President Brown, identified the most critical "intransigent regulations, laws, and structures that are collectively holding us back as a society from achieving true equality." The recommendations illustrate the intersectionality of structural racism across various issues the Task Force examined.

In Brief . . . Task Force Recommendations

1. Gathering and Using Data to Track and Root Out Bias

The Task Force recommends that the Association advocate in a variety of settings for rules that require timely and accurate collection, and public reporting, of data on racially disparate outcomes in certain Criminal Justice, Education, and Health areas. This data will be used to determine the ongoing impact of structural racism in these areas, and to form the basis for efforts to eliminate or reduce the racial disparities.

2. Education for Licensed Professionals and Provider Facilities to Minimize Bias

The Task Force recommends that the Association support rules requiring training on structural racism, bias, and equity for providers working in a number of different areas, including those working for healthcare providers and facilities, licensed appraisers and lenders, and educators and other teaching professionals, so that they are prepared to be responsive to cultural differences in order to eliminate barriers to equitable services for all. Educators should also receive coursework on trauma and its impact on child development, diversity, equity and inclusion, special education, and trauma-informed responses.

3. Establishment of a Commission to Study Remedies to Minimize the Wealth Gap

The Task Force recommends that the Association support creation of a Wealth Gap Commission to study the wealth gap between whites and people of color, and to propose policies that would significantly reduce the disparities. This would include examining the feasibility of economic supports such as restitution, reparations (similar to those previously paid to Native Americans or Japanese Americans) or other legal remedies. This wealth gap is the result of decades of segregation, and policies and processes including, but not limited to: redlined communities; health deserts; polluted neighborhoods where residents cannot safely drink the water, nor breathe the air; disproportionate educational opportunities; and over-policing communities of color. All of these factors have limited essential opportunities to these communities. The Commission should also consider whether proposed remedies will have the desired effect of reducing the racially disproportionate wealth gap beyond the current generation.

4. Jury procedures, to guarantee the constitutional principle that one will be judged by a jury of their peers

The Task Force recommends that the Association support changes in the law and rules for jury service and selection that would: increase the number of people of color available for jury selection; and reduce the potential for implicit or explicit bias in the selection process.

5. Increase access to quality childcare for all children

The Task Force recommends that the Association support passage of the Universal Child Care bill which would amend the state finance law to establish funds to provide for the establishment and funding of universal childcare and provide competitive salaries to childcare workers as "educators."

6. Access to Capital for Minority-Owned Businesses

The Task Force recommends that the Association advocates for an increased part of the 2023 state budget be earmarked for underserved communities in New York for entrepreneurs and small businesses. Specifically, the American Recovery Plan ("ARP") reauthorized and expanded the State Small Business Credit Initiative ("SSBCI"). The newly created Office of Financial Inclusion and Empowerment can and should spearhead the use of these funds for traditionally underrepresented communities and NYSBA should lobby that it do so.

7. Support Measures to Reduce or Eliminate the Racial Disproportionality in School Discipline that Contributes to Disparities in Educational Outcomes.

The Task Force recommends that the Association support legislative and regulatory action to address disproportionality in public education, thereby making sustainable and lasting improvements to the outcomes for all children in the New York State public schools. The Legislature should amend the Education Law to adopt research-based reforms such as those proposed in the Solutions Not Suspensions bill previously before the legislature to address disproportionality in the discipline of students within New York. Disproportionality in academic outcomes for students can be reduced through early screening and intervention. The Education Department should expand the current developmental screening to require that all children be screened (but no more than once every two years): (1) upon entering the district or universal preschool or pre-K program as defined by 8 NYCRR § 100.3 regardless of the age at date of entrance; (2) if the student is performing below grade level in any academic or social emotional areas for more than two reporting periods and (3) upon teacher or administrator recommendation.

8. Establish an Independent Commission to Address Equitable Educational Funding

All children in New York State are constitutionally entitled to a sound basic education. The Court of Appeals has held that the New York Constitution requires the state to offer all children the opportunity for a "sound basic education" defined as a meaningful high school education that prepares students for competitive employment and civic participation. The Task Force recommends that the Association support the introduction of legislation that would establish an independent commission reporting on a recurring five-year basis to the Governor and the Legislature concerning the cost of educational funding necessary to fulfill the state's constitutional obligations on a per district basis.

9. Government Accountability on Environmental Justice Issues

The Task Force recommends that the Association support state actions to hold government agencies accountable for their actions or inactions through judicial review, executive and legislative scrutiny, and public oversight.

10. Lead Safe Drinking Water

The Task Force recommends that the Association support requiring the Department of Health (DOH) to require property owners of multifamily apartment buildings (specifically structures with four or more housing units that are not owner-occupied) to annually sample drinking water in their buildings for lead levels and to take preventive measures when the tests show lead levels above fifty percent of the federal threshold.

11. Make Changes to Property Appraisal Processes to Promote Equity

The Task Force recommends that the Association advocate that the Department of State implement structural changes in appraiser recruitment training and licensing, and the appraisal model, in an effort to increase diversity in the appraisal profession and to eliminate devaluing of property based on the racial composition of the neighborhood in which it is located.

12. Further Recommendations

The Task Force recommends that the appropriate Association sections or committees further consider these solutions for future action by the Association.

II. NEW YORK HISTORY OF RACISM, SOCIAL INEQUITY AND THE LAW

The recommendations of the Task Force address the social inequity with its roots at the inception of New York as a colony under the Dutch Republic. This social inequity intensified when the colony became a part of the British Empire. New York, as a pivotal port city, had one foot in the South and one in the North. New York was at the center of prevailing perceptions about non-whites, especially Africans, who came to the state's shores as slaves. Its commercial interest pulled it toward supporting Southern perceptions, and consequently treatment, of non-white New Yorkers. Yet, its cosmopolitan mix of people from various parts of the world pulled it also toward seeing the inhumanity of enslaving people. The tension between these two views, in many ways, makes New York's legacy of exclusion and structural racism a complicated one.

Slavery in New York (1626–1827)

New Netherland was the first Dutch colony in North America. This colony extended from Albany, New York, in the north to Delaware in the south and encompassed parts of what are now the states of New York, New Jersey, Pennsylvania, Maryland, Connecticut, and Delaware. The earliest

records of Africans being used as unpaid laborers in New York State appear in 1626 when New York City was known as New Amsterdam under the Dutch. The labor of these Africans was owned by the Dutch West Indies Company. "The company imported slaves to New Netherland to clear the forests, lay roads, build houses and public buildings, and grow food. It was company-owned slave labor that laid the foundations of modern New York, built its fortifications, and made agriculture flourish in the colony so that later white immigrants had an incentive to turn from fur trapping to farming."[2]

"New Netherland's enslaved population often lived, worked, and worshipped beside free white settlers," explained the New Netherland Institute's article entitled, "Slavery in New Netherland, "Unlike their eighteenth-century counterparts, some of these enslaved people earned wages, owned property, married and baptized their children in the Dutch Reformed Church, obtained conditional freedom, and received farmland in Manhattan."[3] After they had completed a certain number of years of service, the Company emancipated them and they were able to be paid for their labor to support themselves and their families.[4] The Dutch allowed slaves to be educated together with whites.[5]

When the British gained control of North America, they imposed a more brutal and insidious system creating a permanent class of unpaid, forced laborers – chattel slavery. Africans involuntarily brought to North America and their children were all consigned to this class of unpaid, forced laborers in perpetuity, and considered the property of their owner.

In 1664, New Amsterdam became New York City. It also became one of the main port cities where Africans, like cotton, livestock, sugar, and other goods, were sold on the market as unpaid laborers – slaves – on Wall Street starting in 1711.[6] The British enacted slave codes in New York City "aimed at determining social and environmental status for Blacks" to ensure they were in an "inferior position."[7] Though enacted in the City, they were enforced throughout the state.[8]

Colonial slave owners lived in fear of their slaves: "there was a high level of paranoia among whites that this minority of people would rise up and any minute to rebel against the unjust

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[2] Slavery in the North – Slavery in New York, http://slavenorth.com/newyork.htm (2003).
[3] New Netherland Institute, *Slavery in New Netherland*, https://www.newnetherlandinstitute.org/history-and-heritage/digital-exhibitions/slavery-exhibit/.
[4] John Jay College of Criminal Justice, New York Slavery Records Index, https://nyslavery.commons.gc.cuny.edu/search-for-slaves/.
[5] Carlton Mabee, Black Education in New York State: From Colonial to Modern Times, 12 (Syracuse University Press, 1979).
[6] Sylviane A. Diouf, *New York City's Slave Market*, New York Public Library, https://www.nypl.org/blog/2015/06/29/slave-market, June 29, 2015.
[7] Pitts Mosley, Marie Oleatha, A history of Black leaders in nursing : the influence of four Black community health nurses on the establishment, growth, and practice of public health nursing in New York City, 1900-1930, 16–17.
[8] *Id.* at 17.

treatment they received in their daily lives."[9] The slave codes criminalized actions that would not have been criminalized if the person were white. An example is below issued by the Common Council in 1683:

> "That noe Negro or Inidan Slaves, Above the Number of four, doe Assemble or meet together On the Lords Day or att Any Other tyme any Place, from their Masters Service within [the City] An the Libertyes thereof, And that noe such Slave doe goe Armed att Any tymes with gunns, Swords, Clubs, Staves Or Any Other kind of weapon wit Soever under the Penalty of being whipped att the Publique whipping poste Tenn Lashes, unless the master or Owner of Such Slave will Pay Six Shillings to Excuse the Same."[10]

Blacks resisted being enslaved. There were slave rebellions and after each one, the restrictions on the behavior of slaves was further constrained. Various cities in New York, and the state, enacted slave codes from 1680 – 1788.[11] These codes "equalled the severity of the codes in operation below the Potomac, even though the patrol system of the South never existed in New York, nor was there ever any prohibition on the teaching of slaves to read and write."[12] In addition to the slave codes, Black slaves were also tried under criminal laws such as larceny, burglary (a felony when committed by a slave or free Black New Yorker), arson, and murder, for the which the penalty was more severe than for white people including "whipping, branding, hanging, transportation [sending slaves out of New York State] and jail."[13] The severity of the punishments and the public nature of them were to deter other Black New Yorkers from committing the crime.[14] In addition, crimes committed by Blacks were prosecuted, though crimes committed by whites against Blacks rarely were.[15]

Slaves were held in all parts of the state as evidenced by the records of slave ownership by members of New York Senate in the 1790 and 1800:[16]

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[9] Natalie R. Weathers, "The African American Burial Ground of 1712," Position Paper for the Manhattan Borough President's Office Ruth Messinger, May 22, 1992, at 13.
[10] *Id*.
[11] Edwin Olson, *The Slave Code in Colonial New York*, The J. of Negro History, Apr. 1944, Vol. 29, No. 2, 147–165, https://www.jstor.org/stable/2715308, at 147–154. For example, permits for slaves to leave the home of the master was required in Long Island, Albany, and Schenectady; see also generally
Carl Nordstrom, "The New York Slave Code," Afro-Americans in New York Life and History (1977–1989) 4.1 (1980): 7. ProQuest. Web. 30 Oct. 2022,
https://www.proquest.com/docview/219940248?accountid=35635&cid=&forcedol=true.
[12] *Id*. at 148.
[13] *Id*. at 156–163.
[14] *Id*. at 162.
[15] Leslie M Harris, In the Shadow of Slavery: African Americans In New York City, 1626-1863, 105 (E-book, Chicago: The Univ. of Chicago Press, 2003), https://hdl-handle-net.i.ezproxy.nypl.org/2027/heb06703.0001.001.
[16] John Jay College of Criminal Justice, New York Slavery Records Index, https://nyslavery.commons.gc.cuny.edu/search-for-slaves/.

Year of Record	Owner Last Name	Owner First Name	County or Borough	Locality	Number of Slaves
1790	Cantine	John	Ulster	Marbletown	7.00
1790	Carpenter	James	Orange	Goshen	3.00
1790	Clinton	James	Ulster	New Windsor	13.00
1790	Duane	James	New York	New York City North Ward	1.00
1790	Hathorn	John	Orange	Warwick	3.00
1790	Livingston, Esq	Philip	Westchester	Greensburgh	6.00
1790	Micheau	Paul	Richmond	Westfield	9.00
1790	Morris Esq	Lewis	Westchester	Morrisania	1.00
1790	Savage	Edward	Washington	Salem	1.00
1790	Schuyler	Philip	Albany	Albany Ward 1	13.00
1790	Swartwout	Jacobus	Ulster	Mamakating	4.00
1790	Townsend	Samuel	Queens	North Hempstead	1.00
1790	Van Ness	Peter	Columbia	Kinderhook	10.00
1790	Vanderbilt	John	Queens	Flushing	3.00
1790	Williams	John	Washington	Salem	2.00
1790	Yates	Abraham	Montgomery	Mohawk	3.00

Year of Record	Owner Last Name	Owner First Name	County or Borough	Locality	Number of Slaves
1800	Bloom	Isaac	Dutchess	Clinton	1.00
1800	Cantine	Peter	Ulster	Rochester	5.00
1800	Clarke	Ebenezer	Washington	Argyle	2.00
1800	Clinton	Dewitt	Queens	New Town	1.00
1800	Denning	William	Rockland	Clarks	2.00
1800	Gansevert Jr	Leonard	Rensselaer	Greenbush	7.00
1800	Gorden	James	Saratoga	Ballston	5.00
1800	Graham	James	Ulster	Shawangunk	1.00
1800	Hatfield	Richard	Westchester	White Plains	7.00
1800	Hogeboom	John	Columbia	Claverack	3.00
1800	Hunting	William	Suffolk	East Hampton	1.00

1800	Lush	Stephen	Albany	Albany Ward 3	4.00
1800	Morris	Thomas	Ontario	Canandaigua	1.00
1800	Purdy	Ebenezer	Westchester	North Salem	1.00
1800	Russell	Ebenezer	Washington	Salem	2.00
1800	Sanders	John	Albany	Schenectady Ward 4	8.00
1800	Schenck	John	Kings	Bushwick	4.00
1800	Spencer	Ambrose	Columbia	Hudson	3.00
1800	Suffern	John	Rockland	Clarks	4.00
1800	Sutherland	Solomon	Dutchess	Pawling	7.00
1800	Ten Eyck	Anthony	Rensselaer	Schodack	4.00
1800	Vail	Moses	Dutchess	Beekman	1.00
1800	Van Ness	David	Dutchess	Rhinebeck	6.00

Slaves worked on farms and as domestics throughout the state. Between 1770 and 1790, 12% of the state's population consisted of slaves (with the largest concentration in New York City, Long Island and estates along the Hudson River), making New York the largest slave-owning state in the North.[17] As further explained below:

> "The two biggest slave markets in the country before the American Revolution were in New York City and Albany," Dr. A.J. Williams-Myers, a retired professor of Black Studies at SUNY New Paltz, says. By 1790, the first federal census counted more than 21,000 enslaved New Yorkers, nearly as many as documented in Georgia. "New York was not a society *with* slaves, it was a *slave society*, dependent on enslaved Africans," he says.[18]

While New York State was the seat of proslavery business owners who capitalized on the slave trade, it also served as headquarters for the leading antislavery association: the New York Manumission Society. Created in 1785, the Society's goal was to end slavery and protect New York Blacks – slave or freed – from being kidnapped to slavery in the South.[19] The Society also opened the earliest school to educate Blacks – the African Free School – in New York City in 1787.[20] The school provided basic education because "they knew that many of their pupils would attend school only in the lower grades and would drop out to become domestics, laborers, waiters."[21] Until 1810, very few slaves were educated – if they were, it was primarily through churches or similar charitable organizations.[22] In 1810, the New York State Legislature passed a

[17] Slavery In The Middle States (NJ, NY, PA), Encyclopedia.com.
[18] David Levine, *African American History: A Past Rooted in the Hudson Valley*, Hudson Valley Magazine (Feb. 16, 2022), https://hvmag.com/life-style/history/african-american-past-hudson-valley/.
[19] New York Historical Society, Race and Antebellum New York City – The New York Manumission Society, https://www.nyhistory.org/web/africanfreeschool/history/manumission-society.html.
[20] Mabee, *supra* note 5, at 19–21.
[21] *Id.* at 21.
[22] *Id.* at 14–15.

law requiring slave master to "have their slave children taught to read the scriptures" in preparation for emancipation.[23]

Health care for Black New Yorkers, like education, was also minimal. Slaves had high mortality rates because they were "ill fed . . . The food . . . Was the least expensive food that the slave owner could find, with no consideration for nutritional value, . . . [living in] poor housing and [had] physically demanding working conditions."[24] Scientific opinions at the time supported white superiority and Black biologic and intellectual inferiority.[25] This scientific "fact" impacted the type of medical care Blacks received. As explained in the Journal of the National Medical Association:

> On the overt level . . . there were slave ship surgeons and a slave health subsystem. These circumstances were tempered by the fact enslaved Africans only received medical care when it was clearly profitable (from their owner's perspective) to render it, and were often admitted as patients to the often dangerous almshouses, pesthouses, medical school and poorhouse hospital facilities which were provided for slaves and the "unworthy" poor.
>
> Such institutions were the dregs of the health system of that period. In addition to these adverse circumstances, there were no requirements or standards for providing health care or living standards for the slaves – which helps explain their poor health status and outcomes for blacks during that period. Being outside the mainstream or slave health sub-system, the few free blacks fared worse than the enslaved Africans health-wise. Therefore, based on the documentary evidence available, overall black health status was the poorest of any group in the North American English colonies during the Colonial and Republican eras and was always based on the exigencies of the slave system. (internal citations omitted).[26]

The Manumission Society ultimately was successful in achieving its goal of ending slavery in New York, but abolition was gradual in compromise to those who owned slaves (as shown in the charts above), through two legislative acts in 1799 and 1817 which ended slavery in 1827. In 1821, New York held a Constitutional Convention where the delegation eliminated the property requirement to become an eligible voter except for Black men, who were still required to own property with a value of $250 (in today's dollars, approximately $6,300). A central argument in the debates about imposing the property requirement was about Black New Yorkers' intellect and morality pointing

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[23] *Id*. at 19.
[24] Pitts, *supra* note 7, at 17.
[25] W. Michael Byrd, MD, MPH and Linda A. Clayton, MD, MPH, *Race, Medicine, And Health Care In The United States: A Historical Survey*, J. of the Nat'l Med. Assoc., Vol. 93, No. 3 (Suppl.), March 2001, 11S–34S, 18S, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2593958/pdf/jnma00341-0013.pdf.
[26] *Id*.

to "their alleged immorality, lack of work ethic and lack of intelligence" for imposing the requiring.[27] Concern was raised about Black New Yorkers criminal propensity:

> "[l]ook to your jails and penitentiaries? By the very race, whom it is now proposed to cloth with power of deciding your political rights. . . "
>
> "Survey your prisons – your alms-houses-your bridewells and your penitentiaries, and what a darkening host meets your eye! More than one-third of the convicts and felons which those walls enclose, are of you sable population."[28]

Very few Black men were able to vote with this requirement. Across the state there were freedman communities where Black men owned property – Seneca Village in Manhattan, Weeksville in Brooklyn, Sandy Ground in Staten Island, Newtown and the Green in Queens, Centerville AME Church in the Bronx, Skunk Hollow near the Palisades, Spinney Hill and Roslyn in Nassau County, Sag Harbor Hills in Suffolk County, the Hills in Westchester, Guinea Town in the Hudson Valley and Timbuctoo, Negro Brook and Blackville in the North Country.[29] Freedman settlements also existed in Rockland County (Skunk Hollow, near the New Jersey border), Westchester County (The Hills in Harrison and another community near Bedford), Dutchess County (near Hyde Park, Beekman and Millbrook), and Ulster County (Eagles Nest, west of Hurley).[30] These communities numbered from several hundred to at most 3,000 people. In addition, job opportunities were limited for Black men. Most were in low-level jobs. Eric Foner in his book Gateway to Freedom explains:

> Black men and women found themselves confined to the lowest rungs of the economic ladder, working as domestic servants and unskilled laborers. Ironically, many of the occupations to which blacks were restricted—mariners, dock workers, cooks and waiters at hotels, servants in the homes of wealthy merchants—positioned them to assist fugitive slaves who arrived hidden on ships, or slaves who accompanied their owners on visits to New York and wished to claim their freedom.
>
> Only a tiny number of black New Yorkers were able to achieve middle-class or professional status or launch independent businesses. These, in general, were the men who founded the educational and benevolent societies.[31]

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[27] Harris, *supra* note 15, at 118.
[28] Gellman, David N, and David Quigley, Jim Crow New York: A Documentary History of Race and Citizenship, 1777–1877, 125, 137 (E-book, New York: New York University Press, 2004), https://hdl-handle-net.i.ezproxy.nypl.org/2027/heb90019.0001.001.
[29] Noah Sheidlower, *13 Free Black Communities in and Around New York State*, Untapped Cities, Feb. 2, 2022, https://untappedcities.com/2022/02/22/free-black-communities-new-york-state/2.
[30] David Levine, *African American History: A Past Rooted in the Hudson Valley*, Hudson Valley Mag, Feb. 16, 2022, https://hvmag.com/life-style/history/african-american-past-hudson-valley/.
[31] Eric Foner, Gateway to Freedom: The Hidden History of the Underground Railroad, 139–40 (2015).

"The property requirement effectively disenfranchised nearly all African American men in the state."[32]

At the same Convention in 1821, an amendment was made to the Constitution to stating: "[l]aws may be passed, excluding from the right of suffrage, persons who have been, or may be, convicted of infamous crimes."[33]

As Black New Yorkers transitioned from being slaves to freed people and those freed living in a state that no longer had slavery, their lives would continue to be difficult. Alexis de Tocqueville, in Democracy in America, explains their plight using New York at the example:

> Freed Negroes and those born after the abolition of slavery do not leave the North . . . they find themselves in the same position as the natives: they remain half civilized and deprived of rights amid a population that is infinitely superior to them in wealth and enlightenment; they are exposed to the tyranny of laws and the intolerance of mores. In some respects they are more unfortunate than the Indians, having memories of slavery against them and not have a single spot of land to call their own; many die in misery; the rest crowd into towns, where they perform the roughest work, leading to precarious and wretched existence."[34]

"Under the Color of Law:" Jim Crow in the North (1827–1937)

"Jim Crow" was a character in minstrel shows that were popular in the 1820s. "These performances, especially popular with New York City's white, often immigrant working class, played black characters for laughs, as well as for melodramatic tears . . . New York thus helped launch into the mainstream of American culture a popular form of entertainment and long-living racial stereotypes, including the unsophisticated black country bumpkin Jim Crow. The term later took on a second life, ultimately migrating southward to describe racist laws, rather than inspiring racially derisive laughter."[35]

The North began the separation of white people from non-whites that ultimately became "Jim Crow." "The decades before the Civil War witnessed a gradually deepening separation of the races in New York, particularly in the state's cities," as explained in *Jim Crow New York: a Documentary History of Race and Citizenship, 1777-1877*, "In the middle of the nineteenth

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[32] Historic Geneva, *The Ballot Box in New York State*, Oct. 16, 2020, https://historicgeneva.org/organizations/voting-history-in-new-york-state/.

[33] Erika Wood,Liz Budnitz, *Jim Crow in New York*, Brennan Ctr. for Justice at N.Y. Univ. School of Law (2009), https://www.brennancenter.org/our-work/research-reports/jim-crow-new-york, at 8.

[34] Alexis De Tocqueville, Democracy in America, 350–51 (Mayer JP, ed. Lawrence G, trans. New York: Harper Perennial; 1969). In a footnote to this section on page 351, De Tocqueville comments on the health of Blacks as compared to whites: "There is a great difference between white and black mortality rates in the state where slavery has been abolished: from 1820 to 1831 only 1 white in 41 died, whereas the figure for blacks was 2 in 20. The mortality rate is not nearly so high among Negro slaves."

[35] David N. Gellman, David Quigley, Jim Crow New York: A Documentary History of Race and Citizenship, 1777–1877, 3–4 (New York University Press, 2004), https://hdl-handle-net.i.ezproxy.nypl.org/2027/heb90019.0001.001.

century, African American New Yorkers faced employment discrimination and intensifying residential segregation. To a considerable degree, this process began in the public realm of the ballot box."[36] At the 1846 New York Constitutional Convention, suffrage for Black New Yorkers was again debated but did not lead to the elimination of the property requirement.[37] A central reason for the requirement remaining was the concerning about Black immorality and, specifically, criminality.[38] As explained in the book "In the Shadow of Slavery; African Americans in New York City, 1626 – 1863:"

> [Delegate] John Kennedy of New York City cited prison statistics to show that blacks' "aggregate moral character" should keep them from voting. New York City's courts convicted blacks of crimes at three and a half times the rate of whites, vastly out of proportion to their percentage in the population. . . The disparity between black and white crime statistics reflected the "distinctions and divisions that nature designed to exist" between blacks and whites.[39]

This Convention also amended the Constitutional provision to state the types of crimes that could disqualify a citizen from voting: "Laws may be passed, excluding from the right of suffrage all persons who have been or may be convicted of *bribery, larceny or of any infamous crime*." (emphasis added to amended section).[40]

Being denied the ability to determine their fate via voting, New York Blacks had challenging lives:

> Segregation and discrimination became more imbedded. Black New Yorkers found themselves living in a city that continued to bar them from most skilled jobs, segregated them in poor neighborhoods, and forbade them entry to many public places.
>
> Denied work as longshoremen, street cleaners, baggage handlers, cement carriers, and garment workers, African Americans fought back by taking jobs when unions went on strike. They also brought numerous lawsuits against hotels, restaurants, and theaters that denied them service.[41]

Education was also segregated during this period. Though New York State had laws allowing Blacks to be educated, the schools throughout the state were typically separate schools from

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[36] *Id.* at 201..
[37] Harris, *supra* note 15, at 268.
[38] *Id*.
[39] *Id*.
[40] Wood, *supra* note 33, at 10. The paper states that larceny was likely added because "half of those imprisoned in New York City jails in 1830 were convicted of larceny" and "the large proportion of blacks incarcerated in New York City jail."
[41] N.Y. Pub. Library Schomburg Ctr. For Resarch in Black Culture, *Black New Yorkers*, https://blacknewyorkers-nypl.org.

whites.[42] Although now education was provided not only through religious organizations but through charitable and benevolent societies throughout the state,[43] Blacks were proactively throughout the state setting up their own schools, including in New York, Brooklyn, Albany, Buffalo (Lockport), Troy and Rochester.[44] Overall, few Blacks were educated and those that were received primary education (funded by donations from Blacks and whites and limited public funding) – secondary education was not considered necessary and could not obtain sufficient funding.[45] In 1864, state law required funding for Black schools be "supported in the same manner and to the same extent as the school or schools supported therein for white children . . . and . . . facilities for instructions equal to those furnished to the white schools."[46]

Blacks also challenged these state actions in the courts to exercise the full extent of their rights as citizens. In 1854, Elizabeth Jennings was removed from New York City carriage run by the Third Avenue Railway Company upon insisting on her right to ride the carriage. She sued the Company in 1855.[47] Her lawyer, Chester A. Arthur, successfully arguing that the recently enacted Revised Statutes to common carriers allowing "colored persons, if sober, well behaved and free from disease, had the right to ride the streetcars" applied to this matter.[48] Following this success, Elizabeth's father proceeded to sue the other street car companies until all New York City street and rail cars were desegregated by 1861.[49]

The impending Civil War showed the tension between New York's economic interest in slavery and its abolitionist position. In the November 1860 Presidential Election, Lincoln won New York by 7.42%.[50] South Carolina shortly thereafter seceded from the Union on December 20, 1860. A couple weeks later, on January 7, 1861, a few weeks after South Carolina seceded from the Union, the Mayor of New York City Fernando Wood, a Democrat, suggested New York City follow as well stating:

> With our aggrieved brethren of the Slave States, we have friendly relations and a common sympathy. . . While other portions of our State have unfortunately been imbued with the fanatical spirit which actuates a portion of the people of New England, the city of New

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[42] Mabee, *supra* note 5, at 23–34.
[43] *Id*.
[44] *Id*. at 49–68.
[45] *Id*. at 55.
[46] *Id*. at 81–82.
[47] Historical Society of the New York Courts, *Jennings v. Third Avenue Railroad Co., 1854*, https://history.nycourts.gov/case/jennings-third-ave/.
[48] *Id*.
[49] *Id*.
[50] *1860 United States presidential election in New York*, Wikipedia, https://en.wikipedia.org/wiki/1860_United_States_presidential_election_in_New_York. During the Civil War in 1864, Lincoln won by a smaller margin: .92%. See *1864 United States presidential election in New York*, Wikipedia, https://en.wikipedia.org/wiki/1864_United_States_presidential_election_in_New_York.

> York has unfalteringly preserved the integrity of its principles of adherence to the compromises of the Constitution and the equal rights of the people of all the States.[51]
>
> "The profits, luxuries, the necessities—nay, even the physical existence [of New York] depend upon . . . continuance of slave labor and the prosperity of the slave master!"[52]

The mayoral election in 1862 returned power to the Republicans who were supportive of the Civil War effort.

In 1863, Lincoln realized that more troops would be needed to continue with the war effort. Congress passed the Conscription Law, on July 13, the day men were being chosen to fight in the war, white laborers started a riot. These laborers were concerned that the newly freed slaves would come to New York to take their jobs; they also were frustrated that wealthy white men could buy their way out of the draft.[53] "The rioters' targets initially included only military and governmental buildings, symbols of the unfairness of the draft. Mobs attacked only those individuals who interfered with their actions. But by afternoon of the first day, some of the rioters had turned to attacks on black people, and on things symbolic of black political, economic, and social power."[54]

After the end of the war, Congress passed the 13th, 14th and 15th Amendments to officially end slavery, make Blacks citizens and enable Black men to enjoy all rights of citizenship including the right to vote. Though New York had given Black men the right to vote in 1827, the property requirement remained. On April 14, 1869, New York ratified the 15th Amendment[55] along party lines with Republicans (the party of Lincoln) controlling the Senate. In 1870, control of the Senate changed to the Democrats who were sympathetic to the recently defeated South and also wanted to dilute the voting power of the Republicans.[56] Led by State Senator William "Boss" Tweed, the Democrats claimed that allowing Blacks to vote "would introduce ignorance to the ballot box and the suffrage would be cheapened and degraded."[57] Along another party line vote, New York rescinded its ratification.[58] Fortunately, the rescission did not prevent the 15th Amendment from being ratified. The 15th Amendment was ratified by ¾ of the states in 1870.

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[51] Fernando Wood, *Mayor Wood's Recommendation of the Secession of New York City*, https://teachingamericanhistory.org/document/mayor-woods-recommendation-of-the-secession-of-new-york-city/.
[52] Ron Soodalter, *The Day New York Tried to Secede*, Historynet (Oct. 26, 2011), https://www.historynet.com/the-day-new-york-tried-to-secede/.
[53] Leslie M Harris, In the Shadow of Slavery: African Americans In New York City, 1626-1863, 279 (University of Chicago Press, 2003), https://hdl-handle-net.i.ezproxy.nypl.org/2027/heb06703.0001.001.
[54] *Id*. at 280.
[55] https://www.usconstitution.net/constamrat.html#Am15.
[56] Layhmond Robinson, *State is Haunted by an 1870 Ghost*, N.Y. Times, Jan. 28, 1962, 68.
[57] Forty-First Congress, Second Session, Speech made by Mr. Conkling, Chair of the Committee on Revisions on indefinitely postponing considering of New York State rescission of ratification of 15th Amendment, N.Y. Times (Feb. 23, 1870), 5.
[58] Robinson, *supra* note 56, at 68.

The long-awaited recognition of citizenship and the rights that ensued from that recognition did not make life easier for Blacks. New York State passed the Civil Rights Act of 1873, among the first state in the nation to pass such an act. It was the state-level adoption of the 14th Amendment and similar to the federal Civil Rights Act of 1873. Specifically it stated "No citizen of this State shall, by reason of race, color or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility or privilege furnished by innkeepers, by common carriers, whether on land or water, by licensed owners, managers, or lessees of theaters, or other places of amusement, by trustees, commissioners, superintendents, teachers and other officers of common schools and public institutions of learning, and by cemetery associations."[59] This Act would be a key vehicle for New York Blacks to challenge discriminatory behavior when the Supreme Court foreclosed federal redress.

In 1874, New York State also adopted to proposed amendments from the 1872 Constitutional Convention: (1) eliminating the property requirement for Black New Yorkers to vote and (2) changing the word "may" to "shall" enact laws "excluding from the right of suffrage all persons convicted of bribery or of any infamous crime."[60]

In 1879, a Black New Yorker, Nicholas Singleton, sought to see the opera at the Grand Opera House located on West 23rd Street and 8th Avenue. As reported in a November 25, 1879 *New York Times* article:

> On Saturday, he wished to take a friend to the matinee, and at about 10 o'clock in the morning, she went to the Grand Opera house and bought two tickets at his request. She is a bright octoroon, almost white. She accompanied Mr. Davis to the theatre, but when he offered the tickets to the door keeper, that functionary said that the tickets were not good, and that Davis could have the money he paid for them refunded by the box office. He went to the ticket-seller and returned the tickets, but refused to accept the money back, as he began to suspect thar the exclusion was on account of prejudice against his race.[61]

Davis then secured tickets when he asked a child to buy them for him.[62] He returned to the theatre entrance with his friend.[63] She walked passed the door keeper into the theatre, but he was again stopped by the door keeper who refused to take the tickets again "saying they were no good."[64] At this point, Davis refused to leave.[65] "The gate keeper took hold of him and forced him out and

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[59] N.Y. Civil Rights Law § 1 (1873).
[60] Wood, *supra* note at 33, at 13. The paper notes that there is not record in the transcript of the Convention why the word "larceny" was removed." "Infamous crimes" are considered felony crimes.
[61] *The Color Prejudice*, N.Y. Times, Nov. 25, 1870, 8.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*

called the policeman to remove him. When Davis protested the policeman told him the managers did not admit colored people to their theatre, and that he better go away."[66]

Davis sued the theatre under the federal Civil Rights Act of 1875. His case was consolidated with four other cases concerning public accommodations (these five cases were consolidated into The Civil Rights Cases) alleging violations of the Civil Rights Act of 1875, specifically, in pertinent part:

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[67]

Writing for the majority, Associate Justice Joseph P. Bradley, of New York State, in an 8–1[68] decision, held on October 15, 1883 that the Civil Right Act of 1875 was unconstitutional "not being authorized either by the XIIIth or XIVth Amendments of the Constitution" stating in pertinent part:

> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State and presumably subject to redress by those laws until the contrary appears?
>
> After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that, if it is violative of any right of the party, his redress is to be sought under the laws of the State, or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has

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[66] *Id*.

[67] Civil Rights Cases, 109 U.S. 3, 16 (1883) (https://supreme.justia.com/cases/federal/us/109/3/).

[68] The lone dissent was Associate Justice John Marshall Harlan from Kentucky. He wrote a dissent nearly three times the length of the majority opinion. He criticizes the majority's narrow reading of the Amendments, writing ""The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the constitution have been sacrificed by a subtle and ingenious verbal criticism . . . Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law . . . [T]he court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted." *Id*. at 26.

> adopted, or may adopt, for counteracting the effect of State laws or State action prohibited by the Fourteenth Amendment.[69]

The Court, in voiding the Civil Rights Act of 1875 because it neither addressed slavery (under the 13th Amendment) nor state discriminatory action (under the 14th Amendment), allowed private citizens to lawfully discriminate against Blacks and other people of color on the basis of color.

A subsequent October 16, 1883 New York Times editorial states, "the decision is not likely to have any considerable practical effect, for the reason that the act of 1875 has never been enforced . . . There is a good deal of unjust prejudice against negroes, and they should be treated on their merits as individuals precisely as other citizens are treated in like circumstances. But it is doubtful if social privileges can be successfully dealt with by legislation of any kind. At any rate, it is now certain that they are beyond the jurisdiction of the Federal Congress. If anything can be done for their benefit it must be through State legislation . . . This remands the whole matter to the field in which it rightly belongs and in which it can be effectually dealt with."[70]

"By the 1890s the expression 'Jim Crow' was being used to describe laws and customs aimed at segregating African Americans and others. These laws were intended to restrict social contact between whites and other groups and to limit the freedom and opportunity of people of color."[71] The second line of cases – another set of public accommodations cases challenging separate accommodations on railroad and street cars – cemented these separate practices culminating in the *Plessy v. Ferguson* Supreme Court decision issued in May 18, 1896. In affirming the judgment of the lower court finding the Louisiana statute requiring separate train cars for white and colored people constitutional, the majority opinion citing The Civil Rights Cases stated:

> the fourteenth amendment 'does not invest congress with power to legislate upon subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.[72]

The Court further stated, "we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws,

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[69] *Id.* at 25.
[70] *Civil Rights Cases Decided*, N.Y. Times, Oct. 16, 1883, 4.
[71] *White Only: Jim Crow in America*, Smithsonian Nat'l Museum of Am. History, https://americanhistory.si.edu/brown/history/1-segregated/white-only-1.html.
[72] *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 546–47.

within the meaning of the fourteenth amendment."[73] It explained that separation was not violative of the 13th Amendment:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . .[74]

And lastly, the Court explained, citing a New York Court of Appeals case, that the law could change biases based on race:

> The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in People v. Gallagher, 93 N. Y. 438, 448: 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate' . . . If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.[75]

"Separate, but equal" and the belief that Blacks were inferior to whites allowed segregation to occur in education, housing (creating environmental injustice) and health care.

Segregation in Education

Though New York's Civil Rights Act prohibited discrimination in public accommodations, the law "received shifting levels of support and, at times, defiance by New York State courts and public constituencies."[76] Education was specifically covered in the Act. However, it did not supersede local laws allowing for separate schools. As a result, some cities and counties (Albany, Newburgh, Geneva, Schenectady and Troy) integrated schools and many others did not. Kings County is one example. In 1883, when a Black resident sought to enroll her daughter in the closer and better white school, her child was denied admission.[77] The guardians sued and the resulting case was *People, ex. Rel King v. Gallagher*. Though the guardians argued that the separate school violated the Civil Rights Act, the Court ruled against them in 4–2 decision[78]. Holding that it did

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[73] *Id.* at 548.
[74] *Id.* at 551.
[75] *Id.* at 551–552.
[76] David McBride, *Fourteenth Amendment Idealism: The New York State Civil Rights Law, 1873–1918*, 207–233, 208, N.Y. History , April 1990, Vol. 71, No. 2 .
[77] *People ex rel. King, v. Gallagher*, 93 N.Y. 438 (1883).
[78] One justice was absent. The two dissenting justices found that the Civil Rights Act was enacted to eliminate racial distinctions: " 'difference of color of skin, or variety of race, shall, as to accommodations or privileges spoken of in

not violate the New York Civil Rights Act or the 14th Amendment, the Court explained that Kings County's 1850 municipal law allowing separate schools was legal:

> Upon referring to the various statutes on the subject, we find that the regulations referred to are fully authorized by the laws of this State relating to the management and control of its public common schools. Section 1 of title 10 of chapter 555 of the Laws of 1864 specially provides for the establishment of separate schools for the education of the colored race, in all of the cities and villages of the State, wherever the school authorities of such city or village may deem it expedient to do so. The act containing this provision has been, since its enactment, frequently before the legislature for amendment, and the provision in question has apparently been frequently approved by them, and now remains unchanged. The system of authorizing the education of the two races separately has been for many years the settled policy of all departments of the State government, and it is believed obtains very generally in the States of the Union.[79]

Explaining why the 14th Amendment was not violated, the Court stated two reasons. First, the Amendment pertained only to "privileges and immunities" conferred by the federal government and not those conferred by the states. Education is a "privilege" conferred by the states, therefore, "always subject to its discretionary regulation might be granted or refused to any individual or class at the pleasure of the State."[80] Lastly, the Court made a distinction between "social standing or privileges of citizens" and "legal rights" explaining:

> In the nature of things there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control. The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result.[81]

The New York Court of Appeals upheld the segregation of schools in Kings County.

Six years later, in 1897, another lawsuit attempted to overturn *Gallagher*. Queens County also had a municipal law allowing separate schools. A local Black businesswoman, Elizabeth Cisco, sued Queens for maintaining separate schools for Black children under *People v. Gallagher* because *Gallagher* was overturned by *People v. King*. In *King*, the Court held that a skating rink owner in

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the [1873] statute be deemed not to exist.' New York State had a duty to enforce public education that was color-blind, according to the Gallagher dissent, for '[t]he State gathers to its treasury the money of the tax payer without inquiry as to his color'." (internal citations omitted). McBride, *supra* note 76 at 214.

[79] *Id.* at 443.

[80] *Id*. at 446–47.

[81] *Id*. at 448.

Chenango County could not deny entry to three Black men.[82] The Court of Appeals affirmed *Gallagher* and affirmed the lower court decisions upholding Queens County's segregation law, holding that the law allowing separate but equal schools remained in place. It explained that *King* did not overrule *Gallagher*:

> In that case there was a total denial of the complainant's right to attend or to participate in the enjoyment of the entertainment. There no other accommodation or facility was furnished by the defendant. Not so here. In this case the colored children were given the same facilities and accommodations as others.[83]

In response to this ruling, Cisco and other allies worked to have legislation passed to end segregation in schools. In 1900, the Legislature passed and future president, then Governor, Theodore Roosevelt, signed a law changing the education law so that no person shall be excluded from any public school in the state of New York on the account of race or color.¨[84] The law, however, did not repeal segregation in all schools controlled by the state: the repeal applied to schools in cities and incorporated villages, but not in union school districts and schools operated under special act which were primarily schools in rural school districts in upstate New York.[85]

Housing – Both Segregated and Integrated

In New York City, "Until 1860 the race was infrequently segregated, and black and white were neighbors, not only in their homes, but also in business."[86] Blacks were allowed only to hold the lowest-paying jobs, so only the least affordable housing was available to them. From 1840–1860, New York received an influx of European immigrants from Germany, Great Britain, and Ireland. Many of the Irish who arrived in New York during this time were fleeing the Irish Potato Famine – they were poor and seeking opportunities to work. As a result, "the blacks and Irish immigrants shared commonalities in terms of social status and economic standing and were thus forced to compete for the worst housing and lowest paying jobs in the city."[87]In his book How the Other Half Lives, Jacob Riis documents the poor conditions of this housing as well Blacks being forced to pay higher rents than other tenants:

> Nevertheless, he has always had to pay higher rents than even these for the poorest and most stinted rooms. The exceptions I have come across, in which the rents, though high, have seemed more nearly on a level with what was asked for the same number and size of rooms in the average tenement, were in the case of tumbledown rookeries in which no one

[82] *People v. King*, 110 N.Y. 418 (1888).
[83] *People ex rel. Cisco v. School Board*, 161 N.Y. 598, 601 (1900).
[84] Mabee, *supra* note 2, at 242–43.
[85] *Id*. at 243.
[86] Leo H. Hirsch, Jr, *The Free Negro in New York*, J. of Negro History, 415–453, 439, Oct. 1931, Vol. 16, No. 4, https://www.jstor.org/stable/2713871.
[87] Joseph P. Ferrie,Yankeys Now: Immigrants in the Antebellum United States, 1840–1860 (New York: Oxford University Press, 1999).

> else would live, and were always coupled with the condition that the landlord should "make no repairs." It can readily be seen, that his profits were scarcely curtailed by his "humanity." The reason advanced for this systematic robbery is that white people will not live in the same house with colored tenants, or even in a house recently occupied by negroes, and that consequently its selling value is injured. The prejudice undoubtedly exists, but it is not lessened by the house agents, who have set up the maxim "once a colored house, always a colored house. [88]

In his chapter entitled, "The Color Line," Riis concludes that chapter discussing the impact of prejudice on Blacks:

> I have touched briefly upon such facts in the negro's life as may serve to throw light on the social condition of his people in New York. If, when the account is made up between the races, it shall be claimed that he falls short of the result to be expected from twenty-five years of freedom, it may be well to turn to the other side of the ledger and see how much of the blame is borne by the prejudice and greed that have kept him from rising under a burden of responsibility to which he could hardly be equal. And in this view he may be seen to have advanced much farther and faster than before suspected, and to promise, after all, with fair treatment, quite as well as the rest of us, his white-skinned fellow-citizens, had any right to expect.[89]

As described earlier, 13 Black communities were established throughout the state. Less than half of these communities survived to the end of the 19th century. Seneca Village in Manhattan (which also had German and Irish immigrants) was destroyed in 1858 under eminent domain for Central Park to be developed.[90] Weeksville in Brooklyn began to decline in the 1880s with the construction of Eastern Parkway.[91] Newtown in Queens and Centerville AME Church in the Bronx disappeared with little information about their demise.[92] The Green in Queens became industrialized.[93] Guinea Town in the Hudson Valley disappeared after several properties in the area were bought by an Irish immigrant. Timbuctoo in the North Country dissolved after many residents could not sustain themselves on farming.[94]

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[88] Jacob Riis, How the Other Half Lives, 119 (1890), https://blogs.ubc.ca/fafa/files/2020/01/Riis_How-the-Other-Half-Lives.pdf.
[89] *Id*. at 122.
[90] Noah Sheidlower, *13 Free Black Communities in and Around New York State*, Untapped Cities (Feb. 2, 2022), https://untappedcities.com/2022/02/22/free-black-communities-new-york-state/2.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.

Separate and Substandard Health Care

New York's public health system was not developed until the 1800s. Due to various outbreaks of diseases, New York City had early laws on public health primarily focused on quarantining contagions. The New York City Board of Health was created in 1866 and the New York State Department of Health was created in 1880. Health care, however, during this time continued to be minimal for Black New Yorkers:

> The nation's earliest hospitals such as the Philadelphia Almshouse, founded in 1732, and the New York Hospital, founded in 1771, discriminated against and sometimes medically abused black patients. Public hospitals along with jails, almshouses, pesthouses, and the few public clinics where blacks were sometimes admitted, continued their roles as the dregs of the health system throughout the . . . 19th centuries. Though these facilities were provided specifically for the destitute and unworthy poor, African Americans had only sporadic access to them. Working, middle, and upper class whites of the time continued to receive their health care either in their physician's offices, a few private hospitals, or at home. The data suggest the foundations of the American health delivery system were built on a class stratified, racially segregated, and discriminatory basis (internal citations omitted).[95]

Riis explained in How the Other Half Lives the unsanitary conditions most Black New Yorkers were forced to endure due to poor housing: "they are the hot-beds of the epidemics that carry death to rich and poor alike."[96] "Poverty," explained Leslie M. Harris in the book In the Shadow of Slavery, "was detrimental to the health of New York City blacks":

> Black abolitionist and missionary Charles B. Ray said of black life in the 1840s, "Scarcely ever have I known in the absence of an epidemic, so many sick among the colored people, especially the young. . ." John Griscom, a member of the American Colonization Society and former physician to the City Dispensary and New York Hospital, stated in a talk . . . that "there is an immense amount of sickness, physical disability and premature mortality, among the poorer classes." Illnesses hit blacks particularly hard because of their living conditions. The damp, airless cellar residents that blacks had occupied since slavery exacerbated the illness to which all poor people were subject."[97]

The inferiority of Blacks continued to be considered an established medical fact. A small but growing number of Black medical professionals sought to combat this fact, but was unsuccessful, as explained below:

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[95] Byrd, *supra* note 25, at 19S.
[96] Riis, *supra* note 88, at 16.
[97] Leslie M. Harris, In the Shadow of Slavery, 265 (Univ. of Chicago Press, 2003).

> Between 1900 and 1920, black physicians and social scientists sought to understand the factors contributing to the poor health of African Americans. They aggressively repudiated theories that attributed the race's health status to biological or racial inferiority and ardently supported those that emphasized social factors. In 1906, Du Bois published *The Health and Physique of the Negro American* to document the poor health status of African Americans and to analyze the underlying causes. A major objective of the monograph was to refute theories of black racial inferiority postulated by Frederick L. Hoffman, a statistician at Prudential Life Insurance Company. In his influential 1896 treatise, *Race Traits and Tendencies of the American Negro*, Hoffman argued that the excessive mortality rates in African Americans were due "not in the conditions of life, but in race traits and tendencies." He viewed immorality, general intemperance, and congenital poverty as race traits.
>
> Hoffman was not alone in his theory that African Americans were biologically inferior, inherently diseased, and doomed. In 1915, Dr. J. Madison Taylor, a white physician on the faculty of Temple University Medical School, contended that black and white people were totally unlike in racial characteristics and that black people were susceptible to tuberculosis because they were structurally maladapted to live in northern cities. Black physicians vehemently contested such theories and stressed that African American health disparities reflected socioeconomic inequalities, not physiological and biological difference and inferiority. Roman maintained, "All history shows that ignorance, poverty and oppression are enemies of health and longevity." Despite the efforts of black physicians and social scientists, by the beginning of the influenza epidemic [1918], many white physicians and scientists continued to believe in the biological inferiority of African Americans. (internal citations omitted).[98]

By the early 1900 the hospital system was becoming more developed and Black New Yorkers continued to receive inadequate care. The fight to make Harlem Hospital accessible to Black New Yorkers represents the overall fight to obtain access to equal health care:

> Foremost in the minds of many was the public health care available to them through the New York City hospital system. Both working-class blacks who could not afford private care and the small medical-dental elite who viewed the city hospitals as a valuable source of employment were extremely interested in making these institutions responsive to the needs of their community.

[98] Gamble VN. "There wasn't a lot of comforts in those days:" African Americans, public health, and the 1918 influenza epidemic. Public Health Rep. 2010 Apr; 125 Suppl 3 (Suppl 3):114–22. Erratum in: Public Health Rep. 2010 Jul-Aug;125(4):517. PMID: 20568573; PMCID: PMC2862340.

> By 1917, the dual reality of inadequate hospital facilities and restrictive hiring policies had been transformed into an explosive community issue.[99]

The fight would end in 1930 with more Black doctors hired to work at Harlem hospital and a study to examine the provision of care by Harlem Hospital only.[100]

Crime – Data Used to Cement Black Criminality

Hoffman's book also discussed Black criminality. Using data from the 1890 Census from the major cities across the US, including New York, Hoffman "black criminality as a key measure of black inferiority."[101] Khalil Muhammad explains this impact in his book, The condemnation of Blackness: race, crime, and the making of modern urban America:

> In Race Traits Hoffman brilliantly tied black criminality to a repudiation of abolitionists' and neo-abolitionists' claims that with freedom, education, and moral training blacks would gradually achieve equality with whites. He framed black behavior as impervious to civilizing influences by wedding increasing crime trends to the dramatic increase in black schools and churches over the three decades after slavery: "I have given the statistics of the general progress of the race in religion and education for the country at large, and have shown that in church and school the number of attending members or pupils is constantly increasing; but in the statistics of crime and the data of illegitimacy the proof is furnished that neither religion nor education has influenced to an appreciable degree the moral progress of the race. Whatever benefit the individual colored man may have gained from the extension of religious worship and educational processes, the race as a whole has gone backwards rather than forwards."[102]

In August of 1900, there was a race riot in New York City. The riot occurred in the Tenderloin area (the red-light district at the time in what is now parts of Chelsea and Times Square)[103] sparked by the death of an undercover officer[104]. A Black man saw a white man grabbing at his wife.[105] He cut the man with a knife.[106] The white man was an undercover police officer who thought the

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[99] Michael L Goldstein, *Black Power and the Rise of Bureaucratic Autonomy in New York City Politics: The Case of Harlem Hospital, 1917–1931*, Phylon, Vol. 41, No. 2, 1980, 187–201. *JSTOR*, https://doi.org/10.2307/274971, at 191.
[100] *Id*. at 197.
[101] Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America, 65 (Harvard University Press, 2011).
[102] *Id*.
[103] *Tenderloin, Manhattan*, Wikipedia, https://en.wikipedia.org/wiki/Tenderloin,_Manhattan.
[104] Will Mack, *The New York City Race Riot (1900)*, BlackPast, Nov. 22, 2017, https://www.blackpast.org/african-american-history/1900-new-york-city-race-riot-1900/.
[105] *Id*.
[106] *Id*.

woman was a prostitute.[107] The officer subsequently died.[108] The Tenderloin area was a tense neighborhood: there was tension between the Irish and Blacks living there.[109] At the officer's funeral, a white mob attached a killed a Black man.[110] This action ignited the riot.[111] Many Black people were assaulted by the white mob and arrested by the police and severely beaten while in police custody; no white people were arrested for the assaults or the death of the Black man killed by the mob.[112] The Black man who killed the officer was arrested and convicted to a life sentence for the death of the officer.[113] Blacks had urged the City to take action against the police involved in the riot as well as "wide spread accusations of police brutality against black people."[114] No actions were taken.[115]

The Civil Rights Fight in New York (1938–1964)

Toward the end of the Great Depression in the late 1930s, New York made four significant strides in fighting discrimination against Blacks and other people of color:

1. amending the Constitution in 1938 to include the provision, "No person shall, because of race, creed, color, or religion, be subjected to any discrimination in his civil rights by any other person;"[116]
2. amending the Education Law in 1938 to repeal separate school in rural school districts;[117]
3. creating the Temporary Commission on the Condition of the Urban Colored Population ("Temporary Commission") in 1937 which issued two reports the first in 1938 and a second building on the first in 1939;[118] and
4. creating the first law and agency to combat employment discrimination.

The Legislature created the Temporary Commission to address concerns raised "with conditions affecting the colored population in New York State."[119] Specifically raised by cities in the state with large Black populations, "frequent letters and delegations . . . testified to extremely hazardous

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] NY Const Art I § 11 (https://dos.ny.gov/system/files/documents/2022/01/Constitution-January-1-2022.pdf).
[117] NY Const. Art XI generally (https://dos.ny.gov/system/files/documents/2022/01/Constitution-January-1-2022.pdf).
[118] 1937 N.Y. Laws Ch. 858, p. 1847 "An Act creating a temporary commission to examine, report upon and recommend measures to improve the economic, cultural, health and living conditions of the urban colored population of the state."
[119] First Report of the New York State Temporary Commission on the Condition of the Urban Colored Population to the Legislature of the State of New York (1938), 1.

conditions facing Negroes." The first and second report collectively examined the plight and conditions of Blacks living in New York City and its surrounding suburbs (Westchester and Long Island), Albany, Buffalo, Rochester, Syracuse, Binghamton and Poughkeepsie.[120] The Commission's overall observation was "the conditions often seem almost incredible in so advanced a commonwealth as the State of New York."[121]

In two succinct reports, the Temporary Commission examined six areas: employment, housing, education, recreation, delinquency and crime, and places of public accommodations.[122] Over two years, the Temporary Commission examined public and private records, obtained information via questionnaires, conducted interviews and held public hearings throughout.[123] At the outset of the report, framing the scope of its recommendations, the Temporary Commission states:

> As a population of low income, it suffers from conditions affecting low-income groups of all races. On the other hand, the Negro population is to a large degree kept in the low-income class by causes which do not apply with similar force in the case of other races; there are factors which frequently prevent Negroes from attaining a satisfactory economic, cultural or political status regardless of their income level.[124]

The findings of the Temporary Commission show how entrenched discrimination and segregation were in the various spheres of life for Black New Yorkers. Just focusing on employment, housing, education and health care, the findings show how conditions for Black New Yorkers remained very similar to those they faced when slavery ended in New York 100 years earlier.

Employment (Economic Opportunity)

1. "Most of the problems confronting the Negro population arise primarily out of inadequate incomes . . . Analysis of the composition of the Negro labor force of New York State reveals heavy concentrations in the marginal occupations and a corresponding few scattered here and there in the better-paid skilled or white-collar occupations."[125] The statistics reflecting this finding in the report are below:

[120] Second Report of the New York State Temporary Commission on the Condition of the Urban Colored Population to the Legislature of the State of New York (1939), 6.
[121] *Supra* note 119 at 3.
[122] *Supra* note 120at 10.
[123] *Id*. at 27.
[124] *Id*.
[125] *Id*.

TABLE II

Number and Percentage Distribution of Gainful Workers, Ten Years Old and Over by Occupation and by Race, New York State, 1930

OCCUPATIONAL GROUP	TOTAL		NEGRO		OTHER	
	Number	Per cent distribution	Number	Per cent distribution	Number	Per cent distribution
All Occupations	5,523,337	100.0	239,305	100.0	5,284,032	100.0
Agriculture	267,373	4.8	2,258	0.9	265,115	5.0
Forestry and fishing	5,202	0.1	42	.....	5,160	0.1
Extraction of minerals	9,229	0.2	142	0.1	9,087	0.2
Manufacturing and mechanical	1,866,374	33.8	52,421	21.9	1,813,953	34.3
Transportation and communication	507,031	9.2	27,022	11.3	480,009	9.1
Trade	860,123	15.6	12,260	5.1	847,863	16.0
Public service	117,727	2.1	2,671	1.1	115,056	2.2
Professional service	446,071	8.1	8,325	3.5	437,746	8.3
Domestic and personal service	691,047	12.5	125,534	52.5	565,513	10.7
Clerical occupations	753,160	13.6	8,630	3.6	744,530	14.1

Source: Report of Census Bureau, United States Department of Commerce.

2. "When one considers either the Commission's figures for communities outside of New York City or the figures for New York City compiled by the United States Bureau of Labor Statistics, an appallingly low-income level is found to exist within the colored population . . . The Commission was at a loss to understand how Negroes in these and other communities in the up-State region managed to make a living and to survive starvation."[126]
3. "Your Commission's investigations of the causes behind these low-income conditions reveal the operation of deliberate as well as subconscious forces restricting the Negro to certain of the less desirable types of employment and generally barring him from the more desirable fields."[127]
4. "We are of the opinion . . . that there should be, in our statute, more effective provisions than now exist for bringing to light, and correction, any particular case of racial discrimination that may occur. It is indeed shocking to learn that our statutes contain no provision whereby a department of the State government may be compelled . . . to abandon its long-standing practice of excluding Negroes."[128]

Housing

1. "The Negro population . . . has found itself consistently denied the opportunity to secure improved living conditions in better neighborhood, whether or not the needed income is

[126] *Id*. at 38, 41.
[127] *Id.* at 39.
[128] *Id*. at 80.

available . . . evidence . . . has compelled the inescapable believe that throughout the State efforts have been made to shift the Negro population to the deteriorating areas of cities."[129]

2. "Residential segregation is practiced most easily in cases where the group affected is renting rather than a purchasing group for it is manifestly far easier to discover the racial identity of the tenants . . . Since the incomes of Negro families do not permit property buying, save in exceptional cases, their segregation is thus facilitated."[130]
3. "Refusal of property to Negro would-be tenants is also accomplished by restrictive covenants among property owners . . . The legality of covenants . . . has been attached in the courts . . . but decision have been rendered upholding the right of the covenanters."[131]
4. "The United States Bureau of Labor Statistics . . . shows that at all income levels between $500 and $3000 the Negro family in New York City pays higher rents than white families in the corresponding income level."[132]
5. "Conditions are similar in the up-State cities . . . in Buffalo Negro families pay $18 to $21 for four-room houses or apartments similar in condition and neighborhood to those for which Polish and Italian families pay $10 to $12 . . . in Yonkers, a group of houses occupied by whites rented for several years at $35 to $40 a month. When leased to Negroes the rents were immediately raised to $75."[133]
6. In Poughkeepsie, the area where Blacks lived "consisted of scattered blocks of substandard housing . . . usually surrounding some industrial plant . . . outstanding features – dilapidated, unpainted houses, yards filled with rubbish, used car parts and a marked lack of adequate sanitary facilities . . . wholesale food and fruit markets . . . contribute to the many obnoxious odors prevalent in the area."[134]

Education

1. In public elementary and high school "racial discrimination most usually occurs in considerations involving zoning regulations, the physical conditions of school buildings . . . and the types of courses offered."[135]
2. In New York City, the Temporary Commission found that zoning was used at the high school to segregate Blacks into predominantly Black Schools.[136] In addition, these schools were the least maintained and oldest buildings.[137] Lastly these schools offered mainly vocational courses for students.[138]

[129] *Id*. at 73.
[130] *Id*. at 76.
[131] *Id*.
[132] *Id*. at 77.
[133] *Id*. at 78.
[134] *Id*. at 83.
[135] *Id*. at 100.
[136] *Id*. at 100–06.
[137] *Id*.
[138] *Id*.

3. As an example of the condition of New York City elementary schools for Black, the report describes the condition of one of the worst and overcrowded elementary school located in Harlem: "With 101 classes in a school equipped for 59 classes, the short time schedule has been introduced. . . . This means that the children . . . receive one week less of instruction each month. This applies to every class from kindergarten through fifth grade. . . . The building was built in 1899. In the last 38 years . . . only minor repairs have been made and the building is now in a state of disrepair. . . . Since no soap or towels are provided for either teachers or children, the children eat their lunches with dirty hands. . . . It is . . . needless to continue citing such examples . . . these reports show the physical conditions of schools in this area to be poor and greatly inadequate."[139]
4. In Upstate New York, "Negro children have participated more or less equally in the facilities provided for elementary and secondary education."[140] Parents complained that teachers "do not properly advise or encourage the pupils with respect to their continuation beyond the compulsory school ages."[141]
5. "Many counsellors [at public vocational school] are not particularly interested in the Negro's efforts to break down existing occupational barriers, others feel that the effort is largely hopeless . . . They therefore encourage and advise him away from occupational fields in which they presume that Negroes now have difficulties in finding work."[142]

Segregated Health Care

The report does not specifically discuss segregated medical facilities as it impacts the provision of medical care. It focuses on health care through education and discrimination against Black New Yorkers seeking to become medical professionals. The Temporary Commission found that Black New Yorkers were discriminated against in admission to both nursing and medical schools:

1. "Of 33 nurses´ training schools attached to hospitals in up-State New York, 32 do not admit Negroes. The one exception is the Nurses´ Training School of the Buffalo Municipal Hospital, which three years ago admitted on Negro woman "as an experiment of doubtful value."
2. "In New York City the training of Negro nurses is confined to two institutions where there are no white students – a segregated system."
3. "Testifying . . . On the admission of Negro students, the Director of the School of Nursing, Syracuse University Hospital . . . [testified] that students are accepted not only on scholastic qualifications but personal qualifications . . . And it may involve another angle that has not come up previously and it would be so much different from the white applicant."

[139] *Id*. at 105–06.
[140] *Id*. at 106.
[141] *Id*. at 107.
[142] *Id*.

4. "[T]he Superintendent of Nurses, Kings County Hospital, Brooklyn, New York. . . . Expressed in her testimony . . . I think that there are other fields of work in which these people are happier and enjoy, and that they do not care to be nurses. . . . I do not think the average Negro girl does want to make those personal contacts which a nurse must make – she must work very hard, she must serve – a nurse must sometimes get down on her hands and knees."
5. "In early 1938, it was found that in a sample of 58 hospitals outside New York City none accepted Negroes as internships; none included Negroes on the consulting staff."
6. "At Rochester . . . The dean of the school and director of the hospital stated that it was their belief that admission of Negroes to the medical school and nurses´ training school would cause wholesale objection on the part of the white patients in the hospital . . ."
7. "In New York City . . . Interns are permitted only at Harlem, Sea View, and Lincoln Hospitals. Staff positions held by Negro physicians are also limited to hospitals where there is a predominance of Negro patients."

The Temporary Commission concluded that "the principle and intention . . . to accord all constituent populations groups equal opportunity to share the rights and privileges of citizenship have been disregarded by some local government authorities who have been reluctant to remedy unfavorable conditions which make is impossible for Negroes to share equally such rights and privileges of citizenship." It proposed 10 legislative proposals that focused on ways to enforce the Constitution and the Civil Rights law.[143]

In 1939, the same year the Temporary Commission finished its work, Hitler invaded Poland. World War II erupted shortly thereafter. In 1941, Governor Herbert Lehman created the New York State War Council in anticipation of the United States entering the war.[144] As part of this Council, Lehman created the Committee on Discrimination in Employment "for the purpose of encouraging complete utilization in defense work of all individuals without consideration of race, color, creed, or national origin."[145] At the conclusion of the war, in 1944, a Temporary Commission Against Discrimination was created. This Commission recommended and drafted legislation for a new law against discrimination as well as a permanent administrative agency to enforce the law. The Ives-Quinn Act – The Law Against Discrimination and the State Commission against Discrimination created by the law put New York at the forefront of dealing with discrimination in employment.[146]

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[143] *Id*. at 180–90.

[144] *They Also Served: New Yorkers on the Home Front A Guide to Records of the New York State War Council*, New York State Archives, 8 (1994), http://www.archives.nysed.gov/common/archives/files/res_topics_mi_homefront.pdf.

[145] *Id*. at 14.

[146] *Id*. at 15. *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, The Yale Law J., Vol. 56: 837 (1947), 841, https://openyls.law.yale.edu/bitstream/handle/20.500.13051/13412/51_56YaleLJ837_May1947_.pdf. In 1968, the Commission would be renamed to what we know today as the New York State Division of Human Rights, https://dhr.ny.gov/agency-history.

The creation of this Commission was also considered an innovative way of enforcing discrimination laws: rather than relying on the civil and criminal courts (where juries were expected to be biased against the party bringing or the complainant) to enforce the law, an administrative agency was not responsible for that work.[147]

Laws at the federal level were also making it challenging for Black New Yorkers to obtain equality.

Economic Opportunity (Employment)

In 1935, the landmark Social Security Act was passed. Notably, it excluded two occupations: agricultural workers and domestic servants (who were mostly African American or other people of color).[148] Similarly, the National Labor Relations Act, also passed in 1935, to promote unionization and collective bargaining and providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation excluded agricultural workers and domestic servants.[149]

Housing/Environmental Justice

At the advent of the Great Depression, there was an enormous housing shortage in the country and many families were homeless. In 1933, President Roosevelt created the Public Works Administration, one of the New Deal programs, to build public housing for white middle-class and lower middle-class families. Almost as an afterthought, the government also began to build public housing for Black families. However, one of the explicit requirements was that public housing throughout the country had to be segregated by race. As Richard Rothstein, a senior fellow at the Thurgood Marshall Institute of the NAACP Legal Defense Fund and author of the seminal book The Color of Law, pointed out in an interview on National Public Radio (NPR), the federal government's policy segregated neighborhoods that had never known segregation before.[150]

In 1934, the Federal Housing Administration (FHA) was created to facilitate home financing in the wake of the Great Depression.[151] In seeking to develop a method of assessing the value of residential land, the FHA employed Frederick M. Babcock, who in 1924 had authored the manual

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[147] Arnold H. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 Vanderbilt Law Review 965, 969–70 (1965), https://scholarship.law.vanderbilt.edu/vlr/vol18/iss3/6.
[148] *Historical Background and Development of Social Security*, Social Security Admin., https://www.ssa.gov/history/briefhistory3.html.
[149] 29 U.S.C. §§ 151–169, Nat'l Lab. Relations Act, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act.
[150] Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, Nat'l Public Radio, May 3, 2017, https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america.
[151] Marie Justine Fritz, *Federal Housing Administration (FHA)*, Encyclopedia Britannica, Oct. 4, 2016, https://www.britannica.com/topic/Federal-Housing-Administration.

The Appraisal of Real Estate.[152] Babcock instructed appraisers evaluating homes for federally insured mortgages to:

> investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups. If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupation generally leads to instability and reductions in values.[153]

According to Professor Taylor,[154] with whom the Task Force consulted as an expert in historical and contemporary analysis of distressed urban neighborhoods in New York State and the corollaries of race and class issues among people of color, Babcock theorized that:

> neighborhoods had life cycles. The presence of Blacks in a White residential area signaled the onset of rapid decline. Black residents, then, threatened White neighborhood stability by increasing risk, lowering property values, and jeopardizing the home investment. This residential land valuation system tethered race to place and married racism to classism. As the percentage of Whites and social class exclusivity increased in a community, so did housing values and the neighborhood's wealth-producing capacity. In contrast, as the percentage of Blacks and social class inclusivity increases, the community's home values and wealth-producing power declined.[155]

Joining Babcock at the FHA was Homer Hoyt, named the agency's chief land economist, who had authored the economics dissertation, published in 1933, entitled *One Hundred Years of Land Values in Chicago*. Affirming Babcock's belief that race affected land values, Homer had set forth in his dissertation a list of sixteen racial and national groups ranked in accordance with the group's influence on land values. Lacking any empirical evidence, his listing from very positive to detrimental to land values is: English, Germans, Scotch, Irish, Scandinavians, northern Italians, Bohemians, Czechoslovakians, southern Italians, Negroes, and Mexicans.[156]

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[152] Henry-Louis Taylor, Jr. et al., *id*. at 17; Adrienne Brown, *Appraisal Narratives: Reading Race on the Midcentury Block*, Johns Hopkins University Press, American Quarterly, Vol. 70, No. 2 (June 2018, pp. 211–34), p. 215, https://theasa.net/sites/default/files/Appraisal%20Narratives_1.pdf.

[153] Adrienne Brown, *id*.

[154] Professor Henry-Louis Taylor, Jr. is a tenured professor with the Department of Urban and Regional Planning at the University at Buffalo and director of the U.B. Center for Urban Studies. He was a featured speaker at the Task Force's Second Public Forum, held on December 13, 2021, entitled, "The Impact of Structural Racism: Overcoming Barriers to Housing, Economic, and Environmental Justice." Professor Taylor provided historical and contemporary analysis of factors affecting distressed urban neighborhoods, including social isolation and race and class issues among people of color. Thereafter, Professor Taylor met directly with the Housing subcommittee to provide further consultation for our work.

[155] Henry-Louis Taylor, Jr. et al., *id*.

[156] Adrienne Brown, *id*.

Using the Babcock/Homer construct, determinations were made at FHA as to who would receive government-backed mortgages: white people would qualify because of their perceived positive influence on land values; Black people would not because of their perceived negative affect on land values. As white families left public housing, the FHA-financed mortgages allowed for the development of white suburbia. Moreover, FHA required white homeowners to have deeds with covenants prohibiting the sale of the properties to Black people. Over time, maps all over the country would be constructed showing where FHA would grant mortgages. No FHA-backed mortgages would be issued in neighborhoods with a large number of Black citizens.

Evolving prior to and contemporaneously with the discriminatory policies and requirements of the FHA were the so called "residential security maps" of the Home Owners' Loan Corporation (HOLC). In 1932, the Federal Home Loan Bank Board (FHLBB) was created:

> to charter and oversee federal savings and loan associations. An important new agency, operating at the direction of the FHLBB, was the Home Owners' Loan Corporation (HOLC) . . . . [A]n initiative undertaken by the HOLC at the behest of the FHLBB [was]: to introduce a systematic appraisal process that included neighborhood-level characteristics when evaluating residential properties.[157]

In 1938, as part of HOLC's City Survey Program, security maps were created for approximately 239 cities in which residential neighborhoods were assigned a grade, A to D, and a color based on residential desirability.[158] In the resulting maps, the color-coding reflected the racial and ethnic composition of the neighborhoods; areas of red, deemed hazardous for loans, were often composed of the majority of Black residents.[159] This practice, as noted above, came to be known as redlining. Some historians debate how widely used HOLC maps were by other private and public entities; however, it is known that the FHA relied on a similar set of maps that "rated neighborhoods on a color-coded A to D scale and were based on a systematic appraisal process that took demographic characteristics of neighborhoods into account."[160]

At around the same time (1934), the Federal Housing Administration (FHA) was created. The FHA subsidized builders who were creating subdivisions and developments in the suburbs, with the proviso that none of the homes were sold to African Americans. Further, the FHA refused to

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[157] Amy E. Hillier, *Residential Security Maps and Neighborhood Appraisals. The Homeowners' Loan Corporation and the Case of Philadelphia*, Univ. of Pennsylvania, Dep't Papers (City and Regional Planning) (2005), https://repository.upenn.edu/cplan_papers/5.

[158] *Id*.

[159] Daniel Aaronson, Daniel Hartley and Bhashkar Mazumder, *The Effects of the 1930s HOLC "Redlining" Maps*, Federal Reserve Bank of Chicago (working paper 2017, revised 2020), https://www.chicagofed.org/~/media/publications/working-papers/2017/wp2017-12-pdf.pdf.

[160] Daniel Aaronson, *id*.

insure mortgages in or near African American neighborhoods.[161] This practice was laid out explicitly in the Underwriting Manual of the FHA.[162] It was this Underwriting Manual that recommended that highways be erected to separate African American from white neighborhoods.[163] Because of this recommendation, most neighborhoods continue to be racially segregated today.

The story of Levittown, New York is well known. As described above, post-World War II, the federal government through the FHA facilitated the creation of white suburbs. As Richard Rothstein noted in his 2017 interview with NPR: "What the federal government did, the FHA, is guarantee bank loans for construction and development to Levittown on condition that no homes be sold to African-Americans and that every home have a clause in its deed prohibiting resale to African-Americans."[164]

And while the government was creating homes for white Americans in the suburbs, it was also subsidizing the building of public housing throughout the country where it was contemplated that the underprivileged (African Americans and immigrants of color) would live. At least 9,000 of those public housing projects were built near "superfund"[165] sites (polluted locations requiring a long-term response to clean up hazardous material contaminations) because the land was cheap.[166] As a result, many African Americans who grew up or continue to live in the housing projects suffer from chronic health issues, like asthma and lead and arsenic poisoning. Many of these housing projects continue to be inhabited.

During the Civil Rights Movement, the federal government enacted the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act.[167] This Act not only declared that racial discrimination in housing was unlawful, but provided a remedy for redress as this occurred because persons could now be held responsible for such conduct in civil and criminal proceedings.[168] Also, Congress entrusted the U.S. Department of Housing and Urban Development ("HUD"), which had been created just a few years earlier in 1965, with the responsibility of ensuring that the goals of the Fair Housing Act were carried out.[169] In 1974, HUD was later given the authority to make community development block grants ("CDBG") to State and local governments to affirmatively

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[161] Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, Nat'l Pub. Radio (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america.
[162] *Id.*
[163] *Id.*
[164] *'The Color Of Law' Details How U.S. Housing Policies Created Segregation*, Nat'l Pub. Radio (May 17, 2017), https://www.npr.org/2017/05/17/528822128/the-color-of-law-details-how-u-s-housing-policies-created-segregation.
[165] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.
[166] Angela Caputo, Sharon Lerner, *House poor, pollution rich*, APM Reports, Jan. 13, 2021, https://www.apmreports.org/story/2021/01/13/public-housing-near-polluted-superfund-sites.
[167] *See* 42 U.S.C. § 3601.
[168] *See* 42 U.S.C. § 3631.
[169] *See* 42 U.S.C. §§ 3531–3608(a).

further fair housing throughout the United States.[170] The CDBG are federal funds that HUD distributes to municipalities and not-for-profits throughout the United States for different fair housing initiatives.[171] Receipt of funding has always triggered an obligation to affirmatively furthering fair housing. The obligation to affirmatively further fair housing requires recipients of HUD funds to take meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics, which are:

a. Race
b. Color
c. National origin
d. Religion
e. Sex (including sexual orientation and gender identity)
f. Familial status
g. Disability

While *Shelley* found racially restrictive covenants to be unconstitutional and the Fair Housing Act of 1968 prohibited racial discrimination in the financing of housing, the thirty-four years of non-investment in the Black community contributed to the lack of development in the community and to the poor economic outcomes of the inhabitants. Rothstein noted in the 2017 NPR interview that:

> [t]oday, African-American incomes, on average, are about 60 percent of average white incomes. But African-American wealth is about 5 percent of average white wealth. Most middle-class families in this country gain their wealth from equity they have in their homes. So, this enormous difference between a 60 percent income ratio and a 5 percent wealth ratio is almost entirely attributable to federal housing policy implemented through the 20th century. . . . African-American families that were prohibited from buying homes in the suburbs in the 1940s and '50s and even into the '60s by the Federal Housing Administration gained none of the equity appreciation that whites gained.[172]

Education

Efforts to desegregate schools by successive NYS Commissioners of Education after the Supreme Court decision in *Brown v. Board of Education*, were met by widespread resistance and obstruction on the part of localities and elected officials.[173] Such resistance to desegregation in New York City actually spurred one of the largest civil rights demonstrations in US history in 1964 when over 460,000 students joined in a one day school boycott to demand quicker action on desegregation of

[170] *See* 42 U.S.C. § 5303; 24 C.F.R. § 570.3.
[171] See https://www.hud.gov/program_offices/fair_housing_equal_opp/affh.
[172] Terry Gross, *supra* note 150.
[173] Derek K. Black, Axton Crolley, *Legacy of Jim Crow still affects funding for public schools*, The Conversation, Apr. 15, 2022, https://theconversation.com/legacy-of-jim-crow-still-affects-funding-for-public-schools-181030.

NYC schools.[174] Despite the massive show of support, the New York City Board of Education, the state Legislature[175] and even Congress caved to the demands of white parents opposed to the desegregation efforts.[176]

The obstruction to desegregation was not limited to NYC and echoed throughout the state often compelling the parties to resort to litigation. In 1961, supporters of desegregation of the public schools in New Rochelle won the first ever court-ordered school desegregation order in a northern city.[177] In 1963, white families in Malverne were unsuccessful in their four-year effort to stop the first state-ordered school desegregation of public schools, even taking their case to the US Supreme Court.[178] Similar opposition was found in the suburbs surrounding the City of Rochester. Although the Urban-Suburban Interdistrict Transfer Program was started in 1965 to improve racial balance between schools in Rochester and the suburban school district of West Irondequoit, the program has never involved more than a small fraction of students. This severely limited the impact on segregation in Rochester schools and fierce opposition arose when suggestions were made about creating a county-wide school district.[179]

While stating in *Brown vs Board of Education* that racially segregated schools were inherently unequal, in 1974, in the *Milliken v. Bradley* case, the Supreme Court blocked a potential desegregation remedy that would apply across districts, holding that "No single tradition in public education is more deeply rooted than local control over the operation of schools."[180] Yet, it is this local control that has allowed inequity to exist in segregated and underfunded communities and schools.

Even in cities where there were successes in desegregation, the gains were short lived undermined by a lack of political will and white flight from urban centers. Efforts in Yonkers and Buffalo serve as cautionary tales about the limits of court ordered desegregation plans. Despite legal victories in cases brought in both cities, political opposition and white flight muted any gains achieved through

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[174] Yasmeen Khan, *Demand for School Integration Leads to Massive 1964 Boycott – In New York City*, WNYC (Feb. 3, 2016), https://www.wnyc.org/story/school-boycott-1964/.

[175] *See Lee v. Nyquist*, 318 F. Supp. 710, *aff'd*, 402 U.S. 935 (1971). The court found unconstitutional Education Law Section 3201(2) which prohibits "state education officials and appointed school boards from assigning students, or establishing, reorganizing or maintaining school districts, school zones or attendance units for the *purpose of achieving racial equality in attendance*." (emphasis added)

[176] Adam Sanchez, *The Largest Civil Rights Protest You've Never Heard Of: Teaching the 1964 New York City school boycott*, Rethinking Schools (Winter 2019–20), https://rethinkingschools.org/articles/the-largest-civil-rights-protest-you-ve-never-heard-of/.

[177] John Kucsera, *New York State's Extreme School Segregation: Inequality, Inaction and a Damaged Future*, Civil Rights Project (Mar. 2014), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf.

[178] Adam Harris, *The Firsts: The New York Town that Tried to Stop Desegregation*, The Atlantic, Sept. 29, 2020, https://www.theatlantic.com/education/archive/2020/09/firsts-desegregation-new-york-town/616451/.

[179] Kucsera, *supra* note 177.

[180] 418 U.S. 717, 741 (1974).

these litigations. Although initially hailed as a national success, Buffalo public schools are more segregated than ever.[181]

Health Care

Following the release of what is commonly referred to as the Flexner Report in 1910, during de jure segregation, over half of the Black medical schools which existed at the time were closed based on Abraham Flexner's recommendations and due to a lack of funding or will to support the development of programs which met the "rigorous" model of medical education utilized in the report.[182] The closure of these schools resulted in a negative impact on the number of Black physicians and the provision of health care to African-Americans due to existing segregation policies. The American Medical Association acknowledged that for over 100 years, the organization "actively reinforced or passively accepted racial inequalities and the exclusion of African-American physicians."[183] The only federal legislation passed in the 20th Century which included a "separate but equal" clause was legislation related to the national health care infrastructure, the Hospital Survey and Construction Act of 1946, also known as the Hill-Burton Act, which provided government funding which was ultimately matched by three times that amount in private funding.[184]

The Civil Rights movement incorporated legal challenges by Black dentists and physicians arguing that the segregation of the medical facilities built with Hill-Burton funds was unconstitutional based on denial of privileges to Black physicians at those segregated hospitals; suits in which some of which the Department of Justice entered amicus briefs in support of the plaintiffs. The separate but equal provision of Hill-Burton was found to be unconstitutional in a Circuit Court decision, but was unenforceable on a national level, until the passage of the Civil Rights Act of 1965 which ended de jure segregation in the United States through Title VI which ended the segregation of any hospital facility which received federal funding.[185]

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[181] *Id.*; *see also* Mark Byrnes, *Buffalo Was Once a Model for Integration. Now the Vast Majority of its Public Schools Are Segregated*, Bloomberg, April 11, 2014, https://www.bloomberg.com/news/articles/2014-04-11/buffalo-was-once-a-model-for-integration-now-the-vast-majority-of-its-public-schools-are-segregated.

[182] Kimberly Gordon, Danielle Hairston, Shadé Miller, Rupinder Legha and Steven Starks, Origins of Racism in American Medicine and Psychiatry: Contemporary Issues and Interventions (2019). 10.1007/978-3-319-90197-8_1.

[183] James L. Madara, MD, *Reckoning with medicine's history of racism*, Am. Med. Ass'n, Feb. 17, 2021, https://www.ama-assn.org/about/leadership/reckoning-medicine-s-history-racism.

[184] Pub. L. 79–725, 60 Stat. 1040, enacted July 13, 1946.

[185] Robert B. Baker, PhD, *The American Medical Association and Race*, 16 Am. Med. Ass'n J. of Ethics 479, 479–488 (June 2014), https://journalofethics.ama-assn.org/article/american-medical-association-and-race/2014-06.

Criminal Justice [Excerpted from the Report of the Task Force on Racial Injustice and Police Reform[186]]

The 1960s was also a time of great social upheaval. "The crime rate per 100,000 persons doubled, the civil rights movement began, and antiwar sentiment and urban riots brought police to the center of the maelstrom."[187] Police were seen using excessive force against Civil Rights and Vietnam War protesters. President Lyndon B. Johnson "declared a 'war on crime'" and Congress subsequently passed and Johnson signed major legislation[188] to combat crime that significantly increased money and other resources provided to police departments across the country, including providing military-grade weapons used in Vietnam to local law enforcement. Funding from social programs was diverted to fund this increase.[189]

As a result of this reinforcement of police departments, Black communities became more of a focus of law enforcement activities.

> [T]he "frontline soldiers" in Johnson's war on crime . . . spent a disproportionate amount of time patrolling Black neighborhoods and arresting Black people. Policymakers concluded from those differential arrest rates that Black people were prone to criminality, with the result that police spent even more of their time patrolling Black neighborhoods, which led to a still higher arrest rate. "If we wish to rid this country of crime, if we wish to stop hacking at its branches only, we must cut its roots and drain its swampy breeding ground, the slum," Johnson told an audience of police policymakers in 1966. The next year, riots broke out in Newark and Detroit. "We ain't rioting agains' all you whites," one Newark man told a reporter not long before being shot dead by police. "We're riotin' agains' police brutality."[190]

The laws at the federal and state level did not ameliorate the separate and unequal treatment Black New Yorkers faced as their lived experience. As explained by Professor Martha Bondi, Lorraine H. Morton Professor of African American Studies and Professor of History at Northwestern University:

> After New York State passed antidiscrimination laws in employment, education and housing a clash developed between civil rights leaders and the administration of Republican Governor Thomas E. Dewey over the nature of their implementation. Conservatives argued then . . . that civil rights laws are no guarantee of equality of

[186] Available at https://nysba.org/app/uploads/2021/06/Report-by-the-Task-Force-for-Racial-Injustice-and-Police-Reform-FINAL-with-HOD-wording-on-cover.pdf at 13–14.
[187] Steven M. Cox, David Massey, Connie M. Koski and Brian D. Fitch, Introduction to Policing, 25 (Sage Pub., Jan. 2019).
[188] The Law Enforcement Assistance Act in 1965 and Omnibus Crime Control and Safe Streets Act in 1968.
[189] Jill Lepore, *The Invention of the Police*, The New Yorker, July 13, 2020, https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police.
[190] *Id*.

> representation, or even of access. In its first decade, the new State Commission against Discrimination adopted the rhetoric of a "color-blind" state and a strategy of passivity. What happened in essence was that civil rights laws were passed, and then barely enforced.[191]

Cong. Adam Clayton Powell, Jr., the first African American elected to Congress from New York, in 1945 "declared, 'the Negro people will be satisfied with nothing short of complete equality--political, economic, educational, religious and social'." [192] Professor Bondi explains that the Civil Rights Movement began in the North with New York in a leading role:[193]

> All the issues that would be at the center of the uprisings of the 1960s, and that continue to resonate in urban politics, [New York] African American activists put at the center of municipal politics beginning in the 1940s: the fight against police brutality and for defendant's rights; the fight for more and better housing, as well unrestricted access to property anywhere in the city; the struggle for African American teachers and Black history in the public schools; the fight to expand and equalize government social spending, and the struggle to elect African Americans to office, including statewide office. . . .[194]

With momentum for The Civil Rights Movement building from the South, Black Americans finally were able to force the federal and their state governments to ensure they were treated equally, accorded full access to their rights as citizens and no longer be treated separately under the law. The historic court cases leading to the overturning of "separate but equal" culminating with the Civil Rights Laws of 1964 and 1965 finally set the stage for Blacks and other people of color to obtain equality. Though the laws ended unlawful practices, they did not dismantle the inequities suffused in the laws and policies of New York.

III. THE CURRENT CONDITIONS FOR PEOPLE OF COLOR IN NEW YORK STATE

As of 2017, at 3,824,642, New York State had the 2nd largest Black population of any state in the nation. The vast majority of African Americans in the state live in New York City and its surrounding counties. In the rest of the state commonly referred to as Upstate New York, African Americans live almost entirely in urban areas and mostly within city limits. These areas are mid-sized mostly manufacturing-based cities such as Buffalo, Syracuse, and Rochester. African American concentrations can also be found in smaller cities and towns in or near the Hudson Valley between New York City and Albany such as Poughkeepsie, Newburgh, and Monticello.[195]

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[191] Professor Martha Bondi, *How New York changes the story of the Civil Rights Movement*, at 4, https://www.nyc.gov/html/cchr/justice/downloads/pdf/how_new_york_changes_the_civil_rights_movement.pdf.
[192] *Id*. at 2.
[193] *Id*. at 1.
[194] *Id*. at 8.
[195] *New York State*, Black Demographics, https://blackdemographics.com/states/new-york-state/.

Research on what number are not descendants of American slaves, using the 9% identified by Pew and noted above, provides a rough estimate of about 3,480,324 Black New Yorkers.[196]

The goal of the 1960s Civil Rights Movement to right the wrongs of the past was only partially achieved. The Task Force's research has shown that the legacy of social inequity in New York persists. Housing for those with modest means continues to be substandard while for those with the means to buy a home have had their most important asset undervalued. The criminal justice system continues to arrest and imprison more Blacks and Latinos, over-representing them in the system. The minimal economic opportunities afforded to Blacks and the Latinos manifests itself in an ever-widening wealth gap. The fight for better resources for schools that serve communities of color continues. The COVID-19 pandemic exposed the continuing inequities of our health care system. And, finally, the pursuit of environmental justice reveals the inequitable distribution of environmental hazards. This next chapter summarizes this research.

Segregated Housing Persists

"All of the other forms of segregation that exist in our society," Former Secretary of Housing and Urban Development Henry Cisneros told Retro Report, "begin with, 'Where do you live?'"[197] A February 2022 research report entitled "Dynamics of Racial Residential Segregation and Gentrification in New York City," stated:

> The RRS [Residential Racial Segregation] is the cause and effect of several inequalities. Studies show the relations between racial segregation and income inequalities and property values inequalities. Furthermore, RRS causes racial disparities in health and education.[198]

Segregation in housing has continued in New York State. The public perceptions, housing patterns established by redlining and the location of low-income housing have stymied the creation of more integrated neighborhoods.

Albany

A June 2021 Times Union Special Report examined why Blacks primarily lived in three neighborhoods in downtown Albany finding that the current housing patterns are based on redlining:

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[196] Monica Anderson, *A Rising Share of the U.S. Black Population Is Foreign Born*, Pew Research Ctr., Apr. 9, 2015, https://www.pewresearch.org/social-trends/2015/04/09/a-rising-share-of-the-u-s-black-population-is-foreign-born/.

[197] Clyde Haberman, *Housing Bias and the Roots of Segregation*, N.Y. Times, Sept. 18, 2016, https://www.nytimes.com/2016/09/19/us/housing-bias-and-the-roots-of-segregation.html.

[198] Felipe G. Operti, André A. Moreira, Saulo D.S. Reis, Andrea Gabrielli, Hernán A. Makse, José S. Andrade, Dynamics of Racial Residential Segregation and Gentrification in New York City, 2 (2022), Front. Phys. 9:777761. doi: 10.3389/fphy.2021.777761 https://www.frontiersin.org/articles/10.3389/fphy.2021.777761/full.

> This landscape was mapped out almost a century ago in a way that has locked in racial disparities.
>
> Mapped out, that is, in a literal sense: Parts of the city were "redlined" beginning in 1938 as part of a post-Depression survey conducted by the federal Home Owners' Loan Corp., an entity established to stem the tide of home foreclosures.
>
> When Albany's map was produced, West Hill, Arbor Hill and the South End were the only neighborhoods to be redlined. All three were at the time predominantly white, but poor and made up of European immigrants. After [Blacks] began fleeing the Jim Crow South, the skin color of most residents in those zones changed. But the practices and policies of banks, landlords, various layers of governments and other powerful interests largely controlled by white people remained the same — and blocked Black residents from growing generational wealth.
>
> Albany's racial inequities still follow the contours of the 1938 map, . . . their impacts are more broad in a city where 69 percent of white residents own homes but only 20 percent of Black residents do.[199]

The Stacker, Nexstar Media Wire researched homeownership rates in Albany and found the following:

— Homeownership rate: 64.2%

— Black homeownership rate: 25.1% (#45 lowest among all metros)

— White homeownership rate: 69.7%

— American Indian and Alaska Native homeownership rate: data unavailable

— Asian homeownership rate: 49.7%

— Hispanic homeownership rate: 41.7%[200]

Buffalo

In February 2021, the New York State Department of Financial Services issued a report specifically on the impact of redlining in Buffalo. The report states:

> The City of Buffalo has, unfortunately, long been one of the most racially segregated cities in the United States. The Department has recently conducted an inquiry into mortgage

[199] Massarah Mikati and Eduardo Medina, *A City Divided: How New York's capital city was splintered along racial lines*, Times Union, June 6, 2021, https://www.timesunion.com/projects/2021/albany-divided/.
[200] Stacker, *The Black homeownership gap in Albany*, Nexstar Media Wire, Mar 22, 2022, https://www.news10.com/news/albany-county/the-black-homeownership-gap-in-albany/.

> lending patterns in the Buffalo metropolitan statistical area ("Buffalo MSA"), which consists of Erie, Niagara, and Cattaraugus counties, in essence encompassing the city of Buffalo and its surrounding towns. The Department, using Home Mortgage Disclosure Act ("HMDA") data to map out and analyze patterns of mortgage lending in the Buffalo area, identified a distinct lack of lending by mortgage lenders, in particular several non-depository lenders, in neighborhoods with majority-minority populations and to minority homebuyers in general.
>
> According to a 2018 report, in Buffalo, approximately 85% of people who identify as Black live in neighborhoods to the east of Main Street, which is also where many of HOLC's 1930s redlined areas were located. These populations also continue to experience economic disadvantage, lack of access to quality financial services, environmental hazards, lower life expectancy, and worse health outcomes than the overall population. The homeownership rate for the Black population in Buffalo is also much lower than for the white population. As recently as 2015, a Buffalo-based bank, Evans Bank, entered into a settlement with the New York State Attorney General to resolve charges that it engaged in redlining majority African-American areas of Buffalo, denying access to mortgages to those communities based on the race of their population. (internal citations omitted)[201]

A Brookings Institution/Gallup poll 2018 Report found that "In the average U.S. metropolitan area, homes in neighborhoods where the share of the population is 50 percent Black are valued at roughly half the price as homes in neighborhoods with no Black residents."[202] The Buffalo-Cheektowaga-Niagara Falls, NY region ranked 10th as an area with the most devaluation of homes in Black neighborhoods; Rochester, NY ranked 1st.[203]

For those unable to buy a home, public housing also remains segregated:

> Throughout the 1950s and 60s, BMHA [Buffalo Metropolitan Housing Authority] continued to create segregated public housing developments like the Ellicott and Talbert Malls – both over 90% black occupied – which played a key role in maintaining segregated neighborhood compositions.
>
> Decades of discrimination led to Comer v. Cisneros (1989), a lawsuit in which the BMHA was charged with segregating blacks and whites within public housing. Not only were public housing complexes segregated, but Section 8, which provides housing vouchers to

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[201] New York State Dep't of Fin. Servs., Report on Inquiry into Redlining in Buffalo, New York, 3, 7 (Feb. 4, 2021), https://www.dfs.ny.gov/system/files/documents/2021/02/report_redlining_buffalo_ny_20210204_1.pdf.
[202] Andre Perry, Jonathan Rothwell, David Harshbarger, *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property*, Brookings Metro. Policy Prog. and Gallup at 2 (Nov. 2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf.
[203] *Id.* at 20.

> low-income residents to be used with private landlords, was used mainly by white tenants, while black applicants were languishing on long waiting lists. The settlement of the case included additional Section 8 vouchers for minorities and a "mobility counseling" program to help them move to higher opportunity neighborhoods, a program which Housing Opportunities Made Equal (HOME) continues to run today.[204]

Rochester

As stated earlier, Rochester ranked first in a 2018 Brookings Institution/Gallup report as an area with the most devaluation of homes in Black neighborhoods. The Urban League in 1968 complained of discriminatory housing practices to the New York State Division of Human Rights concluding in its report:

> that housing discrimination in Rochester was "less direct, more subtle" than in other cities, indicating "an advanced state of perpetuation of discrimination." Even black members of the NBA's Rochester Royals had to stay in hotels for months until they could locate somewhere respectable to live.[205]

In 2012, the Attorney General commenced an investigation into Five Star Bank's discriminatory mortgage lending practices in the Rochester area. In a press release announcing a settlement with the bank, the Attorney General stated:

> The investigation found that Five Star created a map defining its lending area that included most of the surroundings of the City of Rochester, but excluded Rochester itself and all of the predominantly minority neighborhoods in and around Rochester. Five Star's lending area excluded these neighborhoods from at least 2009 until September 2013, when Five Star expanded its lending area to include all of Monroe County, including Rochester.
>
> In addition, Five Star adopted a policy that automatically designated any residential mortgage secured by property outside of the bank's lending area as an "undesirable loan type." From at least 2009 until September 2013, this policy effectively discouraged lending to borrowers in all predominantly minority neighborhoods in the area.[206]

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[204] Anna Blatto, *A Report: A City Divided: A Brief History of Segregation in Buffalo*, 8, 9, Partnership for the Public Good, (April 2018), https://ppgbuffalo.org/files/documents/data-demographics-history/a_city_divided__a_brief_history_of_segregation_in_the_city_of_buffalo.pdf.

[205] Justin Murphy, *How Rochester's growing city and suburbs excluded black residents*, Rochester Democrat and Chronicle, Oct. 28, 2020, https://www.democratandchronicle.com/in-depth/news/2020/02/05/rochester-ny-kept-black-residents-out-suburbs-decades/2750049001/.

[206] Office of the Attorney General, Press Release: A.G. Schneiderman Secures Agreement With Five Star Bank To End Racially Discriminatory Mortgage Lending Practices In Rochester (Jan. 19, 2015), https://ag.ny.gov/press-release/2015/ag-schneiderman-secures-agreement-five-star-bank-end-racially-discriminatory.

Westchester

In 2006, Westchester County was sued in federal court, in the Southern District of New York, for allegations that it violated the False Claims Act, under federal law, after it took over 45 million dollars from HUD to build fair and affordable housing throughout its municipalities.[207] The Plaintiffs in this case, the Anti-Discrimination Center of Metro New York, Inc. ("ADC"), a not-for-profit corporation, formed "to prevent and remedy discrimination and expand civil rights protections in housing," amongst other liberties, sought to recover damages incurred by the federal government as a Relator under the qui tam provisions of the FCA.[208]

In its complaint, ADC alleged that Westchester County made false claims that it would affirmatively further fair housing (AFFH) when it received federal monies from HUD in the form of community development block grants (CDBG) and Housing Investment Partnership Program (HOME) affordable housing investment funds between 2000 and 2006 to create fair and affordable housing within its municipalities.[209] ADC also asserted that Westchester County failed to comply with the HUD requirements to AFFH as it certified it would when the funds were granted.[210] Therefore, ADC contended that the County's certifications were both false and improper when it obtained over $45 million dollars in federal funds.[211] ADC further contended that Westchester County failed to factor in racial discrimination and segregation as an impediment to fair housing choice, as required by HUD, when it certified that it would affirmatively further fair housing.[212] Moreover, ADC alleged that Westchester County certified that it and the participating municipalities would comply with the AFFH obligation, yet Westchester County was intimately and fully aware of community resistance within the municipalities to the development of more racially diverse and integrated housing and failed to take appropriate action as a matter of policy.[213] Thus, ADC maintained that Westchester County knowingly made a false claim to HUD under the FCA. In its motion to dismiss the complaint, Westchester County asserted its position that the HUD guidelines were not clear as to whether it was required to evaluate racial discrimination as an impediment to fair housing, and that therefore, it was not required to do so when it made its certifications that it would affirmatively further fair housing.[214]

Once the parties proceeded with discovery, several key Westchester County officials and experts were deposed.[215] Westchester County Chief Executive Officer, Andrew Spano, was deposed and indicated that the County had "jumped at the chance" to create affordable housing whenever it

[207] *See United States of America ex rel. Anti-Discrimination Center of Metro N.Y. v. Westchester Co.*, 2006 WL 6348390 (S.D.N.Y. Dec. 18, 2006).
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] 2007 WL 1622360 (S.D.N.Y April 17, 2007).
[215] 2008 WL 6802246 at 6 (S.D.N.Y. Sept. 30, 2008).

could, but "a willingness to work towards racial integration had to be tempered" with what he called a "political reality" to get enough votes for a project.[216] This evidence tended to show that Westchester County was not willing to confront the municipalities concerning its AFFH obligations.

Other pertinent admissions by employees of Westchester County included that it "did not analyze impediments to fair housing from the point of view of race (either in terms of demographics or in terms of discrimination) and that Westchester did not treat as an impediment anything that was not brought to the County's attention" by the participating municipalities. [217] Income was considered by Westchester County to be more so the basis of discrimination.[218] Furthermore, it was Westchester County's policy to neither "chastise" nor monitor the municipalities efforts to AFFH because that would be construed as "interference" by them.[219] Westchester County did not view discrimination or segregation in terms of race.[220] County officials were aware that some of the opposition to affordable housing involved fear of "impact on the public schools."[221] Lastly, it was also confirmed that Westchester County was aware that several fair housing impediments such as "blockbusting by Realtors"; [the] adoption and enforcement of a zoning ordinance in Mount Kisco that the County believed had a disparate impact on the basis of national origin and familial status; and opposition to affordable housing planning boards in "three certain municipalities" were never included, analyzed, let alone addressed by Westchester County in its analysis of the impediments for fair housing.[222] This particular evidence tended to prove, in good detail, the manner in which Westchester County disregarded its AFFH duties.

In September of 2009, Westchester County's local legislature approved a $50-plus million-dollar settlement entered into between itself and HUD in an effort to resolve the lawsuit filed by the ADC.[223] Although the County ultimately agreed to settle the lawsuit in order to avoid the uncertainty and expense of costly litigation, it maintained that there was no wrongdoing on its part in meeting its obligation to affirmatively further fair housing.[224] While Westchester County steadfastly wrangled that it met its AFFH obligations, according to the trial court, it was not able to adduce any evidence to prove this. Moreover, it was not until HUD intervened that a settlement was finally reached in this matter. This seems quite telling because the then Secretary of HUD under the Obama Administration, Shaun Donovan, actually indicated, after the settlement was finalized, that "this agreement signals a new commitment by HUD to ensure that housing opportunities be available to all, and not just to some" seemingly to account for the United States

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[216] *Id*. at 18; 2008 WL 6802251 at 6, n. 3, 13, 22 (S.D.N.Y. Oct. 31, 2008).
[217] *Id*. at 9.
[218] 2008 WL 6802251 at 7 (S.D.N.Y. Oct. 31, 2008).
[219] *Id*. at 9.
[220] 2008 WL 6802215 at 9 (S.D.N.Y. Nov. 14, 2008).
[221] *Id*. at 13.
[222] *Id*.
[223] Press Release of Westchester County Board of Legislators on Sept. 23, 2009; *see* www.westchester.gov.
[224] See http://www.westchestergov.com/pdfs/HOUSING_lawsuitSettlement.pdf.

decision to intervene and enter into settlement negotiations with the Westchester County.[225] Also, HUD Deputy Secretary Ron Sims, who assisted in the settlement negotiations along with the Justice Department, stated that "[t]his is consistent with the President's desire to see a fully integrated society. Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire."[226] This further suggests that HUD's AFFH eligibility standards for local governments to receive grants are unambiguous and local governments have inherent authority to ensure municipal compliance, but it is HUD's tendency not to enforce the AFFH standards that has been inadequate in ensuring that local government affirmatively further fair housing after receiving federal grant monies.

With a perceived weak enforcement role, it is particularly easy for a local government, such as Westchester County, to point the finger at HUD and portray its own conduct as a misstep or mishap that occurred as a result of HUD's constructive approval or failure to disapprove what it openly and fully disclosed it was improperly doing in its annual submissions to HUD. Westchester's assertion that it completely disclosed to HUD how it was conducting its requisite analysis of impediments to fair housing, in direct contradiction to the HUD Fair Housing Planning guidelines, federal law and regulations as well as under the express understanding that its submissions and disclosures would not be reviewed, confirms that HUD has not done enough, as the Deputy Secretary stated, "to hold peoples' feet to the fire" when they take HUD monies, but do not actually comply with their certification to affirmatively further fair housing.

Exclusionary zoning by municipalities of New York State, under New York's Municipal Home Rule Law, has served as another viable way to limit and/or prevent the construction of fair and affordable housing. Inarguably, this governmental-sanctioned restraint on the development of such housing stock has a palpably disparate impact on residents of color and continues to maintain the status quo of historically segregated communities.

Long Island

Although the Village of Garden City was not a subrecipient of Nassau County and did not accept HUD CDBG funds that required it to affirmatively further fair housing, a not-for-profit affordable housing developer MHANY Management, Inc., along with Black and white residents of the municipality sued both the Village and the County in 2005 for violations of the FHA in federal court**.**[227] Before this litigation ensued in 2003, Nassau County had originally proposed that the defunct County Social Services Building (hereinafter the "Social Services Center"), situated on approximately 25 acres, could be used for the development of long-needed multi-family and

[225] Jereon Brown, *HUD and Justice Department Announce Landmark Civil Rights Agreement in Westchester County*, HUD Press Release, Aug. 10, 2009.
[226] Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. Times, Aug. 22, 2009, http://www.nytimes.com/2009/08/23/weekinreview/23applebome.html.
[227] *See MHANY Management, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016).

affordable housing under the multi-family residential group or R–M zoning controls.[228] Notably, Nassau County had no zoning authority; the Village would have had to change its zoning from public use to include multifamily housing at the site. As the County owned the building that would be razed for development of multifamily housing, it requested that Garden City rezone the parcel accordingly.[229]

Had the Village amended its zoning, this would have allowed for the construction of 311 residential apartment units under the R-M zoning designation.[230] After a series of public hearings were held, where concerns were voiced that multi-family housing would "generate traffic, parking problems, and [an influx of] school children," the Garden City Board of Trustee unanimously adopted a local law to rezone the Social Services Center to R–T, i.e., Residential-Townhouse for the majority of the parcel, leaving 3.03 acres preserved for R–M zoning.[231]

In bringing the lawsuit, the Plaintiffs contended "that Garden City's shift from R–M to R–T zoning was racially motivated, and that Nassau County failed to prevent this discrimination. Plaintiffs also argued that the abandonment of R–M zoning in favor of R–T zoning had a disparate impact on minority groups, and thus violated the disparate-impact component of the Fair Housing Act. Finally, Plaintiffs argued that Nassau County's actions and policies in steering affordable housing to certain communities violated its obligations under Title VI of the Civil Rights Act not to discriminate in the administration of federal funding, and under Section 808 of the Fair Housing Act violated its obligation to affirmatively further fair housing."[232]

The district court commenced a bench trial on June 17, 2013 that lasted eleven days. In a post-trial decision, the district court concluded that the plaintiffs:[233]

> . . . had established, by a preponderance of the evidence, liability on the part of the Garden City Defendants for the shift from R–M to R–T zoning under (1) the FHA, 42 U.S.C. § 3601 et seq., based on a theory of disparate treatment and disparate impact; (2) 42 U.S.C. § 1981; (3) 42 U.S.C. § 1983; and (4) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
>
> . . .
>
> The district court subsequently issued an order concerning appropriate remedies in light of Plaintiffs' violations. In a final judgment issued April 22, 2014, the district court granted Plaintiffs the following relief against Garden City: (1) a prohibitory

[228] *Id.* at 589.
[229] *Id.*
[230] *Id.*
[231] *Id.* at 591–97.
[232] *Id.* at 598.
[233] *Id.* at 599.

> non-discrimination injunction, (2) fair housing training for Garden City officials, (3) a directive to Garden City to pass a Fair Housing Resolution, (4) appointment of a third-party Fair Housing Compliance Officer by Garden City, and (5) expenditure of reasonable sums to fund the relief required by the judgment. . . .

The parties subsequently appealed certain aspects of the trial court's decision to the Court of the Appeals of the Second Circuit. The case was argued in 2015 and decided in 2016. In upholding the salient findings of the district court, the Court of Appeals was careful to note that:

> In considering the sequence of events leading up to the adoption of R–T zoning, the district court also focused closely on the nature of the citizen complaints regarding R–M zoning. Citizens expressed concerns about R–M zoning changing Garden City's "character" and "flavor." App'x at 1243. In addition, contrary to Garden City's contentions that any references to affordable housing were isolated, citizens repeatedly and forcefully expressed concern that R–M zoning would be used to introduce affordable housing and associated undesirable elements into their community. Residents expressed concerns about development that would lead to "sanitation [that] is overrun," "full families living in one-bedroom townhouses, two-bedroom co-ops" and "four people or ten people in an apartment." App'x at 1260, 1275. Other residents requested that officials "guarantee" that the housing would be "upscale" because of concerns "about a huge amount of apartments that come and depress the market for any co-op owner in this Village." App'x at 1237.
>
> The district court also noted Garden City residents' concerns about the Balboni Bill and the possibility of creating "affordable housing," specifically discussing a flyer warning that property values might decrease if apartments were built on the Site and that such apartments might be required to include affordable housing under legislation pending in the State legislature. This flyer came to the attention of at least two trustees, as well as Fish and Schoelle. Concerned about the Balboni Bill, Garden City residents urged the Village officials to "play it safe" and "vote for single family homes." App'x at 362. Viewing this opposition in light of (1) the racial makeup of Garden City, (2) the lack of affordable housing in Garden City, and (3) the likely number of minorities that would have lived in affordable housing at the Social Services Site, the district court concluded that Garden City officials' abrupt change of course was a capitulation to citizen fears of affordable housing, which reflected race-based animus.
>
> We find no clear error in the district court's determination. The tenor of the discussion at public hearings and in the flyer circulated throughout the community shows that citizen opposition, though not overtly race-based, was directed at a potential influx of poor, minority residents.

> The district court concluded that, in light of the racial makeup of Garden City and the likely number of members of racial minorities that residents believed would have lived in affordable housing at the Social Services Site, these comments were code words for racial animus. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir.1996) (observing that it "has become easier to coat various forms of discrimination with the appearance of propriety" because the threat of liability takes that which was once overt and makes it subtle). "Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare.... Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms." Id. at 1081–82. "[R]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications." *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1085 (8th Cir.2010) (internal quotation marks and alterations omitted).[234]

It should be noted that even after the Second Circuit upheld the district court's determination that an impermissible motive was behind the decision to exclude the multi-family and affordable housing development in Garden City, the case did not settle until 2019. *This was 14 years after the litigation had begun*. Moreover, the case was settled by Nassau County agreeing to pay Plaintiff MHANY Management Inc. $5,400,000.00 for these funds to be used for affordable housing development in Nassau County. Ironically, the Social Services Site became the home of the Family and Matrimonial Center in Mineola (a part of the New York State Court System), which was completed in 2021. Thus, no fair and affordable housing was built at the location that was the subject of this lawsuit and Garden City currently remains just as segregated.

New York City

The 2022 "Dynamics of Racial Residential Segregation and Gentrification in New York City" Report reviewed housing patterns from 1990–2010 to determine whether segregation increased or decreased between various communities in New York City. Its findings, similar to what has been described for the rest of the state, show residential segregation has not significantly improved. Key findings include:

- "Segregation between white and black and black and Asian citizens remains relatively stable during the time interval."[235]

[234] *Id.* at 608–09.
[235] Operti, *supra* note 198, at 10.

- "While segregation between white and Hispanic, white and Asian, and Hispanic and Asian has increased, the segregation between black and Hispanic citizens has decreased. Black people are frequently the most segregated, having a high overlap . . . only with Hispanics."[236]

- "Income inequality between white and black citizens is more significant in the Overlap zone [where both white and blacks live – an indicator of gentrification] than in the zones 100% white and black."[237]

- "We compare the variation of the flux of white and black citizens with the variation of the properties values. It shows that where the flux of white citizens [into a black neighborhood] is on average positive, the properties values increase more than the mean.[238] On the other hand, where the flux of black citizens [into a white neighborhood] is negative on average the properties values decreases more than the mean."

Blacks and Latinx Disproportionately Represented in the Criminal Justice

New York's criminal procedure and practices actively prevent social equity in our communities. The disparate racial consequences of the harsh sentencing and over-policing created by the Rockefeller drug laws led to this Association's advocacy for comprehensive drug law reform. Drug use is similar across racial and ethnic groups, yet Black people were arrested and sentenced on drug charges at much higher rates."[239] Critics "deplored the grave collateral consequences of the state's harsh mandatory sentencing scheme – particularly for the low-income inner-city communities of color that have been the primary focus of drug-law enforcement."[240]

Even after drug law reform, systemic racism continued to infuse racially disparate law enforcement, prosecution sentencing and the collateral consequences of those convictions. New York City's "stop, question and frisk" practices which "targeted nearly 4.5 million individuals for no reason other than the color of their skin and the neighborhood they were walking through." are but one example.[241] In 2019, Black New Yorkers accounted for 38% of adult arrests and 48% of prison sentences, despite making up only 15% of the state population. In that same year, Latino New Yorkers accounted for 24% of adult arrests and 23% of prison sentences, while making up

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[236] *Id*.
[237] *Id*.
[238] *Id*.
[239] Elizabeth Hinto, Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Evidence Brief (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.
[240] *Rockefeller Drug Laws Cause Racial Disparities, Huge Taxpayer Burden*, NYCLU New York, May 8, 2008, https://www.nyclu.org/en/publications/rockefeller-drug-laws-cause-racial-disparities-huge-taxpayer-burden.
[241] Brian Purnell and Jeanne Theoharis, *How New York City became the capital of the Jim Crow North*, Wash. Post, Aug. 23, 2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/08/23/how-new-york-city-became-the-capital-of-the-jim-crow-north/.

only 18% of the state population. In contrast, white New Yorkers made up 33% of adult arrests and 28% of prison sentences, while making up 58% of the state population in 2019.[242] This over-representation of racial minorities in the criminal justice system resulted in long term social and economic marginalization of people of color.

The impact of incarceration is far reaching, affecting not only the person convicted of a crime, but their family and communities. The Office of Children and Family Services estimates that about 105,000 children within the state have a parent currently incarcerated.[243] This high incarceration targeting specific communities has generational consequences, as "children of incarcerated parents are, on average, six times more likely to become incarcerated themselves."[244] Notably, people of color represent two-thirds of those sentenced to incarceration in prisons throughout New York.[245] Statutory sentencing requirements including mandatory minimums, the finality of sentences, which are based principally on the prosecution's charging discretion, and the severe reduction in earned time credit availability, all contribute to the racial disparities in carceral sentences.

Longer sentences are known to increase recidivism rates.[246] Sentencing policies enacted between the 1970s and 1990s created structures that disproportionately warehoused people of color in prison for significantly longer than white people causing trauma to families and communities and with minimal improvement to increasing public safety. [247]

Segregation Persists in Education

Few people are fully aware of the impact racism has had on education in New York State. The legacy of New York's legislative and judicial history still adversely affects educational opportunities and outcomes for children of color. Much of this was borne out historically in New York through segregation of students of color to under-resourced schools.

Segregation of students of color to under-resourced schools in New York has almost certainly contributed to the long history of disproportionate academic and social outcomes for these

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[242] New York State DCJS, Office of Justice Research and Performance, *NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2019* (Aug. 31, 2020), *available at* https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf.
[243] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NIJ J. 278 (Mar. 1, 2017), https://nij.gov/journals/278/Pages/impact-ofincarceration-on-dependent-children.aspx.
[244] *Id.*
[245] DCJS, Computerized Criminal History file (as of July 17, 2020); National Center for Health Statistics: Vintage 2019 postcensal estimates of the resident population of the United States (as of July 9, 2020), https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf.
[246] U.S. Sentencing Commission, *Length of Incarceration and Recidivism* (April 2020), 2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200429_Recidivism-SentLength.pdf.
[247] *Id.*; Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, The Sentencing Project, Nov. 5, 2018, https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/.

students.[248]Their subsequent failure to thrive in their under-resourced schools is then frequently used to perpetuate racial/ethnic stereotypes that contribute significantly to implicit bias towards students of color.[249] Yet efforts to address the underfunding of under-resourced schools has been met with opposition and delay as evidenced by the long drawn out struggle to ensure New York complies with the mandate of the Court of Appeals to provide a "sound basic education"[250] to all students through equitable student funding. Insufficient school district funding disproportionately impacts students of color and low income students. Nearly 20 years have passed since the historic ruling that New York failed to sufficiently fund school districts[251] and only recently, after yet another round of litigation, has the state finally agreed to meet its constitutional obligation.[252]

The Task Force notes there are 2,598,921 public school students in New York State in grades kindergarten through 12th.[253] New York has additional students in universal public preschool and prekindergarten public school programs in Buffalo and New York City. The majority of New York public school students, 56.8%, do not identify as white.[254]

Even though the majority of students in New York identify as students of color, the statistics for students of color are concerning. In 2019, the graduation rate for white and Asian students was 90% while the graduation rate for Black, Latinx and Native American students was 75%.[255] In the 2018–2019 school year, Black and Latinx students represented 67% of the student body in NYC, but were involved in 89% of police interventions in school and 84% of suspensions.[256] In 2018, 83% of the children in juvenile detention in New York were children identifying as Black or

[248] McArdle, N. and Acevedo-Garcia, D., Consequences of Segregation for Children's Opportunity and Wellbeing. Joint Center for Housing Studies of Harvard University (2017), https://www.jchs.harvard.edu/sites/default/files/a_shared_future_consequences_of_segregation_for_children.pdf; *see also* Reardon, S.F., & Owens, A., 60 *Years After Brown: Trends and Consequences of School Segregation*, Annual Review of Sociology, 40, 199-218. https://www.annualreviews.org/doi/full/10.1146/annurev-soc-071913-043152.

[249] Stacey Sinclair, Elizabeth Dunn, Brian Lowery, *The relationship between parental racial attitudes and children's implicit prejudice*, 41 J. of Experimental Social Psychology, 283, 283–89 (May 2005), https://doi.org/10.1016/j.jesp.2004.06.003.

[250] *Campaign for Fiscal Equity Inc. v. State*, 86 N.Y.2d 306 (1995).

[251] *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893 (2003).

[252] Joseph Spector, *New York reaches long-sought settlement over school funding. Here's how much it will grow*, Rochester Democrat and Chronicle, Oct. 14, 2021, https://www.democratandchronicle.com/story/news/politics/albany/2021/10/14/ny-school-funding-settlement-hochul-cfe/8451757002/.

[253] *New York State Education at a Glance*, New York State Educ. Dep't, https://data.nysed.gov/ (last visited Apr. 16, 2022).

[254] *Id.*

[255] *NY State Graduation Rate Data 4 Year Outcome as of August 2019*, New York State Educ. Dep't, https://data.nysed.gov/gradrate.php?year=2019&state=yes (last visited Apr. 16, 2022).

[256] *The Bill*, Solutions Not Suspensions, https://www.solutionsnotsuspensionsny.org/sns-bill (last visited Apr. 16, 2022).

Latinx.[257] Coming out of the pandemic, the math achievement scores for Black and Latinx elementary school students trails white and Asian students:

2022 Grades 3-8 ELA & Mathematics State Assessment Data - ELA

Subgroup	% of Students at Levels 3 & 4	Number Tested
All Students	46.6	927,317
American Indian or Alaska Native	41.2	7,045
Asian or Native Hawaiian/Other Pacific Islander	69.4	104,449
Black or African American	36.3	157,624
Hispanic or Latino	36.3	268,572
Multiracial	48.6	30,062
White	52.0	359,565
English Language Learner	13.4	88,253
Students with Disabilities	15.5	160,161
Economically Disadvantaged	36.7	543,320

[258]

[257] New York State Div. Crim. Just. Serv., Statewide Juv. Just. Profile (2019), https://www.criminaljustice.ny.gov/crimnet/ojsa/jj-reports/newyorkstate.pdf.
[258] New York State Educ. Dep't, State Education Department Releases 2021-22 Final State Assessment Results, (Oct. 24, 2022), http://www.nysed.gov/news/2022/state-education-department-releases-2021-22-final-state-assessment-results.

2022 Grades 3-8 ELA & Mathematics State Assessment Data - Math

Subgroup	% of Students at Levels 3 & 4	Number Tested
All Students	38.6	868,294
American Indian or Alaska Native	31.7	6,533
Asian or Native Hawaiian/Other Pacific Islander	67.1	96,188
Black or African American	24.1	145,659
Hispanic or Latino	25.5	257,324
Multiracial	41.6	27,923
White	46.6	334,667
English Language Learner	14.8	96,795
Students with Disabilities	13.1	150,827
Economically Disadvantaged	27.6	510,935

[259]

Minimized Economic Opportunity Perpetuates Wealth Gap

The existence of a substantial racial wealth gap in New York State is undisputed. The history outlined earlier shows that Blacks historically that discriminatory practices impeded Blacks efforts to obtain employment that would enable them to become a part of the middle class in large numbers.

Continuing High Number of Impoverished

New York has one of the highest degrees of income inequality among all 50 states; a profound racial and ethnic dimension accompanies this immense income polarization. In a 2017 data brief, the Fiscal Policy Institute noted that "average and median family incomes are much higher for white, non-hispanics than for blacks and Latinos." White families accounted for nearly 71% of all family income in New York State though they represented only 60% of all families. Blacks and Latinos had much smaller income shares than their share of the population as a whole. 63% of

[259] *Id.*

Black families, and 70% of Latino families, were in the bottom half of the income distribution. New York is one of the worst examples of the racial wealth gap.[260]

A disproportionate number of BIPOC families in New York State continue to live in poverty or are low-income. New York State has about 670,000 children under the age of 3. Twenty-one percent (21%) of these children live in families earning less than the federal poverty level (FPL) and seventeen percent (17%) of them live in families with low incomes – 100% to 200% of the FPL. Nearly 73% of poor children in America are people of color.[261]

Studies have shown that the leading cause of "poverty spells" (falling into poverty for two months or more at a time) is the birth of a child.[262] These poverty spells are more prevalent for those families with children under six years of age.

"Poor children are more likely to have poor academic achievement, drop out of high school and later become unemployed, experience economic hardship and be involved in the criminal justice system. Children who experience poverty are also more likely to be poor at age 30 than children who never experience poverty."[263]This creates a cycle of poverty into perpetuity.

Stunted Employment Opportunities for Entrepreneurs

A 2016 study found that higher rejection rates and lower loan amounts typified lending to Black and Hispanic-owned Minority Business Enterprises (MBE).[264] The 2021 Small Business Credit Survey found that Black-owned firms that applied for traditional financing were least likely to receive all of the funding they sought. The Survey found that 40% of white-owned firms received all of the funding they sought, compared to 31% of Asian-owned firms, 20% of Hispanic-owned firms, and only 13% of Black-owned firms.[265] This trend persists even among firms with good credit scores.

In a 2020 report on Black-owned businesses, the City of New York looked at America's top high-growth sectors – healthcare, technology, and energy over the next 10 years.[266] The report found wide disparities for Black entrepreneurs in those sectors. According to the report, 5% of healthcare

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[260] *The Racial Dimension of New York's Income Inequality*, Fiscal Policy Institute, Mar. 2017, http://fiscalpolicy.org/wp-content/uploads/2017/03/Racial-Dimension-of-Income-Inequality.pdf.
[261] *The State of America's Children 2020*, Children's Defense Fund, https://www.childrensdefense.org/policy/resources/soac-2020-child-poverty/.
[262] Jon Greenberg, *Is having a kid a leading trigger for poverty?*" PolitiFact Blog, Aug. 12, 2014, https://www.politifact.com/factchecks/2014/aug/12/moms-rising/having-kid-leading-trigger-poverty/.
[263] Children's Defense Fund, *supra* note 260.
[264] Wonhyung Lee, Stephanie Black, *Small business development: immigrants' access to loan capital*, J. of Small Bus. & Entrepreneurship 29 (2017), 1–17. 10.1080/08276331.2017.1297106.
[265] Small Business Credit Survey, 2021 Report On Firms Owned by People of Color, https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color.
[266] *Advancing Black Entrepreneurship In New York City*, New York City Small Business Service (Aug. 2020), https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/benyc-report-digital.pdf.

firms are Black-owned, 1% of venture-backed tech founders are Black, and 0.1% of clean energy firms are Black-owned.[267] These disparities can be traced directly to a lack of sufficient access to capital.

Continuing Disparate Treatment in Health Care Exposed by COVID

The Task Force notes the many race-based disparities in the health of New Yorkers. New York's Black non-Hispanic population had the highest age-adjusted mortality rate, the highest rates of diabetes and cardiovascular disease mortality and disease burden, infant mortality, and asthma and diabetes short-term complications hospitalization rates among all racial and ethnic groups in New York State. 57.6% of Black non-Hispanic New Yorkers died before the age of 75 years of age (considered premature death) and 53.8% of Hispanics who died in New York State during 2014–2016 died prematurely. 45.8% of the New York Asian/Pacific Islander population died prematurely. Hispanic New Yorkers had the second lowest age-adjusted total mortality rate compared to the other racial and ethnic groups. There was a higher percentage of Black Non-Hispanic and Asian Pacific Islander infants born between 2014–2016 considered low birth weight and the Black non-Hispanic infant mortality rate was twice the rate of white non-Hispanics. Hispanics had the second highest age-adjusted rates for diabetes mortality and the second highest age-adjusted diabetes hospitalizations in 2012ـــ2014 to other racial and ethnic groups in New York State.

Asian/Pacific Islanders in New York also had the second-highest age-adjusted suicide mortality rate compared to all other racial and ethnic groups in New York. Disaggregated data from New York City reveals that the aggregated data obscures disparities among New York's Asian population. Compared to white adults, Asian/Pacific Islander adults were twice as likely to be uninsured. Bangladeshi, Pakistani, Chinese, and Native Hawaiian and Pacific Islanders had the highest rates of poverty amongst Asian Americans in New York City. Similarly, outcomes during the COVID-19 pandemic revealed disparities among all racial and ethnic groups in New York, including a high mortality rate of Chinese, Hispanic, and non-Hispanic Blacks. The devastating toll of COVID-19 deaths in the United States also revealed a disparity in health care provider deaths, with a median age of death of 59 years of age, compared to 78 years in the general population. The majority of those workers were people of color with a disproportionate burden of deaths amongst Black and Asian/Pacific Islander providers, of 26% and 21% of deaths, respectively, and disproportionate impact on health care providers of Filipino origin.

An abundance of research demonstrates the clear negative impact that racism and implicit bias have on the health care outcomes of BIPOC. For example, a 2020 study found that between 2005 and 2016, medical professionals were 10 percent less likely to admit Black patients to the hospital than white patients, and a 2016 study found that many white medical students wrongly believed

[267] *Id.*

Black people have a higher pain tolerance than white people.[268] 73% of participants held at least one false belief about the biological differences between races—including that Black people have thicker skin, less sensitive nerve endings, or stronger immune systems—beliefs which are centuries old, were used to justify the inhumane treatment of slaves in the 19th century, and which are patently false.[269]

Environmental Injustice: Inequitably Distributed Environmental Hazards

Segregation limited housing opportunities for people of color. Economic opportunities also limited housing opportunities for people of color. With limited funds to spend on housing, a majority of people of color tend to live in housing that is substandard and poorly maintained by landlords resulting in unsanitary conditions.

People of color communities, controlling for income, have borne the brunt of the by-products of industrialization - waste and pollution - impacting their communities.[270] "Communities of color are at a disadvantage not only in terms of availability of resources but also because of underrepresentation of governing bodies when location decisions are made," explains Paul Mohai & Bunyan Bryant in Poverty A the Environment Race, Poverty Distribution Environmental Reviewing the Evidence, "Underrepresentation translates into limited access to policy makers and lack of advocates for people of color's interests."[271]

"Environmental hazards are inequitably distributed in the United States, with poor people and people of color bearing a greater share of pollution than richer people and white people."[272] Though the White House's Council On Environmental Quality identified this inequitable distribution in its 1971 second annual report,[273] the national focus on the impact of pollution disproportionately impacting communities of color was ignited by a 1982 protest in North Carolina over the dumping of PCB soil into a landfill in a rural, predominately African American community.[274] The protest did not stop the creation of the landfill, but it resulted in two studies

[268] Mathieu Rees, *Racism in healthcare: What you need to know*, Medical News Today, Sept. 16, 2020, https://www.medicalnewstoday.com/articles/racism-in-healthcare.
[269] *Id*.
[270] Paul Mohai, Bunyan Bryant, *Race, Poverty & the Distribution of Environmental Hazards: Reviewing the Evidence Race*, Poverty & the Environment, Fall 1991/Winter 1992, Vol. 2, No. 3/4, Special RPE Report Back on the People of Color Environmental Leadership Summit (Fall 1991/Winter 1992), 3, 24–27, at 24, https://www.jstor.org/stable/41555195.
[271] *Id*.
[272] Luke W. Cole, Sheila R. Foster, From the ground up: environmental racism and the rise of the environmental justice movement, 10 (N.Y. Univ. Press, 2001).
[273] Council on Environmental Quality, The Second Annual Report of the Council on Environmental Quality (1971), 189–208, https://www.slideshare.net/whitehouse/august-1971-the-first-annual-report-of-the-council-on-environmental-quality.
[274] Lawsuits argued that the site was not the best scientifically appropriate place to store this contaminated soil.

showing that race and income are key indicators of the locations of hazardous and unhealthy environments.

The first study was regional. In a 1983 report, the U.S. Government and Accounting Office (GAO) found that across eight southern states, Blacks not only made up "the majority of the population in three of the four communities where the landfills are located" but "at least 26 percent of the population in all four communities have income below the poverty level and most of this population is Black."[275]

The second study was national. In 1987, the United Church of Christ (UCC) Commission for Racial Justice (UCC Report), a grassroots group that was part of the Warren County protest, commissioned and published a study documenting a national pattern. The key finds of the report were, in pertinent part:

1. Race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities.
2. Communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents.
3. In communities with one commercial hazardous waste facility, the average minority percentage of the population was twice the average minority percentage of the population in communities without such facilities (24% vs. 12%).
4. Although socioeconomic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant. This remained true after the study controlled for urbanization and regional differences.
5. Three out of every five Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites.
6. Approximately half of all Asian/Pacific Islanders and American Indians lived in communities with uncontrolled toxic waste sites.[276]

The UCC Report also led to the identification of this pattern of activity as environmental racism or injustice.[277] The response to address this inequity is environmental justice.

In New York, examples of environmental injustice include:

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[275] *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, U. S. General Accounting Office, June 1, 1983, p. 1, https://www.gao.gov/assets/rced-83-168.pdf.
[276] *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*, United Church of Christ Commission for Racial Justice (1987), xiii - xiv, https://www.nrc.gov/docs/ML1310/ML13109A339.pdf.
[277] Mohai, *supra* note 269, at 3.

1. West Harlem, New York hosts a crematorium, two bus depots, a marine garbage transfer station, a six-lane highway, a commuter rail line, a highway used for transporting hazardous waste through New York City, and a regularly malfunctioning sewage plant which processes 180 million gallons of sewage daily.[278]

2. The Native American people living in an area spanning the St. Lawrence River between New York and Canada have experienced pollution from:

    a. General Motors, at its Massena, NY plant, has polluted the river and the land in the area with approximately 823,000 cubic tons of PCB-contaminated materials contaminating the Mohawk Akwesasne reservation. The area was declared a Superfund Site.[279]

    b. In the 1950s and 1960s, several thousand acres of the Akwesasne reservation were flooded for New York State water projects.[280]

    c. "Today, an estimated 25 percent of all North American industry is located on or near the Great Lakes, all of which are drained by the St. Lawrence River. That puts the Akwesasne reservation downstream from some of the most lethal and extensive pollution on the continent." (internal citations omitted).

    d. "[A] research project studied 50 new mothers over several years and documented a 200 percent greater concentration of PCBs in the breast milk of those mothers who ate fish from the St. Lawrence River as opposed to the general population."[281]

3. "More than 50 years ago in Syracuse, state and federal officials constructed a massive highway through a redlined segregated Black community, Interstate 81. The construction of the 1.4-mile viaduct devastated a community that was home to Syracuse's working-class Black residents, displacing over 1,300 families. Since 1968, I-81 has been a main artery for interstate trucking, spewing diesel fuel and other pollutants into the adjacent neighborhood that survived its original construction. . . . This community [also] became home to a sewage-treatment facility, a steam-manufacturing plant, an electrical grid, and several brownfields. The environmental inequalities in this community have resulted in one in six Black children suffering from lead poisoning, some of the highest rates in the

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[278] Heidi Y. Willers, *Environmental Injustice: Evidence and Economic Implications*, University Ave. Undergrad. J. of Econ., (1996) Vol. 1:1, https://digitalcommons.iwu.edu/uauje/vol1/iss1/4. Harlem is not the only location where the burden of environmental pollution and waste is carried. *See generally* Dolores Greenberg, *Reconstructing Race and Protest: Environmental Justice in New York City*, Environmental History, Apr., 2000, Vol. 5, No. 2, 223–50, : https://www.jstor.org/stable/398563; Natalie Sitkiewicz, Environmental Justice History for The Heights, May 12, 2021, https://storymaps.arcgis.com/stories/ae130e728e7b473981ff95d97bd38333.

[279] Winona Laduke, All Our Relations: Native Struggles for Land and Life 18 (1999) at 26, https://www.academia.edu/41716531/All_Our_Relations_Native_Struggles_for_Land_and_Life_Winona_LaDuke.

[280] *Id*. at 32.

[281] *Id*. at 38. *See also* Michael J. Lynch and Paul B. Stretesky, *Native Americans and Social and Environmental Justice: Implications for Criminology*, Social Justice, 2012, Vol. 38, No. 3 (125), pp. 104–24, 109–110, https://www.jstor.org/stable/41940950.

nation. In addition, residents who live closest to the viaduct suffer greater rates of asthma and other respiratory illnesses compared to their whiter, residential counterparts."[282]

4. "The communities of West Hill, Sheridan Hollow and Arbor Hill are three examples of local neighborhoods subject to excessive amounts of pollution – including poor air quality from the interstate, waste blowing from the Dunn Landfill in Rensselaer, and toxic emissions from trash burning incinerators. As a result, the predominantly Black and Hispanic populations living in these communities are at a much higher risk for environment-related health problems than those residing in the more affluent, overwhelmingly White areas of Albany and the surrounding suburbs."[283]
5. In Suffolk County, the Brookhaven landfill, established in 1974, is near the village of North Bellport, a predominantly Black and Latinx community. Health outcomes of residents have been negatively impacted by the landfill including:
    a. the landfill is located less than a mile from the Frank P. Long Intermediate School where 35 faculty have been diagnosed with cancer-related illnesses and 11 teachers have died since 1998;
    b. North Bellport has the second-highest asthma hospital ED rates in Suffolk County; and
    c. North Bellport, as reported by the U.S. CDC, has the lowest life expectancy on Long Island.[284]

Acknowledging this inequitable treatment, the New York State Department of Environmental Conservation stated: "Often lost in our desire to protect and preserve our natural environment is that certain segments of our society have not been treated equally, and their communities, have in fact, been made the repositories of the toxic industries that power our economy and dump sites where our waste ends up. New York State recognized the disadvantages these communities, mostly low-income and/or people of color, face and has provided support through grants and educational outreach by creating under the umbrella of the NYS DEC the Office of Environmental Justice."[285]

"It is our hope," the UCC Report explained, "that this information will be used by all persons committed to racial and environmental justice to challenge what we believe to be an insidious form of racism." It included this definition of racism:

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[282] Lanessa Owens-Chaplin, *New York's Green Amendment: Curbing Environmental Racism*, NYCLU, https://www.nyclu.org/en/publications/new-yorks-green-amendment-curbing-environmental-racism.
[283] Dana Brady, *Albany Neighborhoods Highlight a Long History of Environmental Racism*, Albany Proper, Aug. 5, 2020, https://www.albanyproper.com/albany-neighborhoods-highlight-a-long-history-of-environmental-racism/.
[284] *Advocating for Environmental Justice: Professor Seeks Environmental Justice & Action After Decades of Pollution in Local Minority Community*, Stony Brook School of Social Welfare, https://socialwelfare.stonybrookmedicine.edu/environmental-justice-brookhaven-landfill-marvin-colson.
[285] https://nysacc.org/index.php/2021/01/25/environmental-justice/.

> Racism is racial prejudice plus power. Racism is the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.

With this historical and legal background, the report now turns to recommendations to dismantle institutionalized – structural – racism.

IV. TASK FORCE RECOMMENDATIONS TO DISMANTLE STRUCTURAL RACISM

1. Recommendation: The Task Force recommends that the Association advocate in a variety of settings that data be collected and examined to see how it influences and illustrates the ongoing impact of structural racism.

In order to accurately assess the full and ongoing impact of structural racism, we need to accurately measure, collect, and examine data to reveal and dismantle structural racism. Across New York State, the many prosecutors' offices, courts, and public defense organizations use a wide array of case management systems that lack uniformity and often do not interface with one another. This is similarly true in the various electronic medical systems and school systems. Furthermore, much of the data is collected based on observed race and ethnicity data rather than self-reported data, resulting in unavoidable misclassification. There are also many credit reporting and lending agencies that continue to use equally unreliable public information, such as judgments, in making determinations with careless disregard for the rights of victims of identity theft and that fail to recognize simple credit fraud schemes victims may have suffered. Additionally, the employees entering the data – lawyers, nurses, educators, attorneys – lack the data gathering expertise necessary. This makes the simple gathering of information a heavy lift and calls into question the accuracy of any data collected. Training professionals who are often accustomed to making such notations on a paper case file or in an electronic medical record can itself be a tremendous challenge and can have imperfect results.

While collection of accurate data faces myriad challenges, it is imperative. Identification of areas in which disparities exist will equip researchers, educators, and other professionals to study and ultimately to address the factors contributing to those disparities, including the impact of structural inequities as compared to other social determinants. Data collection will permit providers, researchers, and officials to determine whether disparities exist and ultimately to research whether racial discrimination contributes to disparate health, education, criminal, and mortgage-lending outcomes. National data sets are a valuable tool to measure the variables that are the most

important determinants of disparate outcomes and can help estimate and understand the sources of those outcomes.

New York is primed to provide valuable information, but ensuring it is both accurate and complete is paramount and will only be achieved by providing training, increasing the level of self-reported data, and adding subpopulation categories. Additionally, the data must be collected so that it does not perpetuate racist outcomes. The data must be used to target points of bias directly, specifically to develop tailored trainings designed to educate professionals about where their biases are greatest and to interrupt the implicit and explicit biases of professionals. The data must be publicly disseminated at regular intervals close in time so that entities can react, hold each other accountable, and assess the effectiveness of their efforts to reduce disparities.

Accurate Data

In some arenas, data is simply not being collected. In others, the data is being collected, but our own implicit biases and fears are interfering with accurate collection. And then there is the rapid rise in the use of computer applications based on sophisticated algorithms. The best way to encapsulate the concern here is that any application/algorithm is only as good as the data inputted.

In the criminal justice and education systems, the Task Force notes "[i]f you can't measure it, you can't manage it," and this maxim certainly holds true in terms of racial disparities in criminal legal outcomes and in education. Walking into most courtrooms and schools across New York State, the degree of racial disparities will often be immediately apparent – but are these disparities the result of bias amongst those in charge of making decisions, the result of bias by public defenders and teachers in terms of resource allocation, or the result of bias by judges and administrators in administering sentences and suspensions? Certainly, all of these could be true, and there are likely many more factors, but the reality is that there is not the ability to track outcome points from each vantage point and to cross reference such data with demographic information. Therefore, it is difficult to identify, intervene, and eliminate the manifestations of bias.

In health care, racial and ethnic data collected and analyzed in broad categories may obscure disparities which exist amongst subpopulations, rendering them invisible, or obscure the factors that impact health outcomes due to the differing cultural circumstances in which the subpopulations live.[286] Demographic diversity in the United States continues to grow, and thus the importance of tracking and analyzing patterns in racial and ethnic subgroups becomes more valuable and necessary.[287] Using observed race and ethnicity data rather than self-reported data results in unavoidable misclassification.[288]

[286] Rubin, et al., *Counting a Diverse Nation: Disaggregating Data on Race and Ethnicity to Advance a Culture of Health*, PolicyLink, 2018, at 18, https://www.policylink.org/resources-tools/counting-a-diverse-nation.
[287] *Id.*
[288] *Id.* At 23.

In mortgage lending, computer algorithms may be committing discrimination. Fintech is the melding of finance services and technology that now dominate the financial sector of the economy.[289] It not only facilitates the ease of online banking, but also plays an increasingly larger role in the mortgage industry. The rapid rise of complete mortgage services (from application to approval/denial) can now be done remotely with the use of computer applications based on sophisticated algorithms.

"The mode of lending discrimination has shifted from human bias to algorithmic bias," according to the study co-author Adair Morse, a finance professor at the Haas School of Business that published the study.[290] "Even if the people writing the algorithms intend to create a fair system, their programming is having a disparate impact on minority borrowers – in other words, discriminating under the law."[291] Recent articles, scholarship, and studies on Coded Bias indicate that, even when holding 17 different factors steady in a complex statistical analysis of more than two million conventional mortgage applications for home purchases, lenders were 40% more likely to turn down Latino applicants for loans, 50% more likely to deny Asian/Pacific Islander applicants, and 70% more likely to deny Native American applicants than similarly situated white applicants.[292] It was an 80% rejection rate for Black applicants compared to similarly situated white applicants.[293]

Regardless of whether it is a human data collector, or an algorithm written by a person, two things are needed: (1) training and (2) a system for collecting accurate data.

Therefore, as part of the creation of these recommended data collection systems, training will be imperative. Training will need to include how to collect self-reported data and how to properly address concerns of those whose data is being collected. Additionally, race and ethnicity subpopulation categories for all racial designations, particularly for the Black, non-Hispanic

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[289] Fintech is short for financial technology. It is utilized to help companies, business owners and consumers better manage their financial operations, processes, and lives by utilizing specialized software and algorithms that are used on computers and, increasingly, smartphones. Julia Kagan, *Financial Technology (FinTech): Its Uses and Impact on Our Lives*, Investopedia, June 30, 2022, https://www.investopedia.com/terms/f/fintech.asp.

[290] *Mortgage Algorithms Perpetuate Racial Bias in Lending, Study Finds*, Public Affairs, UC Berkeley (Nov. 2018).

[291] *Id.*

[292] At the time of the preparation of this report, cases have been filed against Wells Fargo, alleging that "coded bias" in computer applications used by Wells Fargo resulted in discriminatory mortgage practices. *See Braxton v. Wells Fargo (NDCA)*, 4:2022 cv-748, as reported in the *New York Times* on March 21, 2022. See also the March 11, 2022 issue of *Bloomberg* that reported Wells Fargo had rejected over 1/2 of Black applicants who applied for mortgage refinancing during the pandemic when rates were the lowest. In *Williams v. Wells Fargo*, 4:22-cv-00990, Williams, a black Georgia resident, was denied a refinancing loan. He had identified his race during the application process, and then he asked Wells Fargo to recheck his credit report. The bank, Williams alleged, refused to do so. In September 2019, he received a letter from the bank, wherein the bank allegedly cited its "unique scoring model" considering factors beyond credit scores for applications. *See also The Secret Bias Hidden in Mortgage-Approval Algorithms*, The Markup, Aug. 25, 2021, https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms.

[293] *Id.*

population, should be mandated to ensure the accuracy of the data collected. Finally, it's imperative that to the extent possible all data collected be self-reported.

In order to ensure the accuracy of the data collected, the Task Force recommends:

- The Legislature require the implementation of data collection throughout the NYS courts system through case management systems that store information about each decision made in the course of a criminal case, cross reference case-level data with demographic data, and publish data to ensure transparency and accountability.

- The Legislature require that all school districts in NYS make public and accessible school level discipline data in real time, similar to that legislated in NYC, disaggregated by self-reported race, ethnicity, disability status, socioeconomic status, gender, age, grade, discipline code infraction, and English language learner status.

- The Legislature require collection by all healthcare providers of self-reported race ethnicity information through standardized disaggregated categories with information provided to the patients on why this data is collected. There should be improved training for those collecting the data so they can properly address patient concerns. Race and ethnicity subpopulation categories for all racial designations, particularly for the Black, non-Hispanic population, should be mandated.

- The New York's Department of Financial Services undertakes a study to determine whether any entities underwriting mortgages in New York are using external data sources, computer algorithms, and/or predictive models that have a significant potential negative impact on the availability and affordability of home mortgages for classes of consumers.

<u>Use of Data</u>

Once collected, the data must be used to specifically target points of bias directly. Trainings should be tailored to address areas of implicit bias and to educate professionals where biases are greatest. If the data shows flaws in the offering of treatment, the underwriting of mortgages or the disciplining of students, the responsible entity must be retrained, the algorithm rewritten, or the program discontinued. Data should be collected on a continuing basis to assess the effectiveness of any changes and trainings made in response to the data collected.

In order to ensure the collected data is used to target points of bias directly, specifically to develop tailored trainings designed to education professional about where their biases are greatest and to interrupt the implicit and explicit biases of professionals, the Task Force recommends:

- The Legislature require the use of collected data points in the areas listed above to effectively target points of bias directly, specifically to develop tailored trainings designed to educate professionals about where biases are greatest, and to interrupt the implicit and

explicit biases of the professionals and continue to gather data about disparities to assess the effectiveness of trainings on reducing disparities and make changes accordingly.

Transparency

The Legislature should require that when data is collected it is done through standardized disaggregated categories with information provided on why the data is being collected. Additionally, the data should be used to improve training for those collecting the data so they can address concerns. To ensure transparency and accountability, the data should be published on a regular basis close in time. Therefore, the Task Force recommends:

- The Legislature require that the data collected shall be collected and shared publicly at regular intervals close in time to ensure transparency and accountability.

The intersecting webs of structural racism are easily seen in these recommendations that together support the need for accurate data to measure and dismantle the continuing impact of racial bias on lending, educating, healing and health care, and criminal justice. This is an issue this Association can and should address.

2. Recommendation: Education for Licensed Professionals and Provider Facilities to Minimize Bias:

Given the effect of a long history of systemic and institutionalized racism on our country and in schools, health care facilities, the criminal justice system and in achieving homeownership leading to significant disproportionate outcomes, it is critical that Licensed Professionals and Provider Facilities receive sufficient education and training to address racial biases and deficiencies in cultural competency.

Research indicates that clinicians' racial bias or deficiencies in cultural competency can adversely affect the quality of care they provide. Persistent structural and interpersonal racism impact overall health, the care that people of color receive, their experiences with providers, and their likelihood to seek treatment. Research suggests that implicit bias may result in poorer quality of care and communication and may negatively impact patient compliance and follow-up care. Clinicians' and patient-facing staff's lack of training and understanding of racial bias and cultural humility impacts the health care received by people of color, and action must be taken to ensure that this pattern of practice no longer continues in New York's health care system.

Implicit bias impacts the physician-patient interaction through six mechanisms before, during, and after the clinical encounter, including impacting the perceptions of people of color and their expectations, erroneous statistical interpretations and data application about racial and ethnic groups, impacts on physician and patient communication, and physician's choices of treatment and diagnostic decisions that impact compliance, adherence, and patient follow-up. An abundance

of research demonstrates the clear negative impact that racism and implicit bias have on the health care outcomes of people of color. For example, a 2020 study found that between 2005 and 2016, medical professionals were 10% less likely to admit Black patients to the hospital than white patients, and a 2016 study found that many white medical students wrongly believed Black people have a higher pain tolerance than white people. Seventy-three percent of participants held at least one false belief about the biological differences between races – including that Black people have thicker skin, less sensitive nerve endings, or stronger immune systems – beliefs which are centuries old, were used to justify the inhumane treatment of slaves in the 19th century, and which are patently false.

The negative impacts of implicit bias and racism, both structural and interpersonal, arise in all corners of health care, education, the criminal justice system, and in the housing market, and are further compounded by intersectional issues where people of color are also a member of another minority group. For example, studies show that the experiences of pregnant and birthing people differ based on race and highlight the need for health care systems to focus on and address structural factors, such as racism and bias, that affect treatment.

Similarly, in education, children of color, in particular Black students and Native American students, have disproportionately negative outcomes in virtually every indicator of public education: graduation rates, discipline, overidentification of special education, gifted and talented education participation, and other such indicators.[294] Studies show that Black students are suspended and expelled three times more than white students. Students with disabilities are more than twice as likely to receive an out-of-school suspension versus students without disabilities.[295] Suspension data in NYS reflect similar disparities with Black girls receiving the most disproportionate discipline.[296] Even with the knowledge that students who miss 20 days or more in a single year have a dramatically reduced chance of graduation, suspensions in NYS can last up to a year.[297] Compounding this problem is that children of color are given less access to intervention services provided in early childhood than their white peers.[298]

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[294] Cristobal de Brey et al., *Status and Trends in the Education of Racial and Ethnic Groups 2018*, U.S. Dep't of Educ., Feb. 2019, https://nces.ed.gov/pubs2019/2019038.pdf.

[295] Nicole Scialabba, *How Implicit Bias Impacts Our Children in Education*, Am. Bar Assoc., Oct. 2, 2017, https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2017/fall2017-how-implicit-bias-impacts-our-children-in-education/.

[296] *Stolen Time New York State's Suspension Crisis*, New York Equity Coal. (Dec. 2018), https://urbanleaguelongisland.org/wp-content/uploads/2019/04/Stolen-Time-002.pdf.

[297] N.Y. Educ. Law § 3214(3)(d) (McKinney).

[298] Dawn M. Magnusson et al., *Beliefs Regarding Development and Early Intervention Among Low-Income African American and Hispanic Mothers*, Pediatrics, Nov. 1, 2017, https://publications.aap.org/pediatrics/article/140/5/e20172059/37803/Beliefs-Regarding-Development-and-Early; *Our Youngest Learners: Increasing Equity in Early Intervention*, Educ. Trust, https://edtrust.org/increasing-equity-in-early-intervention (last visited Apr. 16, 2022).

Educators who have knowledge in the areas of special education, implicit bias, and the impacts of trauma and ACEs on child development and the school environment can play an important role in building resilience and promoting academic performance. Frontline educators can be critical agents in the healing process as they spend many hours with students each day. Preparing aspiring educators with a greater understanding of the students they work with will equip them to provide more thoughtful lessons and build stronger student-educator relationships.

Looking at our criminal justice system, walking into most courtrooms across New York State, the degree of racial disparities will often be immediately apparent – but are these disparities the result of bias amongst prosecutors in making charging decisions, the result of bias by public defenders in terms of resource allocation, or the result of bias by judges in administering sentences? Certainly, all of these could be true, and there are likely many more factors.

These disparities are also seen in the appraisal values of homes in Black and Latino communities and homes in majority white neighborhoods. According to a 2021 study by Freddie Mac,[299] homes in Black and Latino communities are significantly more likely to have appraisals that are below the contract price when compared to homes in majority white neighborhoods.[300] The undervaluation occurred even when taking structural and neighborhood characteristics into account. This "appraisal gap" contributes to the widening wealth gap between Black, Latino, and white families because appreciation in home values is one of the most common ways to accumulate wealth in America. When a home is appraised below the contract price, the seller is forced to lower the contract price to match the appraisal value. This prevents Black and Latino families from building equity and perpetuates income inequality.

Of course, these outcomes are not inherent to people of color. Rather, we must decide to do something different that will work to make sustainable and lasting improvements to outcomes for people of color. Training in recognizing one's own implicit biases is critical to ensuring a level playing field for individuals in health care, school, the criminal justice system, and in the housing market. Since implicit bias influences how we act in a subconscious way, it is only by becoming aware of our own implicit biases that we can address them and become cognizant of their impact on our decision making and those around us.

Studies have shown that the biases that are leading to disparate responses in healthcare, education, criminal justice, and housing can be mitigated through education. Implicit bias training has been recommended as an addition to the formal medical school curriculum, educator training, and attorneys are now required to take one hour of diversity training each continuing legal education cycle. Raising awareness of one's implicit biases and the circumstances in which the bias are most

[299] Freddie Mac is a government-chartered enterprise which buys mortgages from commercial banks in order to lower the costs and increase the supply of residential loans.

[300] The contract price is the price agreed to by the buyer and seller. Researchers analyzed more than 12 million home appraisals for purchase transactions submitted to Freddie Mac between January 2015 and December 2020 in the top 30 metropolitan areas in the nation.

likely to be manifested is recommended to decrease the initiation of implicit bias. To combat the disparities, advocates say professionals must explicitly acknowledge that race and racism factor into their professional duties.

New York State's professionals need training on structural racism, bias, and equity, so that they are prepared to be responsive to cultural differences in order to eliminate barriers to equitable services for all. Awareness of bias and its impacts on the provision of professional services is an ethical and professional responsibility imperative. Encouraging professionals to confront interpersonal bias and empowering them to identify and modify any institutional bias can also improve professional services and help to eliminate disparities in care quality. Professional licensing and crediting requirements create an easy path to achieving competency in equity, diversity, and inclusion.

Licensure and Certification Requirements

The New York State Education Department's Office of Professions oversees at least 23 health care–related and ancillary professions, including dentistry, medicine, mental health practitioners, midwifery, nursing, occupational therapy, physical therapy, psychology, social work, and speech-language pathology.[301] At present, it does not appear that any of these professions require anti-racism, bias, diversity, and/or equity-focused training at all, let alone as a prerequisite for licensure and/or certification, or on a continuing basis as part of applicable continuing education requirements. Various professional practice-related guidelines from the New York State Office of Professions reference the importance of culturally competent care, but do not place any affirmative requirements on providers. Notably, it is impossible to meet these ethical requirements without incorporating an understanding of structural racism and unconscious bias into clinical practice.

In addition to the various medical and related professions overseen by the Office of Professions, the New York State Department of Health oversees various types of medical facilities. The types of medical facilities that require a license or certificate from the Department of Health to operate include adult, long-term, assisted living, and residential care facilities; diagnostic and treatment centers; hospitals; hospice; and birthing centers. There are minimum standards for licensure and/or certification that are applicable to each of these types of facilities, but presently there are no minimum standards that apply to racial bias and cultural humility or competency training requirements. There are, however, various patient rights and facility-related requirements that are relevant to the need for racial bias, equity, and cultural competency training.

New York State educators are in a slightly better position having an unspecified amount of implicit bias training required for educator certification, via the NYS Dignity for All Students Act

[301] http://www.op.nysed.gov/opsearches.htm.

(DASA).[302] The state requires that candidates for educator certification complete six hours of DASA training "in harassment, bullying and discrimination prevention and intervention."[303] This training covers a number of topics, including implicit bias, by helping staff "reflect upon their own personal identities including privileges and vulnerabilities."[304] Unfortunately, anecdotal reports and prior research indicate that implicit bias training in New York is not taught in a consistent manner and, worse, that implicit bias work is often not even included in the DASA trainings.[305] Additionally, current and future educators at present receive little to no coursework on trauma, special education, and trauma-informed responses, all of which contribute to disparities.

While attorneys in New York State are required to fulfill one credit hour of diversity training every two years as part of their continuing legal education requirements, similar to educators, the hour training does not include anti-racism, bias, diversity, and/or equity-focused training. Of course, the criminal justice center is not merely made up of prosecutors, defense attorneys, and judges. Therefore, in addition to more thorough training for the attorneys in the criminal justice center, training is also needed for the additional members of the criminal justice system: court officers, police officers, corrections officers, parole officers, clerks, etc.

In the appraisal industry, there are similarly no training requirements. While other structural changes are needed to diversify the appraisal industry itself, bias training will also help to reduce the biases that now play a large part in the inequitable and discriminatory appraisal system in order to improve outcomes for Black and Latino homeowners and communities.

Awareness of bias and its impacts on the provision of services is an ethical and professional responsibility imperative. Encouraging health care providers to confront interpersonal bias and empowering them to identify and modify any institutional bias can improve health equity, patient safety, and help to eliminate disparities in care quality. Educators who are aware of their interpersonal biases and who are trained to effectively respond to the needs of all students, are (1) less likely to resort to the use of punitive and exclusionary responses for disruptive student behaviors and (2) play an important role in building resilience and promoting academic performance for all students.

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[302] DASA aims to provide students "with a safe and supportive environment free from discrimination, intimidation, taunting, harassment, and bullying," and requires mandatory reporting of material incidents. http://www.nysed.gov/content/dignity-all-students-act-dasa.

[303] N.Y. Comp. Codes R. & Regs. tit. 8, § 80-1.13.

[304] *Dignity Act Syllabus for Training in Harassment, Bullying, Cyberbullying, and Discrimination in Schools: Prevention and Intervention (DASA Training)*, New York State Educ. Dep't, http://www.highered.nysed.gov/tcert/certificate/dasa-syllabus.html (last visited Apr. 18, 2022).

[305] E.g. Only 22% of new teachers reported that their DASA training discussed "internalized bias." *DASA Task Force Meeting Notes*, New York State Educ. Dep't, Dec. 6, 2017, http://www.nysed.gov/common/nysed/files/dasanotes120617.pdf.

Mandating bias training and education to combat structural racism as a requirement for both licensure and/or certification of professionals, as well as for the institutions that employ these individuals, health care facilities, school districts, criminal legal agencies, etc., will impact the level of care these professionals and institutions provide and ensure that culturally humble and competent care will be provided to more New Yorkers.

In an effort to combat structural racism and bias in health care, education, criminal justice, and mortgage lending, the Task Force makes the following recommendations:

- Mandate training on diversity, equity, and inclusion, structural racism and bias, bias towards other diverse groups (e.g., LQBTQAI+, ethnic minorities, people with disabilities) in the healthcare industry, the impacts of these structures on patient care, social determinants of health, medical approaches that are grounded in framework that addresses structural racism and equity, and the roles of racial and other biases and gatekeeping in health care, both as a prerequisite for licensure and/or certification and on a continuing basis as part of applicable continuing education requirements for all health care professionals.

- The Legislature require training on diversity, equity, and inclusion, structural racism and bias, bias towards other diverse groups (e.g., LQBTQAI+, ethnic minorities, people with disabilities) in the healthcare industry, the impacts of these structures on patient care, social determinants of health, medical approaches that are grounded in framework that addresses structural racism and equity, and the roles of racial and other biases and gatekeeping in health care for licensure or certification of all healthcare facilities that are licensed and/or certified by the New York State Department of Health.

- NYSED ensure that required DASA trainings specifically include implicit bias training and that all District employees be required to attend this training.

- The governor and Legislature amend the teacher certification law, Section 3004 of the Education Law, to require ALL aspiring educators receive coursework on trauma and its impact on child development as a prerequisite for obtaining any teaching license in New York State.

- The Legislature amend 8 N.Y.C.R.R. § 80-6.3 to designate that a percentage of the 100 hours of coursework teachers must complete as part of their continuing teaching education be in the area of Diversity, Equity, and Inclusion, special education, and trauma-informed responses and that this requirement be in effect for each five-year registration cycle.

- Mandate bias training for those in the appraisal industry itself in order to reduce inequitable and discriminatory outcomes in the appraisal system and to improve outcomes for Black and Latino homeowners and communities.

- Mandate criminal legal agencies develop specific interventions to address identified areas of disparity.

To Ensure Efficacy of Training

Something is not always better than nothing. Frequently, while implicit bias training or diversity, equity, and inclusion credit hours may be required, there are no specific training requirements and credentials for these mandated trainings.

Currently, in terms of the trainer's academic credentials for DASA, for example, the State requires only that an applicant seeking certification to provide DASA training simply show that the applicant has the "competence to offer the course work or training."[306] No specific training or work in bias training is required. Amending this regulation to include specific training requirements for prospective training providers would help to ensure that the trainings are effective and well received. The Task Force recommends that 8 N.Y.C.R.R. § 57-4.3 be amended to include specific credentials relating to bias training, in order to be certified as a New York State–approved DASA trainer and that all other required trainings have similar standards. Additionally, any credential/licensure training requirements by the Legislature should include specific training requirements and minimum credential requirements for trainers.

Similarly, while many health care workers, social services workers, educators, and attorneys are required to take State-mandated reporter training. The usually four-hour training is seriously insufficient, leading to an unintended negative impact that disproportionately affects children of color.[307] According to reports, 25% of Child Protective Services (CPS) investigations stem from allegations of serious physical injury, sexual acts, or substantial emotional abuse. The remaining investigations take place as a result of alleged "neglect," which is defined by a parent's inability to provide the basic needs for their children including healthcare, food, and other essentials.[308] Considering this definition, the inclusion of "neglect" as a mandatory reporting requirement in turn has negatively impacted low-income and poverty-stricken families due to financial struggles and not serious harm.[309] Additionally, the expansion of designated professionals who qualify as a mandated reporter has significantly contributed to the sharp increase and disproportionate number of CPS cases involving children of color.[310] According to a NYC Administration of Children's

[306] N.Y. Comp. Codes R. & Regs. tit. 8, § 57-4.3.
[307] New York State Bar Association, Report and Recommendations of the Committee on Families and the Law Racial Justice and Child Welfare, at 6, https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf (last visited Apr. 18, 2022).
[308] *Id.* at 7.
[309] *Id.* "By the time they reach the age of 18 years old, an astounding 53% of black children in the United States will have been subject to at least one Child Protective Services (CPS) investigation compared with 28% of white children and 38% of all children."
[310] *Id.* at 9. "Since the enactment of CAPTA the number of reports to state child welfare agencies of suspected abuse and neglect have increased exponentially, in 1974 there were 60,000 reports, in 2018 3,534,000 million children were the subject of a CPS investigation or alternative response.; *see also* New York City Administration for

Services report, education-based and social service-based mandated reporters submitted the most SCR intake allegations during a four-month period substantially on the basis of neglect[311] and in boroughs with a significant population of students of color.[312] With this in mind, the Legislature passed amendments to Social Services Law Section 413 to update the mandated reporter training. These updates should include training on understanding the difference between poverty and neglect.

To ensure successful, valid and robust training, the Task Force makes the following recommendations:

- Any credential/licensure training requirements by the Legislature should include specific training requirements and minimum credential requirements for trainers.

- 8 NYCRR § 57-4.3 should be amended to include specific credentials relating to bias training, in order to be certified as a NY State-approved DASA trainer and that all other required trainings have similar standards.

- The Task Force supports the amendment to Social Services Law Section 413 updating the mandated reporter training and recommend an additional update to include training on understanding the difference between poverty and neglect.

Just as our profession recognizes the need for ongoing education in diversity, equity, and inclusion, we should support similar and improved training and accreditation for New York's educators, appraisers, health care providers, and members of the criminal justice system to help dismantle racist practices.

3. Recommendation: Support the Establishment of a Commission to Study Remedies to Minimize the Wealth Gap

As documented throughout the Task Force report, the result of decades of segregation, and policies and processes – including but not limited to redlined communities; health deserts; polluted neighborhoods where residents cannot safely drink the water nor breathe the air; disproportionate educational opportunities; and over-policing communities of color that have limited essential opportunities to these communities – have caused a racial wealth gap. As discussed above, historical discriminatory practices impeded Blacks efforts to obtain employment that would enable them to become part of the middle class in large numbers. The wealth gap starts at birth with nearly 73% of poor children in America being children of color. As a result, in New York State, while

Children's Service Monthly Indicator Flash Report for March 2022 at 29, https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2022/03.pdf (last visited Apr. 18, 2022).

[311] Flash Report for March 2022 *supra* note 54.

[312] *Id.* at 30.

white families only represent 60% of the families in New York State, they account for nearly 71% of family income.[313] Additionally, a disproportionate number of families of color in New York State live in poverty or are low-income. This is unconscionable.

We know how we got here. Now we need to determine how to close the gap. We need to examine the feasibility of economic support such as restitution or reparations (similar to those previously paid to Native Americans or Japanese Americans) or other legal remedies. We need to determine what remedies including those proposed will have the desired effect of reducing the racially disproportionate wealth gap beyond the current generation.

The Task Force recommends that the Association support the creation of a Wealth Gap Commission to study the wealth gap between whites and people of color and to propose policies that would significantly reduce the disparities.

Creation of a Wealth Gap Commission

While Congress issued an apology for slavery and Jim Crow in 2008, the United States has never attempted to right the monetary wrongs inflicted against Black Americans who were descendants of slaves.[314]

> [T]he Negro came to this country involuntarily, in chains, while others came voluntarily . . . [N]o other racial group has been a slave on American soil. . . . [T]he other problem that we have faced over the years is that the society placed a stigma on the color of the Negro, on the color of his skin. Because he was black, doors were closed to him that would not close to other groups.[315]

Not only were Black Americans forcibly enslaved and put to labor – which, as Dr. Martin Luther King, Jr. noted, is not the case for any other group of people in this county – the other groups of people wronged by the federal government have already received apologies and some form of monetary compensation; this includes Native Americans and Japanese Americans who were interned during World War II.[316]

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[313] Melanie Hanson, *Student Loan Debt by Race*, EducationData, Dec. 12, 2021, https://educationdata.org/student-loan-debt-by-race.

[314] *Congress Apologizes for Slavery, Jim Crow*, NPR, July 30, 2008, https://www.npr.org/templates/story/story.php?storyId=93059465.

[315] Martin Luther King, Jr., April 14, 1967 speech: The Other America, https://www.rev.com/blog/transcripts/the-other-america-speech-transcript-martin-luther-king-jr.

[316] Rebecca Hersher, *U.S. Government to Pay $492 Million to 17 American Indian Tribes*, NPR, Sept. 27, 2016, https://www.npr.org/sections/thetwo-way/2016/09/27/495627997/u-s-government-to-pay-492-million-to-17-american-indian-tribes. *See also* Michelle Tsai, *Cherokee Perks: What's so good about being a Native American?*, Slate, Mar. 5, 2007, https://slate.com/news-and-politics/2007/03/what-special-benefits-do-you-get-for-being-cherokee.html.

Reparations were granted after the German Holocaust to resettle refugees, to compensate heirless estates, to provide pensions to survivors of the Holocaust, and to compensate for slave labor. The 2019 total in US dollars was about $89,521,280,000. Such reparations were not the result of the judgment at Nuremberg but, rather, were borne of a political process that led to a new law that set legal precedent worldwide.

Similarly, reparations were given for other historical injustices, including Native American genocide. In 1946, Congress set up the Indian Claims Commission to hear Indian "claims for any land stolen from them since the creation of the USA in 1776." While the National Congress of American Indians acknowledges these efforts, it also notes, as we do, that "those efforts have been woefully inadequate."

In 1988 President Ronald Reagan signed the Civil Liberties Act awarding $20,000 per survivor to Japanese American World War II internees, accompanied by a letter of apology from then President Reagan.[317] With these precedents in mind, as well as a deep understanding of the embedded structural racism in New York's programs, laws, and policies, the commission would study the appropriate actions to begin to close New York's racial wealth gap for descendants of American slaves in our state.

While this will be a daunting task, given the amount of thought and planning that the federal, state, and local governments put into the Black Codes, segregation, Jim Crow, even the "war on drugs" (which saw a disproportionate number of Black men incarcerated for decades upon decades for marijuana offenses), equivalent planning and thought should now be given to close the racial wealth gap.

As an example to draw from, California Assembly Bill 3121 established the Task Force to Study and Develop Reparation Proposals for African Americans, with a Special Consideration for African Americans Who are Descendants of Persons Enslaved in the United States (Task Force or Reparations Task Force). The purpose of the Task Force is: (1) to study and develop reparation proposals for African Americans; (2) to recommend appropriate ways to educate the California public of the task force's findings; and (3) to recommend appropriate remedies in consideration of the Task Force's findings.[318]

Here in, New York State, once the framework and potential recipients are identified, actions to begin to close the wealth gap can take many different forms at both the federal and state levels. The government could provide tax credits in specific amounts over a period of years to African Americans to be used in areas where the most discrimination occurred. For instance, credits toward a higher education or home ownership or to be used as capital to begin a new business. Student

[317] Erin Blakemore, *The Thorny History of Reparations in the United States*, History.com, Aug. 29, 2019, https://www.history.com/news/reparations-slavery-native-americans-japanese-internment.
[318] https://oag.ca.gov/ab3121/members.

loan forgiveness, as has been implemented by the Biden Administration, or mortgage forgiveness (for government-backed mortgages) up to a certain amount could be offered. An additional remedy could be to support cannabis legalization as a form of reparations to the BIPOC Community. Licenses could be provided to those within the BIPOC Community to ensure that the cannabis industry is more equitable. These options all require further study.

Along this line of thinking, and to address the unconscionable racial wealth gap that has grown in America and New York State, a commission needs to be formed to study the wealth gap. Therefore, the Task Force recommends:

- The Association support NY State Senate Bill and Assembly Bill (S7215/A2619a) that will create a Slavery Reparations Commission. The legislation establishes a Commission to study and examine the harm done and would establish a plan on how to deliver reparations to African Americans. The Commission would not provide money. The Bill has stalled, and the New York State Bar Association should urge Assembly Speaker Carl Heastie and Senate Majority Leader Stewart Cousins to pass the bill. The Bill would start off with establishing a Commission to Study. At this time the Commission would not provide financial restitution.

4. Recommendation: Jury procedures, to guarantee the constitutional principle that one will be judged by a Jury of their peers

Juries are essential to the functioning of a democratic society and a fair criminal legal system. A person who is charged with a crime is entitled to unbiased, impartial decision-makers who are selected from a cross-section of their community to sit on the jury. Research demonstrates that racially diverse juries ensure fairer outcomes. Unfortunately, racially diverse juries are not the norm, both because people of color are underrepresented in the jury pool and because of jury selection rules and practices that routinely disproportionately eliminate potential jurors of color.

To provide juries that meet the Constitutional principle that one will be judged by a jury of their peers, it is necessary to change policies that reduce the number of people of color in the jury pool and to change jury section practices and rules that permit implicit or explicit bias to disqualify people of color as potential jurors.

According to the data contained in Table D of the 9th Annual Report Pursuant to Section 528 of the Judiciary Law published by the Office of Court Administration, which examined 2019 jury pools, people of color are severely underrepresented in jury pools throughout New York.[319] The data confirms what practitioners have observed for years.

[319] Compare the data on Black jurors in Table D of the OCA Annual Report, https://ww2.nycourts.gov/sites/default/files/document/files/2020-09/2019%20Section%20528%20Annual%20Report.pdf, with Census data on the percentage of the population that is

Almost half a century ago, the U.S. Supreme Court, in *People v. Kiff*,[320] made clear the deleterious effects of jury exclusion:

> *When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.*

The Task Force identified four laws which depress the participation of people of color in the jury pool and which should be changed to significantly increase the diversity of the jury pool. They are:

- The fact that a felony conviction, no matter how old and no matter for what crime, acts as an automatic bar to inclusion in the jury pool;
- The use of county-wide jury pools to select jurors for City and other lower courts, where the population of the City or other jurisdiction is more diverse than the county as a whole;
- The low level of juror pay; and
- The use of voir dire opportunities and peremptory challenges, which contribute to racial bias in jury selection.

Felony convictions should not act as a complete bar to serving on a jury.

One of the significant contributing factors to the underrepresentation of Black and Latinx people from New York's jury pools is the felony conviction jury service exclusion contained in Judiciary Law § 510(3). More than 19 million people in the United States have a felony conviction. It has been estimated that 13 million people are banned for life from jury service because of a felony conviction. These felony convictions fall disproportionately on Black and Latino males both nationally and in New York. In New York State approximately 33% of Black men are excluded forever from the jury pool because of the State's felony exclusion law.

Accordingly, the Task Force recommends:

Black in each county outside of New York City at https://www.indexmundi.com/facts/united-states/quick-facts/new-york/black-population-percentage#table. In most of the counties with Black populations greater than 10% the rate of Blacks in the jury pool was half the rate in the population or less.

[320] 407 U.S. 493, 503–4 (1972).

- Amending subdivision 3 of Judiciary Law § 510 to permit individuals who have been convicted of a felony, and who have completed the service of any sentence related to such conviction, to be called to serve in the jury pool.

This amendment would conform the rules for jury service with the rules for voting.[321]

Jury pools in City and other lower courts should be drawn from jurors residing in the geographic area covered by the court , rather than from a county-wide jury pool.

Jury pools for City and other lower courts outside of New York City often do not represent the demographics of the community covered by the court, because of an Office of Court Administration practice to use a county-wide jury pool, rather than only potential jurors who reside within the geographic area covered by the court. Outside of New York City, many cities and other political subdivisions have more diverse populations than the counties within which they are located. The use of county-wide jury pools in City and other local courts often has the impact of decreasing the percentage of people of color in the pool.

Judiciary Law § 500, in pertinent part, states "[i]t is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes." The Court of Appeals in *Matter of Oglesby v. McKinney*,[322] held that "[w]hile section 500 clearly does not command that all juries be selected county-wide, it seems to imply that selection from the county will be the norm, to which exceptions are possible."[323] Further, it noted that "neither the Legislature nor OCA has provided for City Court jurors to be empaneled from lists of city residents. City Courts are often located . . . near courts of county-wide jurisdiction, and it has apparently been found convenient for them to draw on the same county-wide lists of jurors."[324]

Convenience should not be the determining factor when constitutional rights are at stake. An accused should have a jury of their peers. The Constitution requires that jurors are chosen from a fair cross-section of the community.[325]

The Task Force recommends:

- The Association support either an OCA rule change or the amendment of Section 500 of the Judiciary Law to address the disparate impact of county-wide selection of jurors for the

[321] *See* Corrections Law § 75, which requires that notice of the restoration of voting rights upon release from custody be provided to individuals being released from state custody. https://nycourts.gov/courthelp/criminal/votingConsequences.shtml.
[322] 7 N.Y.3d 561 (2006).
[323] *See id.* at 566.
[324] *Id*. at 567.
[325] *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative (2021).

jury pool in City and other local courts, when the percentage of people of color in the geographic location of the court exceeds that of the county as a whole.

This change would ensure that the jury pool more fairly and accurately reflects the demographic composition of the community, where the trial will be held.

Jurors should receive sufficient compensation to enable broader participation without undue hardship.

Jury service should be encouraged and should be a financially feasible option for New Yorkers. Jury service is a compulsory obligation, requiring jurors to sacrifice both their time and their potential earnings while they fulfill this unique role of the justice system. For many prospective jurors , jury service is not economically viable, as the current rate of jury pay, $40 per day, does not adequately replace lost earnings, leading to potential jurors for whom the low pay creates a financial hardship being excused.

Forty dollars per day equals five dollars an hour, well under the minimum wage. A prospective juror earning minimum wage will see their pay decrease by two-thirds or three-fifths for each day of jury service; prospective jurors who earn above minimum wage experience even greater decreases. Low juror pay disproportionately affects minority and low-income populations, who work in jobs that do not provided paid jury leave, acting as a bar to their participation. Increasing jury service pay will increase juror participation by making participation economically viable.

The Task Force recommends:

- The Association support legislation to amend Judiciary Law § 506(1) that would increase the daily rate of pay for all juror service from $40.00 to the range of $120.00 per day. Additionally, other avenues for paycheck retention during jury service should be explored, such as tax credits or similar vouchers for businesses that continue to pay employees while they serve.

Such a program would eliminate juror concerns of losing out on pay while forced out of work.

Racial bias in jury selection must be eliminated by expanding voir dire opportunities and limiting peremptory challenges.

Once the jury pool accurately reflects the racial composition of the population, it is critical to prevent implicit or explicit bias from being used to exclude potential jurors of color from sitting on the jury. To achieve this will require legislation that would permit counsel sufficient time during voir dire to explore issues of possible bias, and to strengthen the protections against the use of peremptory challenges to exclude potential jurors of color.

Defense counsel is often subjected to unreasonable time limits during voir dire. CPL § 270.15 should be revised to set some minimum standard for the timeframe that should be afforded to counsel to conduct voir dire. Moreover, the Legislature should articulate a policy that indicates that there is a presumption of unreasonableness, abuse of discretion, and prejudice to the defendant if less than 30 minutes is allotted to counsel per round, particularly when there are serious felonies to be tried in the case.

During the jury selection process counsel is often limited to 15 minutes per round, regardless of the seriousness of the charges, e.g., murder, burglary 1, or other serious felonies. The Court of Appeals in *People v. Jean*[326] found that the trial court did not abuse its discretion in limiting counsel questioning to 15 minutes in the first two rounds and 10 minutes in the third round of voir dire. Questioning potential jurors on bias alone can take more than 15 minutes.

To permit adequate time to explore issues of potential bias, CPL § 270.15 should be amended to provide a presumptive minimum timeframe for questioning prospective jurors. Times set below this timeframe would be presumptively considered to be an abuse of discretion, unreasonable, and prejudicial to the defendant if imposed upon counsel during voir dire.

Peremptory challenges during voir dire must not be used to eliminate people of color merely because of their racial identity. For example, Black potential jurors are often singled out and questioned about their trust of the police. Though the question is not facially biased, white jurors are not asked this same question at equal rates. If only Black jurors are asked questions about their lack of trust of the police, this clearly displays a bias.

The 13th, 14th, and 15th Amendments to the United States Constitution ensured that the formerly enslaved were not only granted "freedom," the right of citizenship, and the right to vote, but that the formerly enslaved could sit as jurors.[327] Congress passed the Civil Rights Act of 1875 to ensure that there were provisions that did not exclude Black jurors from jury selection.[328]

In *Batson v. Kentucky*,[329] the Supreme Court held that the Equal Protection Clause forbids parties from challenging potential jurors based solely on account of their race or racial assumptions. Whether there is a *Batson* violation depends on a three-prong analysis. First, the party alleging a violation must establish a prima facia showing of discrimination. Second, the party seeking to use a peremptory challenge must offer a race-neutral explanation for the challenge. Finally, the trial court must determine whether the purported neutral reasoning is merely a pretext for discrimination.

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[326] 75 N.Y.2d 744 (1989).
[327] U.S. Congress, *The 13th, 14th and 15th Amendments, SHEC: Resources for Teachers,* https://shec.ashp.cuny.edu/items/show/1524.
[328] *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative (2021).
[329] 476 U.S. 79 (1986).

The burden for litigants seeking to raise a *Batson* challenge is significant, and courts are hesitant to imply racial or gender bias. Indeed, "the use of race-and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."[330] In short, *Batson* procedures employed by New York Courts do not offer enough protection against discrimination in jury selection.

Other states have recognized this problem and have responded to it. For example, both Washington and California have enacted legislation targeting peremptory challenges to eliminate unfair exclusion of potential jurors based on race or ethnicity. California Code of Civil Procedure § 237.1 directs the court to employ an objective test, rather than the subjective analysis under *Batson*. The law requires that "the court must consider whether there is a substantial likelihood of an objectively reasonable person. . . would view the challenge as related to the juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation."[331] Washington General Rule 37 similarly employs an objective test, allowing objections to peremptory challenges "if an 'objective observer' could view race or ethnicity as a factor in use of the peremptory strike."[332]

New York should follow this lead. Additional legislation or court rules could target bias in questioning by allowing parties to develop records related to racial, ethnic, and gender bias, both in the substance of questions and to whom they are addressed among the potential jurors. As such, and in order to eliminate bias in jury selection, the Task Force recommends:

- The New York State Legislators should enact legislation to expand and mandate the amount of time permitted for attorney conducted voir dire.

- Legislation should be enacted to compliment *Batson*'s prohibition on racial bias in peremptory challenges.

It is time for New York State to take a leadership role in eliminating racial bias in the criminal justice system. Taking steps to guarantee the constitutional principle that one will be judged by a Jury of their peers is one small way New York can be such a leader.

5. <u>Increase access to quality childcare for all children</u>

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[330] *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring).
[331] Quinn, Emanuel, Urquhart & Sullivan LLP, *Noted with Interest: A Sea Chante to Preemptory Challenges: The Effects of California's AB-3070*, April 22, 2021, https://www.jdsupra.com/legalnews/noted-with-interest-a-sea-change-to-9018157/.
[332] *New Rule Addresses Failings of US. Supreme Court Decision*, ACLU Press Release, April 9, 2019, https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury.

In December 2021, the Office of New York State Senator Jabari Brisport issued a report detailing the state's childcare crisis.[333] Among numerous other serious issues (most notably, the cost of childcare, which can be around $21,000 annually), the study found that "sixty-four percent of New Yorkers live in a 'childcare desert,' where there are either no available childcare providers or far too few providers to meet families' needs."[334] Some counties within the state have lost over 50% of their childcare programs in the last 10 years.[335]

The pandemic has further exacerbated the crisis with the cost of childcare increasing and with nationally approximately 427,000 fewer women in the labor force than before the pandemic, while seeing an increase of 225,000 men.[336] Women who leave the workforce to care for their children will lose more than $480,000 in their lifetime, money families desperately need.[337]

The crisis is amplified for parents and caregivers who work outside of normal business hours. Senator Brisport's study found that while existing providers showed interest in expanding their services to nights and weekends, they lacked the necessary funding (for staff and space) to do so.[338] The lack of available off-hours childcare has disproportionately affected parents and caregivers of color, many of whom live in childcare deserts and continue to serve as essential workers during the pandemic.[339]

With poverty spells being more prevalent for those families with children under six years of age, it appears that the loss of work hours incurred by the parent(s) is a large contributor to poverty.[340] Families with children face the dual obstacles of the increased costs associated with children (formula, diapers and other necessities, childcare, etc.) and the loss of income necessitated by having to fill in if alternative childcare is not available.

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[333] Office of Senator Jabari Brisport and the Alliance for Quality Education, The Child Care Crisis in New York State, Dec. 2021, https://www.nysenate.gov/sites/default/files/childcaretourreport.pdf.
[334] *Id.*
[335] *Id.*
[336] *Council Passes Legislation to Increase Accessibility for Child Care Services in New York*, NYC Council, Oct. 12, 2022, https://council.nyc.gov/press/2022/10/12/2283/.
[337] *Id.*
[338] *Id.*
[339] *See* Cristina Novoa, *How Child Care Disruptions Hurt Parents of Color Most*, Center for American Progress, June 29, 2020, https://www.americanprogress.org/article/child-care-disruptions-hurt-parents-color/; Shiva Sethi, Christine Johnson-Staub and Katherine Gallagher Robbins, *An Anti-Racist Approach to Supporting Child Care Through COVID-19 and Beyond*, Center for Law and Social Policy, July 14, 2020, https://www.clasp.org/publications/report/brief/anti-racist-approach-supporting-child-care-through-covid-19-and-beyond.
[340] The State of America's Children 2020, Children's Defense Fund, https://www.childrensdefense.org/policy/resources/soac-2020-child-poverty/; *see also* Jon Greenberg, *Is having a kid a leading trigger for poverty?*, PolitiFact, Aug. 12, 2014, https://www.politifact.com/factchecks/2014/aug/12/moms-rising/having-kid-leading-trigger-poverty/.

The effects of the childcare crisis are not only disproportionately felt by parents and caregivers of color, but also by Black women and women of color who are paid substandard wages while working in childcare facilities. Governor Hochul's Child Care Availability Task Force found that "65% of childcare providers receive such low wages that they are eligible for several social safety net programs such as food stamps and Medicaid."[341] As Senator Brisport noted, this injustice leads to childcare providers leaving the industry for other employment, thus perpetuating existing childcare shortages.[342]

Given the disproportionate number of children of color living in poverty and the dire outcomes for children who grow up in poverty, it is critical that resources that can end the cycle of poverty be accessible. Increasing access to childcare, particularly for parents and caregivers of color who serve as essential workers, is one such resource that is imperative to combat poverty and increase economic opportunities to people of color. In order to increase access, childcare workers need to be provided competitive salaries as "educators."

A universal childcare bill would provide a singular solution to address both of these issues. Such a bill would provide funds for the establishment and funding of universal childcare particularly in childcare deserts; increase access to childcare for parents and caregivers, especially essential workers, who work outside typical business hours; and provide funding and requirements for competitive salaries for childcare workers who will be acknowledged as the educators they are.

Based on the foregoing, the Task Force recommends:

- The Association support passage of the Universal Child Care bill put forward by Senator Brisport in December 2021 and support the policies and intent of the bill which would amend the State finance law to establish funds to provide for the establishment and funding of universal childcare and provide competitive salaries to childcare workers as "educators."

Lack of access to childcare causes families to lose working hours and, thus, income. In order to close the wealth gap and give families a path to equity, resources such as childcare must be available, affordable, and accessible.

6. Access to Capital for Minority-Owned Businesses

Minority-owned businesses play a critical part in New York's economy. As policymakers have recognized for decades, minority-owned businesses are often the lifeblood of their communities. They help create jobs and provide opportunities for underserved communities. But these businesses face hurdles to surviving and growing, primarily because of their difficulty in obtaining

[341] https://ocfs.ny.gov/reports/childcare/Child-Care-Availability-Task-Force-Report.pdf, at p. 28.
[342] Office of Senator Jabari Brisport and the Alliance for Quality Education, The Child Care Crisis in New York State, Dec. 2021, https://www.nysenate.gov/sites/default/files/childcaretourreport.pdf.

access to capital. Minority businesses often face barriers in securing business loans from their local financial institutions.[343]

A 2016 study found that higher rejection rates and lower loan amounts typified lending to Black and Hispanic-owned Minority Business Enterprises (MBE).[344] The 2021 Small Business Credit Survey found that Black-owned firms that applied for traditional financing were least likely to receive all of the funding they sought. The Survey found that 40% of white-owned firms received all of the funding they sought, compared to 31% of Asian-owned firms, 20% of Hispanic-owned, and only 13% of Black-owned firms.[345] This trend persists even among firms with good credit scores.

In a 2020 report on Black-owned businesses, the City of New York looked at America's top high-growth sectors – health care, technology, and energy – over the next ten years.[346] The report found wide disparities for Black entrepreneurs in those sectors. According to the report, 5% of healthcare firms are Black-owned, 5.1% of venture-backed tech founders are Black, and 0.1% of clean energy firms are Black-owned. These disparities can be traced directly to a lack of sufficient access to capital.[347]

Without access to needed capital, minority businesses struggle to grow and gain any traction in their selected industry. Compared to other business financing options, even having to seek bank loans has disadvantages. Without alternative capital options, businesses either reduce operational capacity or go out of business. Both options can stunt job creation, slow down local economies, and further increase the earnings gap in the United States. The inequities of the COVID-19 economy exacerbated this gap. African Americans experienced the most significant losses due to the COVID-19 pandemic, eliminating 41 percent of business owners.[348] Similarly, the number of Hispanic business owners declined by 32% between February and April 2020, while immigrant business owners dropped 36 percent.[349]

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[343] MBDA: Improving Minority Businesses' Access to Capital, The Opportunity Project, 2021 Problem Statement, https://opportunity.census.gov/assets/files/2021-problem-statements/post-covid/MBDA_Improving%20Minority%20Businesses%20Access%20to%20Capital.pdf.

[344] Wonhyung Lee and Stephanie Black, Small Business Development: Immigrants' Access to Loan Capital, J. of Small Bus. & Entrepreneurship 29(3): 1–17 (Mar. 2017), https://www.researchgate.net/publication/315302976_Small_business_development_immigrants'_access_to_loan_capital

[345] 2021 Report on Firms Owned by People of Color, Fed Small Business, https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color.

[346] Advancing Black Entrepreneurship in New York City, NYC Small Business Services (Aug. 2020), https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/benyc-report-digital.pdf.

[347] *Id.*

[348] MBDA: Improving Minority Businesses' Access to Capital, *supra* note 339.

[349] *Id.*

Even the tools that were designed to help during the pandemic, like PPP and Disaster Relief loans, were provided last to communities of color.[350] Because of the financial deserts in which they live, people of color disproportionately turn to online banks for their financial needs. However, the online lenders were not made eligible to issue the pandemic relief loans until April 14, 2020, two days before the first round of funds was depleted.[351] "The PPP initially relied on traditional banks to deliver loans, which favored existing customers at large banks and disfavored microbusinesses (businesses with fewer than 10 employees), non-employer businesses, and Black- and Latino- or Hispanic-owned businesses (which all tend to be unbanked or underbanked)."[352] Independent contractors and self-employed individuals were not eligible for loans until April 10, 2020.[353]

In 2021, the New York State Department of Financial Services created the Office of Financial Inclusion and Empowerment.[354] According to Superintendent of Financial Services Linda A. Lacewell, the Office would pilot and develop policy initiatives designed to further financial inclusion and empowerment.[355] Newly appointed Director of the Office of Financial Inclusion and Empowerment, Tremaine Wright, indicated that the new office would focus on community wealth building and would connect consumers in underserved communities with financial services and resources.[356] This newly created Office of Financial Inclusion and Empowerment is perfectly poised to commence programing for minority businesses to receive the necessary access to capital so they may grow and gain traction in their selected industry.

As such, the Task Force recommends:

- The Association advocate for an increased part of the 2023 state budget be earmarked for underserved communities in New York for entrepreneurs and small businesses. Specifically, the ARP reauthorized and expanded the State Small Business Credit Initiative (SSBCI). The newly created Office of Financial Inclusion and Empowerment can and should spearhead the use of these funds for traditionally underrepresented communities and NYSBA should lobby that it do so.

For New York State to truly become a state of economic opportunities, it must address the issues presented by minority-owned businesses lacking access to capital.

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[350] Sifan Liu and Joseph Parilla, *New data shows small businesses in communities of color had unequal access to federal COVID-19 relief*, Brookings Institute, Sept. 17, 2020, https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief/.
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] DFS Press Release: Superintendent Lacewell Announces New DFS' Statewide Office of Financial Inclusion and Empowerment, April 13, 2021, https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202104131.
[355] *Id.*
[356] *Id.*

7. Support Measures to Reduce or Eliminate the Racial Disproportionality in School Discipline that Contributes to Disparities in Educational Outcomes.

The New York State Constitution requires that all children be offered a free and appropriate public education, and it is the hope that all students have the chance to explore their full potential. To ensure that all children have this opportunity, it is critical that NYS support efforts to eliminate inequities, reduce biases, whether explicit or implicit, as well as support curriculum and learning settings that embrace a diversity of cultures.

Children learn best when they are included, when all backgrounds are embraced, and when they do not feel like outsiders. A key factor associated with optimal child well-being is our ability to provide children with safe, nurturing, stable environments that support development of sound cognitive, emotional and social skills. It is well established that children tend to thrive and become healthy, productive adults when they are provided with these types of environments.

We can decide to address disproportionality and make sustainable and lasting improvements to the outcomes for all children in the public education system. Over the last 25 years a growing consensus has developed around the impact of trauma and child development. Significant research and medical studies have found that adverse childhood experiences (ACEs) negatively impact a child's social, emotional, and cognitive development. ACEs are potentially traumatic events that can have negative, lasting effects on an individual's health and well-being.[357] These negative experiences range from physical, emotional, or sexual abuse to parental divorce or the incarceration of a parent or guardian. Some of these adverse experiences can come from a collective trauma or a societal history of trauma such as slavery and generations of racism and state sanctioned racist policies.[358] Consequently, children of color and low-income children on average experience many more ACEs than white children and children who come from economically advantaged families.[359]

ACEs sustained over a long period of time may create "toxic stress" upon the child.[360] Children typically are unable to effectively manage this type of stress by themselves. This can lead to an overactive stress response system which can cause permanent changes in the development of the

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[357] *Adverse Childhood Experiences Among New York's Adults*, Council on Child. & Families (2010), https://www.ccf.ny.gov/files/4713/8262/2276/ACE_BriefTwo.pdf; V. J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults. The Adverse Childhood Experiences (ACE) Study*, Am. J. Prev. Med. (May 1998), https://pubmed.ncbi.nlm.nih.gov/9635069/.

[358] Andrew Curry, *Parents' Emotional Trauma May Change Their Children's Biology. Studies in Mice Show How*, Science, Jul. 18, 2019, https://www.*science*.org/content/article/parents-emotional-trauma-may-change-their-children-s-biology-studies-mice-show-how; *Healing the Wounds of Slave Trade and Slavery*, UNESCO/GHFP Report (Jan. 2021), https://healingthewoundsofslavery.org/wp-content/uploads/2021/04/UNESCO-GHFP_2020_Healing-the-Wounds-of-Slavey_Desk-Review_Report.pdf.

[359] *Adverse Childhood Experiences*, Child Trends, https://www.childtrends.org/indicators/adverse-experiences (last visited Apr. 16, 2022).

[360] Jennifer S. Middlebrooks & Natalie C. Audage, *The Effects of Childhood Stress on Health Across the Lifespan*, U.S. Dep't of Health and Human Servs. (2008), https://stacks.cdc.gov/view/cdc/6978.

child's brain. Research strongly links ACEs and childhood trauma with a wide array of negative impacts throughout one's life, including the ability to learn. Young children exposed to five or more ACEs in their first three years are 76% more likely to have one or more delays in language, emotional, or brain development.[361] Trauma and toxic stress can impact a student's ability not only to learn and develop but to respond to challenging situations in the school environment.[362]

Trauma can disrupt a student's core beliefs about safety, security, and the world around them. But students impacted by trauma who have adequate support to make sense of their circumstances may experience psychological growth or post traumatic growth. Thankfully, research shows that these negative effects of toxic stress can be lessened or even *healed* by building resilience through the support of caring adults and with appropriate interventions.[363]

Research-based approaches to address this public health issue are focused on preventing exposure to school-based trauma and on building resilience in children who have been exposed to trauma. A significant aspect to building resilience in children exposed to trauma and ACEs is to create safe, stable, nurturing relationships in the school community. These relationships not only help students cope with ongoing trauma, but they ensure that trauma-related behavioral challenges receive a compassionate, not punitive, response. Healing-centered schools are vital to helping children exposed to trauma and toxic stress build resilience and learn. Healing-centered schools are also more likely to provide support for and reduce manifestations of trauma-related behavioral challenges, unlike punitive responses that exacerbate those challenges.[364]

In order to provide students with safe, stable, nurturing relationships, the school community can play an important role in helping students heal from exposure to trauma/ACEs. Therefore, the Task Force recommends:

- The NYS Board of Regents and the NYS Education Department support the design and development of healing centered/trauma sensitive schools in all school districts throughout the state. This should include the development of guidance, policies, and curricula (see below) that will not only support but also encourage the adoption of a healing centered/trauma sensitive approach by any school or school district.

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[361] Carol Westby, *Adverse Childhood Experiences: What Speech-Language Pathologists Need to Know*, Word of Mouth, 30(1):1–4 (Sept. 6, 2018), https://journals.sagepub.com/doi/10.1177/1048395018796520.
[362] Center on the Developing Child, *The Impact of Early Adversity on Child Development (InBrief)*, Harvard University (2007), retrieved from www.developing child.harvard.edu.
[363] Center on the Developing Child, *The Science of Resilience (InBrief)*, Harvard University (2015). retrieved from www.developingchild.harvard.edu; *see also* Nicole R. Nugent et al., *Resilience after trauma: From surviving to thriving*, 5 European J. of Psychotraumatology 25339 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4185140/.
[364] *Community Roadmap to Bring Healing-Centered Schools to the Bronx*, Healing-Centered Schools Working Group (June 2020), https://www.legalservicesnyc.org/storage/PDFs/community%20roadmap%20to%20bring%20healing-centered%20schools%20to%20the%20bronx.pdf.

One of the adverse effects of failing to respond appropriately to children exposed to trauma and ACEs is that children of color are suspended[365] and over-identified for self-contained special education classrooms in upper elementary and middle school at a disproportionate rate to their white peers.[366] Compounding the problem is that children of color are given less access to intervention services provided in early childhood and early elementary school than their white peers.[367] Black children with developmental delays are 78% less likely to be identified and receive early intervention services.[368]

The failure to provide students of color with necessary interventions and services to address their needs contributes to students of color being suspended at disproportionately higher rates. For example, in 2018–2019, Black and Latinx students represented 67% of students in New York City, but were involved in 89% of police interventions in school and 84% of suspensions.[369]

Under 8 N.Y.C.R.R. § 117.3, students are screened for "determination of development in oral expression, listening comprehension, written expression, basic reading skills and reading fluency and comprehension, mathematical calculation and problem solving, motor development, articulation skills, and cognitive development using recognized and validated screening tools upon entrance to a district" ("Developmental Screening").[370] Additional diagnostic screening is conducted only if the student has low test scores and then only looks at vision and hearing concerns that may contribute to interfering with learning.[371] Response to intervention programs, under 8 N.Y.C.R.R. § 100.2(ii)(1)(ii), require "screenings applied to all students in the class to identify those students who are not making academic progress at expected rates." However, the regulation does not explain how students are to be screened, what the screenings are to look for, or create validity standards for the screenings.

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[365] The 2019 Final Report of NYSBA's Task Force on the School to Prison Pipeline reviewed the evidence and found that students of color were suspended in disproportionate numbers, mostly for minor and common misbehavior and that there was no evidence that the higher rate of suspensions for students of color was linked to higher rates of misbehavior. https://archive.nysba.org/pipelinefinalreport/ at 49 *et seq.* The Task Force recommended the State Department of Education require school districts with levels of disproportionate discipline above thresholds set by SED be required to develop remedial plans to correct the disproportionate discipline. *Id.* at 53.

[366] *The Bill*, *supra* note 5.

[367] Dawn M. Magnusson et al., *Beliefs Regarding Development and Early Intervention Among Low-Income African American and Hispanic Mothers*, Pediatrics, Nov. 1, 2017, https://publications.aap.org/pediatrics/article/140/5/e20172059/37803/Beliefs-Regarding-Development-and-Early; and https://edtrust.org/increasing-equity-in-early-intervention/.

[368] *Id.*

[369] *The Bill supra* note 5.

[370] N.Y. Comp. Codes R. & Regs. tit. 8, § 117.3.

[371] *Id.*

Given the importance of early intervention in improving the outcomes of students with disabilities, it is crucial that school districts timely and correctly identify children in need of special education services. The Task Force recommends:

- 8 N.Y.C.R.R. § 117.3 Developmental Screening and if warranted a referral to the committee on preschool education or committee on special education be expanded to require that all children be screened: (1) upon entering the district or universal preschool or prekindergarten program as defined by 8 N.Y.C.R.R. § 100.3 regardless of the age at date of entrance; (2) if the student is performing below grade level in any academic or social emotional areas for more than two reporting periods[372]; and (3) upon teacher or administrator recommendation. Such screenings should not be performed more than once every two years.

To directly address the disproportionality in student discipline, the Task Force recommends:

- The NYS Legislature amend the Education Law to adopt research based reforms,[373] such as those proposed in the Solutions Not Suspensions bill before the state legislature. Such a bill should require school codes of conduct to include restorative approaches to discipline discussed in part above; to proactively foster a school community based on cooperation, communication, trust, and respect; to limit the use of suspensions for students in kindergarten through 3rd grade to only the most serious behavior[374]; to shorten the maximum length of suspension from 180 to 20 school days (except when required by federal law); to require that students who are suspended receive academic instruction and related services and the opportunity to earn credit, complete assignments, and take exams; to require that a reentry program be established so students can successfully return to the academic environment following a suspension; to require schools to notify parents of the opportunity to receive a special education evaluation for any academic or social emotional concerns that may have led to the suspension; and to require charter schools to follow state education law on student behavior and discipline.[375]

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[372] This would eliminate the need to wait for state exam scores which frequently are not announced until the end of the academic year and would expand the screening criteria to include children whose learning difficulties may be presenting as a behavioral issue.

[373] *See A Framework for Effective School Discipline*, National Association of School Psychologists (2020), http://www.nasponline.org/discipline-framework.

[374] Alex Zimmerman, *NYC to Curb Suspensions Longer than 20 Days, A Major Victory for Discipline Reform Advocates*, Chalkbeat, June 20, 2019, https://ny.chalkbeat.org/2019/6/20/21108352/nyc-to-curb-suspensions-longer-than-20-days-a-major-victory-for-discipline-reform-advocates.

[375] The Judith S. Kaye Solutions Not Suspensions bill encompasses many of these recommendations and is currently before the NYS Assembly (Bill No. A05197) (https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A05197&term=&Summary=Y&Actions=Y) and the NYS Senate (Bill No. S07198) (https://www.nysenate.gov/legislation/bills/2021/S7198) for the 2021–2022 legislative session.

Given the effect of the long history of systemic and institutionalized racism on our country and schools leading to significant disproportionate outcomes among children of color in virtually every indicator of public education, it is critical that the above recommendations be enacted to address the effect of trauma on students and the disproportionate availability of resources in NYS public schools.

8. Establish an Independent Commission to Address Equitable Educational Funding

In 1995, the New York State Court of Appeals, in the landmark case *Campaign for Fiscal Equity v. State of New York*, ruled that the New York Constitution requires the state to offer all children the opportunity for a "sound basic education" defined as a meaningful high school education that prepares students for competitive employment and civic participation.[376]

Funding for public education in New York has historically been provided through a combination of direct state funding and local taxes based on real estate value. Students who live in school districts which have been consistently underfunded have been deprived of the resources necessary to obtain a sound basic education. As described above, students of color have been disproportionately affected by the State's inequitable school funding system. New York ranks 48th in educational equity among *all states* by measure of the funding gap between the districts enrolling the most students in poverty and the districts enrolling the fewest, and it ranks 44th by measure of the funding gap between the districts enrolling the most students of color and those enrolling the fewest.[377]

In 2018, New York underfunded school districts by $4.2 billion with 62% owed to school districts that are defined as high need and have 50% or more Black and Latino students based on the funding formula adopted by the New York State Legislature.[378] Unsurprisingly, those same Black and Latino high need districts had a 26% lower overall graduation rate than wealthy districts.[379] It is important to note that funding inequities also exist on the individual school level within school districts. This is especially pronounced in the "Big 5" school districts (Buffalo, New York City, Rochester, Syracuse and Yonkers), where schools with the highest rates of poverty receive less funding than schools with lower rates of poverty.[380]

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[376] *Campaign for Fiscal Equity Inc. v. State*, 86 N.Y.2d 306 (1995); *See also Background: CFE v. State of New York*, New Yorkers for Students' Educ. Rts., http://nyser.org/about-us/background-cfe-v-state-of-new-york/ (last visited Apr. 16, 2022).
[377] *Education Equity in New York: A Forgotten Dream*, New York Advisory Comm. to the U.S. Comm. on Civ. Rts., Feb. 10, 2020, https://www.usccr.gov/files/pubs/2020/02-10-Education-Equity-in-New%20York.pdf.
[378] Marina Marcou-O'Malley, *Educational Racism: Andrew Cuomo's Record of Underfunding Public Schools in Black & Latino Communities*, All. Quality Educ. (Sept. 2018), http://www.aqeny.org/wp-content/uploads/2018/09/educationalracism_corrected.pdf.
[379] *Id.*
[380] Jim Malatras, *Uneven Distribution of Education Aid within Big 5 School Districts in New York State*, Rockefeller Inst. Gov't, Nov. 14, 2018, https://rockinst.org/wp-content/uploads/2018/11/11-13-18-School-Spending-in-NYS_FINAL.pdf.

The courts have considered it to be the Legislature's function to provide adequate resources to NYS students so as to ensure they are provided an education that prepares them for competitive employment and civic participation. While the Legislature has made some good faith attempts to address the issue, no consistently applied procedure has been developed to determine independently the resources necessary for a school district to provide a sound basic education that considers the needs of students based on their financial, social, and cultural circumstances. The objective determination of funding sufficiency has also suffered from the fiscal pressures of the moment and from outdated data about cost. As a result, many students, particularly students of color, continue to be deprived of their constitutional right to a sound basic education.[381]

To combat the chronic underfunding of NYS schools the Legislature should establish an independent commission reporting on a recurring five-year basis to the Governor and the legislature concerning the cost of educational funding necessary to fulfill the State's constitutional obligations on a per district basis. This costing-out study should also take into account the weighted needs of students in each school district in NYS. The framework of the Commission's inquiry should reflect best practices in place in other states as well as the mission of the New York Board of Regents and other elements that reflect unique factors relating to education in NYS as well as in its five largest districts.

To end the inequity in our schools and provide all students with a sound basic education, the Task Force recommends:

- The Association support the introduction of legislation that would establish an independent commission reporting on a recurring five-year basis to the Governor and the legislature concerning the cost of educational funding necessary to fulfill the State's constitutional obligations on a per district basis.

- NYSED mandate individual school districts address the funding inequities that exist among schools in their district and in particular the disparities between schools that enroll high percentages of students of color and low-income students with those that do not.

9. Government Accountability on Environmental Justice Issues

Environmental justice (EJ) was born from the recognition that communities of color and low-income communities have been, and continue to be, harmed by legacies of environmental racism and unfair processes. State and federal governments in the United States have given some amount of official consideration to EJ issues since the 1980s. President Clinton's 1994 Executive Order

[381] Marina Marcou-O'Malley, *CFE Derailed: The State of Our Schools in the Wake of the 2016 New York State Budget and a Decade after the Campaign for Fiscal Equality*, All. Quality Educ. (June 2017), http://www.aqeny.org/wp-content/uploads/2018/01/CFE-Derailed-June-17-final-1.pdf; Erica Vladimer, *New York City Schools Continue to See Shortfall in Foundation Aid*, New York City Indep. Budget Off. (Mar. 2017), https://ibo.nyc.ny.us/iboreports/new-york-city-schools-continue-to-see-shortfall-in-foundation-aid-march-2017.pdf.

12898, which directed federal agencies to make the pursuit of EJ objectives part of their missions, marked an important transition in environmental policy between an era when the distributional effects of environmental policy were largely or wholly ignored to one in which, officially, they were understood to deserve consideration. Even so, in the years since, federal and state governments alike have been slow to make themselves accountable for outcomes that reflect giving due priority to EJ considerations.[382]

Since 2019, several states, including New York, have used legislation to make EJ a priority for state agencies. In some instances, this legislation introduced EJ to the state's body of laws; in others, it strengthened and clarified earlier commitments. Although the particulars of each state's approach differ, several resemble that of New York, which created a Climate Justice Working Group and tasked it with identifying "disadvantaged communities" and directed the state's DEC to issue regulations that prioritize both avoiding the further burdening of those communities and measures to alleviate existing burdens. New York law also directs state agencies to cause those communities to receive no less than 35% of the overall benefits of spending on clean energy and energy efficiency programs.[383]

Government agencies can be held accountable for their decisions in a variety of ways, including through formal processes like judicial review, scrutiny from political leaders in the executive or legislative branches or the press, and personnel decisions that respond to outcomes or reception of agency (in)action on a given issue, among others.[384]

In New York, government agencies have sometimes not appropriately scrutinized government activities with potential adverse effects on environmental health in EJ communities. Relatedly, government agencies sometimes under-enforce against activities with adverse effects on environmental health. And little if any legal recourse is available to people affected by agencies' laxity with respect to inspection and enforcement.[385]

To address and ameliorate these failings, government agencies should collaborate with community organizations. They should conduct workshops for community groups with attorneys and investigators (both in private practice and employed by government agencies) to explain relevant laws and regulations and to teach community groups how to gather evidence to enable agency determinations about whether to investigate issues or impacts. Government agencies should conduct periodic third-party audits of selected (a) city and state agency decisions about whether to

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[382] *See generally* Jill Harrison, From the Inside Out: The Fight for Environmental Justice Within Government Agencies (Cambridge, MA: MIT Press, 2019).
[383] ECL § 75-0117.
[384] See generally Harrison, *supra* note 377 (exploring external and intra-institutional factors in priority given to EJ by agencies responsible for its consideration and enforcement).
[385] C.P.L.R. § 7803 (authorizing judicial review to determine, inter alia, "whether the body or officer failed to perform a duty enjoined upon it by law"); *see also* 6 N.Y. Jur. 2d Article 78 § 85 (noting that to prevail a petitioner must "establish a clear legal right to relief").

investigate, and (b) completed investigations by responsible agencies. Costs of the audits could be covered by a fee charged to the appropriate subset of permit applicants and other avenues. Results would not need to be made fully public. Government agencies should establish and publicize availability of a dedicated channel of communication between communities and relevant agencies to facilitate the flow of information about (a) problematic activity to agencies, and (b) agency findings and decisions to communities.

Recognizing the disproportionate exposure that EJ Communities have to pollution, extreme weather events, and the adverse impacts of climate change, along with the structurally racist origins of environmental injustice, the Task Force recommends:

- The State should hold government agencies accountable for their actions or inactions through judicial review, executive and legislative scrutiny, and public oversight.

For too long, EJ Communities have pleaded with decision-makers for fair treatment and meaningful involvement in the development, implementation, and enforcement of policies – laws, regulations, guidance, and appropriations – that impact their local environment and health. This Task Force can be the first step towards answering those pleads.

10. Lead-Safe Drinking Water

Lead is a powerful neurotoxin, which can lead to numerous severe health and educational problems, particularly for children.[386] "Between 1900 and 1950, a majority of America's largest cities installed lead water pipes—with some cities even mandating them for their durability. And because lead pipes can last 75 to 100 years, the legacy of lead pipes lives on today. The U.S. Environmental Protection Agency (EPA) has estimated that there are currently 6 to 10 million lead service lines across the United States—and a 2021 NRDC survey found that there may be 12 million or more of these lead pipes."[387] New York State is estimated to have between 329,867 to 679,292 lead water service lines.[388]

[386] Today, health experts, including scientists at the Centers for Disease Control and Prevention and the American Academy of Pediatrics, agree that there is no safe level of exposure. While it's toxic to everyone, fetuses, infants, and young children are at the greatest risk for lead poisoning because their brains and bodies are rapidly developing and more easily absorb lead than do those of older children and adults. But adults are also at risk, particularly from cardiovascular disease due to lead exposure. As levels increase, these harms become more severe. To the cells in our bodies, lead looks a lot like the mineral calcium, which is vital to healthy brain development and function, strong bones and teeth, and a healthy cardiovascular system. As a result, lead that has been absorbed or ingested can travel through our bodies and cause problems in our bones, teeth, blood, liver, kidneys, and brain, disrupting normal biological function. High levels of lead exposure can be serious and life threatening. In children, symptoms of severe lead poisoning include irritability, weight loss, abdominal pain, fatigue, vomiting, and seizures. Adults with lead poisoning can experience high blood pressure, joint and muscle pain, difficulty with memory or concentration, and harm to reproductive health. *See* Keith Mulvihill, *Causes and Effects of Lead in Water*, National Resource Defense Council, July 9, 2021, https://www.nrdc.org/stories/causes-and-effects-lead-water.
[387] *Id*.
[388] *Id*.

Black children and children in low-income families are at the highest risk for lead poisoning.[389] The disproportionate level of lead poisoning results from environmental factors predominately deteriorating lead based paint in housing, lead from water pipes, and lead in soil from leaded gasoline and leaded exterior paint. The vast majority of children who are lead-poisoned in New York are low-income children of color who reside in rental housing.

Wealthy communities were able to replace leaded water service lines when their lead poisoning danger became publicly known. But cities and other poorer communities could not afford to completely replace their water distribution systems despite the known dangers.

While no level of lead exposure is safe,[390] the EPA has set an enforcement threshold of 15 parts of lead per billion (ppb).[391] The New York State Department of Health has set 0.015 micrograms of lead per liter of water (mg/L) as its action threshold.[392] Bottled water can contain no more than 0.005 mg/L. of lead.[393]

New York should require owners of multifamily apartment buildings of four units or more that are not owner-occupied to annually sample drinking water in their buildings for lead. To the extent lead is detected in any sample at half (0.0075 mg/L) the state's lead drinking water standards,[394] the owner should be required to report such sample to the DOH and be required to either provide filtration systems to each unit within the building or update the plumbing to address the lead issues. The owner would also be subject to penalties and/or prosecution for failing to comply with these requirements. To assist owners, grants and/or low interest loans should be made available to owners to fund the annual sampling, installation of filtration systems, and plumbing upgrades in EJ Communities, in order to avoid rent hikes.

11. Make Changes to Property Appraisal Processes to Promote Equity

The data discussed in Section III shows the widespread discrepancy in the appraisal values of homes in Black and Latino communities and similar or identical homes in majority white neighborhoods. That section also discusses how the inequities in appraisal values prevent Black and Latino families from building equity and perpetuates and magnifies income inequality, as well as how federal policies tied to redlining made appraisals a requirement for federally guaranteed

[389] Michelle Tong, Samantha Artiga, and Robin Rudowitz, *Mitigating Childhood Lead Exposure and Disparities: Medicaid and Other Federal Initiatives*, Kaiser Family Foundation, May 20, 2022, https://www.kff.org/racial-equity-and-health-policy/issue-brief/mitigating-childhood-lead-exposure-and-disparities-medicaid-and-other-federal-initiatives/.
[390] *What Are U.S. Standards for Lead Levels?*, Center on Disease Control and Prevention, Agency for Toxic Substances and Disease Registry, https://www.atsdr.cdc.gov/csem/leadtoxicity/safety_standards.html.
[391] *Id*.
[392] *Lead in Drinking Water*, New York State Department of Health, https://www.health.ny.gov/environmental/water/drinking/lead.
[393] *Id*.
[394] The New York State Department provides instructions for home testing. *Id*.

loans and ensured that homes in the redlined areas would have lower appraisals based on the race of those living in the neighborhood.

Addressing the significant systematic "appraisal gap" between properties owned by people of color and by white people will require significant systemic change in both how appraisers are recruited and trained, and in appraisal methods and guidelines.

One important strategy to reduce the implicit and explicit bias that leads to lower appraisals in neighborhoods with significant populations of color is to intentionally promote greater racial diversity among those conducting appraisals. Less than 2% of U.S. appraisers identify as Black.[395] Among real estate appraisers, 78% are men, 71% are age 51 or older, and 85% are white, according to 2019 figures from the Appraisal Institute.[396] The fact that so many are over 50 years old suggests that an intentional program to significantly increase the number of Black and Latino appraisers could increase the percentage of appraisers of color within a decade.

In order to encourage diversity within this profession, the process of becoming an appraiser will need to be reformed.[397] Becoming an appraiser requires new appraisers to complete 1,500 to 3,000 hours of apprenticeship supervised by a licensed appraiser.[398] The lack of diversity in the field "often results in white appraisers supervising white trainees from their personal or professional networks."[399] Rather than recruiting through essentially an old-boys network, the recruitment should be conducted through the existing appraiser certifying agencies. A private foundation with a racial justice mission might well be willing to fund a campaign to market becoming an appraiser to racially diverse candidates and assist those who respond favorably to obtain training slots. The certifying agencies should be responsible to match the new trainees with a supervisor to complete the required apprenticeship program. Finding someone to serve as the supervisor for the apprenticeship has been shown to be a significant barrier to entering the profession. Requiring certifying agencies to ensure that all students have an opportunity to fulfill this requirement would

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[395] Michael Neal and Peter J. Mattingly, *Increasing Diversity in the Appraisal Profession Combined with Short-Term Solutions Can Help Address Valuation Bias for Homeowners of Color*, Urban Institute, July 1, 2021, https://www.urban.org/urban-wire/increasing-diversity-appraisal-profession-combined-short-term-solutions-can-help-address-valuation-bias-homeowners-color.

[396] Barbara Marquand, *How Homeowners Can Address Appraisal Discrimination*, NerdWallet, July 23, 2021, https://www.nerdwallet.com/article/mortgages/black-homeowners-may-face-discrimination-in-appraisals.

[397] See *Chase Commits $3 Million to Appraiser Diversity Initiative*, Appraisal Institute, https://www.appraisalinstitute.org/chase-commits-3-million-to-appraiser-diversity-initiative-, regarding one lender's recent contribution to the Appraiser Diversity Initiative to help "attract diverse new entrants into the residential appraisal field, overcome barriers to entry (such as education, training, and experience requirements), and provide support to position aspiring appraisers for professional success."

[398] *Increasing Diversity in the Appraisal Profession Combined with Short-Term Solutions Can Help Address Valuation Bias for Homeowners of Color*, *supra* note 1; New York State Real Estate Appraiser license requirements are available at https://dos.ny.gov/real-estate-appraiser (including links to relevant statutes, rules, and regulations).

[399] *Id*.

remove a significant obstacle to completion of the experience requirement for prospective appraisers of color.

NYSBA should support efforts to convince New York to adopt the Practical Applications of Real Estate Appraisal (PAREA), which has been developed by Appraisal Foundation, the Congressionally authorized source for appraisal standards and appraiser qualification standards. PAREA is an alternative training model to the mentorship system currently in place. It uses computer-based simulations and learning to train appraisers. Over half the states have adopted it, but New York is not among them.[400]

Furthermore, once trainees complete their training, there must be programs and other supports in place to help and encourage those who finish the process of obtaining a license to start up their business. Existing organizations that assist business startups would need to be trained about the appraisal business so that they could provide the needed assistance. Because many appraisers are independent contractors, access to existing capital or credit is an important resource for individuals seeking to enter the profession. Small business loan programs and other small business support targeted at diverse populations entering the field would greatly help to provide the support and opportunity needed to advance in the field. Additionally, there must be a fair system to help newer and lesser-connected appraisers connect with mortgage lenders to be put on the list of prospective appraisers that the lender employs.

NYSBA should also support changes in the appraisal standards that remove subjectivity and focus more on the quality of the house and sales prices of similar houses than on the demographics of the neighborhood in which it is located. Computerized algorithms called Automated Valuation Models were developed during the pandemic to produce appraisals from hard data without subjective evaluation.

The above suggested measures would go a long way to ensuring a more diverse real estate appraisal profession. Such actions would help to reduce the biases that now play a large part in the inequitable and discriminatory appraisal system in order to improve outcomes for Black and Latino homeowners and communities.

12. Further Recommendations

The Task Force had to decide the best use of our limited time to research and identify the most actionable solutions to dismantle structural racism. Due to time constraints, there were other actions that we could not fully flush out. We, therefore, recommend that the appropriate

[400] *See* Real Property Appraisal Qualification Criteria, Appraisal Foundation, https://appraisalfoundation.org/imis/TAF/Standards/Qualification_Criteria/Qualification_Criteria__RP_/TAF/AQB_RPAQC.aspx.

Association sections or committees further consider these solutions for future action by the Association.

- The Task Force recommends that the new Task Force on Modernization of Criminal Practice address the broad and significant changes that must be made to New York's sentencing structure aimed at lowering the amount of time people spend incarcerated including: (1) Eliminate mandatory minimum sentences; (2) Allow for review of sentences at the trial level; (3) Empower individuals to earn more time against prison sentences; 4) To further the goal of easing the burden of parole requirements, additional legislation should be passed to complement the Less is More Act; (5) Establish standards and procedures for parole eligibility designed to eliminate bias; and (6) Reduce overall time on parole, particularly for older individuals.

- The Task Force recommends the Task Force on Modernization of Criminal Practice address consequences of arrests, prosecutions, and convictions. New York should end mandatory court fees and grant courts discretion in setting fines and fees.

- The Task Force recommends that the Committee on Diversity, Equity, and Inclusion and the Public Interest Loan Repayment Subcommittee of the President's Committee on Access to Justice study the recommended modifications to the student loan program and make the appropriate additions to our current federal legislative priority. The modifications include: (1) "De-capitalize" student loans. Students who borrow relatively small amounts of money end up paying back double, if not triple, the amount borrowed due to the capitalization of interest, even during deferment periods. Student loan debt should not be treated like consumer debt. (2) Extend bankruptcy protection to all federal loans. (3) Allow PLUS loans (student loans taken by the student's parents) to be eligible for income-based repayment. (4) Include a grace period where no interest would be charged for a period of three to five years after graduation in order to allow the graduate time to become economically settled. (5) Expand careers that are eligible for loan forgiveness. 6) Shorten the period after which a loan is eligible for forgiveness from 10 years to seven years. (7) Adjust the federal needs analysis to allow for a negative expected family contribution, so that all struggling families receive more support to facilitate college enrollment, reducing their need to borrow. (8) Increase the transparency of the borrowing process and lower the risks associated with borrowing, thus improving the odds that educational debt will help, rather than hinder, upward mobility. Begin this effort by extending bankruptcy protections to all federal loans and providing for an income-based repayment option for the PLUS loan. (9) Raise the borrowing cap on federal student loans. This would help close the gap between what is borrowed and what needs to be paid. This could prevent the recourse to private lenders with their higher rates. (10) Expand service-based tuition assistance plans, such as ROTC, GI Bill, AmeriCorps, etc. Such service opportunities, in addition to full-time work, could also include options, such as being employed by the military for "reserve" or weekend duty.

- The Task Force requests the Labor and Employment Law Section to comment on our recommendation that the Association support legislation to end the misclassification of workers and wage theft, by New York enacting a law like S6699A/ A8721A that would adopt the so-called ABC test applied in other states for determining independent contractor status: the worker is free from the control and direction of the hiring company, the worker performs work outside the usual course of business of the hiring entity, and the worker is independently established in that trade, occupation, or business.

- The Task Force recommends that the Labor and Employment Law Section support pending legislation or legislation like A00766/S02762, which, if enacted would make it more difficult for employers to escape financial liability for wages by (1) expanding N.Y. Mechanics Lien Law to allow all workers the right to put a temporary lien on an employer's property when they have not been paid for their work; (2) adopting a standard that allows workers with wage theft claims to temporarily place a hold an employer's property during litigation if the workers show a likelihood of success on their claims; and (3) amending N.Y. Business Corporation Law to help workers collect from shareholders and members who are already liable under existing law for unpaid wage judgements against corporations and companies.

- The Task Force recommends that the Family Law Section review to consider an amendment to N.Y. Public Health Law which would (1) provide for a monthly distribution of disposable diapers to all children under the age of four who are receiving other forms of public assistance (such as SNAP, WIC, or TANF), and (2) provide for the distribution of diapers to all daycare centers licensed within the State.

- The Task Force recommends that the Committee on Legislative Policy study and comment on our recommendation that NYSBA support legislation increasing the NYS poverty level and low-income level cut-offs so that more families in need can qualify for assistance from government programs.

- The Task Force recommends that the Family Law Section study and comment on our recommendation that NYSBA should support passage of legislation similar to that the Build Back Better bill to extend the Child Tax Credit expansions and thereby continue to enable parents in New York – and across the country – to pay for food, clothing, housing, and other basic necessities for our most vulnerable children, helping to keep a significant number of children out of poverty.

- The Task Force recommends that the NYSBA President create a task force or ad hoc committee to examine the need for a committee on educational issues and to study and comment on measures to address disproportionality and make sustainable and lasting improvements to the outcomes for all children in the public education system.

- The Task Force recommends that the future Education Task Force or Committee study the lack of adequate internet and appropriate internet device that approximately 726,000 students in NYS experience[401] and support the passage of legislation that requires every NYS public school to provide each student with an internet ready age-appropriate device and high-quality internet access. [402] This requirement would be appropriately funded by the State. Additionally, the Task Force recommends the future Education Task Force or Committee support the implementation of the programs and objectives developed by the gubernatorial Reimagine New York Commission to address universal internet connectivity highlighted in the Comptroller's report.[403]

- The Task Force recommends the future Education Task Force or Committee advocate for the expansion of the Teacher Opportunity Corps, which provides teacher assistants and aides in the Buffalo City School District, the majority of whom are people of color, with funding to cover tuition, books, and vouchers for state certification exams in order to bridge from teacher assistant or aide to teacher. A 2017 John Hopkins University study found that low-income Black students who have at least one Black teacher in elementary school are at least 29% more likely to graduate from high school.[404] This program should be expanded to other districts in New York State.

- The Task Force recommends that the future Education Task Force or Committee advocate for the use of the Regents' Culturally Responsive-Sustaining Education Framework be *required* in all NYS school districts.[405] The Regents used the word "urgent" to describe how critical promoting equitable opportunities that help all children thrive is; we agree**.**

- The Task Force recommends that the future Education Task Force or Committee study and advocate for the Board of Regents and NYSED to promulgate regulations requiring school districts to ensure time is available during the school day for healing centered practices. By providing students with safe, stable, nurturing relationships, the school community can play an important role in helping students heal from exposure to trauma/ACEs.

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[401] Sumit Chandra et al., *Closing the K–12 Digital Divide in the Age of Distance Learning*, Common Sense Media and Boston Consulting Group (2020), https://www.commonsensemedia.org/sites/default/files/featured-content/files/common_sense_media_report_final_7_1_3pm_web.pdf.

[402] *See* Providing every public school student with an internet ready laptop computer, New York City Council, Loc. Laws Int. No. 2138 (2020), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4680231&GUID=B959A7CA-9A0F-4C35-987A-EC08C48188AC&Options=&Search=.

[403] *Understanding Broadband Challenges in NYS*, *supra* note 30.

[404] Jill Rosen, *With Just One Black Teacher, Black Students More Likely to Graduate*, Johns Hopkins University, Apr. 5, 2017, https://releases.jhu.edu/2017/04/05/with-just-one-black-teacher-black-students-more-likely-to-graduate/.

[405] *Culturally Responsive-Sustaining Education Framework*, New York State Educ. Dep't, http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf (last visited Apr. 16, 2022).

- The Task Force recommends that Local and State Government Law Section address environmental injustices relating to clean air and seek specific feedback on: (1) New York City finalizing implementation of 2019 congestion pricing regulations and utilize funds from the recently passed federal Infrastructure Investment and Jobs Act (Infrastructure Act) to improve the mass transit systems throughout the State, particularly New York City; (2) NYC implementing the Comptroller Lander's proposal to invest $500 million over the next eight years to install 25,000 solar panels on rooftops through New York City; and (3) The state Public Service Commission (PCS) reduction of the number of "peaker" power plants in half by 2025, followed by a complete shutdown of such plants by 2030.

- The Task Force recommends that Environmental and Energy Law Section consider for further review these recommendations to address environmental injustices relating to environmental review/public participation by advocating for (1) the DEC to amend regulations to require that project sponsors provide funding for resident groups or community organizations to hire pro bono attorneys and/or technical experts to assist in analyzing potential impacts of proposed projects; (2) State and municipal agencies to utilize New York's existing governing infrastructure, including community boards, to serve as a conduit between lead/reviewing agencies and the public with respect to proposed projects that may impact the health or environment; (3) State and municipal agencies to bolster public participation in meetings concerning proposed projects via several methods including requiring that all public meetings be made available virtually; creating a dedicated hotline/website with information about projects; providing childcare stipends or reimbursement for parents to attend meetings; and boost publicity for projects using traditional media and social media; and 4) State and municipal agencies should extend public review and comment periods for projects.

- The Task Force recommends the Health Law and the Elder Law and Special Needs sections jointly address the affordability and accessibility issues in health care for communities of color by adopting the Task Force's recommendations to: (1) further advocate for equity in Medicaid eligibility for seniors and people with disabilities by assessing Governor Hochul's eligibility expansion and seek additional changes to the remaining income and asset limitations; (2) Expand Medicaid eligibility for incarcerated people prior to reentry, including the scope of covered services and eligibility timeframes; and (3) Expand Medicaid and Medicare coverage of dental care.

- The Task Force recommends the Health Law and the Elder Law and Special Needs sections jointly advocate for legislative action to support continued increased wages and professional development opportunities for direct care and entry-level healthcare workers, such as Home Health Aides and Personal Care Aides, Nursing Assistants, Pharmacy Technicians, and Medical Assistants.

- The Task Force recommends that the President appoint an ad hoc committee composed of members of the Committee on Legal Aid and the Real Property Law Section to examine, evaluate, and recommend steps towards the elimination of substandard housing conditions endemic to public housing and Housing Choice Voucher/Section 8 and promote access to housing through HUD-CDBG affirmatively furthering fair housing (AFFH). Support legislation such as the "Good Cause Eviction" bills pending in the New York State legislature (S3082 and A5573).

V. CONCLUSION

"The majority of Americans say they support integration," observed Sherryl Cashin in her book *The Failure of Integration*. "But that is not the reality the majority of us live. Most of us do not share the life space with other races or classes. And we do not own up to the often gaping inequality that results from this separation because, being physically removed from those who most suffer the costs of separation, we cannot acknowledge what we don't see."

This report details the reality and the costs of separation and segregation in New York. This reality has been the lived experience of Blacks and Indigenous People since 1626 – under the Dutch, under the British, and then Americans segregating fellow Americans. Laws were created, amended and expanded to allow and perpetuate inequitable treatment of Blacks, Indigenous people and later Latinx and Asians. These laws embedded social inequities in our society that remain institutionalized in our housing patterns, administration of justice, availability of economic and educational opportunities, health care treatment and distribution of environmental hazards. For those not bearing the brunt of these social inequity, they cannot acknowledge what they do not see.

This report is the light to see these inequities. And now that these inequities are exposed, this report provides recommendations to undo them. We urge the Association to light the way for New York to own up to and use the law to dismantle these structural inequities.

From:	A. Thomas Levin
To:	reportsgroup
Subject:	• Report and recommendations of the Task Force on Racism, Social Equity, and the Law
Date:	Tuesday, January 3, 2023 3:59:49 PM
Attachments:	image001.png image002.png

I am not at this time commenting with respect to the substance of any of the recommendations in this report. However, I do have a comment on the procedure. Since I am excluded from participating in the January HOD meeting because I am unable to be there in person, I am offering my comment at this time.

The report contains several different recommendations. I am assuming that following customary procedure, there will be a motion to approve the entire report, which means that a "yes" vote is for all of the recommendations and a "no" vote is against all of the recommendations. There should be a division of the questions, so that HOD members who are for some of the proposals, and against others, can vote in a meaningful fashion on all proposals. One should not be put in the position of choosing whether to vote against the entire report because of opposition to one or more parts, nor against the entire report despite supporting one or more parts. Each recommendation of the report should be put to a separate vote.

A. Thomas Levin
Member/Shareholder
Chair, Local Government Law, Land Use & Environmental Review,
and Professional Responsibility Practice Groups
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<u>If you receive an email which seems to be from me, directing you to wire or transfer funds for any reason, do not do so without first calling me to confirm the direction.</u>

NEW YORK STATE BAR ASSOCIATION
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January 6, 2023

Statement of the NYSBA Health Law Section in Response to Certain Recommendations in the Report and Recommendations of the NYSBA Task Force on Racism, Social Equity, and the Law

On behalf of the Health Law Section, we thank the Task Force for its hard work in preparing its Report and Recommendations on Racism, Social Equity, and the Law, dated November 2022, and for its meaningful contribution to the discussion. The Report raises important issues regarding the laws, policies, and practices contributing to social and economic disparity and unequal access to education, health care, housing, and legal justice. We recognize and appreciate the Task Force's focus on structural racism and recommendations to dismantle it. We are limiting our comments in this Statement to certain of the Task Force's proposals relating to health law and health policy.

Antiracism/Antibias Training. The Task Force proposes that healthcare professionals and other healthcare workers receive antiracism, bias, diversity and/or equity-focused training. (Report at 70-71.) The Health Law Section was not able to form a position on the specifics of this recommendation given the limited time available to comment. We are able to confirm, however, that the Health Law Section supports the principle of requiring antiracism/antibias training for healthcare professionals and staff in a practical manner. For instance, New York currently requires Medicaid managed care plans to "ensure the cultural competence of its provider network by requiring Participating Providers to certify, on an annual basis, completion of State-approved cultural competence training curriculum, including training on the use of interpreters, for all Participating Providers' staff who have regular and substantial contact with Enrollees."[1] That requirement already reaches a large portion of New York's healthcare provider community. Consideration could be given to expanding the existing requirement (i) to include an antiracism/antibias component, and (ii) to extend the range of providers subject to it.

Expansion of Medicaid Eligibility and Services. The Task Force proposes to address affordability and accessibility issues in health care for communities of color by:

(i) advocating for equity in Medicaid eligibility for seniors and people with disabilities by assessing the Governor's eligibility expansion and income and asset limitations;

[1] The Mainstream Medicaid Managed Care, HIV Special Needs Plans, and Health and Recovery Plans Model Contract Section 15.10(c).

(ii) advocating for expansion of Medicaid eligibility for incarcerated people prior to reentry; and

(iii) advocating for expansion of Medicaid and Medicare coverage of dental care.

Each of these specific proposals raises issues warranting further review. The Health Law Section would require more time to develop a consensus on these specific proposals. These are complex issues, not necessarily addressed solely through expanded eligibility or coverage criteria. For example, inequitable access to dental services by Medicaid clients might be constrained more by the inadequate rates for dental services than by the extent of eligible patients or the list of covered services.

Having said that, the Health Law Section recognizes that the expansion of Medicaid eligibility and services can be and has been an effective tool for improving access and reducing disparities in care. Our recent fall 2022 conference examining the legacy of Assembly Health Chair Richard N. Gottfried offered an occasion to recall how, with his persistence, commitment, and diligence, and that of others, New York gradually extended Medicaid to reach more and more children, elderly persons, low-income persons, pregnant women, disabled persons and others.

Accordingly, the Health Law Section supports the principle of addressing affordability in and accessibility to healthcare, including through the use of expanded eligibility and coverage criteria, where the expansion will be effective in reducing disparities in access. At this point, however, we are unable to take a position more specific than that.

Other Task Force Recommendations. The Task Force makes other important recommendations relating to health law and policy, including increased wages for healthcare workers, stricter limits on lead levels in water, and access to diapers by low income parents of infants. We regard these as serious and important recommendations but do not have a position on them.

The Health Law Section's Healthcare Equity Initiative. The Health Law Section is committed to identifying and addressing the factors giving rise to disparities in access to healthcare. Toward this end, we have developed and are implementing a healthcare equity initiative designed to highlight the legal and systemic social equity issues contributing to disparities in access. We have asked our Public Health, Young Lawyers and Membership Committees to spearhead the initiative with advice and guidance from our Executive Committee. Through this approach, we hope to raise awareness, prompt discussion, and spur consensus on solutions, while providing educational, mentorship and networking opportunities for members of our Section. We have not, however, reached consensus on the specific strategies outlined in the Task Force's Report and Recommendations.

We appreciate the Task Force's contributions to these important issues and look forward to collaborating with members to address affordability, accessibility, and equity issues in health care.

Very truly yours,

Health Law Section of the
New York State Bar Association

NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
BAR CENTER, ALBANY, NEW YORK, AND REMOTE MEETING
NOVEMBER 4, 2022

Present: Gregory K. Arenson, Simeon H. Baum, T. Andrew Brown, David Louis Cohen, Elena DeFio Kean, Sarah E. Gold, Sherry Levin Wallach, Richard C. Lewis, Michael A. Markowitz, Thomas J. Maroney, Michael R. May, Michael J. McNamara, Ronald C. Minkoff, Hon. James P. Murphy, Domenick Napoletano, Christopher R. Riano, Violet E. Samuels, Mirna M. Santiago, Nancy Sciocchetti, Hon. Adam Seiden, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Hon. Lucy Billings, Catherine A. Christian, Clotelle L. Drakeford, Jacqueline J. Drohan, Albert Feuer, Sheryl B. Galler, Evan M. Goldberg, Henry M. Greenberg, Susan L. Harper, Shawndra G. Jones, Andy Kossover, Anna Masilela, Terri A. Mazur, Betsy R. Ruslander, Robert T. Schofield, IV, Patricia J. Shevy, Lorraine R. Silverman, Dana V. Syracuse, Justin S. Teff, Michelle H. Wildgrube

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Ms. Levin Wallach called the meeting to order.

2. Approval of minutes of June 17-18, July 19, and October 25, 2022, meetings. The minutes were accepted as distributed.

3. Consent Calendar
   a) Award of Committee on Veterans
   b) Bylaws of Local and State Government Law Section
   c) Bylaws of Labor and Employment Law Section

   The consent calendar, consisting of the items above, was approved.

4. Report of Treasurer. In his capacity as Treasurer, Mr. Napoletano reported that through September 30, 2022, the Association's total revenue was $16,051,439, a decrease of approximately $295,278 from the previous year, and that the Association's total expenses were $13,751,497, an increase of $2,786,075 from the previous year. The report was received with thanks.

5. Report of Executive Director. Executive Director Pamela McDevitt and Associate Executive Director Gerard McAvey updated the Executive Committee with respect to the administration and operations of the Association, including staffing developments, preparation for the 2023 Annual Meeting, the ongoing 2023 member renewal campaign, the CLE on-demand program archive and All Access Pass, the scheduling and costs associated with Section destination meetings, and efforts to expand law firm membership. Mr. McAvey also advised on the ongoing merger of the CLE and Sections departments and

spoke to the use of the Bar Center as a venue for Section meetings, with emphasis on the cost savings associated with the in-house technology and on-site NYSBA staff. Ms. McDevitt noted that senior counsel Kathleen Mulligan Baxter would retire at the end of 2022, and thanked Ms. Baxter for her over thirty-five years of service to the Association. The report was received with thanks.

6. Report and recommendations of Committee on Children and the Law. Committee chair Lorraine R. Silverman and Committee member Betsy R. Ruslander presented an affirmative legislative proposal to amend the Civil Rights Law to grant Family Court the same jurisdiction over name change proceedings as that currently vested to Supreme Court and County Court and to amend the Family Court Act §115(e) to grant Family Court concurrent jurisdiction with Supreme Court over name change proceedings. After discussion, a motion was unanimously adopted to approve the proposal.

7. Report of President. Ms. Levin Wallach highlighted the items contained in her written report, a copy of which is appended to these minutes.

8. Report and recommendations of Finance Committee re proposed 2023 income and expense budget. In his capacity as chair of the Finance Committee, Mr. McNamara reviewed the proposed budget for 2023, which projects revenue of $20,521,643, expenses of $20,472,563, and a projected surplus of $49,080. After discussion, a motion was unanimously adopted to endorse the proposed 2023 budget for favorable action by the House.

9. Report and recommendations of Task Force on the U.S. Territories. Mirna Martinez Santiago, co-chair of the Task Force on the U.S. Territories, presented on the Task Force's report calling on the Association to support efforts to overrule the *Insular Cases*, including through the filing of amicus curiae briefs in appropriate litigation. After discussion, a motion was unanimously adopted to endorse the following resolution for favorable action by the House:

> NOW, THEREFORE,
>
> IT IS RESOLVED, that the New York State Bar Association supports efforts to overrule the Insular Cases and the territorial incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of *amicus curiae* briefs in appropriate litigation; and it is further
>
> RESOLVED, that the President of the Association is authorized to take such other and further action as may be required to implement this resolution.

10. Report and recommendations of the Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, outlined proposed bylaws amendments: first, to implement the resolution of the Committee on Diversity, Equity, and Inclusion as adopted by the House of Delegates on June 18, 2022, directing the addition of a new Section 2 to Article II and

amendments to Article V, Section 3(H) and Article VII, Section 1(F)(1); second, to incorporate requests made by the Committee on Membership for amendments to Article III, Section 1(D)(1) and Article III, Section 6; and, third, to correct an internal citation error at Article IV, Section 7. After discussion, a motion was adopted to endorse the amendments for subscription by the House.

11. Discussion of Executive Committee liaison responsibilities and duties of Vice Presidents. Mr. Cohen reported on developments within the Eleventh Judicial District and on the work of the Task Force on Modernization of Criminal Practice and the Committee on Mandated Representation. Judge Seiden provided an update on developments with the 50+ Section, within the Ninth Judicial District, and at the Westchester County Bar Association. Mr. Lewis reported on the work of the Bylaws Committee, Business Law Section, and the Local and State Government Law Section. Mr. Baum advised on developments within the Dispute Resolution Section. Mr. Minkoff reported on the work of the Committee on Professional Ethics and the Committee on Standards of Attorney Conduct. Ms. Yeung-Ha provided an update on developments within the Second Judicial District and on the work of the Committee on Lawyer Referral, the Committee on Mass Disaster Response, and the Committee on Technology and the Legal Profession. The reports were received with thanks.

12. Report of Committee on Continuing Legal Education. Committee chair Shawndra G. Jones, vice chair Patricia J. Shevy, and senior director of CLE and Law Practice Management Katherine Suchocki updated the Executive Committee on CLE programming and revenue. The report was received with thanks.

13. Report of Committee on Membership. Committee co-chairs Clotelle L. Drakeford and Michelle H. Wildgrube, together with senior director of attorney engagement and retention Victoria Shaw, reported on the Association's member renewal and engagement initiatives. The report was received with thanks.

14. Report and recommendations of Women in Law Section. Section chair Sheryl B. Galler, together with past chairs Susan L. Harper and Terri A. Mazur, presented the Section's resolution and accompanying report entitled "Resolution Supporting Reproductive Health-Care Rights and Reproductive Autonomy and the New York State Equal Rights Amendment." After discussion, a motion was adopted to endorse the following resolution for favorable action by the House:

> NOW, THEREFORE,
>
> IT IS RESOLVED, that the New York State Bar Association supports the rights of individuals to choose legal reproductive health care, including abortion; and it is
>
> FURTHER RESOLVED, that the New York State Bar Association supports the amendments to New York State Public Health Law, Education

Law, and Penal Law, as enacted in New York State by the signing of S.240/A.21 in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports N.Y. Public Health Law Article 25-A as enacted in 2019; and it is

FURTHER RESOLVED, that the New York State Bar Association supports the June 13, 2022, Legislative Package, as enacted by New York State and supports the policies and intent of the legislative package enacted; and it is

FURTHER RESOLVED, that the New York State Bar Association supports S.51002 of 2022, as passed by the New York State Senate and Assembly, and as policy the proposal codified in this concurrent resolution to amend Section 11 of Article 1 of the New York State Constitution in relation to equal protection; and it is

FURTHER RESOLVED, that the New York State Bar Association supports passage of the Women's Health Protection Act of 2022, and supports the policies and intent of this bill; and it is

FURTHER RESOLVED, that the New York State Bar Association opposes passage of laws that would ban abortion nationwide and/or diminish the current protections under New York law; and it is

FURTHER RESOLVED, that the New York State Bar Association approves the report and recommendations of the Women in the Law Section; and it is

FURTHER RESOLVED, that the officers of the Association are hereby authorized to take such other and further action as may be necessary to implement this resolution.

Hon. James P. Murphy abstained from the vote.

15. Report and recommendations of the Steering Committee on Legislative Priorities. Evan M. Goldberg, chair of the Committee on Legislative Policy, together with Director of Policy Hilary F. Jochmans, presented proposed legislative priorities for 2023 at both state and federal levels. After discussion, a motion was made to approve the recommendations, after which a motion was successfully carried to amend Federal Recommendation #4.10. to read "Support for passage of Extreme Risk Protection Laws, aka Red Flag Laws, consistent with constitutional and due process protections." The main motion was then adopted, and the legislative priorities approved.

16. Reports and recommendations of Committee on Civil Practice Law and Rules. Hon. Lucy Billings, co-chair of the Committee, presented the following legislative proposals.

A) Amending CPLR § 4013. Judge Billings outlined an affirmative legislative proposal to amend CPLR § 4013 to permit the use of remote audio-visual technological means at judicial proceedings. After discussion, a motion was duly carried to table the report. Mr. Napoletano abstained from the vote.

B) Amending NY City Civil Court Act §§1808 & 1808- A; Uniform District Court Act §§1808 & & 1808-A; Uniform City Court Act §§1808 & & 1808A; and Uniform Justice Court Act §1808 – all of which are titled "Judgment obtained to be res judicata in certain cases". Judge Billings presented an affirmative legislative proposal to amend the NY City Civil Court Act §§1808 & 1808- A; the Uniform District Court Act §§1808 & & 1808-A; the Uniform City Court Act §§1808 & & 1808A; and the Uniform Justice Court Act §1808 to clarify the preclusive effect of small claims court judgments on subsequent claims. After discussion, a motion was unanimously adopted to approve the proposal.

17. Report and recommendations of Trusts and Estates Law Section. Albert Feuer and Anna Masilela, members of the section, outlined an affirmative legislative proposal in support of the New York Equity for Surviving Spouses Act ("ESSA"), with focus on comments received from NYSBA sections, committees, and other stakeholders since the proposal was presented at the June 16 and 17, 2022, meeting of the Executive Committee. After discussion, a motion was adopted to approve the proposal. Mr. McNamara abstained from the vote.

18. Report and recommendations re the Rules of the House of Delegates. Justin S. Teff, a member of the Committee on Bylaws subcommittee tasked with reviewing the Rules of the House of Delegates, outlined proposed amendments to the Rules. After discussion, a motion was unanimously adopted to endorse the report and recommendations for favorable action by the House.

19. Report and recommendations of Committee on Procedures for Judicial Discipline. Justin S. Teff, chair of the Committee on Procedures for Judicial Discipline, reviewed the Committee's report and recommendations concerning suspension as a mode of judicial discipline. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House. Hon. James P. Murphy abstained from the vote.

20. Report of Nominating Committee. Henry M. Greenberg, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2023-2024 Association year: President-Elect – Domenick Napoletano of Brooklyn; Secretary – Taa R. Grays of New York City; Treasurer – Susan Harper of New York City; District Vice-Presidents: First District – Bridgette Ahn of New York City and Michael McNamara of New York City; Second District –Pauline Yeung-Ha of Brooklyn; Third District – Jane Bello Burke of Albany; Fourth District – Nancy Sciocchetti of Saratoga Springs; Fifth District – Hon. James P. Murphy of Syracuse; Sixth District – Michael R. May of Ithaca; Seventh District – Mark J. Moretti of Rochester;

Eighth District – Kathleen M. Sweet of Buffalo; Ninth District – Karen Beltran of Yonkers; Tenth District – Michael A. Markowitz of Hewlitt; Eleventh District – David Louis Cohen of Kew Gardens; Twelfth District – Michael A. Marinaccio of White Plains; Thirteenth District – Orin J. Cohen of Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2023: LaMarr J. Jackson of Rochester (Diversity Seat); Thomas J. Maroney of New York City; and Christopher R. Riano of New York City. Nominated as Young Lawyer Member-at-Large was Lauren E. Sharkey of Schenectady. Nominated as Section Member-at-Large was Barry D. Skidelsky of New York City. The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2023- 2025 term: Claire P. Gutekunst, Yonkers; Scott M. Karson, Melville; Michael Miller, New York City; Domenick Napoletano, Brooklyn; and Sherry Levin Wallach, White Plains. The report was received with thanks.

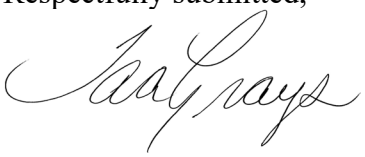
21. Report of Task Force on Modernization of Criminal Practice. Catherine A. Christian and Andy Kossover, co-chairs of the Task Force on Modernization of Criminal Practice, presented on the mission, composition, and goals of the Task Force. The report was received with thanks.

22. Report of Task Force on Emerging Digital Finance and Currency. Jackie Drohan and Dana Syracuse, co-chairs of the Task Force on Emerging Digital Finance and Currency, presented on the Task Force's ongoing work and programming. The report was received with thanks.

23. Date and place of next meeting. The next meeting of the Executive Committee will take place on Thursday, January 19, 2023, in person at the New York Hilton Midtown in Manhattan.

24. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Taa R. Grays
Secretary

NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
REMOTE MEETING
NOVEMBER 15, 2022

Present: Gregory K. Arenson, David Louis Cohen, Orin J. Cohen, LaMarr J. Jackson, Elena DeFio Kean, Richard C. Lewis, Michael A. Marinaccio, Michael A. Markowitz, Thomas J. Maroney, Michael J. McNamara, Ronald C. Minkoff, Mark J. Moretti, Domenick Napoletano, Violet E. Samuels, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Sherry Levin Wallach, Kaylin L. Whittingham, Pauline Yeung-Ha

Guests: Ethan Y. Bordman, Azish Filabi, Marc Jacobson, Scott M. Karson

Ms. Levin Wallach presided over the meeting as President of the Association.

1. Ms. Levin Wallach called the meeting to order.

2. Consent Calendar.
   a) Amendment of Name and Mission Statement of Task Force on Mental Health and Trauma-Impacted Representation

   The consent calendar item was approved.

3. Report and recommendations of Entertainment, Arts, and Sports Law Section. Section chair Ethan Y. Bordman and Section member Marc Jacobson outlined an affirmative legislative proposal to amend the General Obligation Law and the Arts and Cultural Affairs Law to exempt attorneys from the definition of "Theatrical Employment Agency." After discussion, a motion was adopted to approve the report and recommendations.

4. Report and resolution of International Section. Azish Filabi, chair of the International Section, and Scott M. Karson, co-chair of the International Section Ukraine Task Force, presented the Section's resolution concerning the Russian Federation's ongoing invasion of Ukraine and requested approval to co-sponsor the resolution with the ABA International Law Section at the February 2023 Midyear Meeting of the ABA House of Delegates. After discussion, a motion was adopted to approve co-sponsorship of the following resolution:

   > RESOLVED, that the ABA deplores and condemns the Russian Federation's unlawful invasion of Ukraine in direct violation of the prohibition of the use of force against the territorial integrity and political independence of another nation as set forth in Article 2(4) of the Charter of the United Nations, the purported annexation of Ukrainian territory by the Russian Federation, its threat of use of nuclear weapons, its violations of the law of war, including international humanitarian law, and its commission of crimes against humanity, the crime of genocide, the crime

of aggression and violations of international human rights law, causing untold loss of life, suffering, and harm to the people of Ukraine;

FURTHER RESOLVED, that the ABA calls upon the Russian Federation to respect strictly its obligations under international law, including the Charter of the United Nations, the law of war (such as international humanitarian law, the Geneva Conventions of 1949 and Additional Protocol I thereto of 1977), international human rights law, and customary international law, as well as obligations governing the use of nuclear weapons, and further condemns all violations of these obligations;

FURTHER RESOLVED, that the ABA calls upon the Russian Federation to immediately cease hostilities against Ukraine, and to withdraw from all occupied territories of Ukraine to the borders established by the 1994 Budapest Memorandum.

FURTHER RESOLVED, that the ABA calls upon the United Nations General Assembly to request the Secretary General of the United Nations to develop a comprehensive set of proposals for ensuring accountability by legal and physical persons responsible for war crimes, crimes against humanity, the crime of genocide, and the crime of aggression, including but not limited to the following possible measures:

(1) The establishment of tribunals, both international and hybrid, with international and domestic components, as it may deem appropriate, including the option of negotiating an agreement with the Government of Ukraine to create an independent special tribunal for Ukraine on the crime of aggression;

(2) The establishment of fact-finding bodies;

(3) The creation of commissions of truth and reconciliation; and

(4) Such other mechanisms, as appropriate, to remedy, reconcile, and assure accountability for violations of international law.

FURTHER RESOLVED, that the ABA calls upon the United Nations General Assembly to promptly establish a registry of claims and evidence of damage caused by the Russian Federation's illegal invasion of Ukraine, after consulting the government of Ukraine and other relevant governments; and

FURTHER RESOLVED, that the ABA calls upon the United Nations General Assembly to urge all states to maintain the status of the Russian Federation's assets and any other assets that are frozen by states as a result

of the invasion, including central bank funds, pending a resolution of the claims against the Russian Federation caused by its invasion of Ukraine.

Mr. McNamara abstained from the vote.

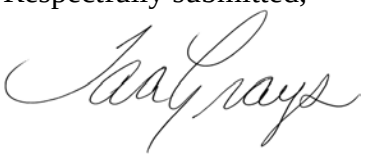
5. Report and recommendations of Committee on Civil Practice Law and Rules. In his capacity as a member of the Committee on Civil Practice Law and Rules, Mr. Napoletano outlined an affirmative legislative proposal to amend CPLR § 4013 to permit the use of remote audio-visual technological means at judicial proceedings. After discussion, a motion was duly carried to postpone consideration of the report until the January 19, 2023, meeting of the Executive Committee. Mr. Napoletano abstained from the vote.

6. New Business. Ms. Levin Wallach advised that registration was open for the 2023 Annual Meeting, with in-person events scheduled for Wednesday, January 18, 2023, through Saturday, January 21, 2023, at the New York Hilton Midtown in Manhattan.

7. Date and place of next meeting. The next meeting of the Executive Committee will take place on Thursday, January 19, 2023, in person at the New York Hilton Midtown in Manhattan.

8. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Taa R. Grays
Secretary

NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
REMOTE MEETING
DECEMBER 6, 2022

Present: Gregory K. Arenson, T. Andrew Brown, Orin J. Cohen, Sarah E. Gold, LaMarr J. Jackson, Elena DeFio Kean, Richard C. Lewis, Michael A. Markowitz, Thomas J. Maroney, Hon. James P. Murphy, Domenick Napoletano, Christopher R. Riano, Violet E. Samuels, Mirna M. Santiago, Diana S. Sen, Lauren E. Sharkey, Kathleen M. Sweet, Sherry Levin Wallach

Guests: Molly C. Casey, Daniel G. Ecker, Sharon Stern Gerstman, Evan M. Goldberg

Ms. Levin Wallach presided over the meeting as President of the Association.

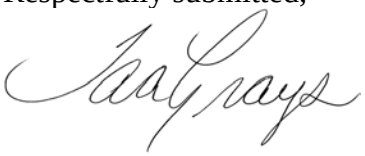
1. Ms. Levin Wallach called the meeting to order.

2. Report of Trial Lawyers Section and Torts, Insurance, and Compensation Law Section. Daniel G. Ecker, chair of the Trial Lawyer Section, together with Section member Evan M. Goldberg, and joined by Molly C. Casey, chair of the Torts, Insurance, and Compensation Law Section, together with Section member Sharon Stern Gerstman, reported on the status of the Grieving Families Act (A.6770/S.74-A) as passed by the State Legislature in July 2022. After discussion, the Executive Committee declined to act concerning the legislation.

3. Date and place of next meeting. The next meeting of the Executive Committee will take place on Thursday, January 19, 2023, in person at the New York Hilton Midtown in Manhattan.

4. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Taa R. Grays
Secretary