

STEPS TOWARDS A MORE INCLUSIVE NEW YORK AND AMERICA

NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE
ON THE CIVIL RIGHTS AGENDA

FINAL REPORT
with revisions following input of the Executive Committee of the NYSBA
OCTOBER 2008

GEORGE BUNDY SMITH, CHAIR

TABLE OF CONTENTS

	<u>Page</u>
CHAPTER I. EDUCATION.....	1
A. BROWN V. BOARD OF EDUCATION OF TOPEKA AND ITS AFTERMATH.....	1
B. FIFTY YEARS AFTER <i>BROWN</i>.....	5
C. NO CHILD LEFT BEHIND.....	31
D. FINANCIAL LITERACY EDUCATION FOR STUDENTS OF COLOR AND THEIR PARENTS.....	35
E. <i>PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1 AND MEREDITH V. JEFFERSON COUNTY BOARD OF EDUCATION</i>.....	45
F. THE RECENT FOCUS IN NEW YORK ON PUBLIC FUNDING OF EDUCATION.....	62
G. THE AFTERMATH OF CAMPAIGN FOR FISCAL EQUITY.....	63
H. RECOMMENDATIONS.....	67
I. ADDITIONAL RECOMMENDATIONS.....	68
ADDENDUM TO CHAPTER I: SIGNIFICANT EDUCATIONAL CASES.....	71
J. CONCLUSION OF THE EDUCATION CHAPTER.....	112
CHAPTER II. JUVENILE JUSTICE.....	114
A. THE PROBLEM IN DETAIL.....	116
B. THE ADJUDICATION PROCESS.....	129

C. DISPROPORTIONATE MINORITY AND NEW YORK CITY YOUTH CONTACTS.....	132
D. ADDRESSING THE ROLE OF GANGS.....	133
E. PREVENTIVE (PRE-ARREST) PROGRAMS.....	136
F. THE NATIONWIDE ISSUE OF DISPROPORTIONATE MINORITY CONTACTS (DMC).....	149
G. RECOMMENDATIONS.....	151
 <u>CHAPTER III. VOTING</u>	157
A. THE VOTING RIGHTS ACT OF 1965.....	157
B. OBJECTIVES AND SUMMARY OF THE VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006 - (THE VRARA, H.R.9/S.2703).....	158
C. SUMMARY OF HELP AMERICA VOTE ACT OF 2002 - HAVA (OVERVIEW).....	163
D. SPECIFIC HAVA PROVISIONS.....	164
E. RECOMMENDATIONS.....	190
 ADDENDUM TO CHAPTER III	
VOTING AND RACE: SIGNIFICANT CONSTITUTIONAL PROVISIONS AND VOTING RIGHTS CASES.....	192
THE STATE OF THE LAW TODAY WITH RESPECT TO RACE AND REDISTRICTING.....	198

CHAPTER IV. CRIMINAL LAW.....	198
A. JURY SELECTION AND DISCRIMINATION.....	200
B. WRONGFUL CONVICTIONS.....	204
C. THE DEATH PENALTY AND THE AMERICAN BAR ASSOCIATION RECOMMENDATIONS.....	208
D. DEATH PENALTY CASES DECIDED BY THE NEW YORK COURT OF APPEALS.....	213
E. RECOMMENDATION.....	233
ADDENDUM TO CHAPTER IV.....	234
SIGNIFICANT JURY DISCRIMINATION CASES.....	234
A. FEDERAL CASES.....	234
B. NEW YORK STATE CASES.....	239
DEATH PENALTY JURIES: RACIAL COMPOSITION OF CAPITAL JURIES AND ITS IMPACT ON A SENTENCE OF DEATH.....	244
EPILOGUE.....	258

Commission Members

Honorable George Bundy Smith, Chair, Chadbourne & Parke, LLP, New York, NY

Fernando A. Bohorquez, Esq., Baker & Hostetler LLP, New York, NY

Earamichia Nake Brown, Esq., Assistant District Attorney, Bronx County, New York, NY

Hon. Cheryl E. Chambers, Justice, New York State Supreme Court, Kings County, New York, NY

David Edmunds, Esq., Phillips Lytle LLP, Rochester, New York

Taa R. Grays, Esq., Metropolitan Life Insurance Company, New York NY

Caitlain Halligan, Esq. former Solicitor General, State of New York Weil, Gotshal & Manges LLP, New York, NY

Hon. Elizabeth Holtzman, Herrick Feinstein LLP, New York, NY

David Hernandez, Esq., Law Office of David Hernandez, New York, NY

Nadine Johnson, Esq., former President Metropolitan Black Bar Association, New York, NY

Hon. Carol Robles Roman, Deputy Mayor of the City of New York, New York, NY

Dana Salazar, Esq., Jones Day LLP, New York, NY

Jon N. Santemma, Esq., Jaspan Schlesinger and Hoffman LLP, New York, NY

Jill K. Schultz, Esq., Piper Schultz LLP, New York, NY

Peter J. W. Sherwin, Esq., Proskauer Rose LLP

Janice Brown Spitzmueller, Esq., New York City Department of Housing Preservation, New York, NY

Kenneth G. Standard, Esq., Epstein Becker & Green, New York, NY

Lorraine Power Tharp, Esq., Whiteman Osterman & Hanna LLP, Albany, NY

Daniel Toal, Esq., Paul, Weiss Rifkind, Wharton & Garrison, New York, NY

ACKNOWLEDGEMENTS

This report could not have been completed without the cooperation of a number of people following:

- 1. Mark A. Alcott, former President of the New York State Bar Association, for his vision in appointing this Committee.**
- 2. Kenneth G. Standard, former President of the New York State Bar Association, for his sponsorship of a program honoring lawyers with a New York connection who participated in the development and implementation of *Brown v. Board of Education of Topeka*.**
- 3. The members of the Special Committee on the Civil Rights Agenda.**
- 4. Frank Ciervo of the New York State Bar Association**
- 5. The following summer interns at Chadbourne and Parke- law students who contributed to research and writing:**

Blake Bethel, Vanderbilt University School of Law,

Craig Davis, University of Virginia School of Law,

Joshua Gold, Brooklyn Law School,

Francesca Perkins, Fordham University School of Law,

Kimberly Zafran, Columbia University School of Law

6. James Poole, Stanford Law School

7. The law firm of Proskauer Rose LLP and its partner Peter J. Sherwin for hosting meetings of the Commission.

8. The law firm of Chadbourne and Parke which not only permitted summer interns to work on the report but also permitted its partner, George Bundy Smith, Senior, to work on the report.

9. Elvira Sorrentino of Chadbourne and Parke.

10. Suzanne Fremer of Chadbourne & Parke

11. My wife, Alene Lohman Smith, for patience and support.

13. My daughter, Beth Beatrice Smith, Instructor at Nassau County Community College in New York, who read and made suggestions for the entire report.

14. Committee members Kenneth G. Standard and Nadine Johnson and New York State Bar Association Executive Committee member Claire P. Gutekunst, a partner at Proskauer Rose, for reviewing the entire manuscript.

PREFACE

On December 18, 2006, New York State Bar Association President Mark A. Alcott announced the formation of the Special Committee on the Civil Rights Agenda. Recognizing the seminal role that lawyers played in the case of *Brown v. Board of Education of Topeka*, which held racial segregation of public schools unconstitutional, President Alcott assigned to the Special Committee the task of identifying goals that would advance civil rights and were achievable within the next five years. This assignment followed a May 2005 event in which the then President of the New York State Bar Association, Kenneth G. Standard, sponsored an event honoring lawyers with a New York State connection who had helped in the preparation of, argument of, and subsequent development of *Brown*.

The Special Committee on the Civil Rights Agenda met on several occasions, divided its work among several subcommittees, obtained reports from and discussed the work of the subcommittees, and concluded its work in the fall of 2007. Appreciation goes to Presidents Alcott and Standard for their recognition of the continuing problem of the denial of civil rights on the basis of race.

CHAPTER I. EDUCATION

INTRODUCTION

Education is often the key to success in life. The Supreme Court in *Brown v. Board of Education of Topeka*¹ recognized this fact. There is a continuing effort by African Americans and others to make America a more inclusive society. This chapter will explore the efforts to improve education of African Americans and others since *Brown*. An Addendum at the end of the chapter identifies some of the major educational cases in New York State and across the country addressing racial segregation. Emphasis will be on the status of education in New York State today, what is being done to improve education, and how these efforts might be enhanced.

A. BROWN V. BOARD OF EDUCATION OF TOPEKA AND ITS AFTERMATH

1. The Initial Case

The Court in *Brown v. Board of Education* held that even where physical facilities and other tangible factors are equal, the segregation of children in public schools based on race deprived children of the minority group of equal educational

¹ 347 U.S. 483 (1954).

opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.²

One passage in *Brown* emphasized the importance of education. Chief Justice Warren stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³

Brown v. Board of Education created an expectation that America was moving toward a society that was both fair and inclusive. For a number of years following *Brown*, the indication was that the Supreme Court would strongly back efforts to desegregate schools and

² 347 U.S. 483 (1954).

³ 347 U.S. at 484.

school systems. Cases that fueled this belief include *Cooper v. Aaron*,⁴ a case that rejected attempts by Little Rock, Arkansas authorities to delay desegregation; *Green v. County School Board*,⁵ in which the Court emphasized the duty of a school board in Virginia to take affirmative steps to eliminate a racially segregated system; and *Swann v. Charlotte-Mecklenburg Board of Education*,⁶ in which the Supreme Court endorsed busing as a remedy for eliminating segregated schools.

2. New York State School Desegregation After Brown

New York State was not immune to lawsuits alleging a denial of the equal protection of the laws because schools were intentionally segregated on the basis of race. In one case involving the public schools in New Rochelle, the school authorities were directed to permit African American youngsters who wished to transfer out of their schools into desegregated schools to do so.⁷

⁴ 358 U.S. 1 (1958).

⁵ 391 U. S. 430 (1968).

⁶ 402 U.S. 1 (1971).

⁷ *Taylor v. Board of Education of the City of New Rochelle*, 195 F. Supp. 231 (S.D.N.Y. 1961), aff'd, 294 F.2d 36 (2d Cir. 1961), cert. denied, 368 U.S. 940 (1961).

A particularly bitter and protracted litigation involved the school system in Yonkers, New York. In that litigation, the federal district court concluded not only that Yonkers officials had intentionally discriminated against African American children attending public schools, but also that Yonkers officials had intentionally segregated public housing. The litigation lasted over twenty years and ended with settlements in the school dispute in 2002 and the housing dispute in 2007.⁸

3. Supreme Court Withdrawal From *Brown v. Board of Education of Topeka*

The Supreme Court of the United States has drastically altered the jurisprudence of the years immediately following *Brown v. Board of Education of Topeka*. Many believe that the retreat from *Brown* was signaled by the opinion in *Milliken v. Bradley*⁹ in which the Supreme Court declined to include the suburbs of Detroit in efforts to desegregate Detroit schools. In *Freeman v. Pitts*,¹⁰ the Supreme

⁸ See *U.S. v. Yonkers Bd of Ed.*, 518 F. Supp. 191 (S.D.N.Y. 1981), aff'd, 747 F.2d 111 (2d Cir. 1984), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988), cert. denied, 489 U.S. 1065 (1989), cert. denied, 502 U.S. 816 (1991), cert. denied, 521 U.S. 1104 (1997), remanded, 992 F. Supp 672 (S.D.N.Y. 1998), cert. denied, 515 U.S. 1157 (1995), cert. denied, 529 U.S. 1130 (2000)(This case has 75 citing references listed for subsequent appellate history).

⁹ 418 U.S. 717 (1974); 433 U.S. 267 (1977).

¹⁰ 503 U.S. 467 (1992).

Court held that a district court could relinquish some control over aspects of a segregated school system without the complete desegregation of that system.

On June 28, 2007, the Supreme Court revisited the problem of race and schools in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Crystal Meredith v. Jefferson County Board of Education*.¹¹ A majority concluded that Seattle, Washington and Louisville, Kentucky had impermissibly used race as a dominant factor in assigning pupils to public schools. While a plurality concluded that race could not be a factor in school assignments, Justice Kennedy, who voted with the majority to hold unconstitutional the Seattle and Louisville plans, concluded that, at times, race could be a factor in the assignment of pupils to schools. By contrast, the four dissenting Justices concluded that race could be a factor in achieving a diverse student body whether there was *de facto* or *de jure* racial segregation.

B. 50 Years After *Brown*

As detailed above and in the Addendum to this chapter, an extensive amount of litigation surrounding education and civil rights has taken place in this country and in New York State. But after all of this, questions remain about the

¹¹ 551 U.S._____, 127 S. Ct. 2738 (2007).

state of educational systems today and whether the promise of *Brown* has finally been fulfilled. Unfortunately, numerous problems still exist.

The process of generating solutions to these problems has also been curtailed, or slowed, after the landmark cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, decided by the United States Supreme Court in June 2007. This long and detailed case, summarized below, disallows the explicit use of racial categories in attempts by school boards to remedy the effects of past segregation and to build an inclusive society. These two cases, that many consider to have overturned *Brown v. Board of Education*, make creative policies that address societal injustices, specifically those with strong racial correlations, even more critical than before.

A focused look on the state of education both in New York State and across the country, shows that, despite significant progress, the battle for educational equality, and quality, is far from over. The following section introduces facts and figures for the state and country, focusing primarily on secondary, post-secondary, and some graduate/professional degree programs. The next section discusses recommendations in light of the current situation.

1. The Numbers: Funding, Achievement, and Race Differences

In *Campaign for Fiscal Equity v. State of New York*,¹² the New York State

Court of Appeals gave this overview of education in New York City:

At the time of trial, the New York City public school system comprised nearly 1,200 schools serving 1.1 million children and employing a staff of over 135,000, including 78,000 teachers. ...Some 84% of City schoolchildren were racial minorities; 80% were born outside the United States; and 16% were classified as Limited English Proficient (LEP--persons who speak little or no English)--most of the state's students in each of these categories. Upwards of 73% were eligible for the federal free or reduced price lunch program; 442,000 City schoolchildren came from families receiving Aid to Families with Dependent Children; and 135,000 were enrolled in special education programs.¹³

In 1996-1997, the last year for which complete records were available at the time of the *Campaign for Fiscal Equity* (CFE)¹⁴ trial, the Court of Appeals noted the State provided 39.9% of all public school funding while school districts provided 56% and the federal government 4%.¹⁵ This represented an investment of

¹² 100 N.Y.2d 893 (2003).

¹³ 100 N.Y. at 903.

¹⁴ 100 N.Y. 2d 905.

¹⁵ Id.

\$9,321 per student with \$3,714 of it coming from the state.¹⁶ In New York City, however, the expenditure was only \$8,171.¹⁷, an amount that disproportionately affects New York's minority students. The state's portion of the expenditure for New York City school children was \$3,562.¹⁸ Although total funding increased to \$12,896 in New York City in 2002, the disparity between City funding and funding in "low-need" districts which serve higher percentages of affluent families and have greater local resources from which to raise funds remains high. Students in low-need districts were funded in 2002 at \$15,076 per pupil.¹⁹

In the fall of 2004, minority students constituted 46.7% of students attending public schools in New York State.²⁰ White students were twice as likely as either African Americans or Hispanics to graduate from high school. Nearly 87%

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Proposal from Jean C. Stevens, to Full Board and Subcommittee on State Aid, The State Education Department (Sept. 29, 2006) (available at <http://www.regents.nysed.gov/2006Meetings/October2006/1006bra5.htm>).

²⁰ The University of the State of N.Y.: The State Educ. Dep't, N.Y. The State of Learning: A Report to the Governor and the Legislature on the Educational Status of the State's Schools: Statewide Profile of the Educational System 148 (2006), available at <http://www.regents.nysed.gov/2006Meetings/October2006/1006bra3a.pdf>.

of white high school graduates of the class of 2005 planned to pursue postsecondary education, whereas only 69% of blacks and 67% of Hispanics had those plans.²¹

Test scores for minority high school seniors also show a need for major improvement. The Nation's Report Card in 2005, a series of tests of fourth, eighth and twelfth grade students, published by the National Center for Education Statistics, shows that twelfth grade performance in science is relatively poor overall. Further, the gap between white and black students has actually increased since 2000. White twelfth grade students scored 156 out of 300 on the national science test in 2005, but black students scored just 120 points, creating a gap of 36 points. This is six points higher than the gap in 2000, when white students scored 153 and black students scored 122. The gap for Hispanics has also increased since 2000, from 25 points to 28 points.²²

The Nation's Report Card shows similar disparities in reading scores for twelfth grade students. In 2005, white students scored 293 out of 500, while blacks and Hispanics scored 26 and 21 points less, respectively. All ethnicities' scores are

²¹ Id.

²² Wendy, S. G. et al. The Nation's Report Card: Science 2005 (2006), available at <http://nces.ed.gov/nationsreportcard/pubs/main2005/2006466.asp#section3>.

down from 1992, but the gap between ethnicities has increased. The 1992 white-black gap was 24 points and the white-Hispanic gap was 19 points.²³

A factor creating these persistent gaps is that minority students are segregated from their white peers in primary and secondary schools, especially in New York City. High-majority schools (those that are more than 80% white) and high-minority schools (those that are more than 80% minority) dominate this state. Nearly four out of five of all schools meet one of these classifications, and the number of high-minority schools has been increasing.²⁴

Teacher segregation also has a strong correlation with student segregation in schools across the nation. According to the Harvard Civil Rights Project, the typical black teacher teaches in a school where 60% of students are from low-income families (most of whom are minorities), while only 35% of the typical white teacher's students are from low-income families. Compounding the

²³ The Nation's Report Card, Gaps Between White and Minority Students Unchanged (2005), available at http://nationsreportcard.gov/reading_math_grade12_2005/s0207.asp.

²⁴ http://www.nyclu.org/ny_schools_race_seg_oped_062403.html.

problem is that teachers with high numbers of low-income students were more likely to report that they were considering switching schools or careers.²⁵

In total, these figures show the significantly different experiences that students in high-minority and low-minority schools can have. The situation for young people is problematic, but not hopeless:

[P]overty, race, ethnicity, and immigration status do tend to depress academic achievement. The evidence introduced at trial demonstrates that these negative life experiences can be overcome by public schools with sufficient resources well deployed. It is the clear policy of the State, as formulated by the Regents and SED (State Education Department), that all children can attain the substantive knowledge and master the skills expected of high school graduates. The court finds that the City's at-risk children are capable of seizing the opportunity for a sound basic education if they are given sufficient resources.²⁶

The educational attainment of adults in New York State also reflects the continuing problems with achieving equality of education and opportunity. In 2003, the percentages of people with high school diplomas were non-Hispanic white

²⁵ Erica Frankenberg & Gary Orfield, The Civil Rights Project, New Harvard Research on the Segregation of American Teachers, (2006), available at http://www.civilrightsproject.ucla.edu/news/pressreleases/segregation_american_teachers.php (last accessed August 31, 2007).

²⁶ Campaign for Fiscal Equity v. State of New York, 187 Misc.2d 1, 23 (N.Y. Sup. Ct. 2001).

(91%), Black (74%), Hispanic (60%), and Asian/Pacific Islanders (85%). These discrepancies are significant and apply only to people over 17 years of age.

However, the results on a national scale for younger populations evidence similar patterns.²⁷ Although these figures are relatively good, it should be noted that the percentage of youth ages 16-19 that were neither enrolled in school nor working in 2006 across the nation presents a direr situation. In particular, blacks and Hispanics in that age group are *twice* as likely as their white and Asian counterparts to be out of work, specifically, roughly 12% for blacks and Hispanics versus 6% for whites and Asians.²⁸

The relative percentages of ethnicities with bachelors' degrees evidence similar patterns. Blacks and Hispanics are roughly half as likely as whites to have bachelors' degrees, and only one third as likely as Asians.²⁹

²⁷ U.S. Census Bureau Current Population Report, Educational Attainment of People in N.Y. State 18 Years and Over (2003), available at <http://www.highered.nysed.gov/oris/demographics/2003/edattainment.htm>.

²⁸ National Center for Education Statistics, Table 19-1: Percentage of Youth Ages 16-19 Who Were Neither Enrolled in School nor Working, by Selected Characteristics, available at <http://nces.ed.gov/programs/coe/2007/section2/table.asp?tableID=694>.

²⁹ U.S. Census Bureau Current Population Report, Educational Attainment of People in N.Y. State 18 years and over (2003), available at <http://www.highered.nysed.gov/oris/demographics/2003/edattainment.htm>.

In regard to professional degrees, the differences between races become more pronounced. According to the National Center for Education Statistics, 80,000 professional degrees were awarded in 1999-2000. Of these, 5,500 were awarded to blacks, 3,800 to Hispanics, and 8,500 to Asians.³⁰ Nearly all of the remaining were awarded to white degree candidates.³¹ This represents percentages of 7.1% (black), 4.9% (Hispanic), 11% (Asian), and 76.3% (white).³² Although still quite low and not correlative with each group's percentage of the population in the U.S., when compared with the 1976-1977 academic year, it is clearly a marked change from 4.0%, 1.7%, 1.6%, and 92.4%, respectively.³³

Conferrals of law (LL.B. and J.D.) degrees evidence the same patterns.³⁴ In 2004-2005, 43,000 law degrees were conferred.³⁵ Of these, 3,000 were awarded to blacks, 2,500 to Hispanics, and 3,300 to Asians.³⁶ The remaining 33,400 were

³⁰ Id.

³¹ Id.

³² Id.

³³ National Center for Education Statistics, Digest of Education Statistics, 2006 Tables and Figures, Table 277.

³⁴ Id.

³⁵ Id.

³⁶ Id.

awarded to whites.³⁷ Another important trend to note is that, according to a 2001 report by the Law School Admission Council, the percentages of law degrees earned by each minority group are roughly identical to the percentages of bachelor's degrees earned by those groups (except for African Americans, where there is a marked drop-off).³⁸ This is in part because the number of minorities who persist and finish law school is lower for black, Hispanic, and Native American students than for Asian and white students, and the rate of admission to law school is also lower for minorities.³⁹

In the fall of 2000, of those who applied to ABA-approved law schools, only 43.7% of blacks and 53% of Hispanics were admitted. Asians and whites were admitted at rates of 69% and 65%, respectively.⁴⁰ As for persistence and attrition, imputed rates indicate an average of roughly 10%, with rates for African

³⁷ Id.

³⁸ Gita Z. Wilder, The Road to Law School and Beyond: Examining Challenges to Racial and Ethnic Diversity in the Legal Profession, Law School Admission Council Research Report (LSAC), 02-01 August 2003

³⁹ LSAC Report at 27.

⁴⁰ LSAC Report at 2323.

Americans and Native Americans the highest at roughly 20%, and rates for Asians and whites the lowest at 9%.⁴¹

Figures in 2004 reflect similar trends. Between 2000 and 2004, the number of matriculating black students increased by only 1.6% in that four-year period, with other minority groups remaining similarly low except for Asians, which saw a 36% increase.⁴² Overall, except for Asians, minority enrollment has remained relatively low. In the 2004-2005 year, African Americans were 10.6% of all law students (up from a 13-year-low of 6.6% in 2003), and Hispanic and Native American students comprised 7.9% and .8% of the law school population.⁴³

The final indicator before entering the legal profession, the Bar exam, drives the disparity point home. Most persons who take the bar exam eventually pass it. One study showed the eventual bar passage rate to be 94.8%.⁴⁴ The

⁴¹ LSAC Report 25.

⁴² ABA Report 113, p 6.

⁴³ ABA Report 113, p6.

⁴⁴ LSAC Report at page 25 and Table 24.

passage rate for whites was 96.7%, for Hispanics 89%, for Puerto Ricans 79.7% and for blacks 77.6%.⁴⁵

2. Moving Forward - Transparency and Equity in Educational Funding

In consideration of the deficits in funding and the disparities in achievement, what must be done to truly create equal opportunity and increase the achievement levels of all of our students? We must devote time, energy, and resources to systematically address and correct the problems and inconsistencies identified above. Creating greater transparency and equity in educational funding, specifically through various forms of weighted student funding plans, is an increasingly popular way to address funding imbalances. These methods are considered below.

a. The National Scene

Creating greater transparency and equity in educational funding, especially at primary and secondary levels of education, would go a long way toward increasing minority achievement levels. Effective funding programs that provide schools and students with the resources they need to succeed are fundamental

⁴⁵ **Id.**

requirements to enabling progress for all students within the school system.⁴⁶

Although every school and student deserves enough funds to match all of their needs, the realities of limited government budgets and inefficiencies in distribution have created the need for different and more inventive systems to solve them. Weighted student funding programs, implemented in several districts around the nation, are increasingly popular as methods for eliminating these funding imbalances and their disparate impact. “Fair Student Funding” in New York City, is an example of such a program.

The Fair Student Funding (FSF) program⁴⁷ creates a system whereby schools receive resources based on the needs of their particular students and the total size of the school’s respective student population. These needs are quantified, and “weighted,” according to a series of calculations that in effect make some students more costly than others. For instance, a poor student (e.g. – one requiring a free lunch) would have his base expense increased, by virtue of his poverty, by a set amount, e.g. – 20%, and the school that student attends would receive 20% extra funds for that student and any other similarly situated students. Some other

⁴⁶ http://www.nyclu.org/ny_schools_race_seg_oped_062403.html.

⁴⁷ New York City Department of Education, Fair Student Funding: Fair Funding for All, January 2007.

proposed factors in FSF are English language learners, children in special education, and low-achieving students. Schools with these more costly students receive additional resources in order to meet these students' greater needs.⁴⁸

The plan is new in New York and so its effects have yet to be fully realized, but it is not a new idea. Various weighted student formulas designed to spread resources on a per-pupil basis have been in existence for years and implemented in several areas around the United States and in Canada, including Seattle,⁴⁹ Edmonton,⁵⁰ and Oregon,⁵¹ among others. San Francisco's Unified School District's Weighted Student Formula (sometimes WSF) is that city's equivalent of

⁴⁸ NYC Department of Education Press Release, 5-8-2007.

⁴⁹ Bruce S. Cooper, et. al., Weighted Student Formula: Putting Funds Where They Count in Education Reform (2006), available at http://www.uark.edu/ua/der/EWPA/Research/School_Finance/1781.html (Seattle's weighted student formula weighs by English proficiency, special education level, and socioeconomic status).

⁵⁰ William G. Ouchi, et. al., The Impact of Organization on the performance of Nine School Systems: Lessons for California, available at <http://www.spa.ucla.edu/calpolicy/Ouchi1.pdf> (Edmonton's weighted student funding plan was among the first, coming to effect in 1981, and it has served as a model for many other districts. Its focus is on maximizing the amount of money available to individual schools rather than a central office, and doesn't emphasize specific allocations from a central point of view. It simply empowers schools to adjust based on their own perceptions of need which include socioeconomic-derived differences).

⁵¹ Deb Kollars, Total Overhaul Sought in Funding for Schools, The Sacramento Bee (2003), available at http://csmp.ucop.edu/cmp/comet/2003/12_13_2003.html#A3 (In Oregon, weights are attached (beyond a universal base amount) for limited English proficiency, special education status, pregnant/parenting students, poverty, foster children, and those classified as "neglected" or "delinquent").

the Fair Student Funding program. Its primary features include providing schools with significant discretion in allocating budget dollars toward staffing and non-staffing items, distributing resources based on each student's specific needs (and the educational services necessary to fulfill them), and creating a common set of principles by which funding decisions can be easily analyzed.⁵²

Because the Weighted Student Formula gives schools greater discretion, it also gives greater responsibility, which is designed to also increase direct accountability. School educators have to develop their own budgets and decide what resources they need and where they are needed before each school year begins.⁵³ They must also apply for budget transfers during the year if their previous decisions about a certain area prove to be inaccurate.⁵⁴ This requirement also created the need for additional training of relevant school staff in financial planning and developing academic plans based on their weighted student population.⁵⁵

⁵² San Francisco Unified School District Weighted Student Formula FAQ (2002), <http://portal.sfusd.edu/template/default.cfm?page=initiatives.formula>.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

These decision-making processes are guided by predictable factors, such as a set amount by which a student's base expense is multiplied in order to reach the final funding decision. These decisions are all published, which helps the public know how its resources are being allocated and why. It sheds light on what used to be a very opaque budgetary process and shows how each school is being treated in relation to the others, along with the bases on which any discrepancies therein exist.⁵⁶

Most importantly, the WSF system was designed to encourage better academic programming for students and better execution of those programs. With the idea in place that each student a school acquires augments its budget in a different way, schools' incentives have changed for the better. Policies and practices are now naturally geared toward attracting and keeping students with greater weights, as schools receive more funding to support them. These students, including low-income and those with special education needs, are precisely the students who need the most help and attention. The WSF is designed to provide that.⁵⁷

⁵⁶ Id.

⁵⁷ Id.

It is hoped that the transparency and equity fostered by this approach can be had in New York as well through its Fair Student Funding program. It has also been boosted by the August 2007 announcement of Schools Chancellor Joel Klein that New York City schools are to receive an unprecedented \$900 million in new funding. Of that, \$110 million is explicitly reserved by the FSF budget to 693 schools that historically received less than their fair share, and the final destination and allocation rationale of all of that funding is published on a new user-friendly budget website. The idea is that by providing extra funding on an accurate basis to needy schools, all schools can then fairly be held to identical high standards.⁵⁸

Notably, this solution sidesteps the problem of identifying and selecting students for certain schools based on race or other controversial factors, which is an important point given the aforementioned *Parents Involved* case. In theory, since all schools will receive the appropriate amount of resources for their student population, selectivity (at least on controversial or unconstitutional grounds) becomes superfluous. The decision-making processes required of individual school educators should naturally tend toward solving these problems, as schools have

⁵⁸ NYC Department of Education Press Release “Chancellor Klein Announces Substantially Large, More Equitable, and More Flexible School Budgets, Giving Educators Greater Spending and Decision-Making Authority,” schools.nyc.gov/Administration/mediarelations/PressReleases... (last accessed 8-8-07).

strong incentives to encourage the attendance and success of its disadvantaged students. The better these students do and the more disadvantaged students that enroll, the more resources schools will receive. FSF assigns weights not just on special education and socioeconomic factors, but also on individual student grade levels and how well a student performs.⁵⁹

b. Transparency of Budget - New York State

On April 1, 2007, the New York State Legislature passed the annual budget for the State, the most contentious part being its school finance section. While New York City will receive more funding, it is unclear how much of this will come from the state. Additionally, there will be prerequisites for the city in obtaining such funding, such as lowering class size. The core issue seems to be that while lawmakers succeeded in producing a foundation formula which calculates and distributes funding based on the needs of each district, this formula was not strictly adhered to in creating the current budget, and party politics and favors appear to have had an effect. Advocates for the foundation formula applaud its creation, but do realize that this year it was not used in full. Democrats from Westchester County were especially unhappy about the budget, claiming that it singled out districts

⁵⁹ New York City Department of Education, Fair Student Funding, January 2007.

which should receive less funding. New York City politicians were concerned that allowing the funding to be based on the ability to reduce class size could make the district susceptible to lawsuits and consequently responsible for funding its education without the assistance of the state.⁶⁰

The foundation formula used by the state in allocating funding per district is based on “a district’s educational needs and local ability to support education.”⁶¹ This new formula effectively takes 29 pre-existing formulae and creates one new formula with only four factors. It can be explained as follows:

The Foundation Formula first calculates the average cost of educating a general education student in New York State (i.e., the “Foundation Cost”). The Foundation Cost is then adjusted by two indices, the “Pupil Need Index,” which accounts for the additional cost of educating disadvantaged students and the “Regional Cost Index,” which accounts for cost disparities in different geographic areas. The State’s share of aid is then calculated by subtracting from the adjusted Foundation Cost an “Expected Local Contribution” from each and multiplying that result by a pupil count. The Foundation Formula is represented as:

$$\text{Foundation Formula Aid} = [\text{Foundation Cost} \times (\text{times}) \text{Pupil Need Index} \times (\text{times}) \text{Regional Cost Index}] - (\text{minus})$$

⁶⁰ See David Hakim and David M. Herszenhorn, School Aid Fight Erupts in Albany as Budget Passes, N.Y. Times, Apr. 2, 2007, at A1.

⁶¹ Id.

Expected Local Contribution⁶²

This formula was not strictly adhered to in the allocation of the education budget passed in April 2007 because districts which were mathematically meant to receive significantly less funding than in previous years were disgruntled and compromises were made. As stated earlier, while the formula was not strictly followed, its implementation is seen by some to be a vast improvement and is hoped to be followed in the future.

c. Transparency of Budget - New York City

A different formula for state aid resulted in an increase in funding to the New York City School District from the state. One of Mayor Bloomberg's goals for the fiscal year includes making the school budgeting system within the city equitable and transparent. This means that each school will receive funding based on the need of the students and maintenance of the facilities and that the public will be able to understand how the budgeting process works based on the clarity of the city's foundation formula.⁶³ However, Mayor Bloomberg has already made changes to the

⁶² Memorandum for N.Y. State Board of Regents as Amicus Curiae, Campaign for Fiscal Equity, et al. v. State of N.Y., et al. (No. 111070/93), <http://www.oms.nysed.gov/budget/infolinks/memorandum.htm>.

⁶³ Children First, Citywide Budget Data (2007), <http://schools.nyc.gov/Offices/ChildrenFirst/FairStudentFunding/CitywideBudgetData/default.aspx>

(Cont'd on following page)

budgeting system regarding the redistribution of teachers at the urging of the teachers' union. Some feel that this demonstrates that political considerations will always obstruct a completely transparent system of funding.

Under the past budget, the city gave each school enough money to cover the salaries of its teachers based on a predetermined number of necessary teachers. The new budget would finance schools based on the number of students and their needs. Due to teacher and administrator outcry, Mayor Bloomberg has already agreed not to take funding away from schools in which a teacher retiree will be replaced by a less senior teacher with a smaller paycheck. The school will still be able to maintain its funding level and use its resources within its discretion.⁶⁴

School District Chancellor Klein has developed a proposal for Fair Student Funding under the City's already existing Children First Initiative.⁶⁵ This includes targeting a greater amount of money from the state to schools which have traditionally been under-funded. Additionally, certain schools will receive

(Cont'd from preceding page)

ult.html (last visited date), See David M. Herszenhorn, New Budget for Schools Steers Funds to the Needy, N.Y. Times, May 9, 2007, at B1.

⁶⁴ **See David M. Herszenhorn, Mayor Revises Some Points Of School Budget Proposal, N.Y. Times, Apr. 20, 2007, at B3.**

⁶⁵ **New York City Department of Education, Fair Student Funding, January 2007.**

“Children First Supplemental Funds” to purchase support services and other resources. Added funding will come from cuts in the central and regional budget in unnecessary bureaucracy. No school will undergo a reduction in funds.⁶⁶

The city’s funding formula will provide to a school \$3,788 per every kindergarten through fifth grade student without any special needs. Other students are given “weights,” based on their need, to determine how much funding will follow them. The average kindergarten to fifth grade student has a weight of 1. Middle and high school students are given a greater weight (1.08 and 1.03 respectively), showing that middle school children are thought to need the most resources allocated to their education, as are students with limited English ability, those from low-income households, and special education students (excluding gifted and talented students). A higher weighting yields a proportionately higher amount of funding accompanying such a student. Using this system, approximately half of the city’s schools are over-funded and half under-funded.⁶⁷

⁶⁶ Letter from Joel Klein, Chancellor of New York City Public Schools, to Department of Education Colleagues (May 25, 2007).

⁶⁷ See David M. Herszenhorn, New Budget for Schools Steers Funds to the Needy, N.Y. Times, May 9, 2007, at B1.

The practical effect of weighting is that funding will follow students. While building maintenance will still be taken into account in school funding, resources will be given to schools based on the needs of individual students. This means that a school with 100 students who have no documented special needs will receive significantly less funding than a school educating students with special needs. As stated before, these needs include being an English language learner, having a disability, (different weights are determined for different disabilities and their severity) or coming from a low socio-economic background. Additionally, middle school children are given the greatest weight, then high school, and then elementary. Each of these children will have the same starting weight (middle: 1.08, high: 1.03, and elementary: 1.00) but such weighting will be increased if the student has additional weighted needs. Having funding follow students based on need can be beneficial; however schools which have large population changes at one time will have difficulty preparing a budget. Also, schools will likely press students and parents to have any type of disability documented.

Critics of the foundation formula claim that there are inherent problems. For example, schools may have an incentive to keep students within a “weighted” category to obtain greater funding. To rectify this, the mayor will allow schools which have students with special needs who test out of this category, to keep the initial weighted funding for the student. Additionally, the proposal has been made

to add \$2,000 to the funding of each student a school accepts as a transfer from a “failing” school under the No Child Left Behind Act.⁶⁸

3. New York City - The Child First Initiative

The Children First initiative in New York City is an educational program comprised of four main components: Empowerment, Accountability, Fair Student Funding, and Teacher Excellence. While each of these components is necessary in providing a quality education to New York City public school children, the methods of achieving each are not without some downsides. On the whole, however, the proposals made and steps taken are moving schools in the right direction and should improve the public educational system.

Empowerment entails giving teachers and administrators more authority to decide what is best for their particular school and student body. The premise behind this decision is that by having less of a top-down structure for decision-making which will impact students’ education, the people closest to the pupils will be able to make decisions for their benefit. One way in which the district is empowering its schools is by allowing them to choose their School Support Organizations (SSOs), which are internal and external organizations that provide

⁶⁸ See David M. Herszenhorn, New Budget for Schools Steers Funds to the Needy, N.Y. Times, May 9, 2007, at B1.

schools with various types of support. While the schools will get to choose their own SSOs, they will still be responsible for meeting state and district standards.

Since greater decision-making latitude is being given, higher standards of accountability must be met. In order to organize such, the district, with the assistance of International Business Machines (IBM), is in the process of developing the Accountability Reporting and Information System (ARIS). Schools will also undergo on-site quality reviews. In addition, schools will receive progress reports with a grade. These reports will focus primarily on improvement in standardized testing scores as well as surveys regarding school environment. Periodic assessments of schools will take place looking at a wide range of assessment options. Schools will be able to influence which areas will be chosen for assessment.

The Chancellor's Fair Student Funding includes targeting a greater amount of money from the state to schools which have traditionally been under-funded. Additionally, certain schools will be receiving "Children First Supplemental Funds" to purchase support services and other resources. Added funding will come from cuts of unnecessary funds in the central and regional budget. No school will undergo a reduction in funds.

To promote the goal of teacher excellence, teachers will no longer automatically receive tenure after three years. Instead, principals will determine

when their teachers are eligible for tenure and will be able to influence this decision. Clear guidelines will also be developed for granting tenure.

These initiatives will help to improve the school district. However, much rests on the implementation of the SSO system, as it is replacing the regional structure. It is fairly impossible to say if SSOs will be more effective than regions, but since the school personnel is deciding how to form the SSOs, hopefully they will be to the benefit of the students, as anticipated by the district. The accountability measures will also be beneficial. The only fear with such measures is that schools will focus only on that which “counts” when being evaluated and will neglect other aspects of the learning process. While this is a concern, it is difficult to avoid. Increasing the requirements for attaining tenure will be beneficial because it will give teachers more of an incentive and will give principals a greater ability to dismiss teachers who do not perform well or contribute positively to the school. A drawback here, however, is that in a district that needs teachers, there could be negative repercussions from not granting tenure. If too many teachers resign due to lack of tenure, there could be even more overcrowding in classrooms because of teacher shortage.

C. No Child Left Behind Act⁶⁹

The No Child Left Behind Act has a number of implications for the New York City School District and its funding. Under No Child Left Behind, schools that do not have an adequate number of students passing state tests and mandates will fail to make adequate yearly progress (AYP). Once a school has failed to meet such standards for two consecutive years, it is deemed “in need of improvement,” and a student in such a school has the right to transfer to another school within the district. Currently, this option is not utilized on a grand scale. It could, however, have large consequences for the district.

If schools which are deemed in need of improvement have numerous students transfer out, there could be both positive and negative effects. Schools which previously had fewer students may receive an influx of students, likely with greater needs. If a school is not equipped to handle students with special needs, despite a greater amount of funding (\$2,000 per transfer student as stated above), this can harm a previously high-performing school. Such schools may also not have the physical capacity to educate more students.

⁶⁹

Public Law 107-110.

Another difficulty lies in the hypothetical of ten students wanting to transfer out of a school deemed to be in need of improvement. These ten students are all in the same special education classroom with ten other children. Because this school had twenty children with similar needs, it could afford to provide a classroom and teacher for such students. However, when ten of these students leave and transfer into five different schools, despite the added funding, these schools do not have the ability to provide a qualified teacher for such students. Receiving less funding due to fewer students will also make it more difficult for the initially failing school to improve. Having fewer students, however, may help this problem. If a school continues to fail to make AYP, then it can be taken over by the state. This remedy in itself has not been shown to be an unqualified success.

Overall, the reforms to both the state and the New York City education budgets seem to be steps in the right direction. The foundation formula is beneficial in ensuring schools are funded adequately and equitably. It does, however, have flaws. For example, while the number of students and their needs should determine the amount of funding a school receives; this formula should probably not be definitive. An area where this is demonstrative is with teacher compensation. If a school has many teachers who require higher salaries, the school would have less to spend on student needs. Also, if ten students, for example, leave a school, the school may decide that it needs to cut a teacher. If, however, the students were spread over

six grades, it begs the question of which grade loses a teacher. Having fewer students in a school can dramatically impact the ability to pay teachers, but does not greatly impact the necessity in each individual classroom and grade.

The decision not to take funding away from schools that replace tenured teachers who retire with newer, lower-salaried teachers is troubling. While schools need funding in order to operate, as shown above, if the amount taken away is solely the difference between the past and present teachers' salaries, it appears reasonable to take these funds away. Otherwise this school that has lost a tenured teacher will receive more discretionary funding than it would ordinarily be entitled to. If the argument is that newer teachers may need funds for more resources to assist them in reaching their full potential as a teacher, this need should be calculated and should be given to schools with newer teachers.

The lack of weighting given to gifted and talented students is also questionable, but may be defended due to added funding given to specialized high schools. But, this begs the question on whether younger students will suffer. If no added resources are provided to follow gifted students, it is less likely that schools will supply these students with added enrichment. While such enrichment should not come at the expense of denying other students in need, the city may in fact be hurting itself by not challenging young and talented students.

In response to critics' fears that schools will try to keep students categorized as special needs even if they are not, the city will continue with the same level of funding for such students. This seems to be a good incentive to focus on the growth of these students and simultaneously to ease the critics' fears. However, this plan also gives the school a greater amount of funding per student than it would receive under the funding formula. This may be unfair to schools which need resources to help their students who remain and have special needs.

The bonus to schools which accept transfers from "failing" schools is understandable. While such a high amount of additional funding may be undeserved, currently very few schools will take students from failing schools, as those students are more likely to have special needs, and the new schools may become overcrowded. Though principals are supposed to accept such students within their district if there is room, many do not want to, as it is a burden on their schools. The added funding alleviates this burden. One suggestion would be to make the parents of students in failing schools more aware of this option, so it can be taken advantage of. There should be outreach to parents of children in failing schools about the rights of their children under NCLB, including the right to transfer. On the other hand, this may only hurt the schools that have already been deemed "failing." However, since this is a legal option, it should be publicized to those whom it affects.

D. FINANCIAL LITERACY EDUCATION FOR STUDENTS OF COLOR AND THEIR PARENTS

1. Nationwide

Achieving greater financial literacy, especially with regard to student loans, is a major recommendation of this section. Specifically the lack of information or presence of misinformation about the financial resources available, and pitfalls to avoid, particularly disadvantages members of minority communities.

Being able to understand one's financial position, make informed choices about credit, and take advantage of saving and investment opportunities is vital to the economic progress of our society. This is particularly critical for populations who have been and continue to be targeted, discriminated against, and taken advantage of by some in the financial services industry. When there is unequal access to information about financial services and tools, individuals are unable to make the smart choices about how to make the most of their income. This results in a cycle of poverty that has effects across generations, spreads into the educational realm, and creates statistics like those discussed earlier in this report. Creating access to funding, as well as ensuring that minority students and families know how to use that funding, will go a long way toward increasing opportunities.

Financial aid is and has long been a critical factor in retention of low-income students (most of whom are minorities) in postsecondary education.⁷⁰ Student loans, especially federal loans, are the most common source of aid for low-income students, with 73% receiving a federal student loan and 35% receiving loans from other sources in 2001.⁷¹ Still, the financial need of the vast majority of low-income students goes unmet. “Unmet” refers to the need a student is calculated to have in order to attend school that is *not* fulfilled by loans, grants, or other sources of income. The National Center for Education Statistics reported that up to 92% of low-income students have unmet financial need, depending on the type of institution.⁷² To make matters worse, the rising cost of education, even for less prestigious public universities, has become nearly impossible to bear for low-income families. According to a statement made by Eduardo Padron, President of Miami Dade College, the cost of attendance at public colleges over the last 30 years has

⁷⁰ Nora Amaury, How Minority Students Finance Their Higher Education Eric Digest (Dec 2001), available at <http://www.ericdigests.org/2002-3/finance.htm>.

⁷¹ Id. Citing O'Brientshedd, 2001.

⁷² Clinton Parks, “Rising College Costs May Deter Low-Income Minorities From Entering Science and Engineering, ” Minority Scientists Network, Apr. 30, 2004, available at [http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/3010/rising_college_costs_may_deter_low_income_minorities_from_entering_science_and_engineering/\(parent\)/68](http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/3010/rising_college_costs_may_deter_low_income_minorities_from_entering_science_and_engineering/(parent)/68).

risen from 42% to 71% of the income of low-income families.⁷³ However, it has held steady over the same period of time for middle income and high income families at 19% and 5%, respectively.⁷⁴ At private universities, the situation is more severe. Since all schools face pressure to increase prestige, the associated costs of increasing the quality of education, faculty salaries, student programs, research, and alumni programs, are all rising and are unlikely to stop rising in the near future. Tuition at private universities, in particular, jumped 474% from 1970 to 1990, while the Consumer Price Index rose only 248%.⁷⁵ This is a long term trend, and greater access to financial aid is essential to increasing low-income recruiting and persistence (i.e. retention).

Some studies have indicated that part of the issue is simply the perception of financial aid offices. “Satisfaction with financial support had a direct effect on academic integration, which had an effect on educational goal commitments.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Susan Lang, How Competition for the Best Students, Faculty and Facilities - and Rankings - Sends Tuition Soaring, (Chronicle Online, Nov.8 2006) <http://www.news.cornell.edu/stories/Nov06/tuition.so.much.sl.html>.

Students also felt a sense of commitment to the institution that provided them with financial aid.”⁷⁶

However, the true impact of federal, state, institutional, and private financial aid on graduation rates is not entirely clear from the literature. One study found that minority recipients of grants and loans persisted at higher rates than those who received no aid, but the same report indicated that as free aid decreases and tuition increases, persistence declines.⁷⁷ Different types of aid, however, do seem to encourage different behaviors. Loans are more closely related to lower persistence, while grants, scholarships and work-study opportunities are correlated with higher persistence.⁷⁸ All work opportunities tend to have a more positive effect, perhaps because of the emotional attachment to the institution that it can create.⁷⁹ Additionally, the timing of aid has a measurable impact on four-year institution persistence. The first three years of attendance are the most important,

⁷⁶ Lana Muraskin et. al., Raising the Graduation Rates of Low-Income College Students: A Report Published by the Pell Institute for the Study of Opportunity in Higher Education December 2004, 19, (Dec 2004), available at http://www.Pellinstitute.org/graduates/Pell_Web.pdf.

⁷⁷ Id. at 18.

⁷⁸ Id. at 19.

⁷⁹ Id.

with aid at the third year level being most critical.⁸⁰ Specifically, studies show the risk of dropping out during the third year was 93-99% lower for students receiving financial aid.⁸¹

There are several different types of grants and loans that are available to college-age students, as well as work-study opportunities. Federal student aid supports over 10 million students each year.⁸² In 2005 the total value of federal student loans alone exceeded \$400 billion.⁸³ Federal support includes four grants (free aid): Pell, Supplemental Educational Opportunity Grant (SEOG), Academic Competitiveness Grant (ACG), and National Science & Mathematics Access to Retain Talent Grant (National SMART Grant), three loans – Perkins, Stafford, and PLUS loans, and work-study.⁸⁴

⁸⁰ Id.

⁸¹ Id.

⁸² Guide to Federal Student Aid, p. iii.

⁸³ Id. at XII.

⁸⁴ The Guide to Federal Student aid 2007-2008, U.S. Department of Education xi (2007-2008), available at http://studentaid.ed.gov/students/attachments/siteresources/FundingEduBeyondHighSchool_0708.pdf.

Pell grants are awarded to undergraduates in amounts that vary with the cost of attendance at a school. The maximum amount in the 2006-2007 school year was \$4,050.⁸⁵ SEOG grants are awarded to those calculated to have the highest financial need which translates to the lowest “Expected Family Contribution” calculation from the Free Application for Federal Student Aid (FAFSA)), and is dependent as well on other aid the student may be receiving.⁸⁶ SEOG grants range from \$100 to \$4000 per year.⁸⁷ . ACG grants are new and only for students who completed a “rigorous secondary school program of study,” which includes those who took Advanced Placement courses, were in an honors diploma program, or other types of similarly advanced education.⁸⁸ Eligible students receive up to \$750 for their first academic year and \$1,300 for the second.⁸⁹ Lastly, the SMART Grant is for third and fourth year undergraduates who have at least a 3.0 GPA and are in

⁸⁵ Id. at 6.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id. at 6 and 7.

a physical sciences, engineering, mathematics, or critical-need foreign language class.⁹⁰

Perkins and Stafford loans are offered through participating schools to all full-time or part-time undergraduate and graduate students.⁹¹ PLUS loans are for parents of dependent undergraduates.⁹² Graduate students may obtain their own PLUS loans.⁹³ The amounts that can be borrowed within these programs vary significantly by year in school, dependency status, and financial need, but can exceed \$10,000 per year.⁹⁴ None of the loans for students require interest payments while in school.⁹⁵

New York State, in particular, has similar financial aid programs, including the Tuition Assistance Program (TAP), the Part-Time TAP, the Math & Science Teaching Incentive Scholarship, and many more, with some funded by the

⁹⁰ Id. at 7.

⁹¹ Id. at 9.

⁹² Id. at 10.

⁹³ Id.

⁹⁴ Id. at 9.

⁹⁵ Id. at 10.

state and others by private entities. More information can be found at the New York State Higher Education Services Corporation.⁹⁶

Bridget Terry Long, an assistant professor at the Harvard School of Education, states that parents should be informed about opportunities while their children are younger, and that the financial system should be simplified. For instance, requiring extremely low-income students to fill out complicated paperwork is unnecessary because the federal government already knows they are needy because of welfare, free lunch programs, etc. It makes sense for students from these backgrounds to automatically qualify for federal grants and loans.⁹⁷ Implementing a program with analogous function to the now-terminated Social Security Student Benefit Program, which provided benefits for children of deceased or disabled workers who were enrolled in college full-time, would be a possible way of addressing this.⁹⁸

⁹⁶ HESC: New York State Higher Education Services Corporation, Your Student Aid Agency, http://www.hesc.com/content.nsf/HESC/About_HESC (last visited date).

⁹⁷ Abigail Bucuvalas, Who Benefits from Financial aid? An Interview with Assistant Professor Bridget Terry Long, (Oct 1, 2002), <http://www.gse.harvard.edu/news/features/long10012002.html>.

⁹⁸ Id. see also; Ronald Ehrenberg & Rebecca Luzadis, , “The Social Security Student Benefit Program and Family Decisions,” 5 Economics of Education Review 119 (1986), available at <http://ideas.repec.org/p/nbr/nberwo/1357.html>.

The College Board takes a different approach to the issue, discussing the need to educate students and families about the risks of student loans *without* frightening them, as has been the case with most loan literature up to date. Although predatory lending and other unscrupulous creditors are a threat, a larger concern at this point is simply increasing access. Helpful techniques include discussing positive data such as low interest rates, the ability of loans to cover the entire cost of attendance, the wide availability of educational loans (as contrasted with private loans), the lack of minimum income requirements, and numerous repayment options. Commentary and figures on the long-term utility of a college degree relative to just a high school diploma could also help: “People with a college degree earn 81 percent more on average than those with only a high school diploma. Over a lifetime, the gap in earnings potential between a high school diploma and a BA is more than \$1,000,000.”⁹⁹

2. New York - Financial Literacy for Students of Color - Historically Disadvantaged Communities

After years of being denied credit, lenders are preying upon people of color and historically disadvantaged neighborhoods by soliciting them to borrow,

⁹⁹ Kathleen Gibbons & Nellie Mae, Increasing Access By Reducing Loan Fear, Rocky Mountain Association of Student Financial aid administrators, <http://www.rmasfaa.org/docs/exchange/April2002/rme9.html>.

using high-cost credit, regardless of their ability to pay. This impacts students of color and those otherwise historically disadvantaged when dealing with financial aid policies at colleges. Lenders are able to take advantage of such borrowers due to a lack of sophistication. To rectify this, such students and their parents need to possess a greater financial literacy. Without equal access to information regarding borrowing and credit, already disadvantaged people will continue in a downward path and find themselves deeper in debt.

To help remedy the situation, the New York City Office of Financial Need will help New Yorkers understand the borrowing process so that they can progress economically. This office is housed in the Department of Consumer Affairs and will create a financial education network, form innovative opportunities to increase savings for the future, and end harmful lending practices.

E. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, and *Crystal Meredith v. Jefferson County Board of Education et al.*,¹⁰⁰ - SUMMARY

1. Introduction

The United States Supreme Court decided two school cases involving race in 2007 - one from Seattle, Washington, and another from Louisville, Kentucky. To many, the decision marks the ultimate retreat from the hopes inspired by *Brown v. Board of Education of Topeka*. Both cases involve public school districts that employ racial integration methods in assigning students to various schools within the district. Although the facts of the two cases are different, the 5-4 plurality found the same legal reasoning applicable to both and held that the use of racial classifications in school choice assignments violates the Equal Protection Clause of the Fourteenth Amendment.

2. Factual Background

Seattle School District No. 1 allows incoming high school freshmen to choose among the district's 10 schools. When a school has more applicants than spots, a series of three tiebreakers is used to determine who can fill the spots. The first is the presence of a sibling at the school, the second is the impact of the

¹⁰⁰ 551 U.S. _____, 127 S. Ct. 2738, 168 L.Ed.2d 508 (2007).

individual student's race on the racial composition of the school, and the third is geographical proximity to the student's residence. The second tiebreaker operates on a requirement that all schools be within 10 percentage points of the district's overall racial balance, classified in terms of "white" (41%) and nonwhite (59%). When schools are not within the prescribed range, students whose race will help properly balance the school are selected.¹⁰¹ Although Seattle was never under a *de jure* segregated school system, a state of *de facto* segregation spawned several lawsuits over the years that eventually led to the implementation of the current racial balancing plan.¹⁰²

Jefferson County Board of Education operates the public schools in Louisville, Kentucky. From 1975 until 2000, the county was under a court ordered decree to desegregate.¹⁰³ Its current student integration plan requires all nonmagnet schools to maintain enrollment of black students between 15-50%, with the goal of roughly matching the district's racial breakdown (34% black, 66% non-black – effectively "white"). After the District Court found that the county had

¹⁰¹ 127 S. Ct. at 2747.

¹⁰² Id.

¹⁰³ 127 S. Ct. at 2749.

achieved unitary status in 2000 and dissolved the decree, the county voluntarily maintained an integration plan.¹⁰⁴

3. Procedural Background

In Seattle, Parents Involved in Community Schools, a nonprofit corporation of parents of children who had been or could be negatively affected by the district's integration plan, brought suit in the Western District of Washington in 2001, alleging that the use of race in school assignments violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the 1964 Civil Rights Act, and the Washington Civil Rights Act.¹⁰⁵

The District Court granted summary judgment to the school district, finding that the tiebreaker did not violate state law and survived strict scrutiny under federal law because it was narrowly tailored to serve a compelling government interest.¹⁰⁶ The Ninth Circuit reversed and enjoined the use of the tiebreaker, but then withdrew its opinion, vacated the injunction, and certified the state law question to the Washington Supreme Court once the court realized that

¹⁰⁴ **Id.**

¹⁰⁵ 127 S. Ct. at 2748.

¹⁰⁶ **Id.**

the litigation would not be resolved before the next assignment cycle.¹⁰⁷ The Washington Supreme Court held that state law permitted the district’s “open choice plan,” and returned the case to the Ninth Circuit.¹⁰⁸

The Ninth Circuit panel reversed again, stating that the program was not narrowly tailored to achieve the compelling government interest of achieving racial diversity.¹⁰⁹ An en banc rehearing was then granted, in which the panel’s decision was overruled and the District Court was affirmed.¹¹⁰ The Supreme Court of the United States granted certiorari.¹¹¹

Crystal Meredith, mother of Joshua McDonald, moved to Louisville after the deadline for applications for the 2002-2003 school year.¹¹² As a result, the school she chose for her son had no available space and the district assigned Joshua to a school significantly farther from home.¹¹³ Meredith applied for transfer to another

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id. at 2749 (377 F.3d 949, 2004.)

¹¹⁰ Id. (395 F.3d 1168 (2005.))

¹¹¹ 127 S. Ct. at 2749 (547 U.S. ____; 126 S. Ct. 2351; 165 L. Ed 2d 277 (2006.))

¹¹² 127 S. Ct. at 2750.

¹¹³ 127 S. Ct. at 2750-51.

nearby school that did have space, but was denied because the transfer would “have an adverse effect on desegregation compliance” of the school to which Joshua had been assigned.¹¹⁴

Meredith brought suit in the Western District of Kentucky, asserting that the district’s assignment plan violated the Equal Protection Clause of the Fourteenth Amendment.¹¹⁵ The District Court found that the school district’s assignment plan was narrowly tailored to serve the compelling government interest in maintaining racially diverse schools.¹¹⁶ The Sixth Circuit affirmed in a *per curiam* opinion, and the Supreme Court of the United States granted certiorari.¹¹⁷

4. Plurality Holding & Analysis

(a). Strict Scrutiny – Compelling Interests

Racial classifications by the government are subject to strict scrutiny by the courts, which in this case means that the school’s assignment plans must be narrowly tailored to achieve a compelling governmental interest. The plurality

¹¹⁴ **Id.**

¹¹⁵ 127 S. Ct. at 2750.

¹¹⁶ **Id.**

¹¹⁷ **Id.** (547 U.S. ____, 126 S. Ct. 2351, 165 L.Ed. 2d 207 (2006)).

notes two already-recognized interests that qualify as compelling in the context of schools: “remedying the effects of past intentional discrimination,”¹¹⁸ and diversity in higher education, as recognized in the *Grutter*¹¹⁹ case involving the University of Michigan Law School.

The plurality notes that Seattle was never segregated by law and that Jefferson County had already achieved “unitary” status as described by the District Court (i.e. – the pernicious effects of its past segregation had been eliminated).¹²⁰ Thus, the first compelling interest does not and cannot apply to either district. The court quotes *Milliken v. Bradley* stating that “the Constitution is not violated by racial imbalance in the schools, without more.”¹²¹ Without a traceable link between harm caused by segregation and the racial balancing programs, something else had to justify the continued use of race in this context.¹²² That “something else” was not demonstrated.

¹¹⁸ 127 S. Ct. at 2752-2753.

¹¹⁹ 127 S. Ct. at 2753; citing Grutter v. Bollinger, 539 US 306, 328 (2003).

¹²⁰ 127 S. Ct. at 2752.

¹²¹ Id.; quoting Milliken v. Bradley, 433 US 267, 280, n. 14 (1977).

¹²² Id.

The second compelling interest, diversity in higher education, could be applicable, but only when “diversity” is considered in a broad sense where racial balancing is not pursued for its own sake. The plurality states, quoting *Regents of the University of California v. Bakke*, that *Grutter* upheld consideration of “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”¹²³ It goes on to state that the racial classification upheld in *Grutter* was merely one part of a “highly individualized, holistic review,”¹²⁴ and that the classification was not “simply an effort to achieve racial balance.”¹²⁵ It also quotes *Gratz v. Bollinger*, in which a University of Michigan undergraduate plan was struck down, stating that the plans must provide for a “meaningful individualized review of applicants.”¹²⁶ In short, the recognized compelling interest of diversity in higher education envisions the term “diversity” quite broadly, with racial classification playing a small role in a much larger picture, and racial balancing being only a means to an end, rather than an end itself.

¹²³ 127 S. Ct. 2753, citing *Grutter*, 539 U.S. at 325; quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 315 (1978).

¹²⁴ *Id.* at 14; quoting *Grutter*, 539 U.S. at 337.

¹²⁵ *Id.* at 14, citing *Grutter*, 539 U.S. at 330 .

¹²⁶ *Id.* at 15; quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003).

The Seattle and Jefferson County plans do not meet these criteria, and thus do not qualify for this compelling governmental interest.

Although the plurality quotes *Grutter*, it emphasizes at the end of its compelling interests analysis that the case does not actually govern here, because its holding was expressly limited to the context of higher education.¹²⁷

(b). Strict Scrutiny – Additional Interests

Both school districts also assert a compelling government interest in achieving the educational and social benefits that flow from racial diversity in their schools. Seattle specifically discusses the goal of ensuring that minority students in racially concentrated housing patterns maintain access to desirable schools, and Jefferson expands on the specific benefits of learning in a racially integrated environment. However, the plurality does not reach the question of whether these expressed interests are valid because it concludes that both the Seattle and Jefferson plans are not narrowly tailored to achieve those interests.¹²⁸ Instead the plans were designed and operated solely to achieve racial balance as related to the district's

¹²⁷ 127 S. Ct. at 2754.

¹²⁸ 127 S. Ct. at 2755.

racial demographics.¹²⁹ Neither district offered any compelling evidence that their programs were driven by a desire to achieve educational/social goals, rather than the desire to achieve a certain number set. In defending these plans, the districts also provided no evidence that the numbers they aimed for coincided with any particular educational benefits.¹³⁰ “In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”¹³¹ Thus, the narrow tailoring requirement was not met.¹³²

The plurality goes on to reemphasize that racial balancing cannot and should not be a goal that is pursued for its own sake (i.e. – a compelling government interest). It cites numerous cases that support the proposition, including *Grutter*, *Miller v. Johnson*,¹³³ *Bakke*, and *Richmond v. J.A. Croson Co.*,¹³⁴ in which that

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ 132 S. Ct. at 2757, citing Miller v. Johnson, 515 U.S. 900, 911 (1995).

¹³⁴ Id., citing Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989).

Court's plurality states that pursuing balancing for its own sake "effectively assur[es] that race will always be relevant in American life..."¹³⁵

Furthermore, the plurality rejects the districts' assertions that their chosen means were necessary, as they failed to show that they considered methods other than these explicit racial classifications to achieve their stated goals. It quotes *Grutter* again in emphasizing the need for "serious, good faith consideration of workable race-neutral alternatives,"¹³⁶ and states conclusively: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹³⁷

5. Concurrences

a. Justice Kennedy¹³⁸

Justice Kennedy approves of the holding but disapproves of the plurality's implication that race can never be a factor in student assignment plans. In the case of Jefferson County, he believes the holding must stand because of significant structural problems with the Jefferson County program, including

¹³⁵ *Id.*, citing *Croson*, 488 U.S. 469, 495, quoting *Wygant v. Jackson Bd of Ed.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting).

¹³⁶ *Id.*, quoting *Grutter*, 539 U.S. at 339.

¹³⁷ 127 S. Ct. at 2768.

¹³⁸ 127 S. Ct. at 2788.

discrepancies, inconsistencies, omissions and mistakes that threaten the program's ability to achieve its own goals. The program is so poorly defined that it cannot survive under strict scrutiny, as the Court is not allowed to construe ambiguities in the government's favor.¹³⁹ The Seattle program similarly failed to achieve its own goals (under a constitutional standard) when it did not adequately explain its use of the crude categories of "white" and "non-white" when only 40% of its student body could be classified as "white." It was not conducive to its self-proclaimed goals of promoting a diverse school environment and reducing racial isolation, which in itself warrants invalidation of its programs on constitutional grounds.¹⁴⁰

However, Justice Kennedy also emphasizes that the plurality "is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race," and that 50 years of post-*Brown* experience shows us that the solution is more complicated than simply "stop[ping] discriminating on the basis of race."¹⁴¹ He makes explicit his disagreement with the plurality in stating that "[t]o the extent that the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status

¹³⁹ 127 S. Ct. at 2790.

¹⁴⁰ Id.

¹⁴¹ 127 S. Ct. at 2791.

quo of racial isolation in schools, it is, in my view, profoundly mistaken.” Moreover, Justice Kennedy states, "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." ¹⁴²

Race can still play a role in a school district’s administration of its schools, insofar as it is not done in a systematic and non-individualized way. ¹⁴³ He suggests some examples of race-conscious measures that meet constitutional standards, including strategic site selection of schools, allocating resources for special programs, and drawing attendance zones “with general recognition of the demographics of neighborhoods.” ¹⁴⁴

b. Justice Thomas¹⁴⁵

Justice Thomas in his concurrence, and contrary to Justice Kennedy, states numerous times that the Constitution imposes a “color-blind” standard on

¹⁴² 127 S. Ct. at 2791.

¹⁴³ 127 S. Ct. at 2792.

¹⁴⁴ Id.

¹⁴⁵ 127 S. Ct. 2768.

these assignment plans, and absent a compelling state interest (which Justice Thomas believes is not present), the plans must fail.¹⁴⁶

6. Dissents

a. Justice Breyer¹⁴⁷

Justice Breyer, in a dissent significantly longer than the plurality opinion, emphasizes that the Court has approved of race-conscious plans in the past and that the Constitution permits such plans to exist even where it does not require them.¹⁴⁸ He also points out that paying attention to the context in and from which these plans were formed is key to understanding what constitutes a “compelling” interest and whether or not the plans are sufficiently “narrowly tailored” to achieve said interest.¹⁴⁹

Seattle’s plan arose from a situation of *de facto* segregation that involved mandatory busing, white flight from urban centers, and several legal challenges, the

¹⁴⁶ Thomas, J., concurring at 1.

¹⁴⁷ 127 S. Ct. 2800.

¹⁴⁸ Id.

¹⁴⁹ Id.

settlement of which ultimately resulted in the creation of the current plan.¹⁵⁰ The Louisville plan was the result of a court ordered decree issued in 1975 that lasted for 25 years before it was dissolved.¹⁵¹ The plan was continued on a voluntary basis after the dissolution.¹⁵²

In response to the majority's comment that Seattle was not *de jure* segregated, Justice Breyer states that the *de jure/de facto* distinction should not be grounds upon which to judge the constitutionality of race-conscious criteria, because that would allow school districts that *avoided* federally-mandated integration decrees by voluntarily complying with *Brown* to escape serious scrutiny.¹⁵³ The Court should, as it had done in the past, permit race-conscious remedies even without a previous court decree.¹⁵⁴ "The Equal Protection Clause outlaws invidious discrimination but does not similarly forbid all use of race-conscious criteria."¹⁵⁵

¹⁵⁰ 127 S. Ct. 2802.

¹⁵¹ 127 S. Ct. 2806.

¹⁵² 127 S. Ct. at 2809.

¹⁵³ 127 S. Ct. at 2810.

¹⁵⁴ 127 S. Ct. at 2812.

¹⁵⁵ 127 S. Ct. at 2834.

Justice Breyer further notes that in creating these programs, both cities explored a “wide range of other means, including non-race-conscious policies”¹⁵⁶ This statement contradicts the majority’s assertion that there was no evidence of such policies being considered. He cites *Swann v. Charlotte-Mecklenburg Board*¹⁵⁷ very heavily throughout his dissent, using it to demonstrate, among other things, that school authorities have historically been allowed broad discretion and power to formulate educational policies as they deem necessary to best reach their respective communities.¹⁵⁸ The race-conscious assignment plans, according to Justice Breyer, fall within this broad mandate. He bases a significant portion of his dissent on this premise that the schools’ discretion was improperly taken away by the majority’s decision.

He also points out that *Grutter*, *Gratz*, and other cases cited by the majority, never actually required that *all* racial classifications be subject to strict scrutiny.¹⁵⁹ None of these cases expressly overturned *Swann* either. In fact, Justice

¹⁵⁶ Id. 18.

¹⁵⁷ 127 S. Ct. 2812-2815, Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 US 1 (1971).

¹⁵⁸ 127 S. Ct. at 2812-2815.

¹⁵⁹ 127 S. Ct. at 2819.

Breyer uses *Grutter* to emphasize the importance of context in reviewing race-based governmental action.

Even with an application of strict scrutiny, Justice Breyer finds that the Seattle and Louisville plans survive strict scrutiny.¹⁶⁰ The interest in remedying the wrongs of past segregation, overcoming adverse educational effects produced by segregation, and producing an educational environment accurately reflective of our pluralistic society, are all components of the same compelling government interest in promoting greater racial “integration.”¹⁶¹ Equal protection jurisprudence has not forbidden the State from addressing these issues, even where the State was not the direct cause (via *de jure* segregation);¹⁶² and the moral vision embodied in the Fourteenth Amendment obviously did not intend for actions that create racial segregation to be constitutionally indistinguishable from actions that eliminate it. Justice Breyer also finds the race-conscious plans to be narrowly tailored, as race only helps form the outer bounds of a broad range (and broad limits in this context are less burdensome and hence more narrowly tailored), the plans place a high emphasis on individual student choice of assignment, and the manner in which the

¹⁶⁰ 127 S. Ct. at 2820.

¹⁶¹ Id.

¹⁶² 127 S. Ct. at 2823.

plans were developed suggests narrow tailoring. He gives weight to the school districts' respective histories and insists that proving consideration of non-race-conscious plans (as the majority wants) is impossible without superfluously describing every plan each district has ever reasonably or obviously eliminated.

He also dismisses the majority's attempt to distinguish *Grutter* on the grounds that it concerned only higher education, stating that it is a meaningless legal distinction, and that the Constitution would not find “‘compelling’ the provision of a racially diverse education for a 23-year-old law student but not for a 13-year-old high school pupil.”¹⁶³

Justice Breyer concludes by stating that the plurality opinion will likely bring a surge of race-based litigation, as it has taken away a vital tool in preventing *de facto* segregation and remedying its associated consequences. “The Court should leave [the people] to their work. And it is for them to decide, to quote the plurality’s slogan, whether the best “way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁶⁴

¹⁶³ 127 S. Ct. at 2929.

¹⁶⁴ 127 S. Ct. at 2834.

b. Justice Stevens¹⁶⁵

Justice Stevens joins in Justice Breyer's dissent, but also points out the "cruel irony" of using the *Brown v. Board* case as grounds for invalidating racial integration programs. (Stevens, J. dissenting) He states that the majority's selective citation of divided cases that "grandly proclaim that all racial classifications must be analyzed under strict scrutiny" is misleading and clearly leads to a perverse result in the Equal Protection context. He concludes stating that "no Member of the Court that I joined in 1975 would have agreed with today's decision."¹⁶⁶

F. THE RECENT FOCUS IN NEW YORK ON PUBLIC FUNDING OF EDUCATION

For over a decade, a case known as *Campaign for Fiscal Equity* was litigated in the State of New York. The New York State Court of Appeals heard the case in 1995, 2003 and 2006. The thrust of the lawsuit was that students in New York City were not receiving a fair share of the educational dollars from the State and were not receiving sufficient funds to assure a minimal education. In the first case, which was known as *CFE I*, the New York State Court of Appeals held that the plaintiffs had stated a cause of action alleging a violation of the Education Article of

¹⁶⁵ 127 S. Ct. at 2797.

¹⁶⁶ 127 S. Ct. at 2800.

the New York State Constitution, Article XI § 1, which states, “The legislature shall provide for the maintenance and support of a system of free common schools, where in all of the children of the state may be educated.” In *CFE II*, the Court found a violation of the Education Article. In *CFE III*, the Court left it to the legislature to determine the amount of money needed to provide a sound basic education for the students in New York City.

G. THE AFTERMATH OF CAMPAIGN FOR FISCAL EQUITY

Governor Spitzer committed to allocating \$7 billion in additional aid to New York schools, with \$4.7 billion going to New York City. Lawyers and New York residents need to support the decision to increase funding for education. It is also important to note, that though the New York Court of Appeals held that \$1.93 billion in additional expenditures was rational, this conclusion was less than what the Appellate Division found to be the constitutional minimum.

A new battle over educational finance in New York concerns accountability. The Senate Majority adopted New York Senate Bill S 5673 which cuts back on the accountability measures proposed by Governor Spitzer used to oversee the school districts and the additional funding allocated. Instead of having fifty-six districts involved in the Contracts for Excellence accountability provisions, the bill proposes to hold only the largest five districts to such accountability standards.¹ While flexibility is an important factor to consider in educational

finance, so too is ensuring that funding is utilized in the most effective way possible. By making some districts accountable for showing how they spend money and others not accountable, the state may implicitly be making a determination based on the perceived ability of certain districts and their administrators. Such supervised districts may feel that they are unfairly held to a higher standard due to mistrust, while students in other districts may not receive the benefits of the additional funding if there is no accountability accompanying the way such funds are spent. It is recommended that all districts be held to accountability standards.

In response to the Campaign for Fiscal Equity lawsuit, there have been historic changes to the state education financing plan in New York over the past two years. Beginning in 2007, the New York State Legislature adopted record increases in aid, as well as programs designed to ensure that school districts with the greatest needs receive adequate funding. Through a new foundation formula, aid is calculated and distributed based on the individual needs of each school district. In 2007, this formula was not strictly adhered to in the budget, and party politics and favors appeared to have an effect. Education advocates across the state applauded the creation of this formula and were encouraged in 2008 by more equitable distribution of aid.

The foundation formula used by the state in allocating funding per district is based on "a district's educational needs and local ability to support

education."¹⁶⁷ This new formula effectively takes 29 pre-existing formulae and creates one new formula with only four factors. It can be explained as follows:

The Foundation Formula first calculates the average cost of educating a general education student in New York State (i.e., the "Foundation Cost"). The Foundation Cost is then adjusted by two indices, the "Pupil Need Index," which accounts for the additional cost of educating disadvantaged students and the "Regional Cost Index," which accounts for cost disparities in different geographic areas. The State's share of aid is then calculated by subtracting from the adjusted Foundation Cost an "Expected Local Contribution" from each and multiplying that result by a pupil count. The Foundation Formula is represented as: Foundation Formula Aid =

$$[\text{Foundation Cost} \times (\text{times}) \text{Pupil Need Index} \times$$

¹⁶⁷

See David Hakim and David M. Herszenhorn, "School Aid Fight Erupts in Albany as Budget Passes, N.Y. Times, Apr. 2, 2007, at A1."

(times) Regional Cost Index] - (minus) Expected

Local Contribution.¹⁶⁸

Although the formula was not strictly followed in the 2007 budget, its implementation was seen by some to be a vast improvement and a creative solution to the problem of inequitable distribution of education aid across the state. On April 9, 2008, New York State passed its annual budget that included a record \$1.75 billion increase in school aid statewide. Notably, the budget deal retained the Foundation Aid formula and its emphasis on ensuring that new spending is targeted toward school districts with the greatest financial need, including New York City. School districts identified under the Foundation Aid formula must continue to operate under Contracts for Excellence, which limit state education funds to measures that have been demonstrated to improve student performance, such as reducing class size and teaching training programs. Some observers believed the 2008 budget adhered more closely to the Foundation Formula, as school districts with greater needs, such as New York City, received higher levels of aid.¹⁶⁹ The

¹⁶⁸ Memorandum for N.Y. State Board of Regents as Amicus Curiae, Campaign for Fiscal Equity, et al. v. State of N.Y., et al. (No. 111070/93), <http://www.oms.nysed.gov/budget/infolinks/memorandum.htm>.

¹⁶⁹ See Nicholas Confessore, "New York City and Long Island Schools Benefit From Deal in Albany," N.Y. Times, Apr. 10, 2008, at B4.

most significant change in the Foundation Aid program in 2008 was that school districts will now receive a maximum increase of only 15 percent in total Foundation Aid, representing a 10 percent decrease from 2007.

H. RECOMMENDATIONS

1. Diversity in the student population should be a New York State goal from the earliest years through college.
2. The amount of money needed to give pupils a sound basic education must be addressed on an ongoing basis and must be addressed statewide.
3. Alternative schools for pupils who do not learn under traditional teaching methods must be continued and expanded.
4. Special attention must be given to assuring that minority males receive an adequate education.
5. Accountability standards should be utilized for all school districts.
6. Programs to challenge gifted students must be encouraged.
7. Programs designed to improve the education of students, including new methods of allocating and spending monies from the state and city, should be encouraged.

I. ADDITIONAL RECOMMENDATIONS

There are numerous ways to approach the issue of access to educational funding and several perspectives on how best to achieve it. Recommendations for maximizing financial literacy and for creating transparency and equity in educational funding are discussed below.

- 1. In New York City, give the recent Fair Student Funding (FSF) formula several years to work and adapt to circumstances. Other districts' weighted student funding programs have shown substantial promise, and this possibility exists in New York as well. Success in New York City alone will have a measurable effect on minority performance across the state, given the incredibly high percentage of New York state minorities taught in New York City.**
- 2. Because FSF will involve massive shifting of budgets over the next several years, the State and City should set aside a high baseline amount of funding specifically for all FSF programs. FSF cannot work unless there is enough of a reservoir of cash to support the increased funding many schools will require.**
- 3. Publish FSF funding decisions in easily accessible, user-friendly formats, along with summaries of explanations. Keeping the public informed about the choices that their schools make and what weights**

are attached to different types of students will aid greatly in increasing public trust.

4. In order to minimize the negative impact of the perception of schools *losing* funding through FSF, the NYSED should publish the exact reasons for the losses where they occur, and state in plain language the extent to which such losses result from non-FSF funding shortcomings (such as a loss of grant funding, changes in programs or other changes in enrollment that affect funding).
5. To the extent possible, New York public universities should increase the amount and availability of need- and merit-based financial aid to low-income families.
6. Low-interest educational loans should be made readily available as a secondary source of aid. Following the College Board's recommendations, concise but user-friendly information on educational loans should be made widely available, preferably in all New York state high schools, but especially high-minority schools.
7. Primary and secondary schools should devote resources to educating parents on the accessibility of college as early as possible, specifically including clear information on the viability of paying for college

through educational loans. New York State should adopt a program where students from extremely low-income families automatically qualify for (and receive information on) free government financial aid for college, as some persons advocate.

ADDENDUM TO CHAPTER I
SIGNIFICANT EDUCATIONAL CASES

In focusing on the promise of *Brown v. Board*, the following sections will summarize some of the seminal desegregation cases decided by the Supreme Court of the United States and by state and federal courts in New York.

A. LIST OF SIGNIFICANT NEW YORK STATE AND FEDERAL CASES

Taylor v. Board of Educ. of the City of New Rochelle, 195 F. Supp. 231 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961).

Balaban v. Rubin, 242 N.Y.S.2d 973 (Sup. Ct. 1963), *rev'd*, 20 A.D.2d 438 (N.Y. App. Div. 1964), *aff'd*, 250 N.Y.S.2d 281 (1964), *cert. denied*, 379 U.S. 881 (1964).

Strippoli v. Bickal, 248 N.Y.S.2d 588 (Sup. Ct. 1964), *rev'd*, 21 A.D.2d 365 (N.Y. App. Div. 1964), *aff'd*, 16 N.Y.2d 652 (1965).

Di Sano v. Storandt, 250 N.Y.S.2d 701 (Sup Ct. 1964), *rev'd*, 22 A.D.2d 6 (N.Y. App. Div. 1964).

United States v. Yonkers Board of Educ., 518 F. Supp. 191 (S.D.N.Y. 1981), *aff'd*, 747 F.2d 111 (2d Cir. 1984), *aff'd*, 990 F.2d 623 (2d Cir. 1993), *vacated*, 96 F.3d 600 (2d Cir. N.Y. 1996), *cert. denied*, 521 U.S. 1104 (1997), *remanded*, 7 F. Supp. 2d

396 (S.D.N.Y. 1998), *aff'd*, 251 F.3d 31 (2d Cir. 2001), *cert. denied*, 529 U.S. 1130 (2000), *cert. denied*, 534 U.S. 1054 (2001).

Paynter v. State, 270 A.D.2d 819 (N.Y. App. Div. 2000), *on remand*, 720 N.Y.S.2d 712 (Sup. Ct. 100), *aff'd*, 290 A.D.2d 95 (N.Y. App. Div. 2001), *aff'd*, 100 N.Y. 2d 434 (Ct 2003).

B. Supreme Court Cases

Parents Involved in Community Schools v. Seattle, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3676 (U.S. June 5, 2006)(No. 05-515), *rev'd* 5451 U.S. _____, 2007.

Meredith v. Jefferson County Board of Educ., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3676 (U.S. June 5, 2006)(No. 05-908), *rev'd* 551 U.S. _____, 2007.

United States v. Fordice, 674 F. Supp. 1523 (N.D. Miss. 1987), *rev'd and remanded*, 893 F.2d 732 (5th Cir. 1990), *aff'd en banc*, 914 F.2d 676 (5th Cir. 1990), *vacated*, 505 U.S. 717 (1992).

Board of Educ. v. Dowell, 219 F. Supp. 427 (W.D. Okla 1963), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *rev'd and remanded*, 795 F.2d 1516 (10th Cir. 1986), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd and remanded*, 498 U.S. 237 (1991).

Washington v. Seattle Sch. Dist. No. 1, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd in part and rev'd in part*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).

Estes v. Metropolitan Branches of Dallas NAACP, 444 F.2d 124 (5th Cir. 1971), *aff'd in part and rev'd in part*, 517 F.2d 92 (5th Cir. 1975), *aff'd*, 572 F.2d 1010 (5th Cir. 1978), *cert. granted*, 440 U.S. 906 (1979), and *cert. dismissed*, 444 U.S. 437 (1980).

Austin Independent School Dist. v. U.S., 467 F.2d 848 (5th Cir. Tex. 1972), *vacated*, 429 U.S. 990 (1976).

Milliken v. Bradley, 433 F.2d 897 (6th Cir. 1970), *aff'd in part and vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

North Carolina State Bd. of Educ. v. Swann, 312 F. Supp. 503 (W.D.N.C. 1970), *aff'd*, 402 U.S. 43 (1970).

United States v. Montgomery County Bd. of Ed., 289 F. Supp. 647 (M.D. Ala. 1968), *rev'd*, 395 U.S. 225 (1969).

Monroe v. Bd. of Comm'rs, 269 F. Supp. 758 (W.D. Tenn. 1965), *remanded*, 380 F.2d 955 (6th Cir. 1967), *vacated*, 391 U.S. 450 (1968).

Raney v. Bd. of Educ., 381 F.2d 252 (8th Cir. 1967), *rev'd* and *remanded*, 391 U.S. 443 (1968).

Green v. County Sch. Board, 382 F.2d 338 (4th Cir. 1967), *vacated*, 391 U.S. 430 (1968).

Goss v. Bd. of Educ., 186 F. Supp. 559 (E.D. Tenn. 1960), *remanded*, 301 F.2d 164 (6th Cir. 1962), *rev'd*, 373 U.S.683 (1963).

Cooper v. Aaron, 163 F. Supp. 13 (E.D. Ark. 1958), *rev'd*, 257 F.2d 33 (8th Cir. 1958), *aff'd*, 358 U.S. 1 (1958).

B. NEW YORK STATE AND FEDERAL DESEGREGATION CASES AFTER BROWN V. BOARD OF EDUCATION

1. *Taylor v. Board of Educ. of the City of New Rochelle*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961).

FACTS - Parents brought a class action suit seeking to enjoin defendants from requiring that children in the city school district register in a racially segregated elementary school. The district court found unlawful racial segregation, directed defendants to submit a plan to correct the violation, and subsequently rejected most of defendants' proposed plan. Defendants were then ordered to implement the district court's plan for desegregation.

Defendants, a city school district, the board of education, and a school superintendent, appealed from the order of the U.S. District Court for the Southern District of New York which directed defendants to implement a desegregation plan that would allow the children of plaintiffs, parents of African-American school children, to transfer to other elementary schools within the city, as a way of addressing unlawful racial segregation.

HOLDING - On appeal, the United States Court of appeals for the Second Circuit affirmed, stating that defendants had violated the Fourteenth Amendment by using race as the basis for school districting, with both the purpose and effect of producing a substantially segregated school system. The Court found that the district court's plan addressed the problem. The plan required that students be allowed to apply for a transfer to other elementary schools in the city and be placed in the same grade they were in or would be in at their current school, without any requirement of emotional or academic testing or approval prior to placement.

2. *Balaban v. Rubin*, 242 N.Y.S.2d 973 (Sup. Ct. 1963), *rev'd*, 20 A.D.2d 438 (N.Y. App. Div. 1964), *aff'd*, 250 N.Y.S.2d 281 (Ct 1964), *cert. denied.*, 379 U.S. 881 (1964).

FACTS - Petitioner-claimants appealed from an order of the Appellate Division of the Supreme Court in the Second Judicial Department of New York,

which reversed the trial court order nullifying a zoning plan developed by respondent school board for a new school for violating N.Y. Educ. Law § 3201.¹⁷⁰

When a new school was completed, the school board zoned the district to provide for racial balance. The trial court held that the zoning plan violated § 3201 because, had the new school not been built, the claimants would have attended a different school in their own neighborhood. The appellate court reversed, finding that § 3201 was on its face and from its history and plain purpose, an anti-segregation statute only, and was not to be interpreted so as to invalidate a zoning plan because the plan accomplishes integration.

HOLDING - On appeal, the court affirmed the appellate court's judgment that the zoning plan did not violate § 3201. The zoning plan excluded no one from any school and had no tendency to foster or produce racial segregation. Additionally, the school board had express statutory power to select a site for a new school and to determine the school where each pupil was to attend, pursuant to N.Y. Educ. Law §§ 2556, 2503(4)(d).¹⁷¹ There were no oppressive results and no child

¹⁷⁰ N.Y. Educ Law § 3201 (2006)(Section 3201 provides that: "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin).

¹⁷¹ "The Board of Education has express statutory power to select a site for a new school and to determine the school where each pupil shall attend." Balaban, 250 N.Y.S.2d 281, 284 (1964), citing Education Law, §§ 2556, 2503, subd. 4, par. d.

had to travel farther to the new school than he or she would have to go to get to his or her “neighborhood” school.

3. *Strippoli v. Bickal*, 248 N.Y.S.2d 588 (Sup. Ct. 1964), *rev’d*, 21 A.D.2d 365 (N.Y App. Div. 1964), *aff’d*, 16 N.Y.2d 652 (1965).

FACTS - With respect to an action by respondents, parents, and a school district association officer, to enjoin transfer of certain students into their school, appellant city school board challenged the order of the Supreme Court at Special Term, which enjoined the board from transferring the students, annulled the board’s determination, and directed the return of students to the original school. The school board determined that it was necessary to transfer students from an overcrowded school into a new school with vacant classrooms. The overcrowded school was comprised almost entirely of black students and the new school was comprised entirely of white students. The cost of transportation was to have been borne largely by the state. Appellants sought to enjoin the transfer. The trial court found in favor of appellants.

HOLDING - The court reversed the judgment and held that, although a substantial factor influencing the decision was the desire to reduce to some extent the racial imbalance existing in the public schools, a determination of the board which was otherwise lawful and reasonable did not become unlawful merely because

the factor of racial balance was accorded relevance. Appellants could not demonstrate having suffered a legal harm as a result of the action of the board.

4. *Di Sano v. Storandt*, 250 N.Y.S.2d 701(Sup Ct. 1964), *rev'd*, 22 A.D.2d 6 (N.Y. App. Div. 1964).

FACTS - Appellant board of education challenged the judgment of the Supreme Court of Monroe County, which stayed, at the request of parents of white students, a voluntary school integration plan. The board of education ordered the adoption of an open enrollment plan for the public schools under its supervision in the hopes of reducing the racial imbalance found in its schools. Under the plan, schools with a disproportionately high number of minority students were designated as “sending” schools, and those with a disproportionately low number of minority students were designated as “receiving” schools. Any minority student attending a “sending” school could, if he or she wished, transfer to a “receiving” school. The white students’ parents sued, seeking to stop implementation of the plan. An injunction was granted and the board of education appealed.

HOLDING - On appeal, the Appellate Division reversed. It held that this was not a case needing an order to alleviate de facto segregation, as the integration plan was voluntary. This was also not a case, as claimed by the parents of white students, of barring nonwhite children from attending their neighborhood schools because attendance was permitted if those families wished.

5. *U.S. v. Yonkers Bd. of Educ.*, 518 F. Supp. 191 (S.D.N.Y. 1981), *aff'd*, 747 F.2d 111 (2d Cir. N.Y. 1984), *aff'd*, 990 F.2d 623 (2d Cir. N.Y. 1993), *vacated*, 96 F.3d 600 (2d Cir. N.Y. 1996), *cert. denied*, 521 U.S. 1104 (1997), *remanded*, 7 F. Supp. 2d 396 (S.D.N.Y. 1998), *aff'd*, 251 F.3d 31 (2d Cir. 2001), *cert. denied*, 529 U.S. 1130 (2000), *cert. denied*, 534 U.S. 1054 (2001).

FACTS - Plaintiff United States Attorney General brought an action against defendant City of Yonkers for violations of the Fourteenth Amendment and Titles IV, VI, and VIII of the Civil Rights Act of 1968. Plaintiff claimed that defendant perpetuated and aggravated racial segregation in public and subsidized housing projects. The City of Yonkers located most of its public housing projects, essentially all of its low-income housing, in its southwest zone. Any attempts to place a project in other areas was met with great residential resistance and resulted in similar projects being built in that zone or closely bordering that zone. The effect was racial segregation. Plaintiffs also brought a claim against the Yonkers Board of Education for racial segregation of public schools because the Board oversaw the construction of public schools, the assignment of staff, and the placement of students.

HOLDING - The court examined the historical character of actions, the specific sequence of events, any alleged departures from normal procedures, and the legislative history of substantive criteria. After those inquiries, the court found that

the city of Yonkers had violated the Fair Housing Act of 1968 through a pattern of racial segregation. The school board was found liable for impermissible racial segregation of Yonkers' public schools. The court also found the city liable for the public school racial segregation because the city discriminated in public housing projects that racially segregated the school districts and then appointed (through its city mayors) the board, which adhered to a neighborhood school policy that racially segregated the city's public schools. The court directed the parties to proceed to the remedies phase of the trial.

U.S. v. Yonkers Timeline

1980 - Justice Department files suit against the city of Yonkers.

1981 - Yonkers NAACP joins the suit as a plaintiff/intervenor.

1983 - Trial of U.S. v Yonkers begins.

1985 - In a 600 page decision, Justice Leonard B. Sand finds the city of Yonkers responsible for intentionally causing the segregation of schools and public housing in the city. He recognizes that institutional discrimination in housing is connected to school segregation. The city of Yonkers appeals. The court orders the desegregation of all of Yonkers' public schools. The proposed plan for school desegregation, "Educational Improvement Plan," is formulated to address Justice

Sand's order. Justice Sand also orders that 200 units of low income housing be constructed outside of southwest Yonkers, using federal funds.

1986 - The Yonkers Board of Education formulates a magnet school program in order to address the court order to desegregate.

1987 – The 2nd Circuit Court of Appeals upholds Justice Sand's ruling relating to both the education and housing components of the case and the City of Yonkers loses its federal appeal.

1988 - The Yonkers City Council signs a consent decree with the U.S. Department of Justice and the Yonkers NAACP. The consent decree provides that the Council will produce seven sites for 200 units of public housing with townhouse units placed throughout the eastside of Yonkers. In addition, the City Council agrees to build an additional 800 units, with incentives to developers of all new market-rate housing to include subsidized housing.

1988-1992 - 200 units of town-house style public houses are built throughout East Yonkers.

1997-2000 - The State of New York (added as a defendant in 1989) is found liable for its role in segregation of Yonkers and ordered to pay one-half of all costs for Yonkers desegregation efforts. The State of New York appeals.

1998 - The State of New York enters into a consent decree to settle under *U.S. v. Yonkers* and consents to fund costs related to subsidized housing within the city. The State of New York agrees to pay for a large part of the costs related to the acquisition and construction of affordable and mixed-income housing in East Yonkers. It is estimated that the funds to be paid are approximately \$8.5 million.

2000 - The State of New York and the City of Yonkers authorities agree to end the lawsuit against the State of New York solely on the issue of education.

2001 - The City of Yonkers appeals the affordable housing order requiring race to be used as a factor when allocating housing units. The Second Circuit Court of Appeals upholds the order on affordable housing.

2002 - The City of Yonkers settles the education segment of *U.S. v Yonkers*. As part of the settlement, the State of New York promises funds to help Yonkers narrow the achievement gap between white and nonwhite students with total funds amounting to \$300 million over five years.

2007 – The Housing segment of the *U.S. v. Yonkers* case settled. The settlement, signed by Mayor Phil Amicone, indicates that the city has met its obligations under a federal order stemming from the lawsuit to build 600 units of affordable housing to help desegregate the city. In addition, the City of Yonkers

also agrees to earmark 15 percent of all units in new housing developments that are being built in the city through 2009.

6. *Paynter v. State*, 270 A.D.2d 819 (N.Y. App. Div. 2000), on remand, 720 N.Y.S.2d 712 (Sup. Ct. 100), *aff'd*, 290 A.D.2d 95 (N.Y. App. Div. 2001), *aff'd*, 100 N.Y. 2d 434 (N.Y. 2003).

FACTS - Plaintiffs are 15 African-American schoolchildren who appealed a judgment from the Appellate Division. The Appellate Division granted the State's motion to dismiss plaintiffs' complaint, which alleged that the concentration of poverty in the Rochester City School District caused the students to receive an inadequate education in violation of Section 1 of the Education article of the N.Y. constitution.¹⁷² The plaintiffs alleged that various State policies, including nonresident tuition and school residency requirements, had resulted in high levels of poverty and racial isolation. This in turn was alleged to have led to deficient student performance. The Appellate Division granted the State's motion to dismiss.

HOLDING - The New York State Court of Appeals affirmed the Appellate Division decision, holding that plaintiffs had failed to state a cause of

¹⁷² The Education Article requires the Legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." NY Const, art XI, § 1 (2004).

action under the Education Article. Plaintiffs did not claim that the substandard academic performance in their schools derived from a lack of funds or inadequacy in the teaching or facilities. Instead, they based their argument on the State's failure to abate demographic factors that might affect student performance. Allegations of academic failure alone, without claims that the State had failed in its obligation to provide basic educational services, were insufficient to state a cause of action. The Court held that to endorse plaintiffs' theory that the State was responsible for the demographic makeup of every school district would subvert the important role of local control and participation in education and would make the State responsible for where people choose to live.

**C. SIGNIFICANT SUPREME COURT CASES OUTSIDE OF NEW YORK
AFTER BROWN v. BOARD OF EDUCATION**

1. *Parents Involved in Community Schools v. Seattle*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3676 (U.S. June 5, 2006)(No. 05-515), 551 U.S. _____, 2007 and

Meredith v. Jefferson County Board of Educ., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3676 (U.S. June 5, 2006)(No. 05-908).

FACTS - Plaintiff parents and students sued defendant school board, alleging that the board's student assignment plan violated their rights under the

Equal Protection Clause of the U.S. Constitution. For approximately 25 years, the board maintained an integrated school system under a 1975 federal court decree. After release from the decree, the board continued to integrate its schools through a plan that included broad racial guidelines.

HOLDING - The district court concluded that the board met the compelling interest requirement. The board described the compelling interests and benefits of integrated schools, such as improved student education and community support for public schools, which are relevant to public elementary and secondary schools. In most respects, the student assignment plan also met the narrow tailoring requirement in that it contained broad racial guidelines that did not constitute a quota. Additionally, the board avoided the use of race in predominant and unnecessary ways that unduly harmed members of a particular racial group, and instead used race-neutral means, such as geographic boundaries, special programs, and student choice to achieve racial integration. However, to the extent the plan incorporated procedures in its traditional school assignment process that separated students into racial categories in a manner that appeared completely unnecessary to accomplish its objectives, the plan violated the Equal Protection Clause. The Supreme Court subsequently issued a writ of certiorari for these cases. See the discussion above, pages ___ to ___.

2. *United States v. Fordice*, 674 F. Supp. 1523 (N.D. Miss. 1987), *rev'd and*

remanded, 893 F.2d 732 (5th Cir. 1990), *aff'd en banc*, 914 F.2d 676 (5th Cir. 1990), *vacated*, 505 U.S. 717 (1992).

FACTS - Petitioners appealed the judgment of the U.S. Court of Appeals for the Fifth Circuit, finding that respondents had abolished its de jure segregated public higher education system under the Equal Protection Clause of the U.S. Constitution¹⁷³ and the Civil Rights Act of 1964.¹⁷⁴ Petitioners, the United States along with other private parties, sought review of the appellate court's ruling that respondent state had met its affirmative duty to end de jure segregation of its public universities.

HOLDING - On appeal, the Court reversed, holding that the appellate court failed to apply the correct legal standard in making its determination. The burden of proof was on respondent to establish that it had disassembled its prior de jure segregated university system. From the trial court's findings of fact, it was clear that there were constitutionally suspect aspects of respondent's prior dual

¹⁷³ The Equal Protection Clause, U.S. Const. amend. XIV § 1 reads, "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

¹⁷⁴ The Civil Rights Act of 1964, 42 U.S.C.S. § 2000d reads, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

system that survived. Such aspects included: (1) different admissions standards, (2) widespread duplication of programs, (3) mission classifications of the institutions, and (4) leaving all institutions open. Even if the suspect aspects were on their face racially neutral, they still substantially restricted a student's choice, based upon race, as to which institution he entered. Therefore, respondent was required to justify or eliminate them.

3. *Board of Educ. v. Dowell*, 219 F. Supp. 427 (W.D. Okla 1963), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *rev'd and remanded*, 795 F.2d 1516 (10th Cir. 1986), *vacated*, 890 F.2d 1483 (10th Cir. 1989), *rev'd and remanded*, 498 U.S. 237 (1991).

FACTS - On writ of certiorari, petitioner appealed an order of the U.S. Court of Appeals for the Tenth Circuit reversing the dissolution of a decree that imposed a school desegregation plan. While the lower court agreed that the court-ordered desegregation should end, the dissolution was reversed on appeal.

HOLDING - The Supreme Court reversed and remanded the case. In remanding, the Court held that desegregation injunctions were not intended to operate in perpetuity. A desegregation decree could be dissolved after local authorities had operated in compliance with it for a reasonable period of time. A federal court's regulatory control of a school system was not to extend beyond the time required to remedy the effects of past discrimination. In deciding whether to

dissolve the decree, good faith compliance with the desegregation decree and a determination of whether the vestiges of past discrimination have been eliminated to the extent practicable are all relevant inquiries.

4. *Washington v. Seattle Sch. Dist. No. 1*, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd in part and rev'd in part*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).

FACTS - Appellant state sought review of an order from the U.S. Court of Appeals for the Ninth Circuit, which affirmed the judgment holding Initiative 350, of the Washington Rev. Code § 28A.26.010 unconstitutional and permanently enjoining the implementation of the initiative's restrictions. Initiative 350 provides that, "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student" ¹⁷⁵ Appellee school districts filed a suit against appellant state challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The district court held that the initiative was unconstitutional and permanently enjoined implementation of the initiative's

¹⁷⁵ See Wash. Rev. Code § 28A.26.010 (1981).

restrictions. On appeal, the state maintained that busing for integration was not a peculiarly racial issue.

HOLDING - The Court held that Initiative 350 created a constitutionally suspect racial classification and radically restructured the political process of the state by allowing a statewide majority to usurp traditional local authority over local school board educational policies. The Court held that the initiative was unconstitutional because it did not allocate governmental power on the basis of any general principle but instead used the racial nature of an issue to define the governmental decision making structure. The Court concluded that the reallocation of decision making authority imposed substantial and unique burdens on racial minorities.

5. *Estes v. Metropolitan Branches of Dallas NAACP*, 444 F.2d 124 (5th Cir. 1971), *aff'd in part and rev'd in part*, 517 F.2d 92 (5th Cir. 1975), *aff'd*, 572 F.2d 1010 (5th Cir. 1978), *cert. granted*, 440 U.S. 906 (1979), and *cert. dismissed*, 444 U.S. 437 (1980).

FACTS - The United States District Court for the Northern District of Texas ordered a number of steps to desegregate the Dallas school system. Appellants sought review by the United States Court of Appeals for the Fifth Circuit challenging a student assignment portion of the district court's order. In consolidated appeals, appellants claimed that the student assignment plan could not

pass constitutional muster because of the large number of one-race schools it established.

HOLDING - On its first review, in 1971, the Fifth Circuit vacated the denial of plaintiff's motion for a preliminary injunction and remanded the case for findings of fact and conclusions of law in light of the Supreme Court holding in *Swann v. Charlotte-Mecklenburg Board of Education*.¹⁷⁶ In the second review, held in 1975, the Fifth Circuit remanded the case to the district court for the formulation of a new student assignment plan. The court noted that findings were required to justify the maintenance of any one-race schools that would be a part of the plan. The Supreme Court granted certiorari but subsequently dismissed the writ of certiorari as improvidently granted, and thereby left standing the ruling of the Court of Appeals.

6. *Austin Independent School Dist. v. U.S.*, 467 F.2d 848 (5th Cir. 1972), vacated, 429 U.S. 990 (1976).¹⁷⁷

FACTS - Appellants, the United States government and several black and Mexican-American intervenors, challenged a decision from the U.S. District Court

¹⁷⁶ 402 U.S. 1, 91 S. Ct. 1267, 28 L.Ed.2d 554.

¹⁷⁷ Case remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976).

for the Western District of Texas upholding the student assignment policies of appellees, Austin Independent School District, in a school desegregation action claiming denial of the equal protection of the law.

HOLDING - The court held that educational facilities segregated on the basis of race were inherently unequal. To establish a prima facie case of unlawful school segregation, the plaintiffs had to prove that: (1) there was segregation in public schools, (2) that state officials had taken certain actions with segregative intent, and (3) that the present segregated system was a result of that action. The court held that appellees intended, by the continued use of a neighborhood assignment policy, to maintain segregated schools. Appellees argued that segregation resulted from preexisting residential patterns and not from segregative motives. The court held that appellees could not constitutionally use a neighborhood assignment policy that created segregated schools in a district with ethnically segregated residential patterns. A segregated school system was the foreseeable result of such policy. The Supreme Court subsequently granted certiorari and then remanded the case in light of *Washington v. Davis*, 426 U.S. 229 (1976).

7. *Milliken v. Bradley*, 433 F.2d 897 (6th Cir. 1970), *aff'd in part and vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

FACTS - Respondents, a class of Detroit school children and resident parents, filed an action against petitioners, various state and local officials, which sought the implementation of a desegregation plan in Detroit schools. The U.S. Court of Appeals for the Sixth Circuit affirmed the decision, ordering the implementation of a plan that involved both suburban and metropolitan school districts. Petitioners appealed the decision. At trial, the district court found that governmental actions at all levels had converged to create and maintain a pattern of residential segregation throughout the city of Detroit. Accordingly, the trial court ordered the implementation of a cross-district school desegregation plan in order to truly integrate the school systems. The appellate court affirmed the order. The court stated that a federal remedial power could be exercised only on the basis of a constitutional violation and the nature of the violation would determine the scope of the remedy. The court further found that before the boundaries of separate and autonomous school districts could be set aside by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation.

HOLDING - The judgment of the lower court was reversed and the case was remanded for further proceedings, including the formulation of a decree directed at eliminating the segregation found to exist in the Detroit city schools without using suburban districts in the plan.

8. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

FACTS - This case involved school children in the city of Charlotte and the surrounding Mecklenburg County, North Carolina. In 1969, two-thirds of African American children attended schools that were totally or almost totally African American. A North Carolina statute prohibited busing to achieve desegregation.¹⁷⁸ The primary issue before the Supreme Court was pupil assignment in achieving a unitary school system.

HOLDING - The Supreme Court held that courts could order a number of steps to achieve a unitary school system, including busing. To forbid all assignments made on the basis of race deprived school authorities of a device

¹⁷⁸ N. C. Gen. Stat. § 115-176.1 (Supp. 1969) ("No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited, and public funds shall not be used for any such busing").

essential to fulfillment of their constitutional obligation to eliminate existing dual school systems. The Court concluded that bus transportation had long been an integral part of all public educational systems, and it was unlikely that a truly effective remedy was possible without continued reliance upon it.

9. *United States v. Montgomery County Bd. of Education*, 289 F. Supp. 647 (M.D. Ala. 1968), *rev'd*, 395 U.S. 225 (1969).

FACTS - On certiorari, the U.S. Court of Appeals for the Fifth Circuit considered an appeal by petitioners, African American students and their parents, from an order by which the appellate court modified the trial court's order requiring respondent school board to desegregate the faculty and staff in its schools. The order required the school board to begin integrating the faculty and staff within a fixed time. Based on the mandate of earlier desegregation cases and the school board's failure to make adequate progress toward achieving the desegregation of its faculty and staff, the trial court entered an order by which the school board was required to take specific steps toward desegregation. The order set forth a schedule within which the school board was required to make immediate changes in the ratio of minority and non-minority teachers at each of its schools. The goal of the order was to make the ratio of minority to non-minority staff and faculty the same in each school as it was within the entire district. The court of appeals modified the trial

court's order to the extent that it required the use of fixed mathematical ratios to require only substantial compliance with the ratios.

HOLDING - On further review, the court reversed, with directions to affirm the trial court's order. The court reasoned, based on the five-year history of the litigation, that the trial court did not intend to impose a totally rigid and inflexible schedule and that the specific and expeditious order of the trial court was appropriate under the circumstances.

10. *Monroe v. Board of Comm'rs*, 269 F. Supp. 758 (W.D. Tenn. 1965), *remanded*, 380 F.2d 955 (6th Cir. 1967), *vacated*, 391 U.S. 450 (1968).

FACTS - Petitioners, African-American students, filed an application for a writ of certiorari seeking review of a judgment of the U.S. Court of Appeals for the Sixth Circuit, which affirmed in part a decision of the district court in favor of respondent, a city board of commissioners, in the students' action challenging the school board's modified desegregation plan with regard to the three junior high schools in the school district. The students filed a complaint seeking a declaratory judgment that the board was operating a compulsory racially segregated school system. The district court ordered the board to enroll the students in the schools in question and directed it to formulate a desegregation plan. The plan submitted was approved after modifications. The plan called for school zones drawn along geographic lines and for free transfers of students. Subsequently, the students filed

a petition for further relief. The district court found that the plan was administered in a discriminatory fashion as to the elementary schools. However, it found that the students failed to show that the proposed junior high school attendance zones were gerrymandered or that a feeder system was necessary. The court of appeals affirmed except on the issue of faculty desegregation.

HOLDING - On certiorari, the Court found the plan to be clearly inadequate. The plan did not meet the board's affirmative duty to take whatever steps were necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The "free transfer" option lent itself to perpetuation of segregation. The case was remanded for further proceedings.

11. *Raney v. Bd. of Educ.*, 381 F.2d 252 (8th Cir. 1967), *rev'd and remanded*, 391 U.S. 443 (1968).

FACTS - Plaintiff students filed an action against defendant school board, in part seeking injunctive relief from the school board's continued maintenance of an alleged racially-segregated school system. The district court denied all relief and dismissed the complaint. On review, the U.S. Court of Appeals for the Eighth Circuit entered a judgment affirming the dismissal. The students petitioned for certiorari. During the first year of the school board's plan to allow any students to attend formerly segregated schools, the number of children applying for enrollment in certain grades at a formerly all-white school exceeded the number

of places available. As a result, the applications of 28 minority children were refused. The suit was then filed on behalf of 16 of the students and others similarly situated. The district court dismissed the suit, and the court of appeals held, in agreement with the district court, that it found no substantial evidence to support a finding that the school board was not proceeding to carry out the plan in good faith.

HOLDING - The Court reversed the judgment of the court of appeals and held that the school board's plan was inadequate to convert to a unitary, non-racial school system and that, under the circumstances, the district court's dismissal of the complaint was an improper exercise of discretion. The Court remanded the action to the district court.

12. *Green v. County Sch. Board*, 382 F.2d 338 (4th Cir. 1967), *vacated*, 391 U.S. 430 (1968).

FACTS - Petitioner parents filed an action against respondent school board and alleged that it had not complied with judicial orders to desegregate the school system. The U.S. Court of Appeals for the Fourth Circuit affirmed a decision of the trial court that denied an injunction based on the board's subsequent adoption of a freedom-of-choice plan. The parents challenged the decision and asserted that desegregation still had not occurred. The parents maintained that the board had not taken appropriate steps to desegregate the school because no white child had chosen to go to the traditionally all-black school and only 15 percent of the

black children attended the traditionally all-white school. The parents asserted that better options were available that would affirmatively cause integration.

HOLDING - The court reversed the decision and held that the board's freedom-of-choice plan could not be accepted as a sufficient step to effectuate a transition to a unitary system. In the three years that the plan had been in place during the appeals, virtually no integration had occurred. Rather than affirmatively dismantling the old dual system, the plan placed the burden of integration on the parents. The court ordered the board to adopt steps to convert promptly to a system without a segregated school. It was incumbent on the board to establish that any proposed plan promise meaningful and immediate progress toward disestablishing state-imposed segregation.

13. *Cooper v. Aaron*, 163 F. Supp. 13 (E.D. 1958), *rev'd*, 257 F.2d 33 (8th Cir. 1958), *aff'd*, 358 U.S. 1 (1958).

FACTS - Petitioners, the Little Rock School Board and School Superintendent, asked a district court to postpone their program for desegregation mandated by the *Brown v. Board of Education* decision because of great difficulties in implementing the program. The district court granted the requested relief but the United States Court of Appeals for the Eighth Circuit reversed. Certiorari was granted to review this judgment. The school authorities claimed that while they made good faith efforts to implement the desegregation program, the Governor and

Legislature of Arkansas resisted the program and enacted laws and took other actions to make implementation impossible.

HOLDING - The Court affirmed the judgment of the appellate court that required the desegregation program to proceed. The prohibitions of the Fourteenth Amendment extend to all actions of a state that deny the equal protection of the laws whatever the agency of the state taking the action, or whatever the guise in which it was taken.¹⁷⁹ Moreover, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color could neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation. Finally, the Court noted that the Constitution was the supreme law of the land. No state legislator or executive or judicial officer could war against the Constitution without violating his undertaking to support it.

D. CAMPAIGN FOR FISCAL EQUITY

1. Denial of Summary Judgment - The 1995 Case

Article XI, § 1 of the New York State Constitution reads, “The legislature shall provide for the maintenance and support of a system of free common schools,

¹⁷⁹ The school authorities were in fact agents of the State of Arkansas.

wherein all the children of this state may be educated.” The Court of Appeals has interpreted this language to guarantee a basic education, but not an equal or uniform education, across the state.

In a 1995 decision, the Court of Appeals kept alive a suit brought by the Campaign for Fiscal Equity by denying a motion for summary judgment. In *Campaign for Fiscal Equity v. State of New York*,¹⁸⁰ plaintiffs, the Campaign for Fiscal Equity, various New York City school districts, and individual students, brought suit against the state for approving an educational fund allocation scheme which they alleged violated both the state and federal constitutions as well as Title VI of the Civil Rights Act of 1964.¹⁸¹ The Court of Appeals held that the plaintiffs had stated causes of action under both the State Constitution Education Clause and Title VI’s implementing regulations. It dismissed the complaint on federal Equal Protection grounds and straight Title VI grounds.¹⁸²

The state constitutional claim turned on distinguishing the facts pleaded in the Campaign for Fiscal Equity case from the case of *Board of Education*,

¹⁸⁰ 86 N.Y.2d 307 (1995)

¹⁸¹ Id. at 312-13.

¹⁸² Campaign for Fiscal Equity, 86 N.Y.2d 307.

Levittown Union Free School District v. Nyquist, decided some thirteen years earlier.¹⁸³ In *Levittown*, plaintiffs alleged that localizing fundraising for public schools throughout the state resulted in lesser educational facilities and opportunities for people in property-poor communities than in wealthy ones. This, it was claimed, violated Article XI, § 1, the Education Clause of the New York Constitution.¹⁸⁴ The court dismissed the claim in *Levittown* because, in its opinion, the Education Clause required a minimum standard of state-wide public education which must be universally available; however, any disparities above this minimum are acceptable. Thus, the fact that some school districts were much better equipped than others was perfectly fine so long as the less wealthy districts had schools that provided “a sound basic education.”¹⁸⁵ In *Campaign for Fiscal Equity*, the Court of Appeals distinguished *Levittown* by noting that here, the plaintiffs alleged not a mere disparity in otherwise constitutionally acceptable education facilities, but rather that the disparities in school funding actually rendered the under-funded schools below the bare constitutional minimum. Because plaintiffs alleged that they

¹⁸³ 57 N.Y.2d 27 (1982).

¹⁸⁴ Campaign for Fiscal Equity, 86 N.Y.2d 307 at 314-15.

¹⁸⁵ Levittown, 57 N.Y.2d 27 at 48.

were not even afforded access to a “sound basic education,” their cause of action survived.¹⁸⁶

It is notable that the court set a relatively low bar for the minimum educational facilities required in this decision. The court determined that the legislature’s purpose in mandating education was to equip every citizen with the skills necessary for civic participation, most notably voting and jury service. Thus, only “light, space, heat,...air...desks, chairs, pencils,...reasonably current textbooks...[and] teaching of reasonably up to date basic curricula...by sufficient personnel adequately trained....”satisfy the constitutional mandate.¹⁸⁷ The court also went out of its way to note that “aspirational goals” set by the state’s own Board of Regents, as well as achievement in standard competence examinations could prove dangerous in assessing whether the education provided was adequate because these were often targets above what is necessary and could be affected by many factors.¹⁸⁸ While the court sustained the claim against a motion to dismiss, the floor for constitutional compliance was set low and seemed to set the stage for acceptance of public education in many school districts that would commonly be

¹⁸⁶ Campaign for Fiscal Equity, 86 N.Y.2d at 315-19.

¹⁸⁷ Id. at 317.

¹⁸⁸ Id.

considered far from “competitive” or even “decent” as those terms are commonly used.

In addition to sustaining the state claim, the court dismissed the federal Equal Protection claim on the ground that education had been found by the U.S. Supreme Court not to be a fundamental right. Thus, the state interest in “the preservation and promotion of local control of education” passed rational basis muster for the state’s funding system.¹⁸⁹

Likewise, the court dismissed the Title VI claim on the ground that such a claim requires a showing of discriminatory intent, which was not alleged in this case.¹⁹⁰ However, the claim alleging a violation of the Title VI implementing regulations did not require a showing of discriminatory intent, but rather just one of disproportionate impact. This was satisfied by plaintiffs’ pleadings as the vast majority of New York State’s racial and ethnic minorities attended the lesser funded New York City Schools.¹⁹¹ Pursuant to these holdings, the court remanded the case for trial on the surviving causes of action.

¹⁸⁹ Id. at 319-20 (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 959 (1973)).

¹⁹⁰ Id. at 321.

¹⁹¹ Id. at 322-24.

2. THE 2003 Ruling

Following the remand and trial, as well as an intermediate appeal, the Court of Appeals finally settled the constitutionality issue in *Campaign for Fiscal Equity v. State of New York* in 2003.¹⁹² By this time, the United States Supreme Court decision in *Alexander v. Sandoval*¹⁹³ had altered Title VI jurisprudence, foreclosing the plaintiffs' Title VI implementing regulations claim, which had initially survived summary judgment.¹⁹⁴

In an opinion devoted to an evaluation of the evidence presented at trial, Chief Judge Kaye reversed the Appellate Division and reinstated the trial court's ruling in holding that the plaintiffs had shown both that New York City public schools did not provide even the bare minimum education called for by the state constitution as interpreted by their first *Campaign for Fiscal Equity* decision, and that plaintiffs had proven a link between the disparate funding which the state scheme produced and the sub-par education.¹⁹⁵ The court also pointed out that the

¹⁹² 100 N.Y.2d 893 (2003).

¹⁹³ 532 U.S. 75 (2001).

¹⁹⁴ Campaign for Fiscal Equity, 100 N.Y.2d at 903.

¹⁹⁵ Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893.

disparity in education overwhelmingly affects the state's minority student population, which is heavily concentrated in New York City schools.¹⁹⁶

After considering everything from student drop-out rates and standardized testing scores to outdated computers, leaking roofs, and excessive class sizes, the court flatly rejected both the Appellate Division's and the State's reasoning and determined that the current system had to be remedied¹⁹⁷ While it noted that programs such as "No Child Left Behind" had recently been enacted and showed promise, the court stressed that it had to act on the facts of the particular case before it, and could not allow optimistic speculation to avert the task of rectifying the educational shortcomings. The court ultimately remanded the case so that the trial court could fashion a remedy under different guidelines than it had originally adopted, specifically limiting the remedy to requiring the state to determine the costs of providing a complete education to every New York City

¹⁹⁶ Id. at 904.

¹⁹⁷ Of specific note is that the Appellate Division, First Department had decided that the bare minimum education required by the state constitution was of an eighth grade level that would allow citizens to understand typical pattern jury instructions. The Court of Appeals, considering the economic and societal demands of the twenty-first century, held that a full high-school education was mandated by the constitution. Id. at 906.

student and to implement measures to provide those funds as well as monitor the process to ensure success.¹⁹⁸

3. Campaign for Fiscal Equity, Inc. v. State of New York Following Remand and Failure of the Legislature to Act

The Supreme Court of New York, in an order dated August 3, 2004, appointed referees to hear, report, and make recommendations with respect to the matters before the court. Such matters focused primarily on the resources necessary to provide New York City school-children with the opportunity to receive a sound basic education as has been mandated by previous litigation. Appointed referees reported such recommendations on November 30, 2004. Plaintiffs moved to take all actions recommended by the report and defendants moved to modify in part and reject in part the recommendations.

The trial court granted the plaintiffs' motion to confirm the report of the referees which included the following findings and conclusions. First, defendants were directed to take necessary measures to implement an operational funding plan to provide the New York City School District with additional funding for operations over the next four years.¹⁹⁹ Operational funding does not include transportation

¹⁹⁸ Id. at 929-931.

¹⁹⁹ Recommended funding over current funding levels:

(Cont'd on following page)

costs and should increase throughout the years.²⁰⁰ Additionally, defendants were directed to perform costing-out studies every four years in order to determine that the district is providing a sound basic education for all students.²⁰¹ These studies would be used to ensure that there is no disparity between the amount of funding needed and that provided. Funding for capital improvements should be implemented over five years beginning in July, 2005 and totaling approximately \$9.179 billion. A facilities study should be implemented every five years to ensure that all school facilities create environments conducive to learning. Lastly, the New York City Department of Education was directed to develop a sound basic education plan detailing future measures and reforms which could be taken in order to provide the opportunity for a sound, basic education. A report of such measures

(Cont'd from preceding page)

Year 1 (7/1/05 - 6/30/06)	\$1.41 billion
Year 2 (7/1/06 - 6/30/07)	\$2.82 billion
Year 3 (7/1/07 - 6/30/08)	\$4.22 billion
Year 4 (7/1/08 - 6/30/09)	\$5.63 billion

²⁰⁰ Additional funding will need to be adjusted for inflation.

²⁰¹ Costing-out studies are used to determine the costs of providing a sound basic education by using various methodologies. "Professional judgment panels" question employees of the district about resources needed and determine the cost of such, while the "successful school district" methodology looks to successful districts that are in the same geographical area or are similarly situated to determine how much funding is needed in such districts and apply this formula to the district in question.

should be made annually and would provide information used to evaluate the progress made by the Department of Education.

In *Campaign for Fiscal Equity, Inc. v. State of New York*, 814 N.Y.S.2d 1 (App. Div. 2006), the Appellate Division found that the State must appropriate a constitutionally-required amount of funding to New York City public schools in its upcoming budget, beginning on April 1, 2006. This funding must be sufficient to provide the opportunity for a sound, basic education for New York City public school students. The court established that, based on the record, a range from \$4.7 billion to \$5.63 billion in additional annual funding would be sufficient to meet this constitutional burden. However, the court declined to determine the exact amount necessary and found that this was a matter for the Governor and the legislature. To determine the exact amount of funding necessary would be to usurp the power of both the Governor and the State Legislature and would consequently produce a separation of powers dilemma between the branches of government.²⁰²

²⁰² Judge Saxe's dissent focuses on his disagreement with this point. He advocates upholding the referees' findings and giving an affirmative direction that defendants allocate specified funding to the school district in the upcoming budget. It is his belief that without a clear directive, there is no remedy, and therefore, that the decision by the Supreme Court should be fully affirmed. This is an appropriate step for the court to take because 1) there has been a constitutional violation, and 2) both the Governor and the Legislature have shown, by their previous inaction, that a remedy will not be enacted without a court directive.

The court went on to state that the additional funding implemented within the newly verified constitutional range should be provided within a four-year phase-in period. The court rejected the proposition by the defendants that the district's capital needs should be based on a project-by-project basis coupled with some methods of accountability. In conclusion, the court directed that the defendants act expeditiously to enact a budget providing the New York City School District with adequate funding to provide students the opportunity to receive a sound basic education. This entails additional expenditures for the New York City School District between the amounts of \$4.7 billion and \$5.63 billion to be phased in over four years and a capital improvement plan that exceeds \$9.179 billion to be distributed over five years or is otherwise constitutional.

4. The 2006 Ruling

In *Campaign for Fiscal Equity, Inc. v. State of NY*, 861 N.E.2d 50 (N.Y. 2006), the Court of Appeals decided, in the final case of the *CFE* litigation, that an additional \$1.93 billion in operating funds was necessary and sufficient to provide a constitutional level of education. This was the amount proposed by the State in 2004. The New York Court of Appeals concluded that because this amount of funding is reasonable, the State's findings and conclusions deserve deference from the court. This deference is owed to the State because this is an area of policymaking and education finance within the state's budget plan.

The Supreme Court erred in attempting to determine the optimal method to calculate the cost of providing a constitutionally sound education. Instead, it was the duty of the Supreme Court to determine whether the state's proposal was rational. The Supreme Court should not have commissioned the referees to make determinations based on their own findings but should have rather analyzed whether the amount of funding found to be adequate by the State was rational.

The Appellate Division neglected to analyze whether the state plan of an additional \$1.93 billion in operating costs could be within its determined constitutional range based on its rationality. This omission was in error. Additionally, due to recent legislation designed to rectify the inadequacies in New York City public school facilities, the court found that the mandate of an additional \$9.179 billion, to be distributed over five years for capital improvements, was unnecessary.

The State commissioned Standard and Poor's to undertake the rigors of determining the amount of additional funding necessary to provide New York school children with a sound basic education. Among many figures and calculations produced by S&P was the \$1.93 billion figure. Though the standard of measuring a successful district, the additional funding required to fulfill the needs of students

with special educational needs, the use of a cost filter,²⁰³ and the manner of attaining costs particular to New York City have all been questioned, they were all ascertained using mathematical principles and established practices.²⁰⁴

CONCLUSIONS OF THE EDUCATION CHAPTER

Justice Breyer's dissent in *Parents Involved in Community Schools v. Seattle School District No. 1* ends with an overall assessment of race and education almost fifty years after Governor Faubus of Arkansas, in 1957, attempted to prevent the desegregation of Central High School in Little Rock, Arkansas by using the Arkansas National Guard. That assessment is appropriate here.

Finally, what of the hope and promise of *Brown*? For much of this Nation's history, the races remained divided. It was not long ago that people of

²⁰³ The "cost effectiveness filter" took into account neighboring school districts determined to be successful and then analyzed the amount of money such districts spent. This would then be converted to relate to New York schools by considering the number of students, faculty, administration, facilities, students with special needs, etc. in relation to New York. The top 50% of spending districts would then be eliminated from the determination, relying on the assumption that if other schools were successful with such funding, the top 50% were over spending. The bottom 50% of successful districts were analyzed when looking into how much additional funding was needed for New York schools.

²⁰⁴ Chief Judge Kaye in her dissent takes particular issue with the methods used in coming to the conclusions regarding these four factors. She additionally does not believe that deference is owed to the state because there has been no state budget plan in order to bring the schools into constitutional compliance. Because the legislature and the executive were at odds with one another, no remedial actions occurred.

different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality -- not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. See *Cooper v. Aaron*, 358 U. S., 1; 78 S. Ct. 1401, 3 L. Ed.2d 5 (1958). Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate plans under review is to threaten the promise of *Brown*. The plurality's position, I fear,

would break that promise. This is a decision that the Court and the Nation will come to regret.²⁰⁵

²⁰⁵

127 S. Ct. 2836-2837.

CHAPTER II. JUVENILE JUSTICE

INTRODUCTION

This section deals with juveniles in the criminal justice system in New York State and the nation. Thousands of juveniles, especially minority youth, do not receive the necessary support and guidance needed to make them productive citizens. Because of this, too many juveniles are encountering the criminal justice system. This section will detail some of the results of this lack of guidance, discuss some programs designed to give guidance, and make some recommendations for the future.

Juvenile delinquents, juvenile offenders, and youthful offenders constitute the juvenile population that comes into contact with the State's juvenile justice system. Juvenile delinquents are persons over seven and less than sixteen years of age who have committed an act that would constitute a crime if committed by an adult.²⁰⁶ Under the Juvenile Offender Act, persons thirteen years of age accused of murder may be criminally responsible and treated as adults, and persons fourteen and fifteen years of age accused of murder and other felonies may be held

²⁰⁶ **See N.Y. Fam. Ct. Act § 301.2(1) (McKinney 2007).**

criminally responsible and also treated as adults. These persons are designated juvenile offenders.²⁰⁷ Since juvenile offenders may be held criminally responsible for their actions, their cases begin in the criminal courts where adult cases are dealt with. Under certain circumstances, juvenile offenders can have their cases transferred to the Family Court. Youthful offenders are persons over sixteen and less than nineteen years of age, originally charged with and convicted of a crime, who can have their criminal convictions replaced with youthful offender adjudications.²⁰⁸ Neither juvenile delinquents nor youthful offenders receive criminal records.

First, the adjudication process will be discussed. A primary focus will be the extent of disproportionate minority contacts in New York State with the juvenile justice system and how disproportionate minority contacts impact minority children and the State as a whole. Details will include pre-arrest and prevention programs, programs available to juveniles during detention, alternatives to detention and related financial and recidivism considerations, as well as programs to reduce

²⁰⁷ See N.Y. Penal Law § 30.00(2) (2006); N.Y. Crim. Proc. Law § 10.00(18) (2006).

²⁰⁸ See N.Y. Crim. Proc. Law § 720.10(1-2) (2006).

juvenile contact with the criminal justice system and the efforts to combat the influence of gangs in New York State.

A. THE PROBLEM IN DETAIL

1. Existing Detention Issues

Despite the programs in place to expedite the process of moving children through New York State's juvenile justice system and back into their communities, the traditional detention practices that the State relies on do not satisfy the purposes of the system. The cost to the State of detaining children exceeds the cost of implementing Alternative-to-Detention (sometimes "ATD") programs. Furthermore, ATD programs result in lower recidivism rates than traditional detention. One reason for the comparative success of ATD programs is the failure of the Office of Children and Family Services (sometimes "OCFS"), the state agency responsible for the incarceration or placement of children, to adequately meet the needs of the children detained in its facilities.

ATD programs are much more effective in treating children's needs and preventing future crime. These programs generally have recidivism rates lower than 20%. For example, the Urban Youth Alliance's Bronx Connect program has a

recidivism rate of 17%.²⁰⁹ Recidivism rates for both the DOME Project²¹⁰ and the Center for Community Alternatives are lower than 10%.²¹¹ Furthermore, the Center for Alternative Sentencing and Employment Services, Inc. (sometimes "CASES") has a Court Employment Project (sometimes "CEP")-ATD program in which only 20% of participants receive new convictions within two years after completing the program.²¹²

Localities, however, continue to confine children in locked facilities because less restrictive options are often not available and disincentives exist that prevent development of such alternatives. Localities receive state reimbursement for the operation of detention facilities and placement of children, as the State must cover 50% of the cost of detention locally or at an OCFS facility.²¹³ These

²⁰⁹ Correctional Ass'n of N.Y., Youth Confined in OCFS Facilities 2 (2006), available at <http://correctionalassociation.org/JJP/publications/youth-in-OCFS-pdf>.

²¹⁰ The Dome Project, Juvenile Justice Program, http://www.domeproject.org/programs_jj.html.

²¹¹ Center for Community Alternatives Innovative Solutions for Justice, Accomplishments, http://www.communityalternatives.org/about_cca/accomplishments.html.

²¹² Joel Copperman et al., "Community-Based Sentencing Demonstrates Low Recidivism Among Felony-Level Offenders", 8 Offender Programs Rep.: Soc. & Behavioral Rehabilitation in Prisons, Jails and the Community 17, 29 (2004).

²¹³ N.Y. Exec. Law § 530 (2006).

reimbursements provide a disincentive to developing community-based alternatives to detention.

2. Financial Considerations

Each year, the State spends nearly \$150 million, to confine children in detention facilities.²¹⁴ In 2006, it cost over \$170,000 to incarcerate one child in a secure detention facility for a year,²¹⁵ Alternative to Detention programs typically are more cost-effective and can save New York State and New York City considerable amounts in budgetary expenditures. However, in 2006, the Department of Probation closed the only available ATD program for children awaiting Family Court sentencing.²¹⁶ despite the fact that the ATD program cost a fraction of what it costs to put a child in detention - only \$42 per child per day compared to \$410 per child per day - or about \$150,000 per year.²¹⁷

A 2006 study by the New York City Independent Budget Office highlights the opportunity for savings presented by ATD programs. The study estimated that

²¹⁴ The Correctional Ass'n of N.Y., Youth Confined in OCFS Facilities 1 (2006), available at <http://correctionalassociation.org/JJP/publications/youth-in-OCFS-pdf>.

²¹⁵ Correctional Ass'n of N.Y., Juvenile Detention in New York City 1 (2006), available at <http://correctionalassociation.org/JJP/publications/detention-fact-2005.pdf>.

²¹⁶ Id. at 2.

²¹⁷ Id.

two ATD programs, Esperanza and the Department of Probation's Enhanced Supervision Program ("ESP"), would save New York City nearly \$5 million by the end of 2006 compared to the cost of incarceration.²¹⁸ The ESP program costs less than \$5,000 per child per year, and the Esperanza program costs less than \$15,000.²¹⁹ In comparison, the City spends about \$75,000 per child each year to place children in OCFS detention facilities.²²⁰

3. Recidivism Rates

Studies consistently show that the detention-based juvenile justice system fails to rehabilitate children. Recidivism rates, the percentage of children that commit new crimes leading to arrest after completing the original sentence, are substantially higher for detained children than those in ATD programs.

A 1999 study determined that 81% of male children and 45% of female children released from detention were rearrested within 36 months.²²¹ This

²¹⁸ N.Y. City Indep. Budget Office, Inside the Budget, No. 148, 3 (2006), available at <http://www.ibo.nyc.ny.us/newsfax/Insidethebudget148.pdf>.

²¹⁹ Id.

²²⁰ Id.

²²¹ Bruce Frederick, N.Y. State Division Crim. Just. Services, Factors Contributing to Recidivism Among Youth Placed with the New York State Division for Youth, 5 (1999).

correlates to a 75% total recidivism rate within three years of release.²²² In addition, 62% of children released from detention had at least one subsequent arrest lead to a conviction.²²³ Moreover, 43% of children released from the Department of Juvenile Justice (DJJ) facilities in 2006 were readmitted later that same year.²²⁴

4. Insufficient Treatment

Many of the detained children have special needs, which places the burden on the Office of Children and Family Services to provide treatment and other services as a part of the rehabilitation process. These special needs include drug treatment and counseling, special education, and mental health services. In 2005, the Office of Children and Family Services identified 59% of children in its custody as having substance abuse problems.²²⁵ That same year 15% required special education.²²⁶ OCFS further determined that 41% needed mental health

²²² **Id.**

²²³ **Id.**

²²⁴ Correctional Ass'n of N.Y., **Juvenile Detention in New York City 2** (2006), available at <http://correctionalassociation.org/JJP/publications/detention-fact-2005.pdf>.

²²⁵ New York State Office of Children and Family Services, **2005 Annual Report Division of Rehabilitative Services** 11 (2005).

²²⁶ **Id.**

services.²²⁷ Ideally, OCFS should provide numerous treatment services to achieve any measure of success in rehabilitating the children in its custody prior to their return to their communities. State law also requires OCFS to provide certain services within a specified timetable.

A 2000 audit by the New York State Comptroller revealed that children in the custody of OCFS do not receive some mandated treatment, counseling, and aftercare services.²²⁸ The audit discovered that provision of services is often incomplete and that OCFS does not always provide the minimum required services.²²⁹ Moreover, OCFS failed to perform initial assessments of need for all children in its custody and failed to maintain critical treatment records.²³⁰ One important consideration for determining the appropriate punishment and rehabilitation program for children who commit offenses is the nature of the offense. More than half of the children entering OCFS custody in both 2004 and

²²⁷ Id.

²²⁸ State of N.Y. Off. of the State Comptroller, Div. of Mgmt. Audit & State Fin. Servs., Report 97-S-5, Office of Children and Family Services: Identifying and Treating Youth Needs (2000).

²²⁹ Id. at 5

²³⁰ Id.

2005 were charged with or convicted of non-violent offenses.²³¹ Furthermore, of the children entering secure detention facilities in 2006, 91% were juvenile delinquents as opposed to juvenile offender or youth offender status that generally applies to more serious crimes.²³² The non-violent nature of the offenses that most children in OCFS custody commit suggests that detention may be counterproductive to rehabilitation and unnecessary for public safety.

Additionally, OCFS workers failed to meet with parents, employers, and school officials as often as required in aftercare and to ensure and monitor each child's attendance in school, work, and therapy programs.²³³ This substantial failure by OCFS to provide mandated necessary services leads to significant obstacles for these youngsters upon their return to school and when they try to obtain employment.

²³¹ Correctional Ass'n of N.Y., Juvenile Detention in New York City 2 (2006), available at http://correctionalassociation.org/JJP/publications/detention_fact_2005.pdf; Correctional Ass'n of N.Y., Youth Confined in OCFS Facilities 1 (2006), available at http://correctionalassociation.org/JJP/publications/Youth_In_Ocfs.pdf.

²³² Correctional Ass'n of N.Y., Juvenile Detention in New York City 2 (2006), available at http://correctionalassociation.org/JJP/publications/detention_fact_2005.pdf.

²³³ Id. at 15-16.

5. Unemployment

Employment and the lack thereof are crucial to the advancement of minority youth in American society. The realization that unemployment for African American and Hispanic males is an issue that needs to be addressed is too often given only lip service. Unemployment for African Americans in virtually every age group is twice that of white Americans.²³⁴

6. The Effectiveness of Alternative to Detention Programs

The primary goals of Alternative To Detention programs are to provide individualized case management and to keep children connected to their families and communities.²³⁵ This approach, as opposed to detention, truly focuses on effective rehabilitation by using the best resources available to help children believe in themselves. ATD programs ensure that the children appear in court, and monitor each child's compliance with orders, attendance at educational programs, and changes in treatment needs with individualized attention that OCFS lacks the resources to provide on its own.

²³⁴ National Urban League, The State of Black America 2007, 210.

²³⁵ The programs listed here are not intended to be comprehensive.

The CEP program of the Center for Alternative Sentencing and Employment Services, Inc. ("CASES") is an alternative to detention for teenaged felony offenders.²³⁶ The central feature of the program is a youth development model that focuses on each child's skills rather than deficiencies.²³⁷ Children who participate in the program plan their own programs and receive a case coordinator to assist in reaching the goals set.²³⁸ CASES workers first screen and interview children for admission into the CEP program.²³⁹ The staff regularly reports to the court and makes sure that children understand their obligations to the court.²⁴⁰ In addition, the staff creates a daily schedule for each participating child based on needs and the child's self-prepared plan.²⁴¹

Other ATD programs provide similar services as well as advocacy for children in Family Court. The Center for Community Alternatives provides court

²³⁶ Cases, Youth Programs: Overview, http://www.cases.org/youth_oview.html.

²³⁷ Id.

²³⁸ Cases, Youth Programs: Court Employment Project, http://www.cases.org/cep_sub.html.

²³⁹ Cases, Youth Programs: Court Services http://www.cases.org/cep_courtsub1.html.

²⁴⁰ Id.

²⁴¹ Cases, Youth Programs: Services and Activities for Participants, http://www.cases.org/cep_subyouth1.html.

advocacy and services if approved by the court.²⁴² These services are individualized and include monitoring curfews and school attendance and performance, tutoring, random urinalysis testing for substance abuse, AIDS prevention education, counseling, and referrals to available community-based services.²⁴³ The DOME Project also has an ATD program that provides court advocacy; individual, group, and family counseling; and assistance with placement to receive education, vocational, mental health, and substance abuse services.²⁴⁴

New York State and New York City officials work in conjunction with the Vera Institute of Justice to administer an ATD program called Esperanza that focuses on family-based rehabilitation.²⁴⁵ The enrolled children live at home, and staff assist the children and their families in setting and achieving individualized goals and providing individual and family counseling.²⁴⁶ The field staff provides

²⁴² Center for Community Alternatives: Innovative Solutions for Justice, New York City Youth Advocacy Services, http://www.communityalternatives.org/programs/youth_nyc/nyc.html.

²⁴³ Id.

²⁴⁴ The Dome Project, Juvenile Justice Program http://www.domeproject.org/programs_jj.html.

²⁴⁵ Vera Institute of Justice, Esperanza/Hope, <http://www.vera.org> (follow “Youth Justice – Esperanza: Home-Based Placement” hyperlink).

²⁴⁶ Id.

services in each child's home rather than at a central location.²⁴⁷ Furthermore, the staff helps parents "develop a system of graduated sanctions to insure quick and appropriate responses to truancy, a broken curfew, and other lapses . . . that teaches youngsters that their actions have consequences and encourages them to resist delinquent behavior."²⁴⁸ Esperanza also uses positive reinforcement when a child's behavior improves.²⁴⁹

The Esperanza program is a short, intensive program lasting four to six months.²⁵⁰ A Family Court judge sends a child to the program "either as part of a conditional discharge or in conjunction with probation."²⁵¹ Staff members provide monthly progress updates to probation officers or the court.²⁵² During the first two to four weeks of the program, counselors meet with the child and family almost daily to identify needs, set goals, create house rules, and create the graduated

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ N.Y. City Indep. Budget Office, Inside the Budget No. 148, 2 (2006), available at <http://www/ibo.nyc.ny.us/newsfax/insidethebudget148.pdf>.

²⁵² Id.

sanction and rewards plans.²⁵³ After this initial phase, field staff monitor the child's behavior and help families implement the sanction and reward plans created.²⁵⁴ Staff visit the home at least twice a week.²⁵⁵ At the end of the program, field staff ensure that the child and family recognize their accomplishments and attempt to have the family make the new lifestyle and house rules permanent.²⁵⁶

The Department of Probation runs the Enhanced Supervision Program ("ESP"), an ATD program designed for children for whom general probation supervision is insufficient but who pose no threat to public safety.²⁵⁷ Probation officers make more frequent contact with each child than under normal practices, including unannounced visits to the child's home.²⁵⁸ Each child must complete at least sixty hours of community service and participate in workshops.²⁵⁹ The program includes testing for substance abuse and implementation of a system of

²⁵³ Id. at 2-3.

²⁵⁴ Id. at 3.

²⁵⁵ Id.

²⁵⁶ Id.

²⁵⁷ Id. at 2.

²⁵⁸ Id.

²⁵⁹ Id.

graduated sanctions.²⁶⁰ Probation officers receive on-going progress reports from the child's school to determine if remediation services or placement in an alternative school program are necessary.²⁶¹ The probation officer prepares a comprehensive progress report at the end of every three-month period that sets the level of supervision the child will receive for the next three months.²⁶² The program lasts at least nine months for each child.²⁶³

These and other Alternative To Detention programs offer promising results for rehabilitation of children placed in OCFS custody. Traditional detention has not met the service needs of these children, which results in recidivism. ATD programs foster lifestyle changes by working with the child's family and other important authority figures in the community. Individualized case management provides an opportunity for a child to participate in intensive educational, employment, counseling, and treatment programs that are tailored to the special needs of the child. ATD programs are generally more effective because they offer Multisystemic Therapy (MST), which means that the rehabilitation program focuses

²⁶⁰ Id.

²⁶¹ Id.

²⁶² Id.

²⁶³ Id.

on multiple sources of delinquent behavior such as family, school, and neighborhood environments. One study that followed children who had previously been arrested until age 29 found that children who did not receive Multisystemic Therapy(MST) were 62% more likely to be rearrested.²⁶⁴ As a result, ATD programs present an attractive alternative for meeting the goals of the juvenile justice system.

B. THE ADJUDICATION PROCESS

Juvenile delinquents, juvenile offenders, and youthful offenders are adjudicated into the custody of the State. The Office of Children and Family Services (OCFS), as indicated supra, is responsible for the incarceration or placement, as well as treatment and aftercare services, for adjudicated children.

Article 3 of the Family Court Act directs family court judges to remand to juvenile detention children at risk of absconding or of re-arrest before their adjournment dates.²⁶⁵ Before disposition or sentencing, those children with pending matters in criminal and family court often become wards of the New York City Department of Juvenile Justice.

²⁶⁴ Cindy M. Schaeffer & Charles M. Bordvin, Long-Term Follow-Up to a Randomized Clinical Trial of Multisystemic Therapy with Serious and Violent Juvenile Offenders, 73 J. Consulting & Clinical Psych. 445 (2005).

²⁶⁵ See N.Y. Fam. Ct. Act § 320.5(3) (2006).

The Bridges Juvenile Center (formerly known as Spofford) is the central processing facility for custody of children in the Department of Juvenile Justice.²⁶⁶ Upon entry in Bridges, youngsters receive screenings to determine medical, dental, and mental health care needs, along with substance abuse and educational assessments.²⁶⁷ DJJ must perform a comprehensive medical evaluation on each child during the first three days at Bridges.²⁶⁸ These evaluations lead to development of treatment plans.²⁶⁹ On-site staff or a City hospital provide the treatment.²⁷⁰ Health status must be monitored regularly.²⁷¹ In addition, each child must receive a dental screening within five days of admission.²⁷² The on-site staff also conducts mental health screening for current or pre-existing conditions, using

²⁶⁶ <http://www.nyc.gov/html/djj/html/secure.html>.

²⁶⁷ Id.

²⁶⁸ [nyc.gov, Medical Mental Health and Substance Abuse Services,
http://www.nyc.gov/html/djj/html/health.html.](http://www.nyc.gov/html/djj/html/health.html)

²⁶⁹ Id.

²⁷⁰ Id.

²⁷¹ Id.

²⁷² Id.

standard mental health assessment tools.²⁷³ Mental health clinicians and psychiatrists are on hand to treat children in groups or individually.²⁷⁴

After assessing their needs, DJJ transfers the youngsters to other sites. Children remanded to secure detention go to either Crossroads Juvenile Center in Brooklyn or Horizon Juvenile Center in South Bronx.²⁷⁵ Children remanded to non-secure detention go to various group homes throughout the City or Sowing Encouragement and Education to Develop Skills ("SEEDS") in Lower Manhattan.²⁷⁶

After disposition or sentencing, the children become wards of the Office of Children and Family Services, which is responsible for the incarceration and placement of juveniles. In 2005, the average length of stay in OCFS custody was 10.5 months for juvenile delinquents and 19.1 months for juvenile offenders.²⁷⁷ At

²⁷³ Id.

²⁷⁴ Id.

²⁷⁵ nyc.gov, Secure Detention, <http://www.nyc.gov/html/djj/html/secure.html> (last visited date).

²⁷⁶ nyc.gov, SEEDS (Sowing Encouragement and Education to Develop Skills) Non-Secure Detention, <http://www.nyc.gov/html/djj/html/nonsecure.html> (last visited date).

²⁷⁷ N.Y. State Off. Child. & Fam. Services, 2005 Annual Report Division of Rehabilitative Services iii (2005).

age 21,²⁷⁸ youths are automatically transferred to the New York State Department of Correctional Services, which is responsible for the confinement and rehabilitation of approximately 63,500 inmates,²⁷⁹ to serve out the rest of their sentence.²⁸⁰ Furthermore, at the discretion of a judge, youngsters may be transferred to an adult prison at age 16.²⁸¹ OCFS also has discretion to transfer youngsters to an adult prison at age 18.²⁸²

C. DISPROPORTIONATE MINORITY AND NEW YORK CITY YOUTH CONTACTS

The disproportionate number of minority children from New York City who are remanded to OCFS facilities suggests the lack of effective alternative intervention strategies in the State. As of December 2005, over 85% of the 3,006 children in OCFS facilities were minorities.²⁸³ In 2005, 62% of children admitted to

²⁷⁸ The Correctional Ass'n of N.Y., Youth Confined in OCFS Facilities 1 (2006), available at <http://correctionalassociation.org/JJP/publications/youth-in-OCFS.pdf>.

²⁷⁹ Department of Correctional Services Overview, <http://www.docs.state.ny.us>.

²⁸⁰ The Correctional Ass'n of N.Y., Youth Confined in OCFS Facilities 1 (2006), available at <http://correctionalassociation.org/JJP/publications/youth-in-OCFS.pdf>.

²⁸¹ Id.

²⁸² Id.

²⁸³ N.Y. State Off. Child. & Fam. Services, Annual Report Division of Rehabilitative Services 11(2005).

OCFS custody were African-American, and only 13% of admissions were non-Hispanic whites.²⁸⁴ In contrast, African-Americans and Hispanics comprise less than two-thirds of New York City's youth population.²⁸⁵

The neighborhoods with the highest rates of juvenile detention are also the poorest: Bedford Stuyvesant, Brownsville, East Harlem, East New York, Far Rockaway, Harlem, Morningside Heights, Morris Heights, Saint George, Soundview, South Bronx, South Jamaica, Tremont, University Heights and Washington Heights.²⁸⁶

Although most of the children confined in OCFS facilities are from New York City, the majority of these facilities are located outside of the City. New York City accounted for 61% of youngsters admitted to OCFS custody in 2005.²⁸⁷ Only

²⁸⁴ See Id. at 2.

²⁸⁵ Mishi Faruquee, Rethinking Juvenile Detention in New York City: A Report by the Juvenile JusticeProject of the Correctional Association of New York 5 (2002).

²⁸⁶ Id. at 6.

²⁸⁷ See N.Y. State Off. Child & Family Services, 2005 Annual Report Division of Rehabilitation Services 38-39 (2005).

five of the thirty-one OCFS residential facilities, however, are located in the five boroughs of New York City.²⁸⁸

D. ADDRESSING THE ROLE OF GANGS

The substantial presence of gangs in New York State creates dangers for residents and pushes juveniles into contact with the juvenile justice system. Gang activity has increased recently, particularly in Upstate New York.²⁸⁹ Both local and national gang presence has grown, leading to a rise in the number of violent crimes and drug crimes.²⁹⁰ Police in Buffalo attribute the recent rise in violent crime in the City to local gangs imitating the activities of larger national gangs.²⁹¹ Buffalo's location has made the city a destination for gun and drug trafficking from New York City and drug trafficking from Canada.²⁹² Law enforcement officials

²⁸⁸ The Correctional Ass'n of N.Y., Youth Confined in OCFS Facilities 1 (2006), available at <http://correctionalassociation.org/JJP/publications/youth-in-OCFS.pdf>.

²⁸⁹ Roy Kilkeary, "Cuomo Appoints Upstate Native to Fight Gang Violence", *Legislativegazette.com*, Mar. 12, 2007, available at <http://www.legislativegazette.com/printable.php?id=2113>.

²⁹⁰ Id.

²⁹¹ Id.

²⁹² Id.

throughout the State have been attacking drug distribution networks with ties to New York City that span Upstate and foster gang violence.²⁹³

In response to the growing problem that increased gang activities pose, Attorney General Andrew Cuomo has launched a Guns and Gangs initiative. Cuomo has appointed a Special Deputy Attorney General for Guns and Gangs to implement this initiative.²⁹⁴ The goal is to make effective use of all available resources for addressing issues involving gangs and guns by increasing collaboration among federal, state, and local law enforcement and prosecutorial agencies.²⁹⁵ Attorney General Cuomo has announced plans to continually increase the involvement of his office with gang prevention and intervention efforts

²⁹³ See Press Release, Office of the N.Y. State Att'y Gen., Organized Crime Task Force Leads Six-County Narcotics Sweep: More Than One Hundred Charged in Central N.Y. Drug Investigations (July 19, 2006) (available at http://www.oag.state.ny.us/press/2006/jul/jul19a_06.html).

²⁹⁴ See Press Release, Office of the N.Y. State Att'y Gen., Att'y Gen. Andrew Cuomo Appoints Special Deputy Att'y Gen. for Guns and Gangs (Mar. 5, 2007); (available at http://www.oag.state.ny.us/press/2007/mar/mar05a_07.html); see also Roy Kilkeary, Cuomo Appoints Upstate Native to Fight Gang Violence, *Legislativegazette.com*, Mar. 12, 2007, available at <http://www.legislativegazette.com/printable.php?id=2113>.

²⁹⁵ E-MAIL from Carl J. Boykin, N.Y. Special Deputy Att'y Gen. for Guns and Gangs, to George Bundy Smith, Partner, Chadbourne & Parke LLP (June 25, 2007, 01:05pm) [hereinafter Remarks by Carl J. Boykin]; see Roy Kilkeary, Cuomo Appoints Upstate Native to Fight Gang Violence, *Legislativegazette.com*, Mar. 12, 2007, available at <http://www.legislativegazette.com/printable.php?id=2113>.

statewide.²⁹⁶ Since 1970, a Task Force has investigated and prosecuted multi-county, multi-state, and multi-national organized criminal activities that occur within the State. Since the Task Force began attacking the recent increased drug and gun trafficking in Upstate New York, the Task Force has charged over 900 defendants, seized more than 500 firearms, and confiscated over \$100 million in illegal drugs from the streets of Upstate New York.²⁹⁷

The Attorney General has partnered with local prosecutors to address the gang issues. Cuomo has permitted cross-designation of three Assistant Attorneys General as Assistant District Attorneys in Erie County to address the recent rise in the number of homicides in Buffalo, attributed partly to gang activity.²⁹⁸ The Attorney General has also met with Buffalo officials to determine how the local and

²⁹⁶ Remarks by Carl J. Boykin; see Roy Kilkeary, Cuomo Appoints Upstate Native to Fight Gang Violence, Legislativegazette.com, Mar. 12, 2007, available at <http://www.legislativegazette.com/printable.php?id=2113>.

²⁹⁷ Press Release, Office of the N.Y. State Att'y Gen., Organized Crime Task Force Leads Six-County Narcotics Sweep: More Than One Hundred Charged in Central N.Y. Drug Investigations (July 19, 2006) (available at <http://www.oag.state.ny.us/press/2006/jul/jul19a-06.html>).

²⁹⁸ Press Release, Office of the N.Y. State Att'y Gen., Att'y Gen. Andrew Cuomo and Erie County Dist. Att'y Frank Clark Team Up to Prosecute Buffalo Homicides (Jan. 30, 2007) (available at <http://www.oag.state.ny.us/press/2007/jan/jan30a-07.html>).

state law enforcement and prosecutorial agencies can share resources to attack Buffalo's growing problem more effectively.²⁹⁹

E. PREVENTIVE (PRE-ARREST) PROGRAMS

Several programs exist in New York that strive to reduce delinquent behavior and place children on a path toward success.³⁰⁰ Some programs work with children at risk of encountering trouble with the law. Other programs work with young persons who have engaged in delinquent behavior and require intervention to avoid continuing their destructive behavior. Many of these programs focus on involving peers in the process of setting standards and enforcement. Furthermore, education plays a central role in prevention and intervention techniques used to address delinquent behavior before it happens.

1. HARLEM COMMUNITY JUSTICE CENTER

The Center for Court Innovation is a public/private partnership between the New York State Unified Court System and the Fund for the City of New York.³⁰¹ The goal of this partnership is to use research and development to test innovative

²⁹⁹ **Id.**

³⁰⁰ As stated previously, the programs mentioned here do not constitute a comprehensive list.

³⁰¹ Center for Court Innovation, <http://www.courtinnovation.org> (follow "About" hyperlink).

methods of reducing crime and aiding courts and agencies involved in the criminal justice system.³⁰²

The Harlem Community Justice Center is a program of the Center for Court Innovation that seeks to address youth crime in East and Central Harlem and to help children “become active law-abiding members of their community.”³⁰³ The Justice Center works intensely with both children who have engaged in delinquent behavior and those at risk of doing so in the future.³⁰⁴ Comprehensive prevention activities involve “reaching out to at-risk youth before they get in trouble with the law and providing them with the skills to make better life choices.”³⁰⁵ For instance, the Justice Center offers mentoring services and paid internship opportunities.³⁰⁶ Some children come to the Justice Center after arrest or referral by probation.³⁰⁷ In

³⁰² Id.

³⁰³ Id. (follow “Demonstration Projects” hyperlink; then follow “Harlem Youth Justice Center” hyperlink).

³⁰⁴ See Id.

³⁰⁵ Id.

³⁰⁶ Id.

³⁰⁷ Id.

addition, schools and community-based organizations refer children to the Justice Center.³⁰⁸

The Justice Center houses a Youth Court that adjudicates low-level, nonviolent offenses such as truancy, shoplifting, and public drinking.³⁰⁹ “[P]eers, that is, teenagers from the neighborhood who have been trained to perform the roles of judge, jury, and attorneys,” preside over cases.³¹⁰ These peer participants articulate and enforce standards of acceptable behavior for young people.³¹¹ “The goal is to encourage young people to take responsibility for their actions and to acknowledge how their behavior undermines the local quality of life.”³¹² Accordingly, community service and letters of apology are typical sanctions.³¹³ Attendance at anger-management workshops is another commonly ordered

³⁰⁸ Id.

³⁰⁹ Id.

³¹⁰ Id.

³¹¹ Id.

³¹² Id.

³¹³ Id.

sanction.³¹⁴ The Youth Court has established a strong level of legitimacy as 80% of those adjudicated before the Youth Court complete the sanctions as ordered.³¹⁵

2. RED HOOK COMMUNITY JUSTICE CENTER

The Red Hook Community Justice Center is another project of the Center for Court Innovation. This Justice Center is “the nation’s first multi-jurisdictional community court.”³¹⁶ Single, coordinated judicial responses to each separate neighborhood problem result from having one judge hear a case that might ordinarily be heard by separate judges in the Civil, Family, and Criminal Courts.³¹⁷ This system design addresses the reality that “neighborhood problems do not conform to the arbitrary jurisdictional boundaries of the modern court system.”³¹⁸ Examples of the neighborhood problems the Justice Center seeks to resolve include drugs, crime, domestic violence, and landlord-tenant disputes.³¹⁹ The goal is to engage local residents in the process of administering justice and solving

³¹⁴ Id.

³¹⁵ Id.

³¹⁶ Id. (follow “Demonstration Projects” hyperlink; then follow “Red Hook Community Justice Center” hyperlink).

³¹⁷ See Id.

³¹⁸ Id.

³¹⁹ Id.

neighborhood problems through mediation and volunteering for community service work before they come to court.³²⁰

As in the Harlem Community Justice Center, the Red Hook Community Justice Center houses a Youth Court.³²¹ The Youth Court adjudicates low-level offenses such as vandalism, fare evasion, assault, and truancy.³²² “These are cases that typically receive ‘YD cards,’ a police notation that results in neither sanctions nor links to social services.”³²³ Young persons from ages 10 to 18, cited for such offenses, appear before the Youth Court.³²⁴ Officers of the New York City Police Department in the 72nd, 76th, and 78th precincts refer children that have admitted their guilt to the Youth Court.³²⁵ To ensure a true jury of peers, Youth Court members ranging from ages 14 to 18, come from a variety of local high schools with no academic or experiential prerequisites.³²⁶ This Youth Court has also seen strong

³²⁰ See Id.

³²¹ Id. (follow “Demonstration Projects” hyperlink; then follow “Red Hook Youth Court” hyperlink).

³²² Id.

³²³ Id.

³²⁴ Id.

³²⁵ Id.

³²⁶ Id.

compliance with its ordered sanctions with over 91% completing their sanctions as ordered.³²⁷

3. LEGAL OUTREACH

Legal Outreach is an educational program that serves at-risk teens throughout New York City.³²⁸ The program uses law-related curricula to help develop skills in children in junior high school to enable and motivate them to strive for academic success.³²⁹ Discussion of legal issues prevalent in their communities, including child abuse and neglect, domestic violence, and police use of force, fosters an interest in the community, academics, professional careers, and the law, as well as develops skills in these youngsters.³³⁰ Legal Outreach provides curricula materials to social studies teachers and partners with the Manhattan District Attorney's Office, the Association of the Bar of the City of New York, and Columbia Law School to send guest speakers into junior high school classrooms.³³¹ Furthermore, Legal Outreach operates a Summer Law Institute in partnership with

³²⁷ **Id.**

³²⁸ Legal outreach: Raising the Bar, <http://www.legaloutreach.org> (follow "About Us" hyperlink; then follow "History" hyperlink).

³²⁹ **Id.**

³³⁰ **Id.**

³³¹ **Id.**

Columbia and Brooklyn Law Schools in which eighth-grade students receive a criminal justice curriculum and participate in a mock trial competition.³³² Today more than 2,600 junior high school students participate in the law-related education programs of Legal Outreach and each year sixty students enroll in the Summer Law Institutes.³³³ In addition, Legal Outreach operates the College Bound program to assist students in underserved communities in gaining admittance to and achieving success in college.³³⁴ Some 164 high school students currently participate in the program at either the Harlem or Brooklyn site.³³⁵ The program provides comprehensive academic enrichment and support during students' four years of high school.³³⁶ The students receive mentors from the legal profession, an SAT preparation course, and individualized college selection and application assistance.³³⁷ Students also participate in academic and life skills workshops and

³³² Id.

³³³ Id.

³³⁴ Id.

³³⁵ Id.

³³⁶ Id. (follow “Programs” hyperlink; then follow “College Bound” hyperlink).

³³⁷ Id.

constitutional law debates “to enhance their reasoning, articulation, and advocacy skills.”³³⁸

The College Bound program has achieved dramatic levels of success. All students have graduated high school in four years. In comparison, 52.1% of African-Americans and 49.4% of Hispanics do so citywide. Moreover, 201 out of 202 students who have completed the program have matriculated into four-year colleges, with many entering schools in the top-tier. The students also achieve success in college: 85% of students who completed the program graduated within four years, and 93% graduated within six years. Furthermore, 70% of these students have or have had a grade point average of 3.0 or higher in college.

4. PROGRAMS DURING DETENTION

The Department of Juvenile Justice, through other city agencies and organizations, provides an array of services to children in detention either awaiting disposition or sentencing or transfer to state facilities to serve a sentence. These include the NYC Department of Health and Mental Hygiene, the NYC Department of Education, the NYC Health and Hospitals Corporation, the Vera Institute of

³³⁸

Id.

Justice, the Research and Evaluation Center at City University of New York, John Jay College of Criminal Justice, and community-based organizations.

The Passages Academy is a full-time school run by the NYC Department of Education for children in detention.³³⁹ The purpose of the program is to tailor an individualized plan to meet each child's educational needs through small group learning in a coed environment.³⁴⁰ Each secure detention facility has a Passages Academy school, and a separate school site exists for children in non-secure detention to attend.³⁴¹ Assessment of reading and math skills through administration of the STAR program determines each child's class placement.³⁴²

The curriculum includes instruction in all major academic subjects, physical education, and health education and is designed with the educational needs of detained children in mind, not the average high school student in the State.³⁴³ The program gives teachers the ability to adapt instruction to the students' learning

³³⁹ nyc.gov, Education in Detention, <http://www.nyc.gov/html/djj/html/education.html>.

³⁴⁰ Id.

³⁴¹ Id.

³⁴² Id.

³⁴³ Id.

styles.³⁴⁴ Children with reading and math skills below grade level may receive special education which includes speech and language services, psychological counseling, and an individualized education plan ("IEP").³⁴⁵ In addition, children who read at or below a fourth grade level attend literacy classes.³⁴⁶ Those children who are not placed in literacy classes and are not eligible for the general equivalency diploma (GED) class earn high school credit for the classes they take.³⁴⁷

Literacy for Incarcerated Teens ("LIT") is a support organization for Passages Academy.³⁴⁸ LIT's purpose is to develop libraries in the schools of New York City's juvenile detention facilities.³⁴⁹ This organization has helped create five

³⁴⁴ Id.

³⁴⁵ See Id.

³⁴⁶ Id.

³⁴⁷ Id.

³⁴⁸ Prisons' Reading Encouragement Project, <http://www.prisonreader.org>, (last updated Jun 5, 2007).

³⁴⁹ Id.

libraries in these facilities.³⁵⁰ The Prisoner's Reading Encouragement Project, Inc. (PREP) is the fiscal sponsor for LIT.³⁵¹

A significant number of children in detention have substance abuse problems that require treatment. Each child receives an assessment for substance use upon entering detention, and those that indicate use receive a more comprehensive assessment to determine treatment needs.³⁵² About 20% of children in detention in the State have used drugs every day for an entire month before entering detention.³⁵³ Most of the substance use is drinking alcohol and smoking marijuana.³⁵⁴

The Vera Institute of Justice runs the Adolescent Portable Therapy ("APT") program for children detained in the State's juvenile justice system. The purpose of the program is to provide substance abuse treatment services to children inside detention facilities and wherever the children may go after leaving detention

³⁵⁰ Id.

³⁵¹ Id.

³⁵² nyc.gov, Medical, Mental Health and Substance Abuse Services
<http://www.nyc.gov/html/djj/html/health.html>.

³⁵³ Vera Institute of Justice, Adolescent Portable Therapy (APT), <http://www.vera.org> (follow "Youth Justice-Drug Treatment for Court-Involved Youth" hyperlink) (last visited date).

³⁵⁴ Id.

rather than delivering services from a fixed location.³⁵⁵ Qualified children have the choice of participating in the APT program.³⁵⁶ APT therapists work with the youngster individually and the child's family.³⁵⁷ Moreover, the same APT therapist follows the child during and after detention, whether remanded as a ward of OCFS or returned to the community.³⁵⁸

The Department of Juvenile Justice has a Discharge Planning Unit that works with detained children, their families, and community-based organizations to find ways to link the children with services they will need upon leaving secure detention facilities.³⁵⁹ Where children remain in the custody of DJJ while awaiting placement with OCFS, they continue to receive the applicable aforementioned services.³⁶⁰ After identifying the needs of the children using the services and assessments provided during detention, DJJ creates partnerships with other

³⁵⁵ Id.

³⁵⁶ nyc.gov, Medical, Mental Health and Substance Abuse Services,
<http://www.nyc.gov/html/djj/html/health.html>.

³⁵⁷ Id.

³⁵⁸ Id.

³⁵⁹ nyc.gov, CBI/Discharge Planning Services,
<http://www.nyc.gov/html/djj/html/cbidischarge.html>.

³⁶⁰ See Id.

agencies and community-based organizations to enable children to have a “seamless transition” of treatment services when they leave DJJ custody to enter OCFS custody or reenter the community.³⁶¹ DJJ has also implemented a Collaborative Family Initiative (CFI). This initiative focuses on detained children with mental health treatment needs.³⁶² Through this initiative, DJJ identifies the roles their families will play in continuing treatment and locates community-based organizations with immediate treatment capacity.³⁶³ The goal of these discharge planning programs is to provide children and families with the resources the children will need to succeed upon returning to the community and to avoid being readmitted to DJJ detention facilities.³⁶⁴

F. THE NATIONWIDE ISSUE OF DISPROPORTIONATE MINORITY CONTACTS (DMC)

The disproportionate number of minorities that come into contact with the juvenile justice system remains a cause for concern. Congress has begun to address this concern in the Juvenile Justice and Delinquency Prevention Act of

³⁶¹ **Id.**

³⁶² **City Counsel Briefed on Collaborative Family Initiative** (available at http://www.nyc.gov/html/djj/pdf/cfi_briefing.pdf).

³⁶³ **Id.**

³⁶⁴ **Id.**

2002.³⁶⁵ The Act amends the Formula Grants Program, a federal program, to aid states administered by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) of the U.S. Department of Justice. Participating states now must “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system.”³⁶⁶

Any state that fails to address overrepresentation of minority youths in juvenile justice system contact stands to lose 20% of its Formula Grants allocation for the year.³⁶⁷ OJJDP defines African-Americans, American Indians, Asians, Pacific Islanders, and Hispanics as minority groups for purposes of the Formula Grants Program.³⁶⁸

OJJDP provides national leadership, coordination, and resources to prevent and respond to juvenile delinquency and victimization. The agency

³⁶⁵ Juvenile Justice, and Delinquency Prevention Act of 2002, Pub.L.No. 107-273 § 12209(1)(P), 116 stat 1869 (codified as amended 42 U.S.C. § 5633(a)(2)(2007)).

³⁶⁶ Id.

³⁶⁷ See Id. at § 5633(c)(1).)

³⁶⁸ Formula Grants Consolidated Regulation, 28 C.F.R. § 31.303(j)(6) (2007).

supports states and communities in their efforts to develop and implement effective and coordinated prevention and intervention programs and to improve the juvenile justice system so that it protects public safety, holds offenders accountable, and provides treatment and rehabilitative services tailored to the needs of children and families.

Each state that participates in the Formula Grants Program must report its progress, including compliance with 42 U.S.C. § 5633(a)(22), in its comprehensive 3-year plan and subsequent plan updates.³⁶⁹ OJJDP reviews the plan updates annually. Participating states address the issue of disproportionate minority contacts on an ongoing basis by: identifying the extent to which disproportionate minority contacts exist; assessing the reasons for disproportionate minority contacts; developing and implementing intervention strategies to address these reasons; evaluating the effectiveness of the intervention strategies; and monitoring changes in disproportionate minority contacts trends to adjust intervention strategies accordingly.³⁷⁰

³⁶⁹ **See Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C § 5633(a) (2007).**

³⁷⁰ **See Formula Grants Consolidated Regulation, 28 C.F.R. § 31.303(j) (2007).**

G. RECOMMENDATIONS

1. General. A good faith effort to address Disproportionate Minority Contacts (DMC) in New York State requires legislative reforms, an overhaul of the New York State Office for Children and Family Services, systemic changes in the New York City and New York State Departments of Education, and government partnerships with ATD programs. Federal enforcement of requirements to receive funding for juvenile justice services is paramount to reducing DMC in New York and other states. To be successful, the State must design a comprehensive system that (1) identifies and provides or directs at-risk children to counseling and treatment services before they come into contact with the juvenile justice system and (2) rehabilitates children in the juvenile justice system utilizing community resources.

2. Legislative Reform. The New York State Legislature can and should revise and amend laws so that judges and agencies can more readily use ATD programs to rehabilitate children who enter the juvenile justice system. Specifically, the Legislature should revise Article 3 of the Family Court Act to authorize judges to remand children to ATD programs. In addition, the Legislature should amend Executive Law § 530 so that the State may provide reimbursement (perhaps 65%) to local detention and

probation agencies and non-profit organizations to operate community-based ATD programs.

3. Overhaul of the New York State Office of Children and Family

Services. According to the State Comptroller's 2000 audit of the agency, children do not receive necessary education, mental health, substance abuse treatment, and aftercare services. A disconnect exists between the services that the Office of Children and Family Services and the New York City Department of Juvenile Justice purport to provide and the actual services children in their custody receive. In particular, discharge planning and aftercare services often do not achieve a continuity of care for children as they move within the juvenile justice system and return to society. Moreover, the recordkeeping practices at OCFS are insufficient to ensure that each child receives necessary assessments and services throughout his or her time as a ward. A wholesale change in the organization and management of OCFS is necessary to provide the children in its custody with the services they need for successful rehabilitation.

4. The Role of Education in Delinquency Prevention and Rehabilitation.

New York State should concentrate its financial resources toward attaining the goal of educating at-risk children instead of pushing these

children into the juvenile and criminal justice systems. Programs such as Legal Outreach have achieved remarkable results in placing at-risk children in New York City on a track toward academic and career success and law compliance. This success suggests that the New York City and New York State Departments of Education should consider reforms of the curriculum, funding formulas, and the provision of education-related services to better serve the needs of the children and the community.

In addition, New York City schools that have substantial minority populations generally have a strong police presence that can disrupt the learning environment.³⁷¹ New York Police Department officers are not accountable to school administration or the community for their actions taken in maintaining school security.³⁷² Moreover, police officers should receive more training in how to work with children in a school setting because the aggressive, belligerent measures and vulgar language sometimes in use are

³⁷¹ See ACLU, Criminalizing the Classroom: The Over-Policing of New York City Schools 20 (2007).

³⁷² Id. at 25, 27-28.

counterproductive to the development of respect for authority figures and self-respect in children.³⁷³ Authority figures must show concern, care, and respect for children as opposed to disdain so that the children view themselves as having a positive role within the community. The success of Alternative To Detention programs using Multisystemic Therapy evidences this dynamic.

5. Government Partnerships with ATD Programs.

The State must utilize the success that many ATD programs currently achieve by working directly with these programs and making them more readily available. ATD programs monitor the children and report to courts and probation officers with greater success than traditional detention programs. More important, ATD programs achieve better results in rehabilitating the children and reducing recidivism. Partnering with ATD programs enables the State to provide individualized counseling, educational, and substance abuse services and to more efficiently expend financial resources.

³⁷³

Id. at 16-18, 26.

New York State and New York City should engage community-based organizations, public defenders, and the at-risk children and their families in the discussion of creating partnerships with ATD programs. Identifying ATD programs that have achieved success and carry the capacity to serve the needs of particular communities is the first step in forging these new partnerships. The State must determine appropriate funding levels for the ATD programs with which the State and New York City choose to create partnerships. Once implemented, the State should evaluate the partnerships through annual reports on the ATD programs and receipt of input from the community-based organizations involved with and families of children placed in the programs. Regular audits by the New York State Office of the State Comptroller of these partnerships are necessary to ensure that government agencies make effective use of the partnerships and that the ATD programs perform the necessary services for children.

CHAPTER III. VOTING

INTRODUCTION

Voting is the key to democracy. Fair voting assures an engaged electorate. Voting was considered so important to the newly freed slaves that the Fifteenth Amendment to the Constitution of the United States was enacted to ensure that right. The Nineteenth Amendment to the Constitution was enacted to insure the right of women to vote.

For decades the right to vote was denied to African Americans. With the passage of the Voting Rights Act of 1965 and the reapportionment cases in which the Supreme Court held that one person's vote was equal to that of another, and leading to legislative and other districts substantially equal in population, African Americans were able to vote in sufficient numbers to affect elections. This chapter deals with both the history and the current status of voting not only for African Americans but for all Americans.

A. THE VOTING RIGHTS ACT OF 1965

The passage of the Voting Rights Act of 1965 ("VRA") was one of the objectives of the Civil Rights Movement of the 1950s and 1960s. It was passed largely to deal with the problem of the disenfranchisement of African American voters in the South. Historically, African Americans had been denied the vote by

various means, including intimidation and violence. Within several years of the passage of the Voting Rights Act of 1965, some two million African Americans were registered to vote in the South.

The Voting Rights Act sought to protect the right of African Americans to vote in a number of ways. These included identifying areas where African Americans had been traditionally denied the right to vote, granting federal registrars the authority to register African Americans to vote, and requiring that any changes in voting procedures in certain areas of the country be approved or pre-cleared by the Department of Justice or a United States District Court.

**B. OBJECTIVES AND SUMMARY OF THE VOTING RIGHTS ACT
REAUTHORIZATION AND AMENDMENTS ACT OF 2006 - (the
VRARA)(H.R.9/S.2703)**

In 2006, President George Bush signed into law The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization And Amendments Act Of 2006. When President Bush signed the 2006 Voting Rights Bill, he committed his administration to vigorously enforce the provisions of this law and to defend it in court. Congress rejected attempts to dilute the original intent of the bill and passed a “clean” reauthorization bill, which renewed key provisions that would otherwise have expired in 2007. However, as effective as it has been, the VRA was never meant to be and will not be a quick fix. Many state and local governments

have continued to erect barriers and implement new tactics and strategies to discourage minority political participation and disenfranchise minority voters.

While designed to guarantee the right to vote for generations of all Americans and to help millions of citizens enjoy the full promise of freedom, there are challenges with both the interpretation and implementation of the 2006 amendments that may shape the future of our nation’s civil rights agenda. Following is an outline summary of the provisions of the 2006 Voting Rights Act Reauthorization and the 2002 Help America Vote Act. In addition, this chapter addresses the activity of the New York State Bar Association Special Committee on the Collateral Consequences of Criminal Proceedings; the activity of the Brennan Center for Justice and the critical challenges that must be addressed to ensure full participation of all Americans and New Yorkers in the electoral process.

Section 1 (Short Title). This section titles the Act the “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.”

Section 2 (Congressional Purpose and Findings). This section sets out the Congressional findings and purposes supporting the VRARA.

Section 3. Section 3 of the Voting Rights Act (VRA) authorizes the court or the Attorney General to direct the Office of Personnel Management to

send federal examiners either to covered jurisdictions, or wherever the court believes it necessary to protect the rights of citizens guaranteed by the 14th and 15th Amendments. Under current law, federal observers can only be assigned after a jurisdiction has been certified for federal examiner coverage. This section eliminates Federal examiners because examiners have not been appointed to jurisdictions certified for coverage in over twenty years and amends the VRA by allowing the assignment of federal observers upon a finding by the Department of Justice ("DOJ") that there is a reasonable belief that a violation of the 14th or 15th Amendment will occur, without having to first certify the use of federal examiners.

Section 4. This section extends the expiring provisions contained in Sections 4 through 8 of the VRA for an additional 25 years.

Section 4 of the VRA identifies by formula those jurisdictions subject to the federal oversight provisions contained in Sections 5 through 8 of the VRA and sets out the requirements covered jurisdictions must meet to be removed from coverage.

Section 5. This section addresses two Supreme Court decisions that have significantly narrowed the effectiveness of the VRA's pre-clearance

requirements. This section rejects the Court’s holding in *Reno v. Bossier Parish II*³⁷⁴ by making clear that a voting change motivated by any discriminatory purpose should not be approved. This section also partly rejects the Court’s decision in *Georgia v. Ashcroft*³⁷⁵ by restricting the standard for review of redistricting plans in order to ensure that voting changes that reduce the ability of the minority community to elect their candidates of choice should not be pre-cleared.

Section 6 (Expert Fees and Other Reasonable Costs of Litigation).

Section 14 of the VRA currently authorizes prevailing parties (other than the United States) to recover attorney fees. This section updates this provision by authorizing the recovery of expert costs as part of the attorney fees.

Section 7 (Extension of Bilingual Election Requirements). This section extends the minority language assistance provisions of the VRA (Section 203) for a period of twenty-five years. (See below).

³⁷⁴ 520 U.S. 471 (1997).

³⁷⁵ 539 U.S. 461 (2003).

Section 8 (Use of American Community Survey Census Data). This section updates Section 203 of the VRA to reflect that the American Community Survey ("ACS") has replaced the Census Decennial long form and will be administered by the Census Bureau annually after 2010. Thus, coverage determinations under Section 203 will be made based on data compiled by the ACS on a rolling five-year average.

Section 203 (Language Minority Assistance) was added to the Voting Rights Act in 1975 and requires certain jurisdictions to make language assistance available at polling locations for citizens with limited English proficiency. These provisions apply to four language groups: American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage. A community with one of these language groups will qualify for language assistance if (1) more than 5% of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited English proficiency (LEP); or (2) more than 10,000 voting-age citizens in a jurisdiction belong to a single language minority community and are LEP; and (3) the illiteracy rate of the citizens in the language minority is higher than the national illiteracy rate.

Registration and voting materials for all elections must be provided in the minority language as well as in English. Oral translation during all

phases of the voting process, from voter registration clerks to poll workers, also is required. Jurisdictions are permitted to target their language assistance to specific voting precincts or areas.

C. SUMMARY OF HELP AMERICA VOTE ACT OF 2002 - (HAVA) OVERVIEW

The Help America Vote Act of 2002 ("HAVA") was passed in the wake of the 2000 presidential election. The legislation aims to improve the administration of elections in the United States, primarily in three ways: (1) creating a new federal agency, the Election Assistance Commission, to serve as a clearinghouse for election administration information and provide assistance with the administration of certain Federal election laws; (2) providing funds to states to improve election administration and replace outdated voting systems; and (3) creating minimum election administration standards for state and local governments with the responsibility for the administration of Federal elections.

HAVA links federal elections administration funding to compliance with the Act's requirements for federal elections.³⁷⁶ In general, HAVA set a deadline of January 1, 2004 for compliance, with waivers available to push compliance back to January 1, 2006.

³⁷⁶ 42 U.S.C. § 15301 (2006).

In 2005, the New York State Legislature passed a series of laws to comply with HAVA.³⁷⁷ However, by March 2006, the State Board of Elections (SBOE) had not yet promulgated final rules and regulations to implement the 2005 legislation. As a result, the Department of Justice sued the State of New York for failing to comply with HAVA's voting system standards and failing to develop and implement a statewide voter registration list.³⁷⁸ The parties reached a settlement agreement, and the District Court for the Northern District of New York ordered the state to comply with HAVA's voting systems requirements by September 1, 2007 and to submit to the court regulations for the implementation of an interim statewide voter registration list by June 15, 2006, and regulations for the implementation of the final statewide voter registration list by December 31, 2006.³⁷⁹ The SBOE subsequently promulgated regulations to implement HAVA.

D. SPECIFIC HAVA PROVISIONS

³⁷⁷ These laws are available on the NY Board of Education website at http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_26319:35_26323&_dad=portal&_schema=PORTAL.

³⁷⁸ United States v. N.Y. State Bd. of Elections, No. 06-CV-0263 (N.D.N.Y. March 1, 2006), available at http://www.usdoj.gov/crt/voting/hava/ny_hava.pdf; Michael Cooper, "New York Is Sued by U.S. on Delay of Vote System," N.Y. Times, March 2, 2006, at A1.

³⁷⁹ United States v. N.Y. State Bd. of Elections, No. 06-CV-0263, proposed remedial order at 3 (N.D.N.Y. June 2, 2006), available at <http://www.nyv.org/doc/USCourtOrder060206.pdf>.

Below is a discussion of New York's implementation of the following HAVA requirements: voting machines, computerized statewide voter registration list, verification of voter registration information, provisional voting, and the administrative complaint procedure.

1. Voting Machines

All voting machines used in a federal election must (1) allow a voter to verify and change his or her ballot; (2) create a permanent paper record with audit capacity; (3) be accessible to people with disabilities, including blindness; (4) conform with section 203 of the Voting Rights Act³⁸⁰ by providing ballots in multiple languages in covered jurisdictions;³⁸¹ and (5) meet federal error rate standards.³⁸²

Pursuant to the proposed remedial order resulting from the Department of Justice settlement, New York was required to replace all lever voting machines

³⁸⁰ 42 U.S.C. § 1973aa-1a (2006).

³⁸¹ The following counties fall under section 203 of the Voting Rights Act and must provide multilingual election materials: Bronx (Spanish); Kings (Spanish and Chinese); Nassau (Spanish); New York (Spanish and Chinese); Queens (Spanish, Chinese, and Korean); Suffolk (Spanish); Westchester (Spanish). Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871, 48875 (July 26, 2002).

³⁸² 42 U.S.C. § 15481(a); N.Y. Elec. Law § 7-202; N.Y. Comp. Codes R. & Regs. tit. 9, § 6209.2.

with HAVA-compliant voting systems by September 1, 2007.³⁸³ Under New York's State Board of Elections (SBOE) regulations, the SBOE certifies voting systems as acceptable for use,³⁸⁴ and the county boards of elections may then choose which of the systems to use. However, no county may use more than two types of voting systems in the same election.³⁸⁵

New York's adoption of new voting machines continues to be delayed, most recently because of problems with the company hired to test the machines. One of the SBOE chairpersons predicted that new machines would be ready for the 2008 general election and possibly in time for the 2008 primaries.³⁸⁶

³⁸³ United States v. N.Y. State Bd. of Elections, No. 06-CV-0263, proposed remedial order at 3 (N.D.N.Y. June 2, 2006).

³⁸⁴ N.Y. Comp. Codes R. & Regs. tit. 9, § 6209.6(10). Full regulations on voting systems standards are set forth at N.Y. Comp. Codes R. & Regs. tit. 9, §§ 6209.1-6209.11.

³⁸⁵ N.Y. Elec. Law § 7-200(1).

³⁸⁶ Jonathan P. Hicks, Electronic Voting May be Ready by Fall '08, Official Says, New York Times, May 8, 2007 at?. (The SBOE lists voting systems vendors that have submitted systems for certification, but none of the testing results are available yet.) http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_26319:35_26327&_dad=portal&_schema=PORTAL.

2. Computerized Statewide Voter Registration List

Under HAVA, the state must create a computerized voter list that will serve as the single list of voters for the state.³⁸⁷ The voter registration list must assign a unique identifier to each registered voter.³⁸⁸ NYSVoter I is the interim voter registration database that is currently in use. NYSVoter II will be the final version of the database, and it is projected to be operational by the third quarter of 2007.³⁸⁹

New York's voter registration list (NYSVoter) was created by combining the existing voter lists maintained by local boards of elections.³⁹⁰ The New York SBOE has determined that the county boards of elections are responsible for inputting and maintaining their own voter registration systems and information.³⁹¹ These systems must be approved by the SBOE and capable of interfacing with NYS

³⁸⁷ 42 U.S.C. § 15483(a)(1)(B)(i); N.Y. Elec. Law § 5-614; N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.1(2).

³⁸⁸ 42 U.S.C. § 15483(a)(1)(B)(iii); N.Y. Elec. Law § 5-614(3)(c), N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.1(2).

³⁸⁹ N.Y. Office of the CIO, New York State Information Technology Projects with Local Impact: PROJECT DASHBOARD, April 2007, available at http://www.cio.state.ny.us/Project_Dashboard_FINAL_FOR%20POSTING.pdf.

³⁹⁰ N.Y. Elec. Law § 5-614; N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.2.

³⁹¹ N.Y. Comp. Codes R. & Regs. tit. 9, §§ 6217.1(3), 6217.4(1) (2006).

Voter.³⁹² After receiving local data, the SBOE runs a check for duplicate registrations and assigns a unique identifier to each voter.³⁹³

The chief state election official must enter into an agreement with the head of the state department of motor vehicles to match information in the statewide voter information system with information in the Department of Motor Vehicles' DMV) database to verify voters' identities.³⁹⁴ The head of the DMV must enter into a similar agreement with the Commissioner of Social Security.³⁹⁵

Full regulations for the statewide voter list are set forth at N.Y. Comp. Codes R. & Regs. tit. 9, §§ 6217.1-6217.12. They include a process for notifying an individual whose application is incomplete and telling him or her when the missing information must be provided in order to vote in the next election.³⁹⁶

³⁹² N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.3 (2006).

³⁹³ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.2 (2006).

³⁹⁴ 42 U.S.C. § 15483(a)(5)(B)(i); N.Y. Elec. Law § 3-103(2) (2006).

³⁹⁵ 42 U.S.C. § 15483(a)(5)(B)(ii); N.Y. Elec. Law § 3-103(3) (2006).

³⁹⁶ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.5 (2006).

3. Verification of Voter Registration Information

HAVA requires the State election system to ensure that voter registration records in the State are accurate and updated regularly and prescribes minimum requirements for verification of voter registration information. An application for voter registration must include the applicant's current and valid driver's license number, the last four digits of his or her Social Security number, or an indication that he or she has neither a driver's license nor a Social Security number.³⁹⁷ If an applicant has neither a driver's license nor a Social Security number, the state must assign him or her a unique identifying number.³⁹⁸ A Department of Motor Vehicle (DMV)-issued non-driver photo ID number is acceptable in place of a driver's license number.³⁹⁹ A person who registers to vote for the first time by mail and does not have a driver's license, non-driver photo ID, or Social Security number must submit a copy of a current and valid photo ID, current utility bill, bank statement,

³⁹⁷ 42 U.S.C. § 15483(a)(5)(A)(i); N.Y. Elec. Law § 5-210; N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.5(4)(v) (2006).

³⁹⁸ 42 U.S.C. § 15483(a)(5)(A)(ii); N.Y. Elec. Law § 5-210(8) (2006).

³⁹⁹ N.Y. Elec. Law § 5-210; N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.5(4)(v) (2006).

government check, paycheck, or other government document that shows his or her name and address.⁴⁰⁰

Verification of a voter's identity will be done at the county level.⁴⁰¹

Failure to verify a voter's identity will not result in the rejection of his or her application.⁴⁰² Rather, the county board of election will send the voter a notice of approval with a request for more information in order to verify his or her identity.⁴⁰³ The voter will then be included on the registration list with a notation that his or her identity has not been verified.⁴⁰⁴

4. Methods of Pre-Election Day Verification

An application is verified if it is received from the Department of Motor Vehicles and "processed simultaneously and integrated with an application for a motor vehicle driver's license, a driver's license renewal or an identification card if such card is issued by the Department of Motor Vehicles in its normal course of

⁴⁰⁰ 42 U.S.C. § 15483(b)(3)(A) (2006); N.Y. Elec. Law § 5-210(5)(k)(vii) (2006).

⁴⁰¹ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6(1) (2006).

⁴⁰² Id.

⁴⁰³ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6(6) (2006).

⁴⁰⁴ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6(10) (2006).

business.”⁴⁰⁵ Otherwise, NYSVoter will compare the license or non-driver number, name, date of birth, and gender with DMV records to verify the voter’s identification.⁴⁰⁶

If necessary in order to verify a voter’s identification, NYSVoter will compare the last four digits of a voter’s Social Security number, name, and date of birth with SSA records.⁴⁰⁷ Results from DMV and SSA that match will be sent to the relevant county board of election, which will determine whether the results are sufficient to verify the applicant’s identity.⁴⁰⁸ County discretion raises the possibility of different standards being applied in different jurisdictions.

5. Provisional Voting (Affidavit Ballot)

HAVA provides for provisional voting by individuals who declare that they are registered to vote in a Federal election in a jurisdiction but who are not on the official list of registered voters or are otherwise alleged to be ineligible. It requires that: (1) such individuals be permitted to cast a provisional ballot; (2) the

⁴⁰⁵ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6(2) (2006).

⁴⁰⁶ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6(3) (2006).

⁴⁰⁷ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6(4) (2006).

⁴⁰⁸ N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6 (2006).

ballot be promptly verified and counted if determined to be valid under State law; and (3) the voter be able to ascertain whether the vote was counted, and, if the vote was not counted, why it was not counted.⁴⁰⁹

In New York, a provisional ballot is called an affidavit ballot. The following people who wish to vote at a polling place may do so only by affidavit ballot: 1) a person whose name does not appear on the list of registered voters for the polling place,⁴¹⁰ and 2) a first time voter who registered by mail but whose identity has not been verified and who does not present a driver's license, non-driver photo ID, other current and valid photo ID, current utility bill, bank statement, government check, paycheck, or other government document that shows his or her name and address.⁴¹¹

When a voter casts an affidavit ballot, the local election official will inform him or her that he or she may call a toll-free telephone number or access a

⁴⁰⁹ 42 U.S.C. § 15301 (2006).

⁴¹⁰ 42 U.S.C. § 15482(a); N.Y. Elec. Law § 8-302(3)(e) (2006).

⁴¹¹ 42 U.S.C. § 15483(b); N.Y. Elec. Law § 8-302(2-a); N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6(11) (2006).

website to determine whether his or her vote was counted, and if it was not counted, the reason.⁴¹²

6. Administrative Complaint Procedure

HAVA also requires that States establish and maintain State-based administrative complaint procedures for any person who believes the above HAVA requirements have been violated.⁴¹³ Under New York's procedure, complaints may be made in person, in writing, or by calling a toll-free number the SBOE has set up.⁴¹⁴ Complaints may be formal or informal. All formal complaints, however, must be made in writing.⁴¹⁵ A person who files a formal complaint is entitled to a hearing on the record if he or she so requests in writing.⁴¹⁶ The full SBOE regulations for the administrative complaint procedure are set forth at N.Y. Comp. Codes R. & Regs. tit. 9, §§ 6216.1-6216.3.

⁴¹² 42 U.S.C. § 15482(a)(5); N.Y. Elec. Law § 8-302(3-c) (2006).

⁴¹³ 42 U.S.C. § 15512; N.Y. Elec. Law § 3-105 (2006).

⁴¹⁴ N.Y. Comp. Codes R. & Regs. tit. 9, § 6216.2.

⁴¹⁵ Id.

⁴¹⁶ N.Y. Comp. Codes R. & Regs. tit. 9, § 6216.2(d).

7. The Voting Rights of Convicted Persons

Felony disenfranchisement laws have received increased attention as a civil rights issue in the past decade because of a series of “tough on crime” measures that have led to a 600% increase in incarceration since 1974 and the disproportionate impact on minority voting populations.⁴¹⁷ Black males are six times as likely to have served time in prison as white males, and Hispanic males are three times as likely.⁴¹⁸

Recently, the New York State Bar Association Special Committee on Collateral Consequences of Criminal Proceedings was charged with studying the legal disabilities and social exclusions resulting from adverse encounters with the criminal justice system and the effects these collateral punishments have on New York residents who have been arrested or charged with a criminal offense, whether convicted or not. The Special Committee on Collateral Consequences thoroughly identified the collateral consequences of conviction and the effect had on the convicted persons' families, their communities, and our society in general. One of

⁴¹⁷ New York State Bar Association Special Committee on Collateral Consequences of Criminal Proceedings.

⁴¹⁸ Id.

the collateral consequences explored by that committee was the imposition of restrictions on civil participation, including felony disenfranchisement laws.⁴¹⁹

New York's felony disenfranchisement laws fall somewhere in the middle of the spectrum of states' policies regarding felon disenfranchisement. All but two states have laws disenfranchising those who have been convicted of a felony. Ten states have permanent disenfranchisement, subject to reinstatement procedures, for at least some people with criminal convictions and another twenty do not restore voting rights until after probation.⁴²⁰ In New York, people who serve a year or more in prison as a result of a felony conviction are prohibited from voting while in prison and on parole, but those on probation or those who have completed their prison sentences and are no longer under supervision are permitted to vote.⁴²¹ In addition, a person who has been convicted of no more than one felony may apply for a Certificate of Relief from Disabilities and be relieved of the disability of disenfranchisement. The Special Committee on Collateral Consequences reported

⁴¹⁹ New York State Bar Association Special Committee on Collateral Consequences, Re-entry and Reintegration: The Road To Public Safety; Civic Participation available at http://www.nysba.org/Content/ContentGroups/News1/Collateral_Consequences_Report/Recommendations_CivilParticipation.pdf.

⁴²⁰ Brennan Center for Justice, Criminal Disenfranchisement Laws Across the United States available at http://www.brennancenter.org/dynamic/subpages/download_file_48642.pdf

⁴²¹ N.Y. Elec. Law § 5-106 (2006).

that New York's restrictions on voting by felons were affecting approximately 126,800 persons.

The Special Committee on Collateral Consequences discussed in detail the development of New York's felony disenfranchisement law with regard to race, punishment purposes, partisanship, public sentiment and the practical effects of disenfranchisement. It offered a number of reform recommendations to promote successful re-entry and reintegration of convicted felons into civil society.

8. Recommendations of the Special Committee on Collateral Consequences of Incarceration

The Special Committee on Collateral Consequences advocated expanding the franchise, at a minimum, to those on parole, and, preferably, also to those still incarcerated. It stated that continued civic participation of convicted felons is valuable both for democracy and as a means of rehabilitation and reintegration.

First, the Committee found no compelling justification for restricting people on parole from voting. The restriction reduces the number of minorities in the electorate and is a hurdle to reintegration into society. The Committee hopes to lessen the confusion of election laws by advocating allowing all persons who have been released from prison to vote. Furthermore, it found that counting people in prison for purposes of the census but refusing to allow them to participate in voting

distorts the representation in state and federal legislative bodies of the towns in upstate New York with prisons.

The Committee on Collateral Consequences found that there were formidable constitutional hurdles to reforming disenfranchisement through the courts. New York's disenfranchisement law has been challenged in federal court on the grounds that it violated the federal equal protection clause and the U.S. Voting Rights Act of 1965. However, the Second Circuit held in *Hayden v. Pataki* that the Voting Rights Act, as amended in 1982, does not encompass felon disenfranchisement provisions such as § 5-106 of the New York State Election Law “because (a) Congress did not intend the Voting Rights Act to cover such provisions; and (b) Congress made no clear statement of an interest to modify the federal balance by applying the Voting Rights Act to these provisions.”⁴²²

Given the *Hayden* decision and that New York courts have held that the state constitution's equal protection clause is no broader than that of the federal constitution,⁴²³ the Committee on Collateral Consequences determined that the

⁴²² Hayden v. Pataki, 499 F.3d 305 (2d Cir. 2006).

⁴²³ Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530 (1949), cert. denied, 339 U.S. 981 (1950); Esler v. Walters, 56 N.Y.2d 306, 313-14 (1982).

likelihood of success of a challenge to the disenfranchisement law brought under New York's constitution seemed "unpromising."

Therefore, the Committee on Consequences recommended that the NYSBA devote its efforts to lobbying for the statute's repeal or amendment. In particular, it advocated supporting Senator Kevin Parker's Enfranchisement Bill, which was reintroduced in the 2006-2007 session. (S03872). The Committee did not recommend expending the State Bar's finite resources in support of federal legislation because of constitutionality concerns.

The Special Committee on the Civil Rights Agenda agrees with and supports the conclusions of the Special Committee on Collateral Consequences. Nevertheless, Article II of the New York State Constitution is entitled "Suffrage" and has as its aim the assurance of the right to vote for citizens of New York State. Moreover, section one of Article II, authorizes every citizen to vote and section four of Article II states that no person should have lost or gained a residence by being in prison. These provisions can be used to aid those denied the vote because of criminal status.

9. De Facto Disenfranchisement and the Work of the Brennan Center

The Brennan Center for Justice at New York University Law School has been at the forefront of studies regarding de facto disenfranchisement. The Center leads a nationwide campaign to restore the vote to people with criminal convictions.

The details of these rights for New Yorkers are more fully set forth in an outline prepared by the Brennan Center.⁴²⁴ The work of the Center includes the following initiatives: (a) litigation to restore the right to vote to people with criminal convictions; (b) counseling state advocates and lawmakers and drafting legislation to restore voting rights, to provide notice to people when their rights are restored, and to ensure that the names of newly eligible voters are properly added to official registration lists; (c) surveying the practices of elections and corrections officials to determine whether existing disenfranchisement laws are properly administered; and (d) educating the public to increase awareness of the scope of disenfranchisement and to promote the restoration of voting rights.

On March 15, 2006, the Center reported a recent survey of county election officials it had conducted in *Demos: A Network for Ideas & Action*. Under current law, a New Yorker who has been convicted of a felony is able to vote automatically upon the completion of his prison sentence. Yet the study found that more than one-third of New York's sixty-three local election boards, including those in three New York City boroughs, continue to unlawfully disfranchise eligible voters with felony convictions. Despite previous advocacy efforts, election officials persist

⁴²⁴ Brennan Center for Justice Home Page, <http://www.brennancenter.org>.

in misapplying the law, resulting in the illegal disfranchisement of potentially thousands of eligible voters. Roughly half of New York’s county election boards were confused about who is eligible to vote or improperly asked for proof of eligibility to vote in the form of papers that do not exist.

The Center recommended that the State Bar assist organizations to “keep those on the front lines, i.e., registrars, poll officials and others, fully informed of the minimal requirements associated with voting.”⁴²⁵ On May 11, 2006, the Center announced that the New York State Board of Elections took the important practical step of offering training to hundreds of county officials to clarify the law.

In addition, the Center suggested that the State Bar support proposed legislation “which would require the state board of parole to notify people of their right to vote upon completion of their sentence.”⁴²⁶ On June 23, 2006, the New York Assembly passed the Voting Rights Notification and Registration Act, legislation designed to notify New Yorkers with felony convictions of their voter eligibility

⁴²⁵ Assemb. B. 11652, 2006 Leg., 228th Sess. (N.Y. 2006).

⁴²⁶ Assemb. B. 11652, 2006 Leg., 228th Sess. (N.Y. 2006).

status.⁴²⁷ However, the bill never got out of Committee in the Senate. It has been reintroduced in this session in both houses.⁴²⁸ (A.554, S.2017).

Lastly, the Center recommended that the State Bar “take steps to facilitate voting by those who are allowed to vote under the law, but by reason of being in jail, cannot as a practical matter.” It recommended that absentee ballots, registration forms and provisional ballots be made available within jails and detention facilities to eliminate de facto disenfranchisement of people allowed to vote under the current law, including those awaiting trial (and presumed to be innocent).

Thus, the Brennan Center’s current voting rights and elections initiatives include:

improving voter registration systems and eliminating unnecessary restrictions on voter registration drives.

working with state officials and advocates to ensure that new voter registration databases improve the administration of elections and do not

⁴²⁷ Assemb. B. 11652, 2006 Leg., 228th Sess. (N.Y. 2006).

⁴²⁸ Assemb. B. 554, 2007 Leg., 229th Sess. (N.Y. 2007); S.B. 2017.

create barriers to the franchise.

working to ensure that efforts to purge the voter rolls or to challenge potentially ineligible voters are non-discriminatory and do not result in the disenfranchisement of eligible citizens.

working to combat strict voter identification rules, especially those that prevent citizens from voting unless they show photo identification or proof of citizenship.

examining allegations of voter fraud to ascertain where truth lies.

working to improve the transparency and accountability of federal agencies that oversee voting and election matters.

convening experts in voting systems to assess the security, accessibility, usability, and cost of the various available types of voting systems, and working to promote procedures to ensure that every properly cast vote is counted.

working to ensure that provisional ballots serve as a meaningful safeguard for eligible voters and are not over-used.

providing counsel to students facing illegal restrictions on their right to vote and to organizations seeking to register young voters.

providing legal and legislative counseling to state officials and advocates seeking to improve election administration and to properly and fairly implement HAVA.

10. Civil Rights Denial by the Practical Disenfranchisement of Convicted Felons⁴²⁹

Section 5-106 of New York's Election Law currently disenfranchises all persons convicted of a felony and sentenced to one or more years' imprisonment.⁴³⁰ This prohibition applies equally to juvenile offenders if they are still serving their juvenile sentence or are still under state supervision upon reaching the age of majority.⁴³¹ The predicate for disenfranchisement is the prison sentence, and not the simple conviction alone. The prohibition on voting lasts for the duration of imprisonment and parole, if it is granted.⁴³² Under the current state of the law,

⁴²⁹ The majority of the contents of this section are distilled from the New York State Bar Association report of the Special Committee on Collateral Consequences of Criminal Proceedings, Re-Entry and Reintegration: The Road to Public Safety, Part 6, Section IX, available at www.nysba.org/Content/ContentGroups/News1/Collateral_Consequences_Report/CollateralConsequencesRepor-section6.pdf. For a more comprehensive discussion of voting rights, please consult the full report.

⁴³⁰ N.Y. Elec. Law § 5-106.

⁴³¹ Id.

⁴³² Id.

voting rights are supposed to be automatically restored to the individual once the sentence is completed.⁴³³

An individual currently barred from voting by § 5-106 may obtain a Certificate of Relief from the New York State Board of Parole to remove the “civil disability.”⁴³⁴ This relief can be vital to a person with an indeterminate sentence which could effectively keep him or her on parole for life, and which would otherwise permanently disenfranchise that person.⁴³⁵ A sentencing judge may also grant a certificate of relief, but only if no prison sentence is imposed.⁴³⁶ Applying for a certificate of relief may take several months.⁴³⁷ Additionally, even if relief is

⁴³³ The law was amended in 1971 to provide for automatic restoration of voting rights. Act of May 25, 1971, ch.310, §2, 1971 N.Y. Laws 1952-53.

⁴³⁴ The Bronx Defenders Civil Action Project, The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records 2, 4 (Oct. 2004).

⁴³⁵ The New York State Bar Association Special Committee on the Collateral Consequences of Criminal Proceedings, Re-Entry and Reintegration: The Road to Public Safety, at 303 (2003).

⁴³⁶ Id.

⁴³⁷ The Bronx Defenders Civil Action Project, supra note 7, at 4.

granted, the certificate may be revoked for violations of parole or the conditions of release from prison.⁴³⁸

Fourteen states currently disenfranchise either permanently or for a set period even after the sentence is completed. Only Maine and Vermont impose no restriction on voting for past felons.⁴³⁹

11. Voting Restrictions and Race

Black males are six times, and Hispanic males three times more likely than white males to be incarcerated at some point in their lives.⁴⁴⁰ Thus, the above restrictions on voting disproportionately affect minority populations within New York State, further diluting what was a minority vote to begin with.⁴⁴¹

Although the law calls for automatic restoration of voting rights upon termination of imprisonment or parole, data suggest that, in practice, many ex-convicts have faced numerous bars to returning to the polls. Until 2003, election

⁴³⁸ **Id.**

⁴³⁹ Mark Hamblett, Full Circuit Weighs Felon Voting Rights, N.Y.L.J., June 23, 2005, at 1, 7; Kate Zernike, "Iowa Governor Will Give Felons the Right to Vote," N.Y. Times, June 18, 2005, at 1.

⁴⁴⁰ Editorial, "Give Ex-Prisoners a Voice," USA Today, Aug. 26, 2003.

⁴⁴¹ See NAACP v. Harvey, 381 N.J. Super. 155 (2005).

registrars in over half of New York's sixty-two counties, including the five boroughs of New York City, were requiring, without authority to do so, additional documentation before registering former felons to vote. In many cases this documentation either did not exist or was not readily available.⁴⁴² Following a campaign by various social and legal advocacy groups, the New York Board of elections has instituted a policy of informing all county boards of elections that former felons are to be treated like any other registrant once they are outside the purview of Election Law § 5-106.⁴⁴³ Although this policy should have addressed the problem, implementing the law among local boards has proved difficult. Recently, 38% of New York's local boards stated their belief past felons were ineligible to vote or that they were uncertain whether such people could vote, and 32% requested unnecessary documentation of former felons, many doing so while knowing that it was unlawful to do so.⁴⁴⁴ Following persistent advocacy on this issue, county boards of election are now required to consult with the Department of Correctional

⁴⁴² Brennan Center, Voting Rights Victory Secured Throughout New York State (Nov. 3, 2003), available at, http://www.brennancenter.org/press_detail.asp?key=100&subkey=9989

⁴⁴³ Id.

⁴⁴⁴ Demos, The Brennan Center for Justice and Legal Action Center, Boards of Elections Continue Illegally to Disfranchise Voters with Felony Convictions (Mar. 15, 2006), available at <http://www.demos.org/pub836.cfm>.

Services if they are uncertain as to whether an individual has a civil disability bar to voter eligibility.⁴⁴⁵

New York City is particularly affected by this wrongful denial of voting rights to former felons. One third of individuals on probation in New York State are from New York City.⁴⁴⁶ At the same time, New York City has by far the largest minority population in the state.⁴⁴⁷ Thus, felon disenfranchisement disproportionately dilutes the voting representation not only of individuals or the statewide minority community, but also the geographic region where such communities are concentrated.

Compounding the above problem is the fact that the census counts prisoners in the local population of the community surrounding the prison. Thus, upstate communities are allotted disproportionate political representation on account of a prison population that cannot vote.⁴⁴⁸

⁴⁴⁵ Id.

⁴⁴⁶ The New York State Bar Association Special Committee, supra, note 7, at 309.

⁴⁴⁷ See U.S. Census Bureau, "State and County Quickfacts: New York City" (May 7, 2007), available at <http://quickfacts.census.gov/qfd/states/36/3651000.html>.

⁴⁴⁸ Hamblett, supra note 11, at 7.

A related matter is that within prisons, even individuals who are not prohibited from voting by Election Law § 5-106 have no way of casting a ballot, thus expanding the disenfranchisement to those awaiting trial or people convicted of a misdemeanor, well beyond the intended scope of Election Law § 5-106.⁴⁴⁹

While a certificate of relief is available in certain cases to restore voting rights to people on parole, attaining such a certificate can take months and require extensive effort.⁴⁵⁰ The result under the present system is that many who may be eligible for relief from disenfranchisement may ultimately never have their right to vote restored.

12. Litigating the Voting Rights Issue

In 2004 in *Hayden v. Pataki* a group of black and Hispanic convicted felons from New York brought suit against then-Governor Pataki in the Southern District of New York.⁴⁵¹ The plaintiffs sought to have § 5-106 invalidated as a violation of, inter alia, the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution and the Civil Rights Acts of 1957 and 1960. The federal

⁴⁴⁹ Voting While Incarcerated: A Tool Kit for Advocates Seeking to Register, and Facilitate Voting by, Eligible People in Jail, ACLU/ Right to Vote (New York, NY at 1), Sept. 2005.

⁴⁵⁰ The Bronx Defenders, supra note 6, at 2.

⁴⁵¹ Hayden v. Pataki, 2004 WL 1335921 (S.D.N.Y., 2004).

district court granted defendant's motion to dismiss, reasoning that plaintiffs had failed to specifically allege a discriminatory intent on behalf of the New York Legislature in enacting the felony disenfranchisement laws.⁴⁵² Moreover, the disparate treatment of incarcerated felons as opposed to those convicted of misdemeanors or not sentenced to prison passed muster under a rational basis test according to the court.⁴⁵³ Finally, the Civil Rights Acts of 1957 and 1960 do not provide for private rights of action, thus foreclosing the issue in *Hayden*.⁴⁵⁴

The plaintiffs in *Hayden* also challenged Election Law § 5-106 as a violation of the Voting Rights Act of 1965. The district court found that Second Circuit case law prevented challenging the New York statute on those grounds.⁴⁵⁵ The plaintiffs took this issue to the Second Circuit on appeal, which ruled in a 5-4 *en banc* decision that a 1982 amendment to the Voting Rights Act did not serve to invalidate statutes such as § 5-106 because there was no clear statement of congressional intent to fundamentally change the balance of power in regulating

⁴⁵² Id. at 3-4.

⁴⁵³ Id. at 4-5.

⁴⁵⁴ Id. at 5.

⁴⁵⁵ Id. at 5.

state by state voting.⁴⁵⁶ Thus, attempts through litigation to change the law have up to now met with no success. Nevertheless, Article II of the New York State Constitution appears to protect the right to vote of citizens, including those convicted of crimes.

E. RECOMMENDATIONS

1. The vote of each person entitled to vote must be protected.
2. Voting over a period of days should be explored.
3. Wherever there is electronic voting, a backup system to insure the vote is registered and counted should be in place.
4. The most direct path to achieving voting rights reform and resultant increased civic participation from former felony convicts is legislative amendment of the existing statute.

State Senator Kevin S. Parker (D- Brooklyn) sponsored S3782, which would repeal the current felony disfranchisement scheme.⁴⁵⁷ Alternatives to

⁴⁵⁶ Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006).

⁴⁵⁷ New York State Senate Legislative Information Database: Senator Kevin S. Parker (last accessed 5/29/07) available at <http://public.leginfo.state.ny.us/distsen.cgi>.

complete repeal include a graduated scheme whereby only crimes of a certain type would lead to disfranchisement, instead of all felonies resulting in a prison sentence.⁴⁵⁸ A third alternative, and perhaps the most appealing one, is to endow sentencing judges with the authority to decide whether civil disability should be attached to a convicted person's sentence. This is a scheme similar to what exists today with regard to sentencing itself. If it is desired, the Legislature would be able to establish minimum guidelines while allowing judges room to decide if any particular case calls for such an extreme measure of civic isolation. Moreover, judges also would be able to decide the duration of disfranchisement. Such a scheme would operate first to work a compromise between different viewpoints on the felony disfranchisement issue as well as prevent such a vast portion of the population from suffering civil disability.

5. Likewise, increased education for those affected by Election Law § 5-106 would act to restore more eligible former felons to voting status. Informing individuals prior to release from prison of their automatic eligibility to vote would increase awareness of their restored rights as well as prevent their acceptance of false information if confronted with resistant or misinformed voting registration

⁴⁵⁸ The New York State Bar Association Special Committee, supra, note 7, at 319.

officials.

ADDENDUM TO CHAPTER III

VOTING AND RACE: SIGNIFICANT CONSTITUTIONAL PROVISIONS AND VOTING RIGHTS CASES

A. FEDERAL CONSTITUTION

1. **Article I § 4[1]**: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.

2. **Amendment XV, Section 1**: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

B. NEW YORK STATE CONSTITUTION

1. Article II Suffrage

Qualifications of voters

Section 1. Every citizen shall be entitled to vote at every election for

all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.

Certain occupations and conditions not to affect residence

Section 4. For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison.

C. APPORTIONMENT

1. Baker v. Carr (1962)

In *Baker v. Carr*,⁴⁵⁹ The Tennessee general assembly had not reapportioned since 1900 so the districts did not represent a shift of the population

⁴⁵⁹

369 U.S. 186 (1962)

from rural to urban areas. As a result, 60% of the population was represented by only 20% of the representatives.

Supreme Court: For the first time, the Supreme Court held that the federal courts could entertain issues dealing with apportionment or the lack thereof.

2. *Reynolds v. Sims* (1964)

In *Reynolds v. Sims*,⁴⁶⁰ the Supreme Court held that as much as practicable, apportionment must be such that one person's vote is worth as much as another's. State legislative districts must be substantially equal in population.

D. VOTE DILUTION

1. *City of Mobile v. Bolden* (1980)

In *City of Mobile v. Bolden*,⁴⁶¹ the City Council was chosen by an at-large multi-member representation procedure and not by single-member districts. The Supreme Court upheld the procedure as constitutional, indicating that those attacking the procedure had to demonstrate an intent to discriminate when a law is facially neutral and has a disparate effect on minorities.

⁴⁶⁰ 377 U.S. 533 (1964).

⁴⁶¹ 446 U.S. 55 (1980).

2. Rogers v. Lodge (1982)

In *Rogers v. Lodge*,⁴⁶² the Supreme Court found a discriminatory purpose behind the at-large voting system in a rural county in the State of Georgia.

3. Thornburgh v. Gingles (1986)

In 1982, Congress amended the Voting Rights Act of 1965 to eliminate the requirement that a discriminatory purpose be proved in order to show vote dilutions. In *Thornburgh v. Gingles*,⁴⁶³ the Supreme Court adopted a three-part test to prove vote dilution - (1) a distinct racial group sufficiently large that could elect one of the group in a single member district, (2) a group that is politically cohesive and (3) a history of racially polarized voting.

E. Racial Gerrymandering

1. Background:

After the 1982 Voting Rights Act amendments and the 1990 census, issues arose about how to both protect incumbent and increase minority representation. Some oddly shaped districts resulted.

⁴⁶² 458 U.S. 613 (1982).

⁴⁶³ 478 U.S. 30 (1986).

2. **Shaw v. Reno** (1993)

In *Shaw v. Reno*,⁴⁶⁴ the Supreme Court held that the issue of racial gerrymandering is justiciable, that the issue of whether race is a factor in the drawing of electoral lines must be determined under a strict scrutiny standard where a compelling governmental reason must be shown for the drawing and that districts cannot be drawn in a way where race is the determining factor.

3. **Shaw v. Hunt** (1996)

In *Shaw v. Hunt*,⁴⁶⁵ The Supreme Court held that a North Carolina redistricting plan with a “bizarre” shape violated the Equal Protection clause of the Fourteenth Amendment because it was drawn on a predominantly racial basis and was not narrowly tailored to meet a compelling state interest.

4. **Hunt v. Cromartie** (1999)

In *Hunt v. Cromartie*,⁴⁶⁶ the Supreme Court reversed a summary judgment determination that a congressional districting plan in North Carolina was motivated predominantly by race.

⁴⁶⁴ 509 U.S. 630 (1993).

⁴⁶⁵ 517 U.S. 899 (1996).

⁴⁶⁶ 526 U.S. 541 (1999)

5. **Easley v. Cromartie** (2001)

In *Easley v. Cromartie*,⁴⁶⁷ the Supreme Court reversed a lower three-judge court and upheld a North Carolina statute by holding that politics, not race, was the predominant factor in the drawing of the district lines.

6. **Miller v. Johnson** (1995)

In *Miller v. Johnson*,⁴⁶⁸ the Supreme Court held that Georgia's congressional redistricting plan that created three predominantly African American congressional districts was a racial gerrymander that violated the Fourteenth Amendment to the Constitution of the United States.

7. **Bush v. Vera** (1996)

In *Bush v. Vera*,⁴⁶⁹ the Supreme Court ruled that a Texas congressional redistricting plan was an unconstitutional racial gerrymander that violated the Fourteenth Amendment to the Constitution of the United states.

⁴⁶⁷ 532 U.S. 234 (2001).

⁴⁶⁸ 515 U.S. 900 (1995).

⁴⁶⁹ 517 U.S.592 (1996).

THE STATE OF THE LAW TODAY WITH RESPECT TO RACE AND REDISTRICTING

After the Supreme Court decisions of the last decade, the state of the law is unclear. Up until that 2001 decision, the Supreme Court seemed to be holding that race could not be used as a predominant factor in drawing district lines.

Cromartie seems to allow race to be used to prevent vote dilution where politics is an overriding factor in the drawing of district lines.

IV. CRIMINAL LAW

INTRODUCTION.

A number of issues in criminal law involve race. The chapter on Juveniles recommended increased efforts to keep African Americans and other minorities out of the criminal justice system. This chapter will focus on several other issues. One issue is the continuing allegation of discrimination in the selection of juries. The problem dates back to the post-Civil War period and is still very much a part of the criminal justice system in New York and in the United States. A second problem is the conviction and incarceration of innocent persons. DNA evidence has led to the freeing of a number of persons wrongly accused and convicted. Thus a portion of this chapter will focus on those wrongly accused and convicted. A third issue involves the death penalty. Even though the Court of Appeals declared the death penalty unconstitutional in *People v. LaValle*,⁴⁷⁰ the death penalty still has strong advocates. Imposition of the death penalty in New York and elsewhere strongly implicates race. This chapter will discuss the recommendation of the American Bar Association for a moratorium on the imposition of the death penalty in the United States and the cases dealing with the

⁴⁷⁰ 3 N.Y.3d 88 (2004).

death penalty in New York. The appendix to Chapter IV discusses a study of the consequences of the racial makeup of the jury in death penalty cases.

A. JURY SELECTION AND DISCRIMINATION

1. THE HISTORY

In 1986, the Supreme Court held in *Batson v. Kentucky* that the Equal Protection Clause forbids a government prosecutor from exercising peremptory challenges on a racially discriminatory basis when choosing a petit or grand jury.⁴⁷¹ The case followed similar holdings in California and Massachusetts.⁴⁷² A defendant claiming racially discriminatory selection bears the burden of showing that he or she is a member of an identifiable racial group, that the prosecutor used peremptory challenges to eliminate venire persons of that racial group and that there is an inference that the prosecutor acted on account of race.⁴⁷³ The prosecution may rebut the prima facie case with a race-neutral, facially valid, reason for every dismissed venire person. If the defense disputes the rebuttal, the court will engage in factfinding to determine if the proffered explanation is false or pre-textual.

⁴⁷¹ 476 U.S. 79 (1986).

⁴⁷² People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461 (1979).

⁴⁷³ 476 U.S. at 93 - 98.

In 1990, the New York Court of Appeals extended *Batson* by prohibiting racially discriminatory challenges by defense counsel, as well as prosecutors, in the case of *People v. Kern*.⁴⁷⁴ Reasoning that judicial enforcement of a peremptory challenge by the defense inextricably involves a government actor in the discrimination, the Court of Appeals held that the state action criterion for Equal Protection violations is satisfied in such a case.⁴⁷⁵

Just five years later, in *People v. Allen*, the Court of Appeals applied *Batson* to prosecutorial peremptory challenges on the basis of gender in a sexual abuse and incest case.⁴⁷⁶ The court held that the prosecutor had clearly acted discriminatorily in using fourteen of her fifteen peremptory challenges to strike men from the jury.⁴⁷⁷ The Court also noted that under established law, this type of sex discrimination was impermissible even if retaliatory. The proper response to

⁴⁷⁴ 75 N.Y.2d 638 (1990).

⁴⁷⁵ Id. at 657-58.

⁴⁷⁶ 86 N.Y.2d 101(1995).

⁴⁷⁷ Id. at 109.

discriminatory challenges by the defense (now outlawed by *Kern*) was to make an objection to the court.⁴⁷⁸

Since the Court of Appeals last enlarged the scope of *Batson* in New York, it has upheld virtually every conviction challenged on jury discrimination grounds that has come before it. In *People v. Smocum* and *People v. James*, the Court of Appeals denied the *Batson* claims on grounds that the challenge was unpreserved either because of the timing or scope of the claim.⁴⁷⁹ In *People v. Wells*, and *People v. Brown*, the court found race neutral reasons for the prosecutor's actions and no prima facie showing of a discriminatory act, respectively.⁴⁸⁰ And in *People v. Hameed*, the procedural rights due a defendant making a *Batson* claim were limited when the court held that the defense was not entitled to adversarial cross-examination during a post-verdict *Batson* hearing in which the prosecutor testified under oath.⁴⁸¹ The court noted that sworn testimony was itself not required to decide a *Batson* claim, even if granted in this unusual case.⁴⁸²

⁴⁷⁸ Id., FN 3.

⁴⁷⁹ People v. Smocum, 99 N.Y.2d 418 (2003); People v. James, 99 N.Y.2d 264 (2002).

⁴⁸⁰ People v. Wells, 7 N.Y.3d 51 (2006); People v. Brown, 97 N.Y.2d 500 (2002).

⁴⁸¹ People v. Hameed, 88 N.Y.2d 232 (1996).

⁴⁸² Id. at 237-38.

Thus, while the Court of Appeals took significant steps in expanding the application of *Batson* to defense peremptory challenges and gender-based discrimination in the 1990s, it seems to have become less receptive to actually striking convictions on *Batson* grounds since those cases.

2. RECOMMENDATIONS FOR REFORM

a. Because *Batson* standards, as set out and applied, are purely a creation of case law, it is difficult to envision many effective “reforms” which could be implemented in an active manner. However, one possible means of ensuring strict compliance with *Batson* standards is to require a verbal instruction to counsel for both sides at the start of jury selection. A brief instruction admonishing both sides that they are forbidden from exercising prejudicial peremptory challenges would keep the issue fresh in their minds throughout the process, as well as indicate that their actions are being observed and that inappropriate behavior in this regard could harm their case in the long run.

b. The whole issue of peremptory challenges and whether or not they are necessary or desirable is a continuing matter of debate. The pros and cons of their continued use should be investigated. The New York State Bar Association, along with other bar associations and interested observers, should undertake a comprehensive study of the necessity for continued use of peremptory challenges.

B. WRONGFUL CONVICTIONS

1. Brief History

Before the enactment of Court of Claims Act § 8-b (L 1984 c. 1009), a person convicted of a crime through malfeasance on the part of a prosecutor had only one extremely limited option. There was no common law right to recover for what is now known as wrongful conviction. The only tort remedies were for false imprisonment (only available until a court authorized the imprisonment) or for malicious prosecution (which requires proof of absence of probable cause and proof of actual malice). Prosecutors and the state, through vicarious liability, were immune from suit. Therefore, before enactment of the Court of Claims Act § 8-b - The Unjust Conviction and Imprisonment Act of 1984 - the only route to recovery was to lobby the Legislature for passage of a so-called moral obligation bill that would authorize an individual person to recover compensation where no legal liability otherwise existed, but notions of justice and equity compelled redress. Court of Claims Act § 8-b has not been amended since its enactment in 1984.

2. The Statute

The statute details the burdens of proof, the limited circumstances when recovery is available and the procedure for making a claim. The statute is not designed to allow defendants to recover when their convictions have been overturned on constitutional grounds (for example, police violation of the Fourth Amendment in making an arrest). Rather, the statute is designed to allow a very

narrow class of defendants to recover, and the most significant requirement is proof of innocence.

3. DNA Evidence

The most significant recent development to aid those wrongly convicted is the widespread availability of DNA analysis. The New York State Court of Appeals approved the admissibility of DNA evidence in 1994 in *People v. Wesley*.⁴⁸³

Periodically, the media announces the release of yet another defendant “based upon DNA evidence.” But DNA evidence does not insure the release of someone from prison. Prosecutors and judges, at times, seem reluctant to process DNA samples when the results will not “prove” that the defendant was not guilty.

4. Pro Se Appeals

The Innocence Project routinely appears in news stories when a person is exonerated, but for every person represented by an experienced advocate, there are many more people fighting for release on their own. Not all people released will have a cause of action under the Court of Claims Act. Only those who have been pardoned by the governor on the ground of innocence or with reversals on specific

⁴⁸³

83 N.Y.2d 417.

Criminal Procedure Law (CPL) CPL § 440.10 grounds and whose indictments are dismissed on specific grounds or whose conviction is overturned by an appellate court on certain CPL § 470.20 grounds may seek damages [and, as mentioned before, he or she must prove that he or she “did not commit any of the acts charged,” nor did he or she cause his or her conviction]. There are statutes of limitations for bringing wrongful conviction claims and the procedures outlined in the Court of Claims Act (as a waiver of sovereign immunity) have been strictly construed and must be followed carefully lest a worthy claim be lost on jurisdictional or procedural grounds.

5. RECOMMENDATIONS CONCERNING WRONGFUL CONVICTIONS

a. **Issue:** The role of DNA evidence, post-conviction seems unclear. When a trial court or prosecutor is presented with a CPL § 440 motion or a pro se request for DNA analysis, the discretion of the district attorney or the trial court seems to weigh heavily in the decision of whether to obtain the analysis and then how much weight to give that evidence once it is obtained, based upon the other evidence available.

Recommendation: Prosecutors and Courts should not hesitate to process DNA samples when they are available. DNA profiles that do not point to a defendant should be compared or “run through” the DNA database periodically for

potential matches to other people within the DNA database. Rather than focusing on whether a match or non-match would have made a difference in the verdict before the test is run, the fact of a match or non-match should be established first.

b. Issue: The Court of Claims Act is very specific and particular. There is a sense in the history behind the Court of Claims Act that the availability of money damages was meant for defendants convicted through prosecutorial malfeasance. While authorizing punitive damages or somehow holding prosecutors personally accountable is, as a policy matter, unwise, there is a small accountability measure that can be required.

Recommendation: Just as an attorney who has committed malpractice must, as an ethical matter, inform his or her client of the malpractice, and recommend that the client seek counsel, a rule requiring that both the court and the prosecutor notify the defendant that he or she should seek counsel to determine whether there may be a wrongful conviction claim when a conviction is vacated on the particular grounds listed within the Court of Claims Act, would be a step in the right direction. Further, an ethical standard can be drafted to encourage prompt correction of prosecutorial malfeasance by expediting processing of untested evidence.

c. **Issue:** The current language of the Criminal Procedure Law § 440.30 (a) allows defendants to move for forensic DNA tests only after a trial and verdict (not after a plea deal).

Recommendation: Defendants should be permitted to move for forensic DNA testing after guilty pleas.

C. THE DEATH PENALTY AND AMERICAN BAR ASSOCIATION RECOMMENDATIONS

On October 29, 2007 the American Bar Association released findings from a three-year study of the death penalty systems in eight states⁴⁸⁴ and called for a national moratorium on executions. The ABA reporters from five states⁴⁸⁵ urged their individual state governments to impose a moratorium on executions. The study focused on the following 12 issues.

Collection, Preservation, and Testing of DNA and Other Types of Evidence - Despite the importance of DNA testing in determining guilt or innocence, states generally do not require physical and biological evidence to be preserved

⁴⁸⁴ Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee.

⁴⁸⁵ Alabama, Georgia, Indiana, Ohio, and Tennessee.

throughout the legal process, including post-execution or release, resulting in a possibility that evidence may be destroyed. DNA statutes are drafted too narrowly, with procedural hurdles impeding a convicted person from filing for and obtaining DNA testing.

Law Enforcement Identification and Interrogations - Although eyewitness misidentification and false confessions are two significant causes of wrongful convictions, states do not require identification and interrogation procedures consistent with the national best practices. Most states do not require a video or audiotape of the entire custodial interrogation in murder cases.

Crime Laboratories and Medical Examiner Offices - Courts increasingly rely on forensic evidence, but crime laboratories and medical examiner offices are not required to be accredited. In most of the surveyed states, there had been at least one instance of laboratory mistake or fraud. These offices are often not using the newest and most sophisticated technology and many laboratories are seriously underfunded. Laboratories in many states are not required to make their standards and procedures available to the public.

Prosecutorial Professionalism - Many states do not require special training for prosecutors who handle capital cases, and in most states prosecutors who engage in serious misconduct in capital cases are not disciplined. Despite the

substantial role the prosecutor plays in capital cases, states have neither established policies nor required prosecutors to establish policies in two key areas:

Prosecutorial discretion in deciding whether to seek the death penalty;
Evaluation of cases that involve eyewitness identification, confessions, testimony of jailhouse snitches, other informants, or witnesses who receive a benefit.

Defense Services - In regard to the counsel of the capital defendant, most states have only a county-by-county indigent capital defense system instead of a statewide program. In either situation, the service systems of the defense are generally significantly underfunded. The judiciary is still primarily responsible for appointing counsel. Some states do not appoint counsel in post-conviction proceedings and none of the surveyed states appoint defense counsel in clemency proceedings. Many states do not provide two lawyers at all stages of the case and do not guarantee access to investigators and mitigation specialists. Several states require only minimal training and experience for attorneys handling capital cases, and compensation for defense-appointed attorneys can be as low as fifty dollars (\$50) per hour.

Direct Appeal Process - One important function of the review process is comparative and proportionality review to ensure that the death penalty is not being imposed arbitrarily. Such review is designed to determine if the death penalty is being unfairly imposed against specific groups such as African Americans. Some

states, however, do not require proportionality review at all, while in the states that do, the review is often cursory and limited only to cases in which the death penalty was ultimately imposed. Few states, if any, have a capital case database with information on actual and potential capital cases to aid in proportionality review.

State Post-Conviction Proceedings - Although state post-conviction proceedings are vital to the process because capital defendants often receive inadequate counsel at trial or appellate proceedings, many states have unreasonably short time periods to file post-conviction petitions. Most states allow the post-conviction judge to rely on findings of fact and conclusions of law proposed by a party, potentially undermining the exercise of independent judgment. Some states direct post-conviction cases to the original trial judge, resulting in bias potential. Many states impede the ability to obtain discovery materials and make it difficult to obtain an evidentiary hearing by allowing the judge multiple opportunities to deny the post-conviction petition. Some states make it difficult to raise claims of error, including wrongful conviction.

Clemency - Clemency proceedings are the final opportunity for review and most states do not require any specific type or breadth of review, nor do they require the clemency decision-maker to explain the reasons behind his or her decision. Few states require the clemency decision-maker to meet with the inmate or with his or her attorney.

Capital Jury Instructions - Despite the important role of the jury in death penalty cases, many jurors do not understand their role and responsibility. Many states do not require written jury instructions or define important terms of art. Most states do not require instruction that a life sentence may be imposed when the jurors do not believe the defendant should receive the death penalty, even in the absence of mitigating factors, and even if an aggravating factor is proven beyond a reasonable doubt.

Judicial Independence - A judge's decision in capital cases may be influenced by electoral pressures and in most states judicial elections for some positions are partisan. The cost of judicial elections is rising in many states, and in most states, candidates advertise and publically discuss their views on the death penalty.

Racial and Ethnic Minorities - There are significant racial disparities in every state capital system, particularly in regard to the race of the murder victim. Little has been done to change these disparities, and, generally, the states do not keep the data necessary in order to quantify the problem and identify the causes.

Mental Retardation and Mental Illness - The Supreme Court has held that it is unconstitutional to execute defendants who are mentally retarded.⁴⁸⁶ States are free to determine whether an individual was mentally retarded at the time of the offense. Mental illness is a relevant factor throughout the capital trial. States do not, however, have policies to ensure that mentally impaired defendants are represented by counsel who fully understand the significance of the impairment. States do not formally commute a death sentence when it is determined that the defendant is not capable of proceeding on factual matters that require his or her input. Finally, most states do not require a jury instruction on the difference between the insanity defense and reliance on mental illness as a mitigating factor in sentencing.

D. DEATH PENALTY CASES DECIDED BY THE NEW YORK STATE COURT OF APPEALS

The following is a brief summary of the facts and holding of death penalty cases decided by the New York Court of Appeals since September of 1995 when the death penalty was reinstated in New York.

1. *Johnson v. Pataki*, 91 N.Y.2d 214 (1997)

⁴⁸⁶ **Atkins v. Virginia**, 536 U.S. 304 (2002).

Majority - Kaye, J.

FACTS: Governor Pataki issued Executive Order No. 27 requiring Attorney-General Dennis C. Vacco to replace District Attorney Robert T. Johnson on all proceedings involving the shooting of Police Officer Kevin Gillespie because the District Attorney had "adopted a 'blanket policy' against the death penalty."⁴⁸⁷ Subsequently, Angel Diaz was indicted in connection with Officer Gillespie's death on two counts of murder in the first degree and related offenses.⁴⁸⁸ Diaz's accomplices were indicted for second-degree murder and lesser offenses.⁴⁸⁹ While the legality of Executive Order No. 27 was being contested, Diaz committed suicide and the accomplices were convicted in federal court.⁴⁹⁰

HOLDING: First, the court held the controversy was not mooted by the death of Diaz and conviction of the accomplices because a "live controversy" remained.⁴⁹¹ Second, Executive Order No. 97 was held to be valid because Article IV § 3 of the New York Constitution and Executive Law § 63 (2) allowed the

⁴⁸⁷ Johnson, 91 N.Y.2d at 221.

⁴⁸⁸ Id.

⁴⁸⁹ Id.

⁴⁹⁰ Id.

⁴⁹¹ Id. at 222.

Governor to supersede the District Attorney.⁴⁹²

Titone, J., dissenting

Judge Titone found that that the Executive Order was an attempt by Governor Pataki to substitute his policy choices for those of the District Attorney in contravention of legislative intent in regard to overall administration of the death penalty.⁴⁹³

G. B. Smith, J., dissenting

As an initial matter Judge Smith found that the action was moot and should be dismissed.⁴⁹⁴ On the merits, supersession was unwarranted because there was no rational basis for Executive Order No. 97 since it undermined the legislative policy granting the District Attorney discretion in seeking the death penalty.⁴⁹⁵

2. *Hynes v. Tomei*, 92 N.Y.2d 613 (1998)

Majority - Kaye, J.

FACTS: This case analyzed the constitutionality of New York's death penalty statute in the aftermath of the Supreme Court decision of **U.S. v. Jackson**

⁴⁹² **Id.** at 223-224.

⁴⁹³ **Id.** at 232.

⁴⁹⁴ **Id.** at 232.

⁴⁹⁵ **Id.** at 241, 243.

which declared the Federal Kidnapping Act unconstitutional and a violation of the Fifth and Sixth Amendments because a defendant could be sentenced to death only after a jury trial.⁴⁹⁶ Therefore, a defendant convicted of the same offense by guilty plea or by a bench verdict would be able to avoid the death penalty.⁴⁹⁷ Similarly, New York's death penalty statute allowed for the death penalty only by jury trial, so only defendants who exercised their Fifth and Sixth Amendment rights were at risk of a death sentence.⁴⁹⁸

HOLDING: The court rejected attempts to distinguish the death penalty statute from Jackson and held that the provisions were unconstitutional because the death penalty applied only to those "who exercise their constitutional right to maintain innocence and demand a jury trial."⁴⁹⁹ The court held, unlike Jackson, that the unconstitutional provisions were severable because of the legislative intent in providing a capital punishment scheme in New York and because invalidation

⁴⁹⁶ Hynes, 92 N.Y.2d at 620.

⁴⁹⁷ Id. at 621.

⁴⁹⁸ Id. at 623.

⁴⁹⁹ Id. at 626.

was not necessary to cure the Jackson problem.⁵⁰⁰ Therefore, a defendant could not plead guilty while a notice of intent to seek the death penalty was pending.⁵⁰¹

3. *Francois v. Dolan*, 95 N.Y.2d 33 (2000)

Majority - Levine, J.

FACTS: Defendant was indicted on eight counts of first degree murder, eight counts of second degree murder, and one count of attempted second degree assault.⁵⁰² After Hynes was decided, but before the district attorney filed a notice to seek the death penalty, defendant offered to plead guilty to the entire indictment.⁵⁰³

HOLDING: The court held that mandamus does not lie and defendant does not have an "unqualified right" to plead guilty to the indictment and interfere with the district attorney's decision on whether to seek the death penalty within the 120 day period after arraignment.⁵⁰⁴ Additionally, defendant does not have an unqualified right to plead guilty to the entire indictment upon arraignment up until

⁵⁰⁰ Id. at 628.

⁵⁰¹ Id. at 629.

⁵⁰² Francois, 95 N.Y.2d at 35.

⁵⁰³ Id. at 36-37.

⁵⁰⁴ Id. at 37.

the verdict.⁵⁰⁵ Instead, defendant must wait until completion of the "statutorily provided deliberative process."⁵⁰⁶

4. *New York State Ass'n of Criminal Defense Lawyers v. Kaye*, 95 N.Y.2d 556 (2000)

Per Curiam

FACTS: Pursuant to article VI § 30 of the New York Constitution and Judiciary Law § 35-b, the Court of Appeals approved a reduced fee schedule for legal representation of capital defendants.⁵⁰⁷ The issue before the court was whether certain individual judges of the Court of Appeals should be disqualified in ruling on the case involving an administrative order that was promulgated by the Court of Appeals while they served as judges on the Court of Appeals.⁵⁰⁸

HOLDING: The court held that the Rule of Necessity compelled

⁵⁰⁵ **Id.**

⁵⁰⁶ **Id.**

⁵⁰⁷ **Kaye**, 95 N.Y.2d at 558.

⁵⁰⁸ **Id.**

participation of the judges.⁵⁰⁹ Additionally, Court of Appeals judges are vested with dual administrative and adjudicative responsibilities.⁵¹⁰

5. *New York State Ass'n of Criminal Defense Lawyers v. Kaye*, 96 N.Y.2d 512 (2001)

Per Curiam

FACTS: This action was brought to annul an order by the Court of Appeals approving reduction of capital counsel fees in all four departments.⁵¹¹ Petitioners contended that respondents exceeded their authority and the reduced fees were not adequate compensation under Judiciary Law §35-b.⁵¹²

HOLDING: The court held that the Court of Appeals had the ultimate rule-making authority, and the role of the screening panels in setting fees was subordinate.⁵¹³ Additionally, the court upheld the order, concluding that the fee

⁵⁰⁹ Id. at 559.

⁵¹⁰ Id. at 559-560.

⁵¹¹ Kaye, 96 N.Y.2d at 516.

⁵¹² Id.

⁵¹³ Id. at 517.

reductions for attorneys who represented capital defendants were not arbitrary or capricious.⁵¹⁴

6. *People v. Edwards*, 96 N.Y. 2d 445 (2001)

Majority, Levine, J.

FACTS: Defendant was indicted on one count of murder in the first degree, murder in the second degree, conspiracy in the second degree, and criminal possession of a weapon in the second degree.⁵¹⁵ Defendant entered into a plea agreement in which he agreed to plead guilty to murder in the first degree and cooperate in the case against the co-defendants in exchange for a sentence between 25 years and life imprisonment.⁵¹⁶ After the plea agreement but before sentencing, this court decided *Hynes*.⁵¹⁷ Defendant filed a motion to withdraw the guilty plea.⁵¹⁸

HOLDING: The court held, based upon United States Supreme Court precedent, that the publication of *Hynes* after defendant's plea did not invalidate the

⁵¹⁴ Id. at 520.

⁵¹⁵ Edwards, 96 N.Y.2d at 448.

⁵¹⁶ Id.

⁵¹⁷ Id. at 449.

⁵¹⁸ Id.

plea.⁵¹⁹ The United States Supreme Court found, "absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty, intelligently made in light of the then applicable law, did not become vulnerable because later judicial decisions indicated that the plea rested on a faulty premise."⁵²⁰

G.B. Smith, J., dissenting

The dissent found that the plea was invalid in the aftermath of *Hynes* because, "[w]hen an applicable provision of law changes while a case is still on appeal the new standard applies to that case."⁵²¹ Additionally, the dissent distinguished the Supreme Court precedent on the grounds that in this case the entire statute authorizing pleas had been declared unconstitutional.⁵²² Finally, *Hynes* indicated that a plea of guilty could not be made while a notice of intent to seek the death penalty was pending.⁵²³

7. *People v. Harris*, 98 N.Y.2d 452 (2002)

Majority - Wesley, J.

⁵¹⁹ Id. at 452.

⁵²⁰ Id. (citing Brady v. U.S., 397 U.S. 742, 757 (1970)).

⁵²¹ Id. at 459.

⁵²² Id. at 460.

⁵²³ Id.

FACTS: Defendant was indicted for the deaths of three individuals, a robbery of a third individual and the underlying felonies for each crime for his actions at a Brooklyn social club.⁵²⁴ Two of the victims died by gunshot wounds and the third escaped a gunshot but was stabbed in the back and was ultimately pronounced dead at the hospital.⁵²⁵ The jury returned a guilty verdict on six counts of first degree murder, attempted first degree murder, and second-degree criminal possession of a weapon.⁵²⁶ The defendant was sentenced to death.⁵²⁷

HOLDING: The court held that guilt was established beyond a reasonable doubt and not against the weight of the evidence, and there was no reversible error in the conduct of trial.⁵²⁸ Additionally, on the penalty side, the court found the death sentence must be vacated.⁵²⁹ Specifically, the court held that in the aftermath of *Hynes* the plea bargaining provisions of the death penalty statute were unconstitutional as violative of the Fifth and Sixth amendments.⁵³⁰ The court

⁵²⁴ Harris, 98 N.Y.2d at 472.

⁵²⁵ Id. at 472.

⁵²⁶ Id. at 473.

⁵²⁷ Id.

⁵²⁸ Id.

⁵²⁹ Id.

⁵³⁰ Id. at 494-496.

declined to decide whether the entire death penalty statute was unconstitutional, in violation of the State Constitution's cruel and unusual punishment clause.⁵³¹

G. B. Smith, J., concurring in part and dissenting in part

Judge Smith concurred with the majority that the plea provisions of the death penalty statute were unconstitutional in the aftermath of *Jackson* and *Hynes*.⁵³² However, he would reverse the conviction because of failure to apply heightened scrutiny on issues affecting the sentence, refusal to permit rebuttal to the testimony of a prosecution witness, and failure to exclude a juror for cause.⁵³³

8. *People v. Cahill*, 2 N.Y.3d 14 (2003)

Majority - Rosenblatt, J.

FACTS: Defendant initially struck his wife repeatedly on the head with a baseball bat, requiring emergency surgery and a lengthy hospital stay.⁵³⁴ Six months later, while she was still in the hospital, Defendant entered the hospital in disguise, after it was closed to visitors, and poisoned his wife through a feeding tube

⁵³¹ Id. at 496.

⁵³² Id. at 497, 522-524.

⁵³³ Id. at 497.

⁵³⁴ Cahill, 2 N.Y.3d at 36.

with potassium cyanide, resulting in her death.⁵³⁵ The jury found the defendant guilty of two counts of first degree murder, first degree assault, and related charges.⁵³⁶ Defendant was sentenced to death based on the two counts of intentional murder to prevent his wife from testifying against him in the assault trial, and intentional murder in the course of and in furtherance of a burglary.⁵³⁷

HOLDING: The court vacated defendant's sentence of death, concluding that the aggravating factors necessary to sentence the defendant to death were not proven.⁵³⁸ The sentenced was reduced to murder in the second degree and remitted for resentencing because intentional murder was proven beyond a reasonable doubt.⁵³⁹ Specifically, the conviction for the elimination of a witness was against the weight of the evidence, and the conviction based upon burglary was legally insufficient.⁵⁴⁰

G. B. Smith, J., concurring

⁵³⁵ Id. at 36-37.

⁵³⁶ Id. at 37-38.

⁵³⁷ Id.

⁵³⁸ Id. at 35.

⁵³⁹ Id.

⁵⁴⁰ Id. at 38.

Judge Smith concurred with the court's decision and wrote separately to address the deadlock jury instruction and the arbitrariness of the death penalty raised by the defendant.⁵⁴¹ Ultimately, Judge Smith, along with Judge Ciparick, concluded that the deadlock jury instruction is coercive and unconstitutional.⁵⁴² Additionally, Judge Smith made no determination on the arbitrariness of the death penalty but "concluded that before a death sentence can be imposed, the issue must be addressed and resolved."⁵⁴³

Graffeo, J., concurring in part and dissenting in part

Judge Graffeo concluded that the first-degree murder convictions should have been upheld.⁵⁴⁴ Because of the majority's holding, Judge Graffeo did not address the penalty phase and expressed no views on it.⁵⁴⁵

Read, J., concurring in part and dissenting in part

Judge Read would have affirmed the conviction of first-degree felony-murder as well as first-degree witness elimination murder.⁵⁴⁶ Like Judge Graffeo,

⁵⁴¹ Id. at 72-73.

⁵⁴² Id. at 98.

⁵⁴³ Id.

⁵⁴⁴ Id. at 98-99.

⁵⁴⁵ Id. at 115.

Judge Read found "sentencing issues academic" and an unpermitted advisory opinion in the aftermath of the majority's holding.⁵⁴⁷

9. *People v. Mateo*, 2 N.Y.3d 383 (2004)

Majority - Kaye, J.

FACTS: Defendant was found guilty of the first degree murder of Juan Rodriguez-Matos by intentionally causing the death of or commanding another to kill Rodriguez-Matos by gunshot in the course of and in furtherance of kidnapping.⁵⁴⁸ The jury sentenced defendant to death.⁵⁴⁹ On the first appeal to the Court of Appeals, heard prior to the trial, the Court of Appeals affirmed the trial court's dismissal of a charge of first degree murder based on a theory that three other murders were committed in similar fashions (serial killer theory), concluding that the evidence before the grand jury was legally insufficient.⁵⁵⁰

HOLDING: On the second appeal, the court held that since defendant went

(Cont'd from preceding page)

⁵⁴⁶ Id. at 141.

⁵⁴⁷ Id.

⁵⁴⁸ Mateo, 2 N.Y.3d at 394.

⁵⁴⁹ Id. at 398.

⁵⁵⁰ Id. at 394, 93 N.Y.2d 327 (1999).

to trial while the plea provisions of the Death Penalty Statute were in effect and those provisions were subsequently declared unconstitutional by the Court of Appeals, the death sentence had be set aside.⁵⁵¹ The majority then affirmed the conviction of first degree murder and remitted to the County Court for resentencing.⁵⁵²

G. B. Smith, J., dissenting

Judge Smith dissented and would have reversed defendant's conviction and remanded because defendant's confessions to the other murders were improperly admitted, in violation of *People v. Molineux*.⁵⁵³ Moreover, Judge Smith's opinion started with a statement that "because the penalty of death is qualitatively different than any other type of sentence a court may impose, both in its severity and its finality, there is a heightened need for reliability."⁵⁵⁴

Rosenblatt, J., dissenting

Judge Rosenblatt also would have reversed defendant's conviction because the trial court committed reversible error by allowing detailed descriptions of

⁵⁵¹ Id. at 399-400.

⁵⁵² Id. at 429-430.

⁵⁵³ Id. at 430.

⁵⁵⁴ Id.

unrelated murders.⁵⁵⁵ However, he would not characterize the ruling as a Molineux issue.⁵⁵⁶

10. *People v. LaValle*, 3 N.Y.3d 88 (2004)

Majority - G.B., Smith, J.

FACTS: Defendant confessed to raping and murdering Cynthia Quinn during her morning jog.⁵⁵⁷ Defendant claimed that he was driving home, stopped on the side of the road to urinate, and Ms. Quinn started waving a piece of metal at him and yelling at him.⁵⁵⁸ He grabbed the metal from Ms. Quinn, started stabbing her, raped her, and then continued to stab her.⁵⁵⁹ The body was found with 73 puncture wounds, a broken rib, bruises on her arms, and abrasions on her body.⁵⁶⁰ Defendant was also connected to a robbery on the same morning of Monique Sturm.⁵⁶¹ The jury found defendant guilty of one count of first degree murder, one count of second

⁵⁵⁵ Id. at 454.

⁵⁵⁶ Id. at 455.

⁵⁵⁷ LaValle, 3 N.Y.3d at 101.

⁵⁵⁸ Id.

⁵⁵⁹ Id.

⁵⁶⁰ Id. at 98.

⁵⁶¹ Id. at 99-100.

degree murder, but not guilty of the robbery charge.⁵⁶² Defendant was sentenced to death.⁵⁶³

HOLDING: The court held that defendant's guilt was established beyond a reasonable doubt and that the verdict was not against the weight of the evidence.⁵⁶⁴ In regard to the penalty phase, the court held that, "the deadlock instruction required by CPL 400.27(10) is unconstitutional under the State Constitution because of the unacceptable risk that it may result in a coercive, and thus arbitrary and unreliable, sentence."⁵⁶⁵ Specifically, the instruction required that the jurors unanimously decide between death and life without parole.⁵⁶⁶ In the event of a deadlock, according to CPL 400.27 (10), "[t]he court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of

⁵⁶² Id. at 102.

⁵⁶³ Id.

⁵⁶⁴ Id. at 102.

⁵⁶⁵ Id. at 120.

⁵⁶⁶ Id. at 116.

life." ⁵⁶⁷ Thus, the sentence after a deadlock was less severe than the sentence the jurors were allowed to consider. ⁵⁶⁸

The court held the current deadlock instruction unconstitutional under the State Due Process clause, which provides greater protection than the federal counterpart. ⁵⁶⁹ Finally, the court determined that it could not draft a new instruction because that would "usurp legislative prerogative." ⁵⁷⁰

Rosenblatt, J. concurring

Justice Rosenblatt wrote separately to emphasize that the decision was based not on "personal predilection" of the judges, but on sound constitutional principles. ⁵⁷¹

R.S. Smith, J. dissenting

The dissent held that the deadlock instruction "was not unconstitutionally coercive, the statutory language requiring that instruction, even if invalid, is severable from the other statutory provisions authorizing the death penalty, and the

⁵⁶⁷ Id.

⁵⁶⁸ Id. at 116-117.

⁵⁶⁹ Id. at 127-130.

⁵⁷⁰ Id. at 131.

⁵⁷¹ See Id. at 132-134.

statute, without instruction, is enforceable."⁵⁷² The dissent relied on practice, in this jurisdiction as well as others, and on United States Supreme Court precedent to conclude that there was no support for the majority's proposition that an anticipatory deadlock instruction was constitutionally required.⁵⁷³ Finally, the dissent concluded with, "[T]oday's decision, in our view, elevates judicial distaste for the death penalty over the legislative will."⁵⁷⁴

11. *People v. Shulman*, 6 N.Y.3d 1 (2005)

Majority - Read, J.

FACTS: A jury convicted a confessed serial killer of multiple offenses including first-degree murder and sentenced him to death.⁵⁷⁵

HOLDING: The court concluded that the death sentence is no longer at issue in the case because of the decision of *Matter of Hynes v. Tomei*, where the court struck plea provisions from the CPL because they created "an unconstitutional two-

⁵⁷² Id. at 134.

⁵⁷³ Id. at 143-144.

⁵⁷⁴ Id. at 149.

⁵⁷⁵ Shulman, 6 N.Y.3d at 17.

tiered penalty level for death penalty cases."⁵⁷⁶ Defendant's convictions were affirmed.⁵⁷⁷

12. *People v. Taylor* ---N.E.2d--- (N.Y. 2007); 2007 WL 3070813.

Majority, Ciparick, J.:

FACTS- Defendant John Taylor and Craig Godineaux robbed a Wendy's restaurant.⁵⁷⁸ Defendant shot the store manager in the head, shot an employee when she protested, and then ordered Godineaux to shoot the other five employees in the store.⁵⁷⁹ Only two employees survived.⁵⁸⁰ Defendant was tried by jury, convicted, and sentenced to death.⁵⁸¹ Defendant appealed the conviction under CPL 450.70(1), arguing that the deadlock jury instruction was unconstitutional.⁵⁸²

HOLDING: The principle of *stare decisis*, in the aftermath of *LaValle*,

⁵⁷⁶ Id. at 17-18.

⁵⁷⁷ Id. at 18.

⁵⁷⁸ Taylor, --N.E.2d-- at 3-4.

⁵⁷⁹ Id. at 4.

⁵⁸⁰ Id. at 5.

⁵⁸¹ Id. at 5.

⁵⁸² Id. at 5-6.

required that the defendant's sentence be vacated.⁵⁸³ Specifically the court wrote, "the death penalty sentencing statute is unconstitutional on its face and it is not within our power to save the statute. *LaValle* is thus entitled to full precedential value. The Legislature, mindful of our State's due process protections, may reenact a sentencing statute that is free of coercion and cognizant of a jury's need to know the consequences of its choice."⁵⁸⁴

Robert Smith, J., concurring

Judge Smith believed that *LaValle* was wrongly decided and an "unjustified interference with legislative authority." Nevertheless, the principles of stare decisis mandated its continued validity.⁵⁸⁵ Further, the "Legislature can, if it has the will, repair the death penalty statute or repeal it. In doing either, it would bring the capital punishment issue back into the realm of democratic decision-making, where it belongs."⁵⁸⁶

Read, J., dissenting

The dissent argued that the majority wrongfully vacated the defendant's

⁵⁸³ Id. at 3.

⁵⁸⁴ Id. at 12.

⁵⁸⁵ See Id. at 12-14.

⁵⁸⁶ Id. at 14.

sentence on the grounds of a coercive dead-lock instruction.⁵⁸⁷ Specifically, the majority wrongly converted the dictum language in *LaValle*, ("under the present statute the death penalty may not be imposed") into precedent ("the death penalty sentencing statute is unconstitutional on its face")⁵⁸⁸ Additionally; the jury instruction given in this case was non-coercive, unlike in *LaValle*.⁵⁸⁹ (Further, the dissent rejected the argument that the jury instruction explaining the implications of a deadlock constituted impermissible "judicial rewriting."⁵⁹⁰) Finally, the dissent concluded that the defendant's arguments against severability were "highly disfavored by longstanding state and federal precedent" and also concluded that a "careful reader" of *LaValle* would not find an "explanation why the deadlock instructions' constitutional and unconstitutional applications are not severable."⁵⁹¹

E. RECOMMENDATION

The death penalty should not be reinstated in New York State at this time.

⁵⁸⁷ Id. at 22.

⁵⁸⁸ Id. at 16.

⁵⁸⁹ Id. at 18.

⁵⁹⁰ Id.

⁵⁹¹ Id. at 19, 22.

ADDENDUM TO CHAPTER IV
SIGNIFICANT JURY DISCRIMINATION CASES

A. FEDERAL CASES

1. ***Swain v. Alabama***

In 1965, the United States Supreme Court decided *Swain v. Alabama*.⁵⁹²

The case was brought by an African-American man who had been convicted of rape in an Alabama state court by an all-white jury. The petitioner claimed that there was racial discrimination in the jury selection in violation of the United States Constitution. First, he claimed, the calling of venire persons to serve was racially biased, as twenty-six percent of the persons in Talledega County, Alabama eligible for jury service were African- Americans, and only ten to fifteen percent were routinely called. Second, the petitioner claimed discrimination in the selection of the jury, as the prosecutor used his peremptory challenges to strike all African American venire persons from the panel during *voir dire*. Third, he argued that there was an ongoing pattern of racial discrimination in the selection of juries within Talladega County and an abuse of the peremptory challenge system,

⁵⁹² 380 U.S. 202 (1965).

evidenced by the fact that no African-American had ever been selected for a petit jury within that county.

Justice White, writing for a five person majority, held that there was no constitutional guarantee of a proportionate representation of persons of a defendant's race to be on the jury. Moreover, an under representation of only ten percent (the percentage of the African American population) does not amount to a showing of purposeful discrimination. Additionally, the Court expressly stated that a prosecutor may use his peremptory challenges to strike all members of an accused's race from the jury. Finally, the Court held that the fact that no African Americans had ever served on a petit jury in Talladega County did not show an abuse or perversion of the peremptory challenge system as the facts or numbers of specific instances under which the challenges were made were not reflected in the record.

2. *Batson v. Kentucky*

Not until 1986 was *Swain* overruled in *Batson v. Kentucky*.⁵⁹³ The Petitioner in *Batson* was an African American charged with burglary and receipt of stolen goods in Jefferson County, Kentucky. He claimed that his Fourteenth

⁵⁹³ 476 U.S. 79 (1986).

Amendment Equal Protection rights were violated by the prosecutor's striking of all four African American venire persons from the jury. After the accused's motion to strike the jury was denied, the case ultimately was decided by the Supreme Court.

Writing for the majority, Justice Powell held that it is a violation of the Equal Protection Clause for a prosecutor to exercise peremptory challenges solely on the basis of race. The Court further established what has become known as the "*Batson* Test" for proving racial discrimination. The defendant may establish a *prima facie* case of forbidden racial discrimination by showing a pattern of discriminatory challenges at that specific trial only, without a need to show a pattern of discrimination over several trials. If this showing is made, the prosecution can rebut it by providing facially valid, non-discriminatory reasons for the challenges in question. If the prosecution is successful in this rebuttal, the defense may show that the prosecution's reasons are merely pretextual, and that the true motive for the peremptory challenges is race. The Supreme Court remanded the *Batson* case to state court for an application of the test to the specific facts.

3. *Miller-El v. Dretke*

In 2005, the United States Supreme Court applied the Batson Test to a capital case in *Miller-El v. Dretke*.⁵⁹⁴ Thomas-Joe Miller-El was convicted of capital murder in a Texas state court and sentenced to death. In the jury selection, the prosecutor used his peremptory challenges to exclude ninety-one percent of the African American venire persons. The state appeals were heard before *Batson v. Kentucky* was decided and, as such, the accused's petition to strike the jury was denied. Over the course of several years, the case made its way to the Supreme Court on a habeas petition after the Supreme Court had ordered (a Certificate of Authorization) be granted by the district court that had initially refused the application. After failing in both the district court and Fifth Circuit, the Supreme Court granted certiorari to hear the merits of the claim.

Writing for the court, Justice Souter held that the prosecutorial conduct in this case constituted a *Batson* violation. The tactical maneuvering by the prosecutor and exclusion of ninety-one percent of the African American venire persons evidenced a pattern of discrimination not readily explainable by a reason other than racial motive, and the striking of two particular persons showed specific

⁵⁹⁴

545 U.S. 231 (2005).

signs of discrimination. Moreover, the district attorney had a wide reputation for racial discrimination which was substantiated by the prosecutor's conduct in this case.

4. *Rice v. Collins*

Following *Miller-El*, the United States Supreme Court refused to grant a writ of habeus corpus on an alleged *Batson* violation in 2006. The accused in *Rice v. Collins* was convicted in California state court of possession of a controlled substance with intent to distribute.⁵⁹⁵ He challenged the prosecutor's striking of one African American from the jury panel. The trial court denied the challenge when the prosecutor explained that the venire person had rolled her eyes when asked questions, was very young and might be tolerant of a drug crime, and lacked ties to the community. The state appellate court upheld the ruling and the district court denied the accused's habeus petition. The Ninth Circuit Court of Appeals, however, reversed, finding that the trial court's factual findings on the issue were unreasonable.

The Supreme Court, in a unanimous opinion written by Justice Kennedy, reversed the Ninth Circuit, holding that the trial court's factual findings were not

⁵⁹⁵ 546 U.S. 333 (2006).

unreasonable under the circumstances. Moreover, the Court held that the prosecutor's race-neutral reasons for striking the juror in question were plausible and valid.

B. NEW YORK STATE CASES

1. *People v. Kern*

In *People v. Kern*,⁵⁹⁶ the defendant was charged with manslaughter and related crimes in the killing of a young African American by a group of white teens in the Howard Beach section of Queens. During jury selection, defense counsel exercised numerous peremptory challenges in order to strike African Americans from the jury. Upon the People's objection, the trial court disallowed some of the challenges as violations of the requirements of *Batson v. Kentucky*. The Appellate Division, Second Department affirmed the trial court's decision, and the Court of Appeals granted leave to appeal.

The Court of Appeals held that an individual has a right under the New York State Constitution to serve on a jury and that the Fourteenth Amendment guarantees him that privilege free of racial discrimination. Moreover, the "state action" requirement of an Equal Protection claim is satisfied when a defense

⁵⁹⁶ 5 N.Y.2d 638 (1990).

attorney makes discriminatory peremptory challenges because the court, an organ of the state, enforces such challenges.

2. *People v. Allen*

*People v. Allen*⁵⁹⁷ involved a man being prosecuted for sexual abuse and incest. The defendant claimed a *Batson* violation when the prosecutor used fourteen of her fifteen peremptory challenges to strike male members of the jury. The Appellate Division, Third Department, held that this required a retrial, because the discrimination on basis of gender was unconstitutional and because the prosecution, in the second step rebuttal of the *Batson* claim, did not account for the fact that it had not peremptorily challenged women on the jury who exhibited the same purported characteristics as the men stricken when providing a facially valid motive.

The Court of Appeals reversed the Third Department and reinstated the conviction. The Court of Appeals acknowledged that gender-based discrimination is as much a *Batson* violation in New York as is racial discrimination. However, the standard applied by the Third Department was in legal error, as the second step of a *Batson* proceeding only requires the prosecution to provide a facially valid reason

⁵⁹⁷ 6 N.Y. 2d 101 (1995).

for striking the jurors in question. The trial court is not supposed to conduct any fact-finding unless the defense challenges those facially valid reasons as pretextual. (As the defense never made that challenge here, the reasons proffered by the prosecution should be presumed true and the inquiry should have ended there.) Thus, the conviction was reinstated. Additionally, the Court noted that the defense had similarly exercised its challenges exhibiting clear gender bias, which would be a violation under the *Kern* standard. However, that did not justify retaliatory discrimination by the prosecutor. The proper course of action would have been to make a proper *Batson/Kern* challenge.

3. *People v. Hameed*

The defendant in *People v. Hameed*⁵⁹⁸ was convicted of murder. A post-trial *Batson* hearing was conducted to resolve the defense's claims regarding discrimination in the jury selection. The hearing judge required that the prosecutor testify under oath in proffering his race-neutral reasons for peremptorily challenging certain jurors. The hearing judge would not, however, allow defense counsel to cross examine the prosecutor at this hearing.

⁵⁹⁸

88 N.Y.2d 232 (1996).

The court stated first that in New York, it is not required that any party testify under oath in the course of a *Batson* hearing, especially given the difficulties that arise at a trial where an attorney is forced to testify. Although these difficulties may be alleviated when the hearing is conducted after trial, there is no compelling reason for altering the standard in such a case. The Court did reiterate, however, that *in camera* proceedings were not acceptable in *Batson* challenges and that the prosecutor must give his supposed race-neutral reasons in open court. Finally, the court held, there is no right to a full adversarial cross examination (or any type of cross examination) even in cases where the hearing judge goes beyond the minimum requirements and has the prosecutor testify under oath.

4. *People v. James*

*People v. James*⁵⁹⁹ involved a man convicted of robbery. At jury selection, the defense challenged the prosecution's striking of one specific juror. On appeal, however, the defense claimed that the prosecutor's peremptory challenges of four others evinced a pattern of discrimination. The Court of Appeals stated that when a defendant wishes to challenge the striking of any jurors on *Batson* grounds, he or she must make clear that he or she is challenging all stricken potential jurors, or

⁵⁹⁹ 99 N.Y.2d 264 (2002).

specify which ones he or she feels are being removed discriminatorily. Here, however, the defense had specifically objected to the removal of only one potential juror, and was thus barred from now challenging the removal of four others as the issue was unpreserved with respect to those four.

5. *People v. Smocum*

In *People v. Smocum*,⁶⁰⁰ the defendant was convicted of criminal possession of stolen property. On appeal, he argued a *Batson* violation because the trial court had conflated steps two and three of the *Batson* inquiry, immediately deciding that the race neutral reasons proffered by the prosecution for striking certain jurors was valid, failing to allow the defense to argue why they were pretextual. There were also issues with the prosecution's striking of another juror, which the trial court had improperly determined could not rise to a *prima facie* equal protection violation because striking only one juror could not be a "pattern of discrimination."

The Court upheld the conviction because the defendant failed to make out an equal protection violation. The Court did note, however, that the trial judge

⁶⁰⁰ 99 N.Y.2d 418 (2003).

had improperly combined steps two and three of the *Batson* inquiry, and admonished trial judges not to do so in the future. The Court also stated that, with regard to the final juror at issue, the trial court was incorrect in stating that a single improper peremptory challenge cannot constitute a *Batson* violation. However, as that issue was unpreserved for appeal, it could not be taken up by the court.

ADDENDUM TO CHAPTER IV

DEATH PENALTY JURIES

RACIAL COMPOSITION OF CAPITAL JURIES AND ITS IMPACT ON A SENTENCE OF DEATH

Many who oppose the death penalty contend that it is basically unfair. Unfairness was one reason why the Supreme Court ruled the death penalty unconstitutional in 1972 in *Furman v. Georgia*.

The Capital Jury Project is an effort to analyze how capital jurors come to sentencing decisions by analyzing results and interviewing jurors from actual

capital trials.⁶⁰¹ As of February 2001, staff working for the Capital Jury Project had interviewed 1,155 capital jurors from 340 trials in fourteen states.⁶⁰² The analysis thus far indicates that the race of individual jurors and the overall racial composition of juries has a substantial impact on the sentencing decision, especially in cases that involve a black defendant and white victim.⁶⁰³

“White male dominance” on a jury, meaning the presence of five or more white male jurors, in a black-defendant/white-victim case has a highly statistically significant impact on the sentencing decision.⁶⁰⁴ When a capital jury includes five or more white males as opposed to four white males, the likelihood of the jury imposing the death penalty increases from 23.1% to 63.2%.⁶⁰⁵ As the sample size increased between February 2001 and October 2003, the numbers continue to support this effect: juries with five or more white males have a 71% likelihood of

⁶⁰¹ William J. Bowers et al., "Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition," 3 U. Pa. J. Const. L. 171, 189 (2001).

⁶⁰² Id. at 189.

⁶⁰³ The analysis includes a sample of 74 black-defendant/white-victim cases. Id. at 193.

⁶⁰⁴ Id. at 192-93. The probability that the observed impact of white male dominance occurred by chance is less than one in one thousand ($p = .0002$). Id. 193 n.103.

⁶⁰⁵ Id. at 192 tbl.1, 193.

sentencing the defendant to death, whereas juries with four or fewer white males have only a 30% likelihood of doing so.⁶⁰⁶

Another highly statistically significant impact on sentencing decisions in black-defendant/white-victim cases is “black male presence.”⁶⁰⁷ The mere presence of one black male on the jury substantially reduces the likelihood of a death sentence.⁶⁰⁸ The difference in the likelihood of imposition of the death penalty drops from 71.9% when no black males are present to 42.9% when one black male is present and further to 37.5% when one or more black males are present.⁶⁰⁹ Again, these results remain basically unchanged as the new data gathered up to October 2003 is included in the analysis. The latest data reported shows that juries with no black males are 70% likely to sentence a defendant to death as opposed to

⁶⁰⁶ Emily Hughes, *"Concluding Thoughts: Speaking To Be Understood: Identity and the Politics of Race and the Death Penalty,"* 53 DePaul L. Rev., 1675, 1679 (2004) (citing William J. Bowers, "Remarks at the DePaul University College of Law Race to Execution Symposium" 86 (Oct. 24, 2003) (transcript on file with DePaul Law Review) [hereinafter Bowers Transcript]).

⁶⁰⁷ Bowers et al. supra note 1, at 192-93. The probability that the impact of black male presence is due to chance is less than one in one hundred ($p = .0055$). Id. at 193 n.103.

⁶⁰⁸ Id. at 192-93.

⁶⁰⁹ Id. at 192 tbl.1, 193.

juries with one or more black males that are only 36% likely to impose the death penalty.⁶¹⁰

The white-male-dominance effect and black-male-presence effect are independent factors (statistically unrelated) in the jury's decision to impose the death penalty.⁶¹¹

In addition, although the data indicates that the presence of three or more black females on a capital jury reduces the likelihood of a death sentence, this result is not statistically significant, and the fact that most of these juries have one or more black males explains this result as spurious.⁶¹²

On the other hand, racial composition of the jury has little effect on the likelihood of imposing the death penalty in both white-defendant/white-victim cases and black-defendant/black-victim cases.⁶¹³ In white-defendant/white-victim cases, the presence of three or more black females appears to reduce the likelihood of a death sentence, but the result is statistically insignificant due to too small a sample

⁶¹⁰ Hughes, supra note 5, at 1679 (citing Bowers Transcript 87).

⁶¹¹ Bowers et al., supra note 1, at 193 & n.105.

⁶¹² Id. at 194.

⁶¹³ Id. at 194-95.

size of cases with such jury composition.⁶¹⁴ In black-defendant/black-victim cases, the difference in the likelihood of sentencing the defendant to death when no black males are present and when there are one or two black males is 66.7% vs. 42.9%, respectively.⁶¹⁵ The breadth of this difference, however, diminishes to 66.7% versus. 50% when the comparison is between juries with no black males and juries with one or more black males.⁶¹⁶

In all capital cases, the presence of or lack of female jurors, white or black, have little effect on the likelihood of the jury imposing the death penalty.⁶¹⁷ One possible reason for this is that, in mixed gender groups, males typically talk more than females, interrupt females, and use conversation to exercise control, while females are more reserved and less confrontational.⁶¹⁸

Males appear to play a more central role in the sentencing deliberations. Black male jurors seem particularly effective at opposing white jurors' sentencing

⁶¹⁴ Id. at 194.

⁶¹⁵ Id. at 192 tbl.1, 195.

⁶¹⁶ Id.

⁶¹⁷ Id. at 195.

⁶¹⁸ Id. at 195 n.110 (citations omitted), 196.

stands.⁶¹⁹ This dynamic may be due to the black male's role in providing a distinct perspective and voice or due to the black male's mere presence inhibiting the rhetoric or the persuasiveness of jurors who discuss black/white cultural boundary-crossing topics.⁶²⁰

Race also impacts the beliefs that jurors form about how dangerous a defendant is. White jurors tend to believe that black defendants are more dangerous than white defendants.⁶²¹ Black jurors tend to believe that defendants who killed blacks are more dangerous than those who killed whites.⁶²²

Race impacts capital jury deliberations at varying stages of the process and in multiple ways. For example, racially diverse juries, whether capital or not, generally deliberate longer, discuss more facts, and ask more questions than all-white juries.⁶²³ More specifically, white jurors are more willing to discuss racially

⁶¹⁹ Id. at 196.

⁶²⁰ Id. at 196 & n.111.

⁶²¹ Id. at 242.

⁶²² Id.

⁶²³ John J. Francis, "Peremptory Challenges", Grutter, and "Critical Mass: A Means of Reclaiming the Promise of Batson," 29 VT. L. Rev. 327-28, 335 (2005) (citing Samuel R. Sommers & Phoebe C. Ellsworth, "How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research", 78 CHI Kent L. Rev., 1025, 1028, 1030 (2003)).

charged topics when they serve on racially diverse juries as opposed to homogenous juries.⁶²⁴ Scholars postulate that the reason for this dynamic is that the presence of black jurors activates cues in white jurors to avoid racial prejudice.⁶²⁵

When cases involve a black defendant and a white victim, the white jurors and black jurors tend to be remarkably polarized on the sentencing question and tend to become progressively more polarized as the process moves forward to the first vote on punishment.⁶²⁶ After the guilt decision but before the sentencing phase begins, white jurors are three times more likely than black jurors to support a death sentence (42.3% vs. 14.7%).⁶²⁷ Then, after receiving sentencing instructions, white jurors become four times more likely than black jurors to support a death sentence (58.5% vs. 15.2%).⁶²⁸ Finally, at the first vote on punishment, white jurors are seven times more likely than black jurors to support a death sentence (67.3% vs. 9.1%).⁶²⁹

⁶²⁴ Id. at 328, 335 (citing Sommers & Ellsworth, supra, note 23, at 1024, 1029-30).

⁶²⁵ Id. at 335 (citing Sommers & Ellsworth, supra, note 23, at 1028).

⁶²⁶ Bowers et al., supra, note 1, at 200.

⁶²⁷ Id. at 199 tbl.2, 200.

⁶²⁸ Id.

⁶²⁹ Id.

Furthermore, white jurors tend to take a stand one way or another on the appropriate sentence earlier in the process than black jurors do.⁶³⁰ After receiving sentencing instructions, only 20.8% of white jurors are still undecided as opposed to 45.5% of black jurors.⁶³¹ By the time that the first vote on punishment occurs, only 5.8% of white jurors remain undecided while 21.2% of black jurors have yet to decide.⁶³²

The final punishment vote is a “product of accommodation during jury deliberations” that typically involves changes in votes from supporting a death sentence to supporting life without parole.⁶³³ Support for a death sentence among white jurors drops from 67.3% to 41.8% between the first vote and the final vote.⁶³⁴ This suggests that vote changes by white jurors occur late in deliberations due to the “steadfast opposition” to a death sentence by one or more black male jurors.⁶³⁵

⁶³⁰ Id. at 200.

⁶³¹ Id. at 199 tbl.2.

⁶³² Id.

⁶³³ Id. at 202.

⁶³⁴ Id. at 199 tbl.2.

⁶³⁵ Id. at 202.

The data suggest a different dynamic in black-defendant/black-victim cases and white-defendant/white-victim cases. In these cases, jurors of the same race as the defendant and the victim are more likely to take an early stand one way or another on an appropriate sentence, suggesting that these jurors more quickly form a belief that they understand the situation and that the situation calls for a certain punishment.⁶³⁶ Moreover, jurors of the same race as the defendant and the victim are more likely to support imposition of the death penalty throughout the entire process than other jurors.⁶³⁷ At the first vote on punishment, 60.5% of white jurors and vs. 35.0% of black jurors are likely to support a death sentence in white-defendant/white victim cases, whereas 44.4% of white jurors and 61.1% of black jurors are likely to support a death sentence in black-defendant/black-victim cases.⁶³⁸ This dynamic may reflect that jurors of the same race as the victim view these defendants as more threatening to themselves and their communities.⁶³⁹ As to vote changes between the first punishment and the final vote, little change occurs in white jurors' votes in white-defendant/white-victim cases and the sample size of

⁶³⁶ Id. at 199 tbl.2, 201.

⁶³⁷ Id. 201.

⁶³⁸ Id. at 199 tbl.2, 201.

⁶³⁹ Id. at 201-02.

black jurors in black-defendant/black-victim cases is too small to perform a statistical analysis.⁶⁴⁰

Why does race play a different and more central role in black-defendant/white-victim cases? The underlying reasons appear to be differences in the opinions that white male jurors and black male jurors draw about the defendant's character and differences between these jurors in their levels of doubt as to the defendant's guilt. Black male jurors are significantly more likely to have lingering doubts about the defendant's guilt than white jurors, male or female, who generally have little lingering doubt.⁶⁴¹ As to the defendant's character, black male jurors are more likely to view the defendant as having remorse than white jurors, especially white male jurors.⁶⁴² Furthermore, white males are most likely to believe that the defendant is dangerous and that the defendant would be released from prison if the jury does not vote for a death sentence, while black males were the least likely to hold these beliefs.⁶⁴³

⁶⁴⁰ Id. at 199 tbl.2, 202 & n.126.

⁶⁴¹ Id. at 233 tbl.7, 234.

⁶⁴² Id. at 233-34 tbl.7, 235.

⁶⁴³ Id. at 234, tbl.7, 235.

The white-male-dominance effect in these cases suggests “more than simple aggregation of individual perspectives.”⁶⁴⁴ White jurors on white-male-dominated capital juries, as opposed to those juries not dominated by white males, are less reluctant to join the guilt verdict, more willing to reject indications of remorse, and more likely to be swayed to vote for death based on a belief that the defendant would be a danger to society.⁶⁴⁵ This heightened support for the death penalty based on a belief that the defendant poses a danger to society is related to the fact that white jurors on white-male-dominated juries believe that convicts sentenced to life imprisonment serve shorter sentences than white jurors on juries not dominated by white males.⁶⁴⁶ Moreover, on white-male-dominated juries, more than ten times more black jurors than white jurors wish they had said or done something differently (43.8% vs. 3.7%), which suggests that the presence and opinions of five or more white males on a jury truly dominates the tone and direction of deliberations.⁶⁴⁷

⁶⁴⁴ Id. at 236.

⁶⁴⁵ Id. at 236-40, 242-43.

⁶⁴⁶ Id. at 238 tbl. 8, 242.

⁶⁴⁷ Id. at 240-41.

Additionally, mock jury studies reveal similar impacts of race on capital juries. These studies find that white jurors are more likely to impose the death penalty on a black defendant than on a white defendant.⁶⁴⁸ Scholars posit that this tendency is fostered by the data that show white jurors fail to give effect to mitigating circumstances when the defendant is black.⁶⁴⁹ White mock jurors also mention stereotypical, negative characteristics of blacks as reasons for voting to impose the death penalty and write significantly less in explaining their sentencing decisions for black defendants.⁶⁵⁰

Mock jury studies have their limitations as far as accurately presenting a positive model of jury behavior. These studies often use written descriptions of the accused mentioned in trial transcripts rather than permitting the mock jury to see the defendant in a re-enactment.⁶⁵¹ Nevertheless, mock jurors who actually see the race of the defendant in a re-enactment are “particularly likely to succumb to the influence of race in their assessments of the defendant’s guilt.”⁶⁵² This suggests that mock jury studies may underestimate the role that race plays in real life jury deliberations.⁶⁵³ The differential treatment of white and black defendants by white mock jurors, however, usually appears when the race of the defendant is not prominent in the experiment as opposed to other

⁶⁴⁸ Id. at 183 (citing Mona Lynch & Craig Haney, “Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty,” 24 LAW & HUM. BEHAV. 337, 349 (2000)).

⁶⁴⁹ Id. (citing Lynch & Haney, supra note 48, at 352).

⁶⁵⁰ Id. (citing Lynch & Haney, supra note 48, at 341).

⁶⁵¹ Id. at 184.

⁶⁵² Id. at 184 n.69 (citing Laura T. Sweeney & Craig Haney, “The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies,” 10 BEHAV. SCI. & L. 179, 191 (1992)).

⁶⁵³ Id. at 185.

experiments.⁶⁵⁴

⁶⁵⁴

Id. (citing Samuel R. Sommers & Phoebe C. Ellsworth, "White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom," 7 **Psychol. Pub. Pol'Y & L.** 201 (2001) and Samuel R. Sommers & Phoebe C. Ellsworth, "Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions", 26 **Personality & Soc. Psychol.. Bull.** 1367 (2000)).

(Cont'd on following page)

EPILOGUE

Considerable time, thought and effort went into this report. Hopefully, the ideas and recommendations presented will be put into practice. If they are, America will yet achieve the promise that all of its citizens should strive for.

(Cont'd from preceding page)

