



NEW YORK STATE  
BAR ASSOCIATION

# Report and Recommendations of the New York State Bar Association **Task Force on Racism, Social Equity, and the Law**

January 2023

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**Lucy Lang, Esq.**

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**With Special Thanks to Claire T. Sellers, Esq., and Bryan  
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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 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 19<sup>th</sup> 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.”<sup>1</sup> 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

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<sup>1</sup> 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 Trounstein 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.”<sup>2</sup>

“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.”<sup>3</sup> 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.<sup>4</sup> The Dutch allowed slaves to be educated together with whites.<sup>5</sup>

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.<sup>6</sup> 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.”<sup>7</sup> Though enacted in the City, they were enforced throughout the state.<sup>8</sup>

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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<sup>2</sup> Slavery in the North – Slavery in New York, <http://slavenorth.com/newyork.htm> (2003).

<sup>3</sup> New Netherland Institute, *Slavery in New Netherland*, <https://www.newnetherlandinstitute.org/history-and-heritage/digital-exhibitions/slavery-exhibit/>.

<sup>4</sup> John Jay College of Criminal Justice, New York Slavery Records Index, <https://nyslavery.commons.gc.cuny.edu/search-for-slaves/>.

<sup>5</sup> Carlton Mabee, *Black Education in New York State: From Colonial to Modern Times*, 12 (Syracuse University Press, 1979).

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> *Id.* at 17.

treatment they received in their daily lives.”<sup>9</sup> 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.”<sup>10</sup>

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.<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup> The severity of the punishments and the public nature of them were to deter other Black New Yorkers from committing the crime.<sup>14</sup> In addition, crimes committed by Blacks were prosecuted, though crimes committed by whites against Blacks rarely were.<sup>15</sup>

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:<sup>16</sup>

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<sup>9</sup> 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.

<sup>10</sup> *Id.*

<sup>11</sup> 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>.

<sup>12</sup> *Id.* at 148.

<sup>13</sup> *Id.* at 156–163.

<sup>14</sup> *Id.* at 162.

<sup>15</sup> 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>.

<sup>16</sup> John Jay College of Criminal Justice, *New York Slavery Records Index*, <https://nyslavery.commons.gc.cuny.edu/search-for-slaves/>.

<b>Year of Record</b>	<b>Owner Last Name</b>	<b>Owner First Name</b>	<b>County or Borough</b>	<b>Locality</b>	<b>Number of Slaves</b>
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

<b>Year of Record</b>	<b>Owner Last Name</b>	<b>Owner First Name</b>	<b>County or Borough</b>	<b>Locality</b>	<b>Number of Slaves</b>
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.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> The Society also opened the earliest school to educate Blacks – the African Free School – in New York City in 1787.<sup>20</sup> 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.”<sup>21</sup> Until 1810, very few slaves were educated – if they were, it was primarily through churches or similar charitable organizations.<sup>22</sup> In 1810, the New York State Legislature passed a

<sup>17</sup> Slavery In The Middle States (NJ, NY, PA), Encyclopedia.com.

<sup>18</sup> 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/>.

<sup>19</sup> 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>.

<sup>20</sup> Mabee, *supra* note 5, at 19–21.

<sup>21</sup> *Id.* at 21.

<sup>22</sup> *Id.* at 14–15.

law requiring slave master to “have their slave children taught to read the scriptures” in preparation for emancipation.<sup>23</sup>

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.”<sup>24</sup> Scientific opinions at the time supported white superiority and Black biologic and intellectual inferiority.<sup>25</sup> 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 subsystem, 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).<sup>26</sup>

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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<sup>23</sup> *Id.* at 19.

<sup>24</sup> Pitts, *supra* note 7, at 17.

<sup>25</sup> 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>.

<sup>26</sup> *Id.*

to “their alleged immorality, lack of work ethic and lack of intelligence” for imposing the requiring.<sup>27</sup> Concern was raised about Black New Yorkers criminal propensity:

“[I]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.”<sup>28</sup>

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.<sup>29</sup> 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).<sup>30</sup> 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.<sup>31</sup>

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<sup>27</sup> Harris, *supra* note 15, at 118.

<sup>28</sup> 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>.

<sup>29</sup> 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>.

<sup>30</sup> 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/>.

<sup>31</sup> 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.”<sup>32</sup>

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.”<sup>33</sup>

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.”<sup>34</sup>

### **“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.”<sup>35</sup>

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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<sup>32</sup> Historic Geneva, *The Ballot Box in New York State*, Oct. 16, 2020, <https://historicgeneva.org/organizations/voting-history-in-new-york-state/>.

<sup>33</sup> 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.

<sup>34</sup> 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.”

<sup>35</sup> 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.”<sup>36</sup> 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.<sup>37</sup> A central reason for the requirement remaining was the concern about Black immorality and, specifically, criminality.<sup>38</sup> 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.<sup>39</sup>

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).<sup>40</sup>

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.<sup>41</sup>

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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<sup>36</sup> *Id.* at 201..

<sup>37</sup> Harris, *supra* note 15, at 268.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 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.”

<sup>41</sup> N.Y. Pub. Library Schomburg Ctr. For Resarch in Black Culture, *Black New Yorkers*, <https://blacknewyorkers-nypl.org>.

whites.<sup>42</sup> Although now education was provided not only through religious organizations but through charitable and benevolent societies throughout the state,<sup>43</sup> Blacks were proactively throughout the state setting up their own schools, including in New York, Brooklyn, Albany, Buffalo (Lockport), Troy and Rochester.<sup>44</sup> 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.<sup>45</sup> 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.”<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

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%.<sup>50</sup> 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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<sup>42</sup> Mabee, *supra* note 5, at 23–34.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 49–68.

<sup>45</sup> *Id.* at 55.

<sup>46</sup> *Id.* at 81–82.

<sup>47</sup> Historical Society of the New York Courts, *Jennings v. Third Avenue Railroad Co., 1854*, <https://history.nycourts.gov/case/jennings-third-ave/>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *1860 United States presidential election in New York*, Wikipedia, [https://en.wikipedia.org/wiki/1860\\_United\\_States\\_presidential\\_election\\_in\\_New\\_York](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](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.<sup>51</sup>

“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!”<sup>52</sup>

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.<sup>53</sup> “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.”<sup>54</sup>

After the end of the war, Congress passed the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> 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 15<sup>th</sup> Amendment<sup>55</sup> 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.<sup>56</sup> 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.”<sup>57</sup> Along another party line vote, New York rescinded its ratification.<sup>58</sup> Fortunately, the rescission did not prevent the 15<sup>th</sup> Amendment from being ratified. The 15<sup>th</sup> Amendment was ratified by ¾ of the states in 1870.

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<sup>51</sup> 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/>.

<sup>52</sup> Ron Soodalter, *The Day New York Tried to Secede*, Historynet (Oct. 26, 2011), <https://www.historynet.com/the-day-new-york-tried-to-secede/>.

<sup>53</sup> 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>.

<sup>54</sup> *Id.* at 280.

<sup>55</sup> <https://www.usconstitution.net/constamrat.html#Am15>.

<sup>56</sup> Laymond Robinson, *State is Haunted by an 1870 Ghost*, N.Y. Times, Jan. 28, 1962, 68.

<sup>57</sup> 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.

<sup>58</sup> 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 14<sup>th</sup> Amendment and similar to the federal Civil Rights Act of 1875. 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.”<sup>59</sup> 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.”<sup>60</sup>

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 that the exclusion was on account of prejudice against his race.<sup>61</sup>

Davis then secured tickets when he asked a child to buy them for him.<sup>62</sup> He returned to the theatre entrance with his friend.<sup>63</sup> 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.”<sup>64</sup> At this point, Davis refused to leave.<sup>65</sup> “The gate keeper took hold of him and forced him out and

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<sup>59</sup> N.Y. Civil Rights Law § 1 (1873).

<sup>60</sup> 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.

<sup>61</sup> *The Color Prejudice*, N.Y. Times, Nov. 25, 1870, 8.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *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.”<sup>66</sup>

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.<sup>67</sup>

Writing for the majority, Associate Justice Joseph P. Bradley, of New York State, in an 8–1<sup>68</sup> 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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<sup>66</sup> *Id.*

<sup>67</sup> Civil Rights Cases, 109 U.S. 3, 16 (1883) (<https://supreme.justia.com/cases/federal/us/109/3/>).

<sup>68</sup> 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.<sup>69</sup>

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.”<sup>70</sup>

“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.”<sup>71</sup> 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.’<sup>72</sup>

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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<sup>69</sup> *Id.* at 25.

<sup>70</sup> *Civil Rights Cases Decided*, N.Y. Times, Oct. 16, 1883, 4.

<sup>71</sup> *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>.

<sup>72</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 546–47.

within the meaning of the fourteenth amendment.”<sup>73</sup> It explained that separation was not violative of the 13<sup>th</sup> 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. . . .<sup>74</sup>

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.<sup>75</sup>

“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.”<sup>76</sup> 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.<sup>77</sup> 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<sup>78</sup>. Holding that it did

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<sup>73</sup> *Id.* at 548.

<sup>74</sup> *Id.* at 551.

<sup>75</sup> *Id.* at 551–552.

<sup>76</sup> 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.

<sup>77</sup> *People ex rel. King, v. Gallagher*, 93 N.Y. 438 (1883).

<sup>78</sup> 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 14<sup>th</sup> 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.<sup>79</sup>

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.”<sup>80</sup> 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.<sup>81</sup>

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.

<sup>79</sup> *Id.* at 443.

<sup>80</sup> *Id.* at 446–47.

<sup>81</sup> *Id.* at 448.

Chenango County could not deny entry to three Black men.<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup>

### **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.”<sup>86</sup> 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.”<sup>87</sup> 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

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<sup>82</sup> *People v. King*, 110 N.Y. 418 (1888).

<sup>83</sup> *People ex rel. Cisco v. School Board*, 161 N.Y. 598, 601 (1900).

<sup>84</sup> Mabee, *supra* note 2, at 242–43.

<sup>85</sup> *Id.* at 243.

<sup>86</sup> 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>.

<sup>87</sup> 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.”<sup>88</sup>

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.<sup>89</sup>

As described earlier, 13 Black communities were established throughout the state. Less than half of these communities survived to the end of the 19<sup>th</sup> 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.<sup>90</sup> Weeksville in Brooklyn began to decline in the 1880s with the construction of Eastern Parkway.<sup>91</sup> Newtown in Queens and Centerville AME Church in the Bronx disappeared with little information about their demise.<sup>92</sup> The Green in Queens became industrialized.<sup>93</sup> 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.<sup>94</sup>

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<sup>88</sup> Jacob Riis, *How the Other Half Lives*, 119 (1890), [https://blogs.ubc.ca/fafa/files/2020/01/Riis\\_How-the-Other-Half-Lives.pdf](https://blogs.ubc.ca/fafa/files/2020/01/Riis_How-the-Other-Half-Lives.pdf).

<sup>89</sup> *Id.* at 122.

<sup>90</sup> 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/>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *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).<sup>95</sup>

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."<sup>96</sup> "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."<sup>97</sup>

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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<sup>95</sup> Byrd, *supra* note 25, at 19S.

<sup>96</sup> Riis, *supra* note 88, at 16.

<sup>97</sup> 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).<sup>98</sup>

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.

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<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup>

### **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.”<sup>101</sup> 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.”<sup>102</sup>

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)<sup>103</sup> sparked by the death of an undercover officer<sup>104</sup>. A Black man saw a white man grabbing at his wife.<sup>105</sup> He cut the man with a knife.<sup>106</sup> The white man was an undercover police officer who thought the

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<sup>99</sup> 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.

<sup>100</sup> *Id.* at 197.

<sup>101</sup> Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, 65 (Harvard University Press, 2011).

<sup>102</sup> *Id.*

<sup>103</sup> *Tenderloin, Manhattan*, Wikipedia, [https://en.wikipedia.org/wiki/Tenderloin,\\_Manhattan](https://en.wikipedia.org/wiki/Tenderloin,_Manhattan).

<sup>104</sup> 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/>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

woman was a prostitute.<sup>107</sup> The officer subsequently died.<sup>108</sup> The Tenderloin area was a tense neighborhood: there was tension between the Irish and Blacks living there.<sup>109</sup> At the officer's funeral, a white mob attacked a killed a Black man.<sup>110</sup> This action ignited the riot.<sup>111</sup> 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.<sup>112</sup> The Black man who killed the officer was arrested and convicted to a life sentence for the death of the officer.<sup>113</sup> 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."<sup>114</sup> No actions were taken.<sup>115</sup>

### **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;"<sup>116</sup>
2. amending the Education Law in 1938 to repeal separate school in rural school districts;<sup>117</sup>
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;<sup>118</sup> 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."<sup>119</sup> Specifically raised by cities in the state with large Black populations, "frequent letters and delegations . . . testified to extremely hazardous

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> NY Const Art I § 11 (<https://dos.ny.gov/system/files/documents/2022/01/Constitution-January-1-2022.pdf>).

<sup>117</sup> NY Const. Art XI generally (<https://dos.ny.gov/system/files/documents/2022/01/Constitution-January-1-2022.pdf>).

<sup>118</sup> 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."

<sup>119</sup> 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.<sup>120</sup> The Commission’s overall observation was “the conditions often seem almost incredible in so advanced a commonwealth as the State of New York.”<sup>121</sup>

In two succinct reports, the Temporary Commission examined six areas: employment, housing, education, recreation, delinquency and crime, and places of public accommodations.<sup>122</sup> Over two years, the Temporary Commission examined public and private records, obtained information via questionnaires, conducted interviews and held public hearings throughout.<sup>123</sup> 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.<sup>124</sup>

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.”<sup>125</sup> The statistics reflecting this finding in the report are below:

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<sup>120</sup> 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.

<sup>121</sup> *Supra* note 119 at 3.

<sup>122</sup> *Supra* note 120 at 10.

<sup>123</sup> *Id.* at 27.

<sup>124</sup> *Id.*

<sup>125</sup> *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	0.1	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."<sup>126</sup>
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."<sup>127</sup>
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."<sup>128</sup>

## 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

<sup>126</sup> *Id.* at 38, 41.

<sup>127</sup> *Id.* at 39.

<sup>128</sup> *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.”<sup>129</sup>

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.”<sup>130</sup>
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.”<sup>131</sup>
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.”<sup>132</sup>
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.”<sup>133</sup>
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.”<sup>134</sup>

## **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.”<sup>135</sup>
2. In New York City, the Temporary Commission found that zoning was used at the high school to segregate Blacks into predominantly Black Schools.<sup>136</sup> In addition, these schools were the least maintained and oldest buildings.<sup>137</sup> Lastly these schools offered mainly vocational courses for students.<sup>138</sup>

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<sup>129</sup> *Id.* at 73.

<sup>130</sup> *Id.* at 76.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 77.

<sup>133</sup> *Id.* at 78.

<sup>134</sup> *Id.* at 83.

<sup>135</sup> *Id.* at 100.

<sup>136</sup> *Id.* at 100–06.

<sup>137</sup> *Id.*

<sup>138</sup> *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.”<sup>139</sup>
4. In Upstate New York, “Negro children have participated more or less equally in the facilities provided for elementary and secondary education.”<sup>140</sup> Parents complained that teachers “do not properly advise or encourage the pupils with respect to their continuation beyond the compulsory school ages.”<sup>141</sup>
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.”<sup>142</sup>

### **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.”

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<sup>139</sup> *Id.* at 105–06.

<sup>140</sup> *Id.* at 106.

<sup>141</sup> *Id.* at 107.

<sup>142</sup> *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 it 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.<sup>143</sup>

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.<sup>144</sup> 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.”<sup>145</sup> 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.<sup>146</sup>

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<sup>143</sup> *Id.* at 180–90.

<sup>144</sup> *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](http://www.archives.nysed.gov/common/archives/files/res_topics_mi_homefront.pdf).

<sup>145</sup> *Id.* at 14.

<sup>146</sup> *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](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.<sup>147</sup>

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).<sup>148</sup> 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.<sup>149</sup>

### **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.<sup>150</sup>

In 1934, the Federal Housing Administration (FHA) was created to facilitate home financing in the wake of the Great Depression.<sup>151</sup> 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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<sup>147</sup> 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>.

<sup>148</sup> *Historical Background and Development of Social Security*, Social Security Admin., <https://www.ssa.gov/history/briefhistory3.html>.

<sup>149</sup> 29 U.S.C. §§ 151–169, Nat'l Lab. Relations Act, <https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act>.

<sup>150</sup> 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>.

<sup>151</sup> 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*.<sup>152</sup> 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.<sup>153</sup>

According to Professor Taylor,<sup>154</sup> 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.<sup>155</sup>

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.<sup>156</sup>

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<sup>152</sup> 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](https://theasa.net/sites/default/files/Appraisal%20Narratives_1.pdf).

<sup>153</sup> Adrienne Brown, *id.*

<sup>154</sup> 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.

<sup>155</sup> Henry-Louis Taylor, Jr. et al., *id.*

<sup>156</sup> 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.<sup>157</sup>

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.<sup>158</sup> 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.<sup>159</sup> 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.”<sup>160</sup>

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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<sup>157</sup> 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](https://repository.upenn.edu/cplan_papers/5).

<sup>158</sup> *Id.*

<sup>159</sup> 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>.

<sup>160</sup> Daniel Aaronson, *id.*

insure mortgages in or near African American neighborhoods.<sup>161</sup> This practice was laid out explicitly in the Underwriting Manual of the FHA.<sup>162</sup> It was this Underwriting Manual that recommended that highways be erected to separate African American from white neighborhoods.<sup>163</sup> 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.”<sup>164</sup>

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”<sup>165</sup> sites (polluted locations requiring a long-term response to clean up hazardous material contaminations) because the land was cheap.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup> 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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<sup>161</sup> 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>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *‘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>.

<sup>165</sup> Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.

<sup>166</sup> 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>.

<sup>167</sup> See 42 U.S.C. § 3601.

<sup>168</sup> See 42 U.S.C. § 3631.

<sup>169</sup> See 42 U.S.C. §§ 3531–3608(a).

further fair housing throughout the United States.<sup>170</sup> The CDBG are federal funds that HUD distributes to municipalities and not-for-profits throughout the United States for different fair housing initiatives.<sup>171</sup> 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.<sup>172</sup>

## **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.<sup>173</sup> 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

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<sup>170</sup> See 42 U.S.C. § 5303; 24 C.F.R. § 570.3.

<sup>171</sup> See [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/affh](https://www.hud.gov/program_offices/fair_housing_equal_opp/affh).

<sup>172</sup> Terry Gross, *supra* note 150.

<sup>173</sup> 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.<sup>174</sup> Despite the massive show of support, the New York City Board of Education, the state Legislature<sup>175</sup> and even Congress caved to the demands of white parents opposed to the desegregation efforts.<sup>176</sup>

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.<sup>177</sup> 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.<sup>178</sup> 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.<sup>179</sup>

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.”<sup>180</sup> 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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<sup>174</sup> 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/>.

<sup>175</sup> 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)

<sup>176</sup> 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/>.

<sup>177</sup> 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-norfler-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf>.

<sup>178</sup> 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/>.

<sup>179</sup> Kucsera, *supra* note 177.

<sup>180</sup> 418 U.S. 717, 741 (1974).

these litigations. Although initially hailed as a national success, Buffalo public schools are more segregated than ever.<sup>181</sup>

## **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.<sup>182</sup> 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."<sup>183</sup> The only federal legislation passed in the 20<sup>th</sup> 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.<sup>184</sup>

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.<sup>185</sup>

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<sup>181</sup> *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>.

<sup>182</sup> 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.

<sup>183</sup> 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>.

<sup>184</sup> Pub. L. 79-725, 60 Stat. 1040, enacted July 13, 1946.

<sup>185</sup> 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]<sup>186</sup>**

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.”<sup>187</sup> 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<sup>188</sup> 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.<sup>189</sup>

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.”<sup>190</sup>

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

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<sup>186</sup> 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.

<sup>187</sup> Steven M. Cox, David Massey, Connie M. Koski and Brian D. Fitch, Introduction to Policing, 25 (Sage Pub., Jan. 2019).

<sup>188</sup> The Law Enforcement Assistance Act in 1965 and Omnibus Crime Control and Safe Streets Act in 1968.

<sup>189</sup> 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>.

<sup>190</sup> *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.<sup>191</sup>

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'." <sup>192</sup> Professor Bondi explains that the Civil Rights Movement began in the North with New York in a leading role:<sup>193</sup>

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. . . .<sup>194</sup>

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.<sup>195</sup>

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<sup>191</sup> 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](https://www.nyc.gov/html/cchr/justice/downloads/pdf/how_new_york_changes_the_civil_rights_movement.pdf).

<sup>192</sup> *Id.* at 2.

<sup>193</sup> *Id.* at 1.

<sup>194</sup> *Id.* at 8.

<sup>195</sup> *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.<sup>196</sup>

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?’”<sup>197</sup> 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.<sup>198</sup>

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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<sup>196</sup> 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/>.

<sup>197</sup> 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>.

<sup>198</sup> 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.<sup>199</sup>

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%<sup>200</sup>

## **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

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<sup>199</sup> 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/>.

<sup>200</sup> 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)<sup>201</sup>

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.”<sup>202</sup> 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.<sup>203</sup>

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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<sup>201</sup> 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](https://www.dfs.ny.gov/system/files/documents/2021/02/report_redlining_buffalo_ny_20210204_1.pdf).

<sup>202</sup> 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](https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf).

<sup>203</sup> *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.<sup>204</sup>

## **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.<sup>205</sup>

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.<sup>206</sup>

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<sup>204</sup> 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](https://ppgbuffalo.org/files/documents/data-demographics-history/a_city_divided_a_brief_history_of_segregation_in_the_city_of_buffalo.pdf).

<sup>205</sup> 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/>.

<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup>

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.<sup>209</sup> 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.<sup>210</sup> Therefore, ADC contended that the County’s certifications were both false and improper when it obtained over \$45 million dollars in federal funds.<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup>

Once the parties proceeded with discovery, several key Westchester County officials and experts were deposed.<sup>215</sup> 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

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<sup>207</sup> 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).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> 2007 WL 1622360 (S.D.N.Y. April 17, 2007).

<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup> Income was considered by Westchester County to be more so the basis of discrimination.<sup>218</sup> 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.<sup>219</sup> Westchester County did not view discrimination or segregation in terms of race.<sup>220</sup> County officials were aware that some of the opposition to affordable housing involved fear of “impact on the public schools.”<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> 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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<sup>216</sup> *Id.* at 18; 2008 WL 6802251 at 6, n. 3, 13, 22 (S.D.N.Y. Oct. 31, 2008).

<sup>217</sup> *Id.* at 9.

<sup>218</sup> 2008 WL 6802251 at 7 (S.D.N.Y. Oct. 31, 2008).

<sup>219</sup> *Id.* at 9.

<sup>220</sup> 2008 WL 6802215 at 9 (S.D.N.Y. Nov. 14, 2008).

<sup>221</sup> *Id.* at 13.

<sup>222</sup> *Id.*

<sup>223</sup> Press Release of Westchester County Board of Legislators on Sept. 23, 2009; see [www.westchester.gov](http://www.westchester.gov).

<sup>224</sup> See [http://www.westchestergov.com/pdfs/HOUSING\\_lawsuitSettlement.pdf](http://www.westchestergov.com/pdfs/HOUSING_lawsuitSettlement.pdf).

decision to intervene and enter into settlement negotiations with the Westchester County.<sup>225</sup> 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.”<sup>226</sup> 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.<sup>227</sup> 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

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<sup>225</sup> Jereon Brown, *HUD and Justice Department Announce Landmark Civil Rights Agreement in Westchester County*, HUD Press Release, Aug. 10, 2009.

<sup>226</sup> 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>.

<sup>227</sup> 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.<sup>228</sup> 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.<sup>229</sup>

Had the Village amended its zoning, this would have allowed for the construction of 311 residential apartment units under the R-M zoning designation.<sup>230</sup> 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.<sup>231</sup>

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.”<sup>232</sup>

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:<sup>233</sup>

. . . 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

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<sup>228</sup> *Id.* at 589.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 591–97.

<sup>232</sup> *Id.* at 598.

<sup>233</sup> *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).<sup>234</sup>

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.”<sup>235</sup>

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<sup>234</sup> *Id.* at 608–09.

<sup>235</sup> 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.”<sup>236</sup>
- “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.”<sup>237</sup>
- “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.<sup>238</sup> 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.”<sup>239</sup> 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.”<sup>240</sup>

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.<sup>241</sup> 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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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> 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>.

<sup>240</sup> *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>.

<sup>241</sup> 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.<sup>242</sup> This overrepresentation 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.<sup>243</sup> 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.”<sup>244</sup> Notably, people of color represent two-thirds of those sentenced to incarceration in prisons throughout New York.<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup>

### **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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<sup>242</sup> 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>.

<sup>243</sup> 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>.

<sup>244</sup> *Id.*

<sup>245</sup> 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>.

<sup>246</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200429_Recidivism-SentLength.pdf).

<sup>247</sup> *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.<sup>248</sup> 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.<sup>249</sup> 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”<sup>250</sup> 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<sup>251</sup> and only recently, after yet another round of litigation, has the state finally agreed to meet its constitutional obligation.<sup>252</sup>

The Task Force notes there are 2,598,921 public school students in New York State in grades kindergarten through 12th.<sup>253</sup> 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.<sup>254</sup>

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%.<sup>255</sup> 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.<sup>256</sup> In 2018, 83% of the children in juvenile detention in New York were children identifying as Black or

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<sup>248</sup> 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](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>.

<sup>249</sup> 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>.

<sup>250</sup> *Campaign for Fiscal Equity Inc. v. State*, 86 N.Y.2d 306 (1995).

<sup>251</sup> *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893 (2003).

<sup>252</sup> 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/>.

<sup>253</sup> *New York State Education at a Glance*, New York State Educ. Dep’t, <https://data.nysed.gov/> (last visited Apr. 16, 2022).

<sup>254</sup> *Id.*

<sup>255</sup> *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).

<sup>256</sup> *The Bill, Solutions Not Suspensions*, <https://www.solutionsnotsuspensionsny.org/sns-bill> (last visited Apr. 16, 2022).

Latinx.<sup>257</sup> 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

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<sup>257</sup> New York State Div. Crim. Just. Serv., Statewide Juv. Just. Profile (2019), <https://www.criminaljustice.ny.gov/crimnet/ojsa/jj-reports/newyorkstate.pdf>.

<sup>258</sup> 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>.

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

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### **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

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<sup>259</sup> *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.<sup>260</sup>

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.<sup>261</sup>

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.<sup>262</sup> 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.”<sup>263</sup> 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).<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> The report found wide disparities for Black entrepreneurs in those sectors. According to the report, 5% of healthcare

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<sup>260</sup> *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>.

<sup>261</sup> *The State of America’s Children 2020*, Children’s Defense Fund, <https://www.childrensdefense.org/policy/resources/soac-2020-child-poverty/>.

<sup>262</sup> 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/>.

<sup>263</sup> Children’s Defense Fund, *supra* note 260.

<sup>264</sup> 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.

<sup>265</sup> 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>.

<sup>266</sup> *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.<sup>267</sup> 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 2012–2014 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

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<sup>267</sup> *Id.*

Black people have a higher pain tolerance than white people.<sup>268</sup> 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.<sup>269</sup>

### **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.<sup>270</sup> “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.”<sup>271</sup>

“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.”<sup>272</sup> Though the White House’s Council On Environmental Quality identified this inequitable distribution in its 1971 second annual report,<sup>273</sup> 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.<sup>274</sup> The protest did not stop the creation of the landfill, but it resulted in two studies

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<sup>268</sup> Mathieu Rees, *Racism in healthcare: What you need to know*, Medical News Today, Sept. 16, 2020, <https://www.medicalnewstoday.com/articles/racism-in-healthcare>.

<sup>269</sup> *Id.*

<sup>270</sup> 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>.

<sup>271</sup> *Id.*

<sup>272</sup> 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).

<sup>273</sup> 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>.

<sup>274</sup> 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.”<sup>275</sup>

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.<sup>276</sup>

The UCC Report also led to the identification of this pattern of activity as environmental racism or injustice.<sup>277</sup> The response to address this inequity is environmental justice.

In New York, examples of environmental injustice include:

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<sup>275</sup> *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>.

<sup>276</sup> *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>.

<sup>277</sup> 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.<sup>278</sup>
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.<sup>279</sup>
  - b. In the 1950s and 1960s, several thousand acres of the Akwesasne reservation were flooded for New York State water projects.<sup>280</sup>
  - 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.”<sup>281</sup>
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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<sup>278</sup> 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>.

<sup>279</sup> 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](https://www.academia.edu/41716531/All_Our_Relations_Native_Struggles_for_Land_and_Life_Winona_LaDuke).

<sup>280</sup> *Id.* at 32.

<sup>281</sup> *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.”<sup>282</sup>

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.”<sup>283</sup>
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.<sup>284</sup>

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.”<sup>285</sup>

“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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<sup>282</sup> 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>.

<sup>283</sup> 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/>.

<sup>284</sup> *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>.

<sup>285</sup> <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.<sup>286</sup> 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.<sup>287</sup> Using observed race and ethnicity data rather than self-reported data results in unavoidable misclassification.<sup>288</sup>

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<sup>286</sup> 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>.

<sup>287</sup> *Id.*

<sup>288</sup> *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.<sup>289</sup> 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.<sup>290</sup> “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.”<sup>291</sup> 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.<sup>292</sup> It was an 80% rejection rate for Black applicants compared to similarly situated white applicants.<sup>293</sup>

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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<sup>289</sup> 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>.

<sup>290</sup> *Mortgage Algorithms Perpetuate Racial Bias in Lending, Study Finds*, Public Affairs, UC Berkeley (Nov. 2018).

<sup>291</sup> *Id.*

<sup>292</sup> 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>.

<sup>293</sup> *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.

### Use of Data

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.<sup>294</sup> 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.<sup>295</sup> Suspension data in NYS reflect similar disparities with Black girls receiving the most disproportionate discipline.<sup>296</sup> 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.<sup>297</sup> Compounding this problem is that children of color are given less access to intervention services provided in early childhood than their white peers.<sup>298</sup>

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<sup>294</sup> 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>.

<sup>295</sup> 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/>.

<sup>296</sup> *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>.

<sup>297</sup> N.Y. Educ. Law § 3214(3)(d) (McKinney).

<sup>298</sup> 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,<sup>299</sup> 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.<sup>300</sup> 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

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<sup>299</sup> 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.

<sup>300</sup> 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.<sup>301</sup> 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

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<sup>301</sup> <http://www.op.nysed.gov/opsearches.htm>.

(DASA).<sup>302</sup> The state requires that candidates for educator certification complete six hours of DASA training “in harassment, bullying and discrimination prevention and intervention.”<sup>303</sup> This training covers a number of topics, including implicit bias, by helping staff “reflect upon their own personal identities including privileges and vulnerabilities.”<sup>304</sup> 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.<sup>305</sup> 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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<sup>302</sup> 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>.

<sup>303</sup> N.Y. Comp. Codes R. & Regs. tit. 8, § 80-1.13.

<sup>304</sup> *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).

<sup>305</sup> 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., LGBTQAI+, 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., LGBTQAI+, 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.”<sup>306</sup> 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.<sup>307</sup> 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.<sup>308</sup> 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.<sup>309</sup> 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.<sup>310</sup> According to a NYC Administration of Children’s

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<sup>306</sup> N.Y. Comp. Codes R. & Regs. tit. 8, § 57-4.3.

<sup>307</sup> 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).

<sup>308</sup> *Id.* at 7.

<sup>309</sup> *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.”

<sup>310</sup> *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<sup>311</sup> and in boroughs with a significant population of students of color.<sup>312</sup> 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

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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).

<sup>311</sup> Flash Report for March 2022 *supra* note 54.

<sup>312</sup> *Id.* at 30.

white families only represent 60% of the families in New York State, they account for nearly 71% of family income.<sup>313</sup> 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.<sup>314</sup>

[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.<sup>315</sup>

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.<sup>316</sup>

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<sup>313</sup> Melanie Hanson, *Student Loan Debt by Race*, EducationData, Dec. 12, 2021, <https://educationdata.org/student-loan-debt-by-race>.

<sup>314</sup> *Congress Apologizes for Slavery, Jim Crow*, NPR, July 30, 2008, <https://www.npr.org/templates/story/story.php?storyId=93059465>.

<sup>315</sup> 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>.

<sup>316</sup> 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-chokechee.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.<sup>317</sup> 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.<sup>318</sup>

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

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<sup>317</sup> 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>.

<sup>318</sup> <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 supports legislation that will create a commission to study and examine the harm done by slavery and consider possible remedies.
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.<sup>319</sup> The data confirms what practitioners have observed for years.

Almost half a century ago, the U.S. Supreme Court, in *People v. Kiff*,<sup>320</sup> made clear the deleterious effects of jury exclusion:

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<sup>319</sup> 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 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.

<sup>320</sup> 407 U.S. 493, 503–4 (1972).

*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:

- 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.<sup>321</sup>

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*,<sup>322</sup> 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.”<sup>323</sup> 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.”<sup>324</sup>

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.<sup>325</sup>

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 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.

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<sup>321</sup> 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>.

<sup>322</sup> 7 N.Y.3d 561 (2006).

<sup>323</sup> See *id.* at 566.

<sup>324</sup> *Id.* at 567.

<sup>325</sup> *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative (2021).

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 provide 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*<sup>326</sup> 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.<sup>327</sup> Congress passed the Civil Rights Act of 1875 to ensure that there were provisions that did not exclude Black jurors from jury selection.<sup>328</sup>

In *Batson v. Kentucky*,<sup>329</sup> 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 facie 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.

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.”<sup>330</sup> In short,

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<sup>326</sup> 75 N.Y.2d 744 (1989).

<sup>327</sup> U.S. Congress, *The 13th, 14th and 15th Amendments, SHEC: Resources for Teachers*, <https://shc.ashp.cuny.edu/items/show/1524>.

<sup>328</sup> *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, Equal Justice Initiative (2021).

<sup>329</sup> 476 U.S. 79 (1986).

<sup>330</sup> *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring).

*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.”<sup>331</sup> 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.”<sup>332</sup>

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. Increase access to quality childcare for all children

In December 2021, the Office of New York State Senator Jabari Brisport issued a report detailing the state’s childcare crisis.<sup>333</sup> 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

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<sup>331</sup> 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/>.

<sup>332</sup> *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>.

<sup>333</sup> 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/childcarefourreport.pdf>.

too few providers to meet families' needs."<sup>334</sup> Some counties within the state have lost over 50% of their childcare programs in the last 10 years.<sup>335</sup>

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.<sup>336</sup> Women who leave the workforce to care for their children will lose more than \$480,000 in their lifetime, money families desperately need.<sup>337</sup>

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.<sup>338</sup> 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.<sup>339</sup>

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.<sup>340</sup> 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.

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."<sup>341</sup> As Senator Brisport noted, this injustice leads

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *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/>.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> 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>.

<sup>340</sup> *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/>.

<sup>341</sup> <https://ocfs.ny.gov/reports/childcare/Child-Care-Availability-Task-Force-Report.pdf>, at p. 28.

to childcare providers leaving the industry for other employment, thus perpetuating existing childcare shortages.<sup>342</sup>

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 access to capital. Minority businesses often face barriers in securing business loans from their local financial institutions.<sup>343</sup>

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<sup>342</sup> 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/childcareourreport.pdf>.

<sup>343</sup> 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](https://opportunity.census.gov/assets/files/2021-problem-statements/post-covid/MBDA_Improving%20Minority%20Businesses%20Access%20to%20Capital.pdf).

A 2016 study found that higher rejection rates and lower loan amounts typified lending to Black and Hispanic-owned Minority Business Enterprises (MBE).<sup>344</sup> 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.<sup>345</sup> 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.<sup>346</sup> 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.<sup>347</sup>

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.<sup>348</sup> Similarly, the number of Hispanic business owners declined by 32% between February and April 2020, while immigrant business owners dropped 36 percent.<sup>349</sup>

Even the tools that were designed to help during the pandemic, like PPP and Disaster Relief loans, were provided last to communities of color.<sup>350</sup> 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

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<sup>344</sup> 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](https://www.researchgate.net/publication/315302976_Small_business_development_immigrants'_access_to_loan_capital)

<sup>345</sup> 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>.

<sup>346</sup> 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>.

<sup>347</sup> *Id.*

<sup>348</sup> MBDA: Improving Minority Businesses' Access to Capital, *supra* note 339.

<sup>349</sup> *Id.*

<sup>350</sup> 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/>.

days before the first round of funds was depleted.<sup>351</sup> “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).”<sup>352</sup> Independent contractors and self-employed individuals were not eligible for loans until April 10, 2020.<sup>353</sup>

In 2021, the New York State Department of Financial Services created the Office of Financial Inclusion and Empowerment.<sup>354</sup> According to Superintendent of Financial Services Linda A. Lacewell, the Office would pilot and develop policy initiatives designed to further financial inclusion and empowerment.<sup>355</sup> 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.<sup>356</sup> 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.

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

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<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> 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](https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202104131).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

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.<sup>357</sup> 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.<sup>358</sup> 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.<sup>359</sup>

ACEs sustained over a long period of time may create “toxic stress” upon the child.<sup>360</sup> 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 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,

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<sup>357</sup> *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](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/>.

<sup>358</sup> 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-Slavery\\_Desk-Review\\_Report.pdf](https://healingthewoundsofslavery.org/wp-content/uploads/2021/04/UNESCO-GHFP_2020_Healing-the-Wounds-of-Slavery_Desk-Review_Report.pdf).

<sup>359</sup> *Adverse Childhood Experiences*, *Child Trends*, <https://www.childtrends.org/indicators/adverse-experiences> (last visited Apr. 16, 2022).

<sup>360</sup> 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>.

emotional, or brain development.<sup>361</sup> 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.<sup>362</sup>

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.<sup>363</sup>

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.<sup>364</sup>

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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<sup>361</sup> 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>.

<sup>362</sup> Center on the Developing Child, *The Impact of Early Adversity on Child Development (InBrief)*, Harvard University (2007), retrieved from [www.developingchild.harvard.edu](http://www.developingchild.harvard.edu).

<sup>363</sup> Center on the Developing Child, *The Science of Resilience (InBrief)*, Harvard University (2015). retrieved from [www.developingchild.harvard.edu](http://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/>.

<sup>364</sup> *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<sup>365</sup> and over-identified for self-contained special education classrooms in upper elementary and middle school at a disproportionate rate to their white peers.<sup>366</sup> 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.<sup>367</sup> Black children with developmental delays are 78% less likely to be identified and receive early intervention services.<sup>368</sup>

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.<sup>369</sup>

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”).<sup>370</sup> 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.<sup>371</sup> 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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<sup>365</sup> 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.

<sup>366</sup> *The Bill*, *supra* note 5.

<sup>367</sup> 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/>.

<sup>368</sup> *Id.*

<sup>369</sup> *The Bill supra* note 5.

<sup>370</sup> N.Y. Comp. Codes R. & Regs. tit. 8, § 117.3.

<sup>371</sup> *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<sup>372</sup>; 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,<sup>373</sup> 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<sup>374</sup>; 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.<sup>375</sup>

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<sup>372</sup> 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.

<sup>373</sup> See *A Framework for Effective School Discipline*, National Association of School Psychologists (2020), <http://www.nasponline.org/discipline-framework>.

<sup>374</sup> 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>.

<sup>375</sup> 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](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.<sup>376</sup>

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.<sup>377</sup>

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.<sup>378</sup> Unsurprisingly, those same Black and Latino high need districts had a 26% lower overall graduation rate than wealthy districts.<sup>379</sup> 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.<sup>380</sup>

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<sup>376</sup> *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).

<sup>377</sup> *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>.

<sup>378</sup> 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](http://www.aqeny.org/wp-content/uploads/2018/09/educationalracism_corrected.pdf).

<sup>379</sup> *Id.*

<sup>380</sup> 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](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.<sup>381</sup>

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

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<sup>381</sup> 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.ageny.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.<sup>382</sup>

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.<sup>383</sup>

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.<sup>384</sup>

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.<sup>385</sup>

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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<sup>382</sup> See generally Jill Harrison, *From the Inside Out: The Fight for Environmental Justice Within Government Agencies* (Cambridge, MA: MIT Press, 2019).

<sup>383</sup> ECL § 75-0117.

<sup>384</sup> 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).

<sup>385</sup> 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 pleas.

#### 10. Lead-Safe Drinking Water

Lead is a powerful neurotoxin, which can lead to numerous severe health and educational problems, particularly for children.<sup>386</sup> “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.”<sup>387</sup> New York State is estimated to have between 329,867 to 679,292 lead water service lines.<sup>388</sup>

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<sup>386</sup> 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>.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

Black children and children in low-income families are at the highest risk for lead poisoning.<sup>389</sup> 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,<sup>390</sup> the EPA has set an enforcement threshold of 15 parts of lead per billion (ppb).<sup>391</sup> The New York State Department of Health has set 0.015 micrograms of lead per liter of water (mg/L) as its action threshold.<sup>392</sup> Bottled water can contain no more than 0.005 mg/L. of lead.<sup>393</sup>

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,<sup>394</sup> 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

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<sup>389</sup> 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/>.

<sup>390</sup> *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](https://www.atsdr.cdc.gov/csem/leadtoxicity/safety_standards.html).

<sup>391</sup> *Id.*

<sup>392</sup> *Lead in Drinking Water*, New York State Department of Health, <https://www.health.ny.gov/environmental/water/drinking/lead>.

<sup>393</sup> *Id.*

<sup>394</sup> 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.<sup>395</sup> 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.<sup>396</sup> 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.<sup>397</sup> Becoming an appraiser requires new appraisers to complete 1,500 to 3,000 hours of apprenticeship supervised by a licensed appraiser.<sup>398</sup> The lack of diversity in the field “often results in white appraisers supervising white trainees from their personal or professional networks.”<sup>399</sup> 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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<sup>395</sup> 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>.

<sup>396</sup> 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>.

<sup>397</sup> 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.”

<sup>398</sup> *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).

<sup>399</sup> *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.<sup>400</sup>

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

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<sup>400</sup> See Real Property Appraisal Qualification Criteria, Appraisal Foundation, [https://appraisalfoundation.org/imis/TAF/Standards/Qualification\\_Criteria/Qualification\\_Criteria\\_RP\\_/TAF/AQB\\_RPAQC.aspx](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 on 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<sup>401</sup> 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.<sup>402</sup> 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.<sup>403</sup>
- 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.<sup>404</sup> 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.<sup>405</sup> 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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<sup>401</sup> 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.common sense media.org/sites/default/files/featured-content/files/common\\_sense\\_media\\_report\\_final\\_7\\_1\\_3pm\\_web.pdf](https://www.common sense media.org/sites/default/files/featured-content/files/common_sense_media_report_final_7_1_3pm_web.pdf).

<sup>402</sup> 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=>.

<sup>403</sup> *Understanding Broadband Challenges in NYS*, *supra* note 30.

<sup>404</sup> 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/>.

<sup>405</sup> *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.