

Racial Justice and the Rule of Law: A Call to Action by the New York Bar Foundation¹

“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”

— Martin Luther King Jr., Letter from the Birmingham Jail

The New York Bar Foundation is a philanthropic organization supporting law-related programs, scholarships, and educational activities throughout New York State. It is the charitable arm of the New York State Bar Association. For its current three-year strategic plan, launched in June 2018 to coincide with the term of its president, Lesley Rosenthal, the Foundation selected the Rule of Law as its guiding theme. The Rule of Law is a concept deeply rooted in our society and jurisprudence. The basic idea is that democratic governments provide a level playing field, evenhandedly applying a well-publicized set of laws, allowing fundamental rights to flourish, and providing other preconditions for justice to be done. In the words of John Adams in the Massachusetts Constitution, ours is “a government of laws and not of men.”

Adherence to the Rule of Law promotes a stable social and civic order, citizen engagement, and a positive climate for economic investment. Conversely, systemic injustice corrodes the public’s faith in our institutions, inhibits investment, and portends civil unrest.

Racial justice is a core element of a just society. Spurred by the killings of George Floyd, Breonna Taylor, and far too many others, at the hands of law enforcement officers, our nation is in the throes of a searching self-examination of race and law in our society. In matters of law enforcement and well beyond – to civil law matters such as housing, health, education, access to capital, and so much more – our nation’s and our state’s Black communities experience egregious inequities.

Addressing racial inequality is pivotal to the success of the Foundation’s Rule of Law efforts. Aware that the Rule of Law is a powerful concept that can bring people together in these fractious times, at its meeting on June 12, 2020, the Foundation explicitly embraced anti-racism work as a part of its agenda. Following discussion, the board unanimously voted to raise and dedicate resources to improving racial justice as part of the Foundation’s focus on strengthening the Rule of Law in New York State.

The Foundation subsequently convened a working group of volunteers from its board members. The Racial Justice Working Group set out to investigate specific ways in which the Foundation can work to disrupt the forces of racial injustice and heal our national divide by funding and fostering relevant law-related projects. The Working Group investigated the

¹ Principal author Lesley Rosenthal, President, New York Bar Foundation, with members of the Racial Justice Working Group, Hon. Cheryl Chambers, Martin Minkowitz, Carla Palumbo, William T. Russell, Jr., Mirna Santiago, David Singer, Lucia B. Whisenand, and Deborah Auspendmyer.

conceptual and practical connections between racial justice and the Rule of Law. It also engaged pro bono assistance from the law firm of Cahill, Gordon & Reindel to conduct legal research and prepare a memorandum connecting concepts of racial justice to the Rule of Law, and connecting data and conditions in New York State and other communities to specific programs and initiatives designed to help address those conditions through a series of suggested Action Items.²

The Working Group also convened a focus group of legal services practitioners from across the state to advise about meaningful anti-racism work. Additionally, members of the Working Group interviewed representatives of the Shriver Center on Poverty Law about their workshops on leadership and diversity development, community lawyering and racial justice.³ Other members familiarized themselves with the work of the Law Firm Anti-Racism Alliance, which “leverages the resources of the private bar in partnership with legal services organizations to amplify the voices of communities and individuals oppressed by racism, to better use the law as a vehicle for change that benefits communities of color and to promote racial equity in the law.”⁴ Overlapping membership between the Foundation’s Racial Justice Working Group and its Development Committee probed ways in which the Foundation could raise dedicated funds to apply to the fight for racial equity.

Through these meetings and discussions over the past three months, the members of the Racial Justice Working Group have charted a course from concept to reality and now put forth a set of action steps to advance the cause.

Measuring Racial Justice As an Element of the Rule of Law

The Foundation adopted a data-driven approach to anti-racism and the Rule of Law. As it did in its path-breaking 2019 report, “Bullseye,” following a data-driven approach to target urgent unmet civil legal needs across the state, the Foundation again turned to the annual Rule of Law index of the World Justice Project (“WJP”). The WJP is an independent, nonprofit organization dedicated to advancing the Rule of Law. The WJP’s Rule of Law Index has identified eight key factors and 44 subfactors of Rule of Law Adherence. By surveying more than 130,000 households and 4,000 experts in 130 nations, the WJP 2020 Index measures how the Rule of Law is experienced and perceived around the globe.

Two factors, Fundamental Rights (Factor 4) and Criminal Law (Factor 8), are most pertinent to the Foundation’s study. While the United States performance on the 2020 Index overall places it within the range of other wealthy nations – albeit at the bottom half of this category – on the two subfactors most pertinent to race, Subfactor 4.1 (equal treatment and absence of discrimination) and Subfactor 8.4 (fairness in the criminal justice system), the United States falls perceptibly short.

² The memorandum of Cahill Gordon has provided several reference points for this Report and the Foundation is grateful to the team for its pro bono contribution. Although the memorandum is not being adopted as a statement of the Foundation, it is appended as an informational resource as Appendix 1.

³ <https://www.povertylaw.org/>

⁴ <https://www.law.com/americanlawyer/2020/06/24/over-125-firms-have-joined-the-law-firm-antiracism-alliance/?slreturn=20200730112033>

Equal Treatment and Absence of Discrimination: Subfactor 4.1 of the WJP Rule of Law Index is Equal Treatment and Absence of Discrimination. This subfactor measures “whether individuals are free from discrimination—based on socio-economic status, gender, ethnicity, religion, national origin, sexual orientation, or gender identity—with respect to public services, employment, court proceedings, and the justice system.”⁵ While the United States received a score of .72 out of 1.00 on the Factor 4 (Fundamental Rights) overall, its score on Subfactor 4.1, Equal Treatment and Absence of Discrimination, is .51 out of 1.00. This poor performance places the U.S. below the global average of .59 and almost last among its peers in the region and among wealthy nations. Clearly our country has a long way to go regarding equal treatment and absence of discrimination in the eyes of a representative sampling of households and experts.⁶

Fairness in the Criminal Justice System: The fairness of American criminal justice falls even shorter. While the US scores .63 out of 1.00 on its criminal justice system in general, ranking approximately in the middle of its region and its high-income peers, its score on the impartiality of police and criminal judges tells a dramatically different and tragic story. On subfactor 8.4, “whether police and criminal judges are impartial and whether they discriminate based on socioeconomic status, gender, religion, national origin, sexual orientation, or gender identity,”⁷ the U.S. scores quite poorly, just .37 out of 1.00, on a par with India and Ghana, far below the global average of .47, and near the bottom of both the region and its income rank.⁸

We can and must do better. Our nation rightly regards itself as a beacon of the Rule of Law; yet we fall short in these two crucial areas. Improving on measures of equal treatment and the fairness of our nation’s criminal justice system are crucial to achieving greater racial equity, which in turn are key levers to improving its Rule of Law standing overall.

Investing in Racial Justice to Improve the Rule of Law

What investments may the Foundation productively make to improve these serious shortcomings in the two areas most pertinent to race, and in doing so enhance the Rule of Law, across New York State and beyond?

The Working Group’s research has pointed it to the following areas in which productive investments can be made: (i) the criminal justice system; (ii) bankruptcy protection; (iii) Black-owned banks/access to capital; (iv) voting rights; (v) education; (vi) healthcare; and (vii) housing and homelessness.

Specific steps for the Foundation’s consideration in each of these areas include:

⁵ The World Justice Project Rule of Law Index 2020, at 15 (available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf).

⁶ The WJP Index’s methodology is to sample the three largest cities in each country, including New York City in its U.S. sample.

⁷ The World Justice Project Rule of Law Index 2020, *supra* at 15.

⁸ WORLD JUSTICE PROJECT, RULE OF LAW INDEX: UNITED STATES, <https://worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/>.

(i) Criminal justice:

- Fund organizations that work to increase municipal funding for minority communities and improve community relations with police
- Fund organizations that are engaged in campaigns to break the cycle of mass incarceration
- Fund research aimed at measuring the financial effects on municipalities that have waived qualified immunity protections.
- Suggest a legislative item for NYS Bar Association consideration to partner with organizations that seek to create robust police review boards whose mandates are consistent with state law

(ii) Bankruptcy protection:

- Fund studies that examine racial disparities in bankruptcy protection in New York State
- Partner with organizations that provide free bankruptcy service to minority communities
- Sponsor educational programs aimed at confronting implicit racial bias

(iii) Black-owned banks / access to capital

- Initiate a writing competition to generate conversation and thought leadership with respect to how public policy could better position Black-owned banks for success
- Support Black-owned banks by partnering with the Association to sponsor pro bono clinics to assist these banks in navigating compliance issues
- Partner with the NYS Bar Association to create a CLE program specifically addressing how smaller banks can effectively comply with the relevant regulatory rules

(iv) Voting Rights

- Partner with organizations aimed at educating voters about their rights and ensuring that voters have access to the materials that they need in order to vote Partner with organizations that study felon disenfranchisement, educate the public, and advocate for permanent legislative change

(v) Education

- Fund restorative justice initiatives
- Fund research regarding the issuance of limited access letters
- Issue a call for data analysis of funding at the school level
- Increase scholarships & fellowships dedicated to recognizing promoting black student progress and excellence

(vi) Health Care

- Partner with local organizations to collect data on racial health disparities and investigate uses of Section 1557 of the Affordable Care Act

(vii) Housing and Homelessness Prevention

- Continue and increase funding of homeless legal aid clinics and criminal reentry programs;
- Support organizations that aid minority communities

(viii) Leadership Training for Legal Services Providers

- Fund leadership training and workshops for legal services providers statewide to address issues of racial justice and inequity

- Facilitate the creation of a statewide network of trained legal services staff in this area
- (ix) Public Education Program**
 - Develop or partner with other organizations providing education for the public and particularly students about racial injustice and the Rule of Law
 - Host a writing competition for advanced high school students on themes of racial justice and the Rule of Law

Some of these action steps represent an expansion of the Foundation’s existing activities, and some herald new directions for the Foundation. Yet others would require partnerships with the NYS Bar Association, as legislation and lobbying is outside the purview of the Foundation given its 501(c)(3) status.

By raising and expending restricted funds in these areas, the Foundation can help in the fight against racism and for equality. It will also begin measuring the impact of its existing grant-making program on addressing racial equality.

Next Steps

The Working Group recommends several next steps in pursuit of greater racial justice in New York through its legal system.

First, beginning in the fall of 2020, the Foundation should relaunch its Firm Challenge to give the opportunity to New York’s law firms to join in this fight. In the words of Development Committee co-chair James Kobak, “Recent events demonstrate all too clearly how structural racism persists and undermines the Rule of Law in our state and country.... The Firm Challenge Against Racial Injustice will not only allow the Foundation to continue funding programs it has traditionally supported aimed at addressing injustices which disproportionately impact racial minorities but allow it to add additional funding and reach out to additional grantees with a special expertise on issues such as police and educational reform, restorative justice and reduction of incarceration, voting rights and community and youth education.” The full text of the Foundation’s updated Firm Challenge solicitation letter appears as Appendix 3.

Second, the Foundation should undertake a new strand of legacy fundraising, attracting generous donors who wish to make a gift of perpetual duration to the fight for racial justice. As stated by Ilene Cooper, co-chair of the Foundation’s Development Committee, “The tragic death of George Floyd has indeed highlighted the deep racial divide that still exists in this country and how essential it is for us as a nation, a state, and an organization to foster the ends of racial justice and social equality. With this in mind, the New York Bar Foundation has created a restricted fund directed toward programs and initiatives with this mission.” The full text of the new Legacy Society solicitation letter appears as Appendix 3.

Third, the Foundation has long funded programs that have addressed areas of racial disparity, but currently has no way to measure the impact of these programs. It has added to its grant

application for the 2021 grant cycle a question about whether the project helps promote racial justice, directly or indirectly.

These efforts will provide fresh funding for new initiatives directly dedicated to tackling racial injustice, and will provide better data to the Foundation about the impact of its existing grant-making upon racial injustice.

In these ways and others, the Foundation joins the fight for racial justice with ever greater intention, and with a greater investment, than ever before.

Appendix 1

Data-Driven Research and Analysis re: Discrimination and the Rule of Law

Memorandum by Cahill Gordon & Reindel, LLP⁹
Brockton B. Bosson, Sesi V. Garimella, Philip Golodetz, Naomi Wossen, and Miles C. Wiley
July 24, 2020

I. INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM.

Adherence to the Rule of Law requires the state to create and enforce “just laws which are clear, publicized, stable, *applied evenly*, and protective of fundamental rights.”¹⁰ As recent protests across the country have highlighted, there are fundamental inequities in our criminal justice system that cause and perpetuate a cycle of mass incarceration that has a disproportionate impact on minority communities. As set forth below, minority communities are negatively impacted at every stage of the criminal justice system, from overpolicing of communities to disproportionate sentencing. These inequities fundamentally undermine the Rule of Law and thus criminal justice reform is an essential component to promoting the Rule of Law. To that end, this report highlights relevant evidence of the effects of disparate treatment of Black Americans in the criminal justice system and proposes several efforts that the foundation may undertake in order to promote the Rule of Law.

a. Addressing The Deterioration Of Police-Community Relations Which Undermines the Rule Of Law in Perception And in Fact.

Data shows that certain policing tactics such as “stop-and-frisk” and the “broken windows” approach to policing have disproportionately affected Black and Latinx New Yorkers and exacerbated fear of the police in communities across New York State.

Fifty-two percent of the people stopped under Stop-And-Frisk procedures were Black, and 31% were Latinx.¹¹ In 2013 Judge Shira Scheindlin issued an order in *Floyd v. City of New York* finding that the City had violated the Fourth and Fourteenth amendments by adopting a policy “of indirect racial profiling” in its use of Stop-And-Frisk. Although the practice of stop-and-frisk has decreased dramatically since the order (dropping 98% from its height in 2011)¹² data shows that stops of Black and Latinx people continue to be disproportionately high. Between 2014 and 2017, four out of every five stops were of Black or Latinx individuals.¹³ Black and Latino males between the ages of 14 and 24 accounted for 38% of reported stops,

⁹ This analysis, guided by the pro bono research of a team of summer associates and their supervising attorneys from Cahill Gordon & Reindel, lights a path for the Foundation to effectively and efficiently direct resources and efforts to combat racism and achieve greater adherence to the Rule of Law. The New York Bar Foundation is indebted to the firm as well as its attorneys, Brockton B. Bosson and Sesi V. Garimella, and summer associates Philip Golodetz, Naomi Wossen, and Miles C. Wiley.

¹⁰ *Id.* [emphasis added.]

¹¹ *Floyd v. City of New York*, 959 F.Supp.2d 540, 558 (S.D.N.Y. 2013).

¹² Christopher Dunn & Michelle Shames, *Stop-and-Frisk in the de Blasio Era*, New York Civil Liberties Union (2019.)

¹³ *Id.*

despite constituting 5% of the population.¹⁴ Moreover, during these interactions with police, Black and Latinx people were more likely to have force used against them.¹⁵

Research identifies clear disparities in negative interactions and perceptions of the police in heavily policed communities as compared to lightly policed communities. In 2016, the New York Civil Liberties Union conducted a study in which 1,500 people in historically heavily policed neighborhoods and historically lightly policed neighborhoods were interviewed.¹⁶ The results showed that in heavily policed areas, New Yorkers felt “targeted and harassed while they go about their daily lives.”¹⁷ Greater than two-thirds of respondents in heavily policed communities feared that a friend or a family member would be killed by police. Only 15% of respondents in lightly policed areas felt the same. In highly policed communities, 41% of respondents reported being subjected to extreme physical force at the hands of police. Only 4% of respondents in lightly policed communities indicated the same. Additionally, 48% of respondents in heavily policed communities said that the police had wrongly accused them of committing a crime. Sixteen percent of respondents in heavily policed communities reported at least one incident of sexual harassment by police, compared to respondents in lightly policed areas who reported a 5% rate. Forty-six percent of respondents in heavily policed neighborhoods reported that calling the police for help would make a situation worse, where only 16% of those in lightly policed areas held that view.¹⁸

Action Items: Fund Organizations that Work to Increase Municipal Funding for Minority Communities and Improve Community Relations with Police.

There are numerous campaigns and organizations that work to increase funding to minority communities to increase social services and infrastructure and to build improved relations between communities and the police. One such organization is Communities United For Police Reform. This organization works with partners such as the New York County Defenders Service, the NAACP New York State Conference, and the New York City Anti-Violence Project.

b. At Multiple Stages of the Criminal Justice System, Black Americans Experience Disproportionate Enforcement and Punishment

Scholars and researchers have analyzed numerous ways in which the criminal justice system has perpetuated inequality.¹⁹ In the United States, Black people are incarcerated at a rate of 1,408 per 100,000, while white people are incarcerated at a rate of 245 per 100,000.²⁰ Disproportionate

¹⁴ *Id.*

¹⁵ *See id.* (demonstrating that stops involving Black and Latinx people resulted in the use of force in 28.1% and 30.1% of the time respectively, while stops involving white individuals resulted in the use of force in 22.4% of cases).

¹⁶ Johana Miller & Simon McCormack, *Shattered: The Continuing, Damaging, and Disparate Legacy of Broken Windows Policing in New York City*, New York Civil Liberties Union (2018).

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ *See generally* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); *see infra* note 20, 21, 22, 24, 27.

²⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (2016) at <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

incarceration rates are also prevalent in New York State, where Black people are incarcerated at a rate of 896 per 100,000 while whites are incarcerated at a rate of 112 per 100,000.²¹ Astonishingly, one in 40 Black males in New York is incarcerated.²² According to one study, a Black man born in 2001 has a one in three likelihood of being imprisoned during his lifetime.²³

Research also shows racial disparity in the duration of time in custody. Black people are more likely to be arrested,²⁴ held in custody pending trial,²⁵ and sentenced to longer prison terms than white people.²⁶ Black people are about twice as likely to be arrested for most misdemeanors than white people.²⁷ Post-arrest, Black defendants are 10% more likely than white defendants to be held in custody after arraignment than whites.²⁸ This disparity is especially pronounced in pretrial detentions for misdemeanor offenses: A 2014 analysis of prosecutions by the New York County District Attorney's Office found that Blacks were 20% more likely than whites to be detained pending trial for misdemeanor person offenses.²⁹

Moreover, post-conviction, sentencing disparities drive disproportionate incarceration rates. A 2017 report by the United States Sentencing Commission found that "Black male offenders received sentences on average 19.1% longer than similarly situated white male offenders" and were "21.2% less likely than white male offenders to receive a non-government sponsored downward departure or variance."³⁰ Black defendants were also 5% more likely than white defendants to be sentenced to prison than white defendants.³¹

Action Item: Support Organizations that are Engaged in Campaigns to Break the Cycle of Mass Incarceration.

The Foundation may consider grants to organizations that work to break the cycle of these inequities in incarceration and promoting the Rule of Law through education and community partnerships. One such organization is the Vera Institute of Justice. The Vera Institute has several

²¹ *Id.*

²² *Id.*

²³ The Sentencing Project, *FACT SHEET: TRENDS IN U.S. CORRECTIONS 1* (2015), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://pe.rma.cc/EB57-57P8>]

²⁴ Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769 (2018)

²⁵ Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County – Technical Report*, Vera Institute of Justice (2014).

²⁶ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 3 (2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

²⁷ Megan Stevenson & Sandra Mayson, *supra* note 21 at 731, 769 (2018) ("We find that Black people are arrested at more than twice the rate of white people for nine of twelve likely-misdemeanor offenses: vagrancy, prostitution, gambling, drug possession, simple assault, theft, disorderly conduct, vandalism, and "other offenses.").

²⁸ Kutateladze & Andiloro, *supra* note 22. ("When controlling for the influence of other factors, including charge seriousness and prior record, compared to white defendants, Blacks were 10% more likely (odds ratio = 1.48), Latinos 3% more likely (odds ratio = 1.14), and Asians 21% less likely (odds ratio = 0.41) to be detained.").

²⁹ *Id.*

³⁰ DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS, *supra* note 23 at 3.

³¹ Besiki Luka Kutateladze & Nancy R. Andiloro, *supra* note 22. This disparity is greatest for misdemeanor offenses, where Black people are 15% more likely to be imprisoned and felony drug offenses where Black people are 14% more likely to be imprisoned.

programs that are aimed at reducing disparities in prison populations, such as “Greater Justice New York,” a program that works across New York State on several policies aimed at reforming bail, improving due process, and increasing access to justice.”³² Another Vera Institute program is “Reshaping Prosecution,” which works with reform-minded prosecutors to implement programs informed by data-policy and practices with the expressed goal of reducing incarceration and promoting racial equity.³³ The Foundation may also consider working with The Legal Aid Society and fund the “Decarceration Project,” which works to decrease the use of bail in New York.³⁴

c. Robust Qualified Immunity Protections and the Lack of Independent Community Review Boards Undermines the Rule of Law by Decreasing Accountability of Police Actors

According to the World Justice Project, the first principle that defines the Rule of Law is “the accountability of government and private actors.” Some researchers argue that policy changes that increase the likelihood and significance of negative consequences for biased behavior by state actors will result in decreases in such behavior.³⁵ Currently, the existence of robust qualified immunity protections and the lack of independent civilian oversight boards to investigate police misconduct makes recourse exceedingly difficult for citizens whose rights have been violated by police. Qualified immunity shields officials from damages even when they have violated the Constitution, provided that they did not violate a “clearly established law.”³⁶ A key argument against legislative changes to the precept of qualified immunity is that a deluge of civil lawsuits would put severe strain on municipal finances.³⁷ However, it appears that research of the actual effects on municipal finances has not been extensively studied in jurisdictions that waived certain protections of qualified immunity.

One solution that has been offered to increase oversight over law enforcement is the creation of robust, independent community review boards. Of the top fifty largest cities in the United States, twenty-six, including Suffolk County, do not have a community review board with

³² Vera Center for Justice, *Greater Justice New York*, <https://www.vera.org/projects/greater-justice-new-york/overview>.

³³ Vera Center for Justice, *Reshaping Prosecution*, <https://www.vera.org/projects/reshaping-prosecution-program>.

³⁴ Legal Aid Society, Decarceration Project, <https://www.legalaidnyc.org/programs-projects-units/decarceration-project/>.

³⁵ Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 360 (2020) (“But eliminating qualified immunity may nevertheless influence government behavior by increasing pressure on officials to change their policies and trainings, providing clearer guidance about the legal standards these policies and trainings should contain, and dampening the message that government officials can violate constitutional rights without consequence. It is difficult to measure the impact these adjustments would have, but there is reason to believe they could, at least to some degree, reduce the frequency of constitutional violations and improve government behavior.”); *see also* Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 Calif. L. Rev. Online 41, 41 (2018) (“(stating that “eliminating qualified immunity “could incentivize officials acting under the color of law to better respect and protect individuals’ rights, which is more than the Court’s § 1983 doctrine currently encourages.”).

³⁶ Joanna C. Schwartz, *The Case against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1801 (2018).

³⁷ See, e.g., Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 Calif. L. Rev. 933, 975 (2019) (arguing that qualified immunity serves to protect municipalities from “unanticipated financial drains on the public fisc [that] could upset budgetary planning and withdraw resources from other needful programs.”).

the authority to investigate complaints of misconduct by police officers.³⁸ Community review boards are designed to provide an avenue for individuals to address potential police misconduct for violations that might otherwise go unaddressed.

Action Item: Fund Research Aimed at Measuring the Financial Effects on Municipalities that have Waived Qualified Immunity Protections.

On June 19th, 2020, Colorado’s legislature passed the “Enhance Law Enforcement Integrity Act.”³⁹ This law creates, in part, a right of action against police officers who deprive them of their state constitutional rights. The law is the first in the nation in which police officers may not use qualified immunity as a defense.

While scholars have theorized about the effects that ending qualified immunity would have on municipalities,⁴⁰ the passage of the “Enhance Law Enforcement Integrity Act” presents a unique opportunity for the Foundation to fund research about the actual effects of ending qualified immunity at the state level. This research could focus on the effects of removing qualified immunity on municipal budgets and on the decision-making of law enforcement agencies and individual members of law enforcement.⁴¹

Action Item: Refer a Legislative Item for NYS Bar Association Consideration to Partner With Organizations that Seek to Create Robust Police Review Boards Whose Mandates are Consistent with State Law

Police Review Boards – In order to promote transparency and accountability in the police force and improve community relations, organizations are working to promote the establishment of independent civilian review boards with robust oversight authority. Recently, in Rochester, New York, 75% of voters approved the creation of a Civilian Review Board that was empowered to investigate and discipline officers for misconduct. However, the New York State Supreme Court declared that the disciplinary functions of the Police Accountability Board conflicted with

³⁸ Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1042 (2016).

³⁹ Nick Sibillia, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way To Protect Civil Rights*, FORBES (Jun. 21, 2020) <https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/#d53f284378ae>.

⁴⁰ See, e.g., Schwartz, *supra* note 32, at 315 (“Of course, it is impossible to know for certain what impact eliminating or restricting qualified immunity might have. We cannot know for certain whether or how eliminating qualified immunity tomorrow would change the litigation and disposition of cases filed today. We also cannot know for certain whether or how eliminating qualified immunity tomorrow might change plaintiffs’ decisions about whether to file cases next week. Eliminating qualified immunity might also cause judges and legislators to tinker in unforeseen ways with rights and remedial design. But uncertainty should not be a barrier to prediction.”)

⁴¹ Joanna C. Schwartz, *The Case against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1823 (2018) (“It is less certain what impact lawsuits have on the law enforcement agencies that do suffer some financial consequences of payouts. There are reasons to believe that payouts may influence policies and practices in these departments to some degree. But no officials I interviewed during the course of my study reported that their police department’s financial responsibility for payouts negatively affected their policy or training decisions, or otherwise encouraged timidity. 154 In order to justify qualified immunity as a means of encouraging vigorous government decisionmaking, it would be necessary to show both that lawsuit payouts influence government policy and supervision decisions, and also that lawsuit payouts cause officials to make policy and supervision decisions that favor inaction. Available evidence offers no reason to believe that is the case.”)

applicable law.⁴² Although legislative lobbying is beyond the purview of the Foundation, it may suggest legislative items for consideration by its sister organization, the New York State Bar Association. The Foundation asks NYSBA to look for opportunities to bring about legislative change needed to make civilian review boards more legally viable.

II. DISPARATE OUTCOMES IN BANKRUPTCY PROTECTION

Part of maintaining the Rule of Law depends on ensuring that implicit bias does not influence legal decision-making or advice. There is evidence that implicit bias is present in advising Black debtors on steps for proceeding into bankruptcy, leading to disproportionately negative outcomes. The risks of this racial bias are particularly acute during the COVID-19 pandemic, which is causing high unemployment and significant disruption to many businesses.⁴³

A 2017 analysis by Pro-Publica demonstrated that consumers living in majority Black zip codes were more than twice as likely to have their bankruptcy cases dismissed compared to consumers living in majority white zip codes.⁴⁴ The driving force behind this disparity was the individual debtors' choices of whether to enter into the Chapter 13 bankruptcy process or the Chapter 7 process.⁴⁵ Chapter 7 bankruptcy generally provides a less onerous form of bankruptcy relief for debtors, and in practice, most consumers "typically receive a discharge within six months of filing."⁴⁶ In contrast, Chapter 13 bankruptcy requires a commitment from a debtor to devote all of its disposable income for three to five years to the repayment of creditors.⁴⁷ Nationally, from 2008 to 2010, only 39% of Chapter 13 cases filed by debtors in majority Black zip codes were ultimately successful. In contrast, 58% of cases from majority white zip codes were successfully discharged.⁴⁸

Although there are significant burdens that come with Chapter 13 bankruptcy, it may present certain advantages depending upon the individual circumstances of the debtor. For example, Chapter 13 may be used to allow some debtors to keep possession of their home. Additionally, although it generally costs more to file for Chapter 13 bankruptcy than Chapter 7 bankruptcy, unlike in Chapter 7 bankruptcy, the fees are generally structured so that they can be paid over time.⁴⁹ Nevertheless, there is evidence that some attorneys steer individuals to Chapter 7 bankruptcies based on race alone.

⁴² See *Rochester Police Locust Club, Inc. v. City of Rochester*, available at

https://www.scribd.com/document/460370974/PAB-Decision-5-7-20#fullscreen&from_embed.

⁴³ Amy Quakenboss, director of the American Bankruptcy Institute predicted that personal bankruptcy numbers will be begin to increase as "government lifelines to help stabilize the economy begin to expire." Janna Herron, *Personal Bankruptcies plunge during pandemic but 'a flood' could be on the horizon*, YAHOO MONEY (July 13, 2020).

⁴⁴ Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy in America: An in-depth discussion of racial patterns in bankruptcy filings and outcomes*, PRO PUBLICA, Sept. 27, 2017, <https://projects.propublica.org/graphics/bankruptcy-data-analysis> [hereinafter *Data Analysis: Bankruptcy in America*].

⁴⁵ *Id.*

⁴⁶ Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 394 (2012).

⁴⁷ *Id.*

⁴⁸ See *Data Analysis: Bankruptcy in America*, *supra* note 25.

⁴⁹ See *id.*

Despite the limited success of Black debtors in obtaining relief from Chapter 13 bankruptcy, Black debtors choose to enter the Chapter 13 process more often than white debtors.⁵⁰ While several studies have hypothesized alternate reasons for this disparity, at least one suggests that attorney steering may be responsible.⁵¹ In 2012, Jean Braucher, Dov Cohen, and Robert Lawless created an experiment that was designed to measure the differences how a client’s race would affect an attorney’s advice on how to proceed in a bankruptcy case. They sent letters to 262 attorneys from across the country and created three fictitious couples: “Reggie and Latisha,” “Todd and Allison,” and “R and L.” The study concluded that attorneys “recommended Chapter 13 to “Reggie and Latisha” 47.4 percent of the time but only recommended it 36.2 percent of the time to “R. and L.” and only 32.1 percent of the time to “Todd and Allison.”⁵²

Action Items: Fund Studies that Examine Disparities in Bankruptcy Protection in New York State, Partner with Organizations that Provide Free Bankruptcy Service to Minority Communities, and Sponsor Educational Programs Aimed at Confronting Implicit Racial Bias

Research is limited regarding disparate legal advice relating to bankruptcy, and there appears to be a gap in research as to racial disparities in advice about entering Chapter 13 or Chapter 7 bankruptcy in New York State. In addition to funding such research, there are opportunities to improve bankruptcy outcomes for minorities by supporting organizations that provide free bankruptcy services to eligible clients such as The Legal Aid Society and the NYC Bankruptcy Assistance Project. Additionally, the Foundation, coupled with the Association, has an excellent platform from which to promote or curate educational programs that are designed to make New York attorneys more aware of forms and potential outcomes of implicit bias.

III. REDUCTION IN THE NUMBER OF BLACK-OWNED BANKS (WHICH PRIMARILY SERVE THE BLACK COMMUNITY)

According to the Federal Deposit Insurance Corporation, between 2001 and 2016, the number of Black-owned banks fell by 54%.⁵³ Many Black-owned banks combat the racial wealth

⁵⁰ See *id.* (“From 2008 through 2015, 72 percent of the filings in white zip codes were under Chapter 7, while debtors in Black zip codes chose Chapter 7 only 49 percent of the time.”) This disparity is particularly likely to occur in the Southern United States. The South is the only region in the country in which Chapter 13 is the predominant form of bankruptcy. This ProPublica study states that “An important reason why Chapter 13 bankruptcy is so popular in the South is the way attorneys are paid. In the South, it is common for attorneys to file Chapter 13s for no money up front, with the entirety of their fees paid through the Chapter 13 plan. In a sample of cases gathered by the Consumer Bankruptcy Project, 56 percent of Chapter 13 filings in the South were filed in this ‘no money down’ fashion. The percentage was even higher (67 percent) in the districts with the highest proportion of Chapter 13 filings. Meanwhile, outside the South, only 21 percent of Chapter 13 cases were filed with \$0 down.” This study further showed that “[t]he style of Chapter 13 practiced in the South creates two important dynamics: First, low-income debtors are more likely than debtors with more income to file under Chapter 13. Second, black debtors are more likely to file under Chapter 13 than white debtors, even at the same income level.”

⁵¹ See Jean Braucher, Dov Cohen, & Robert M. Lawless, *supra* note 45.

⁵² Jean Braucher, Dov Cohen & Robert M. Lawless, *supra* note 27 at 416.

⁵³ Patrice Gaines, *What Happened to the Black Banks?*, EBONY (June 15, 2016), <https://www.ebony.com/career-finance/Black-banks-pt-1/>.

disparity gap by making loans to underserved minority businesses and individuals, revitalizing communities underserved by major banks.⁵⁴

However, Black bank owners state that high expenses and unfavorable policy decisions are the causes of their decline.⁵⁵ Black-owned banks may incur more expenses than large banks due to extra counseling provided for new borrowers and higher security costs in underserved areas.⁵⁶ Meanwhile, in recent years Black-owned banks have been burdened disproportionately by regulations designed to rein in larger institutions. For example, new regulations imposed under Dodd-Frank, enacted in response to the 2008 financial crisis, resulted in burdensome compliance costs for Black-owned banks.⁵⁷ Furthermore, because they are usually smaller, community institutions, Black-owned banks are often excluded from participation in legislation designed to rehabilitate the banking sector.⁵⁸ The 2008 TARP bailout relief funds, for example, were primarily distributed to large banks.⁵⁹

Action Items: CLE Credits, Clinics, and a Writing Competition

The Foundation could initiate a writing competition to generate conversation and thought leadership with respect to how public policy could better position Black-owned banks for success. The Foundation may also support Black-owned banks by partnering with the Association to sponsor pro bono clinics to assist these banks in navigating compliance or creating a CLE program to specifically address how smaller banks should comply with the relevant regulatory rules.

⁵⁴ Russell D. Kashian, Richard McGregory, & Derrek Grunfelder McCrank, *Whom Do Black-Owned Businesses Serve*, bostonfed.org/publications/communities-and-banking/2014/summer/whom-do-Black-owned-banks-serve.aspx (“Given that [black-owned banks] are often one of the few financial intermediaries found in low-income areas, they are vital sources of capital for the residents and provide banking services to communities that are often barren of any other mainstream banking services. For members of the communities they serve, [Black-owned banks] are a source of valuable jobs with career ladders, such as tellers, loan officers, and mortgage originators. They offer family wages and the opportunity for training and skill enrich.”)

⁵⁵ Gaines, *supra* note 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Carrie Sheffield, *How 'Progressive' Policy Weakens African-American Banks*, FORBES (Apr. 9, 2015), <https://www.forbes.com/sites/carriesheffield/2015/04/09/how-progressive-policy-weakens-african-american-banks/#4364c18b7002>; see also Lee, *Black Owned Banks Struggle to Stay Out of the Red*, HUFFINGTON POST, https://www.huffpost.com/entry/Black-owned-banks-struggl_n_933216?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZW5vc2lhLm9yZy8&guce_referrer_sig=AQAAADinMNaZ0sUQnnNR1s5QZ2NxcuZcGcAehSvBy8Es6Rg2xXxAPP9wdce9_e2F5-boHMD1BfdYKSSpv7nvSH_hgSo2bJzSzRthTXQBR8w36D9u1Jmimo_tvnT5nl6dAnqIZYDAlpyIIPdPxWQ7pa5PR9vuM43ANckuxMlopfHJI-d1zh.

⁵⁹ Gaines, *supra* note 1.

IV. THE DISPROPORTIONATE IMPACT OF VOTER DISENFRANCHISEMENT ON MINORITY COMMUNITIES

a. Voter Disenfranchisement Through Voter ID Laws and Voter Purges

There is considerable data to show that inequities in voting disproportionately disenfranchise minority communities.⁶⁰

Voter ID laws disproportionately affect communities of color, as minority voters are less likely to possess a photo ID than white voters. According to one study, in Alabama, “3.33% of white voters, 5.49% of Black voters, and 6.98% of Latin[x] voters lack a useable ID.”⁶¹ This results in less participation by minority voters. Data from elections between 2012 and 2016 showed that, in states with strict Voter ID laws, gaps between white and minority participation in elections substantially increased. In general elections, the participation gap increased for Black voters from 2.9% to 5.1% and for Latinx voters from 4.9% to 13.2%.⁶²

Voter purges, which are an effort by states to remove ineligible voters from voter registration lists, have become increasingly common in states that were previously subject to the federal preclearance provisions of the Voting Rights Act. Between 2014 and 2016, states removed almost 16 million voters from the system.⁶³ Almost 4 million more people were purged from the voting system between 2014 and 2016 than between 2006 and 2008.⁶⁴ These purges have erroneously disenfranchised eligible voters. For instance, an investigation by the New York state attorney general in 2016 found that New York City’s Board of Elections had improperly deleted over 200,000 names from voter rolls.⁶⁵ Moreover, there is evidence that suggests that purging techniques employed in states have a disparate impact on Black voters. According to an analysis by Reuters, in Cincinnati, Ohio, “in the heavily African-American neighborhoods near downtown, more than 10 percent of registered voters have been removed due to inactivity” compared to “suburban Indian Hill, Ohio only 4 percent have been purged due to inactivity.”⁶⁶

⁶⁰ These principles are: (1) the accountability of government and private actors; (2) just laws which are clear, publicized, stable, applied evenly, and protective of fundamental rights; (3) the presence of open government processes (e.g. laws are enacted transparently and are accessible, fair, and efficient); and (4) accessible and impartial dispute resolution.”

⁶¹ Brief for Petitioner at 4, *Greater Birmingham Ministries v. Secretary of State for the State of Alabama* (11th Cir. 2018), available at https://www.naacpldf.org/files/about-us/2018.02.21_Brief%20for%20Plaintiffs-Appellants.pdf.

⁶² Zoltan Hajnal, Nazta Lajevardi, & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 72 THE JOURNAL OF POLITICS (2017).

⁶³ Brater et al., *Purges: A Growing Threat to the Right to Vote*, THE BRENNAN CENTER FOR JUSTICE 1 (2018).

⁶⁴ *Id.*

⁶⁵ *Id.* Additional erroneous purges have happened across the country. In Ohio, 40,000 eligible voters were removed from the voter rolls. *Voter purges: are Republicans trying to rig the 2020 election?*, THE GUARDIAN (Dec 31, 2019) [theguardian.com/us-news/2019/dec/31/voter-purges-republicans-2020-elections-trump](https://www.theguardian.com/us-news/2019/dec/31/voter-purges-republicans-2020-elections-trump).

⁶⁶ Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, REUTERS (June 2, 2016) <https://www.reuters.com/article/us-usa-votingrightsohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-outin-november-idUSKCN0YO19D>.

Action Item: Partner with Organizations Aimed at Educating Voters About their Rights and Ensuring that Voters Have Access to The Materials that They Need in Order to Vote.

Numerous groups have launched programs to provide individual voter assistance and voter ID education, to ensure that citizens have the right type of identification to vote.⁶⁷ One such group is VoteRiders. The Foundation may provide support to organizations that focus on voter assistance and combating voter suppression. Additionally, within its mission the Foundation could support organizations sponsoring voter registration drives in minority communities, as long as it does not endorse a particular candidate or party. For example, each election cycle, the New York Urban League, an organization dedicated to advocating on behalf of Black and other underserved ethnic communities, undertakes efforts to canvass minority neighborhoods to help community members register to vote.

b. Voter Disenfranchisement of Felons Disproportionately Impacts Minority Voters

Incarcerated and formerly incarcerated citizens lack the right to vote. As discussed above, mass incarceration has a particularly detrimental effect on the Black community.⁶⁸ As a result, an estimated one in thirteen Black Americans do not have the right to vote due to past convictions, equating to 2.2 million Black citizens or 7.7% of Black adults.⁶⁹ This is four times the rate of disenfranchisement of any other racial group.⁷⁰

Action Items: Partner with Organizations that Study Felon Disenfranchisement, Educate The Public, and Advocate For Permanent Legislative Change

In 2018, Governor Andrew Cuomo signed a bill that granted conditional pardons to New Yorkers who are on parole which allowed eligible parolees to participate freely in elections.⁷¹ Formerly incarcerated prisoners are automatically considered for pardon. However, this pardon is discretionary. Currently there are two bills, A. 4987 and S. 1941, pending in the New York legislature that would automatically restore voting rights to the formerly incarcerated upon release.⁷² The Brennan Center for Justice has been active in researching the issue of felony disenfranchisement and advocating for the passage of these bills in order to codify Governor Cuomo's discretionary order. Support for such research, and/or suggesting this lobbying item to the Association, could help curb the disproportionate influence of felony disenfranchisement,

⁶⁷ VoteRiders, <https://www.voteriders.org/what-we-do/> (last visited Jul. 20, 2020).

⁶⁸ *Infra* Part I.

⁶⁹ The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, <https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/>

⁷⁰ Karina Schroeder, *How Systemic Racism Keeps Millions of Black People from Voting*, vera.org/blog/how-systemic-racism-keeps-millions-of-Black-people-from-voting).

⁷¹ Governor.ny.gov, *Governor Cuomo Signs Executive Order to Restore Voting Rights to New Yorkers on Parole*, <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-restore-voting-rights-new-yorkers-parole>.

⁷² Brennan Center for Justice, *Voting Rights Restoration Efforts in New York*, <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york>.

and promote the Rule of Law by ensuring that all citizens may effectively participate in democracy.

V. EDUCATION

a. School-to-Prison Pipeline.

One source of racial inequity in education stems from harsher levels of discipline for students of color versus white students, resulting in a phenomenon known as the School to Prison Pipeline. For example, from July 2011 to June 2012, the NYPD reported school safety agents and police made 882 arrests in schools.⁷³ Black students accounted for almost 63% of school-related arrests, while they made up only 28% of the student body.⁷⁴ The resulting consequences are referred to as a School-to-Prison Pipeline because an in-school arrest increases the likelihood of a student dropping out of school, which increases the likelihood of that child going to prison.

Though most school arrests are for “minor, typical” adolescent misbehavior, arrests can have lasting negative effects on children.⁷⁵ A first arrest during high school nearly doubles the odds of the child dropping out of school.⁷⁶ The odds of dropping out are nearly quadrupled for youths who have a court appearance following the first arrest.⁷⁷ Once the student drops out, he or she is eight times more likely to be incarcerated than a youth who finishes high school.⁷⁸

Schools are also more likely to suspend Black students. In New York, Black students represented 28 percent of the student population in the 2011-2012 school year, but they represented more than half of suspensions.⁷⁹ Furthermore, Black students were four times more likely to be suspended than white students.⁸⁰ Hispanic students were nearly twice as likely to be suspended as white students.⁸¹

This is not a phenomenon limited to New York City. The U.S. Department of Education Office for Civil Rights found that Black students are suspended and expelled at a rate three times greater than white students.⁸² On average, 5% of white students were suspended, compared to

⁷³ *Id.*

⁷⁴ *Id.* at 8.

⁷⁵ NEW YORK CITY SCHOOL-JUSTICE PARTNERSHIP TASK FORCE, KEEPING KIDS IN SCHOOL AND OUT OF COURT REPORT AND RECOMMENDATION 7 (2013), <http://www.nycourts.gov/ip/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>. (discussing 2013 report from the New York State Permanent Judicial Commission on Justice for Children).

⁷⁶ Kathleen DeCataldo & Toni Lang, *Keeping Kids in School and Out of Court A School-Justice Partnership*, 83 N.Y. St. B.J., 26, 27 (2011).

⁷⁷ *Id.*

⁷⁸ Judah Schept, et al., *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 SOCIAL JUSTICE 96, 99 (2014).

⁷⁹ NEW YORK CITY SCHOOL-JUSTICE PARTNERSHIP TASK FORCE, *supra* note 1.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE, 1 (2014), <https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

16% of Black students.⁸³ This kind of well-documented racial inequity in discipline implicates Rule of Law principles of equal treatment.

Action Item: Funding for Restorative Justice Initiatives

Restorative justice or other community-centered justice programs are a natural alternative to sending children into the criminal justice system. As New York State Courts embrace alternative methods of dispute resolution (e.g. presumptive ADR measures pursued by Chief Judge DiFiore’s Excellence Initiative⁸⁴), the Foundation may consider similarly funding alternative dispute resolutions programs. For example, a nonprofit group called the Center for Court Innovation offered to work with the New York State judicial branch to reimagine a court’s functioning.⁸⁵ The result was the Red Hook Community Justice Center—a community court initiative that is already functioning. This court aims to interrupt the cycle of crime by resolving cases with special attention to how the defendant can make the victim and the community whole while and issuing novel sentences such as job training, drug rehabilitation and community service instead of simply sending defendants to jail.⁸⁶

The Red Hook Community Justice Center building contains a courtroom, but also sets aside space for social workers, a housing resource center, and other counseling and support services.⁸⁷ The center hosts trials where teens act as judges, jurors, prosecutors and defense attorneys in real cases. A 2013 evaluation by the National Center for State Courts (NCSC) found that adult defendants who went through the Red Hook Community Justice Center had a 10 percent lower recidivism rate than those who went through traditional courts.⁸⁸ Juveniles experienced a 20 percent decrease in recidivism compared to alternate systems.⁸⁹ Overall, the Red Hook Community Justice Center method reduced the number of defendants who were sentenced to jail by 35 percent.⁹⁰ According to the Brooklyn DA’s website, a team of assistant district attorneys handles about 3,200 misdemeanors each year via the Justice Center. These district attorneys usually attend community meetings and participate in neighborhood events.

b. Limited Access Letters

Parents of color may also experience discrimination at their child’s school by principals who issue excessive “limited access letters” to them. Limited access letters allow a principal to ban a parent from school grounds or apply modified and enhanced security protocols when the parent is on campus.⁹¹ Among other things, these letters can mandate different pick up and drop

⁸³ *Id.*

⁸⁴ Press Release, New York State Unified Court System, Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases (May 14, 2019).

⁸⁵ Center for Court Innovation, <https://www.courtinnovation.org/about> (last visited Jul. 14, 2009).

⁸⁶ *Id.*

⁸⁷ Center for Court Innovation, <https://www.courtinnovation.org/programs/red-hook-community-justice-center/more-info> (last visited Jul. 14, 2009).

⁸⁸ Governing, <https://www.governing.com/topics/public-justice-safety/gov-red-hook-brooklyn-justice-center.html> (last visited Jul. 14, 2009).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Andrew Gerst, Limited Access Letters: How New York City Schools Illegally Ban "Unruly" Parents of Color and Parents of Students with Disabilities, 22 CUNY L. REV. 334, 337 (2019).

off procedures for the child, prevent a parent from meeting a teacher without principal approval,⁹² or prevent parents from attending their child’s capstone project or participating in graduation.⁹³ The DOE does not maintain data on how frequently schools issue these letters; however, anecdotal evidence suggests these letters are issued more frequently to parents of color and parents of students with disabilities.⁹⁴ Despite the humiliating and stigmatizing effect of these letters on the parent and the child and potential educational and financial harm experienced by the parent (e.g. parents may miss crucial participation opportunities in their students’ educational activities, or may need to secure alternate forms of pick up and drop off for the child), schools may issue these letters without due process protections. Parents cannot appeal these letters and are afforded no hearing before an impartial fact finder prior to the issuance of these letters.⁹⁵ There are no avenues for accountability on the part of principals for these actions and no transparency as to why they are issued.⁹⁶ No DOE or New York State policy appears to explicitly govern limited access letters.⁹⁷ The issue has garnered the attention of at least two city council members, Ritchie J. Torres and Daniel Dromm, who co-sponsored and introduced a bill that would require the Department of Education to report annually on (i) its policy regarding the issuance of limited access letters, (ii) any appeals process, (iii) the number of letters issued, and (iv) the demographics of those who receive them.⁹⁸ However, the bill has not advanced since it was introduced in 2018. Currently, the DOE has no legal obligation to track the issuance of such letters and no apparent plans to start monitoring this practice.

Action Item: Fund Research Regarding the Issuance of Limited Access Letters

Research of the DOE’s practice for issuing Limited Access Letters appears to be extremely limited. The Foundation may fund research and analysis of the use of Limited Access Letters and what legal authority, if any, supports the issuance of these letters. A call for research could be publicized by working with local educational equity groups such as the Alliance for Quality Education, a coalition dedicated to ensuring that students across New York State receive high quality public education.

c. School Funding Inequity

Districts composed primarily of Black and Brown or low-income children tend to receive less funding than districts primarily composed of white students.⁹⁹ The phenomenon appears to occur intra-district as well, with low income, predominantly Black and Brown schools *inside* the very same district receiving less funding than predominantly white schools.¹⁰⁰ A 2018 study by

⁹² *Id.* at 338.

⁹³ *Id.* at 341.

⁹⁴ *Id.* at 338.

⁹⁵ *Id.* at 342-343.

⁹⁶ *Id.* at 345.

⁹⁷ *Id.* at 342.

⁹⁸ New York City Council,

<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3371522&GUID=CD21B928-E2A0-496C-BDD5-EC8A38EFC0D3&Options=&Search=> (last visited Jul. 14, 2009).

⁹⁹ Ivy Morgan, *Students of Color Face Steep School Funding Gaps*, THE EDUCATION TRUST (Feb. 26, 2018), <https://edtrust.org/resource/funding-gaps-2018>.

¹⁰⁰ Robert Hanna et al., *Comparable but Unequal*, CENTER FOR AMERICAN PROGRESS (Mar. 11, 2015, 12:00PM), <https://www.americanprogress.org/issues/education-k-12/reports/2015/03/11/107985/comparable-but-unequal>.

The Education Trust–New York ranked New York 48th out of all 50 states in educational equity.¹⁰¹ The organization came to this result by measuring the funding gap between the districts enrolling the most students in poverty and the districts enrolling the fewest. New York ranks 44th when the funding gap between the districts enrolling the most students of color and those enrolling the fewest is measured.¹⁰²

Some scholars attribute a certain measure of the inequity to a government program called Foundation Aid which was created as a result of a lawsuit holding that the New York State Constitution requires the state to provide enough funds to schools to ensure all students receive a “sound basic education.”¹⁰³ To align with the court’s mandate, the Foundation Aid formula was designed to distribute state money to districts that needed additional funds in order to provide a sound, basic education. However, the implementation of this formula has allegedly been manipulated through political wrangling, and funding has not been distributed as initially intended.¹⁰⁴ The Citizens Budget Commission has described the formula as outdated, arbitrary and inconsistent.¹⁰⁵ A study found at least 165 New York school districts, which receive approximately \$2 billion in state aid annually, already raise enough revenues locally (i.e., without Foundation Aid) to fund a sound basic education.¹⁰⁶ Instead, this funding could be used in schools with predominantly minority student populations.

A study shows that a 10% increase in per pupil spending for children from low-income families each year for all 12 years of public school would help students achieve approximately 9.6% higher earnings and a 6.1 percentage point reduction in the annual incidence of adult poverty.¹⁰⁷

Though data is limited, at least one study indicates even within a district, students with low-income backgrounds receive less funding. A study by the Center for American Progress on intra-district funding found that at least 4.5 million students from low-income backgrounds are in schools that receive roughly \$1,200 less per child each year than wealthier schools in the same district.¹⁰⁸ Before 2015, schools were not obligated to report on their spending, however the Every Student Succeeds Act, passed in 2015, requires states to disclose and publish spending at a school-by-school level. This data could educate the public on how state money is spent and play an important role in redistribution of state aid. However, it appears not every school has

¹⁰¹ NEW YORK ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, EDUCATION EQUITY IN NEW YORK: A FORGOTTEN DREAM (2013).

¹⁰² *Id.*

¹⁰³ Kevin E. Jason, Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice, 23 CUNY L. REV. 139, 186 (2020).

¹⁰⁴ *Id.*

¹⁰⁵ Citizens Budget Commission, <https://cbeny.org/research/better-foundation-aid-formula> (last visited Jul. 14, 2009).

¹⁰⁶ Jason, *supra* note 27.

¹⁰⁷ *Id.*

¹⁰⁸ Center for American Progress, <https://www.americanprogress.org/issues/education-k-12/reports/2015/03/11/107985/comparable-but-unequal/> (last visited Jul. 14, 2009).

published a financial transparency report yet.¹⁰⁹ Regardless, if the Foundation dedicated grant funding to combing through the data, revelatory insights could soon be unveiled.

Action Item: Issue a Call For Data Analysis of Funding at the School-Level or Provide Scholarships

There are opportunities to expand research and analysis of school-level funding inequity. Raw information relating to school-level funding in New York State is available for some schools, but it could benefit from further analysis. The Foundation could publish a call for research into this issue and fund this work. Groups already involved in work for educational justice include the NYC Coalition for Educational Justice and Alliance for Quality Education. Community Education Councils, which are governmentally recognized advisory bodies made up of volunteer parents and residents, may also be interested in this work.

The Foundation awards 14 fellowships and scholarships annually, including several targeted toward students of color and those identifying with other under-represented groups in the law. The Foundation could increase its offerings in this regard, or further bolster interest in law-related careers among high school students by hosting an essay competition a racial justice and Rule of Law theme.

VI. HEALTHCARE

Numerous studies show that African Americans generally receive worse medical care, even when controlled for income and access to healthcare.¹¹⁰ For example, data suggests that health care providers tend to pursue less aggressive therapies for Black patients seeking medical care.¹¹¹ In 2013, infants born to African American mothers experienced the highest rates of infant mortality.¹¹² Generally, Black people have a shorter life span and are sicker than whites.¹¹³ A 2005 study by the National Academy of Medicine (NAM), showed poverty alone does not account for this difference in health.¹¹⁴ NAM found “racial and ethnic minorities receive lower-quality health care than white people—even when insurance status, income, age, and severity of conditions are comparable.” NAM found minorities are less likely than whites to be given “appropriate cardiac care, to receive kidney dialysis or transplants, and to receive the best

¹⁰⁹ Some schools have published the relevant financial information. However, not all schools have published their breakdown. See New York State Education Department, <https://data.nysed.gov/lists.php?type=school> (last visited Jul. 14, 2009).

¹¹⁰ Dayna Bowen Matthew, Health Care, Title VI, and Racism's New Normal, 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 3,14–19 (2014); Barbara A. Noah, Racial Disparities in the Delivery of Health Care, 35 SAN DIEGO L. REV. 135, 140–41 (1998); Janine S. Hiller, Healthy Predictions? Questions for Data Analytics in Health Care, 53 AM. BUS. L.J. 251, 255 (2016).

¹¹¹ One study showed providers performed certain procedures less frequently on African American patients than on white patients, even after income adjustment. For example, Black patients were over three times more likely than white patients to have a partial or total amputation of the leg. Black patients were more than twice as likely to undergo bilateral orchiectomy as a treatment for prostate cancer. Barbara A. Noah, Racial Disparities in the Delivery of Health Care, 35 SAN DIEGO L. REV. 135, 140–41 (1998).

¹¹² National Academy of Sciences, <https://www.ncbi.nlm.nih.gov/books/NBK425844/> (last visited Jul. 14, 2009).

¹¹³ Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, ABA (Aug. 1, 2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/.

¹¹⁴ *Id.*

treatments for stroke, cancer, or AIDS.”¹¹⁵ Medicaid insurance or the lack of insurance is closely linked to race, resulting in Black and minority communities being subject to worse care than privately insured, mostly white patients.¹¹⁶

Action Item: Partner with Local Organizations to Collect Data on Racial Health Disparities and Investigate Uses of Section 1557 of the Affordable Care Act

The Foundation could empower legal services organizations helping address unequal access to health care.

The Foundation could also issue a call for research on Section 1557 of the Affordable Care Act, which is its nondiscrimination provision. The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs receiving federal money. Hosting a research and writing contest for law students focusing on this Section could help focus attention on racial injustices in health care and promote racial equity in this crucial regard.

VII. HOMELESSNESS

People of color disproportionately suffer from homelessness. A report by the Coalition for the Homeless found “eighty-six percent of homeless single adults and 93 percent of heads-of-household in family shelters identify as Black or Hispanic – significantly higher than the 53 percent of New York City’s population overall who identify as Black or Hispanic.”¹¹⁷ Over the last ten years, the number of single adults sleeping in New York City Department of Homeless Services shelters has increased by more than 1,000 people per year on average. In December 2019, this number “reached an all-time high of 18,694 – a 143-percent increase from the 7,700 single adults sleeping in shelters each night in December 2009.”¹¹⁸

Structural factors contribute to this crisis. From 2015 to 2018, between roughly 3,000 and 4,000 people each year enter the homeless shelter system directly after release from New York State or City prison systems.¹¹⁹ Generally, those experiencing homelessness lack a mailing address and access to bathing facilities or a telephone. These factors make it difficult to obtain a job and climb out of poverty. These limitations are also a significant impediment to voting, which restricts access to the Rule of Law for those experiencing homeless.¹²⁰

Action Item: Continue and Increase Funding of Homeless Legal Aid Clinics And Criminal Reentry Programs; Support Organizations that Aid Minority Communities

¹¹⁵ *Id.*

¹¹⁶ Charmaine Ruddock, *Top Hospitals Offer Separate and Unequal Care*, GOTHAM GAZETTE (Nov. 3, 2011), <https://www.gothamgazette.com/index.php/health/856-top-hospitals-offer-separate-and-unequal-care>.

¹¹⁷ Giselle Routhier, *State of the Homeless 2020*, COALITION FOR THE HOMELESS (March 2020), <https://www.coalitionforthehomeless.org/wp-content/uploads/2020/03/StateofTheHomeless2020.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Christine L. Bella & David L. Lopez, *Quality of Life - at What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT 89 (1994).

The Foundation could direct further resources towards funding or developing clinics to help homeless populations access city benefits (*e.g.*, food stamps, housing vouchers). The Coalition for the Homeless describes the process of applying for supportive housing as burdensome and bureaucratic, and those in this vulnerable population could always benefit from an advocate.¹²¹ The Foundation could continue and increase its funding of clinics dedicated to criminal reentry to divert individuals who served prison time from shelters into supportive housing or connect them with other much-needed public benefits.

The Foundation could also contribute to the Communities of Color Nonprofit Stabilization Fund (CCNSF). CCNSF is a coalition of minority-focused nonprofit groups that awards capacity-building funds to community-based organizations which serve communities of color. The Foundation could request that its portion of CCNSF funding goes to selected organizations that either primarily serve African Americans or have a 51% or greater minority leadership on the board of directors or among their executive staff.¹²² CCNSF funds go to a wide variety of a groups and causes, from criminal reentry programs to mentorship programs.

¹²¹ Routhier, *supra* note 43.

¹²²New York Urban League, <https://www.nyul.org/ccnsf-1> (last visited Jul. 21,2020).

Appendix 2 – Sample Solicitation Letter to Law Firms to Support Racial Justice Initiatives

Prepared by Development Committee Co-Chair James B. Kobak, Jr., Esq.

Dear Law Firm Leader:

This is the 70th anniversary of the New York Bar Foundation. For the last seven decades the Foundation has supported legal services for the indigent, public education and public interest, and scholarships or internship opportunities for law students and others throughout New York State. After conducting a careful study of needs and programs, the Foundation in recent years has targeted its grant-making on projects supporting the Rule of Law and the importance of racial justice to achieving it. We are challenging your firm [or firm name] to participate in a special seventieth year firm challenge campaign dedicated to targeting even more directly legal service organizations, community groups and educators that combat racial injustice across New York State.

Recent events demonstrate all too clearly how structural racism persists and undermines the Rule of Law in our state and country. Even before the effects of COVID-19 and recent manifestations of racially charged behaviors, the United States ranked 96th out of the 128 countries studied by the World Justice Project in “Equal Treatment and discrimination” and 34th out of 37 developed countries in the same income range. This is an intolerable, in some ways almost unthinkable, situation in a nation that fought a bitter war and amended its constitution over 150 years ago to guarantee due process and equal protection of law to all formerly enslaved and mistreated people.

The Firm Challenge Against Racial Injustice will not only allow the Foundation to continue funding programs it has traditionally supported aimed at addressing injustices which disproportionately impact racial minorities but allow it to add additional funding and reach out to additional grantees with a special expertise on issues such as police and educational reform, restorative justice and reduction of incarceration, voting rights and community and youth education.

Lawyers, and particularly lawyers in New York, have always been in the forefront of the battle for equal justice. Seventy years ago lawyers began laying the groundwork for *Brown v. Board of Education* and the civil rights advances that followed. But sadly those advances are far from complete; the Foundation, like so many lawyers and law firms in the State, must step up its efforts. It is imperative that we do so at a time marked by division and turmoil and an unprecedented national crisis. It is also especially fitting to do so now, to mark the passing of John Lewis who in so many ways personified what the Rule of Law means to America.

Please consider adding support of the Foundation’s Firm Challenge Against Racial Injustice to [name of firm’s] notable commitment to pro bono and community service and the Rule of Law. Participating firms will be listed on a donor wall at the Bar

Adopted October 5, 2020

Center in Albany to recognize in a tangible way their commitment to the Foundation and the commitment of New York lawyers to the cause of racial justice.

Appendix 3 – Sample Solicitation Letter to Prospective Legacy Society Donors

Prepared by Development Committee Co-Chair Ilene S. Cooper, Esq.

Dear Colleague:

As a Fellow of the New York Bar Foundation, you serve as a valuable reminder to the bench and bar of the need to promote justice through the Rule of Law, and to strive for enhanced legal services to the community. We commend you and thank you for your unyielding devotion of time, energy and resources to the principles that we all cherish.

Today, the Foundation's commitment to these principles is even more resolute. The tragic death of George Floyd has indeed highlighted the deep racial divide that still exists in this country and how essential it is for us as a nation, a state, and an organization to foster the ends of racial justice and social equality. With this in mind, the New York Bar Foundation has created a restricted fund directed toward programs and initiatives with this mission. We are reaching out to you with the sincere hope that you will provide financial support to this very worthy cause by becoming a member of our Legacy Society, or by enhancing your level of giving. Information about the Legacy Society and giving can be accessed through the Foundation's website.

We greatly appreciate your contribution and recognition of this effort.