

# HOWARD LAW JOURNAL

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# HOWARD LAW JOURNAL

## TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF .....*Briana Adams-Seaton* vii

### ARTICLES & ESSAYS

AN EPIC FAIL .....*Marsha Griggs* 1

THE 14TH AMENDMENT AND ME:  
HOW I LEARNED NOT TO GIVE UP  
ON THE 14TH AMENDMENT ..... *Robert S. Chang* 53

WHEN TRUE COLORS COME OUT:  
PRETRIAL REFORMS, JUDICIAL BIAS, AND  
THE DANGER OF INCREASED DISCRETION ..... *Zamir Ben-Dan* 83

THE PUZZLING PERSISTENCE OF  
CITIZEN’S ARREST LAWS AND  
THE NEED TO REVISIT THEM ..... *Chad Flanders,* 161  
*Raina Brooks,*  
*Jack Compton*  
*& Lyz Riley*

### NOTES & COMMENTS

“DOES MY SASSINESS UPSET YOU?”:  
AN ANALYSIS CHALLENGING WORKPLACE  
AND SCHOOL REGULATION OF HAIR AND  
ITS CONNECTION TO RACIAL DISCRIMINATION .....*Veronica Craig* 239

FACING CURRENT CONDITIONS:  
EMPLOYING VOTING RIGHTS ACT  
PRECLEARANCE TO PROTECT  
REPRODUCTIVE RIGHTS ..... *Michael F. Walker* 267



## LETTER FROM THE EDITOR-IN-CHIEF

As we approach the end of 2020, we confront an inconvenient truth: this year has been riddled with trauma, tragedy, and turbulence. Frankly, 2020 has taken a toll on our country and particularly on black and brown communities. Plagued with a global pandemic, incessant killings by law enforcement, and an economic recession, our communities have had to remain resilient in the most impossible of times. To reflect these troubling times, Volume 64, Issue 1 of the *Howard Law Journal* will illuminate many of this year's cutting-edge legal issues. We hope by featuring articles authored by diverse perspectives, we can address and resolve issues of importance to society.

"An entire class of bar takers was held captive to conventional thinking at a time that called for compassion and innovation. Any failures on this bar exam are ours, not theirs." Professor Marsha Griggs opens her Article, *Epic Fail*, with this apt characterization of bar licensure bodies' failure to adapt to crisis. She then expounds to explore alternative options to measure competency and proposes a theory that explains our perception of the bar exam.

Next, in *The Puzzling Persistence of Citizen's Arrest Laws, and the Need to Revisit Them*, Professors Chad Flanders, Raina Brooks, Jack Compton, and Lyz Riley scrutinize our nation's citizen's arrest laws in light of the killing of Ahmaud Arbery. The Article provides theories as to why citizen's arrest laws exist, illustrates how these laws have been hijacked in the service of white supremacy, and concludes by proposing reforms of citizen's arrest laws.

In Professor Zamir Ben-Dan's Article, *When True Colors Come Out: Pre-trial Reforms, Judicial Bias, and the Danger of Increased Discretion*, he examines the role criminal court judges in New York have played in opposing criminal justice reform and how their judicial biases against defendants have disproportionately affected poor people of color.

Professor Robert S. Chang, in his Essay, *The 14th Amendment and Me*, provides an academic perspective on the Fourteenth Amendment. Chang's Essay also explores the Fourteenth Amendment's relationship with Asian Americans and how the next generation of lawyers can actively engage with the Fourteenth Amendment.

This issue also includes Notes by two of our editors. Senior Articles Editor Michael Walker's Note, *Facing Current Conditions*, introduces the current threat to reproductive rights proposed by anti-abortion legislation and suggests legislation that will respond to the current conditions of abortion care access, as advised by the Supreme Court in *Shelby County v. Holder*. Senior Notes & Comments Editor, Veronica Craig, tackles workplace and school regulation of black hair and its connection to racial discrimination in her Note, *Does My Sassiness Upset You*. Ms. Craig illustrates how regulation of black children's hair has psychological implications and argues that legislation such as the

CROWN Act, should become federal law, which would ban hair discrimination across the United States.

On behalf of the *Howard Law Journal*, I thank you for your support and readership. We hope you find our pieces to be thought-provoking and resonating “good trouble.” We proudly present Volume 64, Issue 1 of the *Howard Law Journal*.

BRIANA ADAMS-SEATON  
EDITOR-IN-CHIEF  
VOLUME 64

# An Epic Fail

MARSHA GRIGGS\*

## Table of Contents

Introduction .....	2
I. The Problem of the Pandemic .....	3
A. A Timeline of Disruption .....	7
B. A Path of Resistance .....	9
C. Social Unrest .....	12
D. The Class of 2020 .....	14
E. Meeting Public Need .....	19
II. Crisis Creates an Opportunity for Change .....	21
A. Thinking Outside the Box .....	22
B. Online State Law Exams .....	25
C. Multiple Paths to Licensure .....	28
III. Alternative Measures of Professional Competence .....	31
A. Emergency Diploma Privilege .....	32
B. Limited Licensure .....	36
C. Remote Examination .....	38
IV. Asking the Hard Questions: Why, and What Next? ....	41
A. Institutional Legitimacy .....	42
B. Stakeholders and Influence .....	45
C. Examiners as Gatekeepers .....	46
D. Systemic Distrust .....	49
Conclusion .....	50

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\* Associate Professor, Washburn School of Law; B.S. Northwestern University, J.D. Notre Dame Law School. This work is dedicated to every 2020 bar candidate, may the legal profession be better under your watch than ours. My thanks to Gillian Chadwick, Melanie Blair, Octavia Carson, and Andrea Reed for thoughtful comments at the early stages of this work; and to Micah Tempel and Daniel Sloan for research assistance.

## INTRODUCTION

All at once, the U.S. found itself embattled with the threat of COVID-19, the new normal of social distancing, and the perennial scourge of racial injustice. While simultaneously battling those ills, the class of 2020 law graduates found themselves also contending with inflexible bar licensing policies that placed at risk their health, safety, and careers. During a global health pandemic, bar licensing authorities made the bar exam a moving target riddled with uncertainty and last-minute cancellations. This costly and unsettling uncertainty surrounding the bar exam administration was unnecessary because multiple alternatives were available to safely license new attorneys. A ball was dropped, and bar examiners at the state and national levels failed epically at an opportunity to be adaptive, decisive, and transparent, to the detriment of a class of new lawyers and the public they will serve. The dogged insistence on status quo that led to the bar exam chaos of 2020, has placed the method and purpose of bar examination under national scrutiny. This Article offers a critical analysis of the systemic failure of bar licensure authorities to respond adaptively to crisis; explores alternative processes to measure minimal competency; and suggests a theory about the institutional mindset that has dominated our perception of the bar exam. An entire class of bar takers was held captive to conventional thinking at a time that called for compassion and innovation. Any failures are ours, not theirs.

This Article makes four original contributions to the limited literature on licensing policy. Part I chronicles the disruptive impact of public crisis on the legal profession and our system of legal licensure. A historical account of threats to the flow of entry into the legal profession is particularly important at a time when the need for new lawyers is so great. Part II contrasts the emergency adaptive measures implemented by some jurisdictions to the negligible responses by others. Providing a scholarly account of systemic shortcomings in licensing policy is essential to establish a foundational framework for improving the process by which we license attorneys. Part III assesses the benefits and drawbacks of licensing alternatives presented to state courts during the early pandemic period. Exploring those alternatives from a neutral perspective is essential both to understand the courts' responses and to consider whether any of these alternatives hold promise for the future. Part IV explores the institutional legitimacy of the bar licensing process, and advances theories for states' rigid adher-

ence to the status quo, even in the face of life or death circumstances. Understanding the root causes of the chaos surrounding the administration of the summer 2020 bar exam can inform our licensing structure going forward. The aim of this work is to expand the existing literature by analyzing an avoidably chaotic outcome and to question under what circumstances and by what channels can we see bar exam policy reform. If not now, when?

## I. THE PROBLEM OF THE PANDEMIC

The emergence of the novel coronavirus, coupled with a medical infrastructure ill-equipped to respond to its severest symptoms and rapid spread, wreaked havoc on our economic, legal, political, and social systems.<sup>1</sup> Businesses shuttered. Unemployment rates skyrocketed.<sup>2</sup> Jury trials were suspended and pretrial hearings that were not canceled proceeded via video or teleconference.<sup>3</sup> Political elections were impacted, threatening the foundation of American democracy.<sup>4</sup> Mandated social distancing prohibited congregation for commerce, leisure, worship,<sup>5</sup> and intellectual exchange. During the early months

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1. David Blumenthal & Shanoor Seervai, *Coronavirus Is Exposing Deficiencies in U.S. Health Care*, HARV. BUS. REV. (Mar. 10, 2020), <https://hbr.org/2020/03/coronavirus-is-exposing-deficiencies-in-u-s-health-care>.

2. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, [https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm#:~:text=of%20the%2016.9%20million%20people,the%20pandemic%20\(78%20percent\)](https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm#:~:text=of%20the%2016.9%20million%20people,the%20pandemic%20(78%20percent)) (“Of the 16.9 million people unemployed in July 2020, 9.6 million (57%) were unable to work because their employer closed or lost business due to the pandemic.”) (last visited Oct. 17, 2020); Rakesh Kochhar, *Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession*, PEW RSCH. CTR.: FACT TANK (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

3. Press Release, John Nevin, Comm’ns Dir., Michigan’s ‘Virtual’ Courtrooms surpass 500,000 hours of Zoom hearings (July 14, 2020), [https://courts.michigan.gov/News-Events/press\\_releases/Documents/Zoom%20500000%20Media%20Release.pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/Zoom%20500000%20Media%20Release.pdf) (stating that Michigan state courts logged 500,000 hours and held more than 6,800 remote hearings for a total of nearly 30,000 hours of proceedings); see also *Pandemic-Related Administrative Orders*, NAT’L CTR. FOR ST. CTS., <https://www.ncsc.org/newsroom/public-health-emergency/orders> (providing a partial list of courts that canceled hearing and trials during the early months of the pandemic) (last visited Aug. 12, 2020).

4. *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>; *COVID-19 and the 2020 Election*, ACLU KAN. (July 22, 2020), <https://www.aclukansas.org/en/covid-19-and-2020-election>.

5. See *Kelly v. Legis. Coordinating Council*, 460 P.3d 832 (Kan. 2020) (upholding the Governor’s ban that prevented public assembly of more than ten people, even in churches.); but see Associated Press, *Federal judge blocks Kansas limits on religious gatherings*, POLITICO (April 18, 2020, 10:44 PM), <https://www.politico.com/news/2020/04/18/judge-blocks-kansas-limits-on-religious-gathering-coronavirus-193907>.

of the pandemic, the interactive connectivity that is our societal fabric took a necessary back seat to preventative protocols aimed to minimize the spread of infection. Even with extreme social distancing, multiple future waves of infection were still predicted<sup>6</sup> and, absent a vaccine, the reach of the deadly pandemic seemed unlimited.<sup>7</sup>

The health and economic worries brought on by the pandemic were further compounded by the civil unrest that erupted in response to multiple police killings of unarmed African American civilians.<sup>8</sup> Streets were filled with peaceful protests, looting riots, and militarized police response.<sup>9</sup> For the class of 2020, the world and law school they experienced were entirely and frighteningly different from that of every graduating class before them. Unlike their predecessors, members of the class of 2020 were unable to memorialize the end of their time in law school with the traditional hooding ceremony.<sup>10</sup> They also had the unenviable distinction of ending the school year wondering when or if they would get to take the bar exam.<sup>11</sup>

Faced with the medical reality that the threat of coronavirus rendered traditional administration of a bar exam unsafe, bar licensing authorities lagged woefully behind other institutions, including the rest of the legal profession, in responding adaptively to the health crisis.<sup>12</sup> Law schools understood the need to make modifications in or-

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6. Nicholas Kristof, *Brace Yourselves for Waves of Coronavirus Infections*, N.Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/opinion/sunday/covid-whats-next.html>.

7. WORLDOMETER, <https://www.worldometers.info/coronavirus/country/us/> (By May 2020, the COVID-19-related death toll in the United States was 81,795.) (last visited Sept. 26, 2020); Neil Ferguson & Imperial College COVID-19 Response Team, *Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce Covid-19 mortality and healthcare demand*, IMPERIAL COLL. LONDON (Mar. 16, 2020), <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>.

8. See, e.g., Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 522–23 (2017).

9. Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond With More Force*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html>.

10. Eugene Sullivan, *Academic Regalia*, AM. COUNCIL ON EDUC. (Jan. 2020), <https://www.acenet.edu/Programs-Services/Pages/Academic-Regalia.aspx> (stating that hooding ceremonies date back to 12th century Europe, that they were first instituted to recognize graduating students as they entered into their scholarly careers, and that unlike the mortar board caps worn by undergraduates, those receiving masters or doctorate degrees are presented with hoods to show their continued pursuit of knowledge).

11. See generally Emma Goldberg, *Bar and Medical Exam Delays Keep Graduates in Limbo*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/us/bar-exam-coronavirus.html>.

12. Emma Cueto, *Bar Examiners 'Failed' COVID-19 Test, Prof Says*, LAW360 (July 27, 2020, 5:41 PM), <https://www.law360.com/articles/1295558/bar-examiners-failed-covid-19-test-prof-says>.

der to continue to service students during a pandemic.<sup>13</sup> With alacrity, schools equipped their faculty members with web-based course delivery tools. Law faculties had to agree on pass/fail or other grading schema, and rethink examination methods. Law schools had to set guidelines for online examinations that would be fair to students, maintain exam security, and meet the required standards for legal education.<sup>14</sup> Shifting to online educational delivery required the relocation of thousands of law students and the remote collaboration and connectivity of faculty, administrators, and IT professionals. Though perhaps imperfectly, the shift was done, and it was done in a manner that did not leave students uncertain about the available options to complete or continue their legal education. Those in charge of the commodity that is legal education rose to the occasion by being adaptive, collaborative, and flexible in the face of crisis.

Like law schools, states had the information, opportunity, and resources to implement safer methods of qualifying new attorneys for practice.<sup>15</sup> Yet, many states failed to make timely and reasoned temporary departures from a testing modality fully incompatible with public safety and questionably out of touch with the needs of today's legal profession.<sup>16</sup> The dogged insistence on an in-person exam in the face of pandemic conditions shaped public perception of the importance and purpose of bar examination. Claims that the bar exam perpetuates a lack of diversity in the legal profession reemerged with furor.<sup>17</sup> Disgruntled bar candidates organized in protest against in-person examinations and lambasted states for not implementing licensing options that would better protect them from the risk of contamination and illness.

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13. Paul Caron, *100% of Law Schools Have Moved Online Due to The Coronavirus*, TAX-PROF BLOG (Mar. 18, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/03/list-of-law-schools-that-have-moved-online-due-to-the-coronavirus.html](https://taxprof.typepad.com/taxprof_blog/2020/03/list-of-law-schools-that-have-moved-online-due-to-the-coronavirus.html).

14. Karen Sloan, *A Little Less Pressure with Law School Final Exams Amid COVID-19*, LAW.COM (Apr. 29, 2020), <https://www.law.com/2020/04/29/a-little-less-pressure-with-law-school-final-exams-amid-covid-19/>.

15. Elizabeth Gil, *INSIGHT: Beyond the Bar Exam – Covid – 19's Call to the Legal World*, BLOOMBERG L. (Aug. 12, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-beyond-the-bar-exam-covid-19s-call-to-the-legal-world>.

16. Brittney Zeller, *An Open Letter to the National Conference of Bar Examiners: We Need a Decision*, JURIST (Mar. 28, 2020, 5:55 AM), <https://www.jurist.org/commentary/2020/03/an-open-letter-to-the-national-conference-of-bar-examiners/>.

17. See, e.g., Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206 (2014); Lauren Hutton-Work & Rae Guyse, *Requiring a Bar Exam in 2020 Perpetuates Systemic Inequities in the Legal System*, APPEAL (July 6, 2020), <https://theappeal.org/2020-bar-exam-coronavirus-inequities-legal-system/>.

[C]ourts across the country — including the United States Supreme Court — have moved hearings and arguments online,<sup>18</sup> the bar exam remains a required and in-person activity. As our final semesters of law school moved online and many law schools adopted pass/fail grading, the bar exam remains a required and in-person activity. As law firms and legal organizations have moved their operations online and lawyers have embraced working from home, the bar exam remains a required and in-person activity. It is plain to any observer that things are not business as usual, yet bar applicants have been expected to operate as if nothing has changed.<sup>19</sup>

Bar applicants, law faculty, law school administrators, and members of the practicing bar sounded similar cries in the form of open letters,<sup>20</sup> signature petitions, and court filings. The cries were to no avail in all but a handful of states. A majority of states dug in their heels and insisted on business as usual — at a time and under circumstances that were far from usual.<sup>21</sup>

When pressed to consider alternatives like diploma privilege, supervised practice, and online administration, many state bar examiners were resolute in their insistence that only an in-person exam could protect the public from the entry of incompetent lawyers.<sup>22</sup> Decision makers in most states stood firm on the position that for decades has been both commonly recited and widely criticized — that the bar exam tests minimum competence to practice law.<sup>23</sup> The courts that

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18. Nina Totenberg, *Supreme Court Arguments Resume – But with a Twist*, NPR (May 4, 2020, 5:01 AM), <https://www.npr.org/2020/05/04/847785015/supreme-court-arguments-resume-but-with-a-twist>.

19. Dalton Hughes, Steven Tinetti & Mollie McGuire, *We Aren't Willing to Leave Any Bar Applicants Behind*, JURIST (July 6, 2020 6:44 PM), <https://www.jurist.org/commentary/2020/07/hughes-tinetti-mcguire-diploma-privilege/>.

20. Alicia Ouellette, Michael T. Cahill, Aviva Abramovsky, Melanie Leslie, Gillian Lester, Mary Lu Bilek, Eduardo Peñalver, Matthew Diller, Gail Prudenti, Anthony W. Crowell, Trevor W. Morrison, Horace Anderson, Jr., Michael A. Simons, Craig M. Boise & Elena B. Langan, *Deans' Letter to NY Court of Appeals on the Bar Exam*, FORDHAM L. NEWS (Apr. 2, 2020), <https://news.law.fordham.edu/blog/2020/04/02/deans-letter-to-ny-court-of-appeals-on-the-bar-exam/>.

21. See, e.g., Letter from Hon. Michael J. Garcia, N.Y. Ct. of Appeals, to the Deans of the fifteen New York law schools (June 22, 2020), <https://dp4dc.org/wp-content/uploads/2020/07/2020-06-22-Letter-to-Deans-of-NY-Law-Schools.pdf> (“[W]e do not have the luxury of abandoning our traditional, robust, in-person bar exam at this juncture.”).

22. Betsy AuBuchon, *UPDATE (7/9/2020) July Bar Examination*, MO. BD. OF L. EXAM'RS (July 9, 2020), <https://www.mble.org/news.action?id=1740> (When asked to consider diploma privilege, supervised practice, or an online exam to qualified July 2020 bar takers, the Supreme Court of Missouri responded “the Court has concluded none of these alternatives adequately ensures the core function of licensure, which is to protect the integrity of the profession and the public from those who have not demonstrated minimum competency to practice law.”).

23. *Id.*

have the ultimate oversight of state bar examiners had to balance the needs of the pandemic era bar applicants with its ongoing obligation to protect the public and the integrity of the profession.

Strong arguments were made that pandemic conditions warranted surrender of the often prevailing *we've always done it this way* mindset. If law school faculties, whether willing or not, were able to make adjustments to the method and manner of testing that had been relied upon for decades — if not centuries, state bar examiners should have been able to make temporary adjustments to the mode of testing and available avenues to licensure. While the public and rest of the legal profession watched, our courts and bar examiners failed us by prioritizing sacrament over protection and concern for the newest members of the profession. Bar applicants had invested months of study time only to see state bar examiners cancel exams just days before they were scheduled to be administered.<sup>24</sup> The real consequences of this epic failure are yet to be seen and fully appreciated.

#### A. A Timeline of Disruption

The novel coronavirus forced American law schools into crisis contingency planning mode. Before a majority of U.S. law schools had entered the spring break period, concerns about the reach and danger of the COVID-19 pandemic drove the fastest major paradigm shift in the history of legal education.<sup>25</sup> By April 2020, the 200 law schools accredited by the American Bar Association (“ABA”) transitioned all class offerings to online instruction.<sup>26</sup> Educational delivery was disrupted and students were displaced from their physical campuses and left to continue the school year online. The face-to-face instruction, that forever had been the primary modality of law school teaching, was no more — at least for the remainder of the 2019–2020 academic year.<sup>27</sup>

Recognizing that the bar exam, as traditionally administered, is a huge gathering of people — the very thing that states should avoid —

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24. Florida Supreme Court, *Florida Board of Bar Examiners postpones August 2020 Bar Exam*, FL. SUP. CT. (Aug. 17, 2020), <https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Board-of-Bar-Examiners-postpones-August-2020-Bar-Exam> [hereinafter Fl. Sup. Ct. Press Release].

25. David G. Broz, *We Are in the Midst of a Paradigm Shift for Higher Education*, GENSLER (Mar. 17, 2020), <https://www.gensler.com/research-insight/blog/coronavirus-paradigm-shift-for-higher-education>.

26. Paul Caron, *supra* note 13.

27. *See, e.g.*, Tim Duane, *Teaching Law in the Time of COVID-19*, SSRN (July 5, 2020), <https://ssrn.com/abstract=3642820>.

the Collaboratory on Legal Education and Licensing for Practice (“The Collaboratory”) published a white paper warning that the public health crisis would render normal administration of the July bar exam improbable.<sup>28</sup> The white paper presented six options available to states and analyzed the benefits and limitations of each.<sup>29</sup> Following the careful analysis of each option was the urging for states to *act now*. Later hailed as prescient, in March 2020, the Collaboratory cautioned:

The progress of the COVID-19 pandemic makes one point abundantly clear: It is imperative to act quickly and plan ahead. It is already time to make decisions about the July 2020 bar exam. In addition to protecting the public health, we need to preserve the mental health of the candidates hoping to join our profession this year.<sup>30</sup>

The widely cited policy paper sounded an early alarm of things to come; but rather than drawing proaction, its suggestions were met largely with inaction and resistance.

Sufficient information was available to state bar authorities to alert them to the safety concerns and the need to plan for alternative methods to license the next cadre of attorneys. Yet, shockingly, a majority of states took insufficient early action to prevent what would become known as bar exam chaos.<sup>31</sup> Because the origin, mutation, and first human infection of the coronavirus were unforeseeable, no single entity could be held responsible for the emergence of COVID-19.<sup>32</sup> But once its contamination rate, mortality rate, and manner of transfer had become better understood, leaders and institutions should not be permitted to circumvent accountability for their re-

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28. *About*, THE COLLABORATORY, [www.barcovid19.org/about/](http://www.barcovid19.org/about/) (The Collaboratory is a group of 11 scholars who have studied and written about the bar exam, licensing, and legal education for many years.) (last visited Sept. 26, 2020).

29. Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol M. Chomsky, Andrea Anne Curcio, Marsha Griggs, Joan W. Howarth, Eileen R. Kaufman, Deborah Jones Merritt, Patricia Salkin & Judith W. Wegner, *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, SCHOLARLY WORKS 3–7 (Mar. 22, 2020), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2309&context=facpub>.

30. *Id.* at 7.

31. Sara Randazzo, *Coronavirus Pandemic Creates Bar Exam Chaos*, WALL ST. J. (July 17, 2020); Paul Caron, *July 2020 Bar Exam Chaos: 50 States, 14 Different Approaches*, TAXPROF BLOG (July 5, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/07/july-2020-bar-exam-chaos-50-states-14-different-approaches.html](https://taxprof.typepad.com/taxprof_blog/2020/07/july-2020-bar-exam-chaos-50-states-14-different-approaches.html).

32. Graham Readfearn, *How did coronavirus start and where did it come from? Was it really Wuhan’s animal market?*, GUARDIAN (Apr. 27, 2020, 8:46 PM), <https://www.theguardian.com/world/2020/apr/28/how-did-the-coronavirus-start-where-did-it-come-from-how-did-it-spread-humans-was-it-really-bats-pangolins-wuhan-animal-market>.

sponse or failure to respond to the foreseeable risks of infection and death.

## B. A Path of Resistance

After widespread dissemination of and positive national reaction to the Collaboratory's white paper, the National Conference of Bar Examiners ("NCBE")<sup>33</sup> issued its own organizational policy paper pointing states away from diploma privilege, supervised practice, and any path to licensure not involving a bar exam.<sup>34</sup> The NCBE paper followed an announced decision that one state, Utah, had proactively implemented a "diploma privilege-plus" pathway to licensure and that two other states would develop their own online exams if they could not offer in-person testing.<sup>35</sup> Even as other states expressed willingness to consider any one or more of the Collaboratory's proposed alternatives, the counterdirective from the organization that provides the majority of the bar exams administered in the U.S. halted the progression away from a July exam.<sup>36</sup>

Placing states and bar takers in a high-stress holding pattern, the NCBE declared that it would announce by early-May whether it would provide bar exams for states to administer in July.<sup>37</sup> At the same time that the NCBE directed jurisdictions away from any alternative path to licensure that did not include a bar exam, it said, essentially, we will let you know later if we decide to provide you with the

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33. The National Conference of Bar Examiners ("NCBE") is a not-for-profit corporation founded in 1931. The NCBE has no regulatory authority, but writes, scores, and provides scoring guidelines for the bar examination used in all U.S. jurisdictions, except Louisiana. *See generally Our Mission*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/about/> (last visited Aug. 15, 2020).

34. National Conference of Bar Examiners, *Bar Admissions During the COVID-19 Pandemic: Evaluating Options for the Class of 2020*, THE BAR EXAM'R (Apr. 9, 2020), [https://thebarexaminer.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic\\_NCBE-white-paper.pdf](https://thebarexaminer.org/wp-content/uploads/Bar-Admissions-During-the-COVID-19-Pandemic_NCBE-white-paper.pdf) ("It is not necessary to take the extreme step of diploma privilege and the risk of diminishing public protection in order to solve the challenges brought on by the pandemic.").

35. *Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak*, UTAH CTS. (Apr. 2020), <http://www.utcourts.gov/utc/rules-comment/wp-content/uploads/sites/31/2020/04/04.09.20-PROPOSED-ORDER-re-Bar-Waiver-final.pdf>.

36. Both California and Massachusetts announced that if the COVID-19 pandemic prevented a bar exam from being safely administered in person, they would offer an online exam. At the time of the announcements the NCBE had not developed an online exam for state use. *See* Stephanie Francis Ward, *California bar exam will be postponed and administered online*, ABA J. (Apr. 27, 2020, 4:17 PM), <https://www.abajournal.com/news/article/first-state-plans-for-online-bar-exam-if-in-person-test-is-not-possible>.

37. Stephanie Francis Ward, *Decision About Releasing July Bar Exam Materials Will Come in May*, NCBE says, ABA J. (Mar. 27, 2020, 1:43 PM), <https://www.abajournal.com/news/article/ncbe-decision-about-releasing-july-bar-exam-materials-will-come-in-may>.

exam that we insist your future lawyers take. Criticized as self-serving<sup>38</sup> and inconsistent,<sup>39</sup> the mettle of the NCBE stance bears witness to a monumental shift in power wielding — away from the states and in favor of the private NCBE — that is the result of widespread adoption of the Uniform Bar Exam (“UBE”).<sup>40</sup> Under a system of uniform examination, fewer states play any role in the writing and selection of the content to be tested on the bar exam. Like bar applicants, state courts were also held in abeyance for more than a month, awaiting the non-governmental entity’s determination of whether or not it would allow a state to administer its bar exam to license attorneys.

In May 2020, the NCBE announced that it would provide multi-state exams for states to administer in both July and September.<sup>41</sup> While this announcement may have quelled anxiety over *whether* states would be permitted to offer a bar exam, it created angst about *when* the exam would be held. Some states initially opted to hold a September exam; other states remained committed to the traditional July exam dates; others opted for both July and September administrations; and a few states made no decision whatsoever.<sup>42</sup> In the days and weeks following the NCBE decision, students ended their law school careers without pomp and circumstance, but with plans to study for a bar exam to be administered on a date uncertain.

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38. Karen Sloan, *Ditching the Bar Exam Puts Public at Risk, Says Test Maker*, LAW.COM (Apr. 13, 2020, 1:10 PM), <https://www.law.com/2020/04/13/ditching-the-bar-exam-puts-public-at-risk-says-test-maker/?srlreturn=20200813142709> (“It’s not surprising that the NCBE is against eliminating the test for admission. Developing the exam is the core function of the organization, which has nearly 100 employees and reported \$26.6 million in revenue in 2018, according to tax filings.”); see, e.g., *National Conference of Bar Examiners: Form 990 for period ending June 2019*, PROPUBLICA, [https://projects.propublica.org/nonprofits/display\\_990/362472009/01\\_2020\\_prefixes\\_34-36%2F362472009\\_201906\\_990\\_2020011617038295](https://projects.propublica.org/nonprofits/display_990/362472009/01_2020_prefixes_34-36%2F362472009_201906_990_2020011617038295) (last visited Oct. 17, 2020).

39. Michael Ariens, *The NCBE’s Wrong-Headed Response to the Covid-19 Pandemic*, SSRN at 1, 10 (Apr. 28, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3587751](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587751); Joe Patrice, *NCBE Trashes Diploma Privilege, Sprinkles In Some Racist and Sexist Conclusions*, ABOVE L. (Apr. 14, 2020), <https://abovethelaw.com/2020/04/ncbe-trashes-diploma-privilege-sprinkles-in-some-racist-and-sexist-conclusions/> (“While Utah is on track to become the first state to shift to ‘diploma privilege plus’ because of the logistical hurdles presented by the COVID-19 crisis with other jurisdictions openly considering following their lead, . . . the NCBE tries — maybe a little too hard — to salvage its central role in licensing.”).

40. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1 (2019).

41. See *NCBE Covid-19 Updates*, NAT’L CONF. OF BAR EXAM’RS (June 1, 2020), <https://www.ncbex.org/ncbe-covid-19-updates/> (stating the decision to add two additional dates for the bar exam traditionally offered only in July: September 9-10 and September 30-October 1).

42. *News Advisory: R.I. Bar exam for July postponed*, R.I. JUDICIARY (Apr. 13, 2020), <https://www.courts.ri.gov/PDF/Bar%20exam%20postponed%20041320.pdf> (“The Rhode Island Bar Examination scheduled for July 2020 has been postponed indefinitely because of COVID-19 related concerns, the Supreme Court announced today.”) (emphasis added).

Quickly, the uncertainty extended beyond the timing of administration and grew to include questions about *who* would be allowed to take the bar exam. Some states placed limitations on the number of candidates who could sit for the exam.<sup>43</sup> These limitations excluded repeat exam takers, out of state law school graduates, and LLM graduates.<sup>44</sup> New York, for example, announced in May 2020 that only graduates of one of New York's fifteen law schools who were first-time bar applicants could sit for the then-planned in person exam.<sup>45</sup> Although the chief judge for New York's Court of Appeals had hinted to seating capacity limits in an April notice, the announcement had the potential to displace thousands of New York bar applicants.<sup>46</sup> Efforts to prioritize first-time takers<sup>47</sup> and in-state law graduates (in New York and other states) were regarded by some as misguided and drew heavy criticism as violative of the dormant commerce clause.<sup>48</sup> The New York Board of Law Examiners responded to that criticism, in part, by directing applicants from out of state law schools who intended to practice in New York to apply to take the UBE in another jurisdiction and transfer their scores to New York.<sup>49</sup> That direction

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43. Vikram David Amar, *Why It is Unconstitutional for State Bars, When Doling out Bar-Exam Seats, to Favor In-State Law Schools*, JUSTICIA: VERDICT (May 21, 2020), <https://verdict.justia.com/2020/05/21/why-it-is-unconstitutional-for-state-bars-when-doling-out-bar-exam-seats-to-favor-in-state-law-schools> (explaining that after New York announced limitations on the number of applicants who would be allowed to sit for a then-planned in-person exam, other states like Connecticut, Massachusetts, Missouri, New York, and Tennessee announced seating or eligibility limitations, and imposed applicant capacities).

44. Emma Whitford, *Pandemic Hinders Bar Exam Retakers Who Aid the Indigent*, LAW360 (May 31, 2020, 8:02 PM), <https://www.law360.com/articles/1277931/pandemic-hinders-bar-exam-retakers-who-aid-the-indigent>.

45. Stephanie Francis Ward, *New York limits bar exam to in-state graduates because of coronavirus concerns*, ABA J. (May 1, 2020, 12:27 PM), <https://www.abajournal.com/news/article/new-york-limits-bar-exam-to-in-state-graduates>.

46. *Chief Judge Approves Temporary Authorization Program*, N.Y. CTS. (Apr. 28, 2020), <https://www.nycourts.gov/whatsnew/pdf/Chief-Judge-TemporaryAuthorizationProgram.pdf> (“Prevailing guidance indicates that, in September, New York will be affected by ongoing travel restrictions, limitations on large gatherings, and social distancing mandates — constraints that prevent us from maximizing space in our larger testing venues across the state. Seating capacity for the September examination is likely to be limited.”).

47. Andrea Curcio, Marsha Griggs, Joan Howarth & Deborah Jones Merritt, *INSIGHT: Bar Exam Repeaters Shouldn't Be Pushed to the Back of the Line*, BLOOMBERG L. (June 1, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-bar-exam-repeaters-shouldnt-be-pushed-to-back-of-the-line>.

48. Claudia Angelos, Eileen Kaufman, Deborah Jones Merritt & Patricia E. Salkin, *INSIGHT: New York's Bar Exam Changes Are Misguided – Here's a New Proposal*, BLOOMBERG L. (May 7, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-new-yorks-bar-exam-changes-are-misguided-heres-a-new-proposal?context=search&index=3>.

49. N.Y. ST. BD. OF LAW EXAM'RS, <https://www.nybarexam.org> (such advice proved ill-advised as (1) the application period in all but a few states was closed at the time of the New York announcement; (2) many states quickly imposed seating capacities to prevent crowds of dis-

proved to be ill-advised as many would-be New York applicants later found themselves stuck taking exams in jurisdictions where they may never practice, because at least twelve UBE jurisdictions canceled their exams in favor of a non-portable, non-uniform exam.<sup>50</sup>

Bar applicants scrambled to find a jurisdiction where they could take a bar exam. Those who could afford to do so applied in multiple jurisdictions to hedge their bets. Those without the financial resources to pay thousands of dollars in additional application fees, were fully at the mercy of the restrictive seating policies of the states. The bar-examiner-created imbroglio had aspiring bar takers submitting applications to take a bar exam in states where they had no connection and no intention of practicing law.<sup>51</sup>

Without guidance or definitive answers about the summer bar exams, commercial bar preparation companies and academic support professors struggled to set course start-dates and plan supplemental programming, thus reducing the efficacy of available support during bar study.<sup>52</sup> About half-way through the bar study period, all the while studying, bar candidates did not know who would be allowed to sit for the exam, when it would be given, how the test would be administered, and what format the test would take. And then things got worse.

### C. Social Unrest

As summer approached, the nation and the world had seen and heard George Floyd, an unarmed black man, as he gasped and pleaded for his last breath. Mr. Floyd died under the knee of a police officer sworn to serve and protect.<sup>53</sup> The Floyd killing followed, in close sequence, the premeditated and racially-motivated killing of

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placed New York examinees from coming in; and (3) by July all but two of the jurisdictions that accepted displaced New York applicants had cancelled their UBE administration, leaving the displaced applicants without the opportunity to earn a portable UBE score).

50. See generally *NCBE Covid-19 Updates*, NAT'L CONF. B. EXAM'RS (Sept. 1, 2020, 1:49 PM), <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/status-table/>.

51. *Id.*

52. Sam Skolnik, *Covid-19 Forces Bar Exam Prep Companies to Alter Courses*, BLOOMBERG L. (June 24, 2020, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/covid-19-forces-bar-exam-prep-companies-to-alter-courses>.

53. Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.



lated the constitutional rights of the accused and exposed them to COVID-19.<sup>60</sup> The subsequent protests, cries for police reform, and televised police brutality against peaceful protesters stirred a hunger in many law graduates to take their rightful place as champions of the Constitution, while leaving them to question its true meaning. The protested killings revealed racial and political realities of the U.S. legal system that will have an unquestionable formative impact on those entering the legal profession.

D. The Class of 2020<sup>61</sup>

As people reckoned with notions of privilege and prejudice, bar applicants were ushered into the uncomfortable nook between the rock and hard place. Bar candidates were forced to study in places that were not libraries, law schools, or quiet coffee shops, because those places remained off-limits due to COVID-19. They studied in the midst of the unavoidable distraction of national civil unrest. All the while managing the ulcerous uncertainty of not knowing if the bar exam would be postponed, canceled, or reconfigured into a format completely different from predecessor exams on which bar preparation is modeled. One situationally unfortunate class of law school graduates found themselves thrust into a pandemic that they did not create, and social unrest that they could not avoid.

Asking our heavily-invested law graduates to risk their health and the safety of their families for an opportunity to take the exam that deems them competent placed more faith in the ink and paper of a testing instrument than in the flesh and blood of the individuals who are the future of our profession.<sup>62</sup> The bar exam should not be a moving target, but for 2020 bar takers that is what it became. Taking the bar exam should not be a life or death decision, but in the summer of 2020, it was just that.

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[www.nbcnewyork.com/news/local/nyc-protests-continue-saturday-following-night-of-arrests-violent-clashes-with-police/2439492/](http://www.nbcnewyork.com/news/local/nyc-protests-continue-saturday-following-night-of-arrests-violent-clashes-with-police/2439492/).

60. Ida Sawyer, *New York Protesters Jailed in Crowded, Filthy Conditions: Locked Up for Hours without COVID-19 Protections*, HUM. RTS. WATCH (June 9, 2020), <https://www.hrw.org/news/2020/06/09/new-york-protesters-jailed-crowded-filthy-conditions>.

61. References to “the class of 2020” hereinafter collectively and inclusively refer to applicants who registered or applied to take a bar exam in July, September or October 2020, without regard to their year of law school graduation or the degree conferred upon them.

62. Claudia Angelos, Mary Lu Bilek, Carol L. Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Welch Wegner, *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020), <https://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence/>.

The very outcome that the Collaboratory sought to warn against, had come to fruition, to the great disappointment of bar applicants. By mid-July, multiple states had canceled outright their bar exams, including some states that had previously postponed their exams until September. Canceling a bar exam is a devastating blow to a bar applicant. Canceling a bar exam only days before the scheduled exam hinges on cruelty. When the Kentucky Office of Bar Admissions canceled its July bar exam just eighteen days before the exam, applicants were understandably devastated. Gabbie Hill, a graduate of St. Louis University School of Law said: “We’re currently prepping for an exam that is constantly changing and wholly unpredictable. How are we supposed to study for an exam that is constantly changing locations, dates, and formats? Also, how long are we supposed to put our careers on hold?”<sup>63</sup>

Another Kentucky bar candidate tweeted:

Kentucky just canceled the bar exam 18 days before the test. Postponed to October 5-6. I am incredibly upset. I can’t afford to go until October. I haven’t slept in 2.5 months studying for the KY bar exam. I have nightmares every night about this exam. I moved to Kentucky in April for this exam. This morning I hit 80% completion of [my bar prep course]. I am devastated. I have no words. I don’t know what to do.<sup>64</sup>

Hyperbole notwithstanding, the real consequences of canceled and postponed bar exam dates were presented in testimony before boards of bar examiners,<sup>65</sup> summarized in impact statements delivered to state supreme courts,<sup>66</sup> and conveyed publicly via social media.<sup>67</sup>

Canceling the bar exam, months into the bar study process, with no replacement date or substitute exam became a disappointing norm for the class of 2020 bar takers. Kentucky’s cancellation 18 days before the scheduled exam seems magnanimous when contrasted to

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63. @GabbieHill, TWITTER (July 9, 2020, 11:42 AM), <https://twitter.com/GabbieHill/status/1281252452382265344>.

64. @emilydotgov, TWITTER (July 10, 2020, 1:27 PM), <https://twitter.com/emilydotgov/status/1281293860078063617>.

65. Staff Report, *State Bar board to meet virtually June 24-25; public comments accepted*, ST. BAR OF TEX. (June 24, 2020), <https://blog.texasbar.com/2020/06/articles/state-bar/state-bar-board-to-meet-virtually-june-24-25-public-comments-accepted/>. Texas BLE holds and live-streams public hearings that include comments on the bar examination (live stream and transcript available at <http://www.texasbarcle.com/CLE/BDPLAYER5.ASP?sMeetingID=062420>).

66. Designer, *Illinois Grads file Petition for Emergency Diploma Privilege*, UNITED FOR DIPLOMA PRIVILEGE (July 6, 2020), <http://www.unitedfordiplomaprivilege.org/2020/07/06/illinois-grads-file-petition-for-emergency-diploma-privilege/>.

67. See @GabbieHill, *supra* note 63; @emilydotgov *supra* note 64.

the Florida Board of Bar Examiners canceling its exam less than 72 hours from the scheduled exam date.<sup>68</sup> Florida, Louisiana, and New York canceled their scheduled exams, and did not do so callously or arbitrarily. However, the fact that they offered no substitute exam dates, and announced no plan for licensing new attorneys at the time of cancellation left a bad taste in the mouths of applicants and a critical public. Because they chose to ignore the foreseeable impact of the pandemic on bar exam administration, states like New York and Florida were afforded very little clemency from a vocal and disapproving public.

The news of cancellation from Louisiana was troubling not only to expectant bar takers, but also to other states that were planning to offer an online exam because Louisiana had provided its applicants an option to test in-person or online.<sup>69</sup> The cancellation of both the in-person and online formats of the planned Louisiana exam left other jurisdictions to wonder if there were untold complications with the online testing option. When the Court of Appeals canceled New York's scheduled September exam with no plan for a delayed exam date or an online exam, it could have displaced up to 10,000 bar applicants who had paid fees and had begun to study for a September exam.<sup>70</sup> Bar takers were left to wonder and continue studying. The consensus response to the New York announcement seemed to be that “[c]ancelling the bar exam with no clear plan demonstrates how far removed from the reality of bar study the [court] is. Adding more chaos to this uncertain time is devastating and traumatizing.”<sup>71</sup>

Ultimately, the Court of Appeals agreed to move the New York bar exam online, but did so only after applicants had scrambled for a week seeking some path to licensure, possibly outside of New York.<sup>72</sup>

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68. Fl. Sup. Ct. Press Release, *supra* note 24.

69. Press Release, Louisiana Supreme Court, Louisiana Sup. Ct. Announces Changes to Method of Administration of August 24 and October 10, 2020 Louisiana Bar Exam (Aug. 12, 2020), [https://www.lasc.org/Press\\_Release?p=2020-23](https://www.lasc.org/Press_Release?p=2020-23); *See also* Press Release, Louisiana Supreme Court, The Louisiana Sup. Ct. and Louisiana Sup. Ct. Comm. On Bar Admissions Announce Changes To July 2020 Bar Examination (May 8, 2020), [https://www.lasc.org/Press\\_Release?p=2020-13](https://www.lasc.org/Press_Release?p=2020-13).

70. Karen Sloan, *New York Cancels September Bar Exam without Alternative Test in Place*, LAW.COM (July 16, 2020, 5:08 PM), <https://www.law.com/newyorklawjournal/2020/07/16/new-york-cancels-september-bar-exam-without-alternative-test-in-place/>.

71. *Id.* (quoting Allie Robbins, Associate Professor, CUNY School of Law); *See* NAT'L CONF. OF BAR EXAM'RS., *supra* note 50.

72. N.Y. ST. BD. OF LAW EXAM'RS, <https://www.nybarexam.org> (stating in a subsequent announcement one week after the cancellation, the New York Court of Appeals announced an online bar exam October 5–6, 2020).

The court's late decision was immediately criticized for what appeared to be poor planning or a lack of plan altogether.<sup>73</sup> By deciding to move its exam online, the court also contradicted its own stricture of the shortcomings of online examinations and its declaration that online exams cannot serve to protect the public.<sup>74</sup> Only one month before announcing a planned online exam for New York, the Court of Appeals had penned its unequivocal opinion of an online exam in a very stern letter to the deans of the fifteen New York law schools: "New York simply cannot afford to participate in an experimental protocol without a guarantee of integrity."<sup>75</sup> Critics unsubtly reminded the court that an online bar exam was no less experimental in July than on the date of the Court's June letter.<sup>76</sup> Even the most objective observer would struggle to characterize the contradictions and the multiple missteps in New York as reasonable under the circumstances.

California, a state that typically seats about 7,800 bar takers each July, joined New York, Florida, and Louisiana in canceling its in-person exam.<sup>77</sup> Not only did the California Supreme Court announce an October online exam, it also permanently lowered the California bar passage cut score.<sup>78</sup> With the news of an online exam, California also announced plans to develop a program of limited licensure that would permit qualified applicants to practice in certain fields under the supervision of a licensed attorney until the applicant passed the California bar exam.<sup>79</sup> Although California provided more guidance than

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73. Susan Arbetter, *New York Cancels Bar Exam – Now What?*, SPECTRUM NEWS (July 17, 2020, 10:32 PM), <https://spectrumlocalnews.com/nys/central-ny/politics/2020/07/18/the-court-of-appeals-canceled-the-bar-exam—now-what->.

74. N.Y. ST. BAR ASS'N., REPORT OF THE NYSBA TASK FORCE ON THE NEW YORK BAR EXAMINATION (Mar. 5, 2020), <https://nysba.org/app/uploads/2020/03/Report-of-the-Task-Force-on-the-New-York-Bar-Examination.pdf>.

75. Garcia, *supra* note 21.

76. @dp4ny, TWITTER (July 23, 2020, 5:06 PM), <https://twitter.com/dp4ny?lang=en> ("Just one month ago, the Court of Appeals stated re: online exam that "New York simply cannot afford to participate in an experimental protocol without a guarantee of integrity." An online exam is no less experimental now than it was a month ago.").

77. *State Bar of California Releases July 2019 Bar Exam Results*, ST. BAR OF CAL. (Nov. 15, 2019), <http://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-releases-july-2019-bar-exam-results>.

78. Letter from Jorge Navarrete, Clerk and Exec. Officer of the Cal S. Ct. to Alan K. Steinbrecher, Chair St. Bar of Cal., Bd. of Tr. (July 16, 2020), [https://newsroom.courts.ca.gov/internal\\_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20206/SB\\_BOT\\_7162020\\_FINAL.pdf](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20206/SB_BOT_7162020_FINAL.pdf).

79. *Id.* ("The court recognizes that postponement of the bar examination may impact employment prospects, delay incomes, and otherwise impair the livelihoods of persons who recently have graduated from law school. Moreover, the court recognizes 2020 graduates may not be in a position to study and prepare for a fall bar 2020 examination. Therefore, in order to mitigate

New York or Florida initially did, applicants still had little information about security protocols for the in-person exam; waitlists and seating priority; scoring and content of online or state specific exam; and refund or transfer of exam fees. Like in so many other states, California applicants were left with more questions than answers.<sup>80</sup>

In understandable exasperation, bar applicants pleaded for diploma privilege because taking the bar exam had become more uncertain than passing the bar exam.<sup>81</sup> The pleas of bar takers in Louisiana were ultimately answered, but not so in other states that had canceled their exams.<sup>82</sup> A divided Louisiana Supreme Court labored over the question of what to do with the class of 2020 bar takers, and granted an emergency diploma privilege. The court decided that diploma privilege was the only practical option under the circumstances of the pandemic. While the court's order is public, its deliberations were not. The Louisiana Supreme Court's decision to grant diploma privilege to the registered 2020 bar applicants was not unanimous and one justice penned an excoriating dissent.<sup>83</sup>

For most bar takers, the story of 2020 is one that got progressively worse. States refused to acknowledge a need to provide licensure alternatives because COVID-19 made an in-person exam unsafe, and, at the same time, required applicants to sign assumption of risk liability waivers to hold them harmless should an applicant contract the virus during the exam. One scholar identified the waivers as an abuse of contract.<sup>84</sup> She argued that the waivers are unenforceable because they lacked consideration, were procured under duress, and were un-

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these hardships faced by graduates while fulfilling the responsibility to protect the public by ensuring that persons engaged in the practice of law are minimally competent . . .").

80. Marsha Griggs, *Unanswered Questions*, L. SCH. ACAD. SUPPORT BLOG (Apr. 13, 2020), [https://lawprofessors.typepad.com/academic\\_support/2020/04/unanswered-questions.html](https://lawprofessors.typepad.com/academic_support/2020/04/unanswered-questions.html).

81. Abigail Hess, *'Literal hell'—how the pandemic made the bar exam even more excruciating for future lawyers*, CNBC MAKE IT (Aug. 19, 2020, 5:40 PM), <https://www.cnbc.com/2020/08/19/literal-hellthe-pandemic-has-made-the-bar-exam-more-excruciating.html>.

82. Order of the Court, SUP. CT. OF LA. (July 22, 2020), [https://www.lasc.org/COVID19/Orders/2020-07-22\\_LASC\\_BarExam.pdf](https://www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.pdf) (on July 22, 2020, the Louisiana Supreme Court entered an order granting diploma privilege to bar applicants who had not previously taken a bar exam).

83. Dissent to the Order of the Court, SUP. CT. OF LA. (July 22, 2020), [https://www.lasc.org/COVID19/Orders/2020-07-22\\_LASC\\_BarExam.wjc.dis.pdf](https://www.lasc.org/COVID19/Orders/2020-07-22_LASC_BarExam.wjc.dis.pdf) (Justice Crain dissented from the majority decision, comparing bar examination during a pandemic to bar examination in the wake of Hurricane Katrina: "Not even in the face of flood-induced homelessness, near complete displacement, and death did we eliminate this prerequisite. . . . Those applicants rose to the occasion and proved themselves worthy of a law license and the public's trust. I have no doubt the current applicants could do the same.").

84. Andrea Boyack, *Abuse of Contract and the July 2020 Bar Exam*, NULR OF NOTE (July 15, 2020), [https://blog.northwesternlaw.review/?page\\_id=1039](https://blog.northwesternlaw.review/?page_id=1039).

conscionable.<sup>85</sup> Unconscionable or not, non-lawyer applicants were forced to sign and return these waivers as a condition of sitting for the exam that is required to allow them to become lawyers.<sup>86</sup> It is also likely not coincidental that support for diploma privilege from the practicing bar increased as information about these waivers became public.

Juxtaposed to the summer 2020 bar exam chaos and dizzying uncertainty, diploma privilege started to look more and more sensible and much less like an extreme. By mid-July, aspiring bar takers had organized in multiple states to lobby for an emergency diploma privilege that would grant licensure on the basis of law school graduation alone.<sup>87</sup> Soon the concerted movement for diploma privilege had drawn the support of law professors, law school deans, and practicing attorneys. Vocal efforts to delegitimize the push for diploma privilege were met with mixed reaction. Opponents of diploma privilege painted the class of 2020 law graduates as entitled, lazy,<sup>88</sup> and wanting to skip the exam because of “exam aversion.”<sup>89</sup> Their requests to bypass the bar exam were dismissed as trivial circumvention, but their requests were far from trivial. The failings of our ability to safely license new attorneys during a period of national crisis would have a direct and harmful effect on the public.

#### E. Meeting Public Need

A new paradox emerged in the legal profession. Scores of legal issues presented by the pandemic, and cries against racial injustice created a need for a new crop of attorneys.<sup>90</sup> When the need for new

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85. *Id.*

86. *Id.*

87. UNITED FOR DIPLOMA PRIVILEGE, <http://www.unitedfordiplomaprivilege.org> (United For Diploma Privilege currently stands for emergency diploma privilege for JD degree holders and LLM degree holders, regardless of if they are first time test takers or otherwise, in all U.S. jurisdictions) (last visited Sept. 12, 2020); *see also* Sam Skolnik, *States Pressured to Waive Bar Exam for New Lawyers in Pandemic*, BLOOMBERG L. (June 30, 2020, 9:28 AM), <https://news.bloomberglaw.com/us-law-week/states-pressured-to-waive-bar-exam-for-new-lawyers-in-pandemic?context=article-related>.

88. Elizabeth Hernandez, *Worried about COVID-19, Colorado law school graduates seek alternative to in-person bar exam*, DENVER POST (July 7, 2020, 11:54 AM), <https://www.denverpost.com/2020/07/07/colorado-bar-exam-july-coronavirus-covid-cu-du/> (quoting Attorney Regulation Counsel for the Colorado Supreme Court, Jessica Yates, “The individuals who are asking [for diploma privilege] are the individuals who don’t want to take the bar exam.”).

89. Matthew Stanford, *Emergency diploma privileges are not the solution to coronavirus caused bar exam delays*, SCOCABLOG (Apr. 8, 2020), <http://scocablog.com/emergency-diploma-privileges-are-not-the-solution-to-coronavirus-caused-bar-exam-delays/>.

90. *See* Angelos et al., *supra* note 62.

attorneys was perhaps greatest, jurisdictions failed to develop a safe pathway for new lawyers to enter the profession. Without a law license earned through bar examination, for most, the three years and the \$80,000–120,000 spent on a legal education would be spent in vain.<sup>91</sup> Although looked upon with dread by all who must take it, the bar exam is an imposed rite of passage into the legal profession.<sup>92</sup> All but two U.S. states require new law graduates and first-time attorneys to pass a bar exam for regular admission to the bar.<sup>93</sup> The unsettling catch-22 of pandemic-era licensing was that a bar exam was both required to practice law, and yet potentially unavailable to those who needed to take it to be able to practice law. This crucial uncertainty was detrimental to the emotional and financial wellbeing of thousands of bar applicants and contrary to our societal goals.

The crises of COVID-19 and racial injustice exposed cracks in a legal system that previously had been presumed to be fair and in the best interest of the public. The cries for racial justice will not be quieted overnight. If states and municipalities reevaluate qualified immunity, debate hate crime legislation, and contemplate avenues of civil recovery for race-based 9-1-1 calls, the need for lawyers and legal service providers will increase. The societal costs of the pandemic will also foreseeably drive demand for affordable legal assistance:

Low- and middle-income people will urgently need lawyers to protect their housing rights, secure health care, fight for safe working conditions, challenge unfair lay-offs, stop abusive debt collectors, protect loved ones in nursing homes and prisons, navigate bankruptcies, and access new benefits that the government has promised to provide.<sup>94</sup>

As the need for legal representation increases, it would be imprudent to erect unnecessary barriers to entry into the legal profession. The licensure delays of 2020 disrupted the flow of new attorneys into the legal profession. That disruption, even if temporary, could deprive the public of the very liberties that lawyers are sworn to protect.

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91. Abigail Hess, *Only 23% of law school grads say their education was worth the cost*, CNBC MAKE IT (Feb. 21, 2018, 3:37 PM), <https://www.cnbc.com/2018/02/21/only-23-percent-of-law-school-grads-say-their-education-was-worth-the-cost.html>.

92. Griggs, *supra* note 40, at 6.

93. Wisconsin maintains a system for admission without bar examination for graduates of the state's two law schools pursuant to Wis. SUP. CT. R. 40.03. New Hampshire allows in-state law school graduates who have completed a specified honors program to practice law without taking a state bar exam pursuant to N.H. SUP. CT. R. 42.

94. Angelos et al., *supra* note 62.

The public protection role of bar licensure authorities was challenged by the inability to hold in-person exams. Pandemic prohibitions against large gatherings presented opportunities for states to explore practical options to maintain the flow of entry of new lawyers to the bar.<sup>95</sup> While some states showed a willingness to harness available technology and enact alternatives to protect the public's need for new lawyers, other states — ironically, also citing public protections — staunchly refused to depart from the paper and pencil in-person exam.<sup>96</sup> Only time will tell how the courts of public opinion will judge the states that followed either path.

## II. CRISIS CREATES AN OPPORTUNITY FOR CHANGE

The pandemic crisis presented unique opportunities for innovation, reimagination, and reprioritizing in all sectors of our society. Law schools and the practicing bar utilized technology to prevent a total disruption in service to others, while those at the helm of bar examination, in all but a few states, seemed impervious to change. Even under pandemic conditions, bar authorities fought to maintain normal business practices. This preference for the status quo is not entirely surprising. When options for change are presented, status quo options tend to be seen as less threatening to decision makers and serve to reduce the negative emotions of anticipated regret.<sup>97</sup> Bar examiners are generally reluctant to deviate from a system and process that they believe protects the public.

University of Kentucky law professor, Brian Frye, said “[s]ometimes, it takes a crisis to make a change.”<sup>98</sup> Professor Frye and others circulated an early petition in support of a universal diploma privilege for law school graduates.<sup>99</sup> The petition urged that administration of an in-person bar exam during the pandemic, in the absence of a safe vaccine and any hint of containment, would be un-

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95. See e.g., Angelos et al., *supra* note 29; Hutton-Work & Guyse, *supra* note 17.

96. Angelos et al., *supra* note 29; Hutton-Work & Guyse, *supra* note 17.

97. Christopher J. Anderson, *The Psychology of Doing Nothing: Forms of Decision Avoidance Result from Reason and Emotion*, 129 *PSYCH. BULL.* 139, 143, 165 (2003); see e.g., Jason. J Riis & Norbert Schwarz, *Status Quo Selection Increases with Consecutive Emotionally Difficult Decisions, in the Society for Judgment and Decision Making poster presentation* (Nov. 19, 2000), [http://www.chicagocdr.org/bdrm/bdrm\\_program.pdf](http://www.chicagocdr.org/bdrm/bdrm_program.pdf).

98. Brian L. Frye, *It's Time for Universal Diploma Privilege*, *JURIST* (Apr. 6, 2020 10:03 AM), <https://www.jurist.org/commentary/2020/04/brian-frye-diploma-privilege/>.

99. Brian L. Frye et al., *Petition of Law Professors in Support of the Diploma Privilege for 2020* (Apr. 8, 2020, 12:00 PM), [https://docs.google.com/document/d/1\\_xlBRaFtaToYKFY5LOgdGQH2ECiuwbN6IucgcEMA/edit?usp=sharing](https://docs.google.com/document/d/1_xlBRaFtaToYKFY5LOgdGQH2ECiuwbN6IucgcEMA/edit?usp=sharing).

fair and unsafe.<sup>100</sup> Professor Frye’s petition was one of the first of many petitions. It preceded a flurry of news stories, blogs, and editorials advancing policy suggestions, public support, and utter disbelief at state courts’ almost universal refusal to adopt some emergency remedy.<sup>101</sup>

As the summer unwound, the 2020 bar takers were joined in large number by law school deans, professors, and alumni in passionate quests for emergency licensing measures.<sup>102</sup> The common characteristic of the myriad requests was an appeal to the humanity and sense of fairness of the decision makers. The aggregate voice of bar takers sounded in plea for the chance to earn a living to be placed above dogmatic adherence to the status quo.<sup>103</sup> Those at the helm of legal licensure were asked to think outside of the traditional bar exam box. Although the majority of states refused to adopt emergency licensing measures, even temporarily, a handful of states embraced the opportunity to offer solutions for bar applicants and the public they would serve.

#### A. Thinking Outside the Box

In June 2020, the Washington Supreme Court issued an order granting the option of emergency diploma privilege to all first-time and repeat takers who had timely registered for its July or September bar exam.<sup>104</sup> In its order, the court acknowledged that “extraordinary barriers facing applicants currently registered to take the bar examina-

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100. *Id.*

101. See e.g., CLINICAL LEGAL EDUC. ASS’N., STATEMENT OF THE BOARD OF DIRECTORS ON THE 2020 BAR EXAMINATION 1 (2020) (stating that State authorities should promulgate rules that “equitably account for the impact of [COVID-19] on recent law school graduates”); Daniel Rodriguez, Utah Emergency Bar Order and the High Costs of Our Bar Federalism, PRAWFSBLAWG (Apr. 9, 2020), <https://prawfsblawg.blogs.com/prawfsblawg/2020/04/utah-emergency-bar-order-and-the-high-costs-of-our-bar-federalism.html> (noting the disparate impacts Utah’s attorney supervision rule might have on graduates of law schools that do not have at least an 86% first-time bar passage rate).

102. Letter from the Deans of New York’s Fifteen Accredited Law Schools to the New York Court of Appeals, (Apr. 1, 2020), <https://www.brooklaw.edu/-/media/Brooklaw/Safety-Security/letter-from-new-york-law-deans-to-chief-judge-diFiore-on-july-2020-bar-exam-april1.pdf> (on file with New York Court of Appeals); Letter from Deans of California Law Schools to the California Supreme Court (Apr. 17, 2020), <https://taxprof.typepad.com/files/ca-deans-letter.pdf>.

103. Emily M. Croucher & Allyssa M. G. Scheyer, *Diploma Privilege is the Only Ethical and Humane Path to Licensure During the COVID-19 Crisis*, JURIST (Apr. 9, 2020, 5:54 AM), <https://www.jurist.org/commentary/2020/04/croucher-scheyer-diploma-privilege/>.

104. Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules, No. 25700-B-630 (Wash. June 12, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%20Granting%20Diploma%20Privilege%20061220.pdf>.

tion” made bar study and exam success elusive.<sup>105</sup> The Washington order was lauded by many for its progressive and compassionate stance, and feared by others for its potential to undam floodgates that could lead to the end of the bar exam.<sup>106</sup> The Washington precedent for emergency diploma privilege paved a path for other jurisdictions to adopt similar orders and possibly impose heightened eligibility requirements, as an added assurance of competency. The Collaboratory, and later others, offered the following heightened requirements: (1) completion of an online course or an exam that the state has developed to supplement the UBE, which could be easily accomplished in the few states that already require a state component; (2) successful completion of a clinic course or program; (3) an affidavit from a supervising attorney attesting that the candidate possesses the knowledge and skills to practice law with minimum competence;<sup>107</sup> or (4) completion of a “bridge-the-gap” or similar program.<sup>108</sup> The Collaboratory identified these optional add-ons as “diploma privilege-plus,” signaling that new attorneys should demonstrate some equatable measure of competency in addition to law school graduation.<sup>109</sup>

Utah evaluated the available competency measures and adopted a “diploma privilege-plus” rule that suited the needs of its citizens.<sup>110</sup> In April 2020, the Utah Supreme Court issued an emergency order that granted “diploma privilege” to 2020 bar exam applicants.<sup>111</sup> Under the terms of the order, such qualified applicants were admitted to practice law in Utah without examination, with the added proviso that they undertake 360 hours of practice under the supervision of an

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105. *Id.*

106. Nicole Hernandez, *Washington law graduates exempt from bar exam amid pandemic*, KREM2 (July 2, 2020, 8:34 AM), <https://www.krem.com/article/news/health/coronavirus/coronavirus-bar-exam-law-students-washington/293-d8820b50-142e-45a2-b4ce-a1d941428256>.

107. Angelos et al., *supra* note 29, at 5 (stating that attorney supervision may come through the candidates work under an approved externship or law school employment).

108. Members of the City Bar of New York who are recent law graduates not yet admitted, or newly admitted lawyers who have been admitted within the last two years, can participate in a free Bridge-the-Gap program. *Bridge the Gap*, N.Y.C. BAR, <https://www.bar.org/bridge-the-gap-ple-ny-nj/> (last visited Aug. 14, 2020).

109. Angelos et al., *supra* note 29, at 6.

110. *See generally* Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak (Utah Apr. 21, 2020), <http://www.utcourts.gov/utc/rules-approved/2020/04/22/order-for-temporary-amendments-to-bar-admission-procedures-during-covid-19-outbreak-effective-april-21-2020/> [hereinafter Utah Order].

111. *Id.* at 1, 3 (The order created a pathway to practice law in Utah for bar applicants who graduated from an ABA-approved law school with a 2019 bar passage rate of 86% or higher).

experienced attorney.<sup>112</sup> In a public statement, the Utah Supreme Court described its emergency privilege as a “temporary accommodation designed to provide relief to certain applicants who had applied to take the Utah bar examination in July 2020 but [were] unable to do so because of public health concerns associated with the COVID-19 pandemic.”<sup>113</sup>

A closer look at the Utah emergency order reveals that it did not provide a pure diploma privilege, but rather a supervised practice path to licensure. Unlike the Washington order, Utah’s grant of licensure was not conferred solely on the basis of having graduated from an ABA-approved law school. Utah bar applicants who wished to capitalize on the alternative path to licensure also had to complete nine weeks of direct practice under the supervision of an attorney in good standing licensed in Utah for at least five years.<sup>114</sup> Working collaboratively, Utah’s law school deans and high court provided an emergency pathway into the profession through legal education and supervised practice.

There can be no greater contradiction in the legal profession if the actual practice of law cannot serve as a proxy for competency presumed by examination. Under a supervised practice regimen, licensure candidates would perform a much fuller range of skills than can be tested on a bar exam, in any form. Supervised practice entails, inter alia, direct client interaction, legal research, scheduling, negotiation, oral presentation, a broad array of legal writing tasks, and the crucial soft skills of effective interpersonal communication. Unlike the bar exam, which some scholars argue focuses inordinately on broad legal knowledge, the setting of a supervised practice is more likely to represent the candidates’ future or intended practice areas, whether they be corporate, governmental, litigation, regulatory or transactional.<sup>115</sup> Nonetheless, supervised practice as an avenue to licensure seems to have been eclipsed in the polarized debates over bar examination or diploma privilege. I will address this in Part III.

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112. *Id.* at 2 (providing rule extension to applicants currently in good standing and licensed in another jurisdiction).

113. Press Release, State of Utah Jud. Council, Utah Sup. Ct. Issues Ord. Providing a Temp. Path to Bar Licensure for Certain Applicants Impacted by the Global Pandemic (Apr. 21, 2020), <https://www.utahbar.org/wp-content/uploads/2020/04/2020.04.21-COVID-Bar-Exam-PR-.pdf>.

114. Utah Order, *supra* note 110, at 1–2, 4

115. James S. Hardy, *Lowering the Bar: Why We Should Test Skills, Not Abstracts*, 38 COLO. LAW. 93, 98 (2009) (“[I]t seems a perverse injustice that we still force transactional attorneys — perhaps more than 50 percent of the current Bar — to pass a two-day exam containing not a single shred of knowledge they will ever use again.”).

## B. Online State Law Exams

Indiana sent shockwaves through the legal community when it became the first state to announce that it would offer an online bar exam in July 2020.<sup>116</sup> The Indiana Supreme Court order for online examination was initially followed by similar orders from the supreme courts of Nevada, Michigan, Louisiana, Texas, Florida, and California.<sup>117</sup> Early test drives of the online exam system proved disastrous.<sup>118</sup> Both Indiana and Nevada postponed their online exams, by one week and two weeks respectively,<sup>119</sup> due to complications with the exam software provided by ILG Technologies.<sup>120</sup> Michigan became the first state to actually administer its bar exam online as scheduled. Like Indiana and Nevada, the exam launch in Michigan was not without technical glitch.<sup>121</sup> The Chief Justice of the Michigan Supreme Court pledged to investigate the source of the glitch, understand why it occurred, and consider a path forward.<sup>122</sup> Shortly after

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116. *In re* July 2020 Ind. Bar Examination, 143 N.E.3d 300 (Ind. 2020).

117. *See, e.g.*, Order Approving Modified July 2020 Nevada Bar Examination, ADKT 0558 (May 20, 2020); Administrative Order Regarding Michigan Bar Examination, No. 2020-15 (May 18, 2020); Order Regarding Louisiana Bar Examination (Aug. 12, 2020); Nineteenth Emergency Order Regarding the COVID-19 State of Disaster, No. 20-9083 (Tex. July 3, 2020); *In Re* COVID-19 Emergency changes to the Administration of the July 2020 Florida Bar Examination, SC20-939 (Aug. 26, 2020); Order Concerning Modifications to the California Bar Examinations, Admin. Ord. 2020-08-10 (Aug. 10, 2020).

118. Dan Sullivan, *Technical glitches postpone Florida Bar exams*, TAMPA BAY TIMES (Aug. 17, 2020), <https://www.tampabay.com/news/florida/2020/08/17/technical-glitches-postpone-florida-bar-exams-set-for-wednesday/>; Debra Cassens Weiss, *Online bar exams delayed in 2 states because of issues with testing software*, ABA J. (July 27, 2020, 1:56 PM), <https://www.abajournal.com/news/article/online-bar-exams-delayed-in-two-states-due-to-issues-with-testing-software>.

119. Stephanie Francis Ward, *Indiana changes online bar exam again after 'repeated and unforeseen technical complications'*, ABA J. (July 29, 2020), <https://www.abajournal.com/news/article/state-changes-online-bar-exam-due-to-tech-issues>; Marilyn Odendahl, *Technological Problems Delay Indiana Remote Bar Exam One Week*, IND. LAW. (July 24, 2020), [https://www.theindianalawyer.com/articles/technological-problems-delay-indiana-remote-bar-exam-one-week#:~:text=the %20Hoosier%20state%20is%20postponing,Supreme%20Court% 20announced%20Friday%20afternoon](https://www.theindianalawyer.com/articles/technological-problems-delay-indiana-remote-bar-exam-one-week#:~:text=the%20Hoosier%20state%20is%20postponing,Supreme%20Court%20announced%20Friday%20afternoon) (Although Indiana was the first to announce that it would offer an online exam, it would not be the first state to administer an online bar exam. One July 24, 2020, a test drive of the exam software revealed malfunctions and the Indiana Supreme Court postponed the exam until August 4, 2020.).

120. ILG Technologies provides ILG Exam360, an application that provides the most comprehensive software available to jurisdictions to process all written examinations in electronic format. The software allows applicants to complete the written portion of the bar exam on a laptop. The graders can then read and score the written portion of the bar exam electronically, both in a secure environment. ILG EXAM 360, <https://www.ilgexam360.com/home.action> (last visited Sept. 13, 2020).

121. Stephanie Francis Ward, *State's online bar exam is delayed after technical glitch*, ABA J. (July 28, 2020), <https://www.abajournal.com/news/article/michigans-tuesday-online-bar-exam-has-a-delay>.

122. Press Release, C.J. Bridget McCormack, Michigan Sup. Ct. C.J. Bridget M. McCormack Statement Regarding the Bar Exam, Mich. Ct. News Release (July 29, 2020), <https://>

the Michigan online exam, both Indiana and Nevada were able to administer online exams without further incident.<sup>123</sup>

The great significance of these pilot online exams is not the delays, nor the technical complications encountered, but the innovation and adaptation they reflected. The state supreme courts in Indiana, Michigan, and Nevada faced the same pandemic challenges and shouldered the same concern for supervising and regulating the practice of law within their borders as did the judicial leaders of other states. Yet, these states, with the input and endorsement of stakeholders, harnessed creativity and compassion to provide a path to licensure that mitigated the risk of infection presented by a traditional in-person exam.

Although Florida committed to offering an online exam, it was not as proactive as other states in so doing. In fact, until July 1, 2020, the Florida Board of Bar Examiners (“FBBE”) had been unwavering in its position that it would hold an in-person exam in July.<sup>124</sup> Record numbers of COVID-19 cases were reported in Florida as the state “re-opened” and the exam date approached.<sup>125</sup> Florida seemed to have been forced into online administration by public, and possibly political, pressure. Replacing the in-person exam with plans for an online version introduced additional stressors for Florida bar applicants as they would face a new exam format, and an unknown scheme for scoring and scaling with little time remaining to prepare. To the dismay of Florida bar applicants who had spent at least six weeks studying for the Multistate Bar Exam (“MBE”)<sup>126</sup> that is normally tested in Florida, the planned Florida online exam would not contain any Multistate

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[courts.michigan.gov/News-Events/press\\_releases/Documents/Chief%20Justice%20Statement%20on%20MI%20Bar%20Exam.pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/Chief%20Justice%20Statement%20on%20MI%20Bar%20Exam.pdf).

123. *Nevada Bar Exam Rescheduled for August 11–12, 2020*, ST. BAR OF NEV. (July 26, 2020), <https://www.nvbar.org/nevada-bar-exam-rescheduled-for-august-11-12-2020/>; Marilyn Odendahl, *Problems, complaints absent from remote bar exam*, IND. LAW. (Aug. 7, 2020), <https://www.theindianalawyer.com/articles/problems-complaints-absent-from-remote-bar-exam>

124. *Compare* Press Release, Florida Bd. of Bar Exam’r (May 5, 2020), <https://www.floridabarexam.org/web/website.nsf/52286ae9ad5d845185257c07005c3fe1/6a5d234624d10e8d8525855f0076ff01?opendocument> (announcing administration of an in-person bar exam in two cities), *with* Press Release, Florida Bar Exam Moves to On-Line Format in August 2020 due to Pandemic, Florida Bd. of Bar Exam’r (July 1, 2020), <https://www.floridasupremecourt.org/News-Media/Court-News/Florida-Bar-Exam-Moves-to-On-Line-Format-in-August-2020-due-to-Pandemic> (canceling the in-person bar exam to administer an online bar exam).

125. Brian Heckmann, *The Abject Failure of the Florida Board of Bar Examiners*, JURIST (Aug. 10, 2020, 10:18 PM), <https://www.jurist.org/commentary/2020/08/brian-heckmann-florida-bar-exam-failure/>.

126. The MBE is a timed 200-question multiple-choice exam testing Constitutional Law, Contracts and Sales, Criminal Law and Procedure, Evidence, Federal Civil Procedure, Real Property, and Torts that is created and sold to states by the NCBE.

content.<sup>127</sup> In essence, Florida bar applicants were relegated to begin bar study anew for an entirely different exam.<sup>128</sup>

This history of disruptive change continued when the FBBE, again, canceled its scheduled bar exam — this time less than 72 hours before the test date — because administering a secure and reliable remote bar examination was not technically feasible.<sup>129</sup> The courts and administrators should be collectively lauded for their efforts and willingness to delve, without precedent, into online bar examination. However, these leaders must also accept the scorn of applicants who forewarned that the exam software, which had already failed in Louisiana, Indiana, and Nevada, was not reliable.<sup>130</sup>

The exams given in Indiana, Michigan, and Nevada contained no multistate content provided by the NCBE. Nevada and Indiana further distinguished themselves by using an open-book format. The Indiana exam was comprised of short answer and essay questions;<sup>131</sup> and the Nevada exam contained only state law essays and a homegrown performance test.<sup>132</sup> The UBE and the bar exams in all but one U.S. jurisdiction is anchored by the 200-question multiple-choice MBE. The use of multiple-choice questions in bar exams has been a subject of scholarly and social critique.<sup>133</sup>

Scholars have argued that the traditional bar exam does not measure the needed skills of an entry-level attorney; instead, it measures an examinee's ability to memorize Restatement provisions and to answer multiple-choice questions.<sup>134</sup> Taking a light-hearted, but deep-meaning jab at the use of multiple-choice testing in preparation for entry into the legal profession, Kyla Molina, a third-year law student

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127. Heckmann, *supra* note 125.

128. *See id.*

129. Fl. Sup. Ct. Press Release, *supra* note 24.

130. Jack Evans, *The Florida Bar exam software crashes, freezes and can lead to hacks, examinees say*, TAMPA BAY TIMES (Aug. 11, 2020), <https://www.tampabay.com/news/2020/08/11/the-florida-bar-exam-software-crashes-freezes-and-can-lead-to-hacks-examinees-say/>.

131. Stephanie Francis Ward, *Indiana plans remote July Exam, and Nevada considers open-book test*, ABA J. (May 8, 2020, 11:15 AM), <https://www.abajournal.com/news/article/indiana-plans-for-remote-july-bar-exam-with-fewer-questions> (“The Indiana bar exam . . . does eliminate the MBE, but will include short-answer questions on MBE topics. It will also have essay questions about state law.”).

132. Ward, *supra* note 121; *see also* Karen Sloan, *First-Ever Open Book, Online Bar Exam Set for July*, LAW.COM (May 26, 2020, 11:46 AM), <https://www.law.com/2020/05/26/first-ever-open-book-online-bar-exam-set-for-july/>.

133. Eileen Kaufman, Andrea Anne Curcio & Carol L. Chomsky, *How to Build A Better Bar Exam*, N.Y. ST. BAR ASS'N J. 37, 37–38 (2018).

134. *Society of American Law Teachers Statement on the Bar Exam July 2002*, 52 J. LEGAL EDUC. 446, 447 (2002).

at the University of Oklahoma said, “[w]ith all these multiple choice . . . exams, I can only assume that I’ll be filing a lot of multiple choice motions one day.”<sup>135</sup> Another law professor commented separately, “if your lawyer sits back in a chair and counsels you based on his or her memory of some little used area of the law based on about 1.7 minutes of reflection — runaway as fast as you can. Of course, this is precisely what the [MBE] tests for. It’s a speeded memory test.”<sup>136</sup> The actions of the states who forsook the use of the MBE to move their exams online further support the theory that an assessment of professional competency does not, of necessity, include multiple-choice questions.<sup>137</sup> If and after Texas, California, and Florida are able to successfully administer online state law exams, it will be important to collect full data sets on the content, format, and examinee performance.

### C. Multiple Paths to Licensure

Although some responded better than others, a forceful minority of states stepped up and showed that flexibility in licensing procedures could be effectively managed under dire circumstances.<sup>138</sup> After canceling its July in-person exam, the Texas Board of Law Examiners (“Texas BLE”) held a public meeting to announce its plans to offer both an online exam in October, and a “pandemic-proof” in-person exam in September.<sup>139</sup> The Texas BLE made plans to use monies not expended on a July exam to provide individual hotel rooms, with separate HVAC systems, for every applicant who sought to take the in-person September exam.<sup>140</sup> The provision of overnight lodging and a private place to take the exam that could be proctored from the hallway would not require the examinees to test in a room with other applicants.<sup>141</sup> Texas found a way to safely offer a modified version of

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135. @CanPanicNow, TWITTER (Apr. 28, 2020, 5:35 PM), <https://twitter.com/CanPanicNow/status/1255264317324365825?s=20>.

136. @JoeMastrosimone, TWITTER (Sept. 4, 2019, 12:58 PM), <https://twitter.com/JoeMastrosimone/status/1169293740915269633>.

137. Sloan, *supra* note 132 (noting that Nevada, California, and Utah have each adopted alternative means for testing professional competence).

138. Hutton-Work & Guyse, *supra* note 17.

139. Texas Courts, *Texas Board Law Examiners’ Personal Meeting Room*, YOUTUBE (July 16, 2020), <https://www.youtube.com/watch?v=CSF4ClTm9mE> (Susan Hendrix, the Executive Director of the Texas Board of Law Examiners states “I think this [plan] is pandemic-proof” at 55:27–28).

140. *Id.*; TEX. BD. OF L. EXAM’R: FREQUENTLY ASKED QUESTIONS, <https://ble.texas.gov/faq.action#963> (last visited Sept. 13, 2020).

141. *Id.*

its state-specific exam and provide a separate option for online testing. The shortcomings, if any, to Texas's "pandemic-proof" plan were most likely connected to the manner of communication from the Texas BLE and the applicants desire for more transparency and details surrounding the plan.<sup>142</sup>

By the time of the BLE announcement, the class of 2020 had already been run through the wringer of the canceled July exam, and denied requests both for diploma privilege and an apprenticeship (supervised practice) pathway to licensure. Texas bar applicants had ready access to the horror stories of bar takers in other jurisdictions. They were understandably distrustful of the examiners and the two new scoring schemes for the September and October exams.<sup>143</sup> Examinee concerns seemed to center around reliable internet access; appropriate study and testing locations access for October applicants; and privacy rights and the potential for COVID exposure for those who would be entering and exiting the hotel en masse, while testing in hotel rooms where the doors were required to remain open.<sup>144</sup> Even with imperfections, Texas's efforts to provide a secure and individualized in-person exam were a far cry from those jurisdictions who insisted on testing hundreds of examinees in a single room.<sup>145</sup>

Washington and Oregon did not provide hotel accommodations for their bar takers, but must be credited with deriving plans that gave their applicants the broadest array of options.<sup>146</sup> The Supreme Court of Washington granted a blanket temporary diploma privilege to all applicants who had timely registered for the July 2020 or September 2020 exams, without regard to the applicants' state of residency, law school situs, or law school bar passage rate.<sup>147</sup> Most notably, the

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142. E-mail from Andrea Reed, Student, SMU Sch. of L., to Marsha Griggs, Assoc. Professor of L., Washburn Univ. Sch. of L. (July 22, 2020, 12:46 PM) (on file with author).

143. *Bar Exam*, TEX. BD. OF L. EXAM'RS, <https://ble.texas.gov/current-exam> (last visited Sep. 7, 2020). The September 2020 Texas Bar Exam was given in-person in Austin, Dallas, and Houston. It consisted of the MBE (200 questions); 6 state law essay questions (instead of 12); one MPT; and 40 short answer questions testing Texas Procedure and Evidence Exam. The components are weighted as follows: MBE — 50%, MPT — 10%, Texas Essay 30%, and Texas P&E 10%. Contrast this content breakdown to the October online exam: MBE (100 questions instead of 200) (40%), MPT (10%), Texas Essay Exam (12 questions) (40%), and Texas P&E (10%).

144. Reed, *supra* note 142.

145. See Stephanie Francis Ward, *Test-takers express safety concerns, fears from in-person bar exam—including lack of masks, unclean bathrooms*, ABA J. (Aug. 10, 2020, 8:57 AM), <https://www.abajournal.com/web/article/one-in-person-bar-exam-had-applicant-with-covid-19-another-ignored-safety-measures-say-test-takers>.

146. WASH. SUP. CT. ORD. GRANTING DIPLOMA PRIVILEGE AND TEMPORARILY MODIFYING ADMISSION AND PRACTICE RULES (2020).

147. *Id.*

Washington diploma privilege was extended equally to first-time and repeat exam takers.<sup>148</sup> The fact that two of the state's three law schools are in Seattle, a city that was fully disrupted, and partially occupied, by social unrest and protests against police brutality, may have also influenced the court's decision.<sup>149</sup> Not only were locales for bar study limited due to the pandemic, applicants in or near Seattle's Central District and Capitol Hill (where Seattle University School of Law is located and many of its students and alumni reside) lived and studied within earshot of the Capitol Hill Autonomous Zone.<sup>150</sup> With the vocal support of the deans of all three in-state law schools, and the convergence of social unrest and pandemic conditions, Washington temporarily lowered its cut score, and gave applicants the option for diploma privilege, an online exam, or an in-person exam taken in either July or September.<sup>151</sup> The in-person exam option would benefit any applicant who desired to obtain a portable UBE score.

Borrowing from aspects of the orders in Washington and Utah, Oregon also extended its diploma privilege to both in-state and out-of-state bar takers, and offered applicants the option to sit for an in-person exam.<sup>152</sup> The Supreme Court of Oregon entered an order that granted the option of: (1) diploma privilege to all 2020 graduates of Oregon law schools; (2) diploma privilege to all 2020 graduates of ABA-approved out of state law schools with a first time bar passage rate of 86% or above; (3) an October online examination provided by the NCBE; or (4) an in-person exam in September for any law graduate who either did not qualify for diploma privilege or desired to take the in-person exam to earn a portable UBE score.<sup>153</sup> Oregon also temporarily lowered its UBE cut score, one of the highest in the country, from 274 to 266 for 2020 bar applicants.<sup>154</sup> The moves toward

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148. *Id.*

149. See David Gutman, Evan Bush & Mike Carter, *After two months of protests, Seattle activists say work not done*, SEATTLE TIMES (Aug. 2, 2020, 6:00 AM), <https://www.seattletimes.com/seattle-news/politics/after-two-months-of-protests-seattle-activists-say-work-not-done/> (“The mass protests against police brutality and for racial equity that have dominated Seattle and the nation for the past two months are like few others in American history.”).

150. Seattle Times staff, *Seattle-area protests: Live updates on Monday, June 15*, SEATTLE TIMES (June 15, 2020, 6:49 AM), <https://www.seattletimes.com/seattle-news/seattle-area-protests-live-updates-on-monday-june-15/> (“[P]rotestors have claimed a few blocks of the streets nearby, calling it the Capitol Hill Autonomous Zone.”).

151. Letter from Debra L. Stephens to Rajeep Majumdar, Terra Nevitt & Jean McElroy (May 13, 2020) (on file with Washington State Bar Association).

152. OR. SUP. CT. ORD. APPROVING 2020 ATTORNEY ADMISSIONS PROCESS (2020).

153. *Id.*

154. *Id.*

diploma privilege in the Pacific Northwest states were giant steps away from published predictions that neither Oregon nor Washington, two states that for years had allowed diploma privilege for law graduates, would likely ever consider diploma privilege again.<sup>155</sup> Although adopted as an emergency response to crisis, one can only wonder whether any of these alternatives has potential for future or even long-term application.

### III. ALTERNATIVE MEASURES OF PROFESSIONAL COMPETENCE

The pandemic challenged states to be malleable with their regulatory function. Alternative measures of assessing competency, such as those described by the Collaboratory, were available to provide courts with precisely the pivot room needed in a time of crisis when administration of a traditional bar exam was not feasible or not advisable.<sup>156</sup> Defenders of the bar exam feared that extending diploma privilege or other non-exam options to the class of 2020 was a ploy to eliminate the bar exam altogether.<sup>157</sup>

The heightened sensitivities of those who sought to maintain the existing system of competency by exam seemed to have created blind spots to the pandemic-induced need for emergency measures and the limited and temporary timeframe for the same. None of the suggested alternatives excluded the requirement that candidates pass the Multistate Professional Responsibility Exam (“MPRE”) and meet the character and fitness requirements imposed by the state.<sup>158</sup> Any state law component that accompanies the uniform exam could also be an add-on requirement with the licensure alternatives. Maintaining the character and fitness, professional ethics, and state law competency requirements of the traditional licensure process should have made the

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155. See W. CLINTON STERLING, WASHINGTON’S DIPLOMA PRIVILEGE 7 (2009) (claiming that it is unlikely that the diploma privilege rule in Washington will be resurrected.); see also OR. STATE BAR ADMISSIONS TASK FORCE, FINAL REPORT 4 (2008) (“[T]he majority concluded that the diploma privilege would amount to a delegation of the gatekeeper function to the law schools that is not desirable.”).

156. See generally Claudia Angelos, Sara Berman, Mary Lu Bilek, Carol Chomsky, Andrea A. Curcio, Marsha Griggs, Joan W. Howarth, Eileen Kaufman, Deborah Jones Merritt, Patricia E. Salkin & Judith Wegner, *Diploma Privilege and the Constitution*, 73 S.M.U. L. REV. F. 168 (2020) (discussing the diploma privilege alternative path to licensure).

157. BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020 4 (Nat’l Conf. of Bar Exam’rs ed. 2020).

158. *Multistate Professional Responsibility Examination*, Nat’l Conf. of Bar Exam’rs, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/M5M8-PR7G>] [hereinafter *Multistate Professional Responsibility Examination*].

proposed temporary alternatives more palatable under the threat of COVID-19. Instead, the influence of COVID-19 has polarized the bar exam conversation to: bar exam or not. With ardent reasoning for either extreme, a multitude of middle ground alternatives seems to have been overlooked. I discuss the benefits and limitations of emergency diploma privilege and other options below.

#### A. Emergency Diploma Privilege

Of the available options, an emergency diploma privilege has been the most heavily debated. Under a pure diploma privilege, graduation from an ABA-accredited law school would be “sufficient evidence of competence to practice law, with no [added] requirement that the graduate take a bar examination.”<sup>159</sup> Identified by the moniker “diploma privilege,” in its truest form it describes a system of diploma sufficiency. Diploma sufficiency is not a new concept. Within the last 100 years, thirty-three U.S. jurisdictions used what I term diploma sufficiency for the admission of new attorneys into the practice of law.<sup>160</sup> Today, only two states routinely allow admission by diploma privilege: New Hampshire and Wisconsin.<sup>161</sup> In New Hampshire, exercise of diploma privilege is limited to New Hampshire law school graduates who complete an optional honors program.<sup>162</sup> Only Wisconsin allows all students who graduate from one of its two law schools to earn a law license without taking a bar exam.<sup>163</sup> The NCBE — headquartered in Madison, Wisconsin — has been led for the last 26 years by graduates of a Wisconsin law school who were admitted by diploma privilege.<sup>164</sup> Current NCBE president Judith Gundersen

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159. Angelos et al., *supra* note 156, at 170.

160. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 646 (2000).

161. Valerie Strauss, *Why this pandemic is a good time to stop forcing prospective lawyers to take bar exams*, WASH. POST (July 13, 2020, 1:45 PM), <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/>.

162. N.H. SUP. CT. R. 42 (XII) (The Daniel Webster Scholars program is a two-year course of study that requires students to demonstrate competency in communication, negotiation, organization, and work management. By supreme court rule, graduates of the Daniel Webster Scholar Honors Program who seek admission within one year of program completion are eligible for admission to the New Hampshire bar without further examination.); *see also NH Bar Admissions, General Information*, N.H. JUD. BRANCH, <https://www.courts.state.nh.us/nhbar/> (last visited Oct. 17, 2020).

163. WIS. SUP. CT. R. 40.03.

164. *The National Conference of Bar Examiners Names Judith A. Gundersen as President and CEO*, NAT'L CONF. OF BAR EXAM'RS (Aug. 28, 2017), <http://www.ncbex.org/news/judith-gundersen-ncbe-president-ceo/>.

publicly shared her journey from law school, to legal practice as a state prosecutor, then to a role in developing the bar exam that is used in most states today.<sup>165</sup> A journey that did not include a state bar exam.<sup>166</sup> Despite the inescapable irony that the head bar examiner never took a bar exam, Gundersen's distinguished career further supports the notion that a quality legal education can be sufficient to develop the minimal competence for the practice of law.

The diploma sufficiency programs in New Hampshire and Wisconsin have been in place for many years and require strict curricular alignments.<sup>167</sup> As such, they were not realistically deployable with the immediacy that pandemic conditions dictated. The class of 2020 sought an *emergency* diploma privilege that could not, under the circumstances, impose the restrictions and curricular requirements of the already established diploma sufficiency programs. For example, bar candidates in Illinois and Pennsylvania petitioned the state supreme courts for temporary diploma privilege that would admit current applicants from any ABA-approved law school, within and outside the state, including repeat takers and LLM program graduates.<sup>168</sup> The appeal of diploma privilege to applicants faced with the threat of a deadly virus and canceled, postponed, and repeatedly rescheduled exams made sense.

The fears and resistance behind diploma privilege were also somewhat understandable. Bar examiners and many members of the practicing bar feared that diploma privilege would admit candidates that a bar exam would keep out.<sup>169</sup> In the case of repeat takers, petitioners were seeking to have admitted to practice candidates who, by previous examination, have shown themselves not competent to deliver legal advice to the public.<sup>170</sup> Additionally, the courts and state examiners would have no basis to assess the degree or educational

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165. Karen Sloan, 'I Understand the Anxiety and the Anger,' Says Top Bar Exam Official, LAW.COM (Aug. 13, 2020), <https://www.law.com/2020/08/13/i-understand-the-anxiety-and-the-anger-says-top-bar-exam-official/?sreturn=20200911145904>.

166. *Id.*

167. See Moran, *supra* note 160, at 648 (“[T]he Wisconsin diploma privilege took a stricter turn with the adoption of the thirty-credit rule and its companion the sixty-credit rule.”); see also N.H. JUD. BRANCH, *supra* note 162 (discussing the requirements for the Webster Scholars program).

168. In re: Diploma Privilege for 2020 Ill. Bar Applicants at 3–6, Petition for Emergency Supreme Court Rule Amendment or Waiver, (2020) (M.R. 030451).

169. Josh Blackman, *The Elephant in the Room for the Diploma Privilege Debate*, REASON: VOLOKH CONSPIRACY (July 23, 2020, 6:33 PM), <https://reason.com/2020/07/23/the-elephant-in-the-room-for-the-diploma-privilege-debate/>.

170. In re: Diploma Privilege for 2020 Ill. Bar Applicants, *supra* note 168, at 4.

sufficiency of LLM degree graduates who are foreign trained attorneys and whose coursework in U.S. law and procedure does not parallel the requirements for the juris doctor degree.

When asked to consider diploma privilege, Mark Gifford, Wyoming State Bar Counsel opined, “[l]aw school diplomas represent an educational assessment, rather than a measurement intended for public protection. The former is a necessary, but not sufficient, condition of the latter.”<sup>171</sup> Pointing to the inherent or perceived conflict of interest in allowing legal educators to also play the role of assessing the practice readiness of their graduates, Mr. Gifford encouraged states to resist diploma privilege, even on a temporary basis.<sup>172</sup> Following Gifford’s argument, replacing the bar exam with a “mere” diploma requirement in states with less than a consistently high or perfect bar passage rate “would abdicate the duty of courts and bar admissions officials to ensure that the public is adequately protected.”<sup>173</sup>

There is no escaping the fact of this fear that lawyers, judges, and certainly bar examiners have of unleashing unvetted attorneys into the public. Taken to extremes, however, this fear is protectionist at best, and obstructionist at worst. Consider Montana, a state that offered diploma privilege until 1983.<sup>174</sup> Montana has one law school. In 2019, the state’s overall bar pass rate was 83.94%.<sup>175</sup> In an order rejecting diploma privilege, the Montana Supreme Court averred:

[I]n 2019, the weighted average pass rate for first-time examinees was 81.43% for University of Montana law school graduates and 83.94% for examinees as a whole. Assuming a generous 85% pass rate, this would mean that if this Court granted diploma privilege in response to this Petition, *14 or 15 individuals would be admitted to the practice of law* in this State who would otherwise not be admitted. This is the harm this Court sought to avoid when it eliminated diploma privilege some 30 years ago. [Emphasis added.]<sup>176</sup>

The text of the court order leaves no room for misinterpretation. The state’s bar and board of bar examiners, backed by their supreme court, would rather expose the presumptive 100 candidates to the risk

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171. Mark W. Gifford, *Why Diploma Privilege for Law School Graduates is a Bad Idea: A Regulator’s Perspective*, WYO. ST. BAR (Apr. 17, 2020), <https://www.wyomingbar.org/diploma-privilege-law-school-graduates-bad-idea-regulators-perspective/>.

172. *Id.*

173. *Id.*

174. ORD. OF SUP. CT. OF MONT. IN RE RULES FOR ADMISSION TO THE BAR OF MONT. (2020).

175. *Id.*

176. *Id.*

of viral infection to keep out an unascertainable 14 or 15 from the practice of law.<sup>177</sup> In its order, the court also cited its concern to keep the role of setting the criteria for attorney admissions within the control of the state.<sup>178</sup> According to the court, a diploma privilege extended to graduates of ABA-approved law schools, diverts that control to the ABA.<sup>179</sup> This desire to maintain judicial control of bar admission is understandable and important. However, it also brings into question exactly who is protected by resisting a temporary and limited diploma privilege — the courts or the public?

To balance the protections necessary for both the public and our power structures, there are restrictive qualifiers that can be imposed on diploma privilege that will allow states to maintain their ability to set admission criteria. For one example, a state could limit diploma privilege to graduates of an ABA-approved law school with a first-time bar pass rate within a set threshold (*i.e.* the Utah model). As another example, a state could extend diploma privilege only to students who graduated in the top half, or top two-thirds of the law school class. This model should be attractive to the courts because empirical studies have shown that law students in the first, second, and third quartiles of their graduating cohorts are statistically most likely to pass a bar exam than those graduating in the bottom quartile.<sup>180</sup> Noting however, that adopting a GPA or rank-based model will draw the ire of students in the excluded section of the class. Also, such a measure could admit to practice a portion, albeit small, of graduates who would have failed a bar exam. Some students who are ranked in the first and second quartiles fail the bar. As mentioned in Part II, states can also require some term of supervised practice, or completion of some form of state law testing.<sup>181</sup>

There are compelling arguments for and against the grant of diploma privilege, with a strong home court advantage going to status

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177. *Id.*

178. *Id.*

179. *Id.*

180. Douglas K. Rush, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 1, 8 (2007).

181. *See e.g.* District of Columbia Court of Appeals Order NO. M269-20 (Sept. 24, 2020), [https://www.dccourts.gov/sites/default/files/2020-09/ORD\\_269-20.pdf](https://www.dccourts.gov/sites/default/files/2020-09/ORD_269-20.pdf) (The District of Columbia entered an order granting a limited diploma privilege to 2020 bar applicants that imposed a three-year period of supervised practice as a precondition to licensure. The limited diploma privilege extends only to first time applicants who have previously taken a bar exam or been admitted to practice in another jurisdiction.).

quo. Possibly one promising development to come out of the pandemic will be an opportunity to collect performance and discipline data on lawyers who were admitted by diploma privilege in 2020 and compare it to data on peers admitted by exam in previous periods. States that offer both an in-person exam and a diploma privilege option for first-time applicants could do a comparative study of the results modeled after the Institute for the Advancement of the American Legal System (“IAALS”) study of the New Hampshire Daniel Webster program admittees.<sup>182</sup> Such data could tip the scales one way or another in this contentious battlefield.

#### B. Limited Licensure

Limited licensure as a temporary measure to allow new law graduates to work in the practice of law until such time as they have an opportunity to sit for a bar exam was an early popular emergency alternative. In April 2020, the ABA Board of Governors issued a policy resolution that urged state bar licensing authorities to adopt emergency rules that would authorize 2019 and 2020 law graduates who could not take a bar exam because of the pandemic to engage in the limited practice of law under certain circumstances.<sup>183</sup> Many states expanded or relied upon existing temporary practice rules that permit law students to practice under a narrow set of guidelines to allow them to represent clients as part of an externship or clinical program. On its face, the limited licensure option seems to address the concern that new law graduates, in times of a pandemic health crisis, might have to wait for a year or more after graduation to become licensed and could not practice law in the interim.

Recognizing that the inability to take a bar exam could translate into an inability to earn an income, a temporary opportunity to practice law, in theory, would allow attorneys who had not yet taken a bar exam to provide legal services to the public within set limitations. But in reality, the notion of limited licensure sounds far better on paper than it actually is. Anecdotally, it is conceivable (and predictable) that legal employers would be hesitant to hire or trust an attorney

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182. See Lloyd Bond & William M. Sullivan, *Ahead of the Curve: Turning Law Students into Lawyers – A Study of the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law* (Inst. for the Advancement of the Am. Legal Sys. Ed., 2015).

183. ABA STANDING COMMITTEE ON BAR ACTIVITIES AND SERVICES LAW STUDENT DIVISION, REPORT TO THE BOARD OF GOVERNORS [sic] 1 (2020) [hereinafter ABA STANDING COMM.].

whose ability to practice is constrained, with no guarantee that the attorney will pass a bar exam at the next available administration. The desire to avoid this very type of hiring risk is the reason that so many legal employers make offers after bar results are published.<sup>184</sup> A limited license may allow those who secured employment before graduation a chance to begin or continue work, but for the number of students who exit law school without a job offer and whose prospects for gainful employment expand with a law license in hand, the temporary practice option will be of little help.

For these law graduates, engagement in the practice of law could actually impede their opportunity to pass the bar, both because of the increased distance between law school and bar study, and the fact that the uniform exam does not test state codified or procedural rules.<sup>185</sup> To attorneys who took a bar examination in an era that predates the UBE, a period of clinical or supervised practice would most certainly be an asset in bar preparation. A bar candidate who had the benefit of experience with court procedural rules and exposure to tested areas of practice like family law, landlord-tenant disputes, or estate planning and administration could use that knowledge on the state bar exam.<sup>186</sup> But today's multistate exam content much more closely resembles law-school-style exams than the bar exams of days past, which adds more questions about the relevance of the uniform exam for law practice today.<sup>187</sup>

Even for those applicants who have jobs and are able to practice on a limited basis, working and then stopping to engage in bar study may not be a financial reality. There is likely an “icing” effect for bar takers.<sup>188</sup> The more removed an applicant is from law school, the more difficult the recall. Some applicants, with intensive study, will be able to refresh themselves and successfully complete the bar exam — even as far out as 18 months after graduation. But graduates who were not top-performing students and/or who have the financial disad-

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184. See EMPLOYMENT OUTCOMES AS OF APRIL 2020 (ABA Section of Legal Education and Admissions to the Bar eds., 2020) (compiled data showing that 73.7% of total 2019 law school graduates' employment was contingent on passing the bar).

185. Readfearn, *supra* note 32.

186. Marsha Griggs, *Sorry, Not Sorry: Temporary Practice in a Pandemic*, NULR OF NOTE (May 11, 2020), <https://blog.northwesternlaw.review/?p=1399>.

187. Jeff John Roberts, *It's not easy being an aspiring lawyer taking the bar exams during a pandemic*, FORTUNE (July 12, 2020, 8:30 PM), <https://fortune.com/2020/07/12/taking-the-bar-exams-during-covid-lawyers-law-students-us-coronavirus-pandemic/> (“The bar exam has outlived its credibility and its usefulness.”).

188. ST. BAR OF CAL., *supra* note 77.

vantage of not being able to study full-time will be at even greater risk of failing the bar. The Los Angeles Times Editorial Board referred to limited licensure as “the best of the bad options.”<sup>189</sup>

A closer look at the ABA Resolution reveals that limited licensure provisions were not solutions to the unique predicament of the class of 2020. In fact, they were, at best, stop gap measures or placeholders not intended to disrupt the status quo. The ABA clarified that its resolution should not be “construed to amend, limit, or call into question, the historic and longstanding policy of the American Bar Association supporting the use of a bar examination as an important criterion for admission to the bar.”<sup>190</sup> But we should and must call into question that historic and longstanding policy, and by failing to do so we show more allegiance to a closed-book, two-day exam anchored by 200 multiple-choice questions than to the human beings who are the immediate future of the legal profession.<sup>191</sup> The class of 2020 bar takers deserved no less than a creative and workable response to an emergency situation that would neither destroy nor impede their professional futures.

### C. Remote Examination

By late-July 2020, 17 jurisdictions had announced plans to offer remote bar exams.<sup>192</sup> Non-UBE states like Florida, Indiana, Michigan, and Nevada could control the content and timing of their online exams. The remaining states opted to use an online exam provided by the NCBE.<sup>193</sup> After months of prodding, the NCBE announced that it would provide an online exam for states who wish to administer their bar exams remotely.<sup>194</sup> For states that were unprepared to sup-

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189. The Times Editorial Board, *Coronavirus has made it unsafe to take the California bar. So put new lawyers to work without it*, L.A. TIMES (July 14, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-07-14/law-student-diploma-privilege> (“The best of the bad options is to grant provisional licensed to members of the class of 2020 right away, without tests, and allow them to practice their new profession and earn their living under the supervision of lawyers who were licensed in the old-fashioned way.”).

190. ABA STANDING COMM. *supra* note 183.

191. Angelos et al., *supra* note 156, at 169.

192. *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA (Sept. 2020), <https://www.justia.com/covid-19/50-state-covid-19-resources/bar-exam-modifications-during-covid-19-50-state-resources/#louisiana> (Arizona, California, District of Columbia, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Pennsylvania, Rhode Island, Tennessee, Texas, U.S. Virgin Islands, and Vermont.).

193. *NCBE COVID-19 UPDATES*, NAT’L CONF. OF BAR EXAM’RS (June 1, 2020, 4:00 PM), <https://www.ncbex.org/ncbe-covid-19-updates/>.

194. *Id.*

ply their own test questions, the NCBE online option was a saving grace. To some degree, this option satisfied the fixation with admission by exam and spared bar takers of the need to risk their health and safety. But the NCBE online exam may have caused more new ails than it cured.

The timing of the NCBE online exam was a significant drawback. The NCBE was admittedly late to the game of online exams. As late as May 2020, the NCBE, by its own claim, had not developed an online exam.<sup>195</sup> Many states belatedly announced the switch from an in-person exam to the online exam that could only be offered in October.<sup>196</sup> In some cases, the announcement came only 18 days before the originally scheduled exam date.<sup>197</sup> Understandably, students who had progressed substantially in bar study were angered and frustrated by the eleventh-hour decision. The later exam date would also delay entry into the practice of law. The class of 2020 bar applicants would be taking the online bar exam in October, the month when a majority of states would normally release summer bar exam results.<sup>198</sup>

The late move to an online exam also impacted the finances, living arrangements, employment prospects, and emotional wellbeing of bar takers. Another drawback to this option is the disparate impact it would have on bar candidates with unreliable internet access, and those without quiet, secure locations to take the exam.<sup>199</sup> As one Texas law school dean said, an online exam offered months after the scheduled July exam date “will not test who has competence, it will test who has the resources to forego employment and maintain childcare for an additional nine weeks.”<sup>200</sup>

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195. See generally NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/ncbe-covid-19-updates> (last visited Sept. 20, 2020).

196. Sam Skolnik, *More States Move Upcoming Bar Exams Online in Response to Virus*, BLOOMBERG L. (May 18, 2020, 5:32 PM), <https://news.bloomberglaw.com/us-law-week/more-states-move-upcoming-bar-exams-online-in-response-to-virus>.

197. Amended Order In Re: Administration of 2020 Bar Examinations, KY. CT. OF JUST. [https://kycourts.gov/courts/supreme/Rules\\_Procedures/202050.pdf](https://kycourts.gov/courts/supreme/Rules_Procedures/202050.pdf).

198. Adaptibar Team, *When Are July Bar Exam Results Released*, ADAPTIBAR (Sept. 3, 2019), <https://blog.adaptibar.com/july-bar-exam-results/>.

199. Siri Chilukuri, *Illinois Bar Exam Being Held Online – But That Could Disadvantage Some Would-Be Lawyers Graduates Say*, BLOCK CLUB CHI. (July 23, 2020, 9:00 AM), <https://blockclubchicago.org/2020/07/23/with-the-bar-exam-coming-up-law-school-grads-worry-about-safety-of-in-person-test-during-pandemic/>.

200. Texas Courts, *Texas Board Law Examiners*, YOUTUBE (July 2, 2020), <https://www.youtube.com/watch?v=RZUAM6Ht91M&feature=youtu.be&t=11733> (Mike Barry, President and Dean, South Texas College of Law-Houston in a statement made during a public meeting of the Texas Board of Law Examiners).

The timing and test modality, however, were not the only major changes. The NCBE explained that it would not provide the scoring or scaling for its online exam that it typically provides for its other multistate exams.<sup>201</sup> Although the online edition of the exam utilized all the components of the UBE in reduced quantity, the exam will not qualify those who take it for the portable score that is the primary appeal of the UBE.<sup>202</sup> Each jurisdiction is responsible for scoring, scaling, and setting its own proficiency standards and cut score.<sup>203</sup> So, every gain in candidate safety was offset by the lack of score validity.

The NCBE implicitly acknowledged the lack of score validity by refusing to scale its own online exam.<sup>204</sup> Because cut scores are based on the scaled scores that the NCBE traditionally reports, not on raw scores that will be reported in 2020, Professor Deborah Jones Merritt admonished states against trying to apply their standard UBE cut scores to the online NCBE exam.<sup>205</sup> Without access to the NCBE's historical databases and scaling algorithms, Merritt asserted, "there is no psychometrically defensible way for [a state] to convert its raw scores to the scaled scores that the current cut score demands."<sup>206</sup>

Also unanswered are many questions about the security and functionality of an online exam and the details of remote administration.<sup>207</sup> The scope of this Article is constrained to the need for emergency short-term licensure alternatives. While I do not address the viability of long-term online testing, scholars are already divided

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201. NCBE COVID-19 UPDATES, NAT'L CONF. OF BAR EXAM'RS (June 1, 2020 4:00 PM) <http://www.ncbex.org/ncbe-covid-19-updates/>.

202. Suzanne Darrow-Kleinhaus, *Portability of the UBE: Where Is It When You Need It?* (July 15, 2020) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3652614](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3652614)).

203. *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. OF BAR EXAM'RS, <https://www.ncbex.org/exams/ube/>.

204. NAT'L CONF. OF BAR EXAM'RS, *supra* note 41.

205. Letter from Deborah Jones Merritt to Maryland State Board of Bar Examiners (Aug. 24, 2020), <https://mdcourts.gov/sites/default/files/import/coappeals/pdfs/publiccomment-sonemergencydiploma.pdf> (The letter appears on pages 236–240 in a 500-page PDF of all the other public comments on the topic).

206. *Id.*

207. Sam Skolnik, *October Online Bar Exams Spark Technology, Privacy Concerns*, BLOOMBERG L. (Aug. 18, 2020), <https://news.bloomberglaw.com/us-law-week/october-online-bar-exams-spark-technology-privacy-concerns>; Melanie Blair, *Remote Exam Failures* (Aug. 19, 2020, 12:40 PM), <https://docs.google.com/document/d/10snZPtFdCzUld-tzKAm14PQ7CvpaMA9k0H-CYVjr9as/edit> (quoting software provider Exterity: "[R]emote proctoring was not envisioned for use on large-scale, simultaneous-start 'event' exams. With four synchronized starts, thousands of examinees, and very-high stakes, we believe remote proctoring carries undue risk for the October exam."); *see also* @Melanie\_K\_Blair, TWITTER (Aug. 19, 2020, 12:40 PM), [https://twitter.com/Melanie\\_K\\_Blair/status/1296124992434905096](https://twitter.com/Melanie_K_Blair/status/1296124992434905096).

on the issue of secure administration of an online bar exam.<sup>208</sup> Online administration is but one of several mechanisms available to states to measure or establish competency of new attorneys. Just as there was no full agreement about the bar exam as a measure of competence, there will certainly be continued debate about the best way to assess a new lawyer's readiness to enter practice. Whatever fate befalls the licensure process, state courts and their appointed boards will most assuredly remain in control of all pathways leading to practice. For that reason, it is crucial to explore the institutional motivation and decision-making processes of the courts and bar examiners.

#### IV. ASKING THE HARD QUESTIONS: WHY, AND WHAT NEXT?

The recent crises have brought into question both the actions and inactions of the bar examiners, and the bar exam itself. How is it that bar examiners were so technologically behind other standardized test makers that they could not readily pivot to a secure online delivery without unreasonable delay? What, if anything, can account for the seemingly tone deaf and dismissive stances that state and national bar examiners took in response to the mobilized pleas of bar applicants, law schools, legislators,<sup>209</sup> and state bar associations?<sup>210</sup> Will public trust in bar examiners and/or the bar exam be lost? Perhaps the most pressing question to arise from the converging crises of 2020 is: why? Why does the legal profession continue to rely so heavily on bar examination in the face of such longstanding criticism? Why were examiners willing to expose applicants to the risk of death rather than make any modification to the method or modality of bar examination?

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208. See e.g., Derek T. Mueller, *Blockchain and the Bar Exam*, EXCESS OF DEMOCRACY (Apr. 28, 2020), <https://excessofdemocracy.com/blog/2020/4/blockchain-and-the-bar-exam>; Josh Blackman, *A Word of Caution Before Offering the Bar Exam Online*, REASON: VOLOKH CONSPIRACY (Apr. 28, 2020), <https://reason.com/2020/04/28/a-word-of-caution-before-offering-the-bar-exam-online/>; but see Sara Berman, Gregory Brandes, Megan M. Carpenter & Andrew L. Strauss, *Secure Online High Stakes Testing: A Serious Alternative as Legal Education Moves Online*, SSRN (Apr. 7, 2020) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3567894](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567894).

209. Senator Brad Hoylman (New York) introduced Senate Bill S8827A that would temporarily admit certain attorneys graduating from law school or taking the bar exam during the COVID-19 state disaster emergency. S.B. 8827A, 2020 Leg., 2019-2020 Legis. Sess. (N.Y. 2020).

210. See e.g., Michael Jones & Jonathan D. Koltash, *COVID-19 Task Force Recommendation*, PA. BAR ASS'N (2020), <https://www.pabar.org/pdf/2020/covid-19-tf-recom-diploma-privilege-final.pdf> (The Pennsylvania Bar Association requested that the Pennsylvania Supreme Court and Pennsylvania Board of Law Examiners offer a diploma privilege to applicants who graduated from law school between April 1, 2020 and June 30, 2020.).

What is it about the bar exam and those who champion it, that not even a deadly global contagion would deter its administration?

We must probe for answers to these questions to understand what went wrong in the spring, summer, and fall of 2020. It is essential that we first acknowledge the objective failures of licensing authorities during this period. We cannot give “an A for effort” to the select bar examiners who canceled and changed exams without sufficient notice, evidence of planning, or feasibility piloting.<sup>211</sup> Neither should we give a pass to states that contributed to the unreasonable delay and uncertainty of the 2020 bar exams. Only through critical analysis of systemic failings can we improve our institutional structures. We need to understand what went wrong to make our system of licensure more resilient, and to explore whether that system (even in stable times) has become fossilized. We must determine to what extent the states’ poor responses are attributable to institutional structure; and to what extent the poor responses are attributable to blind insistence on status quo. To make these determinations, we must look at the institutional legacy of the bar exam and the organizational motives of those at its helm.

#### A. Institutional Legitimacy

The bar examination has become the constant in the legal profession. All other norms in our profession are subject to influential change. As new judicial opinions are rendered, the weight and relevance of case precedent changes. Legislative updates occur with each session of Congress, so our body of codified law is constantly subject to addition, amendment, or clarification. The bar exam, as a rite of passage into the practice of law, represents a universally understood status quo that is not subject to change on the basis of election or appointment. Although the content and format of the bar examination has evolved since its inception in 1855,<sup>212</sup> the licensing examination is a sacred cow in the legal profession and most lawyers have an existential connection to its sanctity. That connection translates to our cognition and self-image. We have been professionally conditioned to

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211. Interview by Karen Sloan with Judith Gunderson, ‘*I Understand the Anxiety and the Anger*’ Says Top Bar Exam Official, LAW.COM (Aug. 13, 2020, 3:14 PM), <https://www.law.com/2020/08/13/i-understand-the-anxiety-and-the-anger-says-top-bar-exam-official/> (quoting NCBE President Judith Gunderson, “I would give jurisdictions an A for effort in their handling of the July 2020 bar exam.”).

212. Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 374 (1996).

accept that taking and passing a bar exam is “just what you do” to become a lawyer.

When confronted with pathways into the profession that do not involve a bar exam, cognitive dissonance ensues. The internal (and often external) monologue of a traditionally licensed attorney tends to read like this:

*The bar exam was horrible. It was the hardest test I have ever taken, but somehow I passed. I would never want to do that again, but there is no way that I will welcome you into my profession and call you a colleague if you don't undergo that same painful ritual.*

The attachment that lawyers have to the bar exam is not because they think it measures competence. In fact, most do not have any particular affinity to the exam itself. But because the concept of licensure by examination is an indelible construct in the mentality of legal professionals, we cannot readily envision a path to practice without it. For lawyers, the bar exam is an institutional norm that they have internalized. Our behavior and sense of belonging is based on that norm.<sup>213</sup>

The professional attachment to the bar exam is a function of deep-rooted institutional legitimacy. Legitimacy is the generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially-constructed system of norms, values, beliefs, and definitions.<sup>214</sup> The bar exam has a moral legitimacy that justifies its right to exist based on normative approval and acceptance.<sup>215</sup> In theory, the basis for the perceived legitimacy of the bar exam is not tied to the exam itself, but to the institutionalization of what bar examination represents: worthiness to practice law.<sup>216</sup> On the basis of that widely accepted legitimacy, the bar exam is an institution all to itself.<sup>217</sup>

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213. Denise Lach, Helen Ingram & Steve Rayner, *Maintaining the Status Quo: How Institutional Norms and Practices Create Conservative Water Organizations*, 83 TEX. L. REV. 2027, 2029 (2005) (explaining “[t]o become effective lawyers, academics, teachers, or members of any social group, we need to internalize and act on the norms governing the behaviors of the group or face the often negative consequences.”).

214. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995).

215. See e.g., John Dowling & Jeffrey Pfeffer, *Organizational Legitimacy: Social Values and Organizational Behavior*, 18 PAC. SOCIO. REV. 122 (1975).

216. See Mark W. Gifford, *Why Diploma Privilege For Law School Graduates Is A Bad Idea: A Regulator's Perspective*, WYO. ST. BAR (April 17, 2020), <https://www.wyomingbar.org/diploma-privilege-law-school-graduates-bad-idea-regulators-perspective/>.

217. Raimund Hasse & Georg Krücken, *Systems Theory, Societal Contexts, and Organizational Heterogeneity*, THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 541 (2008)

While this Article takes no position on the validity or utility of the bar exam, discussion of the functional legitimacy of the exam is vital to the understanding of the decision processes surrounding the iterations of the July 2020 bar exam. Because of the moral or normative legitimacy of the bar exam, its guardians (the bar examiners) enjoy an institutional legitimacy that affords great deference to their opinions and actions. Even if the examiners are rightly subject to exhaustive critique for their handling of the July 2020 bar exam, this failure may not have long-term effects. Once an institution establishes legitimacy, it becomes resilient to criticism for negative events or outcomes.<sup>218</sup> Stakeholders may be outraged at the missteps and insensitivity of the states that were dismissive of the health and integrity concerns of applicants. The callousness and corporate self-interest goes against societal norms. However, those same stakeholders, who are critical of the examiners' failings, will acquiesce to the will and determination of the examiners because of their preconditioned and shared belief in the necessity of the bar exam.<sup>219</sup>

Institutional legitimacy can be an agent to drive change, or a barrier to prevent it. The institutional response to the crises surrounding the July 2020 bar exam could provide significant signaling about the future of the bar exam.<sup>220</sup> The fact that the majority of examiners were unwilling to budge even slightly, and that others would allow the exam to be canceled outright rather than consider exam alternatives, reveals more than just inflexibility and ill-preparedness. It also signals a perilous vulnerability to change. Perhaps examiners feared that successful implementation of any one of the available alternatives, even on a one-time basis, would demonstrate that we do not need the bar exam as the sole arbiter of minimum competence to practice the law. That possibility cannot be discounted as we consider the institutional motivations and the collective influence of the many entities with stakes in the bar exam.

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(Defining institution as repetitive social behavior that is underpinned by normative systems and cognitive understandings that give meaning to social exchange and thus enable self-reproducing social order).

218. Suchman, *supra* note 214, at 574.

219. *Id.*

220. See Erwin Chemerinsky, *INSIGHT: Pandemic Provides Opportunity to Rethink the Bar Exam*, BLOOMBERG L. (Aug. 25, 2020, 4:01 AM) <https://news.bloomberglaw.com/us-law-week/insight-pandemic-provides-opportunity-to-rethink-the-bar-exam> (“The crisis also should provide a basis for thinking about how the bar exam is administered and structured.”).

## B. Stakeholders and Influence

The stark degree to which the responses of bar authorities contrasted with other segments of the legal profession is surprising, if not alarming. Given the similar institutional characteristics of the state courts (that oversee the bar authorities) and law schools,<sup>221</sup> one would have plausibly expected states to respond to pandemic-imposed limitations in ways comparable to law schools. But recent history proved that not to be the case. The disparate reactions to the need for emergency measures are more likely attributable to the systemic dissimilarities than the institutional similarities. That courts do not have the same accountability as law schools could explain the different and dawdled responses from the majority of states.

Both law schools and courts have multiple stakeholders and constrained budgets. Law schools, typically, are heavily dependent on a main university or parent organization and their alumni for budget allocations and fundraising. As such, those stakeholders will have direct influence in law school decision making processes. Most notably, law schools are answerable to regulators at the state, regional, and national levels. While law schools are answerable to multiple stakeholders, courts, in contrast, answer for, not to, their stakeholders.

Courts are self-governing and are not subject to annual review or the strict accreditation standards of law schools. Courts have as their constituents the most vulnerable members of society, including those who have paid for a legal education but cannot yet use it. In matters of law and equity, courts are bound by hierarchical precedent. In matters of administration and regulations, courts tend to be persuaded by the nudging of associations and the platforms they support.

Associations like the ABA, the NCBE, and the Conference of Chief Justices (“CCJ”) have exerted great influence on state courts in the realm of bar licensure. The CCJ is a voluntary organization of state chief justices that is largely unknown to the practicing bar and legal educators.<sup>222</sup> It makes sense that a judicial institution bound by precedent would rather adopt and be guided by the established resolutions of entities like the CCJ. The CCJ played a significant behind-the-scenes role in states’ mass adoption of the UBE.<sup>223</sup> A CCJ resolution encouraged the bar associations in each state to establish emer-

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221. Griggs, *supra* note 40, at 17.

222. THE CONF. OF CHIEF JUSTS., <https://ccj.ncsc.org> (last visited Sept. 20, 2020).

223. Griggs, *supra* note 40, at 17.

gency preparedness committees to assist individuals of limited means in the event of a natural disaster or other public emergency.<sup>224</sup> On one hand the CCJ promoted proactive public protection by pushing states to have emergency plans in place to service the poor and disadvantaged. Yet, on the other, the resolution did not encompass the need for emergency preparedness as it relates to the courts' regulatory role in entry to the legal profession.

The role of the courts in licensing attorneys is one of authority and oversight.<sup>225</sup> One scholar posits that state bar examiners and other occupational licensing entities are often granted the same type of investigative, rulemaking, and adjudicative authority as other state administrative agencies.<sup>226</sup> These licensing entities have great need for supervision and oversight, because they are susceptible to the "same risks and concerns as any other administrative agency that [de facto] possesses and exercises combined governmental powers."<sup>227</sup> Although necessary and important, the oversight measures that are fairly standard in administrative agencies are often absent in the context of licensing attorneys.<sup>228</sup> Whether or not induced by crisis, important decisions regarding the licensure process must be independently evaluated, including exam mode, test security, scoring, content, format, passage thresholds, and more. The judicial deference to external constituencies combined with distrust and a lack of transparency on the part of the examiners, make even temporary change unlikely.

### C. Examiners as Gatekeepers

To understand the resistance to change, temporary or otherwise, it is important to view the bar exam from the vantage point of those who know it best — the bar examiners. Even under optimal conditions, there is much more than meets the eye that goes into the making of a bar exam. Those deployed in bar exam related roles — from character and fitness investigators, to essay graders, and for-hire test

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224. THE CONF. OF CHIEF JUSTS., RESOLUTION IN SUPPORT OF THE PROVISION OF LEGAL SERVICES FOLLOWING A MAJOR DISASTER OR PUBLIC EMERGENCY (2020), [https://ccj.ncsc.org/\\_data/assets/pdf\\_file/0015/23406/02132019-emergency-preparedness.pdf](https://ccj.ncsc.org/_data/assets/pdf_file/0015/23406/02132019-emergency-preparedness.pdf).

225. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, 22–27 (1986) ("lawyer licensing [is] almost always . . . housed under the judicial branch of state government.").

226. Bobbi Jo Boyd, *Do It in the Sunshine: A Comparative Analysis of Rulemaking Procedures and Transparency Practices of Lawyer-Licensing Entities*, 70 ARK. L. REV. 609, 615 (2017).

227. *Id.*

228. *Id.* at 620–21.

proctors — all work in conjunction with the appointed bar examiners to discharge an office of great societal importance. There are layers of research, accountability, and quality control involved in the drafting of the questions.<sup>229</sup> There is beta testing of the exam content.<sup>230</sup> There is scoring, rescoring, and equating.<sup>231</sup> And there are measures for exam security that rival Area 51. The parties involved in the production of the bar exam range from psychometricians to politicians, all whom must gingerly weigh input from the podium, the bar, and the bench. Judicially appointed state bar examiners typically balance their roles with their full-time role as a practicing attorney, law professor, or judge.

Of necessity, bar examiners operate independently of political and law school influence to make decisions about scoring and bar admissions. Understandably, their decisions will be unpopular to some. And while bar examiners are the reasoned targets of much blame surrounding the fate of the July 2020 exam, we must acknowledge that the sole role of the body of bar examiners is to maintain a system of licensure by examination. Decisions about avenues to licensure that do not involve a bar exam, are outside the purview of examiners. New rules to establish alternative paths to licensure will have to be the responsive byproduct of a judicial decree or legislative act. Yet, the courts that oversee the bar examiners are not likely inclined to share or relinquish their authority to govern entry into and supervision of the legal profession.<sup>232</sup>

The extent to which that authority has been delegated to boards of bar examiners creates a further divide between the realities of practice and the content and expectations of the bar as a testing instrument. It is also important to recognize that the administrative arm of the examiner boards may be run by non-lawyers who lack first-hand knowledge of all that is required to prepare for and pass a bar exam. Examiners stand guard at the gateway to the legal profession like sen-

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229. Timothy Davis & Marcy G. Glenn, *How Are Questions Written for NCBE's Exams? Part One: Two Multiple-Choice Question Drafters Share the Process*, 88 BAR EXAM'R 25 (2019); Sheldon F. Kurtz & Alexander W. Scherr, *How Are Questions Written for NCBE's Exams? Part Two: Two Written-Component Question Drafters Share the Process*, 88 BAR EXAM'R (Winter 2019–2020), <https://thebarexaminer.org/article/winter-2019-2020/how-are-questions-written-for-ncbes-exams-part-two/>.

230. Davis & Glenn, *supra* note 229.

231. See generally Lee Schroeder, *Scoring Examinations: Equating and Scaling*, 69 BAR EXAM'R 6 (2000).

232. W. Clinton Sterling, *Washington's Diploma Privilege*, 7 (Nov. 19, 2009) (unpublished article) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1837685](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837685)).

tries with one sole role: maintenance and protection. But what or who is being protected? From the perspective of the class of 2020 bar takers, and many others, bar examiners have become much more gatekeepers of the exam and examination process than of the public and the profession.

Bar exam administrators have seemingly been proselytized into believing that an exam is the only way to demonstrate competency to practice law. Like attorneys, state examiners have become disconnected from the actual content of the exam.<sup>233</sup> Since adopting the UBE, states that just four years ago wrote their own exams, now show reluctance to assert any authority over licensing their own attorneys beyond making character and fitness assessments and establishing a passing cut score. In the 38 states that formally have adopted the UBE, the role of bar examiner essentially has been reduced to essay grader and arbiter of exception requests and character and fitness hearings.

Once the decision to adopt UBE is made, state examiners write none of the bar exam questions and have no input into which subject or rules will be tested. In fact, a correct answer to a multistate exam question, may be absolutely contrary to the actual law in the state where the test is administered.<sup>234</sup> State bar examiners do not have the discretion to offer any variance from the grading point sheet to honor state law distinctions. That state bar exam authorities have become too inhibited to write their own exams, and almost fully restricted in the grading of the exam that it used to measure competency to practice within their states, is a disheartening consequence of broad adoption of the uniform examination.

This inhibition and broad deference to the test makers may explain, in part, the slow response from states to the pandemic crisis. Before the NCBE had announced definitively that it would provide exams for July and September (and much later an online version for October), UBE states were left with nothing to offer the class of 2020. These states had not produced any homegrown exam content for up to nine years. It is not pure coincidence that Indiana, Louisiana, Michigan, Nevada (and ultimately Florida) were able to pivot to create and plan to offer online exams before any definitive announce-

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233. Griggs, *supra* note 40, at 24.

234. *Id.* at 54.

ment was made by NCBE.<sup>235</sup> These five states have not yet adopted the UBE and their state bar examiners still make a practice of drafting and creating bar exam questions. We must also consider that decisions and recommendations of the NCBE (a private, unregulated entity that makes millions of dollars each year from the sale of bar exams, and bar related services and products) may not necessarily be in the best interest of the state or the bar applicants.<sup>236</sup> As long as states continue to give such broad deference to the NCBE, it is impractical to expect to see any real changes to the bar exam process other than those endorsed by the NCBE.<sup>237</sup>

#### D. Systemic Distrust

Ultimately, the lifeblood of the opposition to licensure alternatives is distrust. The bar authorities are distrustful of anyone and everyone. Their test developers speak a language of scaling, equating, reliability, and validity and are not concerned with practicality, test preparation conditions, or cognitive load. Members of the practicing bar do not trust a new generation of lawyers to become their peers unless the newbies undergo the same stringent rituals that were forced upon them. The courts are distrustful of new ideas, and to some degree of themselves. The courts have become so far removed from legal education and attorney qualifications that rarely will they make a move that is not in lock step with a resolution or recommendation from the ABA or other influential entity.

The ABA distrusts the law schools it regulates, and the states' ability to test and regulate entry into the legal profession. The ABA distrust of law schools is both obvious and problematic. The ABA sets detailed guidelines by which schools must abide to maintain their status as member schools. Those guidelines include, *inter alia*, standards for legal education programs, an academic support program, experiential learning, and assessment.<sup>238</sup> Yet even with those standards in place, the ABA mandates that law schools maintain an ultimate bar

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235. Indiana, Michigan, and Nevada successfully administered online exams during the summer of 2020. At the time of this Article, both Louisiana and Florida had announced plans to offer an online exam, but canceled or postponed their exam.

236. See NAT'L CONF. OF BAR EXAM'RS, *supra* note 41; Sloan, *supra* note 38.

237. *But see* Chemerinsky, *supra* note 220 (Claiming that the NCBE acted irresponsibly by refusing to cancel in-person administration of the MPRE and providing paper exams for states to administer in-person during the pandemic).

238. 2020-2021 *Standards and Rules of Procedure for Approval of Law Schools*, ABA, [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) (last visited Oct. 17, 2020).

passage rate of 75% or higher for all graduates who take a bar exam.<sup>239</sup>

The ABA is deeply entangled in a symbiotic relationship with the NCBE. The NCBE was established by the ABA Section on Legal Education and Admissions to the Bar to eliminate overcrowding in the profession.<sup>240</sup> The ABA support for a uniform bar exam produced and controlled by the NCBE was one of several endorsing resolutions that shifted the balance of power away from states and to the central, non-governmental NCBE. The origins of the ABA as an early bar exam regulator, and its role in establishing the NCBE, has predictably led to a sustained and deferential relationship between the two entities.<sup>241</sup> Whether or not merited, the deference, at times, may be to the detriment of the public good, as seems to be the case with the debacle made of the July 2020 bar exam administration.

#### CONCLUSION

The aim of this Article has been to analyze the reactive handling of the pandemic crisis as it relates to bar exam administration, and to discuss the institutional influence that likely contributed to the staunch resistance to short-term change. While this is not intended as a critique of any particular jurisdiction, court, or body of examiners, the outcome and devastating impact on the class of 2020 bar takers show that the measures taken were largely ineffective, and in some cases more detrimental than helpful. While viable solutions were and remain available, decision-makers were dogmatic and resolute in their refusal to break ties, even temporarily, with the established method of bar examination. The 2020 bar takers will be indelibly traumatized by the circumstances surrounding their quest for licensure, and the manifestations of that trauma will surely influence interactions with their future colleagues in the profession. We will expect our future lawyers to champion justice as they join the fight to compassionately protect the rights of those impacted by COVID-19 and those taking a stand against racial injustice. The newest members of our profession will not soon forget the perceived insensitivity and spared justice they received in response to their plight.

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239. *Id.* at 25 (“At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.”).

240. Ariens, *supra* note 39.

241. *See generally id.*

Taking and passing a bar exam is the end goal of journey that is three years or more in the making. The limited and emergency situation, wrought by the pandemic and civil unrest, provided an opportunity to simply move up the goal line by a few yards by offering alternative paths to licensure. Whether the alternative should take the form of diploma privilege or supervised practice should be a matter left entirely to the states to decide. But, deciding against any reasonable alternative should not have been on the table for discussion. Our profession entrusted law examiners with an important responsibility and in 2020 many failed, epically, to maintain that trust.

In a country with constitutional protections that would embrace the risk of letting a guilty party go unpunished before wrongly punishing an innocent party, we must ask why we are willing to keep the 90% of bar takers who would pass a bar exam from practice, to exclude the 10% who might not.<sup>242</sup> Duquesne School of Law Professor Ashley London best summed up our obligation to the class of 2020 and beyond: “We owe the newest members of our profession the most protection, not the least. Our privilege and protectionism [are] showing and it is not a good look.”<sup>243</sup>

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242. Elizabeth Olson, *High Percentage of Grads Pass Bar Within 2 Years, ABA Says*, BLOOMBERG L. (Feb. 18, 2020, 4:52 PM), <https://news.bloomberglaw.com/us-law-week/high-percentage-of-law-grads-pass-bar-within-two-years-aba-says>; *New Report Shows Most Law School Grads Passing Bar*, ABA, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/04/new-report-shows-law-schools/> (last visited Aug. 14, 2020).

243. @ProfAMLondon, TWITTER (June 16, 2020, 6:46 PM), <https://publish.twitter.com/?query=https%3A%2F%2Ftwitter.com%2FProfAMLondon1%2Fstatus%2F1273039225890443264&widget==tweet>.



# ESSAY

## The 14th Amendment and Me: How I Learned Not to Give Up on the 14th Amendment

ROBERT S. CHANG\*

Introduction .....	53
An Academic Perspective on the 14th Amendment .....	54
The 14th Amendment and Asian Americans .....	62
Litigating the 14th Amendment in Arizona .....	68
The 14th Amendment and the Next Generation of Lawyers ...	76
Conclusion .....	81

### INTRODUCTION

In 2012, at the National Archives in Washington, D.C., I saw the original manuscript of the joint resolution of Congress proposing the 14th Amendment.<sup>1</sup> The cursive script and faded ink made the words difficult to read, but the force of the words was manifest:

... [no] State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>2</sup>

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\* Professor of Law and Executive Director, Fred T. Korematsu Center for Law and Equality, Seattle University School of Law. Copyright © 2019 Robert S. Chang. This Essay was written at the invitation of the Thurgood Marshall Institute of the NAACP Legal Defense Fund as part of a planned volume to commemorate the sesquicentennial of the passage of the 14th Amendment. This volume did not come to be. I am grateful for the careful editing of this Essay provided by LDF Senior Counsel Cody Montag and their legal intern, Terrence Hunger of the University of Mississippi School of Law.

1. *14th Amendment*, THE NATIONAL ARCHIVES (July 9, 1968), <https://archive.org/details/14thAmendment/mode/2up>.

2. U.S. CONST. amend. XIV, § 1.

These words had recently gained a newfound importance for me as I had just become co-counsel representing high school students in Arizona. In that case, *Arce v. Douglas*, the students challenged a state statute that had been used to terminate their school district's Mexican American Studies program.<sup>3</sup> The students alleged that the statute had been enacted and enforced in violation of their rights under the 14th Amendment, among other claims.<sup>4</sup> Not to give too much away, but after six years, the students finally prevailed.<sup>5</sup>

Previously, the 14th Amendment's words had existed as more of an abstraction for me, something that I wrote about in law review articles, often to criticize the myriad ways the United States Supreme Court had limited the reach of those words.<sup>6</sup> My academic work on the 14th Amendment, until then, had also included an examination of how Asian Americans fit within constitutional jurisprudence.<sup>7</sup> This work required comparisons of different racial groups and how they navigated the complex and treacherous terrain of race in the United States.<sup>8</sup> This academic work provided context for me when I litigated the 14th Amendment in the courtroom, which resulted in a newfound appreciation of the amendment.

This Essay examines my evolving perception of and engagement with the 14th Amendment. It begins with an academic perspective on the 14th Amendment, then turns to the 14th Amendment and Asian Americans, followed by an examination of a transformative experience litigating the 14th Amendment. Through these experiences, I have conceptualized some thoughts about how to make the 14th Amendment come alive for the next generation of lawyers.

## AN ACADEMIC PERSPECTIVE ON THE 14TH AMENDMENT

One of the most pernicious pronouncements that limited the reach of the powerful words contained in the 14th Amendment occurred fifteen years after its ratification, when the Supreme Court, in

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3. Certain details about the case can be gleaned from the published opinions in the case. See *Arce v. Douglas*, 793 F.3d 968, 973 (9th Cir. 2015); see also *González v. Douglas*, 269 F. Supp. 3d 948, 964 (D. Ariz. 2017). Discussed further *infra* Part III.

4. *González*, 269 F. Supp. 3d at 950.

5. *Id.* at 974.

6. E.g., Robert S. Chang & Jerome M. Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229 (1997).

7. See generally ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999).

8. E.g., Robert S. Chang & Neil Gotanda, *Afterword: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012 (2007).

the *Civil Rights Cases*, invalidated legislation passed by Congress to ensure access and enjoyment of inns, public conveyances, and places of public amusement for persons of color.<sup>9</sup> The chief problem with the legislation, at least with regard to the 14th Amendment, was that it interfered not with discrimination by state or local governments but with acts of discrimination by private individuals, which the Court deemed to be mere private wrongs.<sup>10</sup> The Court thought that parties injured by private actors should seek redress under state law, noting that “[i]nnkeepers and public carriers, by the laws of all the [s]tates, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.”<sup>11</sup> The Court made clear, though, that the injured party was not to turn to Congress for relief.<sup>12</sup> In a particularly cruel passage, expressed with no sense of irony, Justice Joseph P. Bradley stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .<sup>13</sup>

I am unsure if those who emerged from slavery ever went through a period of feeling that they were the special favorites of the law, or, now elevated and armed with their equal status as citizens, felt that they needed nothing further from Congress or the courts.

Despite this problematic language, in demarcating private acts of discrimination as beyond the reach of Congress, the Court did make a broad pronouncement: If state laws “make any unjust discrimination,” the 14th Amendment would afford relief.<sup>14</sup> In 1896, the Court got a chance to determine what exactly it meant by these words in its landmark decision in *Plessy v. Ferguson*, which established the doctrine of “separate but equal.”<sup>15</sup> The challenge in *Plessy* arose from an 1890 Louisiana law requiring “separate railway carriages for the white and colored races.”<sup>16</sup> Homer Plessy challenged the law in court, argu-

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9. *The Civil Rights Cases*, 109 U.S. 3, 19 (1883).

10. *Id.* at 17.

11. *Id.* at 25.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

16. *Id.* at 540.

ing that the “enforced separation of the two races stamps the colored race with a badge of inferiority,”<sup>17</sup> violating the 14th Amendment’s guarantee of equal protection. The Supreme Court rejected his arguments. In his majority opinion, Justice Henry Billings wrote: “If . . . [enforced separation stamps the colored race with the badge of inferiority], it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>18</sup> In other words, the Court told black people that any negative impact they felt from the requirement to sit in separate cars was entirely of their own creation and not the concern of the Court. “Separate but equal” became all that racial minorities could expect from the 14th Amendment’s guarantee of equal protection.

The Court’s decision in *Plessy* robbed the 14th Amendment of its meaning and power until the mid-20th century when Charles Hamilton Houston and the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) breathed new life into it through a series of court challenges that led to the Court’s unanimous decision in *Brown v. Board of Education*<sup>19</sup> and beyond.<sup>20</sup>

These court challenges also led to a less well-known, but very important result: something that has been termed the reverse incorporation of the 14th Amendment’s equal protection guarantee into the 5th Amendment’s Due Process Clause. A companion case to *Brown*, the Supreme Court case *Bolling v. Sharpe* addressed segregated public schools in Washington, D.C.<sup>21</sup> Because D.C. public schools were segregated by federal authorities, the 14th Amendment was not available to protect the plaintiffs. Chief Justice Earl Warren, while acknowledging that “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,”<sup>22</sup> and that the two are not always interchangeable,<sup>23</sup> nevertheless found that an equal protection guarantee is included within the 5th Amendment’s due process guarantee:

Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro chil-

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17. *Id.* at 551.

18. *Id.*

19. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

20. A discussion of this decades-long series of cases is beyond the scope of this chapter. For an excellent account, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1977).

21. See *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954).

22. *Id.* at 499.

23. *Id.*

dren of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.<sup>24</sup>

Before *Bolling*, the guarantee of equal protection of the laws did not apply to the federal government. All manner of mischief was made possible because the federal government was not constrained by this guarantee. The institution of slavery, enshrined in the original Constitution, was made possible because the federal government was not bound by equal protection. Likewise, the lack of a federal equal protection guarantee permitted the disenfranchisement of women<sup>25</sup> and the dispossession, displacement, and extermination of Indians.<sup>26</sup> Moreover, because the federal government is not constrained by an equal protection guarantee, the federal government was able to limit naturalization to free white persons in the 1790 Naturalization Act.<sup>27</sup>

The lack of a federal equal protection guarantee also resulted in discrimination against Asians. For example, the lack of said guarantee might be considered to be partially responsible for permitting the federal government to determine, in the late nineteenth century, that most classes of Chinese persons could not enter the country and that no Chinese immigrant could become a United States citizen.<sup>28</sup> It also led to the policy that Chinese immigrants who wanted to leave the

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24. *Id.* at 500.

25. *Cf.* U.S. CONST. amend. XIX (stating that “[t]he 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 sex”). Had there been a federal equal protection guarantee, presumably there would have been no need for this amendment.

26. Two early cases established the unique relationship between the federal government and Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 15, 20 (1831) (because the Cherokee Nation was not a foreign state, Court lacked jurisdiction to adjudicate bill “brought by the Cherokee Nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that State which, as is alleged, go directly to annihilate the Cherokees as a political society and to seize, for the use of Georgia, the lands of the [Cherokee] Nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force”); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (while the Cherokee Nation retained internal sovereignty, its relationship with federal government was that of a “distinct, independent political communit[y]”). Even if there had been a federal equal protection guarantee at the time, the fact that the relationship was political would have precluded its application to the treatment of Indian tribes by the United States. *Cf. Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (plenary power held by Congress largely precludes equal protection as “[i]terally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”) (citation omitted).

27. NATURALIZATION ACT OF 1790 § 1, 1 STAT. 103; *see Ozawa v. United States*, 260 U.S. 178, 194-95 (1922).

28. CHINESE EXCLUSION ACT, PUB. L. NO. 47-126, 22 STAT. 58, 58-61 (1882).

United States temporarily had to obtain certificates for reentry and that these same duly issued certificates could, with the stroke of a pen, be nullified.<sup>29</sup> It resulted in the statute requiring Chinese immigrants, who were lawfully present in the United States, to have and carry certificates to prove their lawful presence or face deportation.<sup>30</sup> Pursuant to that law, a white witness needed to vouch for the Chinese laborer in order for the certificate to be valid.<sup>31</sup> The federal government could limit the right of naturalization to white persons and persons of African nativity or descent, such that a lawful immigrant of Japanese or South Asian ancestry, who otherwise met the requirements to become a naturalized citizen, could be denied naturalization.<sup>32</sup> All manner of mischief.

The principle that the federal government was not bound to provide equal protection of the laws was invoked by the Court during World War II as part of the justification of a curfew that applied only to persons of Japanese ancestry, including those who were United States citizens. In *Hirabayashi v. United States*, Chief Justice Harlan F. Stone rejected Gordon Hirabayashi's argument that discrimination against citizens of Japanese ancestry violated the 5th Amendment, noting: "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process."<sup>33</sup> In the Court's view, the curtailment of Hirabayashi's liberty interest by a curfew restricting only persons of Japanese ancestry, citizen or not, did not amount to a denial of due process.<sup>34</sup> As Justice Stone made clear, at stake in *Hirabayashi* was merely a curfew, suggestive that a greater curtailment of liberty might violate due process.<sup>35</sup>

That may be what Fred Korematsu hoped for when he pursued his challenge to the military order that required him to leave his home for the government's incarceration camps for Japanese Americans. In *Korematsu v. United States*, in an opinion written by Justice Hugo Black, the Court largely ignored that the liberty interest at issue was far greater than that in *Hirabayashi*, and expressed that "all legal re-

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29. *Chan Ping v. United States*, 130 U.S. 581, 582, 609 (1889).

30. *Fong Yue Ting v. United States*, 149 U.S. 698, 742 (1893).

31. *Id.*

32. *See generally* *United States v. Thind*, 261 U.S. 204, 207–8 (1923); *see also* *Ozawa*, 260 U.S. at 198.

33. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

34. *Id.* at 99–101.

35. *Id.* at 112–14.

restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] that courts must subject them to the most rigid scrutiny.”<sup>36</sup> Yet, the Court concluded that “Korematsu was not excluded . . . because of hostility to him or his race,” but instead “was excluded because we are at war with the Japanese Empire.”<sup>37</sup> That we were at war with Italy and Germany and those of Italian and German ancestry were not similarly burdened could be ignored because the federal government, not constrained by an equal protection mandate, was at greater liberty to discriminate.

The civil rights movement, especially the challenges to segregated education, led to a reinvigoration of the 14th Amendment, including expanding its equal protection guarantee to apply to the federal government.<sup>38</sup> This was followed by the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.<sup>39</sup> Like the earlier Civil Rights Act of 1875, these new civil rights acts were challenged in court. For example, in *Heart of Atlanta Motel v. United States*, the appellant motel challenged the constitutionality of Title II of the Civil Rights Act of 1964, arguing that Congress lacked the power under the Commerce Clause<sup>40</sup> to prohibit it from refusing to rent rooms on the basis of race.<sup>41</sup> The Court, however, rejected this argument, making it abundantly clear that “equal access to public establishments . . . could be readily achieved by congressional action based on the commerce power of the Constitution.”<sup>42</sup>

But unlike prior cases, when the power of the federal government to make good on the promises of the 13th, 14th, and 15th Amendments was largely circumscribed, the 1960s civil rights acts were largely upheld by the Supreme Court.<sup>43</sup> This was no surprise given that the Court was led at the time by Chief Justice Earl Warren, who had a liberal majority and effectively overruled *Plessy* with the decision in *Brown*. But then the Warren Court became the Burger Court.

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36. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

37. *Id.* at 223.

38. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

39. CIVIL RIGHTS ACT OF 1964, PUB. L. NO. 88-352, 78 STAT. 241 (1964); VOTING RIGHTS ACT OF 1965, PUB. L. NO. 89-110, 79 STAT. 437 (1965); FAIR HOUSING ACT OF 1968, PUB. L. 90-284, 82 STAT. 73 (1968).

40. COMMERCE CLAUSE, U.S. CONST. art I, § 8, cl. 3.

41. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243–44 (1964).

42. *Id.* at 250.

43. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

President Nixon, elected in 1968, remade the Supreme Court with four appointments in approximately 18 months during his first term in office, replacing Earl Warren with Warren Burger, Abe Fortas with Harry Blackmun, Hugo Black with Lewis F. Powell, Jr., and John Marshall Harlan II with William Rehnquist.<sup>44</sup>

This reshaped — and more conservative — Court began dismantling the reach of the 14th Amendment in the 1970s, either directly or by limiting the reach of civil rights statutes intended to fulfill its promise. Discrimination had to have been intentional;<sup>45</sup> there were strict causation requirements such that remedial measures could be justified only if there was “prior discrimination by the government unit involved.”<sup>46</sup> and remedies for statutory violations were limited. In addition, remedies were limited in order to not harm so-called innocent white people, whose undeserved settled expectations from seniority systems locked into place the effects of past discrimination.<sup>47</sup>

The Burger Court greatly limited the power of federal courts to fulfill the promise of *Brown*. For example, in *Milliken v. Bradley*, the Court made clear that remedies to redress school segregation would be carefully examined so that any remedy did not exceed the scope of the constitutional violation.<sup>48</sup> The immediate effect in that case was to invalidate an interdistrict remedy because the only constitutional violation established before the district court stemmed from segregation within the Detroit City School District.<sup>49</sup> Justice Thurgood Marshall, in dissent, asserted that the problem of white flight cannot be ignored and that the practical effect of the majority’s decision would be that “[t]he very evil *Brown I* was aimed at will not be cured, but will be perpetuated for the future.”<sup>50</sup>

I attended law school between 1989 and 1992 and learned the language of feminist legal theory and critical race theory to understand this slow demolition of the civil rights gains of the earlier period and labeled the new era as the Second Redemption or post-civil rights

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44. See Warren Weaver, Jr., *Four Nixon Justices Vote as Bloc on 70% of Cases*, N.Y. TIMES, June 28, 1973, at 20; Thomas Healy, *A Supreme Legacy: The Conservative Legacy of the Burger Court Lives on in the Precedents It Set*, NATION (June 23, 2016), <https://www.thenation.com/article/archive/a-supreme-legacy/>.

45. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

46. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

47. *Id.* at 276.

48. *Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

49. *Id.*

50. *Id.* at 802 (Marshall, J., dissenting).

era.<sup>51</sup> As an academic, I wrote about this earlier historical period as a way to understand the retrenchment of civil rights I observed take place following what has been described as the Second Reconstruction embodied by the 1960s civil rights acts. I saw in Justice Sandra Day O'Connor's words echoes of Justice Brown, who declared in *Plessy* that any feeling of inferiority experienced by members of the colored race was in their heads.

For example, in *City of Richmond v. J.A. Croson Company*, the Supreme Court held that Richmond's failure to identify past illegal conduct as the basis for its "Minority Business Utilization Plan" for awarding public construction contracts to its citizens violated the Equal Protection Clause.<sup>52</sup> The fact that 99.33% of government construction contracts went to white-owned businesses in a city that was more than 50% black was not a sufficient factual predicate to justify Richmond's program requirement that 30% of government construction contracts be awarded to minority-owned businesses.<sup>53</sup> Justice O'Connor, noting that statistical disparity cannot by itself establish a prima facie case of discrimination, states, blithely, "Blacks may be disproportionately attracted to industries other than construction."<sup>54</sup> For Justice O'Connor, the notion that this disparity is reflective of discrimination might simply be in the heads of black people because, after all, they may just not prefer the construction trade. Likewise, we may look at corporate boardrooms today and say that black people may be disproportionately attracted to lower positions in corporations, and that any notion that the lack of diversity is a product of discrimination is, as Justice Brown wrote in *Plessy*, "because the colored race chooses to put that construction upon it."<sup>55</sup>

Justice O'Connor also channeled Justice Bradley (who declared in the *Civil Rights Cases* that black people were no longer to be the special favorites of the law)<sup>56</sup> in a key decision on the use of affirma-

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51. E.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2206 n.284 (1992) (listing "at least 12 themes reflected in the move from the civil rights era of the mid-1960s to the present post-civil-rights era"); Robert L. Hayman, Jr., *Recognizing Inequality: Rebellion, Redemption and the Struggle for Transcendence in the Equal Protection of the Law*, 27 HARV. C.R.-C.L. L. REV. 97, 57 (1991) (describing retrenchment of civil rights as "apparent triumph of the second Redemption").

52. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989).

53. *Id.* at 479.

54. *Id.* at 503.

55. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

56. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

tive action programs by universities. In *Grutter v. Bollinger*, the Supreme Court upheld the University of Michigan Law School's affirmative action program but emphasized that it must be temporary.<sup>57</sup> Justice O'Connor, writing for the majority, emphasized that it had been twenty-five years since the Court gave its blessing in *Regents of the University of California v. Bakke* to "use race to further an interest in student body diversity in the context of higher education," but that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>58</sup> Implicit in her opinion was the view that underrepresented racial minorities get to "enjoy" their privileged status as special favorites of the law for just a little while longer.<sup>59</sup> The sunseting of affirmative action reflects a worldview within which the time must come when the uplifted minorities have to stand for themselves and can no longer rely on the beneficence of affirmative action, no longer able to be the special favorites of the law.

This is the 14th Amendment that I knew as an academic.

#### THE 14TH AMENDMENT AND ASIAN AMERICANS

As an Asian American, I have a complicated relationship with the 14th Amendment, because it only partially incorporated persons of Asian ancestry into its protections. Though its due process and equal protection guarantees extended to any person, its first sentence, the so-called Citizenship Clause, only partially incorporated people who looked like me into the national body. I say partially incorporated because the federal government remained free to discriminate to restrict naturalization on the basis of race and national origin.<sup>60</sup> In this section, I first discuss due process and equal protection before turning to the incomplete Citizenship Clause.

The last two clauses of section one of the 14th Amendment state: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>61</sup> The import of "any person"

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57. See generally *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

58. *Id.* at 343.

59. *Id.* ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable.")

60. U.S. CONST. amend. XIV, § 1, cl. 3.

61. *Id.*

is discussed in the *Slaughter-House Cases*.<sup>62</sup> In Justice Samuel Miller's majority opinion, after observing that the 13th, 14th, and 15th Amendments specifically pertained to black people, he stated:

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the Thirteenth Article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so if other rights are assailed by the States, which properly and necessarily fall within the protection of these Articles, that protection will apply, though the party interested may not be of African descent.<sup>63</sup>

The Court got a chance to test its commitment to this proposition in its decision in *Yick Wo v. Hopkins*.<sup>64</sup> That case involved a San Francisco ordinance that permitted laundries to be operated with no restriction if housed in a brick or stone structure but required the written consent of the city Board of Supervisors to operate a laundry in other structures.<sup>65</sup> On its face, the ordinance did not discriminate.<sup>66</sup> The problem arose when the Board began granting and withholding consent.<sup>67</sup> After the passage of the statute, Yick Wo, Wo Lee, and 200 other persons of Chinese ancestry petitioned the Board for permission to continue operating laundries in their wooden structures, which many of them had been using for over twenty years.<sup>68</sup> They were all denied.<sup>69</sup> Eighty others who operated laundries in wooden structures, none of whom were Chinese, were granted permission by the board to continue operations.<sup>70</sup> Only one non-Chinese person, Mrs. Mary Meagles, was denied permission.<sup>71</sup>

Yick Wo and Wo Lee refused to pay the fines for violating the ordinance and were placed in jail.<sup>72</sup> They filed suit in state court seek-

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62. *Slaughter-House Cases*, 83 U.S. 36 (1872).

63. *Id.* at 72.

64. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

65. *Id.* at 368.

66. *Id.* at 373–74.

67. *Id.* at 366.

68. *Id.* at 374.

69. *Id.*

70. *Id.*

71. *In re Wo Lee*, 26 F. 471, 473–74 (C.C.D. Cal. 1886).

72. *In re Yick Wo*, 9 P. 139 (Cal. 1885).

ing habeas relief.<sup>73</sup> After losing in the California Supreme Court, they appealed initially to the Circuit Court for the District of California.<sup>74</sup> The circuit court appeared to acknowledge that “[t]he necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.”<sup>75</sup> Yet it chose to defer to the “greater weight of judicial authority in this state” by upholding the ordinance, but expressed hope that “both parties and the United States [S]upreme [C]ourt will co-operate to procure a speedy decision.”<sup>76</sup>

The Supreme Court quickly took up the review. As a threshold matter, the Court made clear, early in its opinion, that the fact that Yick Wo was a subject of the emperor of China was irrelevant for purposes of the due process and equal protection provisions of the 14th Amendment.<sup>77</sup> It stated that “[t]hese provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws.”<sup>78</sup> Because Yick Wo was protected by the 14th Amendment, the defendants had to answer the substantive charge of discrimination.

The attorneys for the defendants argued:

Why should we want to destroy the [C]hinese laundry business? Do we not voluntarily give them our clothes to wash? Have we not given them three-fourths of the laundry business of San Francisco? We take them into our families as cooks and butlers, and into our churches and [S]unday-schools, and they sleep with us (temporarily) in our cemeteries.<sup>79</sup>

The Court rejected this argument and found that the facts recounted above “establish[ed] an administration directed so exclusively against a particular class of persons . . . that . . . [it] amount[ed] to a practical denial by the [s]tate of that equal protection of the laws.”<sup>80</sup>

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73. *Id.*

74. *Wo Lee*, 26 F. at 476.

75. *Id.* at 471, 474.

76. *Id.* at 477.

77. *Yick Wo*, 118 U.S. at 368–69.

78. *Id.* at 369.

79. Authorities and Argument for Defendant and Respondent, *Yick Wo v. Hopkins*, 1885 WL 18153, at \*95 (1885) (Nos. 1280, 1281).

80. *Yick Wo*, 118 U.S. at 373.

The Court thus found that an ordinance, neutral on its face, could be applied in a manner that violated the Equal Protection Clause.<sup>81</sup>

Though *Yick Wo* had argued that the law itself violated the Constitution, the Court did not make clear if the law was to be struck down in ordering *Yick Wo* and *Wo Lee* to be freed. Early in the opinion, the Court suggested that the ordinance was deficient because “[t]he power given to . . . [the supervisors] is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.”<sup>82</sup> While the Court does not opine directly on the sufficiency of the ordinance, following its suggestion leads to the conclusion that evidence regarding discriminatory enforcement of a law may be sufficient to strike down the entire law. This may be particularly true if there is a factual record that suggests that the discretion granted to enforce the ordinance was, in essence, a license to discriminate. This understanding of *Yick Wo* became crucial in my litigation of the 14th Amendment in an Arizona courtroom, as recounted below.

But *Yick Wo* and the Court’s application of the 14th Amendment to safeguard the rights of persons of Asian ancestry were later undercut because of the incomplete protection provided by the Citizenship Clause. The opening sentence of the clause, in section one of the 14th Amendment, states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>83</sup> Importantly, this ensures that anyone with national citizenship, whether acquired through birth or naturalization, also acquires state citizenship, preventing states from denying state citizenship to black people and others and discriminating on that basis. But what does the qualifying clause “and subject to the jurisdiction thereof” mean?

The meaning of those words was tested when Wong Kim Ark, born in 1873 in San Francisco, left the United States to visit China in 1894 and was denied entry upon his return to the United States in 1895.<sup>84</sup> Despite the fact that Wong’s papers included a certification by white men that he had been born in the United States, the collector of customs decided that Wong was not a U.S. citizen and was barred

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81. *Id.* at 373–74.

82. *Id.* at 366–67.

83. U.S. CONST. amend. XIV, § 1, cl. 1.

84. *United States v. Wong Kim Ark*, 169 U.S. 649, 652–53 (1898).

from entry based on the Chinese Exclusion Act.<sup>85</sup> Wong Kim Ark sued, and his case made it to the Supreme Court. A divided Court determined that the Citizenship Clause meant that a person born in the United States and whose parents were not consular officials of a foreign government was, by virtue of birth, a U.S. citizen.<sup>86</sup>

*Wong Kim Ark* was silent, though, as to “persons . . . naturalized.”<sup>87</sup> The amendment itself was silent as to who may become a citizen through naturalization. Likewise, the Constitution is silent on this issue other than stating that Congress shall have the power “[t]o establish an uniform Rule of Naturalization.”<sup>88</sup> Under this authority, Congress passed the 1790 Naturalization Act, which limited the privilege to “free white persons.”<sup>89</sup> Following the Civil War and the Reconstruction Amendments, Congress revised the Act to permit “white persons and . . . [persons] of African nativity . . . [or] descent” the right to naturalize.<sup>90</sup>

But for those who fell outside of those categories, a federal government not bound to provide equal protection was free to determine that some do not belong. If persons of Asian ancestry may be banned from United States shores, then it follows that good reason exists to also exclude persons of Asian ancestry from joining the national political body as citizens. Nothing could be done, following *Wong Kim Ark*, about pesky birthright citizenship. But the harm could at least be limited by forbidding naturalization, either explicitly by statute as accomplished with Chinese immigrants, or by statutory interpretation and reliance on racial categories as accomplished by the Court in *Ozawa v. United States*<sup>91</sup> and *United States v. Thind*.<sup>92</sup> Then, to the extent that birthright citizenship is a problem, the strategy shifts to prevent births by severely restricting immigration to prevent family formation. As one Congressman said in support of the Immigration Act of 1924, which was intended to foreclose immigration from Asia completely through the use of the facially race- and nationality-neu-

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85. *Id.* at 650, 653.

86. *Id.* at 705.

87. U.S. CONST. amend. XIV, § 1, cl. 1.

88. U.S. CONST. art. I, § 8, cl. 4.

89. U.S. REV. STAT. § 2169.

90. *Ozawa v. United States*, 260 U.S. 178, 190, 193 (1922).

91. *Id.* at 176, 190, 193 (holding that a person of Japanese ancestry could not become naturalized because he was not a “free white person”).

92. *United States v. Thind*, 261 U.S. 204 (1923) (holding that “a high-caste Hindu, of full Indian blood” must have his certificate of citizenship canceled because he was not a “free white person”).

tral legal category, *alien ineligible for citizenship*: “The necessity [for this provision] . . . arises from the fact that we do not want to establish additional Oriental families here.”<sup>93</sup> Another technique used to restrict family formation was through anti-miscegenation laws.<sup>94</sup>

In this sense, the 14th Amendment’s Citizenship Clause was incomplete, because it left open the possibility that certain people could be deemed ineligible for naturalization by race or nationality. This would not be corrected for Chinese immigrants until World War II, when the imperatives of war produced the political will to open naturalization to those from China, a U.S. ally.<sup>95</sup> It was corrected for Filipino immigrants and South Asian immigrants in 1946, and for all immigrants from Asia in 1952 with the passage of the McCarran-Walter Act.<sup>96</sup> Opening up the pathway to naturalization, though, should not be confused with opening the borders for entry. During the mid-20th century, most Asian countries had yearly quotas capped at 100 immigrants per year.<sup>97</sup> To provide context, the quota for calendar year 1963 for the following countries was as follows: Austria, 1,450; Germany, 26,533; Ireland, 6,054; Poland, 7,460; and United Kingdom, 28,291.<sup>98</sup> Europe as a region had a quota allotment that year of 99,244.<sup>99</sup> All of Asia, 2,256; all of Africa, 1,010.<sup>100</sup> In this way, the (mostly) white national character of this nation was maintained, at least for a little while longer. Asian exclusion, for the most part, persisted.

Further, the Privileges and Immunities Clause of the 14th Amendment, which prevents states from treating citizens of other states in a discriminatory manner, only protects citizens of the United States.<sup>101</sup> Immigrants from Asia ineligible for naturalization could never bring themselves under the protection of this clause.

The incomplete Citizenship Clause had repercussions far beyond the denial of naturalization. Once the federal government recognized

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93. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 235 (alteration in original).

94. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) (laws banning interracial marriage); Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-miscegenation Statutes to Asian Americans, 1910–1950*, 9 *ASIAN L.J.* 1 (2002).

95. CHINESE EXCLUSION ACT, repeal, PUB. L. 78-199, 57 STAT. 600 (1943).

96. IMMIGRATION AND NATIONALITY ACT, PUB. L. 82-414, 66 STAT. 163 (1952).

97. LUCE-CELLER ACT, PUB. L. 483.

98. IMMIGR. & NATURALIZATION SERV., DEP’T JUST., *ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE* 34 (1964).

99. *Id.*

100. *Id.*

101. U.S. CONST. amend. XIV, § 1, cl. 2.

“alien ineligible for citizenship” as a category that justified treating Asians differently from other immigrants, states began relying upon that federal classification to discriminate. States such as California and Washington enacted alien land laws, whose constitutionality was upheld in a series of cases in 1923.<sup>102</sup> In the Washington case, *Terrace v. Thompson*, the Supreme Court found that because the category “aliens ineligible for citizenship” was one created by Congress, the state could rely upon the federal category which “in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership.”<sup>103</sup> Stated differently, federal discrimination underwrote and authorized state discrimination, notwithstanding that due process and equal protection were supposed to extend to all persons under the 14th Amendment.

In this manner, the 14th Amendment’s promise contained in the expansive protections to all persons ended up being a mixed bag for Asian Americans.

#### LITIGATING THE 14TH AMENDMENT IN ARIZONA

It is easy to be critical of 14th Amendment jurisprudence. But you need to move beyond critique if you find yourself in court litigating on behalf of clients who claim that their 14th Amendment rights have been violated. Representing students who challenged a state law that was used to terminate the Mexican American Studies Program at the Tucson Unified School District (“TUSD”) changed my relationship with the 14th Amendment.<sup>104</sup>

The Mexican American Studies Program at TUSD was created in 1998.<sup>105</sup> Controversy about the program erupted in 2006 when Dolores Huerta, who had co-founded the National Farmworkers Association with Cesar Chavez, spoke at an assembly at Tucson High Magnet School.<sup>106</sup> When asked by students about anti-immigrant legislation, she responded that Republicans hate Latinos.<sup>107</sup> The Arizona

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102. See *Porterfield v. Webb*, 263 U.S. 225 (1923) (upholding California’s Alien Land Law); see also *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding Washington’s Alien Land Law).

103. *Terrace*, 263 U.S. at 220.

104. *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015); *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017).

105. Abena Hutchful, *What You Need To Know About The Arizona Mexican-American Studies Trial; Update: Judge Rules Ban Unconstitutional*, NAT’L COAL. AGAINST CENSORSHIP (Aug. 23, 2017), <https://ncac.org/news/blog/what-you-need-to-know-about-the-arizona-mexican-american-studies-trial>.

106. *González*, 269 F. Supp. 3d at 952.

107. *Id.*

state legislature learned of this and trouble ensued. Then-State Superintendent of Public Instruction Tom Horne accompanied his deputy, Margaret Garcia Dugan, who was to speak at the school.<sup>108</sup> Her message was plain and simple — she was Latina, she was a Republican, and she did not hate herself.<sup>109</sup> Some students at this assembly engaged in a silent protest because they had been informed before the assembly that they would not be permitted to ask questions of the speaker.<sup>110</sup> The protesting students placed blue tape over their mouths, stood up, and left the assembly.<sup>111</sup> The tape had a double message that was intended to symbolize the current silencing as well as the historical suppression of spoken Spanish in Arizona public schools.<sup>112</sup> School administrators in the Southwest had used a variety of punishments historically to punish students who spoke Spanish at school, including placing tape over their mouths.<sup>113</sup>

Tom Horne was seated on stage when this occurred.

Horne responded first with an open letter to the Tucson community published in a local newspaper.<sup>114</sup> Without evidence, he blamed the silent student protest on the Mexican American Studies Program and called for its citizens to end ethnic studies at TUSD.<sup>115</sup> When this open letter failed to produce his desired result, Horne turned to the Arizona legislature, testifying before key committees and drafting bills that would empower the state superintendent, a position he occupied, to effectively terminate ethnic studies courses and classes in Arizona's public schools.<sup>116</sup> Though his first two attempts failed, he succeeded on his third try, and the Arizona legislature passed House Bill (“HB”) 2281, which then-Governor Jan Brewer signed into law in May 2010.<sup>117</sup> In January 2012, rather than lose 10% of its funding, TUSD terminated its Mexican American Studies Program.<sup>118</sup>

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. See Patricia Gándara & Gary Orfield, *A Return to the “Mexican Room”: The Segregation of Arizona’s English Learners*, UCLA (July 8, 2010), <https://civilrightsproject.ucla.edu/research/k-12-education/language-minority-students/a-return-to-the-mexican-room-the-segregation-of-arizonas-english-learners-1/gandara-return-mexican-room-2010.pdf>.

113. AIDA HURTADO & PATRICIA GURIN, *CHICANA/O IDENTITY IN A CHANGING U.S. SOCIETY, ¿QUIÉN SOY? ¿QUIÉNES SOMOS?* 93 (2004).

114. *Id.* at 953.

115. *Id.*

116. *Id.* at 954.

117. *Arce v. Douglas*, 793 F.3d 968, 975 (9th Cir. 2015).

118. Marc Lacey, *Rift in Arizona as Latino Class Is Found Illegal*, N.Y. TIMES (Jan. 7, 2011), [https://www.nytimes.com/2011/01/08/us/08ethnic.html?pagewanted=all&\\_r=0](https://www.nytimes.com/2011/01/08/us/08ethnic.html?pagewanted=all&_r=0).

In April 2012, when I found myself in the National Archives in front of that talismanic document, I had just become co-counsel in *Arce v. Douglas*, representing Maya Arce, Nicholas Dominguez, and Korina Lopez, three TUSD students who challenged HB 2281, arguing that it violated the 14th Amendment, its enactment and/or enforcement was motivated by discriminatory intent, and it was overbroad. A month earlier, before my role was formalized, I had taken students in my civil rights clinic to Arizona to help the students' attorney, Richard Martinez, prepare for a summary judgment hearing. The student-plaintiffs had moved for summary judgment on their 1st Amendment claims; the state cross-moved for summary judgment on those claims.<sup>119</sup> Though the students had also alleged an equal protection violation, that claim was not part of the summary judgment proceedings.<sup>120</sup>

We waited nearly a year for the judge to rule.

Though the judge found one portion of the statute to be unconstitutionally overbroad, the judge granted summary judgment to the state on all of the students' 1st Amendment claims.<sup>121</sup> Then, in a move that shocked us, the judge, on his own motion, granted summary judgment to the State on the students' equal protection claims, even though neither the students nor the State had sought summary judgment on these claims.<sup>122</sup>

We were shocked by the judge's ruling because it is unusual, as a matter of both procedural and substantive fairness, to rule on a claim not raised by the parties in a summary judgment proceeding. We were also shocked because we had excellent facts demonstrating selective enforcement. Though Horne had railed against the evils of all ethnic studies programs, and HB 2281 was drafted in general terms that did not single out Mexican American Studies, the only program targeted for enforcement was TUSD's Mexican American Studies, even though TUSD also had programs in Pan Asian Studies, African American Studies, and Native American Studies.<sup>123</sup> Further, one of the chief complaints made by then-Superintendent Horne in testifying before the legislature about the Mexican American Studies Program was its use of work by Paolo Freire, an educational theorist who was also a

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119. *Arce*, 793 F.3d at 974.

120. *Id.*

121. *Id.*

122. *Id.*

123. *González v. Douglas*, 269 F. Supp. 3d 948, 957–58 (D. Ariz. 2017).

Brazilian Marxist.<sup>124</sup> When a legislator brought to Horne’s attention that there was a public charter school in Tucson called the Paolo Freire Freedom School, Horne responded that he was “very concerned”<sup>125</sup> and would look into it, but never did.<sup>126</sup> That school continued operating with no repercussions while TUSD’s Mexican American Studies Program was shut down. Most of the students taking MAS courses were Mexican American; most of the students at the Paolo Freire Freedom School were white.<sup>127</sup>

This looked a lot like *Yick Wo*: a facially neutral law was being applied in a discretionary manner that discriminated against people of color — in this case, Latinx students.

To be fair to the judge, he had seen and heard part of the student plaintiffs’ equal protection arguments because the students had sought a preliminary injunction, arguing that they had a strong likelihood of success on their equal protection claims.<sup>128</sup> And the judge had the authority to grant summary judgment on equal protection if he felt that the issue had been fully and fairly argued. Perhaps the judge felt that he had seen and heard enough.

Our task, though, was to appeal and persuade the Ninth Circuit that our equal protection claims had not been fully and fairly heard and that we deserved an opportunity to present them to the trial court.<sup>129</sup> We also made other First Amendment arguments based on overbreadth and void for vagueness that could have won the case outright.<sup>130</sup> Though we were unable to persuade the panel on those theories, the appellate court reversed the grant of summary judgment on equal protection and viewpoint discrimination.<sup>131</sup> Further, the court directed that a trial was required on equal protection.<sup>132</sup> This was unusual. Typically, appellate courts will remand cases for further proceedings, which would have left it open for the parties to seek summary judgment on equal protection or would have permitted the

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124. *Id.* at 955.

125. Transcript at 100–01, Hearing on H.B. 2281 Before H. Educ. Comm., 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

126. *Id.* at 955–56.

127. *Arce v. Douglas*, 793 F.3d 968, 973 (9th Cir. 2015); *González*, 269 F. Supp. 3d at 955.

128. Plaintiffs’ Second Motion for Preliminary Injunction at 14, *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (No. 4:10-cv-00623-AWT).

129. Plaintiffs-Appellants/Cross-Appellees’ Response and Reply Brief at 12, *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (Nos. 13-15657, 13-15760).

130. *Id.* at 21.

131. *Arce*, 793 F.3d at 990.

132. *Id.*

court, on its own motion, to direct the parties to brief the issue for summary adjudication.

It was now summer 2015, with three years lost because of the improper grant of summary judgment. Discovery in this case had stalled pending the resolution of summary judgment and its appeal, so we were now headed into a very time-intensive and expensive phase of discovery as part of pretrial preparation. In September 2015, we were extremely fortunate when attorneys in the New York office of Weil, Gotshal & Manges joined as co-counsel.<sup>133</sup>

*Yick Wo* was an important case for us to draw parallels to, though I did not fully appreciate how important it was initially. Part of the problem was that the facts in *Yick Wo* were so extreme — all of the more than 200 Chinese laundry operators who sought permission to operate were denied; all of the more than 80 non-Chinese laundry operators, with the exception of the hapless Mrs. Mary Meagles, were granted permission. Here, we had only one affirmative instance of enforcement, coupled with instances of lack of enforcement. Was this going to be enough to persuade the judge that our facts presented a *Yick Wo* style of discriminatory enforcement? And even if we prevailed on that basis, would that be enough to get the statute tossed?

Our clients had pursued both a facial and an as-applied challenge to the law.<sup>134</sup> Success on the facial challenge would have invalidated HB 2281. The as-applied challenge, if successful, would have invalidated the enforcement but would leave the law in place.

It is extremely difficult to invalidate a facially-neutral law on equal protection grounds. Our research had shown that the last time the Supreme Court upheld the invalidation of a facially neutral state statute had been in 1985.<sup>135</sup> In that case, *Hunter v. Underwood*, the Court found that a race-neutral Alabama state constitutional provision adopted in 1901 had been motivated by an intent to disenfranchise black citizens, as evidenced in part by the opening address made by John Knox, president of the state constitutional convention: “And what is it we want to do? Why it is, within the limits imposed by the Federal Constitution, to establish white supremacy in this

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133. Though additional lawyers from the firm worked on the case, the primary attorneys were Weil partners Steve Reiss and James Quinn and associates Luna Ngan Barrington and David Fitzmaurice.

134. See Pls. Pretrial Proposed Findings of Fact and Conclusions of Law ¶ 1, *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017).

135. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

State.”<sup>136</sup> But 1901 was very different from 2010. What could be openly expressed in Alabama then was very different from what legislators express now. Discriminatory motivation has become more difficult to discern and prove today.

The 10-day bench trial took place in June and July 2017. Because of the 4th of July holiday and the judge’s schedule, we had a two-week break in the middle of the trial. One morning in the lead up to the second week of trial, Steve Reiss, the lead trial attorney, looked over at me and with a wry smile on his face said, “This is *Yick Wo*.” One of the Weil associates, David Fitzmaurice, and I looked at each other. I am not sure what David was thinking, but I was thinking, “Yes, we’ve been citing to that case since our appellate briefs. Our case is and isn’t *Yick Wo*, which only gets us so far.” I am not sure why I did not say this aloud. Perhaps it was the Cheshire Cat-like grin on Steve’s face.

It is only two years later, as I reflect on the 14th Amendment that I realize how right he was. I had been reading *Yick Wo* too narrowly, thinking of it as an as-applied selective enforcement challenge, which typically invalidates the discriminatory enforcement action but leaves the statute in place. But a close reading of the case shows that the Court treated it as more than that. The Court understood the challenge as follows:

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face as being within the prohibitions of the Fourteenth Amendment, and, in the alternative, if not so, that they are *void by reason of their administration*, operating unequally so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.<sup>137</sup>

The Court rejected the direct facial challenge, finding that regulating businesses is generally within a municipality’s police powers.<sup>138</sup> But the Court appears to have accepted what might be described as an indirect facial challenge where the ordinances in question might be found to be “void by reason of their administration.”<sup>139</sup> This reading of *Yick Wo* is supported by the Court’s characterization of the chal-

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136. Official Proceedings of the Constitutional Convention of the State of Alabama, May 21, 1901 to September 3, 1901, p. 8 (1940) (quoted in *Hunter*, 471 U.S. at 229).

137. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added).

138. *Id.* at 371.

139. *Id.*

lenged ordinances: “They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent.”<sup>140</sup> The Court adds that “[t]he power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint.”<sup>141</sup>

This notion of an indirect facial challenge is supported by the Court’s discussion of *Yick Wo* 13 years later. The Court described how it had come to the conclusion that the San Francisco laundry ordinance was “adjudged void”: “[t]his court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished.”<sup>142</sup>

Though we may not have consciously developed our trial strategy to follow *Yick Wo*, in retrospect, we did precisely that. We asked the court to look beyond the mere letter of HB 2281 to the conditions that existed in Tucson and throughout Arizona. Those conditions showed that an arbitrary classification, disfavoring Latinx students, was intended and accomplished despite the stated policy of the statute (which the student plaintiffs did not challenge) “that public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people.”<sup>143</sup>

Intent with regard to enactment, though, is extremely difficult to prove. Other than John Huppenthal, who played a dual role as a state senator who supported and voted in favor of the bill and as state superintendent of public instruction who later enforced the statute, we did not call legislators to testify about their state of mind when they enacted HB 2281. Other than providing in briefs to the court some of what they expressed in legislative hearings, it would have been foolhardy to call legislators to testify given the scope of legislative privilege. Instead, we had to get at enactment inferentially. *Yick Wo*’s inferential approach is consistent with the modern Court’s inferential

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140. *Id.* at 366.

141. *Id.* at 366–67.

142. *Atchinson, Topeka & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96, 105 (1899) (discussing *Yick Wo*).

143. H.B. 2281, 54 Leg., 2nd Reg. Sess. (Az. 2017).

approach as expressed in the much more often cited *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.<sup>144</sup>

Initially as drafted, HB 2281 gave enforcement authority to the state superintendent of public instruction.<sup>145</sup> One lawmaker, concerned that this gave too much unconstrained power to one individual, amended the bill to instead give enforcement authority to the state board of education.<sup>146</sup> Huppenthal provided a key amendment that the state board and the state superintendent had co-equal enforcement power.<sup>147</sup> Then, he added an amendment that delayed when the statute would go into effect until the start of the next calendar year.<sup>148</sup> Huppenthal was already running for the office of state superintendent when he supplied these amendments.<sup>149</sup> He won that elected office, and as state superintendent, he found TUSD in violation of the statute and imposed a fine resulting in a loss to the district of 10 percent of state funding until TUSD eliminated the Mexican American Studies Program.<sup>150</sup>

There is a telling phrase from *Yick Wo* that aptly describes what we were trying to show the judge about the Arizona statute: “In fact, an Ordinance which clothes a single individual with such power, hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void.”<sup>151</sup> It also turned out that the individual clothed with this power in Arizona had, during his time as state senator and as state superintendent, been blogging anonymously, saying such things as:

No Spanish radio stations, no Spanish billboards, no Spanish TV stations, no Spanish newspapers. This is America, speak English.

The rejection of American values and the embracement of the values of Mexico in La Raza classrooms are the rejection of success and the embracement of failure.

I don't mind them selling Mexican food as long as the menus are mostly in English.<sup>152</sup>

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144. Vill. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

145. González v. Douglas, 269 F. Supp. 3d 948, 955 (D. Ariz. 2017).

146. *Id.* at 955

147. *Id.* at 957.

148. *Id.* at 956.

149. *Id.*

150. *Id.* at 958, 962.

151. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (quoting *City of Baltimore v. Radecke*, 49 Md. 217, 231 (1878) (emphasis in original)).

152. González v. Douglas, 269 F. Supp. 3d 948, 957–58 (D. Ariz. 2017) (citations omitted).

Taken together, though there was no direct evidence that a majority of the legislators harbored animus against Mexican Americans when they voted for HB 2281, the evidence permitted the court to look beyond the mere letter of the statute to the condition of things as they existed in Tucson and throughout Arizona to conclude that, under the guise of regulation, an arbitrary classification was intended and accomplished.<sup>153</sup> The statute gave Superintendent Huppenthal a license to discriminate.<sup>154</sup> The statute fell outside of the domain of law. The judge found that the statute had been enacted and enforced in violation of our clients' 14th Amendment equal protection rights.<sup>155</sup>

Steve Reiss was right. Our case was *Yick Wo*. Too often, *Yick Wo* operates at the margins as an exceptional case because it is thought to present such a stark factual pattern where impact alone is determinative.<sup>156</sup> Instead, it should be more prominent in our 14th Amendment equal protection playbook that permits full consideration of discriminatory enforcement located within the local and historical context that supports the ultimate conclusion (and remedy) that the challenged law is void by reason of administration.

#### THE 14TH AMENDMENT AND THE NEXT GENERATION OF LAWYERS

Litigating the 14th Amendment gave me a newfound appreciation for the amendment. It took me from armchair critic to active engagement. This experience has made me wonder how we can make the 14th Amendment live for our students. Perhaps we can draw our inspiration from how Charles Hamilton Houston made the 14th Amendment come alive for students such as Thurgood Marshall.

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153. *Id.* at 966–67 (finding that MAS had been implemented as part of a remedial effort to redress de jure discrimination in the school district; “the statute was enacted to target a single educational program in use in a single school district in Arizona” which was “probative of discriminatory intent”; finding that several statements by legislators and supporters of the bill reflected racial animus; and finding that “Horne, Huppenthal, and other officials used code words to refer to Mexican Americans in a derogatory way”).

154. One of Huppenthal's amendment restored enforcement authority to the superintendent, a position he was seeking; the other delayed the effective date of the statute so that if he won that office, he would have enforcement authority. After he took office as superintendent, he then proceeded to act on his animus. *Id.* at 968 (discussing Huppenthal's blog comments as providing “the strongest evidence that racial animus motivated the enforcement” of the statute).

155. *Id.* at 972.

156. *See* *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that cases such as *Yick Wo* are rare where impact alone is determinative).

The film *Simple Justice*<sup>157</sup> opens with a young Marshall blowing off steam with fellow classmates who are about to begin their studies at Howard Law School. As they are playing dice, Charles Hamilton Houston walks by and expresses his displeasure with this activity. As he walks away, Marshall asks who that was, and he is told that it is the dean of the law school and that his nickname is “Iron Shoes.” The nickname is never really explained, but the viewer is left to guess that it refers to Dean Houston being a difficult taskmaster.<sup>158</sup>

The scene then cuts to the classroom, with Marshall seated in the front. Dean Houston asks Marshall where he is from. He answers, “Baltimore,” then repeats his answer rolling the “o” and “r” in a working-class Baltimore accent.<sup>159</sup> Though it gets laughs from a number of his classmates, Dean Houston is not amused. Houston asks, “Why are you paying, Mr. Marshall, to attend our little Howard Law School and not going tuition-free to the prestigious University of Maryland?”<sup>160</sup> Marshall responds, sarcastically, “I happen to be a Negro.”<sup>161</sup> After a little more back and forth, Dean Houston asks why Negroes do not attend Maryland.<sup>162</sup> When students are unable to answer, perhaps because they perceived it as an unchangeable social fact that, as articulated by Marshall, “Negroes don’t attend Maryland,” and which therefore must be accepted, Houston walks to the chalkboard, on which is written “*Plessy v. Ferguson*”<sup>163</sup> and underlines “*Plessy*.” After a brief colloquy with various students about the case, Dean Houston states:

*Plessy*, Mr. Hill, is why you ride from Richmond, Virginia, in a racially segregated train. *Plessy*, Mr. Durham, is why no one in this room can eat in most of the restaurants here, in the capital of the world’s greatest democracy. And *Plessy*, Mr. Marshall, is the reason it is against the law in 17 states for black children to go to school with white children.

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157. *SIMPLE JUSTICE* (New Images Productions, Inc. 1993) (based on the first edition of RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976)).

158. Other nicknames for Dean Houston included “iron pants” and “cement shoes,” “which suggested the same image of a stern taskmaster.” Jack Greenberg, *In Tribute: Charles Hamilton Houston*, 111 *HARV. L. REV.* 2161, 2161 (1998).

159. *SIMPLE JUSTICE*, *supra* note 157.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* This was a reference to *Plessy v. Ferguson*, which enshrined the doctrine of “separate but equal.” See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

There are two kinds of lawyers, gentlemen. There are my kind, and there are parasites on society. My kind of lawyer is going to be a social engineer, my kind of lawyer is going to be a fighter for social change. My kind of lawyer is going to find out everything there is to know about *Plessy*, because *Plessy* is a dragon, gentlemen, and my kind of lawyer is going to go out and slay it. That's why you're here, Mr. Marshall, or it had better be, and if it's not, you better pack up and leave, because you will not make it.<sup>164</sup>

Later classroom scenes show students arguing the ins and outs of the 14th Amendment and what it says or does not say about the doctrine of separate but equal enshrined in *Plessy*. When one student refers to that amendment but is unable to recite it, Marshall comes to the rescue and paraphrases, "No state shall make or enforce any law which abridges the privileges of citizens of the United States; nor shall any State deny to any person the equal protection of the laws."<sup>165</sup> You can see Houston start warming to Marshall. Likewise, you can see Marshall blossom.

Though most law students are familiar with Thurgood Marshall and have at least a passing awareness of his role in *Brown*<sup>166</sup> and his role as the first African American to sit on the Supreme Court, most know nothing of Charles Hamilton Houston.<sup>167</sup> Those who do know of Houston know that he is rightfully credited with formulating the legal strategy to dismantle Jim Crow segregation,<sup>168</sup> but even this does not capture the depth of Houston's social justice vision. Houston knew that winning in the courts was not enough. He appreciated that he needed to have a cadre of black civil rights attorneys to carry out the fight for equality with him and who would carry on the fight after

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164. SIMPLE JUSTICE, *supra* note 157.

165. *Id.* The full text of Section 1 of the 14th Amendment states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1, cl. 2-3.

166. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

167. Judge A. Leon Higginbotham, Jr., notes that "[m]ost colleges and law schools give students no exposure to the black heroes in the law who built the foundation for the later success of blacks in the 1960s, 1970s, and 1980s." FOREWORD, GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1984).

168. *E.g.*, *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (challenging the jury panel on the basis that black citizens were excluded from jury service); *see also* *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that it was unconstitutional for law schools to reject students on the basis of race).

him.<sup>169</sup> When he saw that schools were not producing this cadre of black civil rights attorneys,<sup>170</sup> Houston decided to transform Howard Law School so that its graduates would be equipped not only to enter private practice right away, because racism made clerkship opportunities scarce, but also to ensure that its graduates would be trained consistent with his vision:

[The] Negro lawyer must be trained as a social engineer and group interpreter. Due to the Negro's social and political condition . . . the Negro lawyer must be prepared to anticipate, guide and interpret his group advancement . . . [Moreover, he must act as] business adviser . . . for the protection of the scattered resources possessed or controlled by the group . . . He must provide more ways and means for holding within the group the income now flowing through it.<sup>171</sup>

Houston, as Vice-Dean of Howard Law School, worked tirelessly in the classroom and as an administrator to bring about this vision.<sup>172</sup> It was in this capacity that Houston encountered Thurgood Marshall. It was in this capacity that he molded Marshall.

It would be hubris for me to think that the Korematsu Center for Law and Equality, founded in 2009 at the Seattle University School of Law, could ever hope to accomplish what Charles Hamilton Houston did at Howard Law School. Nevertheless, what Houston accomplished provides a model, and the Korematsu Center draws inspiration and lessons from Houston, especially through the Korematsu Center's Civil Rights Clinic.

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169. Biographer Genna Rae McNeil writes that he gained an appreciation during law school “that if it were not for teachers and scholars, the law might never be more than precedent — judgments confirming the correctness of earlier judgments.” MCNEIL, *supra* note 167, at 63.

170. Houston sought to continue his law studies to get a Doctor of Juridical Science degree (J.S.D.) so that he would be able to fulfill his vision:

My reasons for desiring graduate work are both personal and civic . . . a deep desire for further study in the history of the law and comparative jurisprudence . . . [and the belief that] there must be Negro lawyers in every community . . . the great majority [of which] must come from Negro schools . . . [where] the training will be in the hands of Negro teachers. It is to the best interest of the United States . . . to provide the best teachers possible.

*Id.* at 48.

171. *Id.* at 69 (quoting Charles Hamilton Houston, “Personal Observations on the Summary of Studies in Legal Education as Applied to the Howard University School of Law”).

172. Leland Ware credits Houston for transforming Howard Law School “from an unaccredited evening program to a laboratory for Civil Rights litigation.” Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930–1950*, 52 MERCER L. REV. 631, 633 (2001); *see also* Robert L. Carter, *A Tribute to Thurgood Marshall*, 105 HARV. L. REV. 33, 36 (1991) (describing Thurgood Marshall's legal education, Judge Carter characterized “[t]he overriding theory of legal education at Howard during those years was that the United States Constitution — in particular, the Civil War Amendments — was a powerful force, heretofore virtually untapped, that should be used for social engineering in race relations.”).

Launched in 2012, the Civil Rights Clinic was intended, initially, to be a clinic that focused on amicus advocacy.<sup>173</sup> The reasons for this were manifold. Amicus advocacy is particularly well-suited to a one-semester clinic, because, with careful case selection, students can begin and end a project, drafting and filing an amicus brief, in the course of one semester. Another reason is that amicus advocacy is particularly well-suited for academic settings because there can be greater freedom in presenting historical context, social science, and arguments that may allow a court to appreciate the consequences of its decision that extend beyond how it affects the immediate litigants before it.<sup>174</sup>

Related to the last point is that amicus advocacy can have the beneficial effect of democratizing the courts.<sup>175</sup> In a sense, courts are a supremely antidemocratic institution. Litigants appear before a court and the tribunal may issue a ruling that affects countless others aside from the litigants. These countless others, unless they are able to intervene,<sup>176</sup> have no voice in the litigation. Amicus briefs, though, offer a way for the voiceless to have a say in the litigation.<sup>177</sup>

An amicus curiae brief, formally a “friend of the court” brief, can serve various functions. They can help judge and justices appreciate the impact of their decisions; they can provide valuable contextual information in the form of so-called Brandeis briefs;<sup>178</sup> and they can give voice for those who are otherwise shut out of the particular litigation.<sup>179</sup>

Students working in the clinic are able to contribute in ways that bring the law to life. In the clinic, we teach our students to be social engineers in the sense espoused by Houston: “A social engineer was a

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173. *Ethnic studies case heads to trial in Tucson*, SEATTLE UNIV. SCH. L. (June 21, 2017), <https://law.seattleu.edu/newsroom/2017-news/ethnic-studies-case-heads-to-trial-in-tucson>.

174. See Robert S. Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 STANFORD J. C.R. & C. L. 197 (2011); Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 UCLA ASIAN PAC. AM. L. J. 22 (2009); Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FL. ST. U. L. REV. 315 (2008).

175. See Chang & Wang, *supra* note 174.

176. See Fed. R. Civ. P. 24 (Intervention).

177. See also Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from the Chaff*, 106 GEO. L.J. ONLINE 136 (2017).

178. A “Brandeis brief” refers to a brief that relies on non-legal data, such as scientific or social science information, rather than legal citations. Future Supreme Court Justice Louis Brandeis submitted the first of such briefs as a lawyer before the Court in *Muller v. Oregon*, 208 U.S. 412 (1908), a case involving the constitutionality of limiting hours for female laundry workers.

179. See Chang & Wang, *supra* note 174; Bruhl & Feldman, *supra* note 177 at 137; Garcia, *supra* note 174 at 342; see also Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, 46 COLORADO LAWYER 23 (April 2017).

highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of ‘problems of . . . local communities’ and in ‘bettering conditions of the underprivileged citizens.’”<sup>180</sup>

Houston fully understood the challenges to using the 14th Amendment to overcome segregation. Nevertheless, he persisted: “As he explained to his students, discrimination, injustice, and the denial of full citizenship rights and opportunities on the basis of race and a background of slavery could be challenged within the context of the Constitution if it were creatively, innovatively interpreted and used.”<sup>181</sup> The film *Simple Justice* shows him drilling his students incessantly on the ins and outs of the 14th Amendment.<sup>182</sup>

This bore fruit when his former student, Thurgood Marshall, with his LDF team, persuaded the Court that *Plessy v. Ferguson* was wrongly decided.

#### CONCLUSION

Today, we can draw inspiration from Houston. We can make the 14th Amendment come alive for our students by showing them that despite the roadblocks placed by courts to limit the reach of the 14th Amendment, the amendment and its guarantees remain vibrant, vital. As it was in Houston’s day, the 14th Amendment is what we make of it.

We ought not, we cannot, give up on the 14th Amendment.

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180. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84–85 (2011).

181. *Id.* at 84.

182. *SIMPLE JUSTICE*, *supra* note 157.



# When True Colors Come Out: Pretrial Reforms, Judicial Bias, and the Danger of Increased Discretion

ZAMIR BEN-DAN\*

Introduction .....	84
I. The Criminal Justice Reforms .....	86
A. Bail Reform .....	88
1. The Reforms.....	89
2. The Rationale .....	90
B. Discovery Reform .....	96
1. The Reforms.....	97
2. The Rationale .....	99
C. Speedy Trial .....	101
1. The Reforms.....	102
2. The Rationale .....	103
II. Judicial Reaction to Criminal Justice Reforms .....	107
A. Public Denunciations of the New Bail Laws .....	108
B. Open Defiance of the New Bail Laws .....	111
C. Misinterpreting and Distorting the New Laws .....	113
1. Bail Reform Laws .....	113
a. Exploiting Loopholes, Technicalities, and Ambiguities.....	113
b. Eliminating Hearings for Modifying Securing Orders .....	117
2. Discovery Reform Laws .....	119
a. Improperly Granting Protective Orders.....	120

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b.	Granting Improper Protective Orders .....	123
c.	Compliance with Discovery Obligations ....	125
3.	Speedy Trial Reform Laws.....	131
a.	Excluding the First Fifteen Days of January 2020 (or of Any Post-2019 Case) .....	131
b.	Validating Invalid Certificates of Compliance for 30.30 Purposes .....	134
c.	Equating Discovery Compliance with Trial Readiness .....	138
III.	The Danger of Increased Judicial Discretion.....	139
A.	Judicial Discretion Is the Problem .....	140
B.	The Judicial Response to Reforms Demonstrates That Decreased Discretion Is Necessary for the Purposes of Reform to Be Fulfilled.....	145
1.	Preventative Detention Is Inconsistent with Reform .....	145
2.	How Preventative Detention Might Look .....	148
C.	Increased Judicial Discretion Lies at the Crux of the Reform Rollbacks Enacted in April 2020 .....	149
1.	Bail Reform Rollbacks .....	151
2.	Discovery and Speedy Trial Reform Modifications .....	154
3.	The Current State of Reform .....	157
	Conclusion .....	159

## INTRODUCTION

On April 1, 2019, New York passed sweeping legislation designed to reform the administration of criminal justice in the state.<sup>1</sup> The legislation brought major changes in the areas of bail and discovery. Concerning bail, the legislature limited judicial discretion to set bail on a host of offenses and created a general presumption of release.<sup>2</sup> The state also greatly expanded the list of documents and materials that the defense would be entitled to in a given case and set firm time limits for the prosecution to turn over said documents and materials.<sup>3</sup>

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1. Michael Rempel & Krystal Rodriguez, *Bail Reform in New York: Legislative Provisions and Implications for New York City*, CTR. FOR CT. INNOVATION 1 (Apr. 2019), [https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail\\_Reform\\_NY\\_full\\_0.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf).

2. *Id.*

3. Rebecca C. Lewis, *What to Know About New York's New Discovery Laws*, CITY & STATE N.Y. (Feb. 10, 2020), <https://www.cityandstateny.com/articles/policy/criminal-justice/what-know-about-new-yorks-new-discovery-laws.html>.

On a lesser note, the legislation also modified state speedy trial law: the prosecution is now required to turn over all discovery in a given case, and certify that they have fully complied with their newfound discovery obligations, before they can declare readiness for trial.<sup>4</sup> The legislature's reason for passing the reform was to make what was an unfair criminal justice process fairer for persons charged with crimes.<sup>5</sup> The new laws took effect on January 1, 2020.<sup>6</sup>

Within days of the new laws being enacted, a coalition of powerful players began to form, determined to force a repeal of the legislation.<sup>7</sup> Police departments and unions worked overtime to paint the laws as having created a gateway for rampant crime.<sup>8</sup> Prosecutors across the state complained about the laws, claiming they were bad for public safety and very burdensome to comply with.<sup>9</sup> Major New York media sought and published stories supporting the laws' naysayers and continuously amplified the voice of detractors.<sup>10</sup> Republicans seized upon the backlash created by this coalition and piled on with the criticisms, hoping to increase their electoral prospects for November 2020.<sup>11</sup> While these opponents to the reforms have been loud and visible, there is one set of opponents that have not been so vocal, but are arguably the most dangerous enemies of criminal justice reform: criminal trial court judges in New York State.

This article examines the role that criminal trial court judges have played not just in opposing the reforms, but in stymying them as well. Some judges have publicly denounced the laws; a couple other judges have openly defied them.<sup>12</sup> By far, however, trial court judges have waged their battle against the reforms inside the courtroom, routinely flouting the purposes and spirit of the laws while bending over back-

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4. FWD, *New York Passed Historic Reforms to its Bail, Discovery and Speedy Trial Laws*, <https://www.fwd.us/news/ny-session-impact/> (last visited Sept. 13, 2020).

5. Lewis, *supra* note 3.

6. Rempel & Rodriguez, *supra* note 1.

7. Taryn Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

8. *Id.*

9. Ashley Southall & Jesse McKinley, *Spike in Crime Inflames Debate Over Bail Law in New York*, N.Y. TIMES, (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/nyregion/crime-stats-nyc-bail-reform.html>.

10. Jesse McKinley, *The Bail Reform Backlash That Has Democrats at War*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html>.

11. *Id.*

12. David Brand, *"Reform the Reform" – Judges Call for Changes to State Bail Law*, BROOKLYN DAILY EAGLE (Feb. 7, 2020), <https://brooklyneagle.com/articles/2020/02/07/reform-the-reform-judges-call-for-changes-to-state-bail-law/>.

wards to rule against defendants.<sup>13</sup> This article examines some of the decisions of trial court judges regarding the new laws and shows how said decisions reveal a judicial bias against defendants, most of whom are poor people of color. Some of the more offensive decisions will be examined in depth.<sup>14</sup> While judges might profess to be for “sensible reform,” this article argues that in forcefully opposing the reforms, criminal trial court judges have ironically made the case for racial and social justice advocates that they cannot be trusted to be forces of meaningful change.<sup>15</sup> Racial and social justice in New York State (and in America) necessarily requires the limitation of judicial discretion in decisions regarding bail and other related matters. Tragically, the newest amendments to all three reforms that New York passed in April 2020 significantly increases judicial discretion and will consequently sabotage the whole point of the reforms.

This article will be divided into four parts. Part I will discuss the reforms New York State enacted in April 2019, as well as the rationales for the reforms. Certain portions of these reforms will no longer be good law by the time this article is published; however, the reforms will be detailed as if they were still current. Part II will examine the reactions to the reforms by the criminal court judiciary, both inside and outside of the courtroom. Part III will argue that judicial discretion is the often-unacknowledged enemy of reform, and concludes from the examination in Part II that the judicial response to pretrial reforms proves they cannot be granted increased discretion in bail determinations if true reform is to occur. This part will also survey the expansion of judicial discretion by the rollbacks of the short-lived reforms enacted in April 2020, and will illustrate how this expansion will greatly undermine the reforms and resurrect the problems the reforms were designed to solve. Part IV will conclude the article.

## I. THE CRIMINAL JUSTICE REFORMS

Over the past decade, legislative bodies across the United States have heeded increased cries for criminal justice reform.<sup>16</sup> For exam-

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13. *Id.*

14. All decisions examined in this article were issued during the first three months of 2020.

15. The author recognizes that not all judges are opposed to reform, but there are enough opponents in the judiciary to warrant speaking generally.

16. Zach Williams, *The Democrats Working to Reform Bail Reform*, CITY & STATE N.Y. (Feb. 11, 2020), <https://www.cityandstateny.com/articles/policy/criminal-justice/democrats-working-reform-bail-reform.html>; *Criminal Justice Reform: A Curated Collection of Links*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/records/622-criminal-justice-reform>.

ple, California has enacted a number of measures purportedly designed to make the administration of justice more equitable for accused persons, including the elimination of cash bail, the reduction of certain nonviolent crimes from felony to misdemeanor classification, and the end of mandatory minimums for certain narcotics offenses.<sup>17</sup> The state of New Jersey passed legislation that eliminated the use of cash bail throughout the state and created a presumption of release for all accused persons except those facing potential life sentences.<sup>18</sup> In December 2018, the federal government passed criminal justice reform legislation that would modify and ease sentences for drug offenders, expand early release programs, and increase job training and other initiatives designed to reduce recidivism, among other things.<sup>19</sup>

On April 1, 2019, New York enacted legislation that brought significant changes to the administration of criminal justice in the state.<sup>20</sup> These reforms were one of the latest in a string of criminal justice laws passed by the state. Two years prior, New York passed legislation that required law enforcement to videotape interrogations of people accused of certain violent crimes, and strengthened identification procedures with an aim to reduce misidentifications.<sup>21</sup> Also in 2017, New York passed the Raise the Age law, ending the practice of automatically charging 16- and 17-year-olds as adults.<sup>22</sup> And nearly two months after the passage of the criminal pretrial reforms, New York amended its weapons possession law, abolishing the prohibition

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17. Tim Arango, *In California, Criminal Justice Reform Offers a Lesson for the Nation*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/us/california-incarceration-reduction-penalties.html>; *Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime, and Sentencing Reform*, OFF. GOVERNOR GAVIN NEWSOM (Oct. 8, 2019), <https://www.gov.ca.gov/2019/10/08/governor-newsom-signs-criminal-justice-bills-to-support-reentry-victims-of-crime-and-sentencing-reform/>.

18. *Pretrial Justice Reform*, ACLU N.J., <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform>.

19. Nicholas Fandos, *Senate Passes Bipartisan Criminal Reform Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html>; *The FIRST STEP Act: What & Why*, REHAB. ENABLES DREAMS, <https://stoprecidivism.org/the-first-step-act-what-why/>.

20. Rempel & Rodriguez, *supra* note 1, at 1.

21. *Governor Cuomo Announces New Law Requiring Video Recorded Interrogations is Now in Effect*, N.Y. ST.: GOVERNOR ANDREW M. CUOMO (Apr. 3, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-law-requiring-video-recorded-interrogations-now-effect>.

22. Office of Justice Initiatives, *Raise the Age*, N.Y. CTS., <http://ww2.nycourts.gov/ip/oji/raisetheage.shtml>; Natasha Acrie, *17-Year-Olds Will Officially No Longer be Tried as Adults in New York*, SPECTRUM NEWS N.Y. 1 (Oct. 1, 2019, 8:45 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2019/10/02/raise-the-age-new-york-last-phase-for-17-year-olds-goes-into-effect>.

against gravity knife possession<sup>23</sup> and ending the unjust prosecutions that came with it.<sup>24</sup>

The latest reforms passed by New York's legislature and signed into law by the governor brought drastic changes to bail practice and discovery rules. They also worked a significant change into state speedy trial practice. Each of these changes will be explored in turn.

#### A. Bail Reform

New York's new legislation brought major changes to its bail practice. Under the prior laws, judges had wide latitude to determine whether or not to release accused persons or to set bail.<sup>25</sup> Up until 2016, persons charged with crimes in New York City would either be released on their own recognizance, have bail set, or be remanded.<sup>26</sup> Release under supervision became an alternative securing order in 2016.<sup>27</sup> Judges could set bail on any misdemeanor or felony, or even violations and traffic infractions.<sup>28</sup> In setting bail, the court had to set at least two out of nine possible forms of bail.<sup>29</sup> In considering whether or not to set bail, the court was required to consider the following factors: a) the accused person's character, reputation, habits and mental condition; b) the person's employment and financial resources; c) the person's family ties and the length of the person's residence in the community, if any; d) the person's criminal record, if any; e) any prior adjudications as a juvenile offender or a youthful offender; f) any previous history of returning to court; g) the weight of the evidence against the person; and h) the sentence which may be imposed upon conviction.<sup>30</sup> Additionally, courts were empowered to order bench warrants immediately upon a person's failure to appear for a scheduled court date.<sup>31</sup>

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23. STATE OF N.Y. EXECUTIVE CHAMBER, Albany 12224, Memorandum from Governor Andrew Cuomo, (May 30, 2019), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2019\\_Chapter\\_34.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2019_Chapter_34.pdf) (approving of the Bill).

24. Zamir Ben-Dan, *Law and Order Without Justice: A Case Study of Gravity Knife Legislation in New York City*, 21 CUNY L. REV. 177 (2018).

25. N.Y. CRIM. PROC. LAW §§ 510.10, 510.30(1) (repealed 2019).

26. *Id.* § 510.40(1) (repealed 2019).

27. Ted Alcorn, *Jail or Bail? There's a New Option*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/nyregion/rikers-supervised-release-bail.html>.

28. CRIM. PROC. § 510.30(1) (repealed 2019).

29. *Id.* § 520.10 (repealed 2019).

30. *Id.* § 510.30(2)(a) (repealed 2019).

31. *Id.* § 510.50 (repealed 2019).

## 1. The Reforms

The 2019 bail laws impose significant restrictions on the ability to set bail at the initial arraignment. Under these laws, courts are precluded from setting cash bail on a host of offenses at arraignments.<sup>32</sup> Aside from sex offenses and domestic violence contempt, all persons charged with misdemeanors must be released, either on their own recognizance or under non-monetary conditions.<sup>33</sup> With certain exceptions, persons accused of nonviolent felonies must also be released.<sup>34</sup> Among violent felonies, those charged with either robbery in the second degree where someone present aided in the crime, or burglary in the second degree where the building allegedly burglarized is residential, cannot have monetary bail imposed either.<sup>35</sup> With qualifying offenses, courts must set at least three different forms of bail, one of which must be either a partially secured bond or an unsecured bond.<sup>36</sup> With non-qualifying offenses, the new laws also create a presumption of release on recognizance; and courts wishing to set additional conditions on release must set forth the reasons why they imposed said conditions either in writing or on the record.<sup>37</sup> Non-monetary conditions can include electronic monitoring if certain criteria are met.<sup>38</sup>

With regard to warrants, courts can no longer immediately issue a warrant absent a finding that the accused person willfully failed to appear; the court must provide at least forty-eight hours' notice to the defendant to give that person an opportunity to appear voluntarily.<sup>39</sup> After arraignments, courts are allowed to change securing orders under carefully prescribed circumstances.<sup>40</sup> As an example, a released person that has persistently and willfully failed to appear in court after being notified of their scheduled appearances can have bail set on their case.<sup>41</sup> As another example, a person who has committed a felony while charged with a felony can also have bail set on their case.<sup>42</sup> However, the existence of those prescribed circumstances must be

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32. CRIM. PROC. § 510.10(4) (Consol. 2019).

33. *Id.*

34. *Id.*

35. *Id.* § 510.10(4)(a).

36. *Id.* § 520.10(2)(b).

37. *Id.* § 530.20(1).

38. *Id.* § 510.40(4).

39. *Id.* § 510.50(2).

40. *Id.* § 530.60.

41. *Id.* § 530.60(2)(b)(i).

42. *Id.* § 530.60(2)(b)(iv).

proven by clear and convincing evidence.<sup>43</sup> Further, before changing the securing order in these circumstances, the court must hold a hearing and receive relevant evidence and testimony.<sup>44</sup>

The new laws also modified the bail factors to be considered. Now, the factors courts can consider in deciding whether a securing order other than release on recognizance is necessary are: a) the accused person's activities and history; b) the charges facing the person; c) any existing criminal conviction record; d) any prior adjudications as a juvenile offender or a youthful offender; e) any previous record with respect to flight to avoid criminal prosecution; and, where the person is charged with a qualifying offense, f) their individual financial circumstances and ability to post cash bail without causing undue hardship.<sup>45</sup> While neither the old laws nor the new laws had a bail factor of "dangerousness," the new laws place the focus on ensuring a defendant's return to court; and unlike the old laws, the bail factors here are not exhaustive in determining whether a person poses a risk of flight to avoid prosecution.<sup>46</sup>

## 2. The Rationale

The legislative motivation for enacting bail reform was to put an end to pretrial punishment for persons charged with crimes. Pretrial detention is an unnecessary securing order in the majority of criminal cases in the state, because most people pose no flight risk. In New York City for example, over 85% of persons who are released with a criminal case pending return to court to answer to the charges.<sup>47</sup> Further, contrary to how publications such as the New York Post might portray it,<sup>48</sup> most clients who are at liberty during their respective criminal actions do not get rearrested on new charges, let alone on felonies.<sup>49</sup> And even among clients who are rearrested more than

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43. *Id.* § 530.60(2)(c).

44. *Id.*

45. *Id.* § 510.30(1).

46. *Id.*

47. See Scott Hechinger, *Bail Reform is Already Working: Look Beyond the Breathless Fearmongering*, N.Y. DAILY NEWS (Jan. 22, 2020, 3:00 PM), <https://www.nydailynews.com/opinion/ny-oped-bail-reform-is-already-working-20200122-yyj35x7v4rc6te5djpprmnseye-story.html>.

48. Search of "Bail Reform", N.Y. POST, <https://nypost.com/search/bail@eform/>.

49. SHARON LANSING, DIV. CRIM. JUST. SERV., OFF. OF JUST. RESEARCH AND PERFORMANCE, NEW YORK STATE COMPAS-PROBATION RISK AND NEED ASSESSMENT STUDY: EXAMINING THE RECIDIVISM SCALE'S EFFECTIVENESS AND PREDICTIVE ACCURACY (2012), [https://www.criminaljustice.ny.gov/crimnet/ojsa/opca/compas\\_probation\\_report\\_2012.pdf](https://www.criminaljustice.ny.gov/crimnet/ojsa/opca/compas_probation_report_2012.pdf); OFF. OF THE CRIM. JUST. COORDINATOR, CRIMINAL JUSTICE INDICATOR REPORT 5-7 (2013), [http://www.nyc.gov/html/om/pdf/2013/criminal\\_justice\\_indicator\\_report\\_summer\\_2013.pdf](http://www.nyc.gov/html/om/pdf/2013/criminal_justice_indicator_report_summer_2013.pdf); see Qudsia

once with pending cases, most of those clients are rearrested for non-violent offenses.<sup>50</sup> Because accused persons are legally innocent until proven guilty, pretrial detention is supposed to be the exception and not the norm.<sup>51</sup>

For a long time in New York, however, this was not the case. At the time the reforms were enacted, and for decades prior, the overwhelming majority of people sitting behind bars in New York State were innocent persons awaiting trial; and most of them were detained solely because they could not afford to pay bail.<sup>52</sup> Bail as pretrial punishment for impoverished New Yorkers has been a problem for decades.<sup>53</sup> In 1964, then-attorney general Robert F. Kennedy acknowledged the injustice that poor persons faced in not being able to “pay for their freedom” despite having been proven guilty of no offense.<sup>54</sup> The recognition of this problem spawned a movement to change bail practices in New York and resulted in the passage of the prior bail laws in 1970.<sup>55</sup> The prior laws were designed to decrease the number of people being held pretrial by establishing less burdensome means to ensure the return to court of accused persons who might pose a flight risk.<sup>56</sup> The statute allowed for the imposition of nine different forms of bail and trusted judges to exercise their discretion in a manner consistent with the aims of the statute.<sup>57</sup>

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Siddiqi, *Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset*, N.Y.C. CRIM. JUST. AGENCY (Jan. 2009), <https://www.nycja.org/assets/LikelihoodofFTAforRearrest09.pdf>; Richard R. Peterson, *Pretrial Rearrests Among Domestic Violence Defendants in New York City*, NAT'L INST. OF CORRECTIONS (2008), <https://nicic.gov/sites/default/files/023002.pdf>.

50. Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POL'Y INITIATIVE (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html>.

51. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

52. Nathan Tempey, *Half the People Awaiting Trial in NYC Jails are There Because They Can't Afford Bail*, GOTHAMIST (May 18, 2017, 3:55 PM), <https://gothamist.com/news/half-the-people-awaiting-trial-in-nyc-jails-are-there-because-they-cant-afford-bail>.

53. Jesse McKinley, Alan Feuer & Luis Ferré-Sadurní, *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES (Dec. 31, 2019, 8:00 AM), <https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html>.

54. Kerry Kennedy, *How to Honor Civil Rights Leaders*, THE HILL (Aug. 5, 2020, 10:00 AM), <https://thehill.com/opinion/civil-rights/510624-how-to-honor-civil-rights-leaders>.

55. *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 3–4 (2019) (statement of Sakira Cook, Director, Justice Reform Program) [hereinafter *Director Cook Statement*].

56. *Id.*

57. *See* Bail Reform Act of 1966, 18 U.S.C.A. § 3157 (West 1966).

Unfortunately, the prior laws did not accomplish their intended goals.<sup>58</sup> The reason the prior laws were ineffective is because of the level of discretion granted to judges when making determinations regarding securing orders.<sup>59</sup> Judicial discretion led to the consistent use of the most restrictive forms of bail, despite evidence that less restrictive forms were equally effective in securing the return to court of accused persons.<sup>60</sup> Judges were not required by the bail statutes to consider whether or not a person could pay bail; and they seldom considered it.<sup>61</sup> Additionally, although legally precluded from considering “dangerousness” in bail determinations, judges nonetheless were “already factoring public safety into the pretrial calculus by setting extremely high bail as a means of imposing detention.”<sup>62</sup> Therefore, the problem the legislature intended to solve was not fixed; it persisted and, in certain respects, grew.<sup>63</sup> Thousands of New Yorkers, most of which were facing misdemeanor or non-violent felony charges, continued to languish in jail on low amounts of bail.<sup>64</sup> Outside of New York City, pretrial detention populations increased in the past decade;<sup>65</sup> in fact, most pretrial detainees in New York are jailed in counties outside of New York City.<sup>66</sup> And those who were able to gather money and pay bail found it next to impossible to get their bail money back after the case was disposed of.<sup>67</sup>

In addition to bail practices being disadvantageous to the poor, studies have also shown that the prior bail laws had been administered in a racially biased manner.<sup>68</sup> Nationally, African American and Hispanic defendants are far more likely to have bail set on their cases

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58. *Director Cook Statement*, *supra* note 54, at 4.

59. *Id.*

60. *Id.*

61. See 18 U.S.C.A. § 3157.

62. Insha Rahman, *New York, New York: Highlights of the 2019 Bail Reform Law*, VERA INST. JUST. (July 2019), <https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf>.

63. Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. JUST. (Apr. 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

64. *Id.* at 5.

65. *Director Cook Statement*, *supra* note 54.

66. Katie Schaffer, *New York's Jails by the Numbers*, JUSTLEADERSHIPUSA (May 21, 2018), [https://jlsa.org/wp-content/uploads/2018/08/FREENewYork-ByTheNumbers\\_final.pdf](https://jlsa.org/wp-content/uploads/2018/08/FREENewYork-ByTheNumbers_final.pdf).

67. Reuven Blau & James Fanelli, *Thousands of People Denied Bail Refunds Due to State and City Snafus, Records Show*, N.Y. DAILY NEWS (Jan. 21, 2018, 11:53 PM), <https://www.nydailynews.com/new-york/thousands-people-denied-bail-refunds-due-state-city-snafus-article-1.3770685>.

68. David Arnold, Will Dobbie, & Crystal S. Yang, *Racial Bias in Bail Decisions*, (Nat'l Bureau of Econ. Rsch., Working Paper 23421, 2017), <https://www.nber.org/papers/w23421.pdf>.

than similarly situated white defendants; they are more likely to have higher bail amounts set on their cases than white defendants with similar cases, and they are more likely to be remanded on cases than white people in similar situations.<sup>69</sup> In jurisdictions where “dangerousness to the community” constitutes grounds for bail or even remand, African American and Hispanic defendants are far more likely to be deemed “dangerous” than similarly situated white defendants.<sup>70</sup> Like other discretionary decisions in the criminal justice realm, bail practices in America have been racially discriminatory.<sup>71</sup> New York State has been no exception in this regard.<sup>72</sup>

The legislature was moved to enact reform also because of the recognized repercussions of jailing innocent persons while awaiting trial. Pretrial detention disrupts not only the lives of those subjected to it, but also the lives of their family members, relatives, and dependents.<sup>73</sup> A person who is detained pre-trial can lose their employment, their homes, their children, and other valuable possessions.<sup>74</sup> The conditions that often come with pretrial detention are abysmal; prolonged subjection to those conditions can have drastic health effects on an accused person, both physically and mentally.<sup>75</sup> Pretrial detainees can also be subject to physical violence, sexual assault, and other hostile and criminal acts by guards and other detainees.<sup>76</sup> Additionally, pretrial detainees are more likely to plead guilty to crimes they did not commit than those who are released; they are more likely to be given worse plea offers; and they are more likely to receive longer jail sentences.<sup>77</sup> Prosecutors and judges know this, and so they will use bail as a “mechanism for leverage.”<sup>78</sup> In short, pretrial detention is punishment without having been convicted of a crime.<sup>79</sup> Ironically, persons who are detained are *more* likely to be re-arrested for

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69. Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 938–44 (2013).

70. *Id.*

71. Sarah Lustbader, *New York Democrats Are Caving On Bail*, THE APPEAL (Feb. 13, 2020), <https://theappeal.org/new-york-democrats-are-caving-on-bail/>.

72. *Id.*

73. Jones, *supra* note 69, at 937.

74. Paul Heaton, Sandra G. Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017).

75. Jones, *supra* note 69, at 934–37.

76. *Id.*

77. *Id.*

78. Transcript of N.Y. State Senate Reg. Sess. (2019) at 2628–29, <https://legislation.nysenate.gov/pdf/transcripts/2019-03-31T11%3A09/>.

79. *Id.*

new charges than those who either are released or are able to make bail.<sup>80</sup>

With this legislation, New York City can move closer to its stated goal of closing down Rikers Island, dubbed by Governor Cuomo as “one of the most abusive, worst jails in the United States of America.”<sup>81</sup> The infamous jail complex is a lasting symbol of mass incarceration, pervasive racism in the local criminal judicial system, inexcusable violence by the state, and other social injustices.<sup>82</sup> In 2014, the island was the subject of a scathing report by the Department of Justice.<sup>83</sup> The Justice Department found the existence of “a pattern and practice of conduct at Rikers that violates the constitutional rights of adolescent inmates.”<sup>84</sup> More specifically, it found the use of excessive force, physical abuse and punishment as retribution to be disturbingly frequent and common.<sup>85</sup> Although the DOJ’s investigation was limited to minors, the agency noted that adults were likely subjected to the same conditions.<sup>86</sup> Since then, there have been calls throughout the city and the state to close Rikers Island, from New York City mayor Bill de Blasio<sup>87</sup> to Governor Cuomo<sup>88</sup> to former state chief judge Jonathan Lippman.<sup>89</sup> Bail reform is necessary for that goal.

In terms of ramifications for the government, excessive pretrial detention was also costly. New Yorkers had been paying approximately \$2.5 billion annually to lock people up in jails across the

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80. OFF. OF THE CRIM. JUST. COORDINATOR, *supra* note 49, at 7.

81. See Press Release, Andrew M. Cuomo, N.Y. State Governor, *Video, Audio, Photos & Rush Transcript: Governor Cuomo Delivers Remarks at the Association for a Better New York Luncheon* (Apr. 4, 2019), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-delivers-remarks-association-better-new-york#>.

82. Jonathan Lippman, *A More Just New York City*, INDEP. COMM’N N.Y.C. CRIM. JUST. & INCARCERATION REFORM 1, 34, 45 (2017), <https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf>.

83. U.S. DEPT. OF JUST., RE: CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND (2014), <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>.

84. *Id.* at 1, 3.

85. *Id.* at 3–4.

86. *Id.* at 2.

87. See Press Release, Office of the Mayor of N.Y.C., *Smaller, Safer, Fairer: Historic Plan to Close Rikers Island Jails Moves to City Council* (Sep. 3, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/410-19/smaller-safer-fairer-historic-plan-close-rikers-island-jails-moves-city-council>.

88. Lisa W. Foderaro, *New York State May Move to Close Rikers Ahead of City’s 10-Year Timeline*, N.Y. TIMES (Feb. 14, 2018, 3:02 PM), <https://www.nytimes.com/2018/02/14/nyregion/rikers-island-jail-closing-timeline.html>.

89. Lippman, *supra* note 82, at 3–4.

state.<sup>90</sup> New York City residents specifically had been paying \$1.3 billion annually to jail people in Rikers Island and the other local facilities.<sup>91</sup> In 2019, New York City spent \$337,524 per inmate, setting a new record.<sup>92</sup> Outside of New York City, jail populations had been increasing throughout the state, and costs invariably rose as well.<sup>93</sup>

The substantial decrease in pretrial detainees would not only lead to less money being spent on detainees but would also lead to the closing of jails and less money spent on employees, thereby cutting operating costs.<sup>94</sup> Thus, another motivation for the legislature was to cut costs and incur savings.

Part of the push to bring about bail reform came from highly publicized tragedies that resulted from the old bail practices. This includes the case of Jerome Murdough, who was detained on misdemeanor trespassing charges when he tragically died in a city jail;<sup>95</sup> and Layleen Polanco, who died on Rikers Island while detained on \$500 bail for misdemeanor assault charges.<sup>96</sup> Murdough and Polanco are two of over 350 people who died in a New York City jail since 2001.<sup>97</sup> The most infamous tragedy of them all was Kalief Browder, a young man who spent three years on Rikers Island awaiting trial on second-degree robbery charges.<sup>98</sup> His family was not able to pay his bail immediately; and by the time they were able to raise the money, the Department of Probation filed a violation of probation charge against him — leading to him being remanded and the bail

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90. Schaffer, *supra* note 66, at 1.

91. *Id.*

92. Dan Mannarino, *City Comptroller: It Costs \$337,000 Per Inmate at Rikers Island*, PIX 11 (Dec. 6, 2019, 8:33 AM), <https://www.pix11.com/news/local-news/city-comptroller-it-costs-337-000-per-inmate-at-rikers-island>.

93. Schaffer, *supra* note 66, at 1.

94. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

95. Justine Olderman, Lisa Schreibersdorf, Tina Luongo, Stan German & Matt Knecht, *Real Criminal Justice Reform Requires Standing Up to Fear-Mongering*, GOTHAM GAZETTE (Jan. 1, 2020), <https://www.gothamgazette.com/opinion/9025-real-criminal-justice-reform-stand-up-fear-mongering>.

96. Emanuella Grinberg, Monica Haider & Taylor Romine, *She Was Sent to Rikers Island Because She Couldn't Pay \$500 bail. Now, She's Dead and Her Family Wants Answers*, CNN (Jun. 13, 2019, 6:20 PM), <https://www.cnn.com/2019/06/11/us/transgender-woman-dies-rikers-island/index.html>.

97. David Brand, *More Than 370 People Have Died in NYC Jails Since 2001*, BROOK. DAILY EAGLE (Oct. 23, 2019), <https://brooklyneagle.com/articles/2019/10/23/deaths-nyc-jails/>.

98. Jeremy Tanner, *Kalief Browder, Held for Years as a Teen in Rikers Island Without Conviction, Dies at Age 22*, PIX 11 (Jun. 8, 2015, 7:00 PM), <https://pix11.com/2015/06/08/kalief-browder-held-for-years-as-a-teen-in-rikers-island-without-conviction-dies-at-age-22/>.

denied.<sup>99</sup> Had the new laws been in effect a decade ago, all three of them would have been mandatorily released; and all three of them would more likely than not be alive today. With this legislation, it was expected that almost half of all pretrial detainees would be released from jails across the state.<sup>100</sup>

Perhaps most importantly, in enacting these reforms, the New York legislature impliedly recognized that judicial discretion played a noteworthy role in perpetuating a problem the prior laws were supposed to have fixed.<sup>101</sup> They substantively reduced the discretion of the courts in setting bail by exempting a host of offenses from being eligible for bail.<sup>102</sup> The legislature also mandated that courts set at least three forms of bail, thereby forcing courts to set at least one of the less restrictive bail options listed in the statute.<sup>103</sup> Additionally, the legislature required courts to presume that accused persons should be released on their own recognizance.<sup>104</sup> The 2019 laws also required that courts set the “least restrictive means” when issuing securing orders.<sup>105</sup> These changes reduce the role that social and racial biases from the judiciary may play in the determination of securing orders.<sup>106</sup>

## B. Discovery Reform

The other major change New York’s reform legislation brought was to the rules of discovery. Under the prior laws, there were rigid categories of items that were deemed discoverable.<sup>107</sup> There were no catchall provisions, so if a particular material or document did not fall within the delineated categories, the defense was not legally entitled to it.<sup>108</sup> For example, the prosecution did not have to turn over tapes or electronic recordings that they did not intend to introduce at trial.<sup>109</sup> As another example, relevant and material statements made by persons other than the defendant or a co-defendant were not dis-

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99. Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

100. Rahman, *supra* note 62.

101. Hechinger, *supra* note 47.

102. 2019 N.Y. Sess. Laws. S.1509 Ch. 59, Part JJJ § 2(4) (McKinney).

103. *Id.* §§ 1-e(9), 2(1).

104. *Id.* § 2(3).

105. *Id.* § 2(1).

106. Roxanna Asgarian, *The Controversy over New York’s Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained>.

107. N.Y. CRIM. PROC. LAW § 240.20(1) (repealed 2019).

108. *Id.*

109. *Id.* § 240.20(1)(g) (repealed 2019).

coverable under the old laws unless the prosecution intended to call that witness at trial; and even then, the prosecution did not have to turn over that information until right before the prosecution's opening statement.<sup>110</sup> Additionally, the old laws required both parties to file written demands for discovery in order to trigger each party's discovery obligations.<sup>111</sup> If a party believed their adversary was requesting evidence that was not discoverable, they were required to file a refusal within fifteen days.<sup>112</sup> Otherwise, compliance with a written demand to produce discovery had to be made within fifteen days "or as soon thereafter as practicable."<sup>113</sup> With this phrasing, prosecutors were under no real obligations to turn over discovery in a timely fashion.

### 1. The Reforms

The 2019 laws greatly expanded the list of items that the defense is entitled to.<sup>114</sup> Examples of evidence that was not discoverable prior to January 2020 but became discoverable include: grand jury testimony from all persons who testified;<sup>115</sup> the names and adequate information for all civilians that a prosecutor knows to have relevant information or evidence in a given case;<sup>116</sup> all relevant tapes or electronic recordings, irrespective of whether the prosecution intends to introduce them at trial;<sup>117</sup> and all photographs or drawings that relate to the subject matter of the case,<sup>118</sup> among many other things. Unlike the prior laws, the expanded categories are not exhaustive; any item relating to the subject matter of the case that is possessed by the prosecution or an entity under its control is discoverable, even if it falls outside of all of the enumerated categories.<sup>119</sup> The new laws also create a presumption of openness, requiring courts to interpret certain statutes in favor of disclosure.<sup>120</sup>

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110. *Id.* § 240.45(1)(a) repealed 2019).

111. *Id.* §§ 240.10(1), 240.20(1), 240.30(1), 240.90(1), (2) (repealed 2019).

112. *Id.* §§ 240.35, 240.80(2) (repealed 2019).

113. *Id.* § 240.80(3) (repealed 2019).

114. 2019 N.Y. Sess. Laws § 245.20(1) (McKinney); CRIM. PROC. § 245.20(1) (repealed 2019).

115. CRIM. PROC. § 245.20(1)(b) (McKinney 2020).

116. *Id.* § 245.20(1)(c).

117. *Id.* § 245.20(1)(g).

118. *Id.* § 245.20(1)(h).

119. *Id.* § 245.20(1) (emphasizing that "[t]he prosecution shall disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, *all items and information* that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, *including but not limited to* . . .").

120. *Id.* § 245.20(7).

The 2019 laws also created automatic discovery – doing away with the requirement that parties file written demands.<sup>121</sup> Under these laws, when a criminal case commences, the prosecution has fifteen days to turn over all of the discovery for a given case to the defense.<sup>122</sup> The law makes time allowances where the discovery is exceptionally voluminous.<sup>123</sup> This reworking of the discovery laws renders moot the requirement that the defense file a written demand to produce.<sup>124</sup> The same is true for prosecutors; after the prosecution completes its discovery obligation and files a certificate of compliance, the defense automatically has thirty days to provide reciprocal discovery to the prosecution.<sup>125</sup>

The 2019 discovery laws also add specific protections for accused persons in certain circumstances. For persons charged with unindicted felonies, any relevant statements made by said persons to law enforcement must be provided to them at least forty-eight hours in advance of the time scheduled for them to testify before the grand jury.<sup>126</sup> The laws also require prosecutors to serve all discovery in a given case upon the defense before the expiration of any plea offer to a criminal offense; in other words, a prosecutor who makes an offer that requires an accused person to plead to a crime cannot withdraw that offer until at least three days after all discovery has been served.<sup>127</sup> The defense can waive those protections, and can even waive their right to discovery outright;<sup>128</sup> but the waiver of either the discovery or those specific provisions cannot be conditions of a plea offer.<sup>129</sup>

There was also a change in procedure regarding the issuance of protective orders.<sup>130</sup> Given the newly created presumption of openness, whether a protective order should be granted is now to be decided after an individualized determination of each case; generic reasons such as the nature of the charges or an unspecified fear of accused persons intimidating potential witnesses will not do.<sup>131</sup>

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121. *Id.* § 245.20(5).

122. *Id.* § 245.10(1)(b).

123. *Id.* § 245.10(1)(a).

124. *Id.* § 245.20(5); Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CRIM. PROC. § 245.10 (McKinney 2020).

125. CRIM. PROC. § 245.10(2).

126. *Id.* § 245.10(1)(c).

127. *Id.* § 245.25(1-2).

128. *Id.* § 245.75(1).

129. *Id.* § 245.25(1-2).

130. *Id.* § 245.70.

131. *Id.* § 245.70(4); *see, e.g.*, *People v. Mena*, No. 2020-00812 (N.Y. App. Div. Jan. 31, 2020).

Where a prosecutor seeks a protective order, the defense is generally entitled to a prompt hearing within three business days of the request, where the prosecutor has to establish good cause.<sup>132</sup> The same rules apply if the defense is seeking the order.<sup>133</sup> These new laws also allow for expedited review of protective order rulings by an appellate court.<sup>134</sup> The 2019 laws contain language concerning ex parte applications, i.e., applications done outside the presence of the opposing party.<sup>135</sup> This demonstrates that ex parte applications are permissible under appropriate circumstances, but not always.

## 2. The Rationale

The legislative motivation for enacting discovery reform was to end the “trial by ambush” culture in New York State and make the criminal judicial process fairer for accused persons. New York’s prior discovery laws were widely regarded as being amongst the most restrictive in the entire country.<sup>136</sup> Under New York’s prior laws, attorneys were not entitled to many kinds of basic information and evidence, and were unable to advise their clients properly of how to proceed in a given matter.<sup>137</sup> Whether or not an accused person should take a plea or go to trial were determinations based on mere conjecture of what evidence the prosecution might have, as well as the past experiences of the particular defense attorney.<sup>138</sup> Defense attorneys were also restricted in terms of conducting investigations, because the old statutes did not require the disclosure of witness names and contact information.<sup>139</sup> The inability to investigate adequately or advise clients effectively can erode the attorney-client relationship, which brings on its own set of burdens on the criminal judicial process.<sup>140</sup>

Speaking to trials specifically, defense attorneys would often receive significant or even voluminous amounts of evidence right before

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132. CRIM. PROC. § 245.70(3).

133. *Id.* § 245.70(1).

134. *Id.* § 245.70(6).

135. *Id.* § 245.70(1).

136. The Legal Aid Society, *New York State Enacts Comprehensive Criminal Discovery Reform*, (Apr. 1, 2019), <https://www.legalaidnyc.org/news/new-york-state-criminal-discovery-reform/>.

137. *Id.*

138. N.Y. ST. BAR ASS’N., REPORT OF THE TASK FORCE ON CRIMINAL DISCOVERY 7, (2015), <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Criminal%20Discovery%20Final%20Report.pdf>.

139. *Id.* at 4–5.

140. *Id.* at 11.

trial was set to begin.<sup>141</sup> The defense would somehow still be expected to perform effectively at trial despite having grossly inadequate time to process the new materials.<sup>142</sup> If the evidence reveals favorable or potentially exculpatory information, any investigations that could have been done become missed opportunities.<sup>143</sup> For incriminating evidence received at the last minute, the accused person may be more endamaged by virtue of having spurned a plea offer he or she might have taken had the evidence been turned over earlier in the case.<sup>144</sup> The legal lying-in-wait laws allow and have led to wrongful prosecutions and wrongful convictions.<sup>145</sup> These discovery customs are unacceptable given the significant liberty interests involved and are even more outrageous considering how liberal discovery practice is in civil litigation.<sup>146</sup> As Aaron Mysliwec, president of the New York State Association of Criminal Defense Lawyers, rightly stated, “If civil attorneys proceeded in litigation with as little disclosure as currently conducted in criminal cases, it would be considered malpractice.”<sup>147</sup>

The legislature realized that fairer discovery rules would enhance the ends of justice from both sides.<sup>148</sup> In receiving more discovery earlier in a case, the defense counsel would be in a better position to advise his or her client properly on how to proceed.<sup>149</sup> Guilty pleas would happen earlier in a case, and on more cases where pleas are advisable because attorneys would have the evidence to show their clients why proceeding to trial in those cases would be imprudent.<sup>150</sup> In matters where the accused person may be innocent, the defense

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141. Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017, 12:00 AM) <https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html>.

142. See Lisa Schreibersdorf, *A Big Disadvantage for New York Defendants*, TIMES UNION (Nov. 15, 2017, 11:10 AM), <https://www.timesunion.com/opinion/article/A-big-disadvantage-for-New-York-defendants-12356637.php>.

143. *Id.*

144. See Ashley Southall & Jan Ransom, *Once as Pro-Prosecution as Any Red State, New York Makes a Big Shift on Trials*, N.Y. TIMES (May 2, 2019, 12:04 PM), <https://www.nytimes.com/2019/05/02/nyregion/prosecutors-evidence-turned-over.html>.

145. *Id.*

146. *Id.*

147. Memorandum in Support of Final Report of NYSBA's Task Force on Criminal Discovery from Aaron Mysliwec (on file with author).

148. See Jocelyn Simonson, *Discovery Reform Will Bring True Justice Without Threatening Safety*, N.Y. DAILY NEWS (Dec. 11, 2019, 9:46 AM), <https://www.nydailynews.com/opinion/nyoped-discovery-reform-wont-threaten-safety-20191211-j2432cqikbf7pmhgmqaohvzh3u-story.html>.

149. *Id.*

150. See Beth Fertig, *Will New York's Criminal Justice Laws Lead to More Trials?*, GOTHAMIST (Dec. 19, 2019, 5:00 AM), <https://gothamist.com/news/will-new-yorks-new-criminal-justice-laws-lead-to-more-trials>.

could pursue a dismissal; or if such a person is overcharged, the charges the prosecution cannot prove could be dismissed faster.<sup>151</sup> For prosecutors, the more liberal discovery standards could encourage them to assess their cases properly, determine competently which cases they can honestly proceed to trial on, and make appropriate offers. This is far more preferable to prosecutors blindly stating ready for trial and seeking pleas out of accused persons regardless of the facts and circumstances.<sup>152</sup>

### C. Speedy Trial

The new legislation worked a significant change in state speedy trial practice, although less so than bail practice and discovery rules. New York's speedy trial statute is unlike the speedy trial provision of the Sixth Amendment of the United States Constitution in that it is solely focused on prosecutorial readiness.<sup>153</sup> State law requires the prosecution to declare readiness for trial within specified time frames, depending on the nature of the offense.<sup>154</sup> The prosecution has six months to declare readiness on felonies, with certain homicide felonies being exempted altogether.<sup>155</sup> The state has ninety days to declare readiness on misdemeanors that carry a maximum sentence greater than three months,<sup>156</sup> and on misdemeanors that carry a maximum of ninety days in jail, the prosecution has sixty days.<sup>157</sup> On violations and traffic infractions, the speedy trial clock only lasts for thirty days.<sup>158</sup> For prosecutors to discharge their speedy trial obligations, they must communicate readiness either in open court via the filing of a statement of readiness in court, with service of said statement on defense counsel.<sup>159</sup> Said statements or declarations of readiness, however, were presumed accurate, and a defendant who wished to challenge them bore a significant burden in proving them to be illusory.<sup>160</sup>

As explained earlier, the prosecution's obligation to turn over discovery was only triggered when a defendant made a written de-

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151. N.Y. ST. BAR ASS'N., *supra* note 138, at 4.

152. *Id.*

153. *People v. Price*, 14 N.Y.3d 61, 63 (2010).

154. N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2020).

155. *Id.* §§ 30.30(1)(a), 30.30(3)(a).

156. *Id.* § 30.30(1)(b).

157. *Id.* § 30.30(1)(c).

158. *Id.* § 30.30(1)(d).

159. *People v. Kendzia*, 64 N.Y.2d 331, 337 (1985).

160. *People v. Brown*, 28 N.Y.3d 392, 405–06 (2016).

mand for said documents and materials.<sup>161</sup> Importantly, whether or not a prosecutor served discovery upon the defense generally had no bearing on their readiness; the prosecution was allowed to declare readiness for trial without having served any discovery upon the defense.<sup>162</sup> Additionally, the filing of a demand for discovery, like the filing of pre-trial motions, stopped the speedy trial clock.<sup>163</sup>

### 1. The Reforms

Under the new laws, the full service of discovery has now become a prerequisite to prosecutorial readiness.<sup>164</sup> The prosecution can no longer state ready for trial until they have turned over all documents and materials related to the case — as the expanded discovery statutes mandate — to the defense.<sup>165</sup> Additionally, because the prosecution's discovery obligations are automatic, it is no longer necessary for defendants to file written demands to produce discovery.<sup>166</sup> Thus, until the prosecution provides discovery and files a statement of readiness along with a certificate of compliance, a defense attorney would have no reason to stop the clock through the filing of a motion or a demand to produce.<sup>167</sup> Only after the prosecution has filed a valid certificate of compliance can they legally state ready on a case.<sup>168</sup>

Additionally, once the prosecution declares readiness for trial, the trial court is required to inquire about their actual readiness on the record.<sup>169</sup> With this provision, the legislature has withdrawn from the judicial rule that prosecutors' initial declarations of readiness are presumed accurate.<sup>170</sup> If after its inquiry the court does not believe the prosecution is ready to proceed to trial, the statement of readiness is deemed invalid.<sup>171</sup> In making its inquiry, the 2019 laws require courts to allow the defense to challenge said statement on the record, specifically speaking to the validity of the prosecution's certificate of

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161. CRIM. PROC. §§ 240.20(1), 240.30(1), 240.90(1) & (2) (repealed 2019).

162. *People v. Anderson*, 66 N.Y.2d 529, 543 (1985).

163. CRIM. PROC. § 30.30(4)(a).

164. *Id.* § 245.50(3).

165. *Id.*

166. KRISTAL RODRIGUEZ, CTR. FOR COURT INNOVATION, DISCOVERY REFORM IN NEW YORK: MAJOR LEGISLATIVE PROVISIONS 1 (2019) [https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS\\_Full.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_Full.pdf).

167. *Id.* at 7.

168. *Id.*

169. N.Y. CRIM. PROC. LAW § 30.30(5) (McKinney 2020).

170. ROBERT S. DEAN, CTR. FOR APPELLATE LITIG., THE NEW 30.30: PRESERVING ISSUES FOR APPELLATE REVIEW 4 (2020).

171. *Id.* at 71.

compliance, since a valid certificate of compliance is a prerequisite to the prosecution stating ready.<sup>172</sup> This is a partial retreat from the longstanding principle that challenges to the prosecution's statement of readiness must be placed in writing.<sup>173</sup>

The new laws also codify the requirement that the accusatory instrument in a given case be facially sufficient before the prosecution can state ready.<sup>174</sup> The Court of Appeals had already made it clear that a jurisdictionally sufficient accusatory instrument is a prerequisite to the prosecution stating ready.<sup>175</sup> The logical inference of this instruction is that a statement of readiness on a jurisdictionally insufficient charging document is invalid.<sup>176</sup> However, some trial courts took it upon themselves to disregard the high court's guidance, refusing to grant dismissals even though the accusatory instruments were defective for periods that exceeded the speedy trial clock for the particular cases.<sup>177</sup> Other courts would allow prosecutors to be "partially ready," that is, declare readiness on some counts in an accusatory instrument but not others.<sup>178</sup> New York's new laws now expressly bar statements of readiness on facially insufficient complaints and informations, and they have also eradicated the concept of partial readiness.<sup>179</sup>

## 2. The Rationale

The legislature's motivation for enacting speedy trial reform was to put an end to the inordinate lengths of time that accused persons spent waiting for their cases to be resolved.<sup>180</sup> When the speedy trial statute was enacted in 1972, the intent of the legislature was to put an end to the massive overcrowding of criminal court dockets and the incredible delays that came from the backlog of cases.<sup>181</sup> However,

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172. *Id.* at 5.

173. CRIM. PROC. § 30.30(5).

174. *Id.* § 30.30(5-a).

175. *People v. Case*, 42 N.Y.2d 98–99 (1977) (citing *People v. Harper*, 37 N.Y.2d 96, 99 (1975)).

176. *People v. Kerins*, 26 Misc. 3d 127(A), 127(A) (N.Y. App. Term 2009); *see also* *People v. Reyes*, 24 Misc. 3d 51, 54 (N.Y. App. Term 2009).

177. *See, e.g.,* *People v. Odums*, 143 Misc. 2d 503, 503 (N.Y. Crim. Ct. 1989); *People v. Diaz*, 43 Misc. 3d 616, 616 (N.Y. Crim. Ct. 2014).

178. *See, e.g.,* *People v. Ausby*, 46 Misc. 3d 126(A), 126(A) (App. Term 2014); *People v. Miraglio*, 17 Misc. 3d 165, 173–175 (N.Y. Crim. Ct. 2007).

179. CRIM. PROC. § 30.30(5-a).

180. *See* 2019 N.Y. SESS. LAWS 123–28 (McKinney 2020).

181. *See id.*

because the statute actually created a prosecutorial readiness rule,<sup>182</sup> prosecutors' abuses of the statute became one of the biggest causes of unacceptably long durations of criminal cases.<sup>183</sup> Prosecutors would rush to state ready for trial once they had cleared any procedural hurdles, irrespective of whether or not they were actually ready to try the case.<sup>184</sup> In jurisdictions like the Bronx and Brooklyn, prosecutors would state ready for trial as early as at arraignments, just so they can disable the speedy trial clock from the get-go.<sup>185</sup> Judges would allow this despite common sense telling any reasonable person that a lawyer cannot truly be ready to try the case on the very first day of the case's life.<sup>186</sup> Prosecutors would file off-calendar statements of readiness and then state not ready at subsequent court dates, but then only be charged a little time despite lengthy court adjournments.<sup>187</sup> New York speedy trial jurisprudence had empowered prosecutors to subvert the intent of the statute in several respects, including deeming declarations of readiness presumptively truthful,<sup>188</sup> allowing prosecutors to state ready even when the assigned prosecutor is unavailable,<sup>189</sup> and expansively interpreting statutory exclusions.<sup>190</sup> This legislation was designed to cut down on prosecutorial abuse of state speedy trial law.<sup>191</sup>

Interestingly enough, Kalief Browder's case became a greater rallying cry for speedy trial reform than bail reform; previously proposed trial reform bills were termed, "Kalief's Law."<sup>192</sup> Browder spent three years on Rikers Island awaiting a trial that never came, having gone to court a whopping thirty-one times during that period even though the speedy trial statute purportedly required the trial of felony cases

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182. See *People v. Price*, 14 N.Y.3d 61, 63 (2010); see also 2019 N.Y. Sess. Laws 125 (McKinney 2020).

183. FWD, *supra* note 4; see 2019 N.Y. Sess. Laws 123–28 (McKinney 2020).

184. *People v. Khachiyani*, 194 Misc. 2d 161, 164–65 (N.Y. Crim. Ct. 2002).

185. *Id.* at 165–66; see 2019 N.Y. Sess. Laws 123–28 (McKinney 2020).

186. *Khachiyani*, 194 Misc. 2d at 164–65.

187. *Id.*

188. *People v. Brown*, 28 N.Y.3d 392, 405–06 (2016).

189. See *People v. Anderson*, 252 A.D.2d 399, 401 (N.Y. App. Div. 1998).

190. See, e.g., *People v. Green*, 90 A.D.2d 705 (N.Y. App. Div. 1982) (holding that the adjournment following decision on an omnibus motion is excludable pursuant to CPL § 30.30(4)(a)).

191. CRIM. PROC. § 30.30.

192. See Melody Lee, *What Would Kalief's Law Do?*, KATAL, [https://d3n8a8pro7vhmx.cloudfront.net/katal/pages/1958/attachments/original/1546762437/Katal\\_Speedy\\_Trial\\_Factsheet\\_-\\_What\\_Would\\_Kalief%27s\\_Law\\_Do\\_10.10.2017.pdf?1546762437](https://d3n8a8pro7vhmx.cloudfront.net/katal/pages/1958/attachments/original/1546762437/Katal_Speedy_Trial_Factsheet_-_What_Would_Kalief%27s_Law_Do_10.10.2017.pdf?1546762437) (last visited Sept. 24, 2020).

within six months.<sup>193</sup> The prosecution answered “ready” for trial when they satisfied procedural requirements, i.e., filed an indictment; but the government never stated ready when the case was on for trial.<sup>194</sup> Browder’s situation was by no means uncommon; for decades, many New Yorkers sat in jail awaiting trials that took months and sometimes years to come.<sup>195</sup> Like with the prior bail laws, the speedy trial statute was enacted to fix this problem, but plainly failed to do so.<sup>196</sup> Figures from the last ten years regarding how long it took for misdemeanor and felony cases to resolve are arguably as abysmal as they were fifty years ago.<sup>197</sup> In short, the prosecution’s manipulation of the prior laws caused a persistent backlog of court calendars.<sup>198</sup>

The legislature further recognized that even for non-incarcerated defendants, extensive pretrial delay not only harms them, but is also deleterious to the ends of justice.<sup>199</sup> Accused persons are forced to miss school or work, and may have to arrange for childcare.<sup>200</sup> For persons employed by the local government in New York City, they are suspended from their jobs pending the outcome of their cases.<sup>201</sup> Others can lose their jobs outright.<sup>202</sup> The risk of collateral consequences, including adverse immigration consequences, weighs over applicable accused persons.<sup>203</sup> If an order of protection had been issued, persons may be barred from communicating with family, friends or relatives for prolonged periods of time.<sup>204</sup> Accused persons may lose their property during the pendency of the case.<sup>205</sup> And even without all of these consequences, many accused persons get tired of their seemingly endless obligation to return to court and plead guilty just so they can move on with their lives.<sup>206</sup> In all of these scenarios, public confidence in the judicial system is seriously compromised.

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193. Gonnerman, *supra* note 99.

194. *Id.*

195. *Id.*

196. S.B. 1509, 242nd Reg. Sess. (N.Y. 2019).

197. Gonnerman, *supra* note 99.

198. *Id.*

199. *See* CRIM. PROC. § 30.20.

200. FWD, *supra* note 4.

201. N.Y. CIV. SERV. LAW § 75 (Consol. 2019).

202. *See id.*

203. *See* Manuel D. Vargas, *Removal Defense Checklist in Criminal Charge Cases*, IMMIGRANT DEF. PROJECT (Jan. 31, 2011), [https://immigrantdefenseproject.org/wp-content/uploads/2011/10/FINALAppendix-K\\_FINAL5thEd2011.pdf](https://immigrantdefenseproject.org/wp-content/uploads/2011/10/FINALAppendix-K_FINAL5thEd2011.pdf).

204. N.Y. FAM. CT. ACT § 842 (Consol. 2019).

205. CRIM. PROC. § 245.20.

206. *See* Jed S. Rakoff, *Why Innocent Plead Guilty*, N.Y. REV. (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

The legislature's rationale for tying readiness to the fulfillment of their (now expanded) discovery obligations was to give some meaning to prosecutors' declarations of readiness.<sup>207</sup> If prosecutors were forced to gather all relevant evidence in a given case, they would have little choice but to at least perfunctorily investigate their cases and properly evaluate whether or not they should be proceeding with a prosecution.<sup>208</sup> It would also give the prosecution an opportunity to be actual agents of justice. The old statute provided no incentive for prosecutors to do that; and the culture of district attorneys' offices throughout the state (and especially the city) discouraged it.<sup>209</sup> It would also give prosecutors incentive to turn over discovery expeditiously. The legislative intent was clear as to this rule: prosecutors were not allowed to declare readiness until they have turned over all required materials to the defense.<sup>210</sup> This legislation was meant to move away from the "ability to claim 'readiness' without certifying that the claim is real."<sup>211</sup>

Amending speedy trial laws was not solely designed to benefit accused persons; indeed, delay can sometimes serve the interests of people charged with crimes.<sup>212</sup> The swift adjudication of cases is necessary to build public confidence in the judicial system. Delays cannot only disadvantage accused persons, but it can disadvantage even complainants who want to cooperate and spend years waiting for justice.<sup>213</sup> Unacceptable delay puts a strain on already limited resources and adds significantly to the cost of administration.<sup>214</sup> The only real beneficiaries of speedy trial abuse are prosecutors, who can game the system in an effort to extract pleas out of accused persons, or can elongate the judicial process to punish persons they presume to be guilty.<sup>215</sup> During the legislative process, various prosecutors and prosecution organizations gave rather fluffy accounts about their commit-

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207. CRIM. PROC. § 30.30.

208. See Sarah Lustbader, *Prosecutors Blame Discovery Reform Law for Overtime, Tax Hikes, and a Murder*, THE APPEAL (Feb. 11, 2020), <https://theappeal.org/discovery-reform-law-gets-blamed-for-overtime-tax-hikes-and-a-murder>.

209. *Id.*

210. CRIM. PROC. § 30.30.

211. *Id.*

212. *Barker v. Wingo*, 407 U.S. 514, 571 (1972).

213. *Id.* at 523–33.

214. *Id.* at 520.

215. See CRIM. PROC. § 30.30; Joaquin Sapien, *Criminal Justice Legislation Will Force New York Prosecutors to Disclose More Evidence, Sooner*, PRO PUBLICA (Apr. 8, 2019, 5:00 AM), <https://www.propublica.org/article/criminal-justice-legislation-will-force-new-york-prosecutors-to-disclose-more-evidence-sooner>.

ment to the prompt disposition of cases, while attempting to place the blame for matters not being resolved efficiently on the courts and defense attorneys for filing speedy trial motions.<sup>216</sup> The level of self-denial would be laughable if their actual practices were not so destructive to the lives of accused persons.

## II. JUDICIAL REACTION TO CRIMINAL JUSTICE REFORMS

Law enforcement and their allies were opposed to the criminal justice reforms from the first moment they were enacted in April 2019.<sup>217</sup> However, the opposition to bail reform became loud and strong in the weeks after the laws went into effect.<sup>218</sup> Police departments and police unions across the state denounced the laws and trumpeted crime statistics as alleged proof of the failure of reform.<sup>219</sup> Prosecutors complained that the laws threatened public safety, placed unreasonable discovery burdens on them, and ruined speedy trial law.<sup>220</sup> The tabloid press trumpeted the few stories of people released who were subsequently rearrested.<sup>221</sup> The New York Post was particularly disgraceful.<sup>222</sup> As one example, before the 2019 laws got passed, the Post published an anonymous call from a retired police detective to have a judge jailed for setting “lenient” bail.<sup>223</sup> Practitioners outside of New York State’s criminal court system lambasted the law, from federal line prosecutors to even U.S. Attorney General

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216. See CRIM. PROC. § 30.30.

217. Editorial Board, *A Sad Last Gasp Against Criminal Justice Reforms*, N.Y. TIMES (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/opinion/new-york-criminal-justice-reform.html>.

218. Emily Bazelon & Insha Rahman, *There’s a Strong Case for Sticking With Bail Reform*, N.Y. TIMES (Jan. 24, 2020, 1:22 PM), <https://www.nytimes.com/2020/01/24/opinion/sunday/bail-reform-new-york.html>.

219. See Dermot Shea, *New York’s New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020, 11:01 AM), <https://www.nytimes.com/2020/01/23/opinion/shea-nypd-bail-reform.html>; Erin Durkin, *Year Begins With Crime Spike in NYC Amid Statewide Bail Debate*, POLITICO N.Y. (Feb. 4, 2020, 8:57 PM), <https://www.politico.com/states/new-york/city-hall/story/2020/02/04/year-begins-with-crime-spike-in-nyc-amid-statewide-bail-debate-1258758>.

220. Darcel D. Clark, Eric Gonzalez, Melinda Katz, Michael E. McMahon, Anthony A. Scarpico, Jr., Madeline Singas & Cyrus R. Vance, Jr., *Why We Need to Reform New York’s Criminal Justice Reforms*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/opinion/new-york-bail-reform.html>; Noah Goldberg, *Dozens of Brooklyn Assistant DAs Quit Over New State Law That Adds to Workloads*, N.Y. DAILY NEWS (Feb. 8, 2020, 10:22 PM), <https://www.nydailynews.com/new-york/ny-brooklyn-prosecutors-resign-20200209-dj3ljdgmphg5hnhyi7x5r7tzoj-story.html>.

221. McKinley, *supra* note 10.

222. Will Bunch, *As NY Freaks out over Bail, Can America Ever Choose Justice Over Vengeance?*, PHILA. INQUIRER (Jan. 16, 2020, 1:37 PM), <https://www.inquirer.com/columnists/at-tytood/new-york-bail-reform-outcry-progressive-district-attorneys-20200116.html>.

223. See CRIM. PROC. § 150.10.

William Barr.<sup>224</sup> Republican lawmakers seized upon the newfound opposition to bolster their electoral prospects for November 2020.<sup>225</sup>

By and large, criminal court judges have shown themselves to be adversaries of the reforms. A few judges made their displeasure known in public statements; two other judges openly defied the laws.<sup>226</sup> Most judges, however, took the quieter route and worked to undermine the new laws in the courtroom. Taking each in turn:

#### A. Public Denunciations of the New Bail Laws

Much of the opposition to the reforms had centered on the new bail statutes.<sup>227</sup> Opponents to New York's bail reform argued that the limitation on judicial discretion, coupled with the release of people charged with certain felony offenses, endangered public safety and allowed dangerous criminals to remain on the street.<sup>228</sup> To support these arguments, opponents relied upon carefully cherry-picked stories,<sup>229</sup> questionable crime statistics,<sup>230</sup> and even false information.<sup>231</sup> These arguments had been nonetheless effective in turning the public tide against said reforms;<sup>232</sup> and so a few judges took the route of prosecutors and law enforcement and publicly condemned the reforms.

One vocal critic was a jurist from Onondaga County Court, who first publicly criticized the reforms the month before they were set to

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224. Jesse McKinley & Michael Gold, *Barr, Targeting Anti-Semitic Crimes, Enters Bail Reform Fray*, N.Y. TIMES (Feb. 12, 2020, 1:06 PM), <https://www.nytimes.com/2020/01/28/nyregion/bail-reform-william-barr-ny.html?action=click&module=relatedLinks&pgtype=article>.

225. Nick Pinto, *The Backlash: Police, Prosecutors, and Republicans Are Looking to Undo a Criminal Justice Reform in New York*, INTERCEPT (Feb. 23, 2020, 6:30 AM), <https://theintercept.com/2020/02/23/criminal-justice-bail-reform-backlash-new-york/>.

226. *Id.*

227. Bunch, *supra* note 222.

228. *Id.*

229. *Id.*; Mara Gay, *Give the New Bail Reform Law Time to Work*, N.Y. TIMES (Feb. 15, 2020), <https://www.nytimes.com/2020/02/15/opinion/bail-reform-nyc.html>.

230. Jake Offenhartz, *Public Defenders Allege NYPD Is Inventing A Crime Spike to Kill Bail Reform*, GOTHAMIST (Mar. 5, 2020, 5:22 PM), <https://gothamist.com/news/public-defenders-allege-nypd-inventing-crime-spike-kill-bail-reform>; Erin Durkin, *NYPD, de Blasio Blame Bail Reform For Crime Spike as Defenders Question Police Stats*, POLITICO N.Y. (Mar. 5, 2020, 6:41 PM), <https://www.politico.com/states/new-york/city-hall/story/2020/03/05/nypd-reports-spike-in-crime-as-public-defenders-question-the-stats-1265616>.

231. Christopher Robbins, *Tabloids Sow More Bail Reform Confusion, Claiming Laws Set Man "Free To Rape,"* GOTHAMIST (Feb. 3, 2020, 6:36 PM), <https://gothamist.com/news/tabloids-sow-more-bail-reform-confusion-claiming-laws-set-man-free-rape>.

232. Carl Campanile, *New York Voters Have Turned Against Bail Reform, New Poll Says*, N.Y. POST (Jan. 21, 2020, 5:41 PM), <https://nypost.com/2020/01/21/new-york-voters-have-turned-against-bail-reform-new-poll-says/>.

take effect.<sup>233</sup> He called the law “short-sighted,” “misguided,” a “danger to the community,” and “mindless, lemming-like political action.”<sup>234</sup> He claimed that the prior system in place “was fair to everyone,” but then almost immediately afterwards stated that it “needed to be changed.”<sup>235</sup> He complained at length about the significant limiting of judicial discretion and gave examples — at least one of which was somewhat farfetched — in making his argument.<sup>236</sup> As far as he was concerned, the legislative and executive branches overstepped, “usurp[ing] the discretion of the judiciary.”<sup>237</sup>

A second judge, a supervising judge in New York City, denounced the reforms publicly about a month later, calling the laws “rife with confusion and bad logic.”<sup>238</sup> He also characterized the reforms as posing “a significant threat to public safety”; and like the Onondaga judge the month prior, he complained about the limiting of judicial discretion.<sup>239</sup> Also like the Onondaga judge, he cast himself as a supporter of reform, saying that the current laws “would be a missed opportunity for long overdue reform” if they were not changed.<sup>240</sup> He called on Albany to change the laws and pushed for increased judicial discretion, particularly regarding whether or not a person posed a risk to public safety.<sup>241</sup> Thus, like the Onondaga judge, this judge echoed the sentiments and condemnations of prosecutors and law enforcement.<sup>242</sup>

Although both judges try to paint themselves as being in favor of “sensible” reform, there is reason to doubt their sincerity. For starters, when one examines their respective backgrounds, it is relatively easy to see why they are so fervently opposed to the reforms. Prior to ascending to the bench, the Onondaga judge was a prosecutor for over a decade, attaining the rank of chief assistant prosecutor in Syra-

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233. Douglass Dowty, *Onondaga Co. Judge Blasts ‘Ridiculous’ Bail Reform: This Isn’t Gov. Cuomo’s Job, It’s Ours*, SYRACUSE.COM (Dec. 16, 2019), <https://www.syracuse.com/crime/2019/12/onondaga-co-judge-blasts-ridiculous-bail-reform-this-isnt-gov-cuomos-job-its-ours.html>.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. Andrew Denney & Bruce Golding, *NYC Judge Slams Bail Reform as ‘Significant Threat to Public Safety’*, N.Y. POST (Feb. 6, 2020, 3:20 PM), <https://nypost.com/2020/02/06/nyc-judge-slams-bail-reform-as-significant-threat-to-public-safety/>.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

cuse.<sup>243</sup> The supervising judge in New York City spent over thirty years in the NYPD, at one point becoming a first deputy commissioner.<sup>244</sup> Prosecutors and law enforcement have been the loudest voices against reform; so it should come as no shock that a judge who was once a chief prosecutor, and another judge who was once a first deputy commissioner in the NYPD, would have nothing positive to say about the new laws.

More importantly, neither judge is on record as having denounced the old laws as being unjustly punitive to poor people or people of color. The criticisms of the old bail laws are not new, nor are the studies that have shown how unfettered judicial discretion to set cash bail has targeted the most vulnerable in society. Additionally, some of the worst horror stories under the old bail laws caught a lot of press attention, including the deaths of pre-trial detainees like Jerome Murdough, Layleen Polanco, and most infamously Kalief Browder. There is no record of either judge publicly commenting upon or denouncing either the tragedies that occurred, or the more common problem of poor people of color being disparately detained pretrial. This would at least suggest that neither judge had a problem with the prior laws, despite their documented inequalities. The Onondaga judge expressly said as much, claiming that the prior laws “were fair to everyone” before walking back on that claim in the very next breath.<sup>245</sup>

The supervising judge in New York City remarked that judges, prosecutors, police, and victims’ rights groups were “minimally consulted and largely ignored” during the legislative process that led to the reforms.<sup>246</sup> To the extent that this might be true, it is not difficult to see why: these players, particularly and especially prosecutors and police groups, did not see the prior laws as problematic. Both police and prosecutors testified in Albany regarding criminal justice reform during joint legislative budget hearings, and both groups had no prob-

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243. *Steve Dougherty*, LINKEDIN, <https://www.linkedin.com/in/steve-dougherty-22936711> (last visited September 24, 2020); Dowty, *supra* note 233.

244. Denney & Golding, *supra* note 238.

245. Douglass Dowty, *Judge: NY Killers, Burglars, Robbers, Bail Jumpers Must Be Freed Under ‘Dangerous’ Bail Law*, SYRACUSE.COM (Jan. 3, 2020), <https://www.syracuse.com/crime/2020/01/judge-ny-killers-burglars-robbers-bail-jumpers-must-be-freed-under-dangerous-bail-law.html>; *Judge Dougherty on Bail Reform*, NEWS BREAK (Jan. 3, 2020), <https://www.newsbreak.app.com/video/0Nk156hb/judge-dougherty-on-bail-reform?docid=0Nk156hb&fbclid=IwAR2FewXYIUmESRzaQCaYH3ikzq0r9hDYm1Y-lwYMSZCtc-Gg-QOojDZk44I>.

246. Denney & Golding, *supra* note 238.

lem with the status quo and opposed any changes to any of the laws.<sup>247</sup> Like these two judges, neither prosecutors nor police groups have gone on record lamenting the inequalities created by the old bail statutes before the new laws went into effect. By and large, most opponents of the new reforms also had nothing to say about the specific tragedies the old laws caused. And even after the 2019 bail laws were enacted, many adversaries of the reforms (especially police groups) would not even acknowledge that there was *anything* wrong with the prior laws. Some opponents, like these two judges and like prosecutors, intimated after-the-fact that some reform was needed, but never acknowledged the real reasons why.<sup>248</sup> With no recognition amongst these groups that the old bail laws allowed for serious inequities within the system, it would make little sense to rely upon them during a legislative process designed to fix bail practices within the state; one cannot solve a problem by relying significantly on forces that do not even see the problem.

#### B. Open Defiance of the New Bail Laws

It is one thing to disagree with the law but to follow it anyways. As discussed above, the Onondaga judge publicly disagreed with the law, but he did profess at the end of his monologue that he would follow the law nonetheless.<sup>249</sup> It is quite another thing, however, to violate the law willfully because one does not agree with it. In two documented cases, a New York criminal court judge acknowledged that the law barred the setting of bail in the case before him, but set bail anyway.

The first to flout the law publicly was a criminal court judge in Long Island, who set bail on a homeless man charged with counts of robbery that were ineligible for bail.<sup>250</sup> The judge openly acknowledged that the defendant, Romell Nellis was charged with non-qualifying offenses, but nonetheless set bail in the amount of \$10,000 cash and \$20,000 bond, calling Nellis a “menace to society” and declaring,

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247. LAWS OF 2019 CH. 59 PART JJJ BAIL PRIOR MATERIALS at 25–28 (N.Y. Legis. Servs., 2019); LAWS OF 2019 CH. 59 PART JJJ BAIL REFORM at 170–72 (N.Y. Legis. Servs., 2019).

248. Letter from the Dist. Att’y Ass’n of the State of N.Y. (Jan. 29, 2019) (on file with author).

249. Dowty, *supra* note 245; *Judge Dougherty on Bail Reform*, *supra* note 245.

250. Lorena Mongelli, *Long Island Judge Ignores Bail Law, Refuses Release of ‘Menace to Society’*, N.Y. POST (Jan. 28, 2020, 7:40 PM), <https://nypost.com/2020/01/28/long-island-judge-ignores-bail-law-refuses-release-of-menace-to-society/>.

“I don’t want you walking around my neighborhood.”<sup>251</sup> The appellate court reversed the judge’s decision and followed the law, releasing Nellis with an ankle monitor.<sup>252</sup> Unfortunately — but much to the glee of the New York Post, which had actively and continuously excoriated the new laws — Nellis cut off the ankle monitor and failed to show up to court.<sup>253</sup> The following month, he was rearrested and charged again with two counts of robbery.<sup>254</sup> This time, bail was set at \$1 million.<sup>255</sup>

The second judge to violate the law openly was a judge in the Cohoes City Court, who set \$100 bail on a man charged with driving without a valid license.<sup>256</sup> This judge justified his decision by pointing to an alleged history of failing to appear and stated: “The court’s gotta administer justice. If I don’t have a defendant in front of me, I can’t administer justice.”<sup>257</sup> This judge also wrote a twelve-page decision in which he argued, similarly to the Onondaga judge, that the new law violated legal principles regarding the separation of powers and impermissibly infringed on the exercise of judicial discretion.<sup>258</sup> Interestingly, this judge opined in his decision that the imposition of travel conditions and electronic monitoring could adequately ensure the defendant’s return to court, but insisted on setting cash bail anyway because he claimed that cash bail was the least restrictive alternative.<sup>259</sup>

Whether or not these two judges defied the laws in other cases is unknown. Also unconfirmed is whether or not any other judges followed their lead and set bail on non-qualifying cases while freely acknowledging the illegality of their decisions. It would appear that open judicial defiance was enough of a problem to prompt the New York State Commission on Judicial Conduct to issue a warning to judges that intentional disregard of the law would be punished.<sup>260</sup> In any event, just like with the previous two judges, there is no public

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251. *Id.*

252. *Id.*

253. *Id.*

254. Georgett Roberts & Jorge Fitz-Gibbon, *Accused Long Island Bank Robber Romell Nellis Ordered Held on \$1M Bail*, N.Y. POST (Feb. 13, 2020, 4:51 PM), <https://nypost.com/2020/02/13/accused-long-island-bank-robber-romell-nellis-ordered-held-on-1m-bail/>.

255. *Id.*

256. Bernadette Hogan & Bruce Golding, *Upstate Judge Challenges Bail Reform Law with Traffic Case Ruling*, N.Y. POST (Feb. 5, 2020, 2:37 PM), <https://nypost.com/2020/02/05/upstate-judge-challenges-bail-reform-law-with-traffic-case-ruling/>.

257. *Id.*

258. *Id.*; *People v. Johnston*, 121 N.Y.S.3d 836, 842-43 (Cohoes City Ct. 2020).

259. *Johnston*, 121 N.Y.S.3d at 840–41.

260. N.Y. STATE COMMISSION ON JUDICIAL CONDUCT, ANNUAL REPORT 2020 1, 19 (2020).

record of either of these two judges ever denouncing the inequalities of the old bail laws before the reforms were passed. Nor is there any public record of them denouncing the tragedies that resulted from the old bail laws, like the three-year detention of Kalief Browder or the death of poor people of color in jails while awaiting trial. This would suggest that these two judges also had no problem with the bail laws of old or the inequities they perpetuated.

### C. Misinterpreting and Distorting the New Laws

Rare have been the public denunciations and blatant disregard of the new reforms by New York's criminal court judiciary. Not so rare, however, have been the efforts of lower court judges to undermine the reforms more silently through the rulings and decision-making in their courtrooms. Most importantly, the judicial attack on the reforms in this context is *not* solely focused on bail reform. In post-reform decisions regarding bail, discovery and speedy trial, there has been a constant effort by trial court judges to disadvantage criminal defendants in their rulings when the spirit of the laws — and sometimes even the plain language — requires judgment in favor of accused persons. Taken in turn:

#### 1. Bail Reform Laws

As explained above, bail reform was enacted to end the documented abuses of cash bail and reduce the number of people sitting in jail pre-trial.<sup>261</sup> Perhaps most evidently, the 2019 laws created a presumption that defendants should be released on their own recognizance. Many judges, however, have either sought to exploit loopholes — or more likely legislative oversights — in the law, or deliberately distorted some of the statutes in a manner that made it easier for courts to lock up accused persons in given circumstances.

##### a. Exploiting Loopholes, Technicalities, and Ambiguities

With two unambiguous specific exceptions, violent felonies are qualifying offenses under the new laws, so a person charged with committing them can have bail set on their case. The first exception is for persons charged with burglarizing a residence; a person accused of burglary in the second degree under the second subdivision is charged

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261. N.Y. CRIM. PROC. LAW § 510.10(4) (McKinney 2020).

with a non-qualifying offense for which bail cannot be set.<sup>262</sup> The other exception is for people facing robbery charges where they are allegedly helped by at least one other person who was physically present.<sup>263</sup> Robbery in the second degree under the first subsection is also a non-qualifying offense; any person charged with this specific crime cannot have bail set on their case.<sup>264</sup>

Strangely, the new laws on their face do not expressly exempt attempted burglary in the second degree or attempted robbery in the second degree, even under those two subdivisions, from being qualified offenses. This raised interesting questions: are attempts of these offenses non-qualifying offenses, or is this a legislative oversight, or was it the legislature's intention to make the attempts of those two crimes bail-eligible offenses? The prosecution predictably embraced the latter view and trained their subordinates that the attempts of both exceptions were themselves qualifying offenses for which bail could be sought.<sup>265</sup> Some judges adopted this view and, when the new laws took effect, took the liberty of setting bail on persons charged with attempted residential burglary and attempted robbery aided by another.

In one case in Nassau County, for example, the defendant was charged with eight residential burglaries and one attempted burglary, allegedly committed in 2018.<sup>266</sup> On the nine offenses, bail was set in the amount of \$2 million bond and \$1 million cash.<sup>267</sup> On January 13, 2020, he was released on his own recognizance on the eight allegedly *completed* burglaries; but the court re-set \$2 million bail on the attempted residential burglary case, along with \$1 million cash and \$10 million partially secured bond.<sup>268</sup> The newly assigned attorney filed a writ of habeas corpus seeking the release of his client,<sup>269</sup> and the case was argued before the Appellate Division on January 24, 2020.<sup>270</sup> The appeals court openly acknowledged during oral argument that the

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262. *Id.* § 510.10(4)(a) (McKinney 2020); N.Y. PENAL LAW § 140.25(2) (McKinney 1981).

263. N.Y. CRIM. PROC. LAW § 510.10(4)(a); N.Y. PENAL LAW § § 160.10(1) (McKinney 1995).

264. N.Y. CRIM. PROC. LAW § 510.10(4)(a).

265. N.Y. PROSECUTORS TRAINING INST., 2019 CRIMINAL JUSTICE CHANGES 1, 3 (July 21, 2019), available at <https://www.nypti.org/lawssummaries>.

266. Transcript of *People v. Castano*, Ind. No. 1784N-18 (Jan. 13, 2020) at 8 [hereinafter, T.].

267. *Id.* at 3.

268. *Id.* at 27.

269. *People ex rel. Castano v. Fludd*, 179 A.D.3d 1087 (N.Y. App. Div. 2020).

270. Oral Argument at 6:54–29:39, *Id.*, [http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1579878076.External\\_\(Public\).mp4](http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1579878076.External_(Public).mp4).

idea of the two completed crimes being non-qualifying, but the attempts of those crimes being bailable offenses, is illogical.<sup>271</sup> For his part, the defense attorney steered clear from asking the court to *add* crimes to the statute, arguing instead that the attempts of those crimes were already written into the statute because they were lesser-included offenses.<sup>272</sup> Ultimately, it made no difference; the court dismissed the writ, finding that the trial court’s bail ruling “did not violate ‘constitutional or statutory standards.’”<sup>273</sup>

A serious examination of the legislative history and the statutory scheme as a whole shows that the court should have adopted counsel’s reading of the statute. The job of a court in interpreting a statute is to “ascertain the legislative intent and construe the pertinent statutes to effectuate that intent.”<sup>274</sup> While the text of the statute is the starting point of determining the intent, its legislative history and statutory context should be studied as well to determine the spirit and purpose of the legislation.<sup>275</sup> Importantly here, courts should be mindful of the harm the legislation was designed to avert and construe the statute in a manner that averts that harm.<sup>276</sup> Additionally, a statute “must be construed as a whole and its various sections must be considered together and with reference to each other.”<sup>277</sup> With exceptions, like the exception that exempts residential burglaries and aided robberies from being bailable, courts should construe statutes “with a mind towards results that do not lead to unreasonableness or absurdity.”<sup>278</sup> Necessarily then, courts must be mindful of whether a particular reading of an act would result in a logical outcome.<sup>279</sup>

Here, the legislature was trying to reduce or eliminate the problem of people being punished pre-trial for being too poor to afford bail.<sup>280</sup> This brought about the elimination of cash bail for a host of offenses, the imposition of a presumption of release, and the mandating of hearings before a securing order could be modified for the

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271. *Id.* at 9:47–9:56.

272. *Id.* at 9:56–11:15.

273. *Id.*

274. *People v. Roberts*, 31 N.Y.3d 406, 418 (N.Y. 2018) (quoting from *Matter of M.B.*, 6 N.Y.3d 437, 447 (N.Y. 2006)).

275. *People v. Wallace*, 105 N.E.3d 1238, 1240 (N.Y. 2018).

276. N.Y. HISTORY OF TIMES LAW § 95 (McKinney 1916); *Roberts*, 31 N.Y.3d at 418-19.

277. *Matter of New York Cty. Lawyers’ Ass’n v. Bloomberg*, 19 N.Y.3d 712, 721 (N.Y. 2012) (quoting from *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (N.Y. 1979)).

278. *Wallace*, 105 N.E.3d at 1240.

279. *See, e.g., Chianese v. Meier*, 98 N.Y.2d 270, 278 (N.Y. 2002).

280. N.Y. CRIM. PROC. § 510.10(1) (McKinney 2020).

worse.<sup>281</sup> As the Appellate Division readily conceded, it is not logical for the completed crimes to be non-qualifying, but for the attempts of those offenses to be bailable.<sup>282</sup> Indeed, one who is accused of committing the crime is necessarily alleged to have *attempted* it. Otherwise, the argument is that the legislature intended to allow for the pretrial detention of those who try to commit either crime and do not succeed, but to disallow for the pretrial detention of those who try to commit either crime and *actually succeed*. This is clearly unreasonable and absurd. And, in terms of potential for producing illogical results, there is nothing to stop prosecutors from charging defendants with attempting to commit either of those two offenses where they could legitimately charge the completed offense. The language of the attempt statute does not preclude this possibility;<sup>283</sup> and, given how rarely cases go to trial, this could be yet another tool used by the prosecution to get defendants to plead guilty.<sup>284</sup> Such a result would be at odds with the intent of the legislature in passing bail reform.

Perhaps most ironic is how unlikely courts would be to resolve any interpretative or applicative issues in favor of accused persons, even when the bail laws were written to benefit them. It would be hard to imagine many courts finding, for example, that a person charged with attempted rape in the third degree is ineligible for bail because the statute does not expressly qualify attempted nonviolent sex felonies. It would be equally unlikely that any discrepancies in the law be resolved in favor of the defense. Take, for example, the tension in the bail statute regarding the offense of making a terroristic threat, defined in Penal Law § 490.20.<sup>285</sup> On the one hand, this offense is a violent felony,<sup>286</sup> and the subsection of the bail statute that renders violent felonies bailable only exempts residential burglaries and robberies aided by others physically present.<sup>287</sup> On the other hand, a different subsection of the same statute deems felony terrorism offenses eligible for bail “other than the crime defined in section 490.20 of such law . . . .”<sup>288</sup> Thus, it is at least arguable that making a terrorist threat is *not* a qualifying offense. Yet, a court in Orange

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281. N.Y. CRIM. PROC. LAW § 520.10(2) (Consol. 2020); N.Y. CRIM. PROC. LAW § 530.60(2)(d)(ii) (Consol. 2020).

282. Transcript of *People v. Castano*, Ind. No. 1784N-18 (Jan. 13, 2020) at 8.

283. N.Y. PENAL LAW § 110.00 (McKinney 2020).

284. N.Y. CRIM. PROC. LAW § 530.40(6) (McKinney 2020).

285. N.Y. PENAL LAW § 490.20 (McKinney 2020).

286. N.Y. PENAL LAW § 70.02(1)(c) (Consol. 2020).

287. N.Y. CRIM. PROC. LAW § 510.10(4)(a) (McKinney 2020).

288. *Id.* § 510.10(4)(g) (McKinney 2020).

County firmly rejected that argument and concluded that the legislature intended to render it a bailable offense.<sup>289</sup> It would be difficult to imagine the Appellate Division ruling any differently.

b. Eliminating Hearings for Modifying Securing Orders

As noted in Part I, courts are permitted to modify securing orders for the worse under carefully delineated circumstances.<sup>290</sup> Prior to changing the order, the new laws require the courts to hold a hearing and find, by clear and convincing evidence, that one of the enumerated scenarios apply to the defendant in the case.<sup>291</sup> The specified standard of proof marks a departure from the old bail statute. The defense has the right to present evidence and cross-examine any witnesses the prosecution calls.<sup>292</sup> The statute allows the prosecution to introduce the grand jury testimony of a witness in the place of the witness' live testimony.<sup>293</sup> If a court finds the presence of one of the statutorily specified situations by clear and convincing evidence, then the court may modify the securing order accordingly, with the focus still on using the least restrictive means.<sup>294</sup>

As simple as this provision seems, courts have sought to either do away with the hearing requirement or whittle away at the rules of the hearing. In a Brooklyn case, for example, the court remanded the defendant for up to ninety days after finding “‘reasonable cause to believe that defendant committed a violent felony offense.’”<sup>295</sup> The “hearing” the court held was plainly improper under both the new and the old statute. A reading of either statute demonstrates that the prosecution’s proof must either consist of live witness testimony or the grand jury transcripts of witnesses.<sup>296</sup> Here, the prosecution provided neither.<sup>297</sup> The judge’s claim that a notice of voted indictment is sufficient contradicts basic rules of statutory interpretation; at a minimum, if it were the intent of the legislature to allow the prosecution to meet their burden with a notice of voted indictment, it would have said so

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289. *People v. Allen*, 119 N.Y.S.3d 26, 31 (Orange Cty. Ct. 2020).

290. N.Y. CRIM. PROC. LAW § 530.60(2)(c) (McKinney 2020).

291. *Id.* § 530.60(2)(b).

292. *Id.* § 530.60(2)(c).

293. *Id.*

294. *Id.* § 530.60(2)(b).

295. *People v. Knight*, 119 N.Y.S.3d 722, 725 (Sup. Ct. King’s Cty. Ct. 2020) (“Although the defense argued that this “hearing” was insufficient without witnesses or transcripts, this court ruled that it was sufficient.”).

296. N.Y. CRIM. PROC. LAW § 530.60(2)(c) (McKinney 2020).

297. *Knight*, 119 N.Y.S.3d at 725.

in either statute. Further, the addition of the “clear and convincing” standard to these hearings demonstrates a legislative intent to raise the level of proof required; so, if a notice of voted indictment would not suffice under the old laws, they certainly would not be enough under the new laws. The court’s analogy to so-called *Outley* hearings<sup>298</sup> is inapposite, because hearings under the new bail laws are governed by a specific statutory scheme that excludes the use of an indictment notice as the sole proof that the accused person committed another felony.<sup>299</sup>

In a Bronx case, the court went a step further and ruled that such hearings were not even required by the statute where the defendant was charged with a qualifying offense and allegedly refused willfully and persistently to return to court.<sup>300</sup> The court’s conclusion is rather interesting considering that in *People v. Torres*,<sup>301</sup> the case that the Bronx court most extensively relies upon,<sup>302</sup> the court not only required an evidentiary hearing be held on a revocation motion pursuant to C.P.L. § 530.60(1),<sup>303</sup> but the court on its own accord applied the “clear and convincing” standard in determining the motion.<sup>304</sup> Hence, the Bronx trial court’s holding is belied by the case it has obviously deemed most instructive in this matter. And where, as here, the decision to set bail rests largely on the fact that the defendant willfully and persistently failed to appear in court, the trial court’s decision is a clever attempt to sidestep the legislative intent that findings that a defendant “persistently and willfully failed to appear” be made after an evidentiary hearing is conducted. Given the legislative intent, the court should have held a hearing pursuant to C.P.L. § 530.60(2)(c).<sup>305</sup>

It is not as if holding such a hearing is difficult, nor is the clear and convincing standard insurmountable. One court in Nassau County held such a hearing where the defendant was charged with non-qualifying felonies.<sup>306</sup> The defendant was released on his own re-

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298. *Id.* at 725-26.

299. N.Y. CRIM. PROC. LAW § 620.50(1) (McKinney 2020).

300. *People v. Garcia*, 121 N.Y.S.3d 565, 566 (Bronx Cty. Crim. Ct. 2020).

301. *People v. Torres*, 112 Misc.2d 145, 145 (N.Y. Cty. Sup. Ct. 1981).

302. *Garcia*, 121 N.Y.S.3d at 569-70.

303. *Torres*, 112 Misc.2d at 147 (“The subdivision [CPL § 530.60(2)] *also* requires a hearing for revocation motions . . .” (emphasis added)).

304. *Id.* at 148. (“The evidence adduced at the hearing herein, which the Court credits as true, clearly and convincingly indicates that the defendant threatened and otherwise attempted to tamper with witnesses *prior* to the initial bail proceeding.”).

305. *People ex rel. Chiszar v. Brann*, 126 N.Y.S.3d 877, 882 (N.Y. Sup. Ct. 2020).

306. *People v. Chensky*, No. CR-00076L-2020, 2020 NYLJ LEXIS 584, at \*1 (N.Y. Sup. Ct. Feb. 20, 2020).

cognizance, and then failed to appear for two scheduled court dates.<sup>307</sup> After the bench warrant was issued, the defendant had to be returned involuntarily.<sup>308</sup> The trial court found by clear and convincing evidence that the defendant persistently and willfully failed to appear and set bail.<sup>309</sup> The author offers no opinion on the merits of the court's ruling; this case is cited to show that the Bronx court could have done the same exact thing, but simply chose not to. Instead, it concocted a rule that effectively minimizes the usefulness of C.P.L. § 530.60(2). The court's surmising that C.P.L. § 530.60(2)(b) only applies to non-qualifying offenses<sup>310</sup> is illogical; there is no language in that statute that limits its application to bail-ineligible charges, nor does C.P.L. § 530.60(1) contain language that limits its application to qualifying offenses.

The decisions issued by courts regarding the new bail statutes underscore an attempt by the criminal court judiciary to dull the impact of bail reform. There was not much opportunity for courts to undermine bail reform particularly, because the 2019 legislation did away with a substantial amount of judicial discretion. Nonetheless, where there has been wiggle room, courts have acted against the interests of accused persons, even when the spirit of the new laws require otherwise. And in the case of the Bronx trial court decision, some judges look to read statutes in an overly expansive manner so as to widen the discretion they have to improper bounds.

## 2. Discovery Reform Laws

Opponents of discovery reform in New York made the same argument: the reforms endanger the lives of complainants and witnesses who wish to come forward.<sup>311</sup> This argument assumes that accused persons routinely, or often enough, attempt to scare, intimidate or even harm complainants and witnesses who wish to testify against them. While this may be true in a minority of cases, the trumpeting of these claims largely amounts to more fear mongering and misinformation. In one example that received a lot of press attention, Nassau police commissioner Patrick Ryder falsely blamed a gang-related mur-

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307. *Id.* at \*1.

308. *Id.*

309. *Id.*

310. *People v. Garcia*, 121 N.Y.S.3d 565, 568 (Bronx Cty. Crim. Ct. 2020).

311. Lustbader, *supra* note 208; Ed Shanahan & Jesse McKinley, *Furor Erupts Over Killing of Witness in MS-13 Gang Case*, N.Y. TIMES (Feb. 5, 2020, 12:43 PM), <https://www.nytimes.com/2020/02/05/nyregion/ms-13-long-island.html>.

der in Long Island on the new discovery laws;<sup>312</sup> and while he was forced to retract his statements,<sup>313</sup> the damage may have already been done.

Some judges in New York have done their part in perpetuating the narrative of reform opponents both by improperly granting protective orders and by granting improper protective orders.<sup>314</sup> Other judges have also sanctioned prosecutorial measures to skirt the requirements of the new laws.<sup>315</sup> In all of these scenarios, trial courts seemingly operate under the same assumptions: the issuance of these orders and rulings are necessary to protect any witnesses or complainants from the defendants they presume to be guilty of their charged crimes. In the context of protective orders, this is evidenced by the failure of these courts to be inclusive of the defense and to make individualized findings as the statute mandates in granting said orders. Where written decisions are issued, these decisions evidence the existence of these assumptions amongst judges.

a. Improperly Granting Protective Orders

Several trial courts took it upon themselves to grant *ex parte* applications for protective orders by the prosecution. In many of these cases, the court offered no valid reason for excluding the defense from either participating in the proceedings or from having adequate information to be able to oppose either the exclusion of the defense or the issuance of the order.<sup>316</sup> These actions were egregious enough to compel the Appellate Division to intervene.<sup>317</sup>

In Nassau County, for example, a trial court judge granted an application for a protective order without the defense knowing about it until after they received a copy of the order.<sup>318</sup> After receiving the order, the defense asked to be heard on it, and the court denied the request.<sup>319</sup> In a well-reasoned decision, the Appellate Division noted that the new laws “cannot be reasonably construed to permit a protec-

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312. Shanahan & McKinley, *supra* note 311.

313. Ali Watkins, *Police Chief Made Fiery Claim Over MS-13 Murder. Records Dispute It.*, N.Y. TIMES (Feb. 6, 2020, 12:43 PM), <https://www.nytimes.com/2020/02/06/nyregion/ms-13-long-island.html?smid=nytcore-ios-share>.

314. *People v. Reyes-Fuentes*, 179 A.D.3d 980, 981 (N.Y. App. Div. 2020).

315. *See generally* *People v. Todd*, 122 N.Y.S.3d 498 (Mar. 12, 2020); *see also* *People v. Adams*, 119 N.Y.S.3d 831 (Feb. 7, 2020).

316. *People v. Bonifacio*, 179 A.D.3d 977, 977 (N.Y. App. Div. 2020).

317. *Id.* at 980.

318. *Id.* at 977.

319. *Id.*

tive order to be sought entirely ex parte in every case.”<sup>320</sup> The court further ruled that any party seeking an ex parte application bears the burden of establishing a “clear necessity for the entirety of the application, and the submissions in support of it, to be shielded from the opposing party.”<sup>321</sup> Because that showing was not made in this particular case, the appeals court vacated the order and remanded to the trial court for proper consideration of the issues.<sup>322</sup> This decision would serve as the basis for vacating similarly granted protective orders in other Nassau County cases.<sup>323</sup>

This practice of granting ex parte orders without proper cause was not limited to Long Island. In Brooklyn, trial court judges granted protective orders in a host of cases without either defense knowledge or an opportunity for them to be heard.<sup>324</sup> It took an appellate court ruling to have said orders vacated and the defense attorneys in those cases afforded a chance to oppose the orders.<sup>325</sup> In Rochester City Court, a judge granted a protective order sought by the Monroe County District Attorney’s Office, without any notice provided or hearing afforded to defense counsel.<sup>326</sup> A judge in Monroe County Court properly vacated the order, but not without first criticizing the protective order statute as being “poorly drafted.”<sup>327</sup> Across the state, trial courts have been overly concerned with “keeping witnesses safe” to the extent that they would habitually shut out the defense from even being allowed to contest applications for protective orders.<sup>328</sup>

In some situations, vacating the order was not the end of the problem. In one particular case in Long Island, for example, the trial court improperly granted an ex parte application for a protective order.<sup>329</sup> The Appellate Division vacated the order and remanded the case, finding no showing that an ex parte application was justified pur-

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320. *Id.* at 979.

321. *Id.*

322. *Id.* at 980.

323. *See e.g.*, *People v. Reyes-Fuentes*, 179 A.D.3d 980, 981 (N.Y. App. Div. 2020); *People v. Belfon*, 179 A.D.3d 981, 982 (N.Y. App. Div. 2020).

324. *People v. Reyes*, 179 A.D.3d 1098, 1099 (N.Y. App. Div. 2020).

325. *Id.*

326. *Johnson v. Monroe Cty. Dist. Attorney’s Office*, AP 2020/0001 (County Court, Monroe Co. 2020).

327. *Id.* at 2.

328. Kristine Hamann & Jessica Trauner, *Witness Intimidation: What You Can Do To Protect Your Witness Part 2*, 51 *THE PROSECUTOR* 13, 14 (2018).

329. *People v. Belfon*, 114 N.Y.S.3d 720 (N.Y. App. Div. 2020).

suant to its prior precedents.<sup>330</sup> Specifically, the appeals court stated that the case was “remitted to the Supreme Court, Nassau County, to afford the defendant an opportunity to make arguments to that court with respect to the People’s application for a protective order.”<sup>331</sup> The court’s order could not be any clearer: the protective order issued was problematic because the defense was inappropriately precluded from participating, and the proper remedy was to include them.

Following remittal of the case, the trial court did almost nothing different from the first time. The court denied the defense’s requests to make the prosecution disclose either the general nature of the information they sought to protect or the reasons they were seeking the order.<sup>332</sup> The court then excluded both counsel and client from the courtroom and conducted the hearing *ex parte*, ultimately granting a “substantively identical” protective order.<sup>333</sup> So while defense counsel was supposed to be afforded an opportunity to be heard on the protective order, the court effectively rendered that opportunity meaningless. Defense counsel did not even have a gist of what the subject of the order was; they could not refute the arguments the prosecution would make because they did not know what they were.<sup>334</sup> In essence, the trial court got reversed a first time for allowing an impermissible level of secretiveness, only to shroud the defense in secrecy as effectively as it did the first time. This caused the appeals court to vacate the order again and hold the obvious: that the defense was entitled to both the general nature of the information subject to the application and the general reasons why the prosecution sought the order.<sup>335</sup>

The actions of these trial courts fly in the face of the spirit of discovery reform, which was designed to make the process fairer to accused persons. The granting of these orders without defense knowledge or participation in the determination of these issues obviously promotes secretiveness, not openness. While there may be times when granting an *ex parte* application would be appropriate, the manner in which trial courts have been approving such applications certainly is not. These actions demonstrate some of the efforts by trial judges to undermine discovery reform.

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330. *Id.*

331. *Id.*

332. *People v. Belfon*, 112 N.Y.S.3d 346, 347 (N.Y. App. Div. 2020).

333. *Id.*

334. *Id.* at 347–48.

335. *Id.*

b. Granting Improper Protective Orders

In addition to granting *ex parte* applications inappropriately, trial judges have issued unduly restrictive protective orders. As discussed above, the new laws require courts to make individualized determinations regarding the appropriateness of a protective order, both in nature and in scope; the determination is supposed to be specific to each case. However, courts have granted orders where the prosecution made only general policy arguments and speculative claims regarding the possible dangers that could result from full and open disclosure.<sup>336</sup> A number of protective orders have consequently been vacated, even though the standard of review is whether or not there was an abuse of discretion.<sup>337</sup>

In some cases, trial courts would issue protective orders without a legitimate consideration of the factors listed in the statute. In a Nassau County case, for example, the prosecution sought a protective order precluding the disclosure of evidence until the jury was sworn in.<sup>338</sup> The court initially misunderstood the prosecution's request and issued a protective order allowing for redaction of the subject materials and disclosure to just defense counsel and not the defendant.<sup>339</sup> Upon realizing what the prosecution was actually seeking, the court "immediately indicated its intent to preclude the defendant's counsel from access to the witnesses' contact information or names without any apparent consideration of the factors set forth in CPL 245.70(1)."<sup>340</sup> The Appellate Division seemed poised to vacate the order, finding that the court's actions violated the statute.<sup>341</sup> However, the appeals court ultimately denied the defense's application for review, finding that the defendant "waived his objections to the terms of the protective order."<sup>342</sup> Nonetheless, the court made it clear that a granting of such an order without legitimate consideration of the statutory factors is an error of law.

In some cases, judges improperly restricted attorneys from providing certain pieces of discovery to their clients. In one case in the Bronx, a trial judge issued a protective order that barred the defense

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336. See Mot. Decision, *People v. Mena*, No. 2020-00812 (N.Y. App. Div. Jan 31, 2020); see also Mot. Decision, *People v. Swift*, No. 2020-00417 (N.Y. App. Div. Jan. 27, 2020).

337. *People v. Brown*, 122 N.Y.S.3d 120, 121–22 (N.Y. App. Div. 2020).

338. *Id.* at 122.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 123.

from providing a copy of the complainant's grand jury minutes to their client.<sup>343</sup> The judge's ruling followed no case-specific reasons, only general speculations and policy arguments by the prosecution.<sup>344</sup> Making matters worse was that the complainant was fully known to the defendant, so even general speculations did not pass muster.<sup>345</sup> The Appellate Division modified the order, ruling that the lower court improvidently exercised its discretion and permitting the defense attorney to provide the client one watermarked copy of the grand jury minutes.<sup>346</sup>

In another Bronx case, a trial court judge barred the defense from providing either a copy of the complainant's grand jury minutes or a copy of the complainant's medical records to the client.<sup>347</sup> Strangely, however, the order permitted the defense to review both sets of documents with their client, and neither set of documents redacted the complainant's name or relevant information.<sup>348</sup> Like the previous case, no case-specific arguments were proffered by the prosecution; no explanation was proffered as to how giving the defendant his own copy of the grand jury minutes or the medical records endangered the complainant or potential witnesses any more than reviewing it with his attorney did.<sup>349</sup> Therefore, the Appellate Division modified this order as well, permitting the defense to provide their client with a copy of each set of documents.<sup>350</sup>

In some instances, trial courts even prohibited defense attorneys from having otherwise discoverable information until later on in the process. A court in Staten Island did so in a case where the client was charged with a homicide and a host of other violent felonies.<sup>351</sup> In May 2019, seven months prior to the new laws taking effect, the prosecution sought and obtained a protective order *ex parte* that allowed them to withhold the names, addresses and identifying information of the witnesses listed in the indictment from the defense.<sup>352</sup> In support of their motion, the prosecution put forward an affirmation that was

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343. Mot. Decision, *People v. Mena*, No. 2020-00812 (N.Y. App. Div. Jan. 31, 2020).

344. *Id.*

345. *Id.*

346. *Id.*

347. Mot. Decision, *People v. Swift*, No. 2020-00417 (N.Y. App. Div. Jan. 27, 2020).

348. *Id.*

349. *Id.*

350. *Id.*

351. *People v. Beaton*, 179 A.D.3d 871, 871 (N.Y. App. Div. 2020).

352. *Id.*

“vague, speculative and conclusory.”<sup>353</sup> The defense raised an objection twice to the protective order, the second objection being raised after the new laws took effect.<sup>354</sup> For that second objection, the defense attorney first asked for a full disclosure of the names and identifying information of the witnesses, or, in the alternative, for the information to be disclosed to him, his co-counsel and the investigator, with a court mandate barring any sharing of this information with the client.<sup>355</sup> The trial court kept the protective order as it was, and did not even consider the defense’s proposal.<sup>356</sup>

The Appellate Division vacated the trial court’s ruling and remanded the case for further proceedings.<sup>357</sup> The appeals court first noted that the prosecution’s affirmation, while perhaps adequate under the prior laws, would not suffice under the new statutes.<sup>358</sup> The court further noted that it was “an error of law” for the trial judge to not consider the defense’s alternative of providing the attorneys and investigator with the information along with instructions not to share said information with the client.<sup>359</sup> It should be noted, however, that the court’s ruling did not necessarily preclude the trial court from issuing a substantively identical protective order, provided the prosecution submits a more sufficient affirmation and the defense’s alternative proposal is purportedly considered.<sup>360</sup>

c. Compliance with Discovery Obligations

Outside of the cases where prosecutors have sought protective orders, some courts have allowed prosecutors to flout the timelines for disclosure requirements.<sup>361</sup> Some judges have also deemed certificates of compliance to be valid even when prosecutors did not fully comply with their obligations.<sup>362</sup> In a few of those cases, the prosecution acknowledged the existence of outstanding discovery either on the record, or by improperly filing supplemental certificates of compli-

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353. *Id.* at 874.

354. *Id.* at 872.

355. *Id.*

356. *Id.*

357. *Id.* at 875.

358. *Id.* at 874.

359. *Id.* at 875.

360. *Id.*

361. Lustbader, *supra* note 208.

362. *See e.g.*, *People v. Todd*, 122 N.Y.S.3d 498 (Mar. 12, 2020); *see also* *People v. Nelson*, No. 20032 (N.Y. Cnty. Ct. Feb. 10, 2020); *see also* *People v. Percell*, 67 N.Y.S.3d 731 (N.Y. Crim. Ct. Feb. 10, 2020).

ance soon after filing the original certificate.<sup>363</sup> Perhaps the biggest effect of the courts' precedents here is that the prosecution can announce readiness for trial before those courts. Given the interplay between certificates of compliance and New York Criminal Procedure Law § 30.30, these cases will be discussed in the next subsection, "Speedy Trial."

In other cases, prosecutors will try to satisfy their obligations with improper substitutes. In a Bronx case, for example, the prosecution provided the accused with only a written notice of his videotaped statements to law enforcement and claimed this satisfied their obligation under C.P.L. § 245.10(1)(c), even though they were in possession of the video recording.<sup>364</sup> In another case, from Queens, the prosecution failed to provide an envelope containing markings or notes by the vouchering officer, arguing that they fulfilled their duties by providing "a copy of an inventory sheet which details the markings."<sup>365</sup> Although the court in each case disagreed with the prosecution, no real consequence resulted from either case. The court in the former case found that the defendant's discovery rights had been violated, but provided no remedy.<sup>366</sup> In the latter case, the court found that the prosecution's failure did not delegitimize either the prosecution's certificate of compliance or certificate of readiness.<sup>367</sup>

Another problem has been compliance with the prosecution's requirement that it turn over to the defense "[t]he names and adequate contact information of all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses."<sup>368</sup> This statutory provision has been a bone of contention for the prosecution, which fought vigorously against it during the legislative process.<sup>369</sup> Fortunately for them, at least one court officially blessed the prosecution's workaround of the "adequate contact information" requirement.<sup>370</sup> In this case, based out of Queens, the prosecution provided unique numeric codes for

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363. *Id.*

364. *People v. Carswell*, 67 Misc. 3d 444, 445 (N.Y. Crim. Ct. 2020).

365. *People v. Adams*, 66 Misc. 3d 918, 922 (N.Y. Sup. Ct. 2020).

366. *Carswell*, 67 Misc. at 450.

367. *Adams*, 66 Misc. at 924.

368. N.Y. CRIM. PROC. LAW § 245.20(1)(c) (McKinney 2020).

369. Letter from the Dist. Att'y Ass'n of the State of N.Y., *supra* note 248.

370. *People v. Todd*, 67 Misc. 3d 566, 582 (N.Y. Sup. Ct. 2020).

each of their witnesses to the defense.<sup>371</sup> These codes were to allow defense counsel to contact these witnesses through a Verizon online portal.<sup>372</sup> In so doing, the prosecution claimed that they satisfied their obligation to provide “adequate contact information,” despite the fact that they provided *no* contact information.<sup>373</sup> The trial judge court nonetheless agreed in a lengthy opinion that is couched in apparent logic, but ultimately feeds the fire of discovery reform opponents and prioritizes protecting prosecution witnesses from speculative danger above the statute’s presumption of openness.<sup>374</sup>

In the court’s legal analysis, the judge first embarked on defining the term “adequate” in “adequate contact information,” making a passing reference to the rules of statutory construction.<sup>375</sup> His claim that the word “adequate” is the most consequential word in the phrase<sup>376</sup> is plainly incorrect, at least in this case. There was no issue regarding the *adequacy* of contact information, because the prosecution provided *no* contact information. The court expressly conceded this in its recitation of facts: “And, instead of disclosing the callers’ phone numbers (*or any other form of contact information*), the People provided a unique numeric code assigned to each witness to enable defense counsel to contact them through a Verizon service . . .” (emphasis added).<sup>377</sup> If the statute requires the provision of adequate contact information, and the prosecution provided *no* contact information, then the requirements have not been met.

The court opined that, based on the statutory language, the requirement can be satisfied by providing “a new method of communication created specifically for receiving communications related to the criminal case . . .”<sup>378</sup> Except the statutory language specifies that the prosecution provide *contact information* and makes no mention of an online portal, irrespective of however the court chooses to classify it.<sup>379</sup> When interpreting statutes, New York jurisprudence commands that the legislature’s failure to include a matter in a statute suggests an intention that the matter be excluded from it.<sup>380</sup> Based on the failure

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371. *Id.* at 568.

372. *Id.*

373. *Id.*

374. *Id.* at 573–74.

375. *Id.* at 569–70.

376. *Id.* at 572.

377. *Id.* at 568.

378. *Id.* at 573.

379. N.Y. CRIM. PROC. LAW § 245.20(1)(c) (McKinney 2020).

380. N.Y. STAT. LAW § 74 (McKinney 2019); *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (N.Y. 1982).

of the legislature to include “online portal” in the statute, it would seem as if the legislature intentionally excluded online portals from being a legal substitute to the “adequate contact information” mandate. This is more pronounced in light of the fact that: (a) the statute embodies a presumption of disclosure; and (b) the prosecution proposed this “new method of communication” to the legislature, and it was nonetheless omitted from the new statute.<sup>381</sup> The trial court later called into question the veracity of the defense’s averment that such a proposal was rejected by the legislature,<sup>382</sup> but unsurprisingly offered no basis for doubting a factual assertion made under oath and apparently undisputed by the prosecution.

Another problem with equating the provision of actual contact information with the provision of online portal codes is that contact information is not just useful for reaching out to witnesses; the information itself can have evidentiary value. As the prosecution pointed out and the court itself noted, contact information could be the gateway for uncovering additional information about witnesses,<sup>383</sup> some of which can be material and relevant to the proceedings. Additionally, the contact information itself could be material and relevant. For example, if the defense has acquired phone records of either their client or a witness, having a prosecution witness’ phone number can allow the attorney to determine how much interaction, if any, that witness may have had with their client or other witnesses and the relevance of such contacts. Similarly, in a case that turns on electronic records, having a witness’ email address could prove to be quite relevant and material in the case. Contrarily, it is difficult to imagine what evidentiary value numeric codes for a portal could ever have in a given case. Thus, it is not “effectively the same thing as having the witness’s phone number” or “an adequate substitute for that information.”<sup>384</sup>

The court paid lip service to the statutory presumption of openness before claiming that the discovery statute “also includes a more lenient standard that prosecutors must meet when seeking protective orders allowing them to, among other things, delay the disclosure of discoverable materials or restrict disclosure to defense counsel only.”<sup>385</sup> As a threshold matter, this is factually inaccurate; if there is

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381. N.Y. CRIM. PROC. LAW § 245.20(7) (McKinney 2020).

382. *People v. Todd*, 67 Misc. 3d 566, 574-75 (N.Y. Sup. Ct. 2020).

383. *Id.* at 574.

384. *Id.* at 573.

385. *Id.* at 574.

a presumption of openness that did not exist with the prior laws, then the requirements for demonstrating good cause necessarily became *less* lenient. This is evidenced by the novel requirement of prompt hearings for said orders,<sup>386</sup> as well as by the newly created right to an expedited review of rulings on protective orders.<sup>387</sup> This is also evidenced by the vacatur of several protective orders by the Appellate Division within the first three months of the new laws taking effect.<sup>388</sup> By contrast, the author could find only one case in which the appeals court found the granting of a protective order to be an improper use of discretion under the prior disclosure statute; and the error in that case was deemed harmless.<sup>389</sup>

Beyond that, the court's protective order analysis is not even applicable here because the prosecution did not seek a protective order for the contact information.<sup>390</sup> Had they done so, there could have been an individualized determination made, based on the factors embodied in the statute. After all, applications for protective orders are requests for deviations from the automatic disclosure requirements,<sup>391</sup> such as the use of the online portal in place of providing actual contact information. Instead, the prosecution unilaterally decided that they could use the portal instead of providing actual contact information, without seeking a protective order; and this court validated this practice. The court's decision consequently permits prosecutors in every case to withhold actual contact information and instead compel defense participation in communication services on their terms. This simply cannot be reconciled with the statutory presumption in favor of disclosure.

The court then endorsed a familiar argument of discovery reform opponents, stating that the portal “strikes an appropriate balance between the benefits that inure from the timely disclosure of information and evidence to the defense . . . and the legitimate concerns witnesses may have about their personal contact information being shared with defendants who, in some cases, are accused of very serious crimes.”<sup>392</sup> The court's approval of this viewpoint is scattered

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386. N.Y. CRIM. PROC. LAW § 245.70(3).

387. *Id.* § 245.70(6)(a).

388. See prior subsection, “Misinterpreting and Distorting the New Laws,” under “Discovery.”

389. *People v. Nesmith*, 144 A.D.3d 1508 (N.Y. App. Div. 2016).

390. *People v. Todd*, 67 Misc. 3d 566, 569 (N.Y. App. Div. 2020).

391. *Id.* § 245.70(1).

392. *Todd*, 67 Misc. 3d at 574.

throughout the opinion. The judge posited how a “savvy internet researcher” could learn a witness’ address from their telephone number,<sup>393</sup> as if one could not learn a witness’ address from simply googling the witness’ name, provided that name is sufficiently unique. The judge also selectively (perhaps even deceptively) quoted from *People v. Feng*,<sup>394</sup> a decision he would later criticize bitterly and decline to follow, for the proposition that the portal would better facilitate communication because “witnesses will appreciate the measure of privacy the Portal provides without drawing the inference that *the rationale for using it is that there is some element of danger inherent in communicating with an agent of the defendant.*” (emphasis added)<sup>395</sup>

However “inherently dangerous” the trial court thinks communication might be, the legislature already accounted for the need to strike a balance between full disclosure and the protection of witnesses with its protective order statute. If a party establishes a case-specific and credible danger of witness intimidation, harassment or the like in a given case, a court can impose restrictions on the disclosure of that information.<sup>396</sup> In this case, for example, if the prosecution provided good cause, the court could have set rules as to how that contact information can be used, and to whom it can and cannot be given. The trial court in this case offered no reason why valid protective orders do not, at a minimum, equally strike this “appropriate balance.” Instead, it sanctioned a means of avoiding the statutory mandates while pretending that the portal is the functional equivalent of “adequate contact information.”<sup>397</sup> All of this, of course, was done under the theory of minimizing the general, speculative danger accused persons allegedly pose to witnesses.<sup>398</sup>

This case yet again proves that the arguments and reasoning of discovery reform opponents has found its way into the courtroom, minimizing the intended effects of the reform statutes. The new discovery laws create a presumption in favor of disclosure; and yet this court validated a practice that allows the state to withhold information these laws expressly require them to disclose, without a protective order. Decisions like this help to place accused persons where they were before the reforms were enacted; the courts still seek to impede per-

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393. *Id.*

394. *People v. Feng*, No. 8071-18, 2020 NYLJ LEXIS 501 at \*5 (Sup. Ct. Kings County 2020).

395. *Todd*, 67 Misc. 3d at 578.

396. N.Y. CRIM. PROC. LAW §§ 245.70(1),(4) (Consol. 2020).

397. *Todd*, 67 Misc. 3d at 572-73.

398. *Id.* at 573.

sons charged with crimes by overregulating what information should be provided to them.

### 3. Speedy Trial Reform Laws

On paper, the reforms worked a significant change in existing speedy trial law. In practice, whether or not that change is meaningfully reflected in actual jurisprudence depends on the judge. As noted above, the prosecution cannot validly state ready unless they have first filed a valid certificate of compliance with the court.<sup>399</sup> However, some trial judges have allowed prosecutors to announce ready after filing obviously deficient certificates of compliance. In at least one rogue decision, a trial court judge deemed the first fifteen days of January excludable for speedy trial purposes on a case that commenced in March 2019.<sup>400</sup>

#### a. Excluding the First Fifteen Days of January 2020 (or of Any Post-2019 Case)

In a decision arising out of Brooklyn, a criminal court judge denied dismissal of a speedy trial motion, claiming that C.P.L. § 30.30(4)(a) applied to the first fifteen days of the new year.<sup>401</sup> After a brief (and seemingly pointless) foray into the legislative history, the judge referenced the language of C.P.L. § 30.30(4)(a), which excluded delays resulting from demands to produce discovery and requests for bills of particulars.<sup>402</sup> The judge noted that this provision remained unchanged and thus, “[t]he logical reason for not changing that statute is that the legislature intended the speedy trial rule to remain as it had been prior to January 1, 2020. . . .”<sup>403</sup> The judge wrapped up his legal analysis by holding that in any given case that commences after January 1, 2020, the first fifteen days “must be excluded from the speedy trial calculation in order to comply with C.P.L. § 30.30(4)(a).”<sup>404</sup>

This court’s decision is misguided and plainly illogical for several reasons. First, it cannot be legitimately asserted that the legislature intended to keep speedy trial law as it was before January 2020. As discussed above, whether or not the prosecution served discovery had

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399. *People v. Anderson*, 252 A.D.2d 399, 401 (N.Y. App. Div. 1998).

400. *People v. Roland*, 67 Misc. 3d 330, 336 (Crim. Ct. Kings Co. 2020).

401. *Id.* at 338.

402. *Id.* at 335.

403. *Id.* at 336.

404. *Id.* at 337.

no bearing on their readiness under the prior laws.<sup>405</sup> Now under the new laws, the prosecution *cannot* state ready unless they have complied with their discovery obligations and certified so.<sup>406</sup> Thus, the legislature clearly — and intentionally — changed speedy trial law in New York, making the service of discovery an unprecedented prerequisite to trial readiness.

Also problematic is the court's invocation of nonfunctional portions of the law. What made periods of delay from the service of discovery excludable under the old laws was the requirement of a written motion.<sup>407</sup> Under the old discovery laws, the prosecution's discovery obligations were only triggered upon a demand to produce.<sup>408</sup> However, the new laws created automatic discovery, both vitiating the need and terminating the use of written demands.<sup>409</sup> Relevantly, there is no language about "demands to produce" in the newly enacted Article 245 of the Criminal Procedure Law.<sup>410</sup> The court's analogy to jurisdictions that had discovery "by stipulation" is unavailing; in those few jurisdictions, it was informally agreed upon that in exchange for foregoing the demand to produce and not filing motions, the prosecution would consent to hearings, and the time period would be excludable.<sup>411</sup> The informal norms of one or two jurisdictions in New York City do not justify the creation of a formal rule that distorts both the new statutes and the intents of the legislature.

To that end, there is no statutory authority or legislative history that even suggests that the first fifteen days of every case commenced after January 1, 2020, should be deemed excludable for speedy trial purposes. Again, courts are supposed to look to the statutory text when defining the meaning and requirements of statutes;<sup>412</sup> and as noted above, the legislature's failure to include a matter in a statute suggests an intention that the matter not be included in the statute.<sup>413</sup> Here, if it were the intention of the legislature to make the first fifteen

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405. *People v. Khachiyani*, 194 Misc. 2d 161, 167 (N.Y. App. Div. 2002).

406. N.Y. CRIM. PROC. LAW § 245.50 (Consol. 2020).

407. N.Y. CRIM. PROC. LAW §§ 240.20(1), 240.90(2), (Consol. 2018) (repealed 2020); § 30.30(4)(a) (Consol. 2020).

408. *Id.* § 240.20(1).

409. *Id.* § 245.20(1).

410. *Id.*

411. *People v. Khachiyani*, 194 Misc. 2d 161, 166 (N.Y. App. Div. 2002) ("Since [Discovery by Stipulation] is in lieu of motion practice and discovery practice in Kings County, the adjournment is excludable under CPL 30.30(4)(a), irrespective of the People's readiness.").

412. *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (N.Y. App. Div. 1982).

413. N.Y. CRIM. PROC. LAW § 245.10 (Consol. 2020).

days of post-2019 cases excludable, it would have expressly stated so. At a minimum, the legislature's failure to include that language suggests an intention to not make that the law.

More pointedly, both the language and the statutory scheme of the new discovery laws indicate a legislative intent to make the period of discovery *includable* for speedy trial purposes. The 2019 discovery reform statutes require the prosecution to serve discovery within fifteen days, subject to extensions under carefully delineated circumstances.<sup>414</sup> It requires them to file a certificate of compliance when they have fulfilled their discovery obligations, which they generally have fifteen days to do.<sup>415</sup> Finally, it bars them from being able to state ready until after they have filed a valid certificate of compliance, which they generally have fifteen days to do.<sup>416</sup> Putting these three provisions together, it was clearly the legislature's intention to have the speedy trial clock running while the prosecution was fulfilling their discovery obligations. The legislative history itself expresses a clear intent to bar prosecutors from stating ready until they have provided all relevant and material evidence to the defense.<sup>417</sup> It therefore defies logic to claim that it was also their intention to make this period *excludable* for speedy trial purposes, especially without any specific language in either the statute or the legislative history.

The procedural posture of the case makes the court's decision all the more unsound. The case was arraigned on March 31, 2019,<sup>418</sup> the day before the reforms were passed. From April, the prosecution had nine whole months to turn over the documents they knew would be automatically discoverable come the next year. Had the prosecution done so, they could have then filed a certificate of compliance and maintained their readiness into the new year. Instead, they sat on their hands and waited until the following year before completing their discovery obligations.<sup>419</sup> Yet, the court still felt it appropriate to grant the prosecution an additional fifteen excludable days, on top of the nine months they had before the statutes took effect.

In fairness, some trial courts have properly rejected the argument that the fifteen days of January — or the first fifteen days of any post-

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414. *Id.*

415. *Id.*

416. N.Y. CRIM. PROC. LAW § 245.50(3) (Consol. 2020).

417. Laws of 2019 ch. 59 Part KKK Speedy Trial at 158.

418. *People v. Roland*, 67 Misc. 3d 330, 331 (N.Y. App. Div. 2020).

419. *Id.* at 2–3.

2019 case — should be excluded from the speedy trial count.<sup>420</sup> However, this court’s decision is nonetheless dangerous, because it provides judicial support for other judges wishing to either circumvent or resist the changes in the law. It also empowers prosecutors to continue to assert an untenable view of speedy trial law as it relates to the prosecution’s newfound discovery obligations.

b. Validating Invalid Certificates of Compliance for 30.30 Purposes

While not going as far as the Brooklyn trial court did to distort the new speedy trial rules, some judges similarly rendered a disservice to the spirit of reform in how they interpreted the laws. Some courts would also deem the prosecution ready for trial, even when it was abundantly clear that their initial certificate of compliance was not valid.<sup>421</sup>

For example, in a Manhattan case, the trial court rejected a motion to dismiss on speedy trial grounds, finding that the “efforts by the People in this case to comply with their discovery obligations do not render their prior statements of readiness for trial illusory.”<sup>422</sup> This was despite the fact that the prosecution filed four separate certificates of compliance between December 31, 2019 and January 8, 2020,<sup>423</sup> a palpable sign that at least the first three certificates were illegitimate — and the three accompanying statements of readiness consequently illusory. The court here sanctioned a flagrant abuse of the certificate of compliance requirement, allowing the prosecution to file several supplemental certificates of compliance without any adverse impact on their readiness.<sup>424</sup> Given the reasons for discovery reform, the legislative intent, and the statutory scheme, it is clear that the “supplemental certificate”<sup>425</sup> was not designed to allow the prosecution to rush to file a certificate of compliance and declare readiness. Prosecutors are supposed to make a concerted effort to turn over all discoverable materials that exist in a given case and to file a certificate only when they have either turned over or made available all existing items of discovery.<sup>426</sup> The “supplemental discovery” requirement exists in the event the prosecution *subsequently learns of discoverable*

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420. See, e.g., *People v. Akramov*, 124 N.Y.S.3d 639 (N.Y. Crim. Ct. 2020).

421. See, *People v. Percell*, 67 Misc. 3d 190 (N.Y. Crim. Ct. 2020).

422. *Id.*

423. *Id.*

424. *Id.*

425. N.Y. CRIM. PROC. LAW §§ 245.50, 245.60 (McKinney 2020).

426. N.Y. CRIM. PROC. LAW. § 245.50(1).

*material* they did not know about despite having exercised due diligence.<sup>427</sup> Under this court's tortured interpretation of the law, nothing would stop prosecutors from filing meaningless certificates of readiness to stop the speedy trial clock, and then filing countless supplemental certificates afterwards.

The court further misapprehended the law in stating that "the statutory speedy trial clock did not begin to run again on January 1, 2020, in this case merely because the People had not complied with their new discovery obligations."<sup>428</sup> It is utterly illogical to posit, as the trial court does, that while the certificate of compliance requirement became effective on January 1, 2020,<sup>429</sup> the provision making the filing of the certificate a prerequisite for trial readiness, *which is embodied in the exact same statute*, somehow does not also apply. As discussed at length above, the new laws tie the prosecution's ability to declare readiness to whether or not they have fulfilled their discovery obligations.<sup>430</sup> This illogical rationale, however, allows the court to dull the impact that speedy trial reform was supposed to have and insulates the prosecution from being held accountable for failing to complete their discovery obligations diligently.

In a case arising out of Franklin County, a trial court refused to strike the prosecution's statement of readiness despite having filed an obviously deficient certificate of compliance, while authoring an opinion that confuses different discovery statutes.<sup>431</sup> In that case, the prosecution filed a certificate of compliance on January 13, 2020, but then stated two weeks later that they were still missing discovery and were thus entitled to the statute's automatic thirty-day extension.<sup>432</sup> These two positions are irreconcilable: if the prosecution is invoking the need for the extension pursuant to the law,<sup>433</sup> then they have not turned over discovery that they are aware of, and therefore have not fully complied with their discovery obligations. Therefore, the certificate of compliance should have been invalidated, as well as the prosecutor's statement of readiness. Yet, the court ignored this obvious contradiction and refused to void either certificate.<sup>434</sup>

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427. N.Y. CRIM. PROC. LAW § 245.60.

428. *People v. Percell*, 67 Misc. 3d at 194.

429. *Id.*

430. N.Y. CRIM. PROC. LAW § 245.50(3).

431. *People v. Nelson*, 67 Misc. 3d 313 (N.Y. Co. Ct. 2020).

432. *Id.* at 314.

433. N.Y. CRIM. PROC. LAW § 245.10(1)(a) (McKinney 2020).

434. *Nelson*, 67 Misc. 3d at 318.

The trial court claimed the defense argument that the prosecution needed to comply fully with their disclosure obligations before filing the certificate of compliance “is contradicted by Criminal Procedure Law §§ 245.55 (“Flow of information”) and 245.60 (“Continuing duty to disclose”) which independently and jointly contemplate ongoing disclosure as new information becomes available.”<sup>435</sup> However, neither of these subdivisions even suggests that the prosecution can file a certificate of compliance when they have not turned over discovery they know to exist. C.P.L. § 245.55 does not even talk about certificates of compliance, and C.P.L. § 245.60 governs prosecutors’ obligations regarding discovery they learn about *after* they have already complied with their discovery obligations.<sup>436</sup> Again, if the statute were to allow for prosecutors to file certificates of compliance despite the existence of outstanding discovery they know of, prosecutors could just file hollow compliance certificates expeditiously and then follow up with supplemental certificates afterwards. The trial court’s attempt to dismiss the defense’s “suggested” interpretation of the word “learn” from C.P.L. § 245.60<sup>437</sup> is borderline asinine; the absurd outcome of which it warns could result from “accept[ing] the defendant’s narrow interpretation” of the word “learn” is completely foreclosed both by the language of the new statutes and longstanding discovery jurisprudence.<sup>438</sup> Additionally, the definition of the word “learn” is not exactly ambiguous;<sup>439</sup> and if a more expansive definition of that word does exist, the court certainly failed to provide it.

The court further misconstrues the defense’s motion for striking down the prosecution’s certificate of readiness as a request for a sanction.<sup>440</sup> The court’s foray into C.P.L. § 245.80,<sup>441</sup> the statute that deals with sanctions for discovery violations, is completely unnecessary and wholly irrelevant to the issue at hand. The defense did not allege a

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435. *Id.* at 315.

436. *See* N.Y. CRIM. PROC. LAW § 245.55 (McKinney 2020); *See also* N.Y. CRIM. PROC. LAW § 245.60.

437. *Id.*

438. The prosecution and police are deemed one unit for purposes of discovery. Therefore, the prosecution could not be insulated from sanctions for failure of the police to turn over discovery. *See* N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2020); *see also* *People v. Garrett*, 23 N.Y.3d 878 (2014). Further, practically speaking, there is no conceivable scenario in which the prosecution would be sanctioned for informing the defense of discovery that is indeed forthcoming.

439. *Learn*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/learn> (last visited Sept. 22, 2020).

440. *Nelson*, 67 Misc. 3d at 315.

441. *Id.* at 315–16.

discovery violation; they alleged that the prosecution’s certificate of readiness was invalid because they did not fully comply with their discovery obligations, which are a prerequisite to a declaration of readiness.<sup>442</sup> Thus, the defense was not required to prove prejudice or establish why the materials the prosecution had not turned over yet “have any value to either party at trial.”<sup>443</sup> The court’s claim that striking a certificate of readiness is “a drastic remedy which should be used both sparingly and judiciously”<sup>444</sup> is nonsensical; a declaration of readiness should *always* be struck down if it is not valid.<sup>445</sup> The legislature recognized this when they added the language now embodied in C.P.L. § 30.30(5).

These two decisions, and other decisions like them, underscore the efforts by the judiciary to undermine speedy trial reform. The biggest problem is how both cases deem it acceptable for prosecutors to file certificates of compliance when they have not fulfilled their discovery responsibilities, and then file supplemental certificates of discovery later on.<sup>446</sup> The legislature made its intent clear to bar prosecutors from announcing readiness for trial until they have turned over all discovery materials.<sup>447</sup> With this illogical reading of the new laws, prosecutors could theoretically serve some discovery with a certificate of compliance at the arraignment, declare ready for trial to stop the clock, and then serve remaining discovery at their leisure later. This would literally render the reforms meaningless, and the efforts of the legislature to bring about the reforms useless, because New York criminal practice would be right where it was before the reforms were enacted. Prosecutors would rush to state ready just so they could stop the clock, allowing for cases to drag on incessantly throughout New York State. The incentive for prosecutors to fulfill their duties expeditiously — the inability to declare readiness until such duties have been fulfilled — would be rendered nonexistent by

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442. *Id.* at 314–15 (“At the time of the Court’s inquiry, defendant’s counsel moved to strike the certificate of compliance and readiness . . . . The issue before the Court is whether the certificate of compliance and readiness filed on January 13, 2020 is illusory. Defendant makes four separate arguments.”).

443. *Id.* at 317–18.

444. *Id.* at 318.

445. *See generally* *People v. England*, 84 N.Y.2d 1, 4 (1994) (“A statement of readiness at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock.”).

446. *See generally* *People v. Nelson*, 67 Misc. 3d 313 (N.Y. Co. Ct. 2020); *England*, 84 N.Y.2d 1.

447. Law of 2019 ch. 59 Part KKK Speedy Trial at 158.

the judiciary. In effect, the judiciary is helping the opponents of reform by dismantling the reform.

c. Equating Discovery Compliance with Trial Readiness

Even in cases where a valid certificate of compliance may have been filed, it does not automatically follow that the prosecution is ready for trial. Existing C.P.L. § 30.30 jurisprudence still requires that the prosecution be “actually ready to proceed” at the time they declare readiness;<sup>448</sup> the prosecution must, for example, file with the court a jurisdictionally sufficient accusatory instrument before they can state ready.<sup>449</sup> It is not entirely clear whether courts grasp that merely complying with discovery obligations does not necessarily mean that the prosecution is ready for trial. In one Manhattan case, for example, the court denied the defense’s motion to invalidate the prosecution’s certificate of readiness, finding that the certificate of compliance was legally valid and filed in good faith.<sup>450</sup> However, the court also noted that the prosecution was still “continuing to investigate.”<sup>451</sup> A continuing investigation by the prosecution would likely deem a statement of readiness illusory,<sup>452</sup> and there is no indication that the court made on-the-record inquiries about that representation by the state.<sup>453</sup>

In a Queens case, as another example, the prosecution filed a certificate of compliance on January 24, 2020, along with a statement of readiness.<sup>454</sup> The defense challenged both certificates on the grounds that the prosecution failed to follow through with their discovery responsibilities adequately.<sup>455</sup> One of the issues related to the prosecution’s provision of nearly 200 Rikers calls, with an admission that they could not narrow down which specific calls they would use for trial within the time constraints imposed by the statute.<sup>456</sup> Whether the court properly modified the time limits is a separate issue; but if, as

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448. *People v. Kendzia*, 64 N.Y.2d 331, 337 (1985).

449. *People v. Colon*, 59 N.Y.2d 921 (1983).

450. *People v. Alford*, 66 Misc. 3d 1233(A) (N.Y. Crim. Ct. 2020).

451. *Id.* at 2.

452. *See* *People v. Sibbles*, 22 N.Y.3d 1174 (2014); *People v. Bonilla*, 94 A.D.3d 633 (N.Y. App. Div., 1st Dept. 2012); *cf.* *People v. Wright*, 50 A.D.3d 429 (N.Y. App. Div., 1st Dept. 2008).

453. *Cf.* *People v. Nelson*, 67 Misc. 3d 313, 314 (N.Y. Co. Ct. 2020) (Pursuant to CPL § 30.30(5), the Court made inquiry, on January 27, 2020, on the record, as to the prosecutor’s actual readiness.”).

454. *People v. Adams*, 66 Misc. 3d 918, 920 (N.Y. Sup. Ct. 2020).

455. *Id.*

456. *Id.* at 921.

the prosecution plainly admitted, they needed more time to determine which calls they will be introducing at trial, then apparently they are not prepared for trial.<sup>457</sup> Again, the decision offers no hint that the court inquired about the state's representations given that admission.<sup>458</sup> Thus, it appears as if trial courts are not even applying *existing* speedy trial law when doing so benefits accused persons.

### III. THE DANGER OF INCREASED JUDICIAL DISCRETION

Critics of bail reform appeared to get their way. Within days of the new laws taking effect, state lawmakers already began wavering on the reforms in the wake of an alleged increase of hate crimes.<sup>459</sup> Over the next few weeks, detractors labored tirelessly to trumpet the supposed failings of the major reforms with sensationalized stories, questionable crime statistics, and false information.<sup>460</sup> Whether accurate or not, the messaging of opponents took its toll in Albany.<sup>461</sup> Public support for the reforms turned, and the majority of New Yorkers opposed the laws.<sup>462</sup> A number of state democrats, including Senate Majority Leader Andrea Stewart-Cousins, floated the idea of eliminating cash bail entirely while conferring upon judges the discretion to detain persons they deem to be dangerous to the public.<sup>463</sup> She and others argued that making this transition in the law keeps the spirit of the reforms intact.<sup>464</sup>

Nothing could be further from the truth. The history of bail practice in New York shows that judges have consistently used bail to punish poor people and people of color, specifically African American and Hispanic New Yorkers, before they have had their day in court.<sup>465</sup>

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457. *Id.*

458. *Cf. Nelson*, 67 Misc. 3d at 314 (“Pursuant to CPL § 30.30(5), the Court made inquiry, on January 27, 2020, on the record, as to the prosecutor’s actual readiness.”).

459. Zack Fink, *Democrats Rethink Bail Reform After Hate Crime Spike*, SPECTRUM NEWS N.Y. 1 (Jan. 2, 2020, 7:43 PM), [https://www.nyl.com/nyc/all-boroughs/politics/2020/01/03/democrats-rethink-bail-reform-after-hate-crime-spike?cid=share\\_email](https://www.nyl.com/nyc/all-boroughs/politics/2020/01/03/democrats-rethink-bail-reform-after-hate-crime-spike?cid=share_email).

460. *Id.*

461. Pinto, *supra* note 225.

462. *Id.*

463. Jimmy Vielkind, *New York Senate Proposes Changes to Bail Law, Angering Assembly Democrats*, THE WALL STREET J. (Feb. 12, 2020, 5:44 PM), <https://www.wsj.com/articles/new-york-senate-proposes-change-to-bail-law-angering-assembly-democrats-11581547485>.

464. *Id.*

465. *New York City: Bail Penalizes the Poor*, HUM. RTS. WATCH (Dec. 2, 2010, 11:45 PM), <https://www.hrw.org/news/2010/12/02/new-york-city-bail-penalizes-poor>; Terrell Jermaine Starr, *Criminal Justice Experts: Bail System Needs More Than Reform, It Needs to Be Scrapped*, JUST. POL’Y INST. (Jul. 14, 2015), <http://www.justicepolicy.org/news/9463>.

The courts' exercise of discretion has routinely been disadvantageous to accused persons, even when the intent of the legislation at issue and even the very language of the laws themselves militates a contrary ruling.<sup>466</sup> Furthermore, by publicly denouncing, openly defying, and deliberately misinterpreting the new laws, criminal court judges across the state have demonstrated both a resolve to undermine reform and a clear anti-defendant bias largely based on classism and/or racism. The idea that giving these very judges the power to detain accused persons preventatively would somehow advance the goals of bail reform is so absurd that it does not pass the laugh test.

Allowing preventative detention based on “dangerousness” is incompatible with the presumption of innocence,<sup>467</sup> promotes longstanding racism in the criminal judicial system,<sup>468</sup> and grossly undermines the whole purpose of having enacted reform in the first place.<sup>469</sup> Judges will not temper these effects; judicial discretion is primarily the reason why bail reform has been needed for decades. Moreover, if judges cannot even be trusted to apply the new laws in a manner consistent with their intended purposes, as demonstrated in Part II, then it would be foolish to expect them to exercise their discretion in a different vein. By their response to the reforms, New York criminal judges have made the case for why decreased judicial discretion is necessary for real reform to work, at least in the short term.

#### A. Judicial Discretion Is the Problem

The bail crisis in New York State was a product of judicial discretion.<sup>470</sup> New York State judges, like other Americans, live in this society and are subject to the same biases and prejudices as everyone else in America. Through effective political and media propaganda, the faces of crime, poverty and other societal ills have been etched in the minds of Americans as African American and Hispanic.<sup>471</sup> The media has effectively programmed society to examine problems through

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466. Alison Smith, *State Money-Bail Systems: Differing Approaches*, CONG. RSCH. SERV. (Nov. 27, 2018), <https://fas.org/sgp/crs/misc/LSB10220.pdf>.

467. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L. J. 723, 746–54 (2011).

468. Laws of 2019 ch. 59 Part JJJ Bail Reform (N.Y. 2019).

469. *Id.* at 288.

470. Lustbader, *supra* note 71; Hechinger, *supra* note 47.

471. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 100 (2014).

blindness, and then diagnose them at face value while being incognizant of the various factors that contribute to them. This has resulted in the simplifying of complex problems and the hardening of false stereotypes in the minds of everyday Americans, many of which are either law enforcement officers or practitioners within the judicial system.<sup>472</sup> This reverberates throughout the entire judicial process: police officers arbitrarily enforce the law and disproportionately arrest so-called minorities for offenses that white people commit in either equal numbers or greater proportions;<sup>473</sup> district attorneys prosecute defendants of color more harshly than their similarly situated white counterparts;<sup>474</sup> and judges are discriminatory in their bail determinations, sentencing and other decisions.<sup>475</sup>

Judicial discretion has allowed racial bias to persist in the administration of criminal law. The presumption of innocence is largely a myth; judges routinely presume accused persons, most of whom are African American or Hispanic, to be guilty of the crimes with which they are charged.<sup>476</sup> The problem becomes more pronounced when the primary witnesses against accused persons are members of law enforcement.<sup>477</sup> One of the biggest reasons why ‘testilying’<sup>478</sup> — the practice of police officers lying under oath — remains a persistent problem is because judges tolerate it and would rather overlook police perjury than rule in favor of people they hold in disdain.<sup>479</sup> Specifically, African American males have always been viewed as dangerous in American society; and judicial practices regarding bail, particularly

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472. Evi Taylor, Patricia Guy-Walls, Patricia Wilkerson & Rejoice Addae, *The Historical Perspectives of Stereotypes on African-American Males*, 4 J. HUM. RIGHTS SOC. WORK 213, 213 (2019).

473. See Arthur H. Garrison, *NYPD Stop and Frisk, Perceptions of Criminals, Race and the Meaning of Terry v Ohio: A Content Analysis of Floyd, et al. V City of New York*, 15 RUTGERS RACE & L. REV. 65, 82–83 (2014).

474. James C. McKinley Jr., *Study Finds Racial Disparity in Criminal Prosecutions*, N.Y. TIMES (July 9, 2014), <https://www.nytimes.com/2014/07/09/nyregion/09race.html>.

475. Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2402–03 (2018); See Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017, 1:33 PM), <https://www.washingtonpost.com/news/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/>.

476. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 472 (1999).

477. *Id.*

478. Joseph Goldstein, *‘Testlying’ by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018, 12:47 PM), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>.

479. Dorfman, *supra* note 476, at 472.

in jurisdictions where dangerousness is a bail factor, reflect that racial animus.<sup>480</sup>

The funny thing is that those who espouse white supremacist ideals — publicly or privately, be they civilians, law enforcement, or politicians — all recognize that judicial discretion is essential in perpetuating racism. Members of white supremacist organizations like the Three Percenters were part of Repeal Bail Reform, a Facebook group that was created by a sheriff, is moderated by Republican officials in the state, and boasted over 160,000 members that included law enforcement and right-winged politicians.<sup>481</sup> These individuals routinely posted racist and xenophobic comments that were neither denounced by its other members nor removed by the moderators.<sup>482</sup> The rallies in favor of rolling back bail reform have been overwhelmingly white.<sup>483</sup> During a virtual rally to keep bail reform, white participants began posting blatantly racist messages both targeting African American lawmakers in attendance and lambasting reform.<sup>484</sup> Openly racist people finding common ground with law enforcement and right-winged politicians is no surprise, and the logical reason why white supremacists oppose bail reform is because limiting judicial discretion is limiting how much racism can impact decisions in the courtroom. For white supremacists, this is an obvious no-no.

Law enforcement and judges in particular also have clear ideas about who should be victims of judicial discretion and who should benefit from it. Opponents of bail reform harped on case after case of persons who were either rearrested for a new offense after being released, or accused of a crime they deemed heinous and worthy of bail.<sup>485</sup> However, the same set of critics were curiously nowhere to be found when a law enforcement officer was arrested and charged with

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480. Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 943–44 (2013).

481. Zach Williams, *Political Extremists Have Found a Home on This GOP-Backed Facebook Group*, CITY & STATE N.Y. (Feb. 2, 2020), <https://www.cityandstateny.com/articles/politics/news-politics/political-extremists-have-found-home-gop-backed-facebook-group.html>.

482. *Id.*

483. Denis Slattery, *Bail Battle Rages on as Opponents and Advocates Rally in Albany*, N.Y. DAILY NEWS (Feb. 4, 2020), <https://www.nydailynews.com/news/politics/ny-bail-reform-albany-20200204-ivuffbipxuzcgjcm67rsbyx3wty-story.html>.

484. David Brand, *Pro-Bail Reform Conference Invaded by Racists Who Called Lawmakers the N-Word*, QUEENS DAILY EAGLE (Apr. 1, 2020), <https://queenseagle.com/all/pro-bail-reform-conference-invaded-by-white-supremacists>.

485. See Kim Bellware, *Class, Race and Geography Emerge As Flashpoints in New York’s Bail Reform Debate*, WASH. POST (Feb. 15, 2020, 6:42 PM), <https://www.washingtonpost.com/nation/2020/02/15/new-york-bail-reform/> (explaining how bail reform opponents have used cases such as Tiffany Harris’ to exemplify the potential of reoffending after bail is not required).

attempted murder and other felonies for shooting at a bar employee inside of a Brooklyn establishment.<sup>486</sup> To their credit, the prosecution asked for \$50,000 bail.<sup>487</sup> The judge, however, felt that supervised release was appropriate.<sup>488</sup> In prior cases, this same judge set bail on a civilian charged with the nonviolent offense of impersonating a police officer and *remanded* a mentally ill civilian charged with the less violent offense of second-degree assault.<sup>489</sup> Clearly to this judge, many other judges, and law enforcement officials, pretrial jailing is not for law enforcement personnel; it is for civilians — the poor and people of color in particular.<sup>490</sup> The history of bail practice in New York reflects that.

Despite the evidence, there is much reluctance and reticence within the government in openly acknowledging that judicial discretion caused the bail crisis in New York State. Even amongst many supporters of bail reform, the narrative was one of an unfortunate situation that unfolded over time, with no specific actors at fault.<sup>491</sup> Then, the solution for fixing a crisis that nobody seems to have caused lies in establishing a statutory presumption, new bail factors, new options for release, and, of course, judicial discretion to detain “dangerous persons” preventatively.<sup>492</sup> For example, in his State of the Judiciary speech in 2013, then-Chief Judge Jonathan Lippman asserted that creating a bail factor for potential risks to public safety “must be the top priority of any revision to our bail statutes.”<sup>493</sup> He then spoke of empowering judges with the authority to impose supervised release, as well as all sorts of release conditions subject to a statutory presumption of release and the consideration of enumerated bail factors.<sup>494</sup> In the State of the Judiciary speech six years later, Chief Judge Janet Difiore reiterated much of the same things Judge

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486. Jake Offenhartz, *Bail Reform Critics Awfully Quiet On Release Of Narcotics Officer Who Shot Up Williamsburg Bar*, *GOTHAMIST* (Mar. 2, 2020, 5:20 PM), <https://gothamist.com/news/deferential-treatment-narcotics-officer-released-without-bail-after-allegedly-shooting-williamsburg-bar>.

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.* (Marie Ndaiye, supervising attorney of the Decarceration Project at the Legal Aid Society, put it succinctly: “If that was a civilian, they would be on Rikers right now . . . . Most people who shoot up bars are not getting released without conditions.”).

491. Laws of 2019 ch. 59 Part JJJ Bail Reform at 114–15, 122, 131–34.

492. Merkl, *supra* note 7.

493. NY State Ct. Of Apps., *2013 State of the Judiciary Address - Jonathan Lippman*, *YOUTUBE* (June 21, 2018), [https://www.youtube.com/watch?v=941lygN1h98&ab\\_channel=NewYorkStateCourtOfAppeals](https://www.youtube.com/watch?v=941lygN1h98&ab_channel=NewYorkStateCourtOfAppeals).

494. *Id.*

Lippman said, while also advocating for the use of a “release assessment tool” designed to help judges make “fair, accurate and responsible determinations.”<sup>495</sup>

Unfortunately, it is no productive feat to try and solve a problem without recognizing its cause. The prior bail system was not unjust and unfair because of a lack of a presumption, lack of options for judges to consider, or lack of guidance in the law. It was unjust and unfair because judges exercised their discretion to set bail excessively, and in a manner that was racist and classist. As a clear example, the prior laws provided for nine different forms of bail that a judge could set.<sup>496</sup> Of the nine different forms, judges routinely set the two most restrictive kinds of bail, even when studies showed less restrictive forms to be just as effective in securing a defendant’s return to court.<sup>497</sup> The majority of people in jail on bail were charged with misdemeanors or violations; not one of them got there without the action of a criminal court judge.<sup>498</sup> Therefore, if the prior bail laws created an inequitable bail system, judicial discretion is to blame. The legislature seemed to recognize this when they passed bail reform by barring judges, at least initially, from setting bail on a host of offenses and by continuing to disallow preventative detention based on “dangerousness.”<sup>499</sup> As far as risk assessment tools go, studies show that these tools are plainly ineffective in reducing racial disparities and that adding “dangerousness” as a factor will both increase pretrial detention rates and exacerbate the existing racial disparities.<sup>500</sup>

To be clear, the author does not believe that there should be *no* judicial discretion in the current bail statute. In the criminal justice context, it is quite unwise to deal in absolutes; and as mandatory minimum statutes have shown us, allowing for no judicial discretion, one way or the other, will only lead to disastrous results.<sup>501</sup> However, until there is a fundamental change in how America views its poor and darker-complexioned citizens, the state must make efforts to reduce

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495. CHIEF JUSTICE JANET DIFIORE, N.Y. STATE UNIFIED CT. SYS., *THE STATE OF OUR JUDICIARY* 2019 9 (Feb. 26, 2019).

496. N.Y. CRIM. PROC. LAW § 520.10(1)(a)-(i) (McKinney) (Repealed 2019).

497. Insha Rahman, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City’s Criminal Courts*, VERA INST. OF JUST. 1, 2 (Sept. 2017), [https://www.vera.org/downloads/publications/Against\\_the\\_Odds\\_Bail\\_report\\_FINAL3.pdf](https://www.vera.org/downloads/publications/Against_the_Odds_Bail_report_FINAL3.pdf).

498. Asgarian, *supra* note 106.

499. *Id.*

500. See N.Y. LEGIS. SERV., NYLS BILL JACKET SUPPLEMENT 2019 CHAPTER 59 235, 288 (2019).

501. Lustbader, *supra* note 71.

the impacts of bias within government. The bail statutes enacted on April 1, 2019, struck an appropriate balance between the importance of judicial discretion and the interest in minimizing the harms that disparately impact the poor and so-called minorities. The courts retained the authority to set bail on people charged with violent felonies and on persons who persistently and willfully fail to return to court during the pendency of their cases.<sup>502</sup> However, the majority of New Yorkers charged with crimes are charged with misdemeanors and non-violent felonies, do not commit additional crimes while their cases are pending, and return to court without issue.<sup>503</sup> There is no reason to give judges the authority to set bail on them, let alone to detain them preventatively. But unless judges are statutorily barred from these practices, one can reasonably expect them to continue.

**B. The Judicial Response to Reforms Demonstrates That Decreased Discretion Is Necessary for the Purposes of Reform to Be Fulfilled**

The failure of the prior bail laws provides a clear sign that judicial discretion needs to be tempered. An examination of the judicial response to all three criminal justice reform statutes enacted — as done in Part II of this article — provides yet further indication of that conclusion. The judicial bias against persons charged with crimes is evidenced by how judges chose to construe and apply the new laws despite the existence of presumptions in favor of the accused, clear statutory language, and sometimes even an admission by the judge that their actions violate the very law they are sworn to uphold. Allowing for increased judicial discretion, especially to detain “dangerous persons” preventatively, will cause New York’s bail system at a minimum to revert back into crisis.

**1. Preventative Detention Is Inconsistent with Reform**

Some would argue that the proposal to allow for preventative detention could work without compromising the goals of the reform because of the statutory presumption of release. However, the existence of a presumption without much more will not be effective. As ex-

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502. N.Y. Crim. Proc. L. § 530.20(1)(b) (Consol. 2020).

503. FWD, *The Real Impact of New York’s Bail Reform*, (Mar. 3, 2020), <https://www.fwd.us/news/new-york-state-bail-reform-law>; *Pretrial Criminal Justice Research*, LAURA & JOHN ARNOLD FOUND. (Nov. 2013), [https://cjcc.doj.wi.gov/sites/default/files/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](https://cjcc.doj.wi.gov/sites/default/files/LJAF-Pretrial-CJ-Research-brief_FNL.pdf).

plained *supra*, judges have a problem following a basic presumption in criminal law: that all persons accused of a crime are innocent until proven guilty. Additionally, the reforms came with presumptions that were not being followed, such as the discovery reform law presumption in favor of disclosure.<sup>504</sup> The existence of that specific presumption did not stop the Queens trial court from denying the defense information that was mandated by the new laws.<sup>505</sup> On the other hand, courts had no problem applying presumptions *against* the defense, even when said presumptions had at least been modified. For example, a trial court in Manhattan impliedly invoked the presumption about statements of readiness being presumed truthful and accurate,<sup>506</sup> despite a new statutory mandate requiring courts to inquire as to the prosecution's actual readiness.<sup>507</sup>

The creation of nonmonetary conditions of release, much like the creation of nine forms of bail in the prior laws, do not solve anything if judges are unfair or unreasonable in exercising their discretion; and as their applications of the new laws show, many of them are. Take discovery reform as an example: several protective orders issued by judges were either modified or vacated, with a finding that those judges improvidently exercised their discretion.<sup>508</sup> The new bail laws require using the "least restrictive means" when fixing a securing order. Accordingly, the new law requires a consideration of the defendant's ability to pay and at least one form of the bail be a partially secured or unsecured bond, which is among the least restrictive types of bail.<sup>509</sup> Judges, however, can and have thwarted the legislature's intention to encourage the setting of reasonable bail by setting unreasonable bail. For example, an Orange County judge set a \$75,000 cash bail and \$150,000 bond for a person charged with making a terroristic threat.<sup>510</sup> As for the third option, the judge set the partially secured bond amount at \$500,000, several times the amount of either of the other two forms of bail.<sup>511</sup> The judge's intention was rather clear here: to keep the accused person locked up while awaiting trial. The

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504. N.Y. CRIM. PROC. LAW § 245.20(7) (Consol. 2020).

505. *See* People v. Todd, 122 N.Y.S.3d 498, 510 (N.Y. Sup. Ct. 2020).

506. People v. Percell, 119 N.Y.S.3d 731, 734 (Crim. Ct. N.Y. Cty. 2020).

507. N.Y. CRIM. PROC. LAW § 30.30(5) (Consol. 2020).

508. People v. Bonifacio, 179 A.D.3d 977, 977 (N.Y. App. Div. 2020); People v. Reyes, 179 A.D.3d 1098, 1099 (N.Y. App. Div. 2020); People v. Mena, No. 2020-00812 (N.Y. App. Div. Jan 31, 2020); People v. Swift, No. 2020-00417 (N.Y. App. Div. 2020).

509. N.Y. CRIM. PROC. LAW § 510.30(1)(f) (Consol. 2020).

510. People v. Allen, 119 N.Y.S.3d 26, 27 (Orange Cty. Ct., Jan. 9, 2020).

511. *Id.* at 31.

same can be said for the trial judge in Nassau County who set bail in the amount of \$2 million bond and \$1 million cash, but then set a \$10 million partially secured bond with 10% cash down.<sup>512</sup> As exemplified here, unless judicial discretion is statutorily constrained, judges will continue to perpetuate the injustices the legislature supposedly sought to remedy.

Some would point to New Jersey's bail reform model as proof that allowing preventative detention can be consistent with reform.<sup>513</sup> Specifically, they would highlight the sharp decline in New Jersey's jail populations following the state's new bail laws taking effect.<sup>514</sup> However, the racial disparities in New Jersey's jail population have persisted despite the reforms; and now, people of color who are detained pretrial cannot bail themselves out if money was not an object.<sup>515</sup> The risk assessment model New Jersey uses has contributed to that bias, as risk assessment tools are prone to do.<sup>516</sup> It should also be noted that unlike New Jersey, where all judges are appointed by the state, New York also has elected judges, especially outside of New York City.<sup>517</sup> Looking tough on crime is always a selling point in politics; and being portrayed as soft on crime can be detrimental to a jurist's career.<sup>518</sup> As the tabloid press has proven with their "coverage" of bail reform, the harsh-punishment governance of the 1980s and 1990s still resonates with lawmakers and the white public.<sup>519</sup> Thus for elected judges in New York, there is a clear incentive to thwart the objectives of bail reform and use preventative detention as a tool to help themselves politically.

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512. Bridget Murphy, *Bail Reform in Spotlight in Case of Man Indicted in Nassau Burglaries*, NEWSDAY (Jan. 24, 2020, 4:34 PM), <https://www.newsday.com/long-island/crime/bail-reform-nassau-1.40967987>.

513. Reuven Blau, *New Jersey No-Bail System Eyed By New York Leaders Reckons With Bias Risk*, THE CITY (Mar. 6, 2020, 4:05 AM), <https://thecity.nyc/2020/03/nj-no-bail-system-eyed-by-new-york-reckons-with-bias-risk.html>.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.*

519. POST EDITORIAL BOARD, *How Many More Horror Stories Before State Leaders Fix Insane Bail 'Reforms'?*, N.Y. POST (Jan. 22, 2020, 7:45 PM), <https://nypost.com/2020/01/22/how-many-more-horror-stories-before-state-leaders-fix-insane-bail-reforms/>; Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of 1994 Crimes Act*, JUST. STRATEGIES (2002), <https://www.justice.org/sites/default/files/Judy/GettingToughOnCrime.pdf>

## 2. How Preventative Detention Might Look

The thought of conferring discretion upon the courts to remand “dangerous persons” while awaiting trial becomes more frightening when examining prior legislative and executive proposals regarding preventative detention. For example, Governor Cuomo proposed laws permitting the preventative detention of persons charged with misdemeanor domestic violence offenses,<sup>520</sup> as well as persons rearrested for *any* offense while they had a pending case.<sup>521</sup> Prior legislative proposals allowed for preventative detention of persons who posed a “current risk to the physical safety of a reasonably identifiable person or persons.”<sup>522</sup> Under these proposals, an accused person does not even have to be charged with a violent felony, or any other type of a felony, in order to be remanded for the pendency of the case. The power to detain preventatively is an extraordinary power that has ripe potential for abuse, so much so that New York has consistently rejected legislative efforts to authorize it.<sup>523</sup> Yet, Governor Cuomo and members of the legislature actively sought to entrust this power into the hands of judges that have publicly denounced, openly defiled, deliberately distorted, and actively undermined the criminal justice reform laws.

Even scarier were the proposed processes by which determinations regarding preventative detention would be made. Governor Cuomo proposed that persons charged with certain crimes would have to rebut a *presumption* of preventive detention. In other words, individuals charged with certain crimes would be preventatively detained unless they sufficiently demonstrated why a different securing order was better fitting.<sup>524</sup> However, while determinations regarding dangerousness would be made after full evidentiary hearings, the prosecution would be empowered under the statute to make a motion to detain a person who fits the designated criteria preventatively; and that person would be automatically detained for up to five days pending that evidentiary hearing.<sup>525</sup> This portion bears repeating: under

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520. *Governor Cuomo Unveils 22nd Proposal of 2018 State of the State: Restoring Fairness in New York’s Criminal Justice System*, N.Y. GOVERNOR’S PRESS OFF. (Jan. 3, 2018), <https://www.governor.ny.gov/news/governor-cuomo-unveils-22nd-proposal-2018-state-state-restoring-fairness-new-yorks-criminal> (on file with Governor Andrew M. Cuomo Official Website).

521. *Id.*

522. *Id.*

523. N.Y. LEGIS. SERV., *supra* note 500, at 157–58, 284–85 (2019).

524. *Id.* at 14, 131.

525. *Id.* at 131, 135.

prior legislative proposals, prosecutors would have been allowed to file a motion for preventative detention and the law would *require* the accused person to be jailed for up to five days.<sup>526</sup> The potential for abuse of a law like this by judges and prosecutors alike is beyond enormous.

C. Increased Judicial Discretion Lies at the Crux of the Reform Rollbacks Enacted in April 2020

In January 2020, Governor Cuomo stated the following in his budget address: “Let’s understand the facts, understand the consequences, discuss it intelligently, rationally, and in a sober way, and then let’s make the decisions that we need to make.”<sup>527</sup> A few weeks later, Cuomo did a complete volte-face and vowed to make changes to bail reform in the budget.<sup>528</sup> In March 2020, the coronavirus became a statewide and national problem, and the attention of most New Yorkers was turned to the virus.<sup>529</sup> Some state lawmakers were diagnosed with the virus and the entire legislature was evacuated from the building and made to shelter in place.<sup>530</sup> One would think that in the midst of the panic, with many legislators unavailable and inconvenienced, Cuomo would focus only on essential budget items and wait until after the pandemic died down before dealing with the reforms.

The governor, however, proved to be quite dishonorable:<sup>531</sup> he took advantage of the coronavirus panic and came close to forcing what would have been a complete overhaul of bail reform.<sup>532</sup> The governor’s proposal would have, among other terrible items, allowed for both preventative detention and remand on a host of offenses, including some non-violent felonies and some misdemeanors that are

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526. *Id.* at 171.

527. Beth Fertig, *Advocates Say Tweaks To New Bail Reform Would Harm People Of Color*, *GOTHAMIST* (Jan. 23, 2020, 5:30 AM), <https://gothamist.com/news/advocates-say-tweaks-new-bail-reform-would-harm-people-color>.

528. Blau, *supra* note 513.

529. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, *N.Y. TIMES* (Aug. 6, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

530. Nick Pinto, *America’s Crisis Daddy Andrew Cuomo Exploits Coronavirus Panic to Push Bail Reform Rollback in New York*, *INTERCEPT* (Mar. 25, 2020, 2:43 PM), <https://theintercept.com/2020/03/25/coronavirus-andrew-cuomo-new-york-bail-reform/>.

531. Zamir Ben-Dan, Michael Pate, Erin Bannister, Alexandra Smith and Nora Carroll, *Opinion: Cuomo is exploiting a pandemic to roll back bail reform*, *BROOKLYN DAILY EAGLE* (Mar. 30, 2020), <https://brooklyneagle.com/articles/2020/03/30/opinion-cuomo-is-exploiting-a-pandemic-to-roll-back-bail-reform/>.

532. *Id.*

neither sex offenses nor domestic-violence related.<sup>533</sup> Senate majority leader Andrea Stewart-Cousins, who already expressed a willingness to fold on bail reform, was on board; Speaker of the Assembly Carl Heastie, however, was not.<sup>534</sup> The disagreement between Cuomo and the Assembly led to a delay in the budget being passed; and the governor and Heastie haggled over bail reform until a compromise was reached.<sup>535</sup> Monetary bail would remain in the statute, while preventative detention based on dangerousness would remain out of the statute.<sup>536</sup> On the morning of April 3, 2020, the budget, including the bail reform rollbacks, was finally passed.<sup>537</sup> The rollbacks took effect in July 2020, ninety days from the date of passage.<sup>538</sup>

If decreased judicial discretion is essential for a fairer justice system, then increased discretion will conversely lead to less justice for accused persons. The rollbacks enacted by the legislature will resurrect many of the wrongs the reforms were supposed to address, because they have broadened the discretion judges have in making determinations regarding bail and discovery. This part examines that expansion of judicial discretion by the bail reform rollbacks. It also examines the modifications made to the discovery and speedy trial reforms, parts of the budget that went largely unpublicized until after the budget was enacted.<sup>539</sup> This part will discuss how this expansion of discretion will undermine the reforms enacted in 2019 and significantly set New York back to where it was before reforms were seriously considered.

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533. *Draft LBDC 77237-02-0, IN DEFENSE OF* (Mar. 19, 2020), <https://indefenseof.us/assets/images/SECRET-GOV-SENATE-MASS-INDEFINITE-PRE-TRIAL-DETENTION-BILL.PDF>.

534. Marie J. French, Anna Gronewold, Bill Mahoney, Nick Niedzwiadek & Shannon Young, *Budget Talks Turn to a 'Timely' Product, with Bail Among Sticking Points*, POLITICO N.Y. (Mar. 31, 2020, 9:51 PM), <https://www.politico.com/states/new-york/albany/story/2020/03/31/budget-talks-turn-to-a-timely-product-with-bail-among-sticking-points-1269957>.

535. Denis Slattery, *Cuomo and N.Y. Legislature Reach 'Conceptual Agreement' on Budget*, N.Y. DAILY NEWS (Apr. 1, 2020), <https://www.nydailynews.com/news/politics/ny-albany-lawmakers-cuomo-stalemate-bail-budget-medicaid-20200401-koclfw6rnfbwhggesvzmrnjx4-story.html>.

536. N.Y. S. 7506, 242nd Sess. (N.Y. 2020) at 308.

537. Karen Dewitt, *NYS Budget Includes Bail Reform Changes*, WAMC NE. PUB. RADIO (Apr. 2, 2020), <https://www.wamc.org/post/nys-budget-includes-bail-reform-changes>.

538. Corina Cappabianca, *NY Lawmakers Work to Pass State Budget*, ABC NEWS 10 (Apr. 2, 2020, 6:04 PM), <https://www.news10.com/news/ny-capitol-news/ny-lawmakers-work-to-pass-state-budget/>.

539. Briana Supardi, *New York State Budget Slated To Taper Back Controversial Bail Reforms*, CBS 6 NEWS (Apr. 2, 2020), <https://cbs6albany.com/news/local/new-york-state-budget-slated-to-taper-back-controversial-bail-reforms>.

## 1. Bail Reform Rollbacks

The 2020 rollbacks added a number of suggestions for nonmonetary conditions the court can impose in a given case.<sup>540</sup> The rollbacks also note that the list of possible suggestions is not exhaustive.<sup>541</sup> One of the more disconcerting suggestions is a condition requiring a person to “refrain from associating with certain persons who are connected with the instant charge, including, when appropriate, specified victims, witnesses, or co-defendants . . . .”<sup>542</sup> The statute gives no restrictions regarding the type of case or the set of circumstances under which a condition like this can be imposed.<sup>543</sup> There is not even a requirement that the condition only be imposed in complainant cases; in *any* case that has more than one defendant, the accused person can be ordered to stay away from their co-defendant.<sup>544</sup> How this condition is imposed will be subject to the whims of the particular judge.

The imposition of this condition has potential for much abuse, particularly with respect to co-defendants. Common sense tells us that co-defendants most often will be family members, relatives or friends. In cases where police officers are conducting “gang” raids, most of the co-defendants — many of whom are not actually gang members<sup>545</sup> — will be neighbors, or will live on the same block, or reside in the same neighborhood.<sup>546</sup> Ordering accused persons to stay away from co-defendants during the pendency of the case will be punitive in a lot of circumstances. Where co-defendants live together, one of them might be rendered homeless until the case is over. If there are any social arrangements between relatives or friends (e.g. babysitting), those arrangements could be ruined if those persons are arrested together. On a broader level, family members, relatives, friends, and neighbors could be banned from interacting with one another not because they pose a potential danger to each other, but solely because they are accused of committing a crime. This is plainly inconsistent with the presumption of innocence. Moreover, it would not be unrealistic for prosecutors to seek an order like this on every

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540. S. 7506 at 303.

541. *Id.* at 304.

542. *Id.* at 303.

543. *Id.* at 303–04.

544. *Id.*

545. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 632–33 (2011).

546. JOSMAR TRUJILLO & ALEX S. VITALE, GANG TAKEDOWNS IN THE DE BLASIO ERA: THE DANGERS OF ‘PRECISION POLICING’ 2 (2019).

applicable case, given how prosecutors will always ask for an order of protection with civilian complainants even when there are no allegations of violence.<sup>547</sup> The author predicts that courts will excessively impose this condition on accused persons, and will do it in a racially discriminatory manner.

Another potentially problematic condition courts can impose is requiring accused persons to “make diligent efforts to maintain employment, housing, or enrollment in school or educational programming . . . .”<sup>548</sup> Of course it would be ideal that accused persons maintain employment, housing and/or education. However, a condition like this will wind up serving as punishment for living in poverty. It is poor people across America who have difficulty keeping a job, having proper housing, and staying in school (assuming they are of school age).<sup>549</sup> Additionally, racism has played a role in how well some Americans have been able to maintain in any of these circumstances.<sup>550</sup> Some would point to the language about people having to “make diligent efforts”<sup>551</sup> as grounds for arguing for the legitimacy of this condition, but the statute does not define what that phrase means. Thus, judges will have discretion to determine what constitutes “diligent efforts,” and may very well be unreasonable in how they define that language.

The rollback laws also greatly expand the list of qualifying offenses.<sup>552</sup> Burglary in the second degree under the second subdivision is now only a non-qualifying offense as long as the person is not accused of entering the living area of the dwelling, e.g., if he or she was

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547. See David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L. J. 1445, 1457–58 (2010).

548. N.Y. S. 7506, 242nd Sess. (N.Y. 2020) at 304–09.

549. See Janelle Vandergrift, *Why Poor People Can't Just "Get a Job"*, HUFFINGTON POST, (Aug. 25, 2014, 5:59 AM) [https://www.huffingtonpost.ca/janelle-vandergrift/poverty-jobs\\_b\\_5529331.html](https://www.huffingtonpost.ca/janelle-vandergrift/poverty-jobs_b_5529331.html); Alana Semuels, *How Housing Policy Is Failing America's Poor*, THE ATLANTIC (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650/>; Jeff Guo, *Why Poor Kids Don't Stay in College*, WASH. POST (Oct. 20, 2014, 8:35 AM), <https://www.washingtonpost.com/news/storyline/wp/2014/10/20/why-poor-kids-dont-stay-in-college/>.

550. See Kelsey E. Thomas, *This Is What Housing Discrimination in the U.S. Looks Like*, NEXT CITY (Apr. 20, 2017), <https://nextcity.org/daily/entry/housing-discrimination-us-report>; Christian E. Weller, *African Americans Face Systematic Obstacles to Getting Good Jobs*, CTR. FOR AM. PROGRESS (Dec. 5, 2019, 9:03 AM), <https://www.americanprogress.org/issues/economy/reports/2019/12/05/478150/african-americans-face-systematic-obstacles-getting-good-jobs/>; Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>.

551. N.Y. S. 7506 at 303.

552. *Id.* at 304–06.

found in the lobby of the building.<sup>553</sup> All class A-I drug felonies are now qualifying offenses.<sup>554</sup> Misdemeanor criminal obstruction of breathing, a common charge in domestic violence cases, is now eligible for bail.<sup>555</sup> In response to the publicized case of the mentally ill woman who was arrested several times for slapping Hasidic Jewish people,<sup>556</sup> misdemeanor assault as a hate crime is now a qualifying offense.<sup>557</sup> A number of theft crimes are now qualifying offenses as well.<sup>558</sup> All of these crimes were added without any indication that persons charged with them actually posed a risk of flight to avoid prosecution, which is still what the stated purpose of bail is in New York.<sup>559</sup> Therefore, by significantly increasing the number ofailable offenses, courts are now empowered to lock up more people as they await trial, regardless of whether or not those individuals actually pose a risk of flight to avoid prosecution.

Not only are courts empowered to set bail on a greater number of specific offenses, they are now authorized to set bail under specific *circumstances*, notwithstanding that the persons might not be charged with qualifying offenses. For example, the rollbacks now allow judges to set bail on persons charged with a felony if they are on probation or parole.<sup>560</sup> To illustrate how bad this is: Kalief Browder would have been eligible for bail under the rollback laws, whereas he would not have been under the reforms, because he was arrested for a felony while on probation.<sup>561</sup> Most outrageously, the rollback laws now allow bail to be set on a person charged with “any felony or class A misdemeanor involving harm to an identifiable person or property, where such charge arose from conduct occurring while the defendant was released on his or her own recognizance or released under conditions for a separate felony or class A misdemeanor involving harm to an identifiable person or property.”<sup>562</sup> Of course, the statute does not

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553. *Id.* at 304.

554. *Id.*

555. *Id.* at 305.

556. The Associated Press, *Woman Charged with Hate Crime Amid NYC Anti-Semitic Attacks*, ABC NEWS (Dec. 28, 2019, 3:57 PM), <https://abcnews.go.com/US/wireStory/woman-charged-hate-crime-amid-nyc-anti-semitic-67959829>.

557. N.Y. S. 7506 at 305.

558. *Id.*

559. Fertig, *supra* note 527.

560. N.Y. S. 7506 at 305.

561. See generally Jesse McKinley & Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal.*, N.Y. TIMES (Mar. 29, 2019, 3:11 PM), <https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html>.

562. N.Y. S. 7506 at 305–306.

define the word “harm,” so it will be up to judicial discretion to determine whether or not a rearrested person caused “harm” to a person or to property in both cases. The requirement that the prosecution “show reasonable cause to believe that the defendant committed the instant crime and any underlying crime”<sup>563</sup> is easy to meet; so long as the accusatory instruments are facially sufficient, the prosecution’s burden is met.<sup>564</sup> Once again, the rollback laws widen the courts’ ability to set bail without regard to whether the person actually poses a flight risk. The author predicts that these two subsections in particular will be the causes of excessive impositions of bail by judges, aside from the increases that will naturally come from more crimes being deemed qualifying offenses.

Sadly, the state did not even bother to resolve some of the inconsistencies and issues that have arisen from the application of the new laws. The legislature gave no guidance regarding whether attempted aided robbery or attempted residential burglary are non-qualifying offenses. The tension regarding whether making a terroristic threat is a qualifying offense is still unresolved; the statute still allows for a judge to deem it bail eligible or ineligible. The only thing the bail law modifications did was make it far easier for judges to lock up people who are legally cloaked with the presumption of innocence. With these rollbacks, one must wonder why the legislature passed the reforms in the first place. Many of the injustices they professed would be averted by the reforms will once again be realized under the rollback laws.

## 2. Discovery and Speedy Trial Reform Modifications

The discovery reforms were modified in a few ways. The initial timeframes for when prosecutors had to turn over discovery increased: they now have twenty days to comply with discovery obligations if the defendant is detained pretrial, and they have thirty-five days to turn over discovery if the accused person is released.<sup>565</sup> The automatic thirty-day extension for cases where the discovery was voluminous is still in place.<sup>566</sup> For violations and traffic infractions, there is no firm deadline from arraignment: the prosecution only needs to comply with their disclosure obligations fifteen days before trial, at

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563. *Id.*

564. *See* N.Y. CRIM. PROC. LAW §100.40.

565. N.Y. S. 7506 at 348.

566. *Id.*

the latest.<sup>567</sup> Judgment need not be passed on the merit of these changes, because these specific changes do not seem to have a measurable negative effect on the purposes of reform. After all, the prosecution is still required to turn over all existing discovery before they can declare readiness for trial, and they are still barred from withdrawing plea offers to criminal offenses before they have turned over all discovery. Thus, despite the extended deadlines, prosecutors are still incentivized to gather and turn over all discovery as soon as they can.

One modification that *is* problematic is the change that now allows the prosecution to withhold any information regarding the identity of any 9-1-1 caller, or a witness or “victim” in cases charging certain offenses.<sup>568</sup> With those cases, the prosecution can withhold the identity of the witness without a protective order, and the defense would now have to move the court for an order allowing for disclosure.<sup>569</sup> The new modifications do not lay out the procedure by which these decisions should be made, e.g., whether there should be written motion practice or on-the-record arguments; whether there needs be full evidentiary hearings, or something less; or what the standard of proof might be. Nor do the modifications offer any instruction on how judges should determine whether an accused person or their attorney should be entitled to such identifying information.

The problems with this provision should be obvious. First, this is inconsistent with the requirement that prosecutors turn over “the names and adequate contact information of all witnesses . . . whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses.”<sup>570</sup> A person calling 9-1-1 would obviously fall under that category. Second, the law has now indicated that in certain cases, the interests in protecting potential prosecution witnesses presumptively outweigh the interests in adequate defense investigations, which is plainly integral to the constitutional right to present a defense.<sup>571</sup> And in cases where the prosecutor has reason to know that a 9-1-1 caller

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567. *Id.*

568. *Id.*

569. *Id.*

570. N.Y. CRIM. PROC. LAW § 245.20(1)(c).

571. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.”).

would be a favorable witness for the defense, that prosecutor has every incentive to hide that witness' information; and the law now allows them to do so. Further, because the law gives courts no guidance regarding either the procedure to be followed or the considerations to be made, judges are once again empowered to exercise their discretion and decide the rights of accused persons. If New York's 2020 protective order jurisprudence is any guide, this authority will be wielded in a manner that harms accused persons and undermines the purposes of reform.

This new provision is also suspect because it minimizes the usefulness of the statute regarding protective orders. Prosecutors generally sought protective orders to avoid disclosing information regarding their witnesses, and judges were supposed to conduct individualized, case-specific determinations and rule in a manner that protected the accused person's rights while balancing the specific potential dangers to the witness.<sup>572</sup> Now, there is almost no need for prosecutors to seek such orders anymore. Ironically, that Queens trial court unknowingly forecasted this new reality in its decision regarding the Verizon online portal sufficing as "adequate contact information."<sup>573</sup> The new law allows for broader forbearance by prosecutors, which makes it worse than the decision. As a consequence of prosecutors no longer needing a protective order to withhold this information, the expedited review provision of the statute likely does not apply.<sup>574</sup>

No changes were specifically made to the state speedy trial statute, but some modifications to the discovery reform laws will necessarily impact speedy trial. The statute was changed to now allow prosecutors to be deemed ready despite not having turned over evidence that was either lost or destroyed,<sup>575</sup> but common sense obviates the need for this. However, there was one real change that impacts speedy trial: the statute now states that any challenges to certificates

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572. VA. DEP'T CRIM. JUST. SERV., PROTECTIVE ORDERS IN VIRGINIA: A GUIDE FOR VICTIMS 1 (2017).

573. See *People v. Todd*, 122 N.Y.S.3d 498, 502–03 (N.Y. Sup. Ct. 2020).

574. N.Y. CRIM. PROC. L. § 245.70(6)(a) reads as follows: "A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order under this section relating to the name, address, contact information or statements of a person may obtain expedited review of that ruling by an individual justice on the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken." (Emphasis supplied). The statute apparently only applies to the granting and denying of protective orders; it was not modified to include review of applications to disclose identifying information of witnesses who called 9-1-1.

575. N.Y. S. 7506, 242nd Sess. (N.Y. 2020).

of compliance be addressed “by motion.”<sup>576</sup> The statute does not specify whether the motion must be written or can be oral, but it is very likely that courts will interpret this provision to require written motions. This would be at odds with CPL § 30.30(5), which affords the defense an opportunity to be heard on the record as to whether the prosecution met their discovery obligations.<sup>577</sup> Realistically though, courts have been requiring motion practice regarding certificates of compliance before the legislature amended the statute, so the legislation simply gave this court practice its blessing.<sup>578</sup>

With these quiet changes, reform opponents have scored yet another major victory. In many complainant cases, the alleged victim will likely have made a 9-1-1 call. Other witnesses might have made emergency calls as well. Before these alterations, the prosecution would have had to turn over this information or seek a protective order. Now, the law allows them to simply refuse to turn over that information and puts the burden on the defense to justify why this information should be divulged. Courts, at least at the trial court level, will likely unduly prohibit accused persons from receiving identifying information, thereby hindering their ability to investigate the charges against them adequately. In doing so, courts will once again subvert the intention of the legislature in having enacted reform.

### 3. The Current State of Reform

All in all, the criminal pretrial reforms have been severely compromised. In a win for judges, the laws increase judicial authority to set bail, not only on specific charges but also in specific situations. In a win for prosecutors and law enforcement, they now allow prosecutors to refuse to disclose *any* information identifying witnesses so long as they dialed 9-1-1. For judges who might have been in favor of reform or were at least bothered by the injustices that gave rise to the need for reform, these changes will create unnecessary confusion in the law: several of the revisions are inconsistent with current law that the legislature did not repeal. There is little doubt that judges will resolve whatever tensions arise from the new alterations against the defendant, and also in a manner inconsistent with the reasons for reform. When the dust settles, the reform rollbacks will have led to un-

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<sup>576.</sup> *Id.*

<sup>577.</sup> N.Y. CRIM. PROC. LAW § 30.30(5).

<sup>578.</sup> *See, e.g.,* *People v. Adams*, 119 N.Y.S.3d 831, 831 (N.Y. Sup. Ct. 2020); *People v. Nelson*, 119 N.Y.S.3d 837, 837 (N.Y. Sup. Ct. 2020).

necessary pretrial detention, the persistence of racism in criminal pretrial determinations, and the hampering of accused persons' efforts to defend adequately against their charges.

The one saving grace about the rollbacks is that judges are still legally unable to remand accused persons they deem a public safety threat.<sup>579</sup> The New York Assembly and Speaker Carl Heastie are to thank for that. Andrea Stewart-Cousins and other state senators were newly advocating for judicial authority to remand “dangerous persons” after distancing themselves from their own reforms, and Governor Cuomo’s latest proposal would also have authorized preventative detention.<sup>580</sup> The alteration of bail reform was such a divisive issue in the Assembly that the budget had only passed by a few votes. Had a few Assembly members voted “no,” neither the budget nor the rollbacks would have passed.<sup>581</sup> Given the immense power that the state executive branch has over the fiscal budget,<sup>582</sup> it was no easy feat to exclude preventative detention from the bail statutes.

The New York legislature (mainly the state senate) has already violated the spirit of reform by approving the reform rollbacks in April 2020.<sup>583</sup> If the legislature grants the criminal court judiciary discretion to detain accused persons preventatively before trial, the spirit of bail reform would be irreparably broken. Poor people and so-called minorities charged with crimes would once again find themselves being unnecessarily — and excessively — jailed in large numbers awaiting trial; and without an option to pay their way out of jail, the racial disparities would be even more pronounced.<sup>584</sup> African American and Hispanic defendants would be jailed far more often than their similarly situated white counterparts, including those per-

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579. Daily News Editorial Board, *Hasty Bail, Heastie Fail: Albany Must Allow Judicial Discretion to Keep Dangerous Defendants Off the Streets*, N.Y. DAILY NEWS (Jan. 12, 2020), <https://www.nydailynews.com/opinion/ny-edit-heastie-bail-20200112-ih7lvmr3fd2dbdn3bq7tlzm3y-story.html>.

580. See Yancey Roy, *Amid Uproar, Senate Democrats to Offer Compromise on Bail Law*, NEWSDAY (Feb. 12, 2020, 1:12 PM), <https://www.newsday.com/long-island/politics/bail-reform-senate-democrats-1.41726776>.

581. Daniel Nichanian, “Unconscionable”: *New York Senator Denounces State’s Medicaid Cuts and Criminal Justice Reform Rollbacks*, THE APPEAL (Apr. 09, 2020), <https://theappeal.org/politicalreport/new-york-2020-budget-biaggi-medicaid-bail/>.

582. WHITE HOUSE, *State & Local Government*, [whitehouse.gov/about-the-white-house/state-local-government/](http://whitehouse.gov/about-the-white-house/state-local-government/) (last visited Sept. 7, 2020).

583. Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, THE MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states>.

584. N.Y. LEGIS. SERV., *supra* note 500, at 90.

sons who might have otherwise been able to make bail.<sup>585</sup> And then years from now, when courts are once again clogged and more Kalief Browder-like tragedies have been publicized, lawmakers will gather together and condemn this newest “bail” system as being racially biased and unjust. Then, they will spend several more years trying to fix another legislatively-created quagmire.

### CONCLUSION

Of all the adversaries of the criminal justice reforms passed in New York State in April 2019, trial court judges across the state have shown themselves to be the deadliest. They have actively undermined the reforms in the courtroom, disregarding the spirit of the laws and often interpreting them in a manner that harms accused persons, no matter how illogical or plainly wrong their interpretations are. With bail reform critics in particular having made substantial headway, there was talk of granting judges discretion to detain “dangerous people” preventatively while awaiting trial.<sup>586</sup> In pushing back against the reforms, however, judges have ironically made the case for bail reform to remain intact.<sup>587</sup> Judicial discretion must remain limited if New York is to take a meaningful step towards eliminating, as Governor Cuomo called it, “one of the last vestiges of inequality in the criminal justice system.”<sup>588</sup> But with passage of the amendments to the pretrial reforms, New York has instead taken a major step back in the pursuit of racial and social justice.

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585. *Id.*

586. Roy, *supra* note 580.

587. *See id.*

588. N.Y. LEGIS. SERV., *supra* note 500, at 34.



# The Puzzling Persistence of Citizen’s Arrest Laws and the Need to Revisit Them

CHAD FLANDERS, RAINA BROOKS, JACK COMPTON & LYZ RILEY\*

Introduction .....	162
I. General Characteristics of Citizen’s Arrest Laws .....	164
A. Some Examples .....	165
1. Georgia Cases .....	166
2. Cases from Other Jurisdictions .....	167
B. Citizen’s Arrest Statutes in the States .....	169
C. The Arbery Case, Briefly Examined .....	172
II. Situating Citizen’s Arrest Laws .....	174
A. Self-defense .....	176
B. Law Enforcement Use of Force .....	179
C. Citizen’s Arrest .....	181
D. Racism .....	182
III. Suggestions for Reform .....	185
Conclusion .....	190
Appendix: Citizen’s Arrest Laws in the United States .....	192

*The killing of Ahmaud Arbery at the hands of individuals purportedly making a “private person’s arrest” has brought new attention to the existence of so-called citizen’s arrest laws. Every state has them, and surprisingly, most of these laws still have the same content as the common-law doctrine that preceded them. The sheer persistence of these laws is puzzling and demands an explanation. This article is one of the very few in the last several decades to bring critical*

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scrutiny to citizen's arrest laws, and to make recommendations for their reform, if not their repeal.

Part I of our Article describes the main features of citizen's arrest laws, gives some recent examples of citizen's arrests, and briefly analyzes the Arbery case as a supposed instance of a "citizen's arrest." Part II speculates why these laws persist, offering two and non-mutually exclusive broad theories: first, that they are part of an ideology of "citizen empowerment" that sees individuals as co-equal to the police in their ability to enforce the law; and second, that these laws have been hijacked in the service of white supremacy. Part III covers some possible reforms of citizen's arrest laws, viz., restricting the crimes for which citizen's arrests can be made, requiring notification of the police and the wait of a reasonable period of time for the police to arrive, and eliminating citizens' ability to use deadly force to make an arrest. An appendix lists citizen's arrest laws as they now exist in the 50 states and the District of Columbia.

## INTRODUCTION

After the shooting and killing of Ahmaud Arbery, the suggestion that the actions leading to Arbery's death could be justified under Georgia law added insult to the injury. Indeed, one prosecutor, recusing himself in a letter, said that in his opinion the killing of Arbery was "perfectly legal" under Georgia's citizen's arrest law.<sup>1</sup> This is because, according to the prosecutor, Gregory and Travis McMichael were in "hot pursuit" of someone that they had "probable cause" to believe had committed a felony.<sup>2</sup> Although his interpretation of the facts and the law is questionable,<sup>3</sup> Georgia's citizen's arrest law even *appearing* to condone such conduct led to widespread calls for its repeal. In the words of one commentator, "the state of Georgia should not allow private citizens to play amateur detective with guns in their hands.

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1. George E. Barnill, *Ref: Glynn County, The Shooting death of Ahmaud Arbery, Feb 23rd 2020* (May 11, 2020), <https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glynn/b52fa09cdc974b970b79/optimized/full.pdf>.

2. *Id.*

3. See the discussion of the case *infra* Part I.C. The defendants in the Arbery case have now been indicted. See Theresa Waldrop, Erika Henry & Angela Barajas, *Three men indicted in the death of Ahmaud Arbery*, CNN (June 24, 2020, 12:26 PM), <https://www.cnn.com/2020/06/24/us/ahmaud-arbery-grand-jury-indictment/index.html>.

### *The Puzzling Persistence of Citizen's Arrest Laws*

The decisions are too difficult, and the consequences are too dangerous.”<sup>4</sup>

The state of Georgia is hardly unique in having such laws.<sup>5</sup> These laws are common, even ubiquitous. In fact, no state is without one either as a matter of statute or a matter of the common-law.<sup>6</sup> What is more, many of those laws are broad in scope, giving citizens the right to arrest people on misdemeanors or felonies, even ones not committed in their presence.<sup>7</sup> To be sure, a citizen who makes an arrest risks his or her own liability. If the arrest is a false one, they may face charges themselves of false imprisonment or assault.<sup>8</sup> But the mere existence of such laws can seem to be a troubling fact, as it seems to permit — if not positively encourage — citizens to take the law into their own hands. Even more troubling may be the fact that the laws have undergone almost no change in content from the days of the English common law and the “hue and cry.”<sup>9</sup> In the words of one *New York Times* story, such laws look like relics “in an age in which 911 is widely available and police response times are generally within minutes.”<sup>10</sup>

Our short essay takes a critical look at these laws and makes suggestions for reforming them. In the first part, we examine the existing citizen's arrest laws in some detail, giving some examples where those laws might come into play, and pointing out the commonalities between the laws of various states. Many of these laws are not only similar, they are word-for-word *exactly* the same. We conclude the part by looking in detail at the Arbery case, and the operation of Georgia's citizen's arrest law, raising some questions about the initial decision not to charge Gregory and Travis McMichael. In the second part, we try to reckon with the fact that not only do these laws exist, they exist everywhere, and there has been no serious momentum to repeal or even reform them in the past several decades. In doing so,

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4. Dana Mulhauser, *The killing of Ahmaud Arbery shows the dangerous failings of citizen's arrest laws*, WASH. POST (May 7, 2020, 9:14 PM), <https://www.washingtonpost.com/opinions/2020/05/07/killing-ahmaud-arbery-shows-dangerous-failings-citizens-arrest-laws/>.

5. *See* Appendix.

6. *Id.*

7. *Id.*

8. *See* the discussion in Part I.B. *infra*.

9. *See generally* Cynthia A. Brown, *Utah v. Strieff: Sound the Hue and Cry*, 45 S.U. L. REV. 1 (2017).

10. Frances Robles, *The Citizen's Arrest Law Cited in Arbery's Killing Dates Back to the Civil War*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/article/ahmaud-arbery-citizen-arrest-law-georgia.html>.

we situate citizen's arrest laws within the context of two sets of laws that *have* seen recent efforts to change them: self-defense laws and law regarding police officers' use of force. We also deal with whether there may not be a simpler, and more sinister, explanation for the persistence of citizen's arrest laws: they simply persist as tools of white supremacy.

Finally, in the last part of our paper, we offer suggestions for reforming these laws. Many of these suggestions are inspired by a *Columbia Law Review* note from the 1960s, which shows the surprising lack of change in citizen's arrest laws over a half-century,<sup>11</sup> and the need to revisit them.<sup>12</sup> The conclusion to the paper weighs the question of whether citizen's arrest laws should be abolished or only reformed.

## I. GENERAL CHARACTERISTICS OF CITIZEN'S ARREST LAWS

What do we mean by citizen's arrest laws? Two broad distinctions should be made at the outset. First, by a citizen's arrest, we do not intend to capture all those means of enforcing the criminal law that are not conducted by the actual, professional police. This would sweep too broadly for our purposes. That is, we do not mean to be discussing what is widely called the "private police"<sup>13</sup> — *inter alia*, security guards, bouncers, or other "corporate" private security.<sup>14</sup> We will also be putting to one side those not infrequent cases of police officers who make citizen's arrests when they are outside of their jurisdiction. In short, when we deal with citizen's arrests, we mean to take it in its ordinary sense: arrests by citizens, who have no special training or expertise or special statutory authority in enforcing the criminal law.<sup>15</sup> Our focus is only "ordinary" citizens, who attempt to make arrests of people they believe have committed a crime.<sup>16</sup>

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11. See discussion and notes *infra*.

12. Our debt to Robbins' essay is evident throughout our article. See Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557 (2016) (the only major recent paper on the subject).

13. See generally David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

14. *Id.*

15. See also Robbins, *supra* note 12 (arguing that these examples of citizen's arrests, i.e. police outside jurisdiction and lost prevention officers detaining shoplifters, are "good" applications of citizen's arrests). We are not so sure, but we do not pursue that point here.

16. By focusing our inquiry in this way, we do not mean to say that there might be good reasons to reform *these* uses of force as well (a point we emphasize later when discussing police use of force).

## *The Puzzling Persistence of Citizen's Arrest Laws*

But here we also should make another distinction, this one a little harder to make because the relevant contrast is with an ambiguous category, viz., vigilantism.<sup>17</sup> When we speak of citizen's arrest, we also do not mean to talk about vigilante justice, a type of justice that sees itself as outside the law, and as bringing about some desired moral end. On this rough definition of "vigilantism," a vigilante — as opposed to someone making a citizen's arrest — seeks not merely to restrain the person in order to turn that person over to law enforcement, but in fact to mete out punishment of that person.<sup>18</sup> The vigilante, too, may see it as his or her job to seek out criminals, even those who have committed their crimes long ago, rather than simply pursue those who have recently committed a crime in his or her presence. At the same time, an ongoing concern with allowing citizen's arrest is that it may turn into a license for vigilantism, where citizens go beyond *restraining* people who have committed a crime to *punishing* them. We might see a "citizen's arrest" as falling in between a justified arrest by a trained law enforcement officer on one side and vigilantism on the other, but always at risk of spilling over into vigilantism.

### A. Some Examples

We believe it will be helpful to go over some examples of citizen's arrests — of the sort we mean to focus on — before going on to investigate in greater detail the statutes that may or may not provide a justification for these actions.<sup>19</sup> While going through the examples, we will also highlight the statutes of the jurisdictions where these purported citizen's arrests occurred. That will enable us to preview somewhat the surprising uniformity of these statutes, something dealt with in much greater detail in the second section of this part. These examples are not meant to be especially illustrative — the cases from outside of Georgia were almost selected at random. We are necessarily limited by those cases that were considered sensational or troubling enough to generate significant media attention, or which were the subject of an appeal. But they will help make clear what types of cases interest us, and what motivates us in seeking to revisit existing citizen's arrest laws.

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17. In thinking about this concept, we are indebted to unpublished work by Antony Duff on "vigilantism."

18. We return to a discussion of vigilantism in our discussion of citizen's arrest laws and racism, *infra*.

19. For a nice collection of examples, see also Robbins, *supra* note 12.

One further caveat has to be made. We do not claim that all of these cases involve instances where citizen's arrest would *succeed* as a defense at trial against any charges — or even that the defendant would get a jury instruction on the defense. We offer them here to show the range of behaviors that might at least *seem* to raise an issue of citizen's arrest. We begin with two cases from Georgia, which are not as well-known as the Arbery case. We follow that with four cases from four other jurisdictions. We then examine the Arbery case in greater detail in the final section of this Part.

### 1. Georgia Cases

*Payne.* Twenty-two-year-old Hannah Payne witnessed a minor hit-and-run accident in Clayton County, Georgia, and followed the suspect, sixty-two-year-old Kenneth Herring, in her jeep.<sup>20</sup> She blocked off the suspect's vehicle, approached the driver's side window, and shot him, despite repeated instructions from the 9-1-1 operator to not intervene. Hannah Payne was charged with multiple felonies, including murder.<sup>21</sup> Payne's attorney has tried to characterize her actions as part of a citizen's arrest.<sup>22</sup>

*Fannin.* In 2015, when Hashim Fannin was about to leave an Atlanta area Family Dollar parking lot, Edgar Horn got into the passenger seat in an apparent attempted carjacking.<sup>23</sup> Fannin pulled a gun on him, and asked him to exit the car.<sup>24</sup> Fannin then held Horn at gunpoint for several minutes until police arrived and took custody of

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20. Zachary Hansen & Chelsea Prince, *Woman intervenes in hit-and-run, fatally shoots driver, police say*, ATLANTA J. CONST. (May 9, 2019), <https://www.ajc.com/news/crime—law/just-woman-allegedly-shot-killed-man-285-after-crash/K1Ht2xXOUoB348wnD1JtaL/>; Diane Diamond, *The good, the bad, and the ugly of citizen's arrests*, ALBUQUERQUE J. (May 23, 2020, 12:02 AM), <https://www.abqjournal.com/1458879/the-good-the-bad-and-the-ugly-of-citizens-arrests.html>.

21. *Id.*

22. Donessa Aldridge, *She's accused of witnessing a hit and run and killing the driver. A judge denied her bond*, 11ALIVE (July 13, 2019, 1:26 AM), <https://www.11alive.com/article/news/shes-accused-of-witnessing-a-hit-and-run-and-killing-the-driver-a-judge-denied-her-bond/85-865526a6-6c39-496f-bf4c-6d28fee15e6d>; see also Simon Cherie, *This Failed Citizen's Arrest Case Reminds us that "Karen" is Capable of Murder*, MEDIUM (July 16, 2020), <https://medium.com/antiparty/after-multiple-delays-controversial-citizens-arrest-case-moves-forward-in-clayton-county-8d43b448133c> (describing Payne's attorney's arguments at a bail reduction hearing).

23. Evan Bleier, *Atlanta man turns the tables on would-be carjacker when he pulls a gun and holds the robber for police*, DAILY MAIL (May 22, 2015, 12:46 AM), <https://www.dailymail.co.uk/news/article-3092966/Hashim-Fannin-Atlanta-pulls-gun-carjacker-Family-Dollar.html>.

24. *Id.*

## *The Puzzling Persistence of Citizen's Arrest Laws*

Horn.<sup>25</sup> Horn has said that he mistakenly got into the wrong car, and had no intent to steal.<sup>26</sup>

In Georgia, it is lawful for a private citizen to arrest anyone who has committed a misdemeanor or felony in their presence or with their immediate knowledge. The law also allows a private person to make an arrest of someone who is escaping.<sup>27</sup> If the offense is a felony and the offender is escaping or attempting to escape, and the citizen has reasonable and probable ground to suspect the offender has committed a felony, then the private person is permitted to make an arrest.<sup>28</sup>

### 2. Cases from other jurisdictions

*Indiana.* In Indiana, the city council president of Gary, Ron Brewer, used a phone app to track his stolen vehicle. This led him to East Chicago, where he found teenagers occupying his vehicle. Brewer allegedly fired shots at the teenagers, and captured one fourteen-year-old, taking him back to his home in Indiana. Brewer was charged with kidnapping, criminal confinement, and intimidation. Brewer and his attorney are claiming he had a right to confront the teenagers under Indiana's citizen's arrest law.<sup>29</sup>

In Indiana, a private citizen may arrest anyone if they have probable cause to believe that person committed a felony. A private citizen may also arrest someone who commits a misdemeanor in their presence if arrest is necessary in order to prevent further breach of peace.<sup>30</sup>

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25. Emily Shapiro, *Georgia Man Turns the Tables on Carjacker: 'You Messed Up Big Time,'* ABC NEWS (May 22, 2015, 4:41 PM), <https://abcnews.go.com/US/georgia-man-turns-tables-carjacker-messed-big-time/story?id=31238545>. *But cf. id.* (indicating through police spokesperson that they generally advise "citizens to take themselves out of harm's way and to contact 911, so that police may respond to the situation").

26. Rebecca Lindstrom, *Suspected would-be robber says he's the real victim*, ARGUS LEADER (May 22, 2015, 7:12 PM), <https://www.argusleader.com/story/news/local/east-point/2015/05/22/edgar-horn-hashim-fannin-cell-phone-robbery/27803595/> ("Horn says Fannin's story actually supports his own. He says Fannin's car was a similar color and model to his friends. He didn't get in aggressively or make any demands. He didn't even realize his mistake until he turned around and saw Fannin, and the gun.").

27. GA. CODE ANN. § 17-4-60 (West 2020).

28. *Id.*

29. Jeremy Ross, *Gary Councilman In Jail After Attempting 'Citizen's Arrest'*, CBS CHI. (Sept. 23, 2019), <https://chicago.cbslocal.com/2019/09/23/gary-councilman-in-jail-after-attempting-citizens-arrest/>; Dimond, *supra* note 20.

30. IND. CODE ANN. § 35-33-1-4 (West 2020).

*Montana.* In 2016, four men fled from the scene after colliding with a truck in Billings, Montana.<sup>31</sup> Bystander Jake Vangen was standing on a nearby street and pulled a gun on one of the fleeing men, ordering him to the ground until police arrived.<sup>32</sup> On a different nearby street, two bystanders tackled a second suspect and held him down until police arrived.<sup>33</sup> A responding Highway Patrolman thanked the citizens for their help saying it was “greatly appreciated.”<sup>34</sup> There was no indication that the citizens making the arrest were charged with any crime.<sup>35</sup>

In Montana, “[a] private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person’s immediate arrest.”<sup>36</sup> In addition, “[t]he private person may use reasonable force to detain the arrested person.”<sup>37</sup>

*Missouri.* Last year in Springfield, Missouri, Dmitriy Andreychenko walked into a Walmart wearing body armor and carrying an assault rifle and a handgun with 100 rounds of ammunition.<sup>38</sup> He did this during a rash of mass shootings in 2019, and less than a week after the El Paso Walmart mass shooting.<sup>39</sup> He began walking around the store filming people’s horrified reactions.<sup>40</sup> A shopper held him at gunpoint until police arrived.<sup>41</sup> Andreychenko was charged with second degree terroristic threats.<sup>42</sup> It does not seem as that the shopper was charged with any crime.<sup>43</sup> In Missouri a private citizen may make an arrest when a felony has been committed and they have reasonable grounds to suspect the culprit.<sup>44</sup>

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31. Mike Kordenbrock, *Citizens stop two men fleeing Billings wreck, police looking for two more*, BILLINGS GAZETTE (Oct. 29, 2016), [https://billingsgazette.com/news/local/citizens-stop-two-men-fleeing-billings-wreck-police-looking-for-two-more/article\\_7421faa7-10f0-51ed-ba0b-228fe0eab40b.html](https://billingsgazette.com/news/local/citizens-stop-two-men-fleeing-billings-wreck-police-looking-for-two-more/article_7421faa7-10f0-51ed-ba0b-228fe0eab40b.html).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. MONT. CODE ANN. § 46-6-502(1) (West 2019).

37. *Id.*

38. Hannah Knowles, *Armed man who sowed panic at Walmart claimed he was testing his Second Amendment rights, police say*, WASH. POST (Aug. 19, 2020), <https://www.washingtonpost.com/nation/2019/08/10/armed-man-who-sowed-panic-walmart-said-he-was-testing-his-nd-amendment-rights-police-say/>.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. MO. ANN. STAT. § 548.141 (West 2020).

## *The Puzzling Persistence of Citizen's Arrest Laws*

*California.* A San Jose man, Victor Magana, suspected of attempted murder and kidnapping, was detained by a number of citizens in San Luis Obispo County at a gas station when they recognized his car from an Amber Alert.<sup>45</sup> Local law enforcement arrived shortly after, and the child was found in the vehicle unharmed.<sup>46</sup> Magana was charged with attempted murder and kidnapping for slashing the throat of his ex-girlfriend and taking their two-year-old daughter.<sup>47</sup> There is no indication that the citizens who made the arrest were charged with a crime.<sup>48</sup> In California, a private citizen may arrest someone whom they have reasonable cause to believe has committed a felony or anyone who commits a misdemeanor in their presence.<sup>49</sup>

### B. Citizen's Arrest Statutes in the States

Every state<sup>50</sup> has a citizen's arrest law, and even more surprisingly, those laws are very similar, even to the point of being word-for-word copies of one another. Most of the laws tend to provide broad latitude for citizens to make arrests, subject to few limitations, especially when it comes to felony arrests.<sup>51</sup> The parallel to police officer's use of force statutes, something we highlight in the text, is hard to miss.<sup>52</sup> While it would be impossible to summarize the variations in all of the laws, we can make a few generalizations about them. In particular, we can pick out which crimes citizens may arrest for, and what general restrictions they have in their ability to make those arrests. Five commonalities among the laws stand out.<sup>53</sup>

*Distinctions between crimes.* The key distinction here is between felonies and misdemeanors. When there are restrictions on citizen's

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45. *People block in Amber Alert suspect at California gas station*, KCRA3 (Dec. 16, 2019, 4:20 PM), <https://www.kcra.com/article/amber-alert-issued-san-jose-victor-magana/30242034>; Robert Salonga, *Man charged with brutal stabbing of ex-girlfriend, kidnapping daughter in San Jose*, MERCURY NEWS (Dec. 18, 2019, 1:39 PM), <https://www.mercurynews.com/2019/12/18/san-jose-man-charged-with-brutal-stabbing-and-kidnapping-of-daughter/>.

46. *People block in Amber Alert suspect at California gas station*, *supra* note 45.

47. Salonga, *supra* note 44.

48. *Id.*

49. CAL. PENAL CODE § 837 (West 2020).

50. And the District of Columbia.

51. See discussion *infra* Part II-B.

52. *Id.*

53. The list here is obviously indebted to the one in Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502, 503-09 (1965) [hereinafter Note]. See also Alvin Stauber, *Citizen's Arrest: Rights and Responsibilities*, 18 MIDWEST L. REV. 31, 31-33 (2002) (laying out several "statutory variations on a common law theme" in citizen's arrest laws).

arrests, they tend to fall on the misdemeanor side.<sup>54</sup> Citizen's arrests for felonies are generally permitted, although they are not without their own limitations.<sup>55</sup> In some states, citizen's arrests are not allowed for misdemeanors, or only for certain misdemeanors, such as those that involve a "breach of the peace."<sup>56</sup> There are no such corresponding categorical exclusions for felonies in most states. Many states, however, will allow arrests for any offense — felony or misdemeanor.

*Presence or immediate knowledge.* When there is a qualification on misdemeanor arrests, the misdemeanor is usually made in the presence of the person or within that person's "immediate knowledge."<sup>57</sup> There is greater allowance of citizen's arrests for felonies that are committed outside the presence or immediate knowledge of the person making the arrest.<sup>58</sup> Indeed, many states, such as Georgia, allow for a felony arrest if the person making the arrest only had "reasonable and probable grounds" to believe that the person arrested was the one who committed the felony — especially in those cases where the suspected felon is escaping.<sup>59</sup>

*Notice.* A common restriction on citizen's arrest is that a person making a citizen's arrest must inform the person he or she is arresting that they are being arrested and what is the "cause for the arrest."<sup>60</sup> Some states explicitly remove this requirement when the person being arrested is still in the course of committing the crime; is apprehended after hot pursuit; or more generically, in those cases where the person would clearly know that he or she is being arrested.<sup>61</sup>

*Notification and surrender of arrestee.* After the arrest is made, the person making the arrest must take the arrestee before a judge as soon as practically possible, or else notify a law enforcement officer of

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54. A citizen's arrest for a misdemeanor usually requires that it be committed in the presence of the person making the arrest. *See, e.g.*, ALASKA STAT. ANN. § 11.81.390 (West 2020); ARIZ. REV. STAT. ANN. § 13-3884 (2020); IND. CODE ANN. § 35-33-1-4(a) (West 2020). *See also* discussion *infra* in the following paragraph.

55. ALASKA STAT. ANN. § 11.81.390 (West 2020); ARIZ. REV. STAT. ANN. § 13-3884 (West 2020); IND. CODE ANN. § 35-33-1-4(a) (West 2020).

56. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Paul, 261 A.2d 731, 739 (Md. 1970) (restricting citizen's arrests for misdemeanors that "amounts to a breach of the peace"); City of Waukesha v. Gorz, 479 N.W.2d 221, 223 (Wisc. Ct. App. 1991) (clarifying that only misdemeanors that breach the peace allow for a citizen's arrest).

57. *As in* Georgia. GA. CODE ANN. § 17-4-60 (West 2020).

58. *Id.*

59. *Id.*

60. *See, e.g.*, ALA. CODE § 15-10-7(c) (West 2020); MINN. STAT. ANN. § 629.38 (West 2020); MISS. CODE ANN. § 99-3-7(1) (West 2020).

61. MISS. CODE ANN. § 99-3-7(1) (West 2020).

*The Puzzling Persistence of Citizen's Arrest Laws*

the arrest, and turn over the arrestee to the officer.<sup>62</sup> Some “reasonable delay” in turning the suspect over is usually explicitly allowed by statute.<sup>63</sup>

*Consequences of a mistaken arrest.* Although citizen’s arrest laws (as we will detail in the next part) share many features with laws regarding law enforcement officer’s use of force, there is a crucial difference, highlighted by many state statutes. If a police officer has probable cause but arrests someone who has not in fact committed a crime, he or she will normally not face liability for that arrest.<sup>64</sup> This is not so for a citizen who arrests someone who has not committed a crime. In that case, the citizen has not just made a mistake; that citizen has quite possibly committed a tort, or even a crime — of false imprisonment, or worse.<sup>65</sup> Thus the requirement in many statutes that the person arrested has “in fact” committed a felony,<sup>66</sup> although not all states have this rule.

There are some variations on these major themes in citizen’s arrest laws — some states further qualify *which* felonies or misdemeanors can be the basis of a citizen’s arrest,<sup>67</sup> and others add that the arrest must be immediately necessary to prevent the arrestee from escaping — but the uniformity is obvious and striking. Few states have sought to modify or adapt their citizen’s arrest laws, let alone get rid of them, even in the face of changes to other areas of the criminal law, or to particularly reported instances of the abuse of the citizen’s arrest power.<sup>68</sup>

One further point to note is that citizen’s arrest laws still may be subject to general rules about the *proportionality* of force that can be used to affect the arrest.<sup>69</sup> For the most part, these rules are not explicitly codified in the citizen’s arrest statute *per se*.<sup>70</sup> They may be in other statutes, such as law enforcement officer’s use of force laws.<sup>71</sup> Still, some courts have seen fit to read these restrictions into the citi-

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62. IND. CODE ANN. § 35-33-1-4(b) (West 2020).

63. D.C. CODE ANN. § 23-582 (West 2020).

64. MISS. CODE ANN. § 99-3-7(1) (West 2020).

65. See Robbins, *supra* note 12, at 573.

66. See, e.g., ARIZ. REV. STAT. ANN. § 13-3884 (2020); CAL. PENAL CODE § 837 (West 2020).

67. ME. STAT. tit. 17-A, § 16 (2020) (limiting citizen’s arrests to the crimes of murder or any Class A, B, or C crime).

68. Robbins, *supra* note 12, at 577, 580.

69. Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

70. Robbins, *supra* note 12, at 568.

71. *Graham v. Connor*, 490 U.S. 386, 386–87 (1989).

zen's arrest laws.<sup>72</sup> But in some states, because of reforms to law enforcement officer's use of force laws, citizens sometimes have a *greater* ability to use force than police officers do in certain circumstances.<sup>73</sup>

### C. The Arbery Case, Briefly Examined

With this background, we can look at the Arbery case, both as a matter specific to Georgia law, and as an abstract comparison to the principles that seem to unify most citizen's arrest statutes across states. The killing of Ahmaud Arbery now stands as the most notorious and most familiar recent case of citizen's arrest.<sup>74</sup> Apparently, believing that Arbery was a suspect in several crimes, Gregory and Travis McMichael pursued Arbery as he was jogging down a street.<sup>75</sup> At some point, they stopped and confronted him while armed with a gun.<sup>76</sup> In the ensuing struggle, Arbery was shot and killed. When the video of the confrontation emerged, the McMichaels were arrested and charged with murder and assault.<sup>77</sup>

Given the facts as we know them, could the attack on Arbery be justified as a citizen's arrest? We can see dangers in either way we answer this question. In one direction, the answer to the question might be "no," so that the McMichaels would not succeed on their claim of making a valid citizen's arrest. This would open them up — barring a successful self-defense claim<sup>78</sup> — to a conviction for the murder of Arbery. The citizen's arrest law in Georgia could still be condemned for encouraging this behavior rather than permitting it. That is, even if citizen's arrest is not a valid defense in this case, having it available *as* a defense may lead some people to go too far and lead to tragic results, as it did in the Arbery case.<sup>79</sup>

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72. *State v. Emmons*, 141 N.M. 875, 879 (N.M. Ct. App. 2007).

73. MO. ANN. STAT. § 563.051 (West 2020). In Missouri, for example, citizens can use deadly force to arrest a person who has committed a Class A felony, which includes some non-violent felonies. Missouri law enforcement officers lack the power to use force on this basis.

74. *See generally Ahmaud Arbery: What do we know about the case?*, BBC (June 5, 2020), <https://www.bbc.com/news/world-us-canada-52623151#:~:text=ahmaud%20Arbery%20was%20jogging%20in,we%20know%20about%20the%20case>.

75. *Id.*

76. *Id.*

77. *Id.*; *see* Robles, *supra* note 10.

78. *See* Lauren Aratani, *Trio charged with murder of Ahmaud Arbery plead not guilty*, GUARDIAN (July 18, 2020, 12:30 AM), <https://www.theguardian.com/us-news/2020/jul/17/ahmaud-arbery-murder-suspects-plead-not-guilty> (although the McMichaels have not made a formal statement, Gregory McMichael told the police that he was acting in self-defense after Arbery attacked his son).

79. Hansen & Prince, *supra* note 20; Dimond, *supra* note 20; Ross, *supra* note 29 (a similar point could be made about the *Payne* and *Brewer* cases).

*The Puzzling Persistence of Citizen's Arrest Laws*

The second direction we might go in examining the Arbery case would involve finding that the McMichaels' actions *could* be justified under Georgia's citizen's arrest law. This may be the more disquieting result, as it would mean that their apparently outrageous, cruel, and even evil behavior would get a legal "cover."<sup>80</sup> If this were the case, then it would seem to provide an even greater motivation for repealing citizen's arrest laws, or at least drastically curtailing them.

In looking at the *Arbery* case as an instance of a possible citizen's arrest, we should start by acknowledging that our assessment here awaits a fuller picture of the evidence, namely, evidence that may only come out at trial. There is a lot that we still do not know, although what we know is troubling enough. In any event, we will emphasize our uncertainty about the facts throughout as we consider three major points: (1) whether there was a felony; (2) whether (even if there was not a felony) there was a reasonable suspicion that Arbery was "escaping"; and, finally, (3) whether disproportionate force was used in "arresting" Arbery. Questions can be raised about the validity of the citizen's arrest at each point. Raising these three questions in this context may help us see in more detail the flaws in many citizen's arrest laws, and to point the way toward reform.

First, it is not obvious what felony Arbery is supposedly guilty of, if he is indeed guilty of any felony. There is a video of Arbery looking into a building under construction prior to the pursuit of Arbery. This might be the felony of burglary, depending on whether there is proof that Arbery intended to commit a crime inside the structure,<sup>81</sup> and also whether the half-completed house would count as a "structure" under Georgia's second-degree burglary statute.<sup>82</sup>

But this brings us to the second point. Presumably, the McMichaels would claim that they were making a citizen's arrest in

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80. See Seth W. Stoughton, *Ahmaud Arbery's killing puts a spotlight on the blurred blue line of citizen's arrest laws*, CONVERSATION (May 29, 2020), [https://www.salon.com/2020/05/29/ahmaud-arberys-killing-puts-a-spotlight-on-the-blurred-blue-line-of-citizens-arrest-laws\\_partner/](https://www.salon.com/2020/05/29/ahmaud-arberys-killing-puts-a-spotlight-on-the-blurred-blue-line-of-citizens-arrest-laws_partner/) ("[W]hat concerns me is not just that the men who killed Arbery may have thought that their attempted apprehension was legally sanctioned, but that they would have had good reason to believe that. Most states still retain outdated laws that protect would-be vigilantes.").

81. A person commits burglary under OCGA § 16-7-1(b)-(c) when "without authority and with the intent to commit a felony or theft therein, he or she enters or remains within . . . [the] dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another," or "enters or remains within . . . [any other] building, railroad car, watercraft, or aircraft." GA. CODE ANN. § 16-7-1(b)-(c) (West 2017).

82. See, e.g., *Weeks v. State*, 616 S.E.2d 852, 853-54 (2005) ("A house under construction which is so far completed as to be capable of providing shelter to people, animals, or property constitutes a building under this statute.").

pursuit of a fleeing felon. Under the second part of Georgia's citizen's arrest statute, this requires that the citizen making the arrest have "reasonable or probable grounds" to believe that the person had committed a felony.<sup>83</sup> Did the McMichaels have this? Based on what we know, it is hard to conclude that they did. According to recent reports, Gregory McMichael had only a "gut feeling" or an "instinct" that Arbery was responsible for a prior burglary.<sup>84</sup> This seems hardly enough to amount to reasonable or probable grounds of suspicion.

Finally, there is the question of disproportionate force. Although Georgia's citizen's arrest law does not say anything about a proportional use of force, Georgia state courts have found that citizens are constrained in a similar way as police in their use of force.<sup>85</sup> Deadly force to arrest someone can only be used in certain circumstances: (1) when the person is armed, (2) presents a physical threat to others, or (3) when the crime suspect is one involving the infliction of serious physical harm.<sup>86</sup> But *none* of those circumstances seems obviously present. Arbery was unarmed, and (certainly while being pursued) presented no threat to the McMichaels; nor was the suspected crime (burglary or trespass) one that involved the infliction of serious harm.<sup>87</sup> This means that if the use of deadly force can get a justification in these circumstances, it would probably have to come from Georgia's self-defense statute.

## II. SITUATING CITIZEN'S ARREST LAWS

Every state has a citizen's arrest law, although it is something of a puzzle *why* these laws still exist. To be sure, there was a time where there simply were no professional police, and so the main type of ar-

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83. GA. CODE ANN. § 17-4-60 (West 2020) ("If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.").

84. *Ahmaud Arbery killing: What we learned from latest court hearing*, WRDW (June 5, 2020, 5:24 AM), <https://www.wrdw.com/content/news/Ahmaud-Arbery-killing-What-we-learned-from-latest-court-hearing-571040041.html> (investigator testimony that Greg McMichael told police that "he didn't know if Mr. Arbery had stolen anything or not, but he had a gut feeling" that Arbery had committed prior break-ins).

85. *Patel v. State*, 603 S.E.2d 237, 242 (2004).

86. *Prayor v. State*, 447 S.E.2d 155, 156 (1994) ("[T]he law in Georgia forbids a person from using more force than is reasonable under the circumstances to make a citizen's arrest and deadly force in making the arrest is limited to self-defense or to a situation where it is necessary to prevent a forcible felony.").

87. *Ahmaud Arbery: What do we know about the case?*, *supra* note 74.

*The Puzzling Persistence of Citizen's Arrest Laws*

rest was one made by ordinary citizens.<sup>88</sup> Citizens were to make a “hue and cry” when a crime was committed, and other citizens were then able to use force to stop and to restrain the person who was suspected of committing the crime.<sup>89</sup> Not only was this an option on the part of citizens, in was a positive duty,<sup>90</sup> because in a real sense, it was a matter of necessity.<sup>91</sup> If citizens were not going to make the arrest, nobody would.

Of course, when the police were invented, there were still gaps in a citizen's ability to enforce the law, so the right of citizen's arrest remained, and was from time to time needed.<sup>92</sup> But as policing became more professionalized and more pervasive, the need for citizen's arrests waned, and the rights of citizens and police to make arrests could no longer be seen as coequal.<sup>93</sup> It could no longer be plausibly maintained that citizens had the *duty* to arrest.<sup>94</sup> And now, citizens would bear the risk that if they made an arrest of a person who was not in fact guilty of a felony, they could be liable for damages.<sup>95</sup>

The inevitable result of the rise of the police would seem to be that the power of citizen's arrest would not only be used less but that the laws authorizing those arrests would be limited, and eventually repealed. If there is a professional police force, leaving arrests — any arrests — in the hands of citizens, could suggest that the police are not capable of controlling crime. In addition, it gives citizens power that could be abused (as recent events show).<sup>96</sup> The common-law rules that most states adopted thus seem out of place “in a society that places the primary responsibility for apprehending criminals in the hands of professional law-enforcement officers.”<sup>97</sup> In short, we may believe that “the law governing arrest by citizens is outmoded in to-

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88. *Stevenson v. State*, 413 A.2d 1340, 1347 (1980) (“During the formative years of the law of arrest, the apprehension of criminals by private individuals was the norm rather than the exception as it is today.”).

89. *Id.* at 1345.

90. M. CHERIF BASSIOUNI, *CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE* 9 (1977); Emeline L. K. Diener, *Into Our Own Hands Citizen's Arrest in Pennsylvania*, 41 PA. LAW. 18, 20 (2019) (asserting that “citizen's arrest was an affirmative duty”); Robbins, *supra* note 12, at 562.

91. Alameda County District Attorney's Office, *Citizen's Arrests* (2009), <https://le.alcoda.org/publications/files/CITIZENSARREST.pdf>.

92. *Id.*

93. *Stevenson*, 413 A.2d at 1347.

94. *Id.* at 1348.

95. *Id.*

96. *Id.* at 1349.

97. Note, *supra* note 53, at 504.

day's world,"<sup>98</sup> and reasonably expect to see many states abandoning such laws, or at least strongly limiting them.

But this is not what happened. Citizen's arrest laws have "stagnated,"<sup>99</sup> staying in place, relatively unchanged; and while these arrests are not as common as they once were, they are still made, and seem to have an important place in the background of the criminal law. What we need, then, is a better explanation of why citizen's arrest laws not only seem to exist, but also seem to *persist*. There are forces at work making the laws stick, and we need to explain those forces.

In this Part, we try to give some context for the persistence of citizen's arrest laws. We can initially see tacit support for those laws coming in two directions. The first direction is an increasing assertion of individual citizen power to use force in the form of expanding self-defense laws. The second direction is in rising skepticism of the police to adequately enforce the criminal law.<sup>100</sup> Citizen's arrest laws importantly complement both of these developments. If they do not directly support the existence of citizen's arrest laws (and in our third part, we offer arguments why they might show the *lack* of need for such laws), they at least can be construed as broadly consistent with these two movements, viz., one that shows increasing citizen empowerment, and the other which points to greater constraints on law enforcement. These movements fit into the larger traditions of American individualism and self-reliance, as well as skepticism of state power.<sup>101</sup> In the closing section of this Part, however, we also consider the relationship of citizen's arrest laws to another tradition in America: racism.

#### A. Self-defense

The past several decades have seen a movement in favor of expanding self-defense laws, which, in essence, give citizens the authority to prevent crime.<sup>102</sup> In principle, citizens can use force justifiably not only to hurt someone — the usual case of self-defense — but also

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98. *Stevenson*, 413 A.2d at 1349; *see also* *Brooks v. Commonwealth*, 61 Pa. 352, 359 (1869).

99. *See* Note, *supra* note 53.

100. This skepticism may be part of a broader American tradition of separating out power — not placing power in any one source, whether that be public or private. *See* WILBUR R. MILLER, *A HISTORY OF PRIVATE POLICING IN THE UNITED STATES* 220 (2018).

101. *See id.* at 286 (discussing of American "individualism").

102. Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RES. 821 (2013).

*The Puzzling Persistence of Citizen's Arrest Laws*

to restrain them.<sup>103</sup> Self-defense laws could then be read, plausibly, to be involved in the same sort of activity that citizen's arrest laws permit: using force to restrain crime. Of course, self-defense is usually repelling force against one's person with force, so there is a critical distinction here — citizen's arrest laws can justify force used against a crime against another.<sup>104</sup> But even here, lines can become blurred. Most self-defense laws give a person the right, not only to protect him or herself, but also to protect another party.<sup>105</sup> And this gets us closer to the focus of citizen's arrest laws, which are designed to give protection to those who make an arrest for a crime not necessarily committed against *them*. Again, self-defense laws and citizen's arrest laws are certainly not identical, but they are cousins to one another, and may spring from the same basic idea. In the words of Wilbur Miller, that idea is something like “an assertion that citizens may protect themselves when threatened instead of having to depend on public officials.”<sup>106</sup>

So, it does not strike us as implausible to see the expansion of self-defense laws as relevant to the persistence of citizen's arrest laws. Over the past several years, several states have made it easier for citizens to stand their ground in the face of an impending attack.<sup>107</sup> Missouri's experience in this regard is illustrative. Missouri initially was a state where one could stand one's ground in one's house (one's “castle”).<sup>108</sup> That is, one did not have to retreat when faced with an immediate threat of force inside of one's home or within one's curtilage.<sup>109</sup> In all other places — the street, someone else's home, a bar — one would have to retreat, if retreat was practicable. Otherwise, it was not just that one would lose at trial on a claim of self-defense, one would probably not even get the jury instructed in self-defense in the first

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103. Alameda County District Attorney's Office, *supra* note 91.

104. Joseph A. Conoscienti, *A Guide to Georgia Stand Your Ground Law*, CONOSCIENTI & LEDBETTER (June 13, 2019), <https://cl-firm.com/georgia-stand-your-ground-law/>.

105. *See, e.g., Foster v. Commonwealth*, 412 S.E.2d 198, 201 (Va. App. 1991) (use of force generally available to defend a third person)

106. Wilbur R. Miller, *A State within 'The States': Private Policing and Delegation of Power in America*, 17 CRIME, HIST. & SOC'Y 125, 127 (2017). We are indebted to Miller's article in this section, as well as his book, MILLER, *supra* note 100.

107. Pamela C. Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood*, 46 U. MEM. L. REV. 383, 401 (2015). Bell's article usefully collects the laws on the books in many states. We disagree with her strong defense of “stand your ground” laws, however, for reasons which may be clear from our article.

108. *Id.* at 408.

109. *Id.*

place.<sup>110</sup> Retreat was a *duty* one had, prior to the justifiable use of force.

But over the years, Missouri (along with a number of other states), gradually allowed people to “stand their ground” in the face of a threat *outside* the home, including in one’s car and eventually to any place one had a right to be.<sup>111</sup> In other words, there was no duty to retreat in the face of an imminent threat in *most* places (a duty to retreat still exists for trespassers). As a result, citizens’ ability to use justified force markedly increased.<sup>112</sup> A citizen no longer had to run away from a threat. They could simply confront it with force.

Standing one’s ground and using force is not the same as actively *pursuing* someone in order to arrest them, and so self-defense — even when there is no duty to retreat — is not redundant with an ability for a citizen to make an arrest. But one can certainly see the relationship. Most obviously, expanding self-defense makes a strong statement both about that citizen’s rights and about that citizen’s powers. The default is no longer to *avoid* using force by retreating if this is a possibility. The default is instead to *confront and deal with the crime on one’s own*, without waiting — and without needing to call the police.

In a context where the right to self-defense is being expanded, citizen’s arrest laws no longer look so out of place, especially if we include a citizen’s right to defend property in the formula as well. Citizen’s arrest laws, when seen in this way, emerge as a natural companion to the idea that a citizen *in his or her own case* can deal with the situation on their own, without having to immediately resort to contacting the police, and, importantly, without having to back away from using force to deal with the threat.<sup>113</sup> Indeed, a citizen’s arrest law can look like a logical extension of the right to self-defense.<sup>114</sup> If one can use force to prevent a crime *against oneself*, or against a third

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110. See generally Chad Flanders, *Interpreting the New “Stand Your Ground” Rule*, 73 J. Mo. B. 20 (2017).

111. Chad Flanders, *Commentary: Of castles, cars, road rage, and guns*, ST. LOUIS PUB. RADIO (June 15, 2012, 2:17 PM), <https://news.stlpublicradio.org/government-politics-issues/2012-06-15/commentary-of-castles-cars-road-rage-and-guns>; Chad Flanders, *The problem with ‘stand your ground’ law*, ST. LOUIS POST-DISPATCH (Feb. 21, 2018), [https://www.stltoday.com/opinion/columnists/the-problem-with-stand-your-ground-law/article\\_clf7fa57-f5fb-5b06-beb5-e3210c2b6883.html](https://www.stltoday.com/opinion/columnists/the-problem-with-stand-your-ground-law/article_clf7fa57-f5fb-5b06-beb5-e3210c2b6883.html).

112. *Self Defense and “Stand Your Ground”*, NCSL (May 26, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx>.

113. AJ Willingham, *Citizen’s arrest laws aren’t cut and dry. Here’s what you need to know*, CNN (May 12, 2020, 7:32 AM), <https://www.cnn.com/2020/05/12/us/citizens-arrest-what-is-explained-trnd/index.html>.

114. *Id.*

*The Puzzling Persistence of Citizen's Arrest Laws*

party, why should it be OK, when the crime has already been committed, to let the person get away with it? Why leave the citizen's power only in the realm of *prevention* but not also in *apprehension*? Both situations require a need to act quickly; both situations prevent obvious dangers if left unattended to. If a citizen can use force in his or her own defense, why not also as a way of protecting the community?

B. Law Enforcement Use of Force

Now consider a movement in another, different direction, this time toward restraint rather than toward empowerment. In the past several decades, dating from at least the Supreme Court's decision in *Tennessee v. Garner*, there has been an increasing skepticism about letting police use force, especially deadly force, in encounters with citizens.<sup>115</sup> *Garner* was a decision in a civil suit, and so we should be careful about drawing too many lessons from it about state criminal law.<sup>116</sup> Still, *Garner* embodied a trend in regard to law enforcement's use of force, embodied most clearly in *Garner's* caution that it was not always better that "all felony suspects die than they escape."<sup>117</sup> When it came to force, especially deadly force, police needed to be restrained. They could use that force but only in situations that clearly called for it — when a person had committed a violent felony or was continuing to threaten violence.<sup>118</sup>

State laws now seem to have come more and more to mirror *Garner*, if not in direct response to it, at least in response to a mood that the old idea — that deadly force could be used against all felons — resulted in too many deaths, too many unjustified uses of force.<sup>119</sup> Some states even go further, requiring such things as notice before deadly force was used, or that all other available methods of detaining the suspect have been exhausted.<sup>120</sup> The pattern of reform was not the same throughout all states, and some states have only very recently brought themselves in line with the *Garner* standard.<sup>121</sup> Even when change was not reflected at the legislative level, it was present at

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115. Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS UNIV. PUB. L. REV. 109 (2015).

116. *Id.* at 110.

117. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

118. *Id.*

119. Flanders & Welling, *supra* note 115, at 133.

120. These reforms are gaining increased momentum in the wake of several recent, high-profile excessive uses of police force. Flanders & Welling, *supra* note 115, at 114.

121. *Id.* at 120–21.

the level of the department: the police themselves, at least in theory, were more closely regulating the use of force in making arrests.<sup>122</sup>

Again, we should be careful about drawing too close causal connections between restrictions on police use of force and citizen's arrests laws. But there *does* seem to be a line that we can draw. If citizens are skeptical of police, for whatever reason (they are racist, or corrupt, or simply unresponsive or unavailable, for example), it might be safer to at least leave citizen's arrests laws on the books, so that citizens retain the power of self-help when police either cannot be counted on to respond in time or otherwise cannot be trusted. What may at first seem a counter-trend to the persistence of citizen's arrest laws — skepticism about the uses of force against criminal suspects — may on further reflection be a confirmation of why those laws still exist. Distrust of police power, and limits on that power, mean that more power should reside in the citizen. Restrictions on the police may be at the same time reminders of the powers that citizens still have.

In any event, it is a rather striking fact that in the 21st century, an increasing focus on reforming police and calls to limit their power have been met with no corresponding efforts to limit the ability of citizens to engage in self-help, in the form of limiting or eliminating citizen's defense laws. In other words, the movement here seems not to be simply against the use of force, regardless of who uses that force. If we add to this equation the expansion of self-defense laws and the increasingly zealous protection courts have given to Second Amendment rights,<sup>123</sup> then the conclusion becomes even more striking. Citizens have seen a positive increase in their ability to *be almost exactly like* police officers both in their legal rights (self-defense) and in the lethal means they have to exercise those rights (guns). Note that this conclusion is consistent with saying that police still have too much power, viz. citizens, and they should be further constrained. The point is a relative one. Still, if recent events are any indication, we may expect that the balance will shift further to citizen empowerment.

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122. SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 85 (2020); see generally Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 241 (1994).

123. Miller, *supra* note 106, at 127.

C. Citizen's Arrest

It is important to be clear, again, about what we are saying in this Part. The claims are extremely speculative, but worth investigating. The puzzle is that the arc of the standard narrative would seem to point in the direction of the eventual dismantling of citizen's arrests laws, and their eventual repeal. The standard narrative, after all, was a story of a shift from *only* citizens being able to make arrests to the existence of a separate police force whose job was to make arrests so that citizens would not have to. Moreover, it was not simply a story of addition — police now get to arrest people, in addition to citizens — it was a story of *displacement*. Police would be the *only* ones to make arrests, not only because citizens would be bad at making arrests, but also because citizens *should not* make arrests: they did not have the authority to do so.

What we have tried to suggest, instead, is an emerging counter-narrative of citizen empowerment that pushes back against the standard story. The transition of power to the police has been blocked by an expansion of the rights of citizens to stand their ground and use force in defense of themselves and others and a corresponding distrust of the police to protect communities.<sup>124</sup> On this different story we are describing, while citizen's rights laws do not need to be expanded (the necessary expansion is being done in the self-defense area and in the assertion of gun rights) neither do those laws need to be repealed.<sup>125</sup> They are not anomalous, as the standard narrative would have it; rather, they exist as complements to other social facts, viz., the right of people to act in self-defense, and the need to limit the police in the exercise of their powers. As such, citizen's arrest laws "belong." They do not need to be changed or repealed — because they are part of the rights citizens have against the government. On this revised story, getting rid of citizen's arrest laws would signal that we either did not trust ourselves to protect ourselves or trusted the police to protect us. Even if the two trends we have noted in this Part (expansion of self-defense and restrictions on policing) do not provide a *justification* for citizen's arrest laws (as they most certainly do not), they may explain

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124. STOUGHTON, NOBLE & ALPERT, *supra* note 122, at 73.

125. As Seth Stoughton has pointed out to us, citizen's arrest laws still represent a real expansion beyond self-defense, despite the continuity. Those laws represent *assertive* uses of force, whereas self-defense laws ostensibly remain defensive. *Id.* at 72 (explaining that citizen's arrest laws still represent a real expansion beyond self-defense, despite the continuity; such laws represent *assertive* uses of force, whereas self-defense laws ostensibly remain *defensive*); see also MILLER, *supra* note 100, at 11 (distinguishing between self-defense and "aggressive" attacks).

why they persist — or better, our relative inattention to them until something goes wrong.

The resulting picture of where we are, today, or at least where we seem to be heading, is much closer to the common-law period, where citizen's ability to arrest was taken for granted, and even relied on as part of a broader responsibility of the community to prevent and deter crime. On this picture, the right of citizens to make arrests is parallel to the ability of the police to make arrests, even if it is not precisely equal to it. Instead of telling a story about the increasing power of the police, we may instead need to look further back, to a time we have not have fully left behind, where citizens and police both have a share in law enforcement. But there is a further variable we need to explore, viz., race.

#### D. Racism

What may be a more obvious, and more sinister, explanation for the persistence of citizen's arrest laws is that they function as a tool to entrench and enforce white supremacy. It is hard to overlook the racial aspects of the Arbery case, especially with the revelation that Gregory McMichael used racial slurs in the course of making his "citizen's arrest."<sup>126</sup> And there is some evidence that citizen's arrest laws were passed in response to changing racial and legal dynamics in the South. Indeed, we may be able to make a connection in the case of Georgia's citizen's arrest law, which was part of the codification of Georgia's criminal law led by Thomas Cobb, a lawyer and a slaveholder as well as the author of a book defending slavery.<sup>127</sup> The fact that the language of Georgia's citizen's arrest statute echoes the common-law is not dispositive. It is perfectly possible for a racially neutral law to be passed with racial animus as its motive and racial oppression as its goal.<sup>128</sup>

The claim here is once more speculative, we should emphasize, and the evidence is not easy to come by. There is strong evidence that border patrols have sought cover from citizen's arrest laws to enforce

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126. Brakkton Booker, *White Defendant Allegedly Used Racial Slur After Killing Ahmaud Arbery*, NPR (June 4, 2020, 6:17 PM), <https://www.npr.org/2020/06/04/869938461/white-defendant-allegedly-used-racial-slur-after-killing-ahmaud-arbery>.

127. See Alan J. Singer, *Citizen's Arrest: Racist at its Roots*, HIST. NEWS NETWORK (May 24, 2020), <https://historynewsnetwork.org/article/175619>.

128. *Id.*

*The Puzzling Persistence of Citizen's Arrest Laws*

a nativist agenda.<sup>129</sup> But it is harder to find that citizen's arrest laws were used in this way in the case of race. One reason is that the campaign of racial oppression carried on by white people during the 19th and 20th century may be better characterized as acting *outside* of the law, rather than within it.<sup>130</sup> Lynching and other acts of terror against black people were not justified as citizen's arrests — rather, they did not have to be justified at all given the way the law was selectively enforced at the time.<sup>131</sup> Black people were killed or maimed and the white people who were guilty of these acts were almost never called into account by the legal system.<sup>132</sup>

In the terminology referenced briefly above, these acts were acts of *vigilantism*.<sup>133</sup> They did not purport to be legally justified; given the corrupt and racist legal systems in many parts of the U.S. at the time, there was no need for the pretense; the law was going to allow them in practice, however much of these acts were extra-judicial and unlawful in theory.<sup>134</sup> More specifically, while the Ku Klux Klan and other groups may have thought that they were agents enforcing the “law,” they did not, to our knowledge, offer that they were acting under the power of citizen's arrest laws.<sup>135</sup> Their actions were tacitly condoned, and even approved of, by the relevant authorities.<sup>136</sup> If anything, these groups acted under a broader notion of “popular sovereignty,” in which the law was ultimately enforced by “the people,” and so the

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129. Peter Yoxall, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIA. INTER-AM. L. REV. 517, 519 (2006) (noting how border patrols “acted within the legal framework of a citizen's arrest while fulfilling a societal need that the government did not necessarily have the resources to provide” but also “were motivated by racist, xenophobic agendas”); see also Robbins, *supra* note 12, at 582–83.

130. Christopher Waldrep, *National Policing, Lynching, and Constitutional Change*, 74: 3 J.S. HIST. 589, 591 (2008).

131. Miller, *supra* note 106, at 128.

132. As explained more fully in the next paragraph, they would never need to assert *any* defense to their actions, let alone a defense that they were making a citizen's arrest. See ROBIN D. G. KELLEY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* 83–84 (Univ. of N.C. Press, 25th ed. 2015) (troubling discussion of a citizen's arrest case).

133. See generally the discussion of vigilantism in MILLER, *supra* note 100.

134. *Id.* at 32.

135. See Miller, *supra* note 106, at 128 for a discussion of the Klu Klux Klan in the context of private policing.

136. Miller describes that during reconstruction “although a few local Sheriffs resisted lynch mobs in the name of due process of law, most were absent or stood aside when crowds broke into jails to seize black prisoners.” *Id.* See Christopher Capozzola, *The Only Badge Needed Is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America*, 88: 4 J. AM. HIST. 1354, 1359 (2002). (“White vigilance groups enforced white racial supremacy. They enjoyed the support of formal state institutions at every level of American government, which consistently declined to intervene in what they deemed local or wholly private matters.”).

people could choose to enforce it their way if they wished.<sup>137</sup> The “higher law” on this theory could be managed and manipulated in the interests of enforcing a racist order, even if — by the letter of the law — these white people were guilty of false imprisonment or murder.<sup>138</sup>

But this is not to say that the racist hypothesis regarding citizen’s arrest does not seem to us rather plausible all things considered. Citizen’s arrest laws over the course of the last century could have been overtly or implicitly “repurposed” to enforce white supremacy.<sup>139</sup> In the words of Sherrilynn Ifill, this could be another instance in which “the law itself has been hijacked, and it plays a central role in aiding and abetting white people’s ability to kill black people with impunity.”<sup>140</sup> Recent cases — we can add Trayvon Martin to this list, as well as Arbery — certainly point in that direction. White people may not have needed, before, to justify their actions in actual legal terms, but now they do, and citizen’s arrest laws are another tool they can use to do it (along with self-defense, or the right to bear arms under the Second Amendment).<sup>141</sup>

Racism helps explain something else. It is our impression that many of those who defend citizen’s arrest laws also tend to be pro-police. That is, there does not seem to be a strong coalition nowadays that is both aggressive when it comes to self-defense but also extremely skeptical of police power.<sup>142</sup> But if the goal of citizen’s arrest laws is to help white people exert “justified” force over black people, then those who believe this may also view the police in this way, either consciously or unconsciously. Lynch mobs in the 20th century South,

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137. This idea of popular sovereignty was commonly used to justify extra-judicial violence against black people. See Waldrep, *supra* note 130, at 591 (“In this highly localized world where local jurisdictions struggled to maintain order with little outside help, Americans sometimes rationalized lynching as so-called lynch law, a constitutionally legitimate expression of popular sovereignty outside statutory law.”).

138. Miller also notes appeals to public safety as the “supreme law” in the attempts of vigilantes to justify their actions. MILLER, *supra* note 100, at 31.

139. In other words, it could be that when white people started being charged with crimes, they needed a defense (before, they would not need a defense because they were never charged).

140. Sherrilyn Ifill, *We must confront the inconsistent laws that allow black lives to be taken with impunity*, WASH. POST (May 11, 2020, 5:38 PM), <https://www.washingtonpost.com/opinions/2020/05/11/even-if-we-bring-justice-ahmaud-arbery-work-will-remain/>; see Ekow Yankah, *Racialized violence never takes a break: On the killing of Ahmaud Arbery*, N.Y. DAILY NEWS (May 8, 2020, 4:16 PM), <https://www.nydailynews.com/opinion/ny-oped-racialized-violence-never-takes-a-break-20200508-2qgf7s73nzfp3hd7ywiwxnakdi-story.html>.

141. See, e.g., MILLER, *supra* note 100, at 48 (increasing convictions for extra-judicial, vigilante justice in the latter half of the 20th century).

142. This may need to be qualified, as there are extremist groups that both assert their power as citizens to defend themselves and are extremely skeptical of the state, including the police.

*The Puzzling Persistence of Citizen's Arrest Laws*

after all, in the words of one historian, “act[ed] as an auxiliary to the state, carrying out its policy of white supremacy while saving its money.”<sup>143</sup> The result is a more or less coherently racist view that sees the criminal law — whether enforced by private citizens or by state police — as a tool for the oppression of black bodies and lives.

III. SUGGESTIONS FOR REFORM

The second Part gave only a possible explanation for why citizen's arrest laws persist, and why they are seemingly taken for granted. It was not meant, by any stretch, as a justification for those laws. Indeed, one may believe that the expansion of citizen's rights to self-defense is troubling (especially when combined with a strengthened Second Amendment) *and* that reforms on police officer's use of force are welcome. That is, as opposed to a citizen empowerment narrative, one may instead side with a *limited force* model, where both citizen and police use of force is put under greater constraint.<sup>144</sup> In other words, the fact that a variety of social conditions and trends have put us in a place where citizen's arrest laws may not seem to be especially out of place does not mean that we have to agree to a large place for them, or indeed any place at all. We may, in fact, be troubled by the persistence of these laws. If we add the fact that there seems to be racial overtones in the use — if not in the existence — of these laws, our disquiet may grow even further.

We believe one should also be troubled by the fact that these laws seem to have undergone no substantive revisions since they were passed, even when in the past several decades increasing attention has been paid to the use and abuse of police force.<sup>145</sup> It is in the spirit of raising questions about the presently existing laws that we offer the following reform suggestions. What is more than a little perplexing is that these reform suggestions echo those made in a Note in the *Columbia Law Review* that was written over a half century ago.<sup>146</sup> The suggestions were welcome and good then, but — as the subsequent history has shown — have fallen on deaf ears. The result is that we are left with laws that are mostly common-law era holdovers.<sup>147</sup> One

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143. MILLER, *supra* note 100, at 38.

144. *See id.* at 178.

145. Indeed, as noted above, in some cases reform of police use of force has left citizens with a *greater* power to arrest than the police.

146. Note, *supra* note 53, at 513.

147. *Id.*

does not even have to think that things have changed all that much to believe that seriously considering reform is at least a useful hypothetical exercise. But it is no longer merely hypothetical for it appears that, finally, some states are taking seriously the need to change their citizen's arrest laws.<sup>148</sup>

Here, then, are some of those reforms:

*Limit the type of offense that can be subject to a citizen's arrest, and when.*<sup>149</sup> The first limitation should be a limitation on what types of offenses that can be subject to a citizen's arrest. Here we do not mean to refer to the distinction between felonies and misdemeanors, with the idea that only those suspected of committing a felony may be subject to a citizen's arrest. This strikes us too blurry a line to be drawn, especially given the wide range of behaviors that could be considered felonious under many criminal codes.<sup>150</sup> Rather, we believe that there should be a *substantive* standard for citizen's arrest, rather than the formal one of felonies as opposed misdemeanors: only those crimes which involved a risk of physical harm to others, or those offenders who present an ongoing risk of physical harm to others should be capable of being arrested not only by police officers but also by citizens. This would apply even to those felonies that were not committed in the presence of the person making the arrest.

The rationale here is straightforward. When it comes to minor crimes, citizens should not be the ones in charge of making arrests; this should be left to the police and not to the meddling of citizen-officers. The stakes are simply not great enough to allow citizens to take the risk. However, if there is an exigent situation where lives or safety are at risk, citizens should be able to intervene if there is simply no other option available (this can be the case even if the crime does not rise to the level of a felony). Of course, intervening in such a

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148. See, e.g., Robles, *supra* note 10 (citing legislators in Georgia who want the citizen's arrest law abolished); see also Stanley Dunlap, *Lawmakers press change to citizen's arrest law cited in Arbery case*, GA. RECORDER (June 1, 2020), <https://georgiarecorder.com/2020/06/01/lawmakers-press-change-to-citizens-arrest-law-cited-in-arbery-case/> (Georgia lawmakers are considering reform of citizen arrest law); see also A.T. McWilliams, *Georgia Can Honor Ahmaud Arbery by Repealing Its Horrible Citizen's Arrest Statute*, SLATE (May 19, 2020, 10:01 AM), <https://slate.com/news-and-politics/2020/05/georgia-honor-ahmaud-arbery-repeal-citizens-arrest.html>; see also Trone Dowd, *Ahmaud Arbery's Death is Already Inspiring a State to Change Its Citizen's Arrest Law*, VICE NEWS (May 14, 2020, 5:54 PM), [https://www.vice.com/en\\_us/article/z3ee73/ahmaud-arberys-death-is-already-inspiring-a-state-to-change-its-citizens-arrest-law](https://www.vice.com/en_us/article/z3ee73/ahmaud-arberys-death-is-already-inspiring-a-state-to-change-its-citizens-arrest-law) (South Carolina considering change in its citizen's arrest laws).

149. Note, *supra* note 53, at 513.

150. Robbins, *supra* note 12, at 573 (noting the confusion citizens may face in requiring them to distinguish between felonies and misdemeanors).

*The Puzzling Persistence of Citizen's Arrest Laws*

situation contains risks of its own, so we do not believe many citizens will avail themselves of this option. But that seems a feature of our approach, not a bug. Our default is that citizens *usually* should not be stepping into the shoes of the police — not for misdemeanors, because they are too trivial, and not (usually) for crimes of violence, because the risks are too great.

Moreover, the power of citizen's arrest should be allowable only in those situations where there is a risk of immediate harm, not one that has passed. It will not do to allow citizens to affect an arrest for a felony that is days or weeks old, something seemingly allowed by many citizen's arrest laws still on the books. This should be changed. The aim of a citizen's arrest is not to supplant the police officer's job and to freely range about and make arrests, but to address a dangerous situation where police are unable to respond in time. A requirement that one be present when the crime has or is being committed may serve the same end (*viz.*, making sure that the risk is still at hand, rather than over), although a probable cause in a belief that the suspect presents a real and credible threat may be preferable, and sufficient.<sup>151</sup>

*Require efforts to contact the police, first, and allow reasonable time for police to respond.*<sup>152</sup> In the days of the hue and the cry, communication with others was not easy — if one was not in a populated area, you were pretty much on your own. But we no longer live in that era. Not only do we have a 911 system, nearly all of us have the means at our disposal to *call* 911 if a crime has been committed. It makes sense to us, then, to require citizens who wish to make an arrest at least make an *attempt* to contact the authorities, rather than go at it on their own. A citizen's arrest should be a last resort, not a first option.

The requirement here is meant to mirror those rules of the use of deadly force by police officers, *viz.*, that they try other means to diffuse the situation *short* of deadly force as a prerequisite to employing deadly force. The issue in our case is relatively similar, although the standard is not to use lesser means of force before greater ones, but to try to avoid intervening in the situation *at all* until one had made a

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151. “[I]t would seem preferable to lower the incidence of mistaken arrests not through an arbitrary requirement of firsthand observation but by application of a standard of probable cause — namely, that the apprehension be justified by probable cause for believing a crime had been committed.” Note, *supra* note 53, at 507.

152. *Id.* at 513.

good faith effort to get the police involved. We believe in most cases, proving this will be easy, by showing, e.g., that one had made a 911 call and waited, but the response would not be quick enough, or for whatever reason, one was without any means to communicate with the police.

*No deadly force in making arrests.*<sup>153</sup> For this restriction, we try to draw a firm line between what citizens can do and what the police are permitted to do. Police can use deadly force in making an arrest, if necessary, and often only when certain conditions are met: the crime was a felony, or involved a present risk of violence. Police also are ostensibly trained in the use of deadly force, and are taught not to use it until all other means have been exhausted (as was mentioned above, in a related context). Not so with citizens. Citizens by and large have not been trained to use force, and they should not use force when they are trying to arrest someone. The use of force by citizens in these situations is simply too likely to escalate the situation, rather than diffuse it (although the same could certainly be the case with police violence as well).

In recommending the no-deadly-force limitation on citizen's arrests, it is important that we are *not* proposing to remove a citizen's right to defend him or herself from attacks with the use of deadly force in those cases where use of deadly force would be a proportionate response. In cases where a citizen faces a direct, imminent attack against him or a third party that threaten serious physical injury or death, that person can use deadly force to repel the attack. Indeed, many times in which a citizen's arrest will seem appropriate to our mind will be precisely in these situations — where the felony to be committed is in the form of an attack against the person who goes on to try to repel the attack and restrain the attacker. It is in these cases that the goals of citizen's arrest laws and the goals of self-defense overlap, and the justifications reinforce one another: it is good to stop the attack, and it is good to restrain the attacker, if possible, and bring them to justice.

Based on our survey, there is no state that currently adopts all of these recommendations, though there are a few states that have adopted one of them.<sup>154</sup> It is important to note that the reforms we

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153. The Note permits deadly force to be used by a citizen making an arrest in certain circumstances. In recommending a limit on use of deadly force, we obviously depart from this. *Id.*

154. Massachusetts and Nevada, for example, have banned the use of deadly force by citizens in making an arrest. *See generally* Appendix.

*The Puzzling Persistence of Citizen's Arrest Laws*

propose do not have to be adopted wholesale. Each stands separately from the others, although we believe they support one another, by pointing to the idea that citizen's arrests should be rare, and arrests should be left to the police for the most part. Only in those cases where there is a serious threat that needs to be addressed, and the citizen is willing to take the risk in stopping that threat, should the law provide support for that citizen. Otherwise, and to paraphrase *Garner*, it is not always better that a citizen make an arrest than a suspect get away.<sup>155</sup>

In offering these above suggestions, we need to return to a point we made in the first Part. Our focus here has been in restraining the *citizen* in making the arrest, and in Part I, we tried to make clear that we meant a citizen who was untrained in anything relating to use of force, and who did not have a job in any way related to crime prevention: we left to one side cases involving store security guards and police officers making arrests out of their jurisdiction. These cases, in theory, could be covered under citizen's arrest laws, and in fact many times are. But some states have separated these cases out, under separate shopkeeper's laws and laws relating to out-of-jurisdiction police arrests. We think this is a wise move. These cases are best treated separately, as they may raise fewer concerns than with having citizens making arrests. They also may need to be specifically limited in ways not relevant to the general and more sweeping limitations to citizen's arrests laws.

There is one final point that we wish to emphasize especially given current events. Reform of citizen's arrest laws does not mean that efforts to reform policing should not also proceed. We are not proposing to readjust the equilibrium away from citizens and toward the police. Our suggestions for reform are not meant to be suggestions for police empowerment. Limits on police force, and generally on police intervention, should be considered, debated, and then, if they make sense, put into law. But there is still, overall, a benefit to having a professionalized police force rather than roaming citizen-officers be in charge of making arrests and keeping the peace. There is no contradiction between wanting the use of force to be centralized rather than dispersed, yet wanting to put strong constraints on that centralized body in its ability to use force.

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155. See generally *Tennessee v. Garner*, 471 U.S. 1 (1985).

## CONCLUSION

Our final section concluded with suggestions for reforming citizen's arrest laws, but we should ask in conclusion: why have those laws at all? The question merits serious thought. The limits we proposed would make citizen's arrests an uncommon thing, even more uncommon than they already seem to be. Why not, then, simply get rid of them? This may not be a bad idea. Given that the one situation we believe would merit citizen intervention — where there is a person who has committed a violent crime, and still represents an ongoing threat — is so risky and so serious, we might want citizens to stay away rather than try to play the “hero.”<sup>156</sup> In those situations, it may not be good that the person be left to get away, but it may be better all things considered. That is, it may be better than having a citizen put his or her life at risk with an uncertain chance of success, and a greater chance of more violence. If we add to this the idea that the citizen may still act in his or her own self-defense, then we still leave open that in a subset of those situations, there *will* be room for a response. Again, why not send a clear signal that citizens should just stay out of it, and wait for the police, by getting rid of these laws rather than by amending them?

This indeed may be the answer, but we also may need to get there by incremental steps. For political reasons, it may be better to start by mending citizen's arrest laws rather than ending them outright. They may still be needed in some places where police are simply not around, or cannot be trusted. There may also be some unanticipated consequences of removing the citizen's ability to affect an arrest of someone who has committed a crime.<sup>157</sup> In any event, it may not be wrong to think seriously about a world in which citizens are no longer given the legal cover to take the law into their own hands. But if there are to be such laws, we can do no better than conclude with the unheeded admonition of the 1965 *Columbia Law Review* Note:

If the private citizen is to assume his proper responsibility in the enforcement of the criminal law, the immunities and limitations of citizen's arrest must be clearly defined. If professional enforcement au-

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156. Here we are again inspired by Robbins, and the examples he cites where individuals taking “the law into their own hands” and risks dangers for “both the arrestor and the arrestee.” Robbins, *supra* note 12, at 572.

157. *See, e.g.*, Alameda County District Attorney's Office, *supra* note 91 (noting that citizen's arrests are necessary because police officers in California cannot make arrests for misdemeanors not committed in their presence).

*The Puzzling Persistence of Citizen's Arrest Laws*

thorities are to receive necessary assistance from private individuals, the scope of citizen's arrest must be adapted to the conditions and problems of modern society.<sup>158</sup>

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158. Note, *supra* note 53, at 502.

APPENDIX: CITIZEN'S ARREST LAWS IN THE UNITED STATES<sup>159</sup>

Alabama	
ALA. CODE § 15-10-7 (2020).	<p><b>Arrests by Private Persons</b></p> <p>(a) A private person may arrest another for any public offense:</p> <p>(1) Committed in his presence;</p> <p>(2) Where a felony has been committed, though not in his presence, by the person arrested; or</p> <p>(3) Where a felony has been committed and he has reasonable cause to believe that the person arrested committed it.</p> <p>(b) An arrest for felony may be made by a private person on any day and at any time.</p> <p>(c) A private person must, at the time of the arrest, inform the person to be arrested of the cause thereof, except when such person is in the actual commission of an offense, or arrested on pursuit.</p> <p>(d) If he is refused admittance, after notice of his intention, and the person to be arrested has committed a felony, he may break open an outer or inner door or window of a dwelling house.</p> <p>(e) It is the duty of any private person, having arrested another for the commission of any public offense, to take him without unnecessary delay before a judge or magistrate, or to deliver him to some one of the officers specified in Section 15-10-1, who must forthwith take him before a judge or magistrate.</p>
ALA. CODE § 13A-3-27 (2020).	<p><b>Use of force in making an arrest or preventing an escape</b></p> <p>(g) A private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest or prevent the escape from custody of an arrested person whom he reasonably believes has committed a</p>

159. This appendix was assembled by Lyz Riley, Raina Brooks, Jack Compton, and Lindsay Parks. After we compiled the appendix, we learned of a similar one that had recently been assembled. See Shakierah Smith, Module on Citizen's Arrest and the Killing of Ahmaud Arbery, *2020 Summer Supplement to KAPLAN, WEISBERG & BINDER, CRIMINAL LAW: CASES AND MATERIALS* (8th Edition 2016).

*The Puzzling Persistence of Citizen's Arrest Laws*

	felony and who in fact has committed that felony, but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical forces.
Alaska	
ALASKA STAT. ANN. § 12.25.030 (West 2020).	<p><b>Grounds for arrest by private person or peace officer without warrant</b></p> <p>(a) A private person or a peace officer without a warrant may arrest a person</p> <p>(1) for a crime committed or attempted in the presence of the person making the arrest;</p> <p>(2) when the person has committed a felony, although not in the presence of the person making the arrest;</p> <p>(3) when a felony has in fact been committed, and the person making the arrest has reasonable cause for believing the person to have committed it.</p>
ALASKA STAT. ANN. § 11.81.390 (West 2020).	<p>In addition to using force justified under other sections of this chapter, a person, acting as a private person, <b>may use nondeadly force</b> to make the arrest or terminate the escape or attempted escape from custody of a person who the private person reasonably believes has committed a misdemeanor in the private person's presence or a felony when and to the extent the private person reasonably believes it necessary to make that arrest or terminate that escape or attempted escape from custody. A private person may use deadly force under this section only when and to the extent the private person reasonably believes the use of deadly force is necessary to make the arrest or terminate the escape or attempted escape from custody of another who the private person reasonably believes</p> <p>(1) has committed or attempted to commit a felony which involved the use of force against a person; or</p> <p>(2) has escaped or is attempting to escape from custody while in possession of a firearm on or about the person.</p>
ALASKA STAT. ANN. § 12.25.010 (West 2020).	An arrest may be made by a peace officer or by a private person.

Arizona	
<p>ARIZ. REV. STAT. ANN. § 13-3884 (2020).</p>	<p><b>Arrest by private person</b></p> <p>A private person may make an arrest:</p> <ol style="list-style-type: none"> <li>1. When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.</li> <li>2. When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.</li> </ol>
<p>ARIZ. REV. STAT. ANN. § 13-3889 (2020).</p>	<p><b>Method of arrest by private person</b></p> <p>A private person when making an arrest shall inform the person to be arrested of the intention to arrest him and the cause of the arrest, unless he is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the person making the arrest has opportunity so to inform him, or when the giving of such information will imperil the arrest.</p>
<p>ARIZ. REV. STAT. ANN. § 13-3854 (2020).</p>	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed an complaint must be made against him under oath setting forth the ground for the arrest as in § 13-3853, and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
Arkansas	
<p>ARK. CODE ANN. § 16-81-106 (West 2020).</p>	<p><b>Authority to Arrest</b></p> <ol style="list-style-type: none"> <li>(a) An arrest may be made by a certified law enforcement officer or by a private person.</li> <li>(b) ...</li> <li>(c) ...</li> <li>(d) A private person may make an arrest where he or she has reasonable grounds for believing that the person arrested has committed a felony.</li> </ol>

*The Puzzling Persistence of Citizen's Arrest Laws*

	<p><i>Practice Note:</i> According to <i>Arkansas Law of Damages</i> § 33:3 the reasonable grounds or probable cause standard found in the statute reflects a balancing between the right to personal liberty and the public interest in apprehending criminals. It then defines probable cause for citizen's arrests. Probable cause exists when the circumstances give the private citizen a reasonable belief that there is a likelihood that the other has committed a felony.</p>
Ark. R. Crim. P. 4.1(b), (e) (2020).	<p><b>Authority to Arrest Without Warrant</b></p> <p>(b) A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.</p> <p>(e) A person arrested without a warrant shall not be held in custody unless a judicial officer determines, from affidavit, recorded testimony, or other information, that there is reasonable cause to believe that the person committed an offense. Such reasonable cause determination shall be made promptly, but in no event longer than forty-eight (48) hours. Such reasonable cause determination may be made at the first appearance of the arrested person pursuant to Rule 8.1.</p>
Carr v. State, 43 Ark. 99,105 (1884).	<p><b>Resistance of arrest</b></p> <p>If a felon resist arrest or fly so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them.</p>
California	
CAL. PENAL CODE § 834 (West 2020).	<p><b>“Arrest” defined; persons authorized to arrest</b></p> <p>ARREST DEFINED. BY WHOM DEFINED. An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.</p>
CAL. PENAL CODE § 837 (West 2020).	<p><b>Private persons; authority to arrest</b></p> <p>ARRESTS BY PRIVATE PERSONS. A private person may arrest another:</p> <ol style="list-style-type: none"> <li>1. For a public offense committed or attempted in his presence.</li> <li>2. When the person arrested has committed a felony, although not in his presence.</li> <li>3. When a felony has been in fact committed, and he has</li> </ol>

	<p>reasonable cause for believing the person arrested to have committed it.</p> <p><i>Practice Note:</i> According to <i>California Criminal Procedure</i> § 3:66 a citizen has a limited ability to break doors or windows in making an arrest. They may also remove weapons from the suspect. In addition, when the arrestor contacts the police, the police must make a good faith effort to inform the citizen how to safely execute the arrest.</p>
CAL. PENAL CODE § 838 (West 2020).	<p><b>Magistrate; oral order to officer or private person to arrest</b></p> <p>MAGISTRATES MAY ORDER ARREST. A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offence in the presence of such a magistrate.</p>
CAL. PENAL CODE § 839 (West 2020).	<p><b>Authority to summon aid to make arrest</b></p> <p>PERSONS MAKING ARREST MAY SUMMON ASSISTANCE. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.</p>
CAL. PENAL CODE § 844 (West 2020).	<p><b>Breaking open door or window to effect arrest; demand admittance; explanation of purpose</b></p> <p>To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.</p>
CAL. PENAL CODE § 847(a) (West 2004).	<p><b>Arrest by private person; duty to take prisoner before magistrate or deliver him to peace officer; liability for false arrest</b></p> <p>(a) A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him or her to a peace officer.</p>
CAL. PENAL CODE § 849(a) (West 2017).	<p><b>Arrest without warrant; duty to take prisoner before magistrate and file complaint; release from custody</b></p> <p>(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested,</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	<p>if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before the magistrate.</p>
<p><b>Kaufman v. Brown</b>, 93 Cal. App. 2d 508, 513 (1949).</p>	<p><b>False arrest and imprisonment, arrest</b></p> <p>One making arrest without warrant owes duty to bring arrested person before proper magistrate without unnecessary delay, and failure to do so renders officer or private person making arrest a trespasser from beginning and liable for false arrest and imprisonment.</p>
<p>Colorado</p>	
<p>COLO. REV. STAT. ANN. § 16-3-201 (West 1972).</p>	<p><b>Arrest by Private Person</b></p> <p>A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest.</p> <p><i>Practice Note:</i> According to 14 Colo. Prac., <i>Criminal Practice &amp; Procedure</i> § 3.35 (2d ed.) a citizen arrestor may use the same degree of force in performing the arrest as a police officer could. It further adds that a private person may also arrest anyone upon reasonable information that the suspect stands charged with a crime punishable by death or a prison term exceeding one year.</p>
<p>COLO. REV. STAT. ANN. § 16-19-115 (West 2020).</p>	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. When so arrested the accused must be taken before a judge with all practicable speed, and complaint must be made against him under oath setting forth the ground for arrest as in section 16-19-114; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
<p>COLO. REV. STAT. ANN. § 18-1-707 (West 2020).</p>	<p><b>Use of physical force in making an arrest or in preventing an escape</b></p> <p>(7) A private person acting on his own account is justified in using reasonable and appropriate physical force</p>

	upon another person when and to the extent that he reasonably believes it necessary to effect an arrest, or to prevent the escape from custody of an arrested person who has committed an offense in his presence; but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.
People v. Joyce, 68 P.3d 521, 523 (Colo. App. 2002).	<b>Arrest by private person</b> In order to be entitled to use of physical force to effect arrest by private person, person who attempted to effect arrest must have witnessed arrestee’s alleged crime.
Connecticut	
CONN. GEN. STAT. ANN. § 53a-22(f) (West 2020).	<b>Use of physical force in making arrest or preventing escape</b> (f) A private person action on his or her own account is justified in using reasonable physical force upon another person when and to the extent that he or she reasonable believes such to be necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he or she reasonably believes to have committed an offense and who in fact has committed such offense; but he or she is not justified in using deadly physical force in such circumstances, except in defense of person as prescribe din section 53a-19.
CONN. GEN. STAT. ANN. § 54-170 (West 2020).	<b>Arrest without warrant</b> The arrest of a person may be lawfully made also by any peace officer or a <b>private person</b> , without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused shall be taken before such a judge with all practicable speed and complaint shall be made against him under oath setting forth the ground for the arrest as in section 54-169; and thereafter his answer shall be heard as if he had been arrested on a warrant.  <i>Practice Note:</i> A private citizen may justify use of physical force in making an arrest to the extent that he believes the force to be necessary to effect an arrest or

*The Puzzling Persistence of Citizen's Arrest Laws*

	<p>prevent escape of the suspect he reasonably believes committed an offence and who, in fact, has committed such offence. Such circumstances do not, however, justify deadly force. Additionally, if the suspect did not commit the offense the arrest is not justified regardless of the reasonableness at the time. It is not required that the arresting citizen must have witnessed the offence, nor must they have come upon the scene shortly after the offence occurs. <i>State v. Smith</i>, 63 Conn. App. 228, 238 (Conn. App. 2001).</p>
<p>Delaware</p>	
<p>DEL. CODE ANN. tit. 11, § 2514 (West 2020).</p>	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding 1 year, but when so arrested the accused shall be taken before a judge or justice of the peace with all practicable speed and complaint shall be made against the accused under oath setting forth the ground for the arrest as in § 2513 of this title, and thereafter the accused's answer shall be heard as if the accused had been arrested on a warrant.</p>
<p>District of Columbia</p>	
<p>D.C. CODE ANN. § 23-582 (West 2020).</p>	<p><b>Arrest without warrant by other persons</b></p> <p>(b) A private person may arrest another —</p> <p style="padding-left: 2em;">(1) who he has probable cause to believe is committing in his presence —</p> <p style="padding-left: 4em;">(A) a felony; or</p> <p style="padding-left: 4em;">(B) an offense enumerated in section 23-581(a)(2); or</p> <p style="padding-left: 2em;">(2) in aid of a law enforcement officer or special policeman, or other person authorized by law to make an arrest.</p> <p>(c) Any person making an arrest pursuant to this section shall deliver the person arrested to a law enforcement officer without unreasonable delay.</p>

Florida	
<p>FLA. STAT. ANN. § 941.14 (West 2020).</p>	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding 1 year, but when so arrested the accused must be taken before a judge with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in the preceding section; and thereafter his or her answer shall be heard as if the accused had been arrested on a warrant.</p> <p><i>Practice Note:</i> Deadly force is justifiable during a citizen’s arrest in order to prevent the escape of a felon as long as that deadly force is reasonable under the circumstances and the precipitating felony was committed in the arrestor’s presence. <i>Nelson By and Through Bowens v. Howell</i>, 455 So.2d 608, 609 (Fla. Dist. Ct. App. 1984).</p>
Georgia	
<p>GA. CODE ANN. § 17-4-60 (West 2020).</p>	<p><b>Arrest by private person</b></p> <p>A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.</p> <p><i>Practice Note:</i> According to 9 Ga. Proc. Criminal Procedure § 6:19 the terms “presence” and “immediate knowledge can be taken synonymously. In addition, if a citizen does not immediately arrest upon witnessing a crime, their power to arrest goes away. The only situation in which a citizen may arrest a suspect for a crime not committed in their presence is if they have probable cause to believe the suspect committed a felony and the suspect is fleeing the scene. Finally, a citizen does not have the right to kill in order to carry out a citizen’s arrest.</p>
<p>GA. CODE ANN. § 17-4-</p>	<p><b>Procedures subsequent to arrest by private person</b></p> <p>(a) A private person who makes an arrest pursuant to</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

61(West 2020).	<p>Code Section 17-4-60 shall, without any unnecessary delay, take the person arrested before a judicial officer, as provided in Code Section 17-4-62, or deliver the person and all effects removed from him to a peace officer of this state.</p> <p>(b) A peace officer who takes custody of a person arrested by a private person shall immediately proceed in accordance with Code Section 17-4-62.</p> <p>(c) A peace officer who in good faith and within the scope of his authority takes custody of a person arrested by a private person pursuant to this Code section shall not be liable at law for false or false imprisonment arising out of the arrest.</p>
GA. CODE ANN. § 17-4-62 (West 2020).	<p><b>Duty of person arresting without warrant</b></p> <p>In every case of an arrest without a warrant, the person arresting shall, without delay, convey the offender before the most convenient judicial officer authorized to receive a affidavit and issue a warrant as provided for in Code Section 17-4-40. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose; and any person who is not brought before such judicial officer within 48 hours of arrest shall be released.</p>
GA. CODE ANN. § 17-13-34 (West 2020).	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made by an peace officer or private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested, the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath, setting forth the ground for the arrest, as provided in Code Section 17-13-33; and thereafter the answer of the accused shall be heard as if he had been arrested on a warrant.</p>
Lavina v. State, 63 Ga. 513, 514 (Ga. 1879).	<p><b>False imprisonment under color of legal process</b></p> <p>If a private person arrests a supposed fugitive from justice without a warrant, and detains him beyond a reasonable time, without carrying him before a magistrate, he is, under Code, § 4725, guilty of the offense of false imprisonment.</p>
Habersham v. State, 56 Ga.	<p><b>Aiding escape</b></p> <p>Actual guilt of the person held in custody for felony by</p>

61, 62 (Ga. 1876).	a private person without warrant, is not indispensable to the legality of the custody, and therefore neither his conviction nor his prosecution is a prerequisite to convicting another for assisting him to escape. The question of his guilt is not otherwise involved than as throwing light upon the motive and lawfulness of his arrest, but for that purpose it is open to the consideration of the jury.
McPetrie v. State, 263 Ga.App. 85, 87 (Ga. Ct. App. 2003).	<p><b>Weight and sufficiency of evidence</b></p> <p>Sufficient evidence supported defendant’s conviction for false imprisonment; even assuming that defendant had “immediate knowledge” that victim had committed felony as required by statute governing arrest by private person, evidence nonetheless supported his conviction for false imprisonment since record revealed that defendant detained victim either to bludgeon a confession out of him or administer his version of vigilante justice.</p>
Hawaii	
HAW. REV. STAT. ANN § 803-3 (West 2020).	<p><b>By person present</b></p> <p>Anyone in the act of committing a crime, may be arrested by any person present, without a warrant.</p>
HAW. REV. STAT. ANN. § 832-14 (West 2020).	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in section 832-13; and thereafter the accused’s answer shall be heard as if the accused had been arrested on a warrant.</p> <p><i>Practice Note:</i> Hawaii permits arrests of citizens if they are in fact committing a crime by any person present. Citizen’s arrest has been part of Hawaii statutory law since 1869. <i>State v. Kapoi</i>, 64 Haw. 130 (Haw. 1981).</p>
Idaho	
IDAHO CODE ANN. § 19-4514 (West	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made by any peace officer or a private person, without a warrant upon</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

2020).	reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one (1) year. When so arrested the accused must be taken before a judge or magistrate with all practicable speed, and compliant must be made against him under oath setting forth the grounds for the arrest as provided in section 19-4513, Idaho Code, and thereafter his answer shall be heard as if he had been arrested on a warrant.
IDAHO CODE ANN. § 19-601 (West 2020).	<b>Arrest defined</b> An arrest is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.
IDAHO CODE ANN. § 19-604 (West 2020).	<b>When private person may arrest</b> A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.
IDAHO CODE ANN. § 19-605 (West 2020).	<b>Magistrate may order arrest</b> A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate
IDAHO CODE ANN. § 19-611 (West 2020).	<b>Breaking doors and windows</b> To make an arrest, if the offense is a felony, a private person, if any public offense, a peace officer may break open the door or window of the house in which the person to be arrested is, or in which there is reasonable ground for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.
IDAHO CODE ANN. § 19-614 (West 2020).	<b>Duty of private person making arrest</b> A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer.
IDAHO CODE ANN. § 19-615 (West 2020).	<b>Procedure upon arrest without warrant</b> When an arrest is made without a warrant by a peace officer or private person the person arrested must, without

	unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate.
Illinois	
720 ILL. COMP. STAT. ANN. 5/7-6 (West 2020).	<p><b>Private person’s use of force in making arrest</b></p> <p>(a) A private person who makes, or assists another private person in making a lawful arrest is justified in the use of any force which he would be justified in using if he were summoned or directed by a peace officer to make such arrest, except that he is justified in the use of force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.</p> <p>(b) A private person who is summoned or directed by a peace officer to assist in making an arrest which is unlawful, is justified in the use of any force which he would be justified in using if the arrest were lawful, unless he knows that the arrest is unlawful.</p>
725 ILL. COMP. STAT. ANN. 5/107-3 (West 2020).	<p><b>Arrest by private person</b></p> <p>§ 107-3. Arrest by Private Person. Any person may arrest another when he has reasonable grounds to believe that an offense other than an ordinance violation is being committed.</p> <p><i>Practice Note:</i> According to 2 <i>Trial Handbook for Illinois Lawyers - Criminal</i> § 80:15 (9th ed.) an arresting citizen must have the same reasonable ground to make an arrest that a police officer without a warrant would need to have.</p>
725 ILL. COMP. STAT. ANN. 5/107-8 (West 2020).	<p><b>Assisting peace officer</b></p> <p>(a) A peace officer making a lawful arrest may command the aid of persons over the age of 18.</p> <p>(b) A person commanded to aid a peace officer shall have the same authority to arrest as that peace officer.</p> <p>(c) A person commanded to aid a peace officer shall not be civilly liable for any reasonable conduct in aid of the officer.</p>
725 ILL	<b>Arrest Without a Warrant</b>

*The Puzzling Persistence of Citizen's Arrest Laws*

<p>COMP. STAT. ANN. 225/14 (West 2020).</p>	<p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding Section; and thereafter his answer shall be heard as if he had been arrested on a warrant</p>
<p>720 ILL COMP. STAT. ANN. 5/7-9 (West 2020).</p>	<p><b>Use of force to prevent escape</b></p> <p>(a) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.</p> <p>(b) A guard or other peace officer is justified in the use of force, including force likely to cause death or great bodily harm, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.</p>
<p>Indiana</p>	
<p>IND. CODE ANN. § 35-33- 1-4 (West 2020).</p>	<p><b>Any person</b></p> <p>Sec. 4. (a) Any person may arrest any other person if:</p> <p>(1) the other person committed a felony in his presence;</p> <p>(2) a felony has been committed and he has probable cause to believe that the other person has committed that felony; or</p> <p>(3) a misdemeanor involving a breach of peace is being committed in his presence and the arrest is necessary to prevent the continuance of the breach of peace.</p> <p>(b) A person making an arrest under this section shall, as soon as practical, notify a law enforcement officer and deliver custody of the person arrested to a law enforcement officer.</p> <p>(c) The law enforcement officer may process the</p>

	arrested person as if the officer had arrested him. The officer who receives or processes a person arrested by another under this section is not liable for false arrest or false imprisonment.
Iowa	
IOWA CODE ANN. § 804.9 (West 2020).	<p><b>Arrests by private persons</b></p> <p>A private person may make an arrest:</p> <ol style="list-style-type: none"> <li>1. For a public offense committed or attempted in the person's presence.</li> <li>2. When a felony has been committed, and the person has reasonable ground for believing that the person to be arrested has committed it.</li> </ol>
IOWA CODE ANN. § 804.10 (West 2020).	<p><b>Use of force in arrest by private person</b></p> <ol style="list-style-type: none"> <li>1. A private person who makes or assists another private person in making a lawful arrest is justified in using any force which the person reasonably believes to be necessary to make the arrest or which the person reasonably believes to be necessary to prevent serious injury to the person.</li> <li>2. A private person who is summoned or directed by a peace officer to assist in making an arrest may use whatever force the peace officer could use under the circumstances, provided that, if the arrest is unlawful, the private person assisting the officer shall be justified as if the arrest were a lawful arrest, unless the person knows that the arrest is unlawful.</li> </ol>
IOWA CODE ANN. § 804.24 (West 2020).	<p><b>Arrests by private persons – disposition of prisoner</b></p> <p>A private citizen who has arrested another for the commission of an offense must, without unnecessary delay, take the arrested person before a magistrate, or deliver the arrested person to a peace officer, who may take the arrested person before a magistrate, but the person making the arrest must also accompany the officer before the magistrate.</p>
IOWA CODE ANN. § 804.6 (West 2020).	<p><b>Persons authorized to make an arrest</b></p> <p>An arrest pursuant to a warrant shall be made only by a peace officer; in other cases, an arrest may be made by a peace officer or by a private person as provided in this chapter.</p>
IOWA CODE ANN. § 820.14	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by any</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

(West 2020).	<p>peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in section 820.13; and thereafter the accused's answer shall be heard as if the accused had been arrested on a warrant.</p> <p><i>Practice Note:</i> A private person may perform an arrest when a felony is committed and the citizen has reasonable ground for believing that the suspect has committed it. The citizen making the arrest must take the arrested person before a magistrate or deliver the person to a peace officer. A citizen may use physical force if the citizen reasonably believes it to be necessary to make the arrest, prevent escape, or prevent serious injury to any person. A citizen's arrest does not require formal words of arrest to be legitimate. <i>State v. Bowman</i>, No. 00-1015, 2001 WL 1578007 (Iowa Ct. App. 2001).</p>
Kansas	
KAN. STAT. ANN. § 21.5228 (West 2020).	<p><b>Same; private person making arrest</b></p> <p>(a) A private person who makes, or assists another private person in making a lawful arrest is justified in the use of any force which such person would be justified in using if such person were summoned or directed by a law enforcement officer to make such arrest, except that such person is justified in the use of deadly force only when such person reasonably believes that such force is necessary to prevent death or great bodily harm to such person or another.</p>
KAN. STAT. ANN. § 22-2403 (West 2020).	<p><b>Arrest by private person</b></p> <p>A person who is not a law enforcement officer may arrest another person when:</p> <p>(1) A felony has been or is being committed and the person making the arrest has probable cause to believe that the arrested person is guilty thereof; or</p> <p>(2) any crime, other than a traffic infraction or a cigarette or tobacco infraction, has been or is being</p>

	committed by the arrested person in the view of the person making the arrest.
KAN. STAT. ANN. § 21-5228 (West 2020).	<p>(a) A private person who makes, or assists another private person in making a lawful arrest is justified in the use of any force which such person would be justified in using if such person were summoned or directed by a law enforcement officer to make such arrest, except that such person is justified in the use of deadly force only when such person reasonably believes that such force is necessary to prevent death or great bodily harm to such person or another.</p> <p>(b) A private person who is summoned or directed by a law enforcement officer to assist in making an arrest which is unlawful, is justified in the use of any force which such person would be justified in using if the arrest were lawful.</p>
KAN. STAT. ANN. § 22-2714 (West 2020).	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
Kentucky	
KY. REV. STAT. ANN. § 431.005 (West 2020).	<p><b>Arrest by peace officers; by private persons</b></p> <p>...</p> <p>(6) A private person may make an arrest when a felony has been committed in fact and he or she has probable cause to believe that the person being arrested has committed it.</p>
KY. REV. STAT. ANN. § 440.280 (West 2020).	<p><b>Arrest may be made without warrant; conditions; procedure</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one (1) year, but when</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	so arrested the accused must be taken before a judge with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.
Louisiana	
LA. CODE CRIM. PROC. ANN. art. 214 (2019).	<p><b>Arrest by private person; when lawful</b></p> <p>A private person may make an arrest when the person arrested has committed a felony, whether in or out of his presence.</p> <p><i>Practice Note:</i> According to <i>La. Prac. Crim. Trial Prac.</i> § 2:5 (4th ed.), people who wrongly believe they have the authority to make an arrest do not validate the arrest by their good faith.</p>
LA. CODE CRIM. PROC. ANN. art. 218 (2019).	<p><b>Method of arrest without warrant</b></p> <p>... A private person, when making an arrest, shall inform the person to be arrested of his intention to arrest him and of the cause of the arrest.</p> <p>The officer or private person making the arrest need not so inform the person to be arrested if the person is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the officer or person making the arrest has an opportunity to so inform him, or when the giving of the information would imperil the arrest.</p>
LA. CODE CRIM. PROC. ANN. art. 224 (2019).	<p><b>Forcible entry in making arrest</b></p> <p>(a) The right of forcible entry in making an arrest is limited to “a peace officer,” but this includes a private person who is called upon to assist a peace officer in making an arrest. See Art. 219. The general authority of a private person, under Art. 72 of the 1928 Code, to break and enter to arrest for “a felony committed in his presence” is not continued. Such drastic measures in effecting private arrest should not be authorized or encouraged.</p> <p>(b) ...</p>
LA. CODE CRIM. PROC. ANN. art. 226 (2019).	<p><b>Duty of private person after making arrest</b></p> <p>A private person who has made an arrest shall immediately turn the prisoner and all effects removed from him over to a peace officer.</p>

Maine	
<p>ME. REV. STAT. ANN. tit. 17-A, § 16 (2019).</p>	<p><b>Warrantless arrests by a private person</b></p> <p>Except as otherwise specifically provided, a private person has the authority to arrest without a warrant:</p> <ol style="list-style-type: none"> <li>1. Any person who the private person has probable cause to believe has committed or is committing:                             <ol style="list-style-type: none"> <li>A. Murder; or</li> <li>B. Any Class A, Class B or Class C crime.</li> </ol> </li> <li>2. Any person who, in fact, is committing in the private person's presence and in a public place any of the Class D or Class E crimes described in section 207; 209; 211; 254; 255-A; 501-A, subsection 1, paragraph B; 503; 751; 806; or 1002.</li> <li>3. For the purposes of subsection 2, in the presence has the same meaning given in section 15, subsection 2.</li> </ol>
<p>Santoni v. Potter, 369 F.3d 594, 600 (1st Cir. 2004).</p>	<p><b>In general</b></p> <p>Maine law does not authorize private citizens to make an arrest for a Class E crime not committed in their presence.</p>
Maryland	
<p><i>Common-law rules govern, supported by case law</i></p>	<p>In Maryland a private person has authority to arrest without a warrant only when a) there is a felony being committed in his presence or when a felony has in fact been committed whether or not in his presence, and the arrester has reasonable ground (probable cause) to believe the person he arrests has committed it; or b) a misdemeanor is being committed in the presence or view of the arrester which amounts to a breach of the peace. <i>Great Atl. &amp; Pac. Tea Co. v. Paul</i>, 261 A.2d 731, 738-739 (Md. Ct. Spec. App. 1970).</p>
Massachusetts	
<p><i>Common-law rules govern, supported by case law</i></p>	<p>A private person may lawfully arrest one who in fact has committed a felony. <i>Com. v. Lussier</i>, 128 N.E.2d 569, 575 (Mass. 1955).</p> <p style="text-align: center;"><i>Also:</i></p> <p>In the interest of curbing the promiscuous use of firearms, and the unnecessary and dangerous use of deadly</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	<p>force in the community, we have now set limits applicable to arrests by private persons. The defendant can be held to have used excessive force only in light of the fact that the felons here were not themselves engaged in the use of threatened use of deadly force in their crimes directed against the drug store. <i>Com. v. Klein</i>, 363 N.E.2d 1313, 1320 (Mass. 1977).</p> <p><i>Practice Note:</i> According to 30 <i>Mass. Prac., Criminal Practice &amp; Procedure</i> § 3:4 (4th ed.) the Fourth Amendment does not apply to citizen's arrests unless the citizen is acting as an agent or instrumentality of the police. In 30 <i>Mass. Prac., Criminal Practice &amp; Procedure</i> § 3:51 (4th ed.) it says that the person arrested must be shown to have committed a felony in fact. This requirement is designed to discourage citizen's arrests as well as to prevent vigilantism and anarchistic actions. Furthermore, 17B <i>Mass. Prac., Prima Facie Case</i> § 53.88 (5th ed.) notes that the use of force is only justified in a citizen's arrest if the actor makes known the purpose of the arrest or otherwise believes the suspect already knows or it is not practical to inform the suspect; and the arrest is made under a valid warrant or the actor believes there is a valid warrant. Deadly force is justifiable if the arrest is for a felony, if the citizen is assisting a peace officer, if the actor believes the force creates no substantial risk to the suspect, if the precipitating crime included the use or threat of deadly force, or if there is substantial risk that the suspect will cause death or serious physical injury if the arrest is delayed.</p>
Michigan	
<p>MICH. COMP. LAWS ANN. § 764.14 (West 2020).</p>	<p><b>Disposition following arrest by private person; complaint</b></p> <p>Sec. 14. A private person who has made an arrest shall without unnecessary delay deliver the person arrested to a peace officer, who shall without unnecessary delay take that person before a magistrate of the judicial district in which the offense is charged to have been committed. The peace officer or private person shall present to the magistrate a complaint stating the charge against the person arrested.</p>
<p>MICH. COMP. LAWS ANN. § 764.16 (West 2020).</p>	<p><b>Arrest by private person</b></p> <p>Sec. 16. A private person may make an arrest—in the following situations:</p>

	<p>(a) For a felony committed in the private person’s presence.</p> <p>(b) If the person to be arrested has committed a felony although not in the private person’s presence.</p> <p>(c) If the private person is summoned by a peace officer to assist the officer in making an arrest.</p> <p>(d) If the private person is a merchant, an agent of a merchant, an employee of a merchant, or an independent contractor providing security for a merchant of a store and has reasonable cause to believe that the person to be arrested has violated section 356c or 356d of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.356c and 750.356d of the Michigan Compiled Laws, in that store, regardless of whether the violation was committed in the presence of the private person.</p> <p><i>Practice Note:</i> According to Gillespie <i>Mich. Crim. L. &amp; Proc. Search &amp; Seiz.</i> § 5:67 (2d ed.), a private person may use deadly force to arrest a felon without regard to the dangerousness of the felon as long as it is necessary to prevent escape.</p>
<p>MICH. COMP. LAWS ANN. § 764.20 (West 2020).</p>	<p><b>Duty of private person making arrest</b></p> <p>Sec. 20. A private person, before making an arrest, shall inform the person to be arrested of the intention to arrest him and the cause of the arrest, except when he is then engaged in the commission of a criminal offense, or if he flees or forcibly resists arrest before the person making the arrest has opportunity so to inform him.</p>
<p>MICH. COMP. LAWS ANN. § 764.21 (West 2020).</p>	<p><b>Right to break open door in making arrest</b></p> <p>Sec. 21. A private person, when making an arrest for a felony committed in his or her presence, or a peace officer or federal law enforcement officer, when making an arrest with a warrant or when making a felony arrest without a warrant as authorized by law, may break open an inner or outer door of a building in which the person to be arrested is located or is reasonably believed to be located if, after announcing his or her purpose, he or she is refused admittance.</p>
<p>MICH. COMP. LAWS ANN. § 764.22 (West 2020).</p>	<p><b>Right to break out of building in making arrest</b></p> <p>Sec. 22. A peace officer, a federal law enforcement officer, or a private person who has lawfully entered a building for the purpose of making an arrest and is detained in the building, may break open a door or window of the</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	building if necessary to escape from the building. A peace officer or federal law enforcement officer may break open a door or window of a building if necessary to liberate a person who lawfully entered the building for the purpose of making an arrest and is detained in the building.
Minnesota	
MINN. STAT. ANN. § 629.14 (West 2020).	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. When arrested the accused must be taken before a judge with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in section 629.13. Thereafter the answer shall be heard as if the accused had been arrested on a warrant.</p>
MINN. STAT. ANN. § 629.37 (West 2020).	<p><b>When private person may make arrest</b></p> <p>A private person may arrest another:</p> <ol style="list-style-type: none"> <li>(1) for a public offense committed or attempted in the arresting person's presence;</li> <li>(2) when the person arrested has committed a felony, although not in the arresting person's presence; or</li> <li>(3) when a felony has in fact been committed, and the arresting person has reasonable cause for believing the person arrested to have committed it.</li> </ol>
MINN. STAT. ANN. § 629.38 (West 2020).	<p><b>Private person to disclose cause of arrest</b></p> <p>Before making an arrest a private person shall inform the person to be arrested of the cause of the arrest and require the person to submit. The warning required by this section need not be given if the person is arrested while committing the offense or when the person is arrested on pursuit immediately after committing the offense. If a person has committed a felony, a private person may break open an outer or inner door or window of a dwelling house to make the arrest if, before entering, the private person informs the person to be arrested of the intent to make the arrest and the private person is then refused admittance.</p> <p><i>Practice Note:</i> According to 7 Minn. Prac., Criminal Law &amp; Procedure § 4:4 (4th ed.), a private person may</p>

	<p>arrest for a gross misdemeanor. A misdemeanor, or ordinance violation as long as it is predicated by a crime committed or attempted in the arrestor's presence except for certain statutory exceptions. In 9A Minn. Prac., Criminal Law &amp; Procedure § 56:36 (4th ed.) it states that a private person may perform a citizen's arrest for impaired driving violations but may not investigate, i.e. perform sobriety test or the like. 7 Minn. Prac., Criminal Law &amp; Procedure § 5:11 (4th ed.) notes that constitutional search and seizure provisions apply to law enforcement officers only, not to private persons.</p>
<p>MINN. STAT. ANN. § 629.39 (West 2020).</p>	<p><b>Private person making arrest to deliver arrestee to judge or peace officer</b></p> <p>A private person who arrests another for a public offense shall take the arrested person before a judge or to a peace officer without unnecessary delay. If a person arrested escapes, the person from whose custody the person has escaped may immediately pursue and retake the escapee, at any time and in any place in the state. For that purpose, the pursuer may break open any door or window of a dwelling house if the pursuer informs the escapee of the intent to arrest the escapee and the pursuer is refused admittance.</p>
<p>Mississippi</p>	
<p>MISS. CODE ANN. § 99-3-7 (West 2020).</p>	<p><b>Warrantless arrests, domestic violence and protection order violations; intensive supervision program violations</b></p> <p>(1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.</p>
<p>MISS. CODE ANN. § 99-3-</p>	<p><b>Admission to house</b></p> <p>To make an arrest an officer or private person, after</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

11 (West 2020).	notice of his office and object, if admittance is refused, may break open a window or outer or inner door of any dwelling or house in which he has reason to believe the offender may be found.
MISS. CODE ANN. § 99-3-17 (West 2020).	<p><b>Offender to be promptly taken before magistrate</b></p> <p>Every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case, except as otherwise provided in Section 99-3-18.</p>
Missouri	
MO. ANN. STAT. § 548.141 (West 2020).	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or associate circuit judge with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in section 548.131; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
MO. ANN. STAT. § 563.051 (West 2020).	<p><b>Private person's use of force in making an arrest</b></p> <p>1. A private person who has been directed by a person he or she reasonably believes to be a law enforcement officer to assist such officer to effect an arrest or to prevent escape from custody may, subject to the limitations of subsection 3 of this section, use physical force when and to the extent that he or she reasonably believes such to be necessary to carry out such officer's direction unless he or she knows or believes that the arrest or prospective arrest is not or was not authorized.</p> <p>2. A private person acting on his or her own account may, subject to the limitations of subsection 3 of this section, use physical force to arrest or prevent the escape of a person whom such private person reasonably believes has committed an offense, and who in fact has committed such offense, when the private person's actions are immediately necessary to arrest the offender or prevent his or her escape from custody.</p> <p>3. A private person in effecting an arrest or in</p>

	<p>preventing escape from custody is justified in using deadly force only:</p> <p>(1) When deadly force is authorized under other sections of this chapter; or</p> <p>(2) When he or she reasonably believes deadly force is authorized under the circumstances and he or she is directed or authorized by a law enforcement officer to use deadly force; or</p> <p>(3) When he or she reasonably believes such use of deadly force is immediately necessary to arrest a person who at that time and in his or her presence:</p> <p>(a) Committed or attempted to commit a class A felony or murder; or</p> <p>(b) Is attempting to escape by use of a deadly weapon.</p> <p>4. The defendant shall have the burden of injecting the issue of justification under this section.</p> <p><i>Practice Note:</i> An arresting citizen must give notice to the suspect of the intention to arrest. Additionally, any use of force must be reasonable and necessary to prevent escape. <i>Chism v. Cowan</i>, 425 S.W.2d 942, 949 (Mo. 1967). An arresting citizen must have a reasonable belief that the suspect committed a crime, and the suspect must have in fact committed that crime. Also, any physical force must be reasonably necessary to effect arrest or prevent escape. <i>State v. Brown</i>, 824 S.W.2d 924, 928 (Mo. Ct. App. W.D. 1992).</p>
<p>Montana</p>	
<p>MONT. CODE ANN. § 46-30-301 (West 2019).</p>	<p><b>Arrest of accused without warrant</b></p> <p>The arrest of a person may also be lawfully made by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term of 1 year or more. When arrested under this section, the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as provided in 46-30-227. After the complaint is made, the accused's answer must be heard as if the accused had been arrested on a warrant.</p>
<p>MONT. CODE</p>	<p><b>Arrest by private person</b></p>

*The Puzzling Persistence of Citizen's Arrest Laws*

ANN. § 46-6-502 (West 2019).	<p>(1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest. The private person may use reasonable force to detain the arrested person.</p> <p>(2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace officer and give custody of the person arrested to the officer or agency.</p>
Nebraska	
NEB. REV. STAT. ANN. § 29-402 (West 2020).	<p><b>Arrest by person not an officer</b></p> <p>Any person not an officer may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there is reasonable ground to believe the person arrested guilty of such offense, and may detain him until a legal warrant can be obtained.</p>
NEB. REV. STAT. ANN. § 29-742 (West 2020).	<p><b>Arrest without warrant by officer or citizen; when</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in section 29-741; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
Nevada	
NEV. REV. STAT. ANN. § 171.104 (West 2020).	<p><b>Arrest defined; by whom made</b></p> <p>An arrest is the taking of a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.</p>
NEV. REV. STAT. ANN. § 171.126 (West 2020).	<p><b>Arrest by private person</b></p> <p>A private person may arrest another:</p> <ol style="list-style-type: none"> <li>1. For a public offense committed or attempted in the person's presence.</li> <li>2. When the person arrested has committed a felony, although not in the person's presence.</li> <li>3. When a felony has been in fact committed, and the</li> </ol>

	<p>private person has reasonable cause for believing the person arrested to have committed it.</p> <p><i>Practice note:</i> In 2001, the Nevada Supreme Court in <i>State v. Weddell</i> ruled that a private citizen could not use deadly force during a citizen's arrest in order to prevent escape. The Court reasoned that this privilege which had existed in the common-law and early legislation was abrogated by the Nevada Legislature in 1993. <i>State v. Weddell</i>, 117 Nev. 651, 656 (2001).</p>
<p>NEV. REV. STAT. ANN. § 171.128 (West 2020).</p>	<p><b>Magistrate may order arrest for committing or attempting to commit offense in magistrate's presence</b></p> <p>A magistrate may orally order a peace officer or private person to arrest anyone committing or attempting to commit a public offense in the presence of the magistrate, and may thereupon proceed as if the offender had been brought before the magistrate on a warrant of arrest.</p>
<p>NEV. REV. STAT. ANN. § 171.138 (West 2020).</p>	<p><b>Breaking open door or window: Making arrest</b></p> <p>To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open a door or window of the house, structure or other place of concealment in which the person to be arrested is, or in which there is reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.</p>
<p>NEV. REV. STAT. ANN. § 171.1772 (West 2020).</p>	<p><b>Issuance of citation after arrest by private person</b></p> <p>Whenever any person is arrested by a <b>private person</b>, as provided in NRS 171.126, for any violation of a county, city or town ordinance or state law which is punishable as a misdemeanor, such person arrested may be issued a misdemeanor citation by a peace officer in lieu of being immediately taken before a magistrate by the peace officer if:</p> <ol style="list-style-type: none"> <li>1. The person arrested furnishes satisfactory evidence of identity; and</li> <li>2. The peace officer has reasonable grounds to believe that the person arrested will keep a written promise to appear in court.</li> </ol>
<p>NEV. REV. STAT. ANN. § 179.205 (West 2020).</p>	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	imprisonment for a term exceeding 1 year; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against the person under oath setting forth the ground for the arrest as in NRS 179.203. Thereafter the answer shall be heard as if the person had been arrested on a warrant.
New Hampshire	
N.H. REV. STAT. ANN. § 612:14 (West 2020).	<p style="text-align: center;"><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him, under oath, setting forth the ground for the arrest as in RSA 612:13, and, thereafter, his answer shall be heard as if he had been arrested on a warrant.</p>
New Jersey	
N.J. STAT. ANN. § 40:24-6 (West 2020).	<p style="text-align: center;"><b>Arrest without warrant</b></p> <p>Every police officer shall, <b>and any other person may</b>, apprehend without warrant or other process any person violating in his presence or view any of the provisions of any such resolution, and shall take the offender before a court of the county where apprehended.</p> <p><i>Practice Note:</i> According to <i>31 N.J. Prac., Criminal Practice and Procedure</i> § 12:15 (2019 ed.), there are numerous citizen's arrests every day in the state and they are usually made in retail establishments. <i>51 N.J. Prac., Municipal Court Prac. Manual</i> § 43:10 (2019-2020 ed.), adds that shoplifting suspects are the exception to the rule that the crime be committed in the citizen's presence; for shoplifting the actor only needs probable cause to make a citizen's arrest.</p>
N.J. STAT. ANN. § 2A:161-1 (West 2020).	<p style="text-align: center;"><b>Appointment of citizen to make immediate arrest</b></p> <p>In all criminal complaints before a judge of the Superior Court or a municipal court, where in the opinion of such judge, public justice shall require that a warrant for the arrest of the alleged offender issue and be executed immediately, and no person authorized to make an arrest</p>

	can be had in time, such judge may, by writing, under his hand and seal, appoint some fit person, who shall be a citizen of this State, to execute the warrant, who shall have the same authority in the premises in all respects and be subject to the same liability as a constable.
New Mexico	
N.M. STAT. ANN. § 31-4-14 (West 2020).	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p> <p><i>Practice Note:</i> Before using force, a citizen must give notice of intent to arrest unless circumstances are such that notice is apparent or cannot reasonably be made. In order to get an instruction on citizen's arrest as a defense the court need not require proof that felony actually occurred, but only see evidence of the reasonableness of the arrestor's belief that a felony was committed. <i>State v. Johnson</i>, 122 N.M. 696, 700 (N.M. 1996).</p>
New York	
N.Y. CRIM. PROC. LAW § 140.30 (McKinney 2019).	<p><b>Arrest without a warrant; by any person; when and where authorized</b></p> <p>1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.</p> <p>2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed.</p> <p><i>Practice Note:</i> According to 1 <i>Criminal Procedure in New York</i> § 4:15 (2d), justifiable force may be used in</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	making a citizen's arrest pursuant to the penal law. In addition, it notes that a police officer is not required to take an arrested person into custody or take any action on behalf of the arresting person if the officer has reasonable cause to believe the suspect did not commit the alleged offense or if the arrest is otherwise unauthorized.
N.Y. CRIM. PROC. LAW § 140.40(1) (McKinney 2019).	<p><b>Arrest without warrant; by person acting other than as a police officer or a peace officer; procedure after arrest</b></p> <p>(1) A person making an arrest pursuant to section 140.30 must without unnecessary delay deliver or attempt to deliver the person arrested to the custody of an appropriate police officer, as defined in subdivision five. For such purpose, he may solicit the aid of any police officer and the latter, if he is not himself an appropriate police officer, must assist in delivering the arrested person to an appropriate officer. If the arrest is for a felony, the appropriate police officer must, upon receiving custody of the arrested person, perform all recording, fingerprinting and other preliminary police duties required in the particular case. In any case, the appropriate police officer, upon receiving custody of the arrested person, except as otherwise provided in subdivisions two and three, must bring him, on behalf of the arresting person, before an appropriate local criminal court, as defined in subdivision five, and the arresting person must without unnecessary delay file an appropriate accusatory instrument with such court.</p>
N.Y. Fam. Ct. Act § 305.1 (McKinney 2019).	<p><b>Custody by private person</b></p> <ol style="list-style-type: none"> <li>1. A private person may take a child who may be subject to the provisions of this article for committing an act that would be a crime if committed by an adult into custody in cases in which such private person may arrest an adult for a crime under section 140.30 of the criminal procedure law.</li> <li>2. Before taking such child under the age of sixteen into custody, a private person must inform the child of the cause thereof and require him to submit, except when he is taken into custody on pursuit immediately after the commission of a crime.</li> <li>3. After taking such child into custody, a private</li> </ol>

	<p>person must take the child, without unnecessary delay, to the child’s home, to a family court, or to a police officer or peace officer.</p> <p><i>Practice Note:</i> Under the Criminal Procedure Law, a private person may arrest an individual for misdemeanors committed in his presence and for felonies committed within or outside his presence [CPL § 140.30]. Section 305.1 extends the rule to the arrest of children. Since the word “crime” does not encompass violations, arrests for violations such as public intoxication or disorderly conduct are precluded. (See the Practice Commentary to Section 301.2.)</p>
<p>N.Y. CRIM. PROC. LAW § 570.34 (McKinney 2019).</p>	<p><b>Arrest of accused without warrant therefor</b></p> <p>The arrest of a person in this state may be lawfully made also by any police officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year; but when so arrested the accused must be taken before a local criminal court with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and, thereafter, his answers shall be heard as if he had been arrested on a warrant.</p>
<p>North Carolina</p>	
<p>N.C. GEN. STAT. ANN. § 15A-404 (West 2020).</p>	<p><b>Detention of offenders by private persons</b></p> <p>(a) No Arrest; Detention Permitted.—No private person may arrest another person except as provided in G.S. 15A-405. A private person may detain another person as provided in this section.</p> <p>(b) When Detention Permitted.—A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:</p> <ol style="list-style-type: none"> <li>(1) A felony,</li> <li>(2) A breach of the peace,</li> <li>(3) A crime involving physical injury to another person, or</li> <li>(4) A crime involving theft or destruction of property.</li> </ol> <p>(c) Manner of Detention.—The detention must be in a</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	<p>reasonable manner considering the offense involved and the circumstances of the detention.</p> <p>(d) <b>Period of Detention.</b>—The detention may be no longer than the time required for the earliest of the following:</p> <p>(1) The determination that no offense has been committed.</p> <p>(2) Surrender of the person detained to a law-enforcement officer as provided in subsection (e).</p> <p>(e) <b>Surrender to Officer.</b>—A private person who detains another must immediately notify a law-enforcement officer and must, unless he releases the person earlier as required by subsection (d), surrender the person detained to the law-enforcement officer.</p>
N.C. GEN. STAT. ANN. § 15A-734 (West 2020).	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in G.S. 15A-733; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
North Dakota	
N.D. CENT. CODE ANN. § 29-06-02 (West 2020).	<p><b>Who may make an arrest</b></p> <p>An arrest may be made:</p> <ol style="list-style-type: none"> <li>1. By a peace officer, under a warrant;</li> <li>2. By a peace officer, without a warrant; or</li> <li>3. By a private person.</li> </ol>
N.D. CENT. CODE ANN. § 29-06-20 (West 2020).	<p><b>When private person may arrest</b></p> <p>A private person may arrest another:</p> <ol style="list-style-type: none"> <li>1. For a public offense committed or attempted in the arresting person's presence.</li> <li>2. When the person arrested has committed a felony, although not in the arresting person's presence.</li> <li>3. When a felony has been in fact committed, and the arresting person has reasonable grounds to believe the person arrested to have committed it.</li> </ol>
N.D. CENT.	<b>Must inform person of cause of arrest</b>

<p>CODE ANN. § 29-06-21 (West 2020).</p>	<p>A private person making an arrest must inform the person to be arrested of the intention to arrest the person, and of the cause of the arrest, unless:</p> <ol style="list-style-type: none"> <li>1. The person to be arrested then is engaged in the commission of an offense;</li> <li>2. Such person is pursued immediately after its commission or after an escape;</li> <li>3. Such person flees or forcibly resists before the person making the arrest has opportunity to inform the person; or</li> <li>4. The giving of such information will imperil the arrest.</li> </ol>
<p>N.D. CENT. CODE ANN. § 29-06-22 (West 2020).</p>	<p><b>When a private person may break into a building</b></p> <p>A private person, in order to make an arrest when a felony was committed in the arresting person's presence, as authorized in section 29-06-20, if the person is refused admittance after the person has announced the person's purpose, may break open a door or window of any building in which the person to be arrested is, or is reasonably believed to be.</p>
<p>N.D. CENT. CODE ANN. § 29-06-23 (West 2020).</p>	<p><b>Arrested by private person – Duty – Taken before magistrate</b></p> <p>A private person who has arrested another for the commission of a public offense, without unnecessary delay, shall take the person before a magistrate or deliver the person to a peace officer.</p>
<p>N.D. CENT. CODE ANN. § 29-06-25 (West 2020).</p>	<p><b>Procedure against person arrested without warrant</b></p> <p>When an arrest is made by a peace officer or a private person without a warrant, the person arrested without unnecessary delay must be taken:</p> <ol style="list-style-type: none"> <li>1. Before the nearest or most accessible magistrate in the county where the arrest is made; or</li> <li>2. If there is no magistrate in said county qualified to act, then before the nearest or most accessible magistrate authorized to act for the county where the arrest is made.</li> </ol> <p>A complaint stating the charge against the person arrested must be made before such magistrate, as is provided in rule 5 of the North Dakota Rules of Criminal Procedure.</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

Ohio	
OHIO REV. CODE ANN. § 2935.04 (West 2020).	<p style="text-align: center;"><b>When any person may arrest</b></p> <p>When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.</p>
OHIO REV. CODE ANN. § 2935.06 (West 2020).	<p style="text-align: center;"><b>Duty of private person making arrest</b></p> <p>A private person who has made an arrest pursuant to section 2935.04 of the Revised Code or detention pursuant to section 2935.041 of the Revised Code shall forthwith take the person arrested before the most convenient judge or clerk of a court of record or before a magistrate, or deliver such person to an officer authorized to execute criminal warrants who shall, without unnecessary delay, take such person before the court or magistrate having jurisdiction of the offense. The officer may, but if he does not, the private person shall file or cause to be filed in such court or before such magistrate an affidavit stating the offense for which the person was arrested.</p>
OHIO REV. CODE ANN. § 2935.07 (West 2020).	<p style="text-align: center;"><b>Person arrested without warrant shall be informed of cause of arrest</b></p> <p style="text-align: center;">...</p> <p>When an arrest is made by a private person, he shall, before making the arrest, inform the person to be arrested of the intention to arrest him and the cause of the arrest.</p> <p>When a person is engaged in the commission of a criminal offense, it is not necessary to inform him of the cause of his arrest.</p>
OHIO REV. CODE ANN. § 2963.12 (West 2020).	<p style="text-align: center;"><b>Arrest without warrant</b></p> <p>An arrest may be made by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of any state with a crime punishable by death or imprisonment for a term exceeding one year. When so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest, as provided in section 2963.11 of the Revised Code. Thereafter his answer shall be heard as if he had been arrested on a warrant.</p>

Oklahoma	
OKLA. STAT. ANN. tit. 22, § 1141.14 (West 2020).	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one (1) year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
OKLA. STAT. ANN. tit. 22, § 187 (West 2020).	<p><b>Arrest made by whom</b></p> <p>An arrest may be either:</p> <ol style="list-style-type: none"> <li>1. By a peace officer, under warrant,</li> <li>2. By a peace officer without a warrant; or,</li> <li>3. By a private person.</li> </ol>
OKLA. STAT. ANN. tit. 22, § 202 (West 2020).	<p><b>Arrest by private person</b></p> <p>A private person may arrest another:</p> <ol style="list-style-type: none"> <li>1. For a public offense committed or attempted in his presence.</li> <li>2. When the person arrested has committed a felony although not in his presence.</li> <li>3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.</li> </ol>
OKLA. STAT. ANN. tit. 22, § 203 (West 2020).	<p><b>Private person must inform person of cause of arrest</b></p> <p>He must, before making the arrest, inform the person to be arrested of the cause thereof, and require him to submit, except when he is in actual commission of the offense or when he is arrested on pursuit immediately after its commission.</p>
OKLA. STAT. ANN. tit. 22, § 204 (West 2020).	<p><b>Private person may break door or window</b></p> <p>If the person to be arrested has committed a felony, and a private person, after notice of the intention to make the arrest, be refused admittance, the private person may break open an outer or inner door or window of the dwelling house of the person to be arrested, for the purpose of making the arrest.</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

OKLA. STAT. ANN. tit. 22, § 205 (West 2020).	<p style="text-align: center;"><b>Private person making arrest must take defendant to magistrate or officer</b></p> <p>A private person who has arrested another for the commission of a public offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer.</p>
Oregon	
OR. REV. STAT. ANN. § 133.225 (West 2020).	<p style="text-align: center;"><b>Arrests by private persons; physical force</b></p> <p>(1) A private person may arrest another person for any crime committed in the presence of the private person if the private person has probable cause to believe the arrested person committed the crime. A private person making such an arrest shall, without unnecessary delay, take the arrested person before a magistrate or deliver the arrested person to a peace officer.</p> <p>(2) In order to make the arrest a private person may use physical force as is justifiable under ORS 161.255.</p> <p><i>Practice Note:</i> According to the <i>Oregon State Bar Committee on Uniform Criminal Jury Instructions</i> § 1115 Defense—Physical Force—Arrest by Citizen, force is justifiable to the extent to which the citizen arrestor reasonably believes it necessary. Deadly force is justifiable when the actor reasonably believes it necessary to defend themselves or another from an imminent use of deadly force.</p>
OR. REV. STAT. ANN. § 133.805 (West 2020).	<p style="text-align: center;"><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in ORS 133.803; and thereafter the answer of the accused shall be heard as if the accused had been arrested on a warrant.</p>
OR. REV. STAT. ANN. § 161.255 (West 2020).	<p style="text-align: center;"><b>Private person making citizen's arrest</b></p> <p>(1) Except as provided in subsection (2) of this section, a private person acting on the person's own account is justified in using physical force upon another</p>

	<p>person when and to the extent that the person reasonably believes it necessary to make an arrest or to prevent the escape from custody of an arrested person whom the person has arrested under ORS 133.225.</p> <p>(2) A private person acting under the circumstances prescribed in subsection (1) of this section is justified in using deadly physical force only when the person reasonably believes it necessary for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of deadly physical force.</p>
<p>OR. REV. STAT. ANN. § 419C.088 (West 2020).</p>	<p><b>Custody by private person</b>  A private person may take a youth into custody in circumstances where, if the youth were an adult, the person could arrest the youth.</p>
<p>Pennsylvania</p>	
<p>42 Pa. STAT. AND CONS. STAT. ANN. § 9162 (West 2020).</p>	<p><b>Arrest without a warrant</b>  The arrest of a person may be lawfully made by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of another county of this Commonwealth with a crime punishable by death or imprisonment for a term exceeding one year, but, when so arrested, the accused must be taken before a judge or issuing authority with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in section 9161 (relating to arrest prior to requisition), and, thereafter, his answer shall be heard as if he had been arrested on a warrant.</p> <p><i>Practice Note:</i> Regarding Citizen’s arrest, in order to use deadly force in preventing the escape of a felon, there must be fresh pursuit and the citizen must give notice of his purpose to arrest the felon. <i>Commonwealth v. Shaffer</i>, No. 111 MDA 2016, WL 6330467 (Penn. 2016).</p> <p><i>Practice Note:</i> According to 26 <i>Standard Pennsylvania Practice</i> 2d § 132:387, citizens may arrest a person for a felony actually committed and they have reasonable grounds to suspect that the person they arrest committed the felony. Additionally, a private person in fresh pursuit of someone who has just committed a felony may make an</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	arrest without having witnessed the crime itself.
42 PA. STAT. AND CONS. STAT. ANN. § 9135 (West 2020).	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or issuing authority with all practicable speed, and complaint must be made against him under oath setting forth the ground for the arrest as in section 9134 (relating to arrest prior to requisition), and thereafter his answer shall be heard as if he had been arrested on a warrant.</p>
Rhode Island	
12 R.I. GEN. LAWS ANN. § 12-9-17 (West 2020).	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may also be lawfully made by any peace officer or a private person without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested, the accused must be taken before a judge with all practicable speed, and complaint must be made against him or her under oath, setting forth the ground for the arrest as in § 12-9-16; and thereafter his or her answer shall be heard as if he or she had been arrested on a warrant.</p> <p><i>Practice Note:</i> A citizen may arrest any person while such a person is actually engaged in the commission of any offense. A citizen has the authority to arrest a suspect while actually engaged in driving under the influence of alcohol. <i>State v. Dixon</i>, Nos. W385-370, W385-371, W385-372, 1986 WL 714421 (R.I. 1986).</p>
South Carolina	
S.C. CODE ANN. § 17-13-10 (1976).	<p><b>Circumstances when any person may arrest a felon or thief.</b></p> <p>Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.</p>

	<p><i>Practice Note:</i> 8 S.C. Jur. False Imprisonment § 3 provides additional circumstances in which a citizen may arrest: if a suspect has committed a felony, entered a dwelling with evil intent, broken or is breaking into an outhouse with an intention to plunder, possesses stolen property, or under circumstances which raise just suspicion of an intent to steal or commit a felony. If, during nighttime, such a suspect attempts to flee a citizen may arrest by such means as the darkness and probability of escape make necessary, including lethal force.</p>
<p>S.C. CODE ANN. § 17-13-20 (1976).</p>	<p><b>Additional circumstances when citizens may arrest; means to be used</b></p> <p>A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person:</p> <ul style="list-style-type: none"> <li>(a) has committed a felony;</li> <li>(b) has entered a dwelling house without express or implied permission;</li> <li>(c) has broken or is breaking into an outhouse with a view to plunder;</li> <li>(d) has in his possession stolen property; or</li> <li>(e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.</li> </ul>
<p>South Dakota</p>	
<p>S.D. CODIFIED LAWS § 23A-3-3 (2020).</p>	<p><b>Citizen's arrest</b></p> <p>Any person may arrest another:</p> <ul style="list-style-type: none"> <li>(1) For a public offense, other than a petty offense, committed or attempted in his presence; or</li> <li>(2) For a felony which has been in fact committed although not in his presence, if he has probable cause to believe the person to be arrested committed it.</li> </ul> <p><i>Practice Note:</i> In <i>State v. Bonrud</i> 393 N.W.2d 785, 787 (SD 1986), the South Dakota Supreme Court found that the exact degree of seriousness of offense is not essential to the validity of the arrest because this would “require citizens to have more legal expertise than some law enforcement officials.” <i>Id.</i> In that case the actor did not witness the robbery itself, but heard a cry for help and saw a man fleeing and arrested him; these circumstances were</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	considered adequate probable cause for a valid citizen's arrest. <i>Id.</i>
S.D. CODIFIED LAWS § 23-24- 16 (2020).	<b>Arrest without a warrant</b> The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or incarceration for a term one year or greater, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in § 23-24-15; and thereafter the accused's answer shall be heard as if the accused had been arrested on a warrant.
Tennessee	
TENN. CODE ANN. § 40-7- 109 (West 2020).	<b>Private persons arrests; grounds</b> (a) A private person may arrest another: (1) For a public offense committed in the arresting person's presence; (2) When the person arrested has committed a felony, although not in the arresting person's presence; or (3) When a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested committed the felony.
TENN. CODE ANN. § 40-7- 110 (West 2020).	<b>Private persons arrests; time</b> A private person may make an arrest for a felony at any time.
TENN. CODE ANN. § 40-7- 111 (West 2020).	<b>Private persons arrests; notice</b> A private person making an arrest shall, at the time of the arrest, inform the person arrested of the cause of the arrest, except when the person is in the actual commission of the offense, or when arrested on pursuit.
TENN. CODE ANN. § 40-7- 112 (West 2020).	<b>Private persons arrests; refusal of admittance; breaking in</b> If the person to be arrested has committed a felony, and a private person, after notice of the person's intention to make the arrest, is refused admittance, the arresting person may break open an outer or inner door or window of a dwelling house to make the arrest.
TENN. CODE	<b>Private persons arrests; disposition</b>

<p>ANN. § 40-7-113 (West 2020).</p>	<p>(a) A private person who has arrested another for a public offense shall, without unnecessary delay, take the arrested person before a magistrate or deliver the arrested person to an officer.</p> <p>(b) An officer may take before a magistrate, without a warrant, any person who, being engaged in the commission of a public offense, is arrested by a bystander and delivered to the officer, and anyone arrested by a private person as provided in §§ 40-7-109 -- 40-7-112, and delivered to the officer.</p>
<p>Texas</p>	
<p>TEX. CODE CRIM. PROC. ANN. art. § 14.01 (West 2020).</p>	<p><b>Offense within view</b></p> <p>(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.</p> <p>(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.</p> <p><i>Practice Note:</i> According to 43 <i>Tex. Prac., Criminal Practice and Procedure</i> § 43:39 (3d ed.), a citizen may use force if they reasonably believe force is immediately necessary to make the arrest, but may not use force in a search. The use of force is also contingent upon the actor's manifestation of a reason for the arrest. In addition, deadly force is only justified if the actor reasonably believes the suspect used or attempted to use deadly force in the commission of the initial crime or if they reasonably believe there is substantial risk of death or serious bodily injury if the arrest is delayed.</p> <p><i>Practice Note:</i> The court properly charged that a private person making an arrest should inform accused of the purpose of the arrest, and if defendants had committed a felony in the presence of decedent or the third person, and if decedent and the third person were attempting to arrest defendants, decedent and the third person should inform defendants of that purpose, provided he had time and opportunity so to do, which is for the jury and if they failed to so inform defendants, the latter could resist an illegal arrest, and use necessary force, viewed from the standpoint of defendants, correctly submitted the issue of resisting</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	arrest. <i>Stewart v. State</i> , 76 Tex. Crim. 442 (1915).
Utah	
UTAH CODE ANN. § 77-7-3 (West 2020).	<p><b>By private persons</b></p> <p>A private person may arrest another:</p> <ol style="list-style-type: none"> <li>(1) For a public offense committed or attempted in his presence; or</li> <li>(2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it.</li> </ol>
UTAH CODE ANN. § 77-30-14 (West 2020).	<p><b>Arrest without warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in Section 77-30-13, and thereafter his answer shall be heard as if he had been arrested on a warrant.</p> <p><i>Practice Note:</i> Any person is justified in using any force except deadly force, as long as he reasonably believes it to be necessary to make an arrest or prevent bodily harm while making an arrest. <i>State v. Quada</i>, 918 P.2d 883, 887 (Utah Ct. App. 1996).</p>
UTAH CODE ANN. § 77-7-23 (West 2020).	<p><b>Delivery of prisoner arrested without warrant to magistrate—Transfer to court with jurisdiction—Transfer of duties—Violation as misdemeanor</b></p> <ol style="list-style-type: none"> <li>(1) <ol style="list-style-type: none"> <li>(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested shall be taken without unnecessary delay to the magistrate in the district court, the precinct of the county, or the municipality in which the offense occurred, except under Subsection (2). An information stating the charge against the person shall be made before the magistrate.</li> <li>(b) If the justice court judge of the precinct or municipality or the district court judge is not available, the arrested person shall be taken</li> </ol> </li> </ol>

	<p>before the magistrate within the same county who is nearest to the scene of the alleged offense or nearest to the jail under Subsection (2), who may act as committing magistrate for arraigning the accused, setting bail, or issuing warrants.</p> <p>(2) ...</p>
Vermont	
<p>VT. STAT. ANN. tit. 13, § 4954 (West 2020).</p>	<p><b>Arrest without a warrant</b></p> <p>The arrest of a person may be lawfully made by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year. When so arrested, the accused shall be taken before a Superior Court judge as soon as may be, and complaint shall be made against him or her under oath, setting forth the ground for the arrest as in section 4953 of this title; and thereafter his or her answer shall be heard as if he or she had been arrested on a warrant.</p> <p><i>Practice Note:</i> A citizen cannot make an arrest for misdemeanors committed in their presence unless it constitutes a breach of the peace. <i>State v. Hart</i>, 149 Vt. 104, 108 (Vt. 1987).</p>
Virginia	
<p>VA. CODE ANN. § 19.2-100 (West 2020).</p>	<p><b>Arrest without Warrant</b></p> <p>The arrest of a person may be lawfully made also by any peace officer or private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. But when so arrested the accused shall be taken before a judge, magistrate or other officer authorized to issue criminal warrants in this Commonwealth with all practicable speed and complaint made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.</p> <p><i>Practice Note:</i> There must be a breach of peace in order to make a citizen’s arrest for a misdemeanor under Virginia</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	<p>common law. A breach of peace is the offense of disturbing the public peace or a violation of a public order or public decorum. <i>Commonwealth v. Borek</i>, 68 Va. Cir. 323, 325 (Cir. Ct. Va. 2005).</p> <p><i>Practice Note:</i> According to <i>Va. Prac. Tort and Personal Injury Law</i> § 2:22, a private citizen may perform an arrest if the suspect has in fact committed the felony, a felony has in fact been committed and the actor reasonably believes the suspect committed it; or if the suspect has committed a breach of peace in the presence of the actor, or if the actor is preventing a felony being attempted in his presence.</p>
<p>Washington</p>	
<p>WASH. REV. CODE ANN. § 10.88.330 (West 2020).</p>	<p><b>Arrest without warrant</b></p> <p>(1) The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him or her under oath setting forth the ground for the arrest as in RCW 10.88.320; and thereafter his or her answer shall be heard as if he or she had been arrested on a warrant.</p> <p><i>Practice Note:</i> Since few arrests occur with the consent of the criminal, the authority to make arrests must necessarily carry with it the use of all reasonable force. <i>State v. Miller</i>, 103 Wash.2d 792, 795 (Wash. 1985).</p> <p><i>Practice Note:</i> 12 <i>Wash. Prac., Criminal Practice &amp; Procedure</i> § 3111 (3d ed.), states that a private citizen has probable cause sufficient to perform an arrest when they have trustworthy information which would justify a person of reasonable caution to believe that an offense has been or is being committed by a certain person. In addition, a private person is only authorized to arrest for a misdemeanor if it constitutes a breach of peace and was committed in the actor's presence. Furthermore, 12 <i>Wash. Prac., Criminal Practice &amp; Procedure</i> § 3140 (3d ed.), adds that force may be used as long as the force is reasonable and no reasonably effective alternative appears to exist. A citizen may use deadly force if a felony has been committed</p>

	in their presence and it would be lawful for a peace officer to use such force. In the case of a misdemeanor the arresting citizen has no right to kill the offender in order to prevent escape or overcome resistance, unless it is in self-defense.
West Virginia	
<i>Common-law rules govern, supported by case law</i>	<p>It has often been recognized that a police officer who is without <i>official</i> authority to make an arrest may nevertheless make the arrest if the circumstances are such that a private citizen would have the right to arrest either under the common-law or by virtue of statutory law. State ex rel. State v. Gustke, 516 S.E.2d 283, 289 (W.Va. 1999).</p> <p>Under the common law, a private citizen is authorized to arrest another person who the private citizen believes has committed a felony. State v. Horn, 750 S.E.2d 248 (W. Va. 2013).</p> <p><i>Practice Note: The Trial Handbook for West Virginia Lawyers</i> § 30:36, notes that a DUI violation constitutes a breach of peace and as such is a misdemeanor offence for which a private citizen may perform an arrest.</p>
Wisconsin	
<i>Common-law rules govern, supported by case law</i>	<p>In general, citizens may arrest when a felony or misdemeanor effecting a breach of the peace is committed in their presence. A citizen’s arrest is authorized for a misdemeanor committed in the citizen’s presence and amounting to a breach of the peace. City of Waukesha v. Gorz, 479 N.W.2d 221, 223 (Wisc. Ct. App. 1991).</p>
Wyoming	
WYO. STAT. ANN. § 7-3-214 (West 2020).	<p><b>Authority to arrest person without warrant</b></p> <p>The arrest of a person may be lawfully made by an officer or a private citizen without a warrant upon reasonable information that the accused is charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one (1) year. When arrested under this section the accused shall be taken before a judge or magistrate as soon as possible and complaint shall be made against him under oath setting forth the ground for the arrest as in W.S. 7-3-213. Thereafter his answer shall be heard as if he had been arrested on a warrant.</p>

*The Puzzling Persistence of Citizen's Arrest Laws*

	<p><i>Practice Note:</i> A citizen may make an arrest when a felony has been committed in his presence, when a felony has been committed in fact and he has probable cause to believe the suspect committed it, or a misdemeanor larceny has occurred in his presence, or misdemeanor property destruction is committed in his presence. <i>Marshall v. State</i>, 941 P.2d 42, 46 (Wyo. 1997).</p>
<p>WYO. STAT. ANN. § 7-8-101 (West 2020).</p>	<p><b>Arrest by private person</b></p> <p>(a) A person who is not a peace officer may arrest another for:</p> <ul style="list-style-type: none"> <li>i. A felony committed in his presence;</li> <li>ii. A felony which has been committed, even though not in his presence, if he has probable cause to believe the person to be arrested committed it; or</li> <li>iii. The following misdemeanors committed in his presence: <ul style="list-style-type: none"> <li>(A) A misdemeanor theft offense defined by W.S. 6-3-402; or</li> <li>(B) A misdemeanor property destruction offense defined by W.S. 6-3-201.</li> </ul> </li> </ul>



## NOTE

# “Does My Sassiness Upset You?” An Analysis Challenging Workplace and School Regulation of Hair and Its Connection to Racial Discrimination

VERONICA CRAIG\*

“It is certain, in any case, that ignorance, allied with power, is the most ferocious enemy justice can have.”

– James Baldwin, *No Name in the Street* (1972)

Introduction .....	240
I. Comb It — Combing Through the History of Black Hairstyles’ Significance to Black Culture .....	243
II. Tame it — Courts and Policies Taming the Styling of Black Hair in School and Work Settings .....	247
A. Dreadlocks (“Locs”) .....	249
B. Braids .....	251
C. Afros .....	253
D. School Regulation .....	254
III. Cut It — The Solution to Cut All Forms of Discrimination Against Black Hairstyles .....	261
Conclusion: “Don’t remove the kinks from your hair. Remove them from your brain.” .....	264

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Introduction

“Too black” were the words that flashed across every social media platform describing Gabrielle Union’s hairstyles the week she was fired from her job of hosting America’s Got Talent.<sup>1</sup> Though unconfirmed, it was rumored that her black hairstyles were the reason she was fired.<sup>2</sup> Actors, singers, athletes, and fans used Twitter and Instagram to express their outrage about the allegations.<sup>3</sup> The conversation shed light on how Gabrielle Union was not the only black woman who had experienced the discriminatory questions, remarks, and encounters because of her hair or appearance.<sup>4</sup> Black women are 30 percent more likely to be made aware of a workplace appearance policy.<sup>5</sup> A black woman is 80 percent more likely to change her natural hair to meet social norms or expectations at work.<sup>6</sup> Black women with natural hair are less likely to get job interviews.<sup>7</sup>

While hair in the black community has historically been a symbol of pride and strength, to avoid the stigmatization of their natural hair, black women use straightened hairstyles in order to bypass harassment, unfavorable performance evaluations, and loss or denial of employment.<sup>8</sup> Hair’s role in the black community is different from other ethnic groups, because black hairstyles carry a cultural significance and connection to their blackness.<sup>9</sup> To black women, “[h]air is beauty, hair is emotion, hair is our heritage, hair tells us who we are, where

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1. Andrea K. McDaniels, *Stop Policing Black Women’s Hair*, BALT. SUN (Dec. 06, 2019, 10:53 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1206-black-women-hair-20191205-feptsymkvf3nfheji2pzig2mt4-story.html>.

2. *Id.*

3. Michael O’Connell, *Gabrielle Union’s ‘America’s Got Talent’ Exit Prompts Outcry and Culture Concerns*, HOLLYWOOD REP. (Nov. 27, 2019, 3:24 PM), <https://www.hollywoodreporter.com/live-feed/gabrielle-union-fired-americas-got-talent-culture-concerns-1258399>.

4. *Id.*

5. The CROWN Act (@thecrownact), INSTAGRAM (July 28, 2020), <https://www.instagram.com/thecrownact/>.

6. The CROWN Act (@thecrownact), INSTAGRAM (July 10, 2020), <https://www.instagram.com/thecrownact/>.

7. Nadine White, *Black Women With Natural Hairstyles Less Likely To Get Job Interviews, Study Reveals*, HUFF POST (Aug. 12, 2020, 9:00 AM), [https://www.google.com/amp/s/www.huffpost.com/entry/black-women-natural-hairstyles-job-interviews-bias-study\\_1\\_5f32c915c5b64cc99fdecdf/amp](https://www.google.com/amp/s/www.huffpost.com/entry/black-women-natural-hairstyles-job-interviews-bias-study_1_5f32c915c5b64cc99fdecdf/amp).

8. D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIA. L. REV. 987, 991 (2017).

9. Madison Horne, *A Visual History of Iconic Black Hairstyles*, HISTORY (Feb. 28, 2018), <https://www.history.com/news/black-hairstyles-visual-history-in-photos>.

“Does My Sassiness Upset You?”

we’ve been, and where we’re going.”<sup>10</sup> In an attempt to make black professionals assimilate to white majority culture, grooming codes have historically been implemented to pressure black women into wearing styles that are not natural. Black women trade their own cultural styles, which help to maintain healthy hair, for styles that would make them appear more like their white counterparts and could cause damage to their hair.<sup>11</sup> However, in order for black women to copy styles worn by the white majority, they must endure hair styling that is very harmful to black women’s hair.<sup>12</sup> Black women exchange moisturized, long, and healthy hair for hair that can become brittle, dry, and significantly shorter all to make the white majority more comfortable to see styles that they are used to in the workplace and schools.<sup>13</sup>

This problem is something that is unique to the experience of a black woman. As explained by Professor Wendy Greene:

Grooming codes discrimination at the intersection of race and gender is not an isolated incidence. Countless employers have instructed African descendant women to cut off, cover, or alter their naturally textured hair in order to obtain and maintain employment for which they are qualified. African descendant women have endured a barrage of offensive, stereotypical perceptions, denigrating their naturally textured hair as ‘messy,’ ‘unkempt,’ ‘dirty,’ and ‘unprofessional,’ not only during the hiring process, but also during the course of their employment.<sup>14</sup>

Unfortunately, “federal courts have not treated these occurrences of grooming code discrimination uniquely and commonly affecting African descendant women, as unlawful race and/or gender discrimination under federal law — except when employers regulate or ban afros adorned by African descendant women.”<sup>15</sup> The courts’ inability to recognize hair’s importance and connection to the culture of black women is a blatant disregard to the racial undertones in grooming code policies.

As expressed in India Arie’s song “I Am Not My Hair,” the notion that black women should have to limit their styles because they are threatening to someone or considered unkempt and unprofes-

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10. *Self Made: The Fight of the Century*, NETFLIX (Mar. 20, 2020), <https://www.netflix.com/title/80202462>.

11. Greene, *supra* note 8, at 1012.

12. *Id.*

13. India Arie, *I Am Not My Hair*, GENIUS (Nov. 15, 2005), <https://genius.com/5211086>.

14. Greene, *supra* note 8, at 990–91.

15. *Id.* at 991.

sional is an insulting falsehood, because it suggests that certain behaviors are associated with certain hairstyles.<sup>16</sup> Firing individuals because their hairstyles are “too black” is based on an assertion that traditionally black hairstyles are unprofessional and are worn by unprofessional women.<sup>17</sup> This idea in action is discrimination on the basis of race. The networks’ comments about Gabriel Union’s hair reference her race.<sup>18</sup> The network asserts that blackness is not something it wants to associate with and so Gabriel Union wearing styles that are representative of her culture is what they wish to prevent.<sup>19</sup> Although the network referenced Gabriel Union’s hair, it is being used as a proxy to represent her race. The network discriminating against Gabriel Union’s hair is the same as it discriminating against her on the basis of race.

While the story about Gabriel Union is shocking, she is not alone as many other women have been fired from their jobs due to their black hairstyles being considered unprofessional. Former news anchor, Brittany Noble, was fired from her position at a local news station in Jackson, Mississippi, because she was told that wearing her natural hair was equivalent to her boss throwing on a baseball cap to go to the store.<sup>20</sup> Her boss said, “Mississippi viewers need to see a beauty queen” — insinuating that black hairstyles are neither beautiful nor professional.<sup>21</sup> These efforts to tone down black hairstyles are in effect toning down blackness and as previously stated it silences the pride, confidence, and personality that comes with the hair. Black women are beautiful and professional with their natural hair and traditional black hairstyles. So, what is it about black hairstyles that threatens the school and work systems across the globe? Why does the attitude, sassiness, and self-assurance that come with black hairstyles seem to upset people who regulate schools and workspaces? This Note aims to answer these questions, and explains the importance of black hairstyles and its significance to the culture and history of black people.

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16. Arie, *supra* note 13.

17. McDaniels, *supra* note 1.

18. *Id.*

19. O’Connell, *supra* note 3.

20. Briana Moné Williams, *Black anchor fired for wearing her natural hair because “viewers needed to see a beauty queen”*, TV ONE (Jan. 16, 2019), <https://tvone.tv/82840/black-anchor-fired-for-wearing-her-natural-hair-because-viewers-needed-to-see-a-beauty-queen/>.

21. *Id.*

“Does My Sassiness Upset You?”

This Note argues that discriminatory practices against black women’s hair in the workplace and schools occur in both the private and public sectors. Black people represent a substantial amount of people populated within the United States. These facts are proof enough that a federal law would be more efficient to prevent discrimination against black hair in all spaces rather than only implementing state-wide policies or interpretations of Title VII. This Note will highlight discrimination in private and public settings and will explore California’s and New York’s legislations to protect against discrimination of black hair in all spaces. The overall purpose of this Note is to suggest that the CROWN Act be adopted as federal law. The CROWN Act made it unlawful to discriminate on the basis of race by way of discrimination against traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.<sup>22</sup>

In the first part of this Note, I will discuss the background of discrimination against black women’s hair in school and the workforce, and the background of black hair’s history and importance in the black community. In the second part, I will introduce three major Title VII cases and explain errors the courts made in failing to connect race with certain hairstyles. In this part, I will also show how hair discrimination has affected children in school settings, thus asserting the need for uniformity in the way the country deals with the discrimination of black hairstyles. Finally, in the last section, I will explain what I believe to be a possible solution to this problem and conclude.

I. COMB IT — COMBING THROUGH THE HISTORY OF  
BLACK HAIRSTYLES’ SIGNIFICANCE TO BLACK  
CULTURE

Black people represent about 14 percent of the nation’s population.<sup>23</sup> While still a “minority group,” it is evident that black people make up a substantial portion of the country’s total demographics.<sup>24</sup> Thus, laws should exist to protect the interest of black Americans. Ti-

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22. Creating a Respectful and Open World for Natural Hair (CROWN) Act of 2020, H.R. 5309, 116th Cong. (2019).

23. United States Census Bureau, Quick Facts, U.S. CENSUS BUREAU (2020), <https://www.census.gov/quickfacts/fact/table/US/RHI125219#RHI125218>.

24. Katherine Schaeffer, *In a Rising Number of U.S. Counties*, PEW RSCH. CTR. (Nov. 20, 2019), <https://www.pewresearch.org/fact-tank/2019/11/20/in-a-rising-number-of-u-s-counties-hispanic-and-black-americans-are-the-majority/> (“But in a growing number of counties, a majority of residents are Hispanic or black, reflecting the nation’s changing demographics and shifting migration patterns.”).

title VII of the Civil Rights Act of 1964 exists to protect certain classes of citizens from being discriminated against in private settings.<sup>25</sup> These protected classifications include race, sex, and gender.<sup>26</sup> This legislation has allowed members of these protected classes to assert claims against those who have discriminated against them. This case law includes those who have worked in private settings from insurance companies to private universities.<sup>27</sup> On the other hand, the Fourteenth Amendment protects the same classes from being discriminated against in public settings or when there is a state action being done.<sup>28</sup> By the Equal Protection Clause of the Fourteenth Amendment protecting against discrimination, this allows members of protected classes to be able to bring suit against public entities who have discriminated against them.

While both Title VII and the Equal Protection Clause protect certain classes of people against discrimination, they are asserted against different entities in the United States. Title VII of the Civil Rights Act of 1964 prohibits two categories of employment practices.<sup>29</sup> It is unlawful for an employer: “(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”<sup>30</sup> The Equal Protection Clause protects persons, not groups, and the clause’s protections apply to administrative as well as legislative acts.<sup>31</sup> States do not escape the structures of the Equal Protection Clause in their role as employers.<sup>32</sup> While both Title VII and the Equal Protection Clause offer a level of protection against discrimination of various forms, they both fail to protect against discrimination of features and characteristics in connection with protected classes. For the purposes of this Note, I want

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25. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1991).

26. *Id.*

27. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020 (5th Cir. 2016).

28. U.S. CONST. amend. XIV, § 1.

29. 42 U.S.C. § 2000e-2(a).

30. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031–32 (2015).

31. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 597 (2008).

32. *Id.*

“Does My Sassiness Upset You?”

to focus on the lack of protection these laws have for discriminatory acts against black hair.

Black hair remains unprotected, because there is a lack of knowledge by those creating legislation concerning the significance of black hair in the black community, and the history of white people’s regulation over black hair and black bodies. When racism is the overarching, unwritten law of the land, any and every rule can and will be used to control black people.<sup>33</sup> The lived experiences of black people show that all-white decision-making bodies enforce racial biases and stereotypes.<sup>34</sup> Historically, discrimination against black hairstyles has been rooted in white, European standards of beauty, and the accompanying stereotypical view that traditionally black hairstyles are “unprofessional” or “unkempt.”<sup>35</sup> The history of our nation is riddled with laws and societal norms that equate blackness and the associated physical traits — for example, dark skin and kinky, curly hair — to a badge of inferiority, sometimes subject to separate and unequal treatment.<sup>36</sup>

After slavery, black Americans moved to larger cities like Chicago and New York to find work.<sup>37</sup> However, during this time, black people were expected to assimilate to European standards of beauty, including straightening their hair to appeal to the white standard of professionalism. In order to fit in, black women had to “dye it, tie it, and fry it” — straightening their hair to look more like their white counterparts.<sup>38</sup> However, for those who chose not to assimilate, “countless braid-wearing black women like cashier Cheryl Tatum and telephone operator Sydney M. Boone faced negative responses: In the 1980’s one was fired and the other forced to wear a wig because their hairstyles violated their company’s dress code.”<sup>39</sup> Essentially, black women lost the ability to be themselves simply because they could not

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33. Andre Perry, *Dress codes are the new ‘whites only’ signs*, HECHINGER REP. (Feb. 5, 2020), <https://hechingerreport.org/dress-codes-are-the-new-whites-only-signs>.

34. *Id.*

35. Rachel Wainer Apter, *Guidance on Race Discrimination Based on Hairstyle*, ST. OF N.J.: DIV. OF C.R. (Sept. 2019), <https://www.nj.gov/oag/newsreleases19/DCR-Hair-Discrimination-Guidance.pdf>.

36. S.B. 188, 2019–2020 Leg. (Cal. 2019).

37. History.com Editors, *The Great Migration*, HISTORY (Mar. 4, 2010), <https://www.history.com/topics/black-history/great-migration>.

38. *Mixed-ish: Let Your Hair Down* (ABC television broadcast Oct. 8, 2019).

39. Siraad Dirshe, *Respect Our Roots: A Brief History Of Our Braids*, ESSENCE (June 27, 2018), <https://www.essence.com/hair/respect-our-roots-brief-history-our-braids-cultural-appropriation/>.

wear styles that were healthier and overall better for their hair. “Hair is power, you can’t imagine what it’s like to lose it.”<sup>40</sup>

No career has been left unregulated from the board room to the battlefield. For years, the United States Army explicitly banned dreadlocks (or “locs”), a style that features twisted locks of hair,<sup>41</sup> referring to them as “matted” and “unkempt.”<sup>42</sup> In 2014, the army put an “outright ban” on twists for female soldiers, and a more specific prohibition on “[b]raids or cornrows” that were considered to be “unkempt or matted.”<sup>43</sup> Shortly after issuing the 2014 updates, the Army reversed some portions of the policy after complaints that it was “racially biased against black women who choose to wear their hair naturally curly rather than use heat or chemicals to straighten it.”<sup>44</sup> Thus, these current policies, which allow for school suspensions and firing of black Americans who do not follow facially-neutral grooming policies, take root in the country’s history of forcing black people to assimilate in order to participate as citizens.

The sentiment of assimilation is best explained in Andre Perry’s article “Dress codes are the new ‘whites only’ signs.”<sup>45</sup> He explains that those who would have our society return to a period of legal segregation do not need to bring back signposts to separate us when they can discriminate in other ways, simply on the basis of how we look, how we dress, and how we wear our hair.<sup>46</sup> “When dress codes reinforce white norms, being black becomes a violation.”<sup>47</sup> Issuing anti-black policies, while leaving white hairstyles unregulated or less regulated, uphold the notion that black hairstyles are somehow of lesser value and prestige than white hairstyles. Therefore, there is a need for a law that prohibits this sort of discrimination.

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40. *Self-Made: The Fight of the Century*, *supra* note 10.

41. Madison Horne, *A Visual History of Iconic Black Hairstyles*, HISTORY (Feb. 28, 2018), <https://www.history.com/news/black-hairstyles-visual-history-in-photos>.

42. Apter, *supra* note 35.

43. *Id.*

44. *Id.*

45. Perry, *supra* note 33.

46. *Id.*

47. *Id.*

## II. TAME IT — COURTS AND POLICIES TAMING THE STYLING OF BLACK HAIR IN SCHOOL AND WORK SETTINGS

This Note aims to explain how discrimination against black hair is a problem that affects a variety of entities in the United States. While Title VII and the Equal Protection Clause both exist to protect against discrimination in various settings, this particular problem still affects black children in schools, and black men and women in their place of work, whether it be an airline or an insurance company.<sup>48</sup> There are three Title VII cases that this Note will focus on: *Equal Employment Opportunity Commission v. Catastrophe Management Solutions* (“*Catastrophe*”),<sup>49</sup> *Rogers v. American Airlines Incorporation* (“*Rogers*”),<sup>50</sup> and *Jenkins v. Blue Cross Mutual Hospital Insurance Incorporation* (“*Jenkins*”).<sup>51</sup> The first two cases explain how courts have deemed non-afro black hairstyles as unprotected because the courts alleged that the styles are not directly related to the black race.<sup>52</sup> However, the third case explains why the specific hairstyle of the afro is considered protected.<sup>53</sup> This part of the Note aims to draw a connection between black hairstyles other than afros to the black race.

Where courts have erred is in limiting hair references to the black race simply to afros — insinuating that afros are the only black hairstyle closely related to black people. However, the variety of ways in which black people style their hair is infinite. It is my assertion that because black people have hair that is malleable and able to take many forms, their hair should not be regulated at all. While black hair can change into many forms and itself is not immutable or unchanging, its ability to switch from style to style is what will never change — thus making its range an immutable characteristic. While women of other races are able to wear a variety of styles as well, black women are more widely known for the different styles they wear.<sup>54</sup> This is not to assert an idea that people of other races cannot also change their

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48. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1020 (11th Cir. 2016); *Rogers v. Am. Airlines Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

49. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1018.

50. *Rogers*, 527 F. Supp. at 229.

51. *Jenkins v. Blue Cross Mut. Hosp. Ins. Inc.*, 538 F.2d 164 (7th Cir. 1976).

52. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1028–30; *Rogers*, 527 F. Supp. at 232.

53. *Jenkins*, 538 F.2d at 167.

54. Nerisha Penrose, *Black Women Doing The #DMX Challenge Is What You Really Want To See Today*, ELLE, (Aug. 22, 2019), <https://www.elle.com/beauty/hair/a28787865/dmx-challenge-viral-twitter-black-women-hair/>.

hair, but rather to point out that the very curly texture of black hair gives it the ability to shrink and stretch into a variety of styles. It is a cultural practice for black mothers to comb their daughter's hair every morning giving them a different style every time.<sup>55</sup> This practice continues into adulthood as black women choose new styles much more often than women of other races.<sup>56</sup>

That being said, it is likely that a black woman might wear an afro one week and braids the next. The time and money that is spent on black hair is evidenced by the fact that the black hair care industry revenues billions of dollars a year.<sup>57</sup> In fact, the billion-dollar black hair industry exists because black men and women change styles very often.<sup>58</sup> While many women might visit a salon once or twice a year to dye their hair or for a trim, it is a cultural norm for black women to visit the hair salon much more often at an average of every two weeks.<sup>59</sup> The changing of styles is important to note because it is important for courts to recognize that there are a myriad of hairstyles that are traditionally black, and that black women are likely to display any one of these styles and should be allowed to wear the styles at work.

The way in which black women change their hair is often referred to in cultural references. In 2019, the "DMX Challenge" crazed social media as many black women created videos featuring the variety of hairstyles worn over the years by one woman as the artist, DMX, named nearly 50 names.<sup>60</sup> Essentially each woman that participated in the challenge uploaded a picture with a different hairstyle for each

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55. Monica C. Bell, *The Braiding Cases, Cultural Deference, and the Inadequate Protection of Black Women Consumers*, 19 YALE J.L. & FEMINISM 125, 129 n.15 (2007). ("Yet no matter where we find ourselves on the color-and-texture spectrum, hair will always be the Black girl's consummate rite of passage . . ."); Damola Durosomo, *Reclaiming Tradition: How Beads Connect Us to Our History*, OKAYAFRICA (Nov. 8, 2018, 12:55PM), <https://www.okayafrika.com/hair-beads-history-african-black-beauty-hair-jewelry-fulani-braids-twists-solange-floella-benjamin/>.

56. Princess Jones, *8 Things You Always Wanted to Know About Black Women's Hair*, MASH UP AMS., <http://www.mashupamericans.com/issues/8-things-always-wanted-know-black-womens-hair/>.

57. Tamara E. Holmes, *The Industry That Black Women Built*, ESSENCE (Oct. 22, 2019), <https://www.essence.com/news/money-career/business-black-beauty/>.

58. GOOD HAIR (HBO Films Oct. 9, 2009).

59. Helen W. Brown, *African American Women's Hair Issues and Engagement in Physical Activity Focus Groups*, AARP (Nov. 2009), <https://assets.aarp.org/rgcenter/health/aahair.pdf>.

60. Mindy Isser, *The grooming gap: What "looking the part" costs women*, SALON (Jan. 5, 2020, 6:30PM), [https://www.salon.com/2020/01/05/the-grooming-gap-what-looking-the-part-costs-women\\_partner/](https://www.salon.com/2020/01/05/the-grooming-gap-what-looking-the-part-costs-women_partner/) ("For instance, Black women spent \$473 million on relaxers, weaves and other hair care in 2017, in part because of racist ideas that natural Black hair is not professional or attractive. Black workers annually spend nine times more on hair and beauty products than other workers."); Penrose, *supra* note 54.

“Does My Sassiness Upset You?”

name in the song, thus highlighting and celebrating the variety that comes with black hair.<sup>61</sup> It would seem that changing hair and trying different styles is a cultural experience and one that can be unique to being a black woman. Therefore, if the workplace is not able to ban an afro style because of its close connection to the black race, then all other styles that are traditionally black should receive the same protection so that black women do not have to limit their blackness within the workplace.

A. Dreadlocks (“Locs”)

The court in *Catastrophe* wrongly concluded that a ban on locs was race-neutral and would not affect black people more than those of other races, because it is a style of historical and cultural importance to black people.<sup>62</sup> In *Catastrophe*, the EEOC filed suit on behalf of Chastity Jones, a black job applicant whose offer of employment was rescinded by Catastrophe Management Solutions due to a grooming policy when she refused to cut off her locs.<sup>63</sup> The EEOC argued that Catastrophe Management Solutions’s conduct constituted discrimination on the basis of Ms. Jones’s race in violation of Title VII of the Civil Rights Act of 1964 because it argued the grooming policy was not race neutral due to its ban on the wearing of locs.<sup>64</sup> The EEOC argued that a “prohibition of dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent.”<sup>65</sup> Thus, although Catastrophe Management Solutions’s grooming policy was race-neutral on its face, the EEOC argued that a ban on a style typically associated with a particular race constituted an employment practice that discriminates on the basis of race.<sup>66</sup>

The court dismissed the complaint because it claimed that it did not plausibly allege intentional racial discrimination by Catastrophe Management Solutions against Ms. Jones.<sup>67</sup> Moreover, the court grappled with the idea of what race was and how it is defined.<sup>68</sup> The court determined that hair is not an immutable characteristic because

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61. Penrose, *supra* note 54.

62. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1022–35 (11th Cir. 2016).

63. *Id.* at 1020.

64. *Id.* at 1031.

65. *Id.* at 1023.

66. *Id.* at 1023–24.

67. *Id.* at 1035.

68. *Id.* at 1030.

it is a characteristic that has the ability to change.<sup>69</sup> Just recently decided in 2017, it is important to recognize that this case made it legal to discriminate on the basis of hair in the Eleventh Circuit.<sup>70</sup> The court reasoned a “race-neutral grooming policy” used to justify rescinding a job offer to a woman who wore locs was not discriminatory because hairstyles, while “culturally associated with race,” are not “immutable physical characteristics.”<sup>71</sup>

The court in *Catastrophe* erred because it defined race too narrowly. After all, race is a social construct and should therefore be legally recognized in the same way that it is often socially recognized — through one’s physical appearance. The court should have recognized how the dreadlock hairstyle was being used as a proxy for race, because it is a style more traditionally associated with black people. Banning locs would essentially be akin to banning an afro or kinky curly hair when black people are the only people that fall into that category. Therefore, the ban would have a disproportionate impact on black Americans, because it likely affects more black people than those of any other race.

Historians and anthropologists have found evidence of the dreadlock hairstyle in ancient Egypt, the Aborigines, and the New Guineans as well as the Somali, the Galla, the Maasai, the Ashanti and the Fulani tribes of Africa.<sup>72</sup> “The actual term ‘dreadlock’ comes from the Rastafarian culture, which is widely credited with popularizing the look in Western culture. Rastafarians consider the locs a sign of their African identity and a religious vow of their separation from what they call Babylon, a historically white-European imperialist structure that has oppressed blacks and other people of color since way back when.”<sup>73</sup> Thus, in considering the history of the style, locs are traditionally a black hairstyle and one that has origins that would produce feelings of pride to the people wearing them. Recognizing this style’s history and significance in black culture would make it more obvious to see that hair in this context is a proxy for classifying and discriminating against black people.

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69. *Id.* at 1029–30.

70. Perry, *supra* note 33.

71. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030.

72. Emanuella Grinberg, *Dear white people with dreadlocks: Some things to consider*, CNN (Apr. 1, 2016, 2:16 PM), <https://www.cnn.com/2016/03/31/living/white-dreadlocks-cultural-appropriation-feat/index.html>.

73. *Id.*

## B. Braids

In *Rogers*, the court similarly decided that braided hairstyles were not protected, because it was not a style only worn by black people and was not representative of an immutable trait.<sup>74</sup> In *Rogers*, the plaintiff was a black female employee of American Airlines who filed a lawsuit under Title VII, arguing that her employer discriminated against her as a black woman when they attempted to enforce a grooming policy that prohibited employees who had customer contact from wearing all-braided hairstyles.<sup>75</sup> The plaintiff argued that her style was one that has been, “historically, a fashion and style adopted by [b]lack American women, reflective of cultural, historical essence of the [b]lack women in American society.”<sup>76</sup> The court discussed how the airline did not require the plaintiff to restyle her hair, and that it “suggested that she could wear her hair as she liked while off duty, while it permitted her to pull her hair into a bun and wrap a hairpiece around the bun during working hours.”<sup>77</sup> In dismissing *Rogers*’s claims based on American Airlines’s appearance grooming regulations, the district court provided two reasons for its decision (without actually ever addressing the plaintiff’s intersectional discrimination claim): (1) that the challenged appearance code did not regulate on the basis of any immutable characteristic, and (2) that the challenged policy applied equally to all races and sexes.<sup>78</sup>

Again, the court overlooked the use of black hair as a proxy for race. As previously argued about the dreadlock hair style, braided hairstyles are traditionally a style worn by black Americans. “The discovery of ancient stone paintings depicting women with cornrows in North Africa shows that braids date back thousands of years.”<sup>79</sup> *Essence Magazine* describes getting braids and cornrows as a rite of passage for many black women in America.<sup>80</sup> So, while women of other races wear braids, it is a more common hairstyle for black women to wear and is also closely connected to the heritage and culture of being a black woman.<sup>81</sup> During slavery, black women braided their hair to

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74. *Rogers v. Am. Airlines Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

75. *Id.* at 231.

76. *Id.* at 232.

77. *Id.* at 233.

78. *Id.*

79. Dirshe, *supra* note 39.

80. *Id.*

81. *Here’s Why White Women Can’t Wear Black Hairstyles*, CENTENNIAL BEAUTY (Jun. 10, 2020), <http://centennialbeauty.com/why-cant-white-women-wear-black-hairstyles/>.

depict messages and even hide food when escaping.<sup>82</sup> Historically, black men wearing braids can be traced as far back as the early nineteenth century to Ethiopia, where warriors and kings such as Tewodros II and Yohannes IV were depicted wearing cornrows.<sup>83</sup> This proves that the history of braids holds much more significance in the black community than simply styling for beauty purposes. This particular styling practice is the reason many slaves were able to escape, because the braids were used as maps to freedom.<sup>84</sup> Being told that the style is unacceptable for work creates an unwelcoming environment for black employees because it says that the company wishes not to associate itself with black culture, black history, and essentially, black people.

Lastly, the court alluded to the plaintiff being able to wear her braided hairstyle outside of work as a viable solution,<sup>85</sup> however, it is not. Giving black employees an option to wear certain styles outside of work is still a restriction, and thus only proves the plaintiff's Title VII claim of discrimination, because other styles that are typically worn by those of European descent can be worn outside of work and at work. Braided extensions can take hours to put in and cost hundreds of dollars. Braids are considered a protective style and are used to help retain moisture when the air is too harsh, or to practice low maintenance with one's hair, which can promote healthy hair.<sup>86</sup> Therefore, the money, time, and thought that goes into getting a braided style is not something that lends the style to be taken down daily or even on a weekly basis, because doing so would place a financial and physical burden on black employees or punish them for embracing their natural hair. That burden and punishment is a form of discrimination, because it makes black employees refrain from wearing styles that represent their culture or financially burdens them to take the styles down sooner than they need to in order to maintain white superiority in the workplace.

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82. Beauty Studio (@BeautyStudio.KeliNetwork), FACEBOOK (Feb. 14, 2020), <https://www.facebook.com/254307648319573/posts/987460928337571/?vh=e>.

83. *The Secret Meaning of African Cornrows*, AFROBIZ (Oct. 08, 2019), <https://www.afrobizworld.com/the-secret-meaning-of-the-african-cornrows>.

84. *Id.*

85. *Rogers v. Am. Airlines Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981).

86. Renee Henson, Comment, *Are My Cornrows Unprofessional?: Title VII's Narrow Application of Grooming Policies, and its Effect on Black Women's Natural Hair in the Workplace*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 521, 522 (2017) ("A black woman does not have the freedom to wear her hair in a large afro, cornrows, or many other ethnic hairstyles at work, which can be the easiest, healthiest, and most natural way that she could wear her hair.").

“Does My Sassiness Upset You?”

Therefore, banning the hairstyle of braids or cornrows is essentially banning black women or treating them differently than others by suggesting that they only wear their hair braided outside of the workplace setting. “In a society in which hair has historically been one of many determining factors of a person’s race, and whether they were a second-class citizen, hair today remains a proxy for race.”<sup>87</sup> Therefore, hair discrimination targeting hairstyles associated with race is racial discrimination.<sup>88</sup> This different treatment is discrimination based upon hair — a proxy for race.

C. Afros

The final Title VII case has an outcome unlike the previous two. In *Jenkins*, the plaintiff asserted a Title VII race discrimination claim, because her supervisor told her that she could never represent Blue Cross with her afro.<sup>89</sup> The court held that the supervisor’s lone statement was sufficient to support a race discrimination claim because “[a] layperson’s description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff’s supervisor allegedly expressed the employer’s racial discrimination.”<sup>90</sup> This case is important because it finally admitted what the other courts refused to recognize — that hair is closely associated with race.<sup>91</sup> While the court only recognized this exception because of the use of the word afro, it opened the door to the idea that certain hairstyles are indeed associated with certain races.<sup>92</sup>

Returning to the two previous cases, dreadlocks, cornrows, and braided styles do not contain the word “afro” or any word akin to the word “African”, however, these styles are historically and traditionally related to African American heritage. If the court is able to recognize that an afro is related to being African American, it should be able to do the same for other styles that are traditionally associated with black culture — including headwraps, twists, etc. Essentially, what the previous two courts have failed to recognize is that black

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87. CROWN Act of 2020, H.R. 5309, 116th Cong. (2020). At the time of writing, the CROWN Act has yet to be voted on by the House of Representatives.

88. S.B. 188, 2019–2020 Leg. (Cal. 2019).

89. *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 168 (7th Cir. 1976).

90. *Id.*

91. *Id.*

92. Crystal Powell, *Bias, Employment Discrimination, and Black Women’s Hair: Another Way Forward*, 2018 BYU L. REV. 933, 944–45 (2018).

people's freedom to wear their hair in a braided style, in locs, or even with weave sewn into the braids is closely related to their culture and identity. Therefore, all styles that are typically associated with black women should be as equally protected as the afro.

#### D. School Regulation

Black men and women are not alone in their struggle against racial discrimination when it comes to hair — even black children suffer at the hands of racist grooming policies in school settings. The idea that black hair is dirty or not professional, presentable, or neat is rooted in the racist principles of white supremacy, because it reinforces the notion that anything that is not traditionally white is inferior. It suggests that any styles unlike that of white majority culture are less than, untidy, and inappropriate. While adults in the workplace are able to perceive hair regulation as discrimination, children — being lesser developed — are unable to understand fully why this injustice exists.<sup>93</sup> Children can understand that a wrong has been done and that something about the arrangement is unfair, but their lack of understanding of racism paired with experiencing this level of discrimination at such a young age also yields negative psychological effects.<sup>94</sup> Because black children suffer at the hands of hair discrimination due to grooming policies in public school settings, and black adults suffer at the hands of hair discrimination due to grooming policies in the workplace, the need to prevent nationwide regulation of black hair is further solidified, because it occurs in multiple settings. This section will explain that while public school grooming policies seem facially valid, they tend to overregulate black children. This section will share the stories of black children who have been removed from school and treated differently because of how they wear their hair. Finally, this section will explain the psychological effects discrimination has on black children.

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93. Christia Spears Brown & Rebecca S. Bigler, *Children's Perceptions of Gender Discrimination*, UNIV. OF TEX. AT AUSTIN (Oct. 2004), [https://www.researchgate.net/publication/8359224\\_Children's\\_Perceptions\\_of\\_Gender\\_Discrimination](https://www.researchgate.net/publication/8359224_Children's_Perceptions_of_Gender_Discrimination) (“Thus, it appears that children . . . are reluctant to attribute outcomes to discrimination unless bias is very apparent . . . [t]hus, children are likely to attribute negative feedback from adults, including teachers, to their own performance.”).

94. Claudia Boyd-Barrett, *Study: Racism Affects Even Young Kids' Mental and Behavioral Health*, CAL. HEALTH REP. (Oct 29, 2018), <https://www.calhealthreport.org/2018/10/29/study-racism-affects-even-young-kids-mental-behavioral-health/>.

“Does My Sassiness Upset You?”

The following are two different school districts’ grooming policies with suggested language that would apply particularly to black students.

Jordan Public School District Grooming policy excerpt: “All students shall maintain their hair, mustaches, sideburns, and beards in a clean, *well-groomed manner*. Hair, which is so *conspicuous, extreme*, odd in color or style that it *draws undue attention, disrupts*, or tends to *disrupt or interfere with the learning atmosphere at the school*, shall not be allowed.”<sup>95</sup>

District of Columbia Public School District Grooming policy excerpt: “Students participating in sports may be required to wear protective clothing and to change hairstyles for their safety and the safety of others.”<sup>96</sup>

Although these policies seem facially neutral in that they do not appear to intentionally target a specific racial group, the application of the policies would affect black children more than children of other races. For example, depending on what the Jordan School District qualifies as a distracting hairstyle, a young black girl with braids and beads could be prohibited from wearing the style because other people are distracted by her hair. Even though a policy that prohibits distracting styles seems to affect everyone in the school, it has the propensity to affect more black children than anyone else.

For instance, one student was not able to take pictures on picture day because of her “distracting” hairstyle.<sup>97</sup> Marian is an eight-year-old girl who had her hair braided with red extensions to take pictures for school.<sup>98</sup> Unfortunately, due to the school’s grooming policy, she was pulled aside and not allowed to take pictures because her hair color was not of “natural tones.”<sup>99</sup> Beyond the historical significance of braids and locs as explained earlier, there is even historical significance to having hair adorned in beads and gold.<sup>100</sup> While Marian had

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95. *Jordan Policy Manual*, JORDAN SCH. DIST. (Revised May 22, 2018), <https://policy.jordandistrict.org/conduct/>.

96. *District of Columbia Public Schools - Notice of Final Rulemaking*, UDC-DCSL CLINIC MANUALS 2 (Aug. 14, 2009), <http://udcdcsclinicmanuals.pbworks.com>.

97. *An 8-Year-Old Girl Was Denied a Class Picture Because of Her Hair*, NBC WASH. (Oct. 8, 2019, 3:33 PM), <https://www.nbcwashington.com/news/national-international/An-8-Year-Old-Girl-Was-Denied-a-Class-Picture-Because-of-Her-Hair-562541651.html>.

98. *Id.*

99. *Id.*

100. Durosomo, *supra* note 55 (“Many black women are using hair jewelry like beads, gold cuffs, and multicolored string to accentuate natural or protective styles such as braids, locs and twists. This ‘trend’ however is rooted in the black hair experience.”).

color in her hair, she had red hair extensions braided into her hair, and her actual hair was not dyed.<sup>101</sup> Just as it is a part of black culture to adorn hair with beads and gold string, colorful hair is often used to show pride in displaying a braided hairstyle.<sup>102</sup> Not allowing a child to participate in picture day because of the coloring in her hair can thus be interpreted as anti-black.

Beyond regulating hair that is distracting, some school policies explicitly ban styles that would typically be worn by black children, like long braids (typically called box-braids). In Massachusetts, two young black girls, Deanna and Mia Cook, were given detentions for wearing braided hairstyles because the Mystic Valley Regional Charter School dress code said braid extensions were not allowed.<sup>103</sup> Their mother commented, “What they’re saying is we can’t wear extensions, and the people who wear extensions are black people. They wear them as braids to protect their hair and they’re not allowing us to do that[.]”<sup>104</sup> Their mother went on to describe that this sort of treatment was discriminatory against her daughters.<sup>105</sup> Their mother explained that their braids give them pride, and said “they want to partake in their culture.”<sup>106</sup>

While the examples given thus far only address girls in schools, black boys who choose to embrace their natural hair and style it, rather than wearing a closely shaved hairstyle, suffer from discrimination as well.<sup>107</sup> More recently, De Andre Arnold, a senior at Barbers Hill High School in Mont Belvieu, Texas, was suspended and told that he could not walk at his high school graduation ceremony unless he cut his dreadlocks.<sup>108</sup> While the school’s dress code did not explicitly ban dreadlocks, it stated that hair must be clean and well-groomed.<sup>109</sup> The dress code also stated that male student’s hair must not extend

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101. *An 8-Year-Old Girl Was Denied a Class Picture Because of Her Hair*, *supra* note 97.

102. Durosomo, *supra* note 55.

103. *Two black charter school students punished for braided hair extensions*, CBS NEWS (May 12, 2017, 9:33PM), <https://www.cbsnews.com/news/two-black-charter-school-students-punished-for-braided-hair-extensions/>.

104. *Id.*

105. *Id.*

106. *Id.*

107. See Leah Asmelash, *Black students say they are being penalized for their hair, and experts say every student is worse off because of it*, CNN (Mar. 8, 2020, 3:51 PM), <https://www.cnn.com/2020/03/08/us/black-hair-discrimination-schools-trnd/index.html>.

108. Perry, *supra* note 33.

109. *Barbers Hill ISD Student Handbook 2019-2020 School Year*, 1, 54, <https://resources.finalsite.net/images/bhisd/gbxcdmj8opcqkctcuk8sv/BHISDStudentHandbook2019-2020rev1-6-2020.pdf>.

“Does My Sassiness Upset You?”

past their eyebrows or ear lobes and when gathered, it must not extend below the collar of their t-shirts.<sup>110</sup> The stated two policies are what the school alleged De Andre failed to adhere to.<sup>111</sup>

Each of these instances subjected black children to treatment different than those of children from other races for wearing hairstyles that are traditionally related and closely intertwined with their racial and cultural backgrounds. While it might be difficult for courts to pinpoint the issue, those who understand the history and significance of black hair recognize that the problem is less about hair and more so about race.<sup>112</sup> “Anti-black hair sentiment in the U.S. has existed for centuries, with Eurocentric norms of beauty taking main stage. This sentiment is directly tied to institutional racism.”<sup>113</sup> Racial discrimination is weaponized against black people in schools and the workplace — allowing white supremacist views to guide and power institutions within the United States. The policies that led to these students’ humiliation, suspensions, and being excluded are anti-black because they do not recognize the importance of these different styles to the black community.

The humiliation, embarrassment, and degradation of black children matters, because our court system has recognized psychological effects on black children. The Supreme Court in the *Brown v. Board of Education* decision acknowledged these types of effects when it said: “To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>114</sup> In the preceding examples, students were suspended from school and told they would be unable to participate in certain activities due to their hair, and were thus actually physically separated.<sup>115</sup> While some forms of segregation against black children do not involve physical separation from their counterparts of other races, they are constructively separated in that their natural and cultural hairstyles are treated differently in school settings than their white counterparts. This separate

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110. Perry, *supra* note 33.

111. *Id.*

112. Brenda Alvarez, *When Natural Hair Wins, Discrimination in School Loses*, NEATODAY (Sept. 17, 2019), <https://www.nea.org/advocating-for-change/new-from-nea/when-natural-hair-wins-discrimination-school-loses>.

113. *Id.*

114. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

115. Perry, *supra* note 33; Asmelash, *supra* note 107.

treatment can affect the hearts and minds of these students to make them feel less than, unworthy, and degraded.

Again, this separate type of treatment is discrimination, and some may argue that an adult might be keener and easily able to spot this form of racism to potentially refrain from internalizing the humiliation. However, children who experience this type of discrimination are left to process the shame of rejection of their cultural pride internally, because they are not as aware that the policies are racist. The Court in *Brown v. Board of Education* reasoned that separate treatment caused psychological effects by using results from a doll test conducted by doctors Kenneth and Mamie Clark.<sup>116</sup> The Clarks used two dolls, identical except for color, to test children's racial perceptions.<sup>117</sup> Their tested subjects were children between the ages of six to nine<sup>118</sup> and were asked the following questions in this order:

"Show me the doll that you like best or that you'd like to play with,"

"Show me the doll that is the 'nice' doll,"

"Show me the doll that looks 'bad',"

"Give me the doll that looks like a white child,"

"Give me the doll that looks like a coloured child,"

"Give me the doll that looks like a Negro child,"

"Give me the doll that looks like you."<sup>119</sup>

A majority of the children preferred the white doll and assigned positive characteristics to it.<sup>120</sup> The Clarks concluded that prejudice, discrimination, and segregation created a feeling of inferiority among African American children and damaged their self-esteem.<sup>121</sup> The Court in *Brown v. Board of Education* used this study to reason that the segregation of white and black children in public schools had a "detrimental effect" on black children.<sup>122</sup> "The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."<sup>123</sup> It is extremely important to note that the Court stated that this impact has an even greater negative effect under the sanction of law, because, as previously stated, the use of the superiority of white

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116. Julian Abagond, *The Clark Doll Experiment*, ABAGOND (May 29, 2009), <https://abagond.wordpress.com/05/29/the-clark-doll-experiment/>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

123. *Id.*

“Does My Sassiness Upset You?”

people and their features is the inherent driving force behind hair regulations in schools and work.<sup>124</sup> The Court acknowledged that “a sense of inferiority affects the motivation of a child to learn.”<sup>125</sup> Thus, by denoting the white race’s features as better and the black race as inferior, I argue that it can affect the child’s motivation not only to learn, but to exist as confidently as their white counterparts whose features continue to be celebrated. The Court explained that segregation with the sanction of law has a tendency to slow down the educational and mental development of black children and to deprive them of some of the benefits they would receive in a racially integrated school system.

The actual meaning of segregation is “the separation for special treatment or observation of individuals or items from a larger group.”<sup>126</sup> Therefore, while segregation is no longer legally in effect, the separate treatment of non-white individuals does legally exist through names of professionalism and acceptable hair, attire, and even language. These forms of separate treatment like suspension and losing privileges to engage in activities that other students are able to engage in reinforce negative psychological effects in black children. While *Brown v. Board of Education* alluded to the notion that these discrimination practices would affect the hearts and minds of black children, a more recent study explains in detail the effects of discrimination toward black teenagers and how it leads to signs of depression.<sup>127</sup>

In the consideration of current legislation, the *Brown* decision is most important in the school setting because *Brown* laid the foundation of what equality should be for all children in schools. We see the importance of the *Brown* decision and how ignoring its reasoning is detrimental when creating school regulations by looking at Andrew Johnson’s story, a New Jersey high school wrestler who was forced to cut his dreadlocks to compete in his wrestling match.<sup>128</sup> According to the New Jersey wrestling policy, wrestlers are not allowed to have hair

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124. *Id.*

125. *Id.*

126. *Segregation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/segregation> (last visited Sept. 25, 2020).

127. See Devin English, Sharon F. Lambert, Brendesha M. Tynes, Lisa Bowleg, Maria Cecilia Zea & Lionel C. Howard, *Daily Multidimensional Racial Discrimination Among Black U.S. American Adolescents*, 66 J. APPLIED DEV. PSYCH. 1–2 (2019).

128. Erik Ortiz, *N.J. wrestler forced to cut dreadlocks still targeted over hair, lawyer says*, NBC NEWS (Jan. 10, 2019, 10:49 AM), <https://www.nbcnews.com/news/nbcblk/n-j-wrestler-forced-cut-dreadlocks-still-targeted-over-hair-n957116>.

that falls below the back of an athlete's shirt collar, earlobes, or eyebrows.<sup>129</sup> "The referee at that match, Alan Maloney, who is white, told Johnson that his hair and headgear did not comply with rules, and that if he wanted to compete, he would have to immediately cut his dreadlocks — or forfeit."<sup>130</sup> A video of a white female trainer cutting off Johnson's hair went viral after the match and "transformed the teenager into a new symbol of racial tension in America."<sup>131</sup> Viewers were upset that officials believed a sixteen year old boy and his hair presented such a threat that he needed to be publicly humiliated by having his dreadlocks cut with scissors in front of everyone in the crowd.<sup>132</sup> While a policy that prohibits men to have long hair seems facially neutral, it affects black males more than those of other groups, because long dreadlocks and cornrows are cultural styles not just for black women but black men as well.<sup>133</sup>

Even in watching the video of Andrew Johnson's dreadlocks being cut, the black community was outraged and appalled at the level of dehumanization.<sup>134</sup> Dreadlocks, braids, and afros are not simply hair-styles. These styles represent the heritage, history, attitude, and culture of the black community. After seeing the video, Ava Duvernay, a film director, said "I don't just wear locs. They are a part of me. A gift to me. They mean something to me. So, to watch this young man's ordeal, wrecked me. The criminalization of what grows from him. The theft of what was his[.]"<sup>135</sup> In the past, black people have been criminalized for features and behaviors that are not closely related to white people or white culture.<sup>136</sup> This criminalization was evident in the unfortunate death of Trayvon Martin, a teenage boy, murdered because he was considered a threat for being a black boy

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129. *Id.*

130. *Id.*

131. Roman Stubbs, *A wrestler was forced to cut his dreadlocks before a match. His town is still looking for answers.*, WASH. POST (April 17, 2019 at 11:28 AM), <https://www.washingtonpost.com/sports/04/17/wrestler-was-forced-cut-his-dreadlocks-before-match-his-town-is-still-looking-answers/>.

132. *Id.*

133. See generally Ortiz, *supra* note 128.

134. Josh Magness, *Black wrestler had this choice: Cut his dreadlocks or forfeit the match, video shows*, MIA. HERALD (Dec. 21, 2018, 3:44 PM), <https://www.miamiherald.com/news/nation-world/national/article223432070.html>.

135. Ortiz, *supra* note 128.

136. Calvin J. Smiley & David Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350, 351 (2016).

with the hood from his sweatshirt over his head.<sup>137</sup> The fear of hoodies and locs camouflage the fear of black people. In ending the regulation of black hair, it could be an additional step toward progress to minimize the demonization of black people simply for what is growing from their heads.

Following the wrestling incident, the New Jersey Division on Civil Rights (“DCR”) wrote a guide on race discrimination based on hairstyle.<sup>138</sup> In this guide, the division explains how “anti-[b]lack racism can take many forms,” one of the forms being discrimination against black people based on hairstyles that are “inextricably intertwined or closely associated with being [b]lack.”<sup>139</sup> The guide essentially walked through the history of the regulation of black hair and pointed out how a policy that seems facially neutral could target black children.<sup>140</sup> For example, the policy states “[a] school administrator selectively applying a facially neutral hair-length policy only to black students or only to students with braids, while not applying the policy to white students with long hair.”<sup>141</sup> While this guidance helps schools and employers to interpret Title VII in a way that is more inclusive to black Americans, and more states should adopt such guidelines, it does not completely solve the problem, because it does not put an end to the racially discriminatory acts.

### III. CUT IT — THE SOLUTION TO CUT ALL FORMS OF DISCRIMINATION AGAINST BLACK HAIRSTYLES

A more viable solution to this problem can be found in California, New York, and New Jersey — where state legislators have adopted the CROWN Act (“the Act”), banning discrimination against black hair.<sup>142</sup> The Act clarifies traits that are historically associated with race, such as hair texture and hairstyle, and asserts that those traits be protected from discrimination in the work place and in Cali-

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137. Orlando Sentinel, *Florida teen Trayvon Martin is shot and killed*, HISTORY (Feb. 26, 2019), <https://www.history.com/this-day-in-history/florida-teen-trayvon-martin-is-shot-and-killed>.

138. See N.J. Div. C.R., GUIDANCE ON RACE DISCRIMINATION BASED ON HAIRSTYLE 1 (2019).

139. *Id.* at 2.

140. *Id.* at 2–3.

141. *Id.* at 8.

142. Shalwah Evans, *United States House of Representatives Passes the CROWN Act*, ESSENCE (Sept. 23, 2020), <https://www.essence.com/beauty/beauty-news/house-of-representatives-passes-crown-act/>.

for California's K-12 public and charter schools.<sup>143</sup> CROWN is an acronym that stands for Creating a Respectful and Open Workplace for Natural hair.<sup>144</sup> As asserted earlier, “while anti-discrimination laws presently protect the choice to wear an Afro, Afros are not the only natural presentation of [b]lack hair.”<sup>145</sup> The Act aims to protect all natural styles like dreadlocks and braids, because the ways in which black women style their natural hair are infinite.

While explaining the history of discrimination against black traits in this country, the Act further explains how ideals of professionalism are rooted in white supremacy.<sup>146</sup> “Professionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional.”<sup>147</sup> This idea is something I alluded to earlier in the Note, in explaining that there is an underlying assumption that blackness should be considered undesirable. Also as explained earlier, the Act describes how “workplace dress code[s] and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on [b]lack individuals as these policies are more likely to deter [b]lack applicants and burden or punish [b]lack employees more than any other group.”<sup>148</sup>

While California was the first state to enact this act, New York state quickly followed suit in adopting the legislation.<sup>149</sup> So far, seven states have adopted the CROWN Act, but it is still legal in 43 states to be discriminated against because of your hair.<sup>150</sup> In the seven states that have adopted the law, while the CROWN Act was enacted at different times, the law has been adopted with no changes.<sup>151</sup> This provides proof that the language in the act is detailed and specific

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143. Press Release, Senate Votes to End Hair Discrimination in the Workplace and Schools (Apr. 22, 2019), <https://sd30.senate.ca.gov/news/press-releases/2019-04-22-april-22-2019-video-senate-votes-end-hair-discrimination-workplace>.

144. *Id.*

145. *Id.*

146. S.B. 188, 2019–2020 Leg. (Cal. 2019).

147. *Id.*

148. *Id.*

149. Janelle Griffith, *New York Is Second State to Ban Discrimination Based on Natural Hairstyles*, NBC NEWS (July 18, 2019), <https://www.nbcnews.com/news/nbcblk/new-york-second-state-ban-discrimination-based-natural-hairstyles-n1029931>.

150. The CROWN Act (@thecrownact), INSTAGRAM (July 10, 2020), <https://www.instagram.com/p/CCeIT-IJXgl>.

151. Valerie Russ, *Pa. Lawmakers Promote CROWN Act Legislation Banning Discrimination Against Natural Hair Styles*, PHILA. INQUIRER (Sept. 24, 2020), <https://www.inquirer.com/news/pa-lawmakers-crown-act-protect-against-discrimination-natural-hair-20200924.html>.

*“Does My Sassiness Upset You?”*

enough to address all or most of the potential concerns of discrimination. It is my recommendation that the same language from the original California CROWN Act be enacted as a federal law. On December 5, 2019, the CROWN Act was introduced as H.R. 5309 in the House of Representatives.<sup>152</sup> On September 21, 2020, the House of Representative passed the bill and it moved to the Senate for review.<sup>153</sup> H.R. 5309 not only explains the history of the ways in which black Americans have been discriminated against because of their hairstyles, but it also specifically prohibits those same forms of discrimination in public forums, places of employment, access to government assistance, and more.<sup>154</sup> Discrimination based upon race, with hair as a proxy, is a problem that affects both public and private buildings, employers, and institutions. The first two states to adopt this law are amongst the top ten cities in the United States with high populations of black Americans.<sup>155</sup> I would argue that cities and towns where black people are not highly represented need this sort of protection just as much. Thus, the United States should enact this as a federal law, making it illegal to discriminate against black hairstyles in any setting.

While the proposed federal bill aims to end the regulation of black hair, it does not have the same detailed language as the original act. The California CROWN Act also readdressed “race” referenced in state codes that protect against racial discrimination to include traits historically associated with race, “including, but not limited to” hair texture and protective hairstyles.<sup>156</sup> The “including, but not limited to” language is important because it emphasizes that there are different ways to perceive race outside of skin color including hair, clothing style, speech, and more.<sup>157</sup> These are all ways in which the professional world attempts to regulate black people and those of other races to adopt a way of living and behaving that is white and Eurocentric. The California CROWN Act also defined “protective hairstyles” to include a non-exhaustive list of braids, locks, and twists.<sup>158</sup> This language is also important because it ensures that the

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152. CROWN Act of 2020, H.R. 5309, 116th Cong. (2020).

153. *Id.*

154. *Id.*

155. *See Majority of African Americans Live in 10 States; New York City and Chicago Are Cities With Largest Black Populations*, U.S. CENSUS BUREAU, available at [https://www.census.gov/newsroom/releases/archives/census\\_2000/cb01cn176.html](https://www.census.gov/newsroom/releases/archives/census_2000/cb01cn176.html).

156. S.B. 188, 2019–2020 Leg. (Cal. 2019).

157. *Id.*

158. *Id.*

workplace or courts will not try to limit the hairstyles of black people simply to what is listed in the bill. My suggestion is that the federal CROWN Act be just as detailed as the original bill. The intentional language of “including, but not limited to” is most important because it supports what I have explained throughout this Note: that black hairstyles are limitless.<sup>159</sup> Thus, the regulation of black hair should end completely by deeming more than just a few additional styles as protected.

In August of 2019, lawmakers amended New York’s Human Rights Law and Dignity for All Students Act, which makes it clear that discrimination based on race includes hairstyles or traits “historically associated with race, including but not limited to hair texture and protective hairstyles.”<sup>160</sup> Because there are a variety of styles that connect to the culture and race of black people, the description of the different hairstyles that need protection is not explicit. To name all of the possibilities in which black people can change their hair would be virtually impossible. The change that should occur is in the minds of lawmakers to help them understand the cultural competency it takes to solve this problem. It takes understanding that black Americans should not exist within the limits and confines of whiteness. When that is understood, not only would hairstyles not be regulated, but also types of clothing, jewelry, and even the way people speak in the workplace would be less regulated.

CONCLUSION:  
“DON’T REMOVE THE KINKS FROM YOUR HAIR.  
REMOVE THEM FROM YOUR BRAIN.” –  
MARCUS GARVEY

Until our courts, Congress, and other legislative positions are filled with those who understand the plight of all citizens no matter their identity, it will be difficult to have discussions that are inclusive of different types of people. “Representation matters [and] [r]esearch has shown that diverse decision-making bodies are better problem solvers than homogenous ones.”<sup>161</sup> While it will take a long time to make changes in that manner, we can begin with one piece of inclusive legislation at a time — the CROWN Act. Countless struggles already

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159. *Id.*

160. Alvarez, *supra* note 112.

161. Perry, *supra* note 33.

*“Does My Sassiness Upset You?”*

exist for black Americans trying to integrate themselves into the predominately white corporate America. In many ways black Americans and non-white Americans may never feel fully comfortable in the work setting because of white supremacy’s rule on workplace culture. However, banning the regulation of hair while recognizing that it is one of the ways in which black Americans have been discriminated against in the workplace and schools is a start.

Though the tragic deaths of George Floyd, Breonna Taylor, Tony McDade, and many others this spring at the hand of law enforcement ignited a racial justice pandemic, these deaths in the spring of 2020 were not the beginning of racial discrimination for black Americans.<sup>162</sup> Black Americans have faced forms of racism and discrimination daily for years.<sup>163</sup> The CROWN Act, while powerful, is one piece of the puzzle to solve racial discrimination and give black Americans a real seat at the table. Hair to black Americans is not just a style, it represents culture, pride, tenacity, and sass.

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162. *George Floyd, Tony McDade, Sean Reed, and Breonna Taylor*, S. POVERTY L. CTR. (June 1, 2020), <https://www.splcenter.org/news/2020/06/01/george-floyd-tony-mcdade-sean-reed-and-breonna-taylor>.

163. Amy Harmon, *How Much Racism Do You Face Every Day?*, N.Y. TIMES (Jan. 20, 2020), <https://www..com/interactive/2020/us/racism-african-americans-quiz.html>.



## NOTE

# Facing Current Conditions: Employing Voting Rights Act Preclearance to Protect Reproductive Rights

MICHAEL F. WALKER\*

*“The burden is too heavy — the wrong to our citizens is too serious — the damage to our national conscience is too great not to adopt more effective measures than exist today.”*<sup>1</sup>

Introduction: The damage to our national conscience .....	268
I. Reproductive Rights in the Aftermath of <i>Roe v. Wade</i> .	273
A. The Caselaw .....	273
B. The Threat of Current Anti-Abortion Legislation ..	279
II. Voting and Abortion as Vulnerable Fundamental Rights.....	283
A. Rights That Protect Other Rights.....	284
B. Shared Standards, Shared Vulnerability.....	286
III. The Reproductive Rights Act.....	289
A. VRA Preclearance and <i>Shelby County</i> as Blueprints.....	289
B. Components to the Legislation .....	292
1. Reaffirming the Right .....	293
2. The Preclearance Provision .....	293
3. The Coverage Formula .....	295
4. The Bail-Out Provision .....	297
Conclusion .....	298

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1. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

*Since the Supreme Court's decision in Roe v. Wade in 1973, many states have passed various anti-abortion legislation that will likely curtail the right to receive abortion care. In response to this effort, some, such as Senator Kamala Harris, have posited federal legislation creating a preclearance requirement imposed on states with a history of restricting access to the right to abortion care. The blueprint for this legislation comes from the Voting Rights Act of 1965. Sections 4(b) and 5 of the VRA as originally enacted required that jurisdictions with a history of restricting the right to vote to preclear with the federal government any changes in their laws affecting the right to vote. To withstand constitutional challenge, a preclearance plan to protect the right to abortion care must be responsive to the current conditions of abortion care access and abortion-related services, as is suggested by the Supreme Court's criticisms of the VRA in Shelby County v. Holder. Therefore, the abortion protection legislation must limit its scope only to states that have committed demonstrable violations of the right. This Note recommends such legislation. To do this, the Note provides a history of reproductive rights jurisprudence since Roe v. Wade and introduces the current threat to those rights posed by anti-abortion legislation. Next, the Note explores the parallels between the right to vote and the right to abortion care that make preclearance legislation appropriate. The Note then proposes legislation that will comply with Shelby County. The Note concludes with the ramifications associated with successful enactment of the proposed legislation.*

## INTRODUCTION: THE DAMAGE TO OUR NATIONAL CONSCIENCE

History may not repeat, but it rhymes.<sup>2</sup> This remark rings true when considering the similarities between the political landscape that inspired the Voting Rights Act of 1965 (“VRA”) and the current backdrop for women<sup>3</sup> and other pregnant people seeking abortion care.

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2. John Robert Colombo, *A Said Poem*, in *NEO POEMS* 46 (1970).

3. The use of the term “women” in this Note is not meant to be understood as an exclusion of gender-nonbinary and transgender persons. The author acknowledges that the anti-abortion legislation and judicial outcomes discussed throughout this Note pose deleterious consequences for transgender and nonbinary persons. See, e.g., *Key Facts on Abortion*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/> (last visited Mar. 15, 2020).

In 1962, when Fannie Lou Hamer attempted to register to vote, she encountered obfuscation, intimidation, and violence.<sup>4</sup> During her testimony before the credentials committee at the Democratic National Committee, Ms. Hamer recounted her first-hand experience of the violence African Americans faced for attempting to exercise their right to vote.<sup>5</sup> When she and seventeen other Student Nonviolent Coordinating Committee (“SNCC”) members attempted to register to vote at Mississippi’s Indianola courthouse, they were handed literacy exams rather than registration cards.<sup>6</sup> As they boarded their bus to return home, they did so under the ominous specter of armed policemen.<sup>7</sup> During the trip, more police stopped the SNCC members and cited the bus driver with driving a bus that was “too yellow.”<sup>8</sup> When word traveled that the group attempted to register to vote, gunshots were fired into the window of Ms. Hamer’s home in retaliation.<sup>9</sup> Later that night, those same perpetrators murdered two African American girls.<sup>10</sup> Ms. Hamer later detailed a torturous four days she spent as a voting rights activist in a Montgomery County jail, where she was beaten unconscious by police and other prisoners under police direction.<sup>11</sup> Ms. Hamer’s story is paradigmatic of the obstacles African Americans faced while attempting to vote prior to the enactment of the VRA.

“You’ve got to do it just because you believe women deserve the opportunity.”<sup>12</sup> Those are the words of the physician-turned-petitioner in *June Medical Services v. Russo*,<sup>13</sup> the latest abortion care decision penned by the United States Supreme Court. Although “Dr. John Doe 1” (as he is named in court filings) did not initially plan to provide abortion care, he realized women needed such services.<sup>14</sup>

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4. See MAEGAN PARKER BROOKS, *A VOICE THAT COULD STIR AN ARMY: FANNIE LOU HAMER AND THE RHETORIC OF THE BLACK FREEDOM MOVEMENT* 38–39 (2014).

5. *Id.* at 38.

6. *Id.* at 38–39.

7. *Id.* at 38.

8. *Id.*

9. *Id.* at 35.

10. *Id.* at 46–47.

11. *Id.* at 55.

12. Jessica Mendoza, *The View from One of the Last Abortion Clinics in Louisiana*, CHRISTIAN SCIENCE MONITOR (June 13, 2019), <https://www.csmonitor.com/USA/Politics/2019/0613/The-view-from-one-of-the-last-abortion-clinics>. The case was originally filed as *June Medical Services v. Gee*, but has since been renamed *June Medical Services v. Russo*.

13. See generally *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2103 (2020). This case was consolidated with *Gee v. June Med. Servs.*, 140 S. Ct. 35 (2019).

14. Mendoza, *supra* note 12; Emergency Appl. for a Stay Pending the Filing and Disposition of a Pet. for a Writ of Cert. at 7, *June Med. Servs. v. Gee*, 905 F.3d 787 (5th Cir. 2019).

This need has grown dire in the face of anti-abortion legislation, sentiment, and even violence. Since 1977, there have been forty bombings, over one hundred arsons of abortion clinics, and a rash of murders of abortion care providers.<sup>15</sup> The pressure of this climate of violent retaliation to clinics facilitating women's right to abortion care has materially reduced the number of physicians willing to provide it.<sup>16</sup> Indeed, two of Dr. Doe's partners left his practice due to the mounting outside "pressures" on them they attributed to his abortion patients.<sup>17</sup> Dr. Doe has also experienced violent retaliation first-hand. Protesters accost him as he goes to and from his clinic and his neighbors receive "nasty mailers" about him, forcing him to hide his identity.<sup>18</sup>

In the midst of this resistance, Dr. Doe's patients need him. Dr. Doe is one of only a handful of physicians who administer abortion care in Louisiana.<sup>19</sup> Patients — "[l]ike the intellectually disabled young woman who'd been raped by her brother, and who'd hummed church hymns in the operating room[, o]r the woman whose pregnancy was at risk because she'd needed a heart transplant" — may not have been able to exercise their right to regain control over their bodies without his clinic.<sup>20</sup>

Fannie Hamer and Dr. Doe share immutable commonalities. Their stories are of two people attempting to facilitate the rights of specific social minorities. Ms. Hamer had a personal stake in procuring access to the polls for herself, as well as for her fellow African Americans. While Dr. Doe does not belong to the at-risk population he serves, he nonetheless stands on the front lines of a similar fight for access — to adequate abortion care.<sup>21</sup> Ms. Hamer and Dr. Doe ex-

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15. Sarah Frostenson, *40 years of attacks on abortion clinics, mapped*, Vox (Dec. 1, 2015, 12:30 PM), <https://www.vox.com/2015/12/1/9827886/abortion-clinic-attacks-mapped>.

16. Mendoza, *supra* note 12.

17. *Id.*; for a discussion on violence perpetrated by anti-abortion vigilantes targeting abortion care providers see DAVID S. COHEN & KRISTEN CONNOR, *LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM* (Oxford Univ. Press 2015).

18. Mendoza, *supra* note 12; *June Med. Servs.*, 140 S. Ct. at 2115 (noting that "[a]t the outset of this litigation, those women were served by six doctors at five abortion clinics" and that one physician retired by the time the district court rendered its decision).

19. Mendoza, *supra* note 12.

20. *Id.*

21. Physicians have long been granted third-party standing to assert the constitutional rights of their patients in abortion jurisprudence. See *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (concluding, "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."); *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (June 27, 2016) (holding that a group of abortion care providers successfully established that a Texas abortion law constituted an undue

cuted their missions under the threat of violence aimed at obstructing access to the right to vote and to receive abortion care. The threatening climates Ms. Hamer and Dr. Doe experienced were common to African Americans attempting to vote, as they are to clinicians and patients attempting to administer and receive abortion care.

However, where Congress passed the VRA to thwart the hostilities toward African American voter registration efforts, there remains no comparable safeguard for women who face similar threats as they seek access to abortion care. For years, the chief vulnerability of abortion access has been state-level anti-abortion laws that test the Supreme Court's relatively flexible undue burden standard used to evaluate abortion restrictions. But in the spring of 2019, an additional threat to abortion access emerged. Many states passed new anti-abortion legislation that will likely curtail American women's right to abortion care.<sup>22</sup> These "heartbeat" laws directly repudiate the Supreme Court's precedent recognizing abortion as a fundamental right.<sup>23</sup> Equally troubling is that these laws appear to result from a coordinated effort to restrict women's right to receive abortion care by special interest groups who have a long history of espousing anti-abortion sentiment.<sup>24</sup> In response to this effort, Senator Kamala Harris's presidential campaign posited federal legislation creating a

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burden on women); *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 324 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Mazurek v. Armstrong*, 520 U.S. 968, 969–70 (1997) (per curiam). Yet the Court granted certiorari in part to answer the question whether physicians have third-party standing in *June Medical Services v. Russo*. *June Med. Servs.*, 140 S. Ct. at 2118 (2020); Leah Litman, *June Medical And The End of Reproductive Justice*, TAKE CARE (Oct. 2, 2019), <https://takecareblog.com/blog/june-medical-and-the-end-of-reproductive-justice>. While the Court held that Louisiana waived its argument against third-party standing in *June Medical Services*, the Court noted that this case "lie[d] at the intersection" of its line of precedents allowing third party standing to plaintiffs whose conduct is directly regulated and when a challenged law would indirectly harm a third party. *June Med. Servs.*, 140 S. Ct. at 2119.

22. K.K. Rebecca Lai, *Abortion Bans: 9 States Have Passed Bills to Limit the Procedure This Year*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html>.

23. Anna North & Catherine Kim, *The "Heartbeat" Bills that Could Ban Almost All Abortions, Explained*, VOX (June 28, 2019), <https://www.vox.com/policy-and-politics/2019/4/19/18412384/heartbeat-bill-georgia-louisiana-ohio-2019>.

24. Anne Ryman & Matt Wynn, *For Anti-Abortion Activists, Success of 'Heartbeat' Bills was 10 Years in the Making*, AZCENTRAL (June 19, 2019), <https://www.azcentral.com/in-depth/news/local/arizona/2019///laws-2019-how-heartbeat-bills-passed-ohio-missouri-more/1270870001/>.

preclearance requirement imposed on states with a history of restricting access to the right to undergo an abortion procedure.<sup>25</sup>

The blueprint for this legislation lies in the VRA. Sections 4(b) and 5 of the VRA as originally enacted, provided that jurisdictions with a history of restricting the right to vote, and whose voter rolls reflected less than fifty percent turnout, were required to preclear with the Department of Justice any changes in their laws affecting the right to vote.<sup>26</sup> This meant that the federal government effectively prohibited these covered jurisdictions from changing their voting laws without federal approval. However, in *Shelby County v. Holder*, the Supreme Court struck down the preclearance requirement's accompanying formula, calling into question the constitutional viability of preclearance.<sup>27</sup> The *Shelby County* decision invalidated the preclearance formula because it failed both to limit the scope to recent violators and to establish state conduct that caused current disenfranchisement.<sup>28</sup> In highlighting the failures of the VRA, *Shelby County* created a guideline on which future preclearance measures must be based if they hope to survive judicial scrutiny.

To withstand a constitutional challenge, a preclearance plan to protect the right to receive abortion care must be responsive to the current conditions of abortion care access and abortion-related services, as is suggested by *Shelby County's* criticisms of the VRA. Therefore, to avoid the VRA's stumbling blocks, the abortion protection legislation must clearly define what past state actions constitute an undue burden on women's access to abortion procedures — the standard set in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>29</sup> Further, the legislation must limit its scope only to states that have committed demonstrable violations of the right.

This Note makes the case for such legislation. Part I will provide a history of reproductive rights jurisprudence since *Roe v. Wade*, and introduce the current threat to those rights posed by anti-abortion legislation. Part II will explore the parallels between the right to vote and the right to an abortion procedure that make preclearance legisla-

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25. Ronald Brownstein, *A New Age of Conflict Between Washington and the States*, ATLANTIC (May 30, 2019), <https://www.theatlantic.com/politics/archive/2019/05/kamala-harriss-plan-curb-state-anti-abortion-laws/590593/>.

26. Voting Rights Act of 1965, Pub. L. 89-110, title I, § 2, 79 Stat. 437 (1965), [http://library.clerk.house.gov/reference-files/PPL\\_VotingRightsAct\\_1965.pdf](http://library.clerk.house.gov/reference-files/PPL_VotingRightsAct_1965.pdf).

27. *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013).

28. *Id.*

29. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

tion appropriate. Part III will propose legislation that will comply with *Shelby County*. The Note will conclude briefly with the ramifications associated with the successful enactment of the proposed legislation.

I. REPRODUCTIVE RIGHTS IN THE AFTERMATH OF  
*ROE V. WADE*

A. The Caselaw

The Supreme Court’s seminal decision in *Roe v. Wade* first recognized women’s right to seek abortion care.<sup>30</sup> In *Roe*, a pregnant woman challenged the constitutionality of a Texas criminal abortion law that prohibited abortion care except for the purpose of saving the mother’s life.<sup>31</sup> The Court held that states that criminalize abortion care, without regard to the stage of the pregnancy, violate the Due Process Clause of the Fourteenth Amendment.<sup>32</sup> The Court reasoned that such laws violate the right to privacy, which includes a woman’s right to terminate her pregnancy.<sup>33</sup> This privacy right, “whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, or in the Ninth Amendment’s reservation of rights to the people,” is sufficiently broad to cover a woman’s right to abortion care.<sup>34</sup> The abortion right, however, is not unlimited.<sup>35</sup> The Court affirmed that, although the state cannot casually override a woman’s right to terminate her pregnancy, it has legitimate interests in protecting both the pregnant woman’s health and the potentiality of human life, both of which grow and reach a “compelling” point in the second and third trimesters of the woman’s pregnancy.<sup>36</sup> Although its holding was qualified by subsequent case law, *Roe* was a watershed decision for reproductive rights.

In the decades since *Roe*, the Court has continued to affirm the fundamental right to abortion care, including in 1992 in *Planned Parenthood v. Casey*, in 2016 in *Whole Women’s Health v. Hellerstedt*, and most recently in *June Medical Services v. Russo*. In *Planned Parenthood*, for example, the Court expressly declined the opportu-

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30. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

31. *Id.* at 118–20.

32. *Id.* at 164.

33. *Id.* at 153.

34. *Id.*

35. *Id.* at 154.

36. *Id.* at 162–63.

nity to overturn *Roe*.<sup>37</sup> Heeding former Supreme Court Justice Benjamin Cardozo's early warnings against abandoning precedent, the Court doubled down on abortion care as a right.<sup>38</sup> Importantly, the Court qualified this right, abandoning the confusing distinction between the state's and the woman's interests based on trimester.<sup>39</sup> Instead, the Court drew the line at viability. That is, at any point before the fetus can be sustained medically outside of the womb, the woman has a right to terminate her pregnancy — subject to the compelling interest of the state to “enact regulations to further the health or safety of a woman seeking an abortion.”<sup>40</sup> While qualifying the rule of *Roe* to better accommodate the state's legitimate interests in maintaining a woman's physical and psychological health, the Court emphasized its main holding, that “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden” on the right to abortion care.<sup>41</sup>

One such state regulation that the Supreme Court deemed a “substantial obstacle” imposing an undue burden on women's right to abortion care was Texas's H.B. 2, a law known as a targeted regulation of abortion providers (“TRAP law”).<sup>42</sup> While TRAP laws purportedly protect women's health, medical experts contend that they are unnecessary because abortion is a safe procedure.<sup>43</sup> Leading medical groups, like the American Medical Association and the American College of Obstetricians and Gynecologists, oppose these laws because they jeopardize women's health by decimating access to abortion care.<sup>44</sup>

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37. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 845–46 (1992).

38. *Id.* at 854 (“The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.”).

39. *Id.* at 869–71.

40. *Id.* at 870.

41. *Id.* at 878.

42. *Targeted Regulation of Abortion Providers (TRAP)*, CTR. FOR REPRODUCTIVE RIGHTS (Aug. 28, 2015), <https://reproductiverights.org/document/targeted-regulation-abortion-providers-trap>.

43. *See Whole Women's Health v. Hellerstedt*, ACLU (June 27, 2016), <https://www.aclu.org/womans-health-v-hellerstedt>; Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 217 (2012) (concluding that legally induced abortions are markedly safer than childbirth).

44. *See id.*; *see also* Brief for American College of Obstetricians and Gynecologists and the American Medical Association as Amici Curiae Supporting Plaintiff-Appellees, *Whole Women's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014).

In *Whole Women's Health v. Hellerstedt*, the Court applied the criticisms of these medical groups in its repudiation of H.B. 2 as a violation of the undue burden test.<sup>45</sup> The two delinquent provisions of H.B. 2 were an “admitting-privileges requirement,” which mandated physicians performing or inducing abortions have active admitting privileges at a hospital thirty miles or less from the abortion facility, and a “surgical-center requirement,” which required abortion facilities to meet the “minimum standards . . . for ambulatory surgical centers” under Texas law.<sup>46</sup>

Notably, Justice Stephen Breyer, writing for the Court, remarked on the testimony of Dr. Grossman, an expert witness who conducted research together with other university researchers tracking the number of facilities providing abortion care using information from public sources.<sup>47</sup> Dr. Grossman testified that the prohibitive cost of the surgical-center requirement would cause a decrease in the number of clinics providing abortion care.<sup>48</sup> With fewer clinics, the number of abortions performed by each remaining clinic would likely increase by a factor of about five.<sup>49</sup> Given Dr. Grossman's testimony, the Court agreed that it “stretch[ed] credulity” to think that the seven or eight remaining abortion care facilities would be able to meet the demand.<sup>50</sup> Consequently, the Court found the surgical-center requirement to be an unnecessary and substantial obstacle in the path of women seeking an abortion.<sup>51</sup>

The inquiry in *Whole Women's Health* also found that the admitting-privileges requirement would not realistically address the unlikely risk of abortion-related complications.<sup>52</sup> Abortion care physicians

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45. *See generally* *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

46. *Id.* at 2300; Prior to the enactment of H.B. 2, Texas required physicians providing abortion care to possess either such admitting privileges *or* a patient transfer arrangement with a physician who had them. The remarkable feature of these new requirements was that they eliminated this flexibility.

47. *Id.* at 2316–18.

48. *Id.* at 2316.

49. *Id.*

50. *Id.* (quoting *Whole Women's Health v. Lakey*, 46 F.Supp.3d 673, 682 (W.D. Tex. 2014) (“That the State suggests that these seven or eight providers could meet the demand of the entire state stretches credulity.”)).

51. *Id.* at 2318; *see also id.* at 2315 (“There is considerable evidence . . . that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary.”).

52. *Id.* at 2310–12, 2315 (“[W]hen directly asked at oral argument whether Texas knew of a single instance in which the [admitting-privileges] requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case.”).

struggled to obtain admitting-privileges because hospitals conditioned these privileges on reaching a certain number of admissions per year and other prerequisites “that have nothing to do with [a physician’s] ability to perform medical procedures.”<sup>53</sup> As enforcement of the admitting-privileges requirement increased, the number of facilities providing abortion care dropped by half.<sup>54</sup> Consequently, enforcement of the admitting-privileges requirement created a shift in geographical distribution in which the number of women of reproductive age living prohibitive distances from a clinic increased exponentially.<sup>55</sup> The Court concluded that the dramatic increases in the distance that women of reproductive age live from an abortion clinic, in combination with the drop-off in the number of clinics able to comply with the medically unnecessary admitting-privileges requirement, posed a substantial obstacle to women seeking abortion care.<sup>56</sup> In short, when it weighed the asserted benefits of the law against the burdens it imposed, the Court found that balance tipped against the statute’s constitutionality.

Just months after the Texas TRAP law forced the closure of many of that state’s abortion care clinics, Louisiana’s legislature enacted its own variation on the same law.<sup>57</sup> Act 620 required doctors providing abortion care to hold active admitting-privileges at a hospital that provided obstetrical or gynecological healthcare services located within thirty miles from the location at which the abortion was performed.<sup>58</sup> In a reprisal of *Whole Women’s Health*, physicians and clinics challenged the constitutionality of Act 620 before it could take effect.<sup>59</sup> As the ink dried on the *Whole Women’s Health* opinion, the Court

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53. *Id.* at 2312. Citing a record consisting of undisputed facts from the various amicus briefs and expert witness testimony heard by the district court, the Court noted that “doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit[.]” and determined that “[t]he admitting-privileges requirement does not serve any relevant credentialing function.”

54. *Id.*

55. *Id.* at 2301, 2312 (The Court expressed concern that “as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20.” The Court also noted that “the number of women of reproductive age living more than 50 miles from a clinic has doubled . . . those living more than 100 miles has increased by 150% . . . those living more than 150 miles has increased by 350% . . . and those living more than 200 miles has increased by about 2,800% . . .”).

56. *Id.* at 2310–11.

57. Compare *id.* at 2300 with *June Med. Servs. v. Kliebert*, 250 F. Supp. 3d 27, 53 (M.D. La. 2017); LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a) (2020).

58. § 40:1061.10(A)(2)(a).

59. *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2113 (2020).

found itself once again evaluating whether a state's admitting-privileges requirements were unconstitutional burdens on the right to abortion care.<sup>60</sup>

In *June Medical Services v. Russo*, a plurality of the Supreme Court struck down Act 620.<sup>61</sup> Here, as was the case in *Whole Women's Health*, Justice Breyer writing again for the Court looked to the trial court's factual findings in arriving at the ultimate holding that Act 620's burdens on the right to abortion care outweighed its benefits to women.<sup>62</sup> Ample direct and indirect evidence demonstrated that Louisiana hospital admitting-privileges practices effectively barred the few active abortion care physicians from performing those duties, while providing no useful credentialing function.<sup>63</sup> But the Court did not stop there in its analysis. Justice Breyer's opinion looked next to the law's impact on abortion access for women, finding again that the district court soundly concluded that the Louisiana law "[left] thousands of Louisiana women with no practical means of obtaining a safe, legal abortion, and it would not meaningfully address the health risks associated with crowding and delay for those able to secure an appointment . . . ."<sup>64</sup> Finally, the Breyer opinion cast aside the law's purported benefits, agreeing with the district court that "the State introduced no evidence 'showing that patients have better outcomes when their physicians have admitting privileges' or 'of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment.'"<sup>65</sup> Satisfied with the district court's "significant factual findings," the Court held Act 620 unconstitutional.<sup>66</sup>

The Court's willingness to incorporate the findings of abortion researchers into its undue burden analysis in *Whole Women's Health* gave legal legitimacy to this research and, importantly, centered the

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60. *Id.* at 2112–13.

61. *See generally id.*

62. *Id.* at 2121 ("[W]e find that the testimony and other evidence contained in the extensive record developed over the 6-day trial support the District Court's ultimate conclusion that, '[e]ven if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden.'") (quoting *Kliebert*, 250 F. Supp. 3d at 88) (internal quotation marks in original).

63. *Id.* at 2122–24 (The Court highlighted that the district court in *June Medical Services* found stronger evidence of the undue burden caused by the Louisiana admitting-privileges requirements than found in Texas in *Whole Women's Health*.)

64. *Id.* at 2130.

65. *Id.* at 2132 (quoting *Kliebert*, 250 F. Supp. 3d at 64).

66. *Id.*

real effects of anti-abortion legislation in the undue burden analysis.<sup>67</sup> At the heart of the undue burden test is the question of whether there is a substantial obstacle in the way of women attempting to exercise their fundamental right to receive abortion care.<sup>68</sup> A critical assessment of that question must distinguish sound policy that attempts to promote — *and actually promotes* — reasonable health and safety standards in abortion care from legislation that perniciously uses health and safety standards as barriers to entry. Health and safety requirements for abortion providers cannot be so infeasible that women are effectively denied the procedure altogether. An effective denial must be measured by the relative hardship faced by the most economically and geographically disadvantaged women. This examination proved fundamental in *June Medical Services* as well.<sup>69</sup> The criticisms found in these cases reflected this analysis as the Court was persuaded by the burdens the law placed on poor and rural women.<sup>70</sup>

Even with these triumphs for abortion rights advocates, the question of their scope remains.<sup>71</sup> Chief Justice Roberts provided the critical fifth vote to strike down the Louisiana law, but not without drawing his own line in the sand.<sup>72</sup> Although the Chief conceded that the Louisiana law was too similar to the Texas law to overcome its predecessor's pitfalls, Roberts "spen[t] the bulk of his concurrence on his disdain for *Whole Woman's Health*."<sup>73</sup> In Roberts's view, the disposition of cases like *Whole Women's Health* and *June Medical Services* should rest on a state-by-state analysis of the specific facts relevant to each case.<sup>74</sup> Put plainly, the Roberts concurrence proffers an undue burden standard ill-equipped to strike down TRAP laws categorically; in doing so, it invites more creative anti-abortion care legislation to challenge the limits of the standard.<sup>75</sup>

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67. See generally *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (noting throughout the effects the Texas requirements had and would have on women seeking abortion care).

68. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 878 (1992)).

69. *June Med. Servs.*, 140 S. Ct. at 2130.

70. *Id.*

71. See generally Leah M. Litman, *Unduly Burdening Women's Health: How Lower Courts are Undermining Whole Women's Health V. Hellerstedt*, 116 MICH. L. REV. 50, 50–60 (2017).

72. Gretchen Bortchelt, *Symposium: June Medical Services v. Russo: When a "win" is not a win*, SCOTUSBLOG (June 30, 2020, 12:31 PM), <https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/>.

73. *Id.*

74. *June Med. Servs.*, 140 S. Ct. at 2136, 2157 (Roberts, J., concurring in result).

75. Bortchelt, *supra* note 72.

The Chief Justice’s concurring opinion raises concerns about how TRAP laws will be treated under the undue burden standard. The admitting-privileges and surgical-center requirements may be overly burdensome for the West Texas woman who must travel over 100 miles to access the nearest abortion clinic able to comply with the law.<sup>76</sup> But what about a woman who must travel only fifty miles? The Court determined that six or seven suitable clinics was far too few for a state home to twenty-nine million people,<sup>77</sup> and that an additional \$1.5 million to \$3 million spent by each clinic in compliance was too high a cost. Yet, any change in those numbers may yield a different outcome. In relying on data to inform its decision, the Court did not announce a hard and fast rule. Such a rule may be impossible because the undue burden test depends on a balancing of interests.<sup>78</sup> As Justice Roberts suggests, the subjective nature of the Court’s inquiry leaves the door open for requirements like those in the Texas and Louisiana TRAP laws that pass the Court’s eye test but still obstruct many women’s access to abortion.

#### B. The Threat of Current Anti-Abortion Legislation

When the Supreme Court struck down the TRAP laws in *Whole Women’s Health* and *June Medical Services*, it did so with an appreciation for the reality women seeking abortion care face. That is, the Court considered the real effects the laws’ restrictions would have on women. Geography, income, and race are key determinants of who needs abortion care and who has access to it.<sup>79</sup> As clinics close, poor,

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76. *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2302 (2016)

77. Ashley Lopez, *For Supporters Of Abortion Access, Troubling Trends In Texas*, NPR (Nov. 18, 2019, 5:01 AM), <https://www.npr.org/sections/health-shots/2019/11/18/741117422/for-supporters-of-abortion-access-troubling-trends>.

78. Leah M. Litman, *Potential Life in the Doctrine*, 95 TEX. L. REV. 204, 210 (2017). (“[T]he permissible interest that *Casey* has in mind is the state’s ability to ‘express a preference’ against abortion — instances where some kind of government speech conveys the state’s desired message about abortion and childbirth before a woman makes her decision between the two.”).

79. Because African American women experience unintended pregnancies at three times the rate of white women, these women will likely seek abortion care at a higher rate as well. See Maria Gurra, *Fact Sheet: The State of African American Women in the United States*, CTR. FOR AMERICAN PROGRESS (Nov. 7, 2013), <https://.org/issues/race/reports/2013/11/07/79165/fact-sheet-the-state-of-african-american-women-in-the-united-states/>; see also *The Abortion Barriers and Needs of Black Women*, SCHOLARS STRATEGY NETWORK (Apr. 26, 2018), <https://scholars.org/brief/abortion-barriers-and-needs-black-women>; see also Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J. L. & FEMINISM 255, 258 (1992) (lamenting that “[i]rrespective of what the law might state one’s reproductive rights to be, if money is needed to exercise those rights, most African American women and other poor women of color will not have many. The reproductive rights and choices of poor women of color are fairly limited and sometimes non-existent”). Additionally, the Guttmacher Institute recently

rural, and minority women must rely on the few abortion care providers available within their states because these women often lack the means to travel.<sup>80</sup> These providers are easy targets for opponents of abortion care.

In 2017, clinics provided an estimated ninety-five percent of abortions in the United States.<sup>81</sup> Clinic facilities play a critical role in abortions, and, in 2017, specialized abortion clinics — facilities where half or more of patients received abortion care — provided sixty percent of all abortions, while non-specialized clinics provided thirty-five percent.<sup>82</sup> The number of specialized abortion clinics declined by seven percent from 2014 to 2017.<sup>83</sup> However, the number of non-specialized clinics increased by seven percent over the same period.<sup>84</sup>

Legislation that places an indirect ban on abortion care, such as the aforementioned TRAP laws, restrict access to an already declining slate of suitable abortion care options — meaning women who cannot travel to distant clinics face insurmountable burdens on their right to abortion care.<sup>85</sup> The reduced number of clinics also means that women living in densely populated areas may face “congestion” while attempting to receive abortion care.<sup>86</sup> Congestion occurs when clinics must serve an increased number of patients, increasing wait times or effectively denying service altogether.<sup>87</sup>

United States law must be sensitive to the potentially dangerous impacts that travel distance and congestion have on women’s access to abortion care. Anti-abortion laws that deny women meaningful access to safe and legal abortions do not stop women from seeking alternatives, such as dangerous self-induced abortions “under exceedingly

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found that “[t]he intersecting aspects of an individual’s identity — such as race, socioeconomic status, gender, age, education, state of residence, and rural or urban location — play a role in how barriers to health care affect the ability to obtain abortion services.”; *see also Later Abortion*, GUTTMACHER INST. (Nov. 2019), <https://www..you-can-use/later-abortion>.

80. Jason M. Lindo, Caitlin Myers, Andrea Schlosser & Scott Cunningham, *How Far is Too Far? New Evidence on Abortion Clinic Closures, Access, and Abortions*, NBER Working Paper Series 2 (2018), available at <https://www.nber.org/papers/w23366.pdf>.

81. Rachel K. Jones, Elizabeth Witwer & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. (Sept. 2019), <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017> [hereinafter *Abortion Incidence in 2017*].

82. *Id.*

83. *Id.*

84. *Id.*

85. Lindo et al., *supra* note 80, at 21–22.

86. *Id.* at 22.

87. *Id.*

harrowing circumstances.”<sup>88</sup> Moreover, the incidence of these harrowing circumstances is greater among women of color.<sup>89</sup>

The statistics regarding access to abortion care are not divorced from the legal realities. The anti-abortion laws passed by the Louisiana and Texas legislatures bring this point into stark relief.<sup>90</sup> A critical problem presented by the Louisiana and Texas requirements is that hospitals are not obligated to issue admitting-privileges to abortion care providers.<sup>91</sup> Particularly in Louisiana, abortion providers struggled to obtain admitting-privileges from local hospitals.<sup>92</sup> Thus, the Louisiana law threatened to reduce the number of abortion clinics in the state to just one.<sup>93</sup>

In addition to indirect restrictions on access to abortion care, recent changes in state abortion restrictions have the potential to “legislate abortion out of existence.”<sup>94</sup> States have escalated their anti-abortion laws from indirect attacks on abortion — like the Texas and Louisiana TRAP laws — to more direct constraints on the procedure itself. These latter laws place restrictions on *when* women may seek an abortion.<sup>95</sup> The uptick in the number of anti-abortion laws and in the severity of their restrictions poses an existential threat to women’s fundamental right.

In 2019, nine states passed heartbeat laws that effectively prohibit abortions after six to eight weeks of pregnancy, when doctors can usu-

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88. Brief for Michele Coleman Mayes, *et al.* as Amici Curiae Supp. Pet’r at 20, *June Med. Servs., v. Gee*, *decided sub nom.* *June Med. Servs., v. Russo*, 140 S. Ct. 2103 (2020).

89. *Id.*; for a description of the risks of illegal abortion and its disparate impact on communities of color and other vulnerable populations, see Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 53, 55 (Melissa Murray, Katherine Shaw, & Reva B. Siegel eds. 2019).

90. Leah Litman, *June Medical Services v. Gee and the Future of Abortion Rights*, TAKE CARE (Sept. 16, 2019), <https://takecareblog.com/blog/june-medical-services-v-gee-and-the-future-of-abortion-rights>; Kate Smith, *Abortion in America – Louisiana: “These laws have literally nothing to do with safety”*, CBS NEWS (Oct. 25, 2019, 11:39 AM), <https://www.cbsnews.com/news/louisiana-abortion-case-supreme-court-attorney-says-these-laws-have-literally-nothing-to-do-with-safety/>.

91. Kate Smith, *Religious, legal and medical groups voice opposition to Louisiana abortion law to Supreme Court*, CBS NEWS (Dec. 3, 2019), <https://www.cbsnews.com/news/abortion-supreme-court-case-amicus-briefs-filed-for-june-medical-service-v-gee-louisiana-abortion-case-2019-12-03/>.

92. *Id.*; Elizabeth Nash & Megan K. Donovan, *Admitting-privileges Are Back at the U.S. Supreme Court with Serious Implications for Abortion Access*, GUTTMACHER INST. (Oct. 2, 2019), <https://www.guttmacher.org/privileges-are-back-us-supreme-court-serious-implications-abortion-access>.

93. Smith, *supra* note 91.

94. See Litman, *supra* note 78, at 205.

95. GUTTMACHER INST., *An Overview of Abortion Laws* (Jan. 2020), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

ally start detecting a fetal heartbeat.<sup>96</sup> Many of the laws provide lengthy prison sentences for doctors who perform such abortions. Georgia Governor Brian Kemp, for example, signed a measure that prohibits abortions once a fetal heartbeat is detected with the threat of a ten-year prison sentence for doctors who violate the law.<sup>97</sup> The provocative legislation also has consequences for women who receive outlawed abortions. Because the law recognizes fetuses with a detectable heartbeat as persons guaranteed all the same legal rights that born persons possess, some commentators believe women who obtain the outlawed abortions could face criminal homicide charges.<sup>98</sup> While it is arguably the most extreme abortion ban in the country,<sup>99</sup> the Georgia law is just one of many examples of oppressive heartbeat legislation.

The most startling aspect of the heartbeat law trend is that these laws appear to be the result of a coordinated effort by special interest groups who have a history of fighting for abortion restrictions.<sup>100</sup> From 2010 to 2018, more than 400 abortion-related bills that were introduced in forty-one states were substantially copied from model bills written by special interest groups.<sup>101</sup> The “copycat” bills required women to receive ultrasounds before an abortion procedure, imposed stricter licensing requirements on abortion clinics, and established waiting periods before performing abortions.<sup>102</sup> States passed sixty-nine of these bills into law.<sup>103</sup>

Following the successful use of copycat bills, special interest groups applied the technique on even more restrictive abortion care legislation. The states in which the most copycat legislation was introduced from 2010 to 2018 also passed heartbeat legislation in 2019. Seven of the states that passed heartbeat laws — Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Ohio — accounted for more than one-third of the copying of special interests’ anti-abortion model legislation between 2010 and 2018.<sup>104</sup>

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96. Lai, *supra* note 22.

97. North & Kim, *supra* note 23.

98. Mark Joseph Stern, *Georgia Just Criminalized Abortion. Women Who Terminate Their Pregnancies Would Receive Life in Prison*, SLATE (May 7, 2019, 2:03 PM), <https://slate.com/news-and-politics//hb-481-georgia-law-criminalizes-abortion-subjects-women-to-life-in-prison.html>.

99. *Id.*

100. Ryman & Wynn, *supra* note 24.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

The heartbeat laws may pose a greater threat to women than laws targeting clinics. Rather than limit abortion care by restricting who has meaningful access to it, heartbeat laws place direct and invidious bans on the fundamental right to abortion care itself. The heartbeat laws ban abortion as early as six weeks after gestation, a point when women may not yet realize they are pregnant. These laws have already been challenged in court and it is only a matter of time before they reach the Supreme Court. If the conservative majority of the Supreme Court further dulls *Roe's* precedent, then women seeking abortions will no longer be able to rely on the courts. Instead, women seeking abortion care will require a legislative panacea to validate their rights.

## II. VOTING AND ABORTION AS VULNERABLE FUNDAMENTAL RIGHTS

At first glance, voting and abortion care do not appear to share much in common. Voting is a procedural means to a political end in a representative democracy, whereas abortion is a medical procedure reflecting a woman's choice to terminate her pregnancy. However, both voting and abortion rights are fundamental to notions of individual liberty. The forfeiture of either right threatens both individual autonomy and freedom from arbitrary governmental interference.

Moreover, both rights are vulnerable. From this nation's beginning, politically unpopular groups have fought for representation and the right to choose their government office holders.<sup>105</sup> The successes of these groups have been met with violent opposition and electioneering cunning intended to disenfranchise them.<sup>106</sup> In the same manner, poor and minority women have struggled to retain rights over their bodies.<sup>107</sup> The vulnerability of these rights manifests perhaps

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105. See *Voting Rights: A Short History*, CARNEGIE CORP. OF N.Y. (Nov. 18, 2019), <https://www.carnegie.org/topics/topic-articles/voting-rights/voting-rights-timeline/>.

106. *Id.*

107. See, e.g., PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 41–42 (HarperCollins e-books 1984), [https://caringlabor.files.wordpress.com/2010/12/when-and-where-i-enter\\_-the-impact-of-b-paula-giddings.pdf](https://caringlabor.files.wordpress.com/2010/12/when-and-where-i-enter_-the-impact-of-b-paula-giddings.pdf) (noting that the struggle of black women for bodily autonomy dates back to chattel slavery); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding the involuntary sterilization of a teen-aged rape victim who had a history of poverty and sex work); ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 125–26 (First Vintage Books ed. 1983), <https://legalform.files.wordpress.com/2017/08/davis-women-race-class.pdf> (chronicling the history of abusive forced sterilizations of black girls and women); see also Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609 (2009) (analyz-

most strikingly in the judicial system ostensibly constructed to protect all fundamental rights. The Supreme Court employs the undue burden test as its preferred standard of review for all restrictions on abortion rights<sup>108</sup> and for an increasing number of restrictions on voting rights,<sup>109</sup> rather than applying its strictest level of scrutiny against restrictions as is typical for review of restrictions on fundamental rights. The use of this more flexible test has the predictable effect of denying Americans access to the polls, as well as to abortion clinics — thus rendering concomitant rights vulnerable to infringement.

#### A. Rights That Protect Other Rights

Though there are disputes over the function of rights and the history of rights' language, many agree that rights carry a distinct and normative weight.<sup>110</sup> Rights permit their holders to act in certain ways, even if some social aim would be served by doing otherwise.<sup>111</sup> Rights take priority over non-right objectives, such as stimulating state economies.<sup>112</sup> Moreover, some rights have a higher priority than others: “Your right of way at a flashing yellow light has priority over the right of way of the driver facing a flashing red; and the right of way of an ambulance with sirens on trumps you both.”<sup>113</sup> The right to vote and the right to abortion care should take priority as gatekeepers of other constitutional rights; not only do they express commitments to specific, clearly defined conduct, they also implicate related but distinct conduct.

The Supreme Court long ago enshrined the right to vote among those rights fundamental to all citizens because it is “preservative of all rights.”<sup>114</sup> In a representative democracy, citizens protect their rights by participating in elections.<sup>115</sup> Because the U.S. Constitution confers few affirmative rights directly, most of the social and economic rights that Americans enjoy today are the product of legislation

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ing the relationship between the struggle for the recognition of black women's reproductive rights in the United States and the fight for racial justice).

108. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992).

109. Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 *IND. L. J.* 139, 145–47 (2018).

110. *Id.* at 145–46; LEIF WENAR, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 5.1 (Edward N. Zalta ed. 2015), <https://plato.stanford.edu/entries/rights/#5>.

111. WENAR, *supra* note 110.

112. *Id.*

113. *Id.*

114. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

115. Karlan, *supra* note 109, at 141.

passed by elected officials.<sup>116</sup> The Constitution does not directly protect these rights, nor does it compel legislation to protect them. “These rights are protected because citizens elected public officials who voted to enact laws conferring particular entitlements.”<sup>117</sup>

Similarly, the right to control one’s reproductive capacity is integral to the constitutionally protected expectation of personal privacy. The Supreme Court has said as much time and again.<sup>118</sup> Because abortion rights emanate from this basic right to privacy, the exercise of abortion rights implicates other rights procured through the right to privacy, such as the right to marry, the right to procreate, rights involving family relationships, and the right of control over child rearing.<sup>119</sup> Among the pantheon of privacy rights, no action speaks more to the right to control one’s reproductive capacity than the choice to terminate one’s pregnancy.<sup>120</sup> Thus, any corrosion in abortion rights strikes at “the very heart of this cluster of constitutionally protected choices.”<sup>121</sup>

Many legal scholars also emphasize that abortion care implicates Equal Protection values as well.<sup>122</sup> As Yale Law School professor

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116. *Id.* at 140 (“Rights to health care are provided through Medicare and Medicaid and the Emergency Medical Treatment and Labor Act; workers’ rights are protected through the National Labor Relations Act, the Occupational Health and Safety Act, and Title VII; the right to a clean environment is protected by the Clean Water Act and the Clean Air Act.”).

117. *Id.*

118. *See, e.g.,* *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding the right to procreate to be a fundamental right); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that laws forbidding use of contraceptives unconstitutionally undermines the right of marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that statutes permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single people for the same purpose violates the right to privacy and the Equal Protection Clause); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that that the right of personal privacy includes the right to terminate one’s pregnancy).

119. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977).

120. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 *TEX. L. REV.* 1189, 1200 (2017) (“Autonomy and privacy in pregnancy relate not only to terminating a pregnancy, but also a woman’s dignity to carry a pregnancy to term if she wishes to do so. When the State makes judgments as to who should or should not be granted autonomy over her reproductive decision making, it engages not only in social determinism, but also an unconstitutional and discriminatory practice.”).

121. *Id.*

122. *See* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, And the New Rhetoric of Planned Parenthood v. Casey*, 45 *AM. U. L. REV.* 77, 81 (arguing that the Supreme Court’s decision in *Planned Parenthood* recognized “that reproductive rights implicate all aspects of women’s social and economic lives and that a state’s effort to pigeonhole women impinges on their right to liberty—not just to privacy.”); *see also* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *EMORY L. REV.* 4 (2007) (positing a framework whereby women enjoy reproductive rights through a sex equality application of the right to abortion care); Michele Estrin Gilman, *Welfare, Privacy, And Feminism*, 39 *U. BALT. L. F.* 1, 18 (2008) (“[M]any scholars have argued that reproductive rights

Reva Siegel suggests, when women exercise control over whether and when to give birth, they practice self-governance, repudiating customary notions about women's agency and gender roles.<sup>123</sup> The Supreme Court expressed a similar idea in *Planned Parenthood*: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>124</sup> Without this power of self-determination accessed through their reproductive autonomy, women are prohibited from vindicating "the Constitution's liberty and equality guarantees."<sup>125</sup>

### B. Shared Standards, Shared Vulnerability

Although restrictions on fundamental rights traditionally have received strict scrutiny,<sup>126</sup> the Supreme Court established the undue burden test as the modern standard of review to evaluate restrictions on voting and abortion rights. The link between these two rights under the undue burden standard is fundamental to the justification for creating abortion care access legislation premised on the VRA. If reviewing courts treat restrictions on voting and abortion care rights so similar as to subject them to the same standard of review, then it stands to reason that the outcomes of court challenges to these restrictions suffer from the same limitations.

The Court analyzes voting laws that are not related to the act of voting, such as poll taxes, under strict scrutiny, reasoning that "the

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should be founded on equal protection, rather than privacy, because equality analysis better captures how lack of reproductive choice permanently subordinates women, and only women, as a class.").

123. Siegel, *supra* note 122, at 819.

124. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 852, 928 (1992) (Abortion restrictions rest on an "assumption . . . that women can simply be forced to accept the 'natural' status and incidents of motherhood . . .") (Blackmun, J., concurring in part, dissenting in part). In fact, the High Court has invoked Equal Protection throughout its reproductive rights jurisprudence. *See, e.g., Eisenstadt*, 405 U.S. at 453 (extending right to use contraception to single persons under the Equal Protection Clause); *Skinner*, 316 U.S. at 541 (invalidating statute mandating sterilization of certain felons, implicating "one of the basic civil rights of man," "lest . . . invidious discriminations [be] made against groups or types of individuals in violation of . . . equal protection"). *Cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (concluding that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects").

125. Siegel, *supra* note 122, at 838.

126. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403–07 (1963) (applying strict scrutiny to a denial of unemployment benefits because it infringed on the fundamental right to free exercise of religion); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (applying strict scrutiny to the District of Columbia's one-year residency requirement for welfare recipients because it infringed on the fundamental right to travel); *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (explaining that the Due Process Clause "also provides heightened protection against government interference with certain fundamental rights and liberty interests").

Equal Protection Clause of the Fourteenth Amendment restrains the states from fixing voter qualifications which invidiously discriminate.”<sup>127</sup> However, the Court has increasingly declined to apply strict scrutiny, upholding restrictions on voting by relying instead on a balancing test resembling the undue burden standard.<sup>128</sup> Under this more flexible standard, reviewing courts must evaluate state justifications for “evenhanded restrictions that protect the integrity and reliability of the electoral process” against the burdens on voters imposed by the rule.<sup>129</sup> In other words, the voting restriction must be “narrowly drawn to advance a state interest of compelling importance” only if the burdens are “severe.”<sup>130</sup> Otherwise, a state’s “‘important regulatory interests are generally sufficient to justify’ the restrictions,” as the Court determined in *Burdick v. Takushi*.<sup>131</sup>

Supreme Court abortion precedent is not so bifurcated, but its linear path nonetheless led to an undue burden standard. Although *Roe*’s standard was tripartite in the type of scrutiny the Court was willing to apply based on in which trimester the woman wished to terminate her pregnancy,<sup>132</sup> later precedents smoothed the standard into the undue burden test. Employing reasoning similar to that of *Burdick*, the Court discarded *Roe*’s searching test:

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.<sup>133</sup>

Therefore, when government restrictions superficially intended to improve some aspect of voting or abortion procedures impose too great a cost on those rights, the restrictions are said to create an undue burden. The Court’s adoption of the undue burden test marked its abandonment of the notion that restrictions on the right to vote, or on

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127. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (applying strict scrutiny to a poll tax because it bore no relation to voting qualifications and infringed the fundamental right to vote).

128. Karlan, *supra* note 109, at 145–146.

129. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

130. Karlan, *supra* note 109, at 146.

131. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

132. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

133. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 874 (1992).

a woman's right to terminate her pregnancy, deserved the most searching judicial review.<sup>134</sup> Thus, the undue burden standard is an inquiry often resembling fluid intuition rather than a rigorous analysis of the purpose and effect of the challenged regulations.<sup>135</sup>

The parallel shift from a strict scrutiny standard to an undue burden standard seen in voting rights and abortion rights cases is particularly relevant and emphasizes the need for ameliorative legislation. Important state interests aside, the application of the undue burden standard to voting restrictions increases the threat of court-sanctioned disenfranchisement. Even when courts dole out judgments favorable to disenfranchised people, those judgments may be ineffectual because litigation over voting rights is expensive and may come too late after the damage to the voters has been realized. Congress responded to this possibility by passing the VRA. But for *Shelby County*, the VRA's preclearance requirement would still be a more effective means of combatting disenfranchisement than the federal judiciary. The same is true for abortion care. As evidenced by the case law, the undue burden test almost necessarily denies some women the right to terminate their pregnancies in favor of "important" state interests in protecting the mother and potential life.<sup>136</sup> The Supreme Court has even suggested that the undue burden standard differs from other doctrinal approaches partly *because* the right to abortion care enjoys fewer protections than do other fundamental rights.<sup>137</sup> With the Court's stamp of approval, states may propagate policies denying women their rights, subject only to the imprecise weighing of the state's interests in enforcing the law against the burdens caused therefrom on women's rights.<sup>138</sup> The problem is only exacerbated by the costly and

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134. Compare Karlan, *supra* note 109, at 145, with Chemerinsky & Goodwin, *supra* note 120, at 1200 (arguing that "the constitutional protection of abortion rights is made more difficult by the failure of the Court to provide a persuasive explanation for why reproductive autonomy should be deemed a fundamental right").

135. Karlan, *supra* note 109, at 145.

136. See Litman, *supra* note 78, at 211–12 (noting that states committed to restricting abortion continue to pass anti-abortion legislation in direct resistance to the limits meted out by the undue burden standard under the "guise of expressing an interest in potential life").

137. See Mary Ziegler, *Rethinking an Undue Burden: Whole Women's Health's New Approach to Fundamental Rights*, 85 TENN. L. REV. 461, 482 (2018) (citing *Gonzales v. Carhart*, 550 U.S. 124, 182–83); see also Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223–27 (2009) ("If [*Gonzales v. Carhart*] holds that fetuses are third parties that the government can choose to protect as a 'public health' matter, that would logically lead to a justification for denying the abortion right altogether.").

138. See Litman, *supra* note 78, at 212. Here, Litman suggests that the fate of many abortion laws remains in the hands of courts who must interpret the Supreme Court's undue burden standard jurisprudence: "The question is whether courts will use [the available tools to ensure

time-sensitive nature of abortion care litigation. Consequently, congressional legislation is a better means of protecting women’s right to abortions — just as with voting rights.

### III. THE REPRODUCTIVE RIGHTS ACT<sup>139</sup>

In enacting the VRA’s preclearance requirement, Congress deemed previous voting legislation and court decisions inadequate in protecting voting rights because neither safeguard could keep pace with state-level voter disenfranchisement.<sup>140</sup> The speed at which state legislatures pass copycat legislation and the bold introduction of heartbeat legislation slow the administration of reproductive justice in ways that resemble the obstacles to voter enfranchisement.<sup>141</sup> Therefore, the VRA preclearance requirements are a good fit for application to restrictions on abortion care.

#### A. VRA Preclearance and *Shelby County* as Blueprints

The preclearance requirement in the VRA was revolutionary. For the first time, Congress usurped states’ province over establishing voting standards. Through its preclearance requirement, the VRA effectively prohibited covered jurisdictions from changing their voting laws without federal approval.<sup>142</sup>

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that states do not use their ability to express respect for potential life as a means to impede access to abortion] and will treat the legal standards governing abortion as law, or whether they will instead effectively overrule *Casey* and *Whole Woman’s Health* by giving states free rein to legislate when states purport to be vindicating an interest in potential life.” *Id.*

139. While Congress vested its authority to enact and enforce the VRA in the Fifteenth Amendment, there is no direct textual justification for an abortion law proscribing the same remedies. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (“Congress assumed the power to prescribe these remedies from s[ection] 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by ‘appropriate’ measures the constitutional prohibition against racial discrimination in voting.”). Although this note does not endeavor into a discussion on the constitutional bases for congressional action, it is useful to note that there is precedent for use of the Commerce Clause for federal abortion care legislation. This proposed legislation would likely be grounded in the Commerce Clause as well. *See* *Partial-Birth Abortion Ban Act of 2003*, Pub. L. 108–105, 117 Stat. 1201 (2003) (Any physician “who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both”). An additional basis for legislation may be found in Congress’s enforcement authority through section 5 of the fourteenth amendment, which permits Congress to enact legislation enforcing the provisions of the fourteenth amendment. U.S. CONST. amend. XIV, § 5.

140. *Katzenbach*, 383 U.S. at 312–14.

141. In *Katzenbach*, the Court cited the history of a slow, onerous litigation process for validating voting rights and fast-acting state lawmakers who engaged in new discriminatory practices when old ones were struck down by the courts. *Id.* at 314.

142. *See generally* *Voting Rights Act* § 2.

Although it was reauthorized five times over its fifty-four-year history,<sup>143</sup> the VRA did not go without its challenges. The first such challenge in the Supreme Court occurred just one year after the VRA was enacted. In *South Carolina v. Katzenbach*, the Court upheld the VRA, concluding that such an “uncommon exercise of congressional power” could be justified by “exceptional conditions.”<sup>144</sup> The Court approvingly concluded that “[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.”<sup>145</sup>

The “exceptional conditions” and “unique circumstances” reiterated in *Katzenbach* are those lived by Fannie Lou Hamer and other African Americans who endured hostile resistance while attempting to vote. Those circumstances underscored the ineffectiveness of the courts in protecting voting rights. Not only did recalcitrant state legislatures move too swiftly in enacting laws to obfuscate court orders, but Supreme Court precedent creating exceptions for laws that “protect[ed] the integrity and reliability of the electoral process”<sup>146</sup> allowed literacy tests and other restrictions with disparate negative impacts on African American enfranchisement to exist unopposed by the federal judiciary.<sup>147</sup>

However, by the time the Court decided *Shelby County* in 2013, enthusiasm for the preclearance provision of the VRA waned.<sup>148</sup> In

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143. *Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUST. (Dec. 21, 2017), <https://www.justice.gov/crt/section-4-voting-rights-act> (“In 1975, the Act’s special provisions were extended for another seven years, and were broadened to address voting discrimination against members of ‘language minority groups,’ which were defined as persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”) [hereinafter *Justice Dep’t*].

144. *Katzenbach*, 383 U.S. at 334.

145. *Id.* at 335 (“Congress knew that some of the States covered by s[ection] 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.”).

146. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

147. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 536 (2013) (“[States] began to enact literacy tests for voter registration and to employ other methods designed to prevent African-Americans from voting. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down.”); BROOKS, *supra* note 4, at 38 (noting that white leaders in Mississippi devised strategies, such as literacy tests, grandfather clauses, poll taxes, and “the widespread practice” of publishing registration applicants’ names in the newspaper, to thwart Fannie Hamer and other blacks attempting political engagement).

148. Vann R. Newkirk, *How Shelby County v. Holder Broke America*, ATLANTIC (Jul. 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

*Shelby County*, the Court denounced the coverage formula in the VRA as unconstitutional “in light of current conditions.”<sup>149</sup> Once deemed “rational in both practice and theory,”<sup>150</sup> the coverage formula underlying the preclearance provision as of 2013 failed to account for current political conditions in the Court’s view.<sup>151</sup> Specifically, the Court reasoned that because the VRA exacted its desired effect over the previous fifty years, voter turnout and registration rates in covered jurisdictions “approached parity” and “blatantly discriminatory evasions of federal decrees” were infrequent.<sup>152</sup>

Ironically, the Court appeared to conclude that the VRA’s effectiveness in combatting disenfranchisement of racial minorities put the constitutionality of the law in doubt.<sup>153</sup> What tipped the scales, however, was Congress’s reliance on an out-of-date record of voter suppression violations by covered jurisdictions.<sup>154</sup> Although Congress updated the coverage formula to reflect the then-existing conditions when it re-authorized the law in 1970 and 1975, it failed to do so in its 1982 and 2006 reauthorizations.<sup>155</sup> Moreover, the Court introduced the principle of equal sovereignty<sup>156</sup> to support its skepticism of federal legislation that singles out states for differential treatment.<sup>157</sup> In the Court’s view, a coverage formula that did not reflect the most up-to-date conditions could not justify such a “dramatic departure from the principle that all States enjoy equal sovereignty.”<sup>158</sup>

While the Court’s ruling in *Shelby County* may have overlooked the possibility that Congress left the coverage formula intact to continue the voter enfranchisement gains the VRA made and to prevent

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149. *Shelby Cnty.*, 570 at 552–53.

150. See *Katzenbach*, 383 U.S. at 330.

151. *Shelby Cnty.*, 570 U.S. at 532.

152. *Id.* at 531.

153. *Id.* at 553. Or as the late Justice Ginsburg famously, if not aptly, characterized it: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.” *Id.* at 590 (Ginsburg, J., dissenting).

154. *Id.*

155. *Justice Dep’t*, *supra* note 143.

156. Equal sovereignty of the states is a doctrine rooted in the notion that all states enjoy equal footing for states newly admitted into the Union. See Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 *DUKE L. J.* 6, 1095–96 (2016). However, the Court’s invocation of the doctrine in *Shelby County* has remained controversial. *Id.* at 1089; Abigail B. Molitor, *Understanding Equal Sovereignty*, 18 *U. CHI. L. REV.* 1839, 1840 (2014).

157. *Shelby County*, 383 U.S. at 542 (quoting *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (“[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”)).

158. *Id.* at 535, 556.

backsliding,<sup>159</sup> the Court's opinion provided a framework for future ameliorative legislation designed to stymie state practices that infringe on other fundamental rights. A law requiring states to pre-clear changes to their abortion care laws with the federal government likely *must* comport itself to the requirement that it be tailored to the "current conditions" of state anti-abortion efforts due to the equal sovereignty issue the Supreme Court raised.

## B. Components to the Legislation

Despite *Shelby County*, the structure of the VRA is informative. Congress passed the VRA because states restricted the right to vote based on race and courts were not equipped to stop them. By design, the VRA's strength is in acting as a de facto court by enjoining state action and judging state laws before they take effect. The proposed legislation (the "Reproductive Rights Act" or the "RRA") should mirror the VRA in this regard. The voting rights and reproductive rights questions share commonalities not only as fundamental rights considered under similarly imperfect standards, but also in the public policy problems they present. Just as Congress passed the VRA to address violations of voting rights against the African American electorate,<sup>160</sup> the Reproductive Rights Act must protect women against state violations of their right to abortion care.

This Note proposes four main components to the legislation. *First*, the legislation will re-affirm the right to seek and receive abortion care and related services found in *Roe v. Wade* and its progeny. *Second*, the legislation will set forth the requirement that states with a demonstrated history of restricting access to abortion care in violation of Supreme Court precedent be subject to a preclearance requirement whereby any abortion-related laws passed by legislatures of these states be subject to Department of Justice approval. *Third*, the proposed legislation will outline the criteria, or coverage formula, under which states qualify as violators of the right to abortion care. *Fourth*, the legislation will allow states to demonstrate that they should not be included in the preclearance requirement.

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159. *Id.* at 559–560 (Ginsburg, J., dissenting).

160. And later Congress added discrimination against members of language minority groups. See *Justice Dep't*, *supra* note 143.

## 1. Reaffirming the Right

The first section of the Reproductive Rights Act must follow section two of the VRA and make it unlawful for any state to impose restrictions on women's right to abortion care. Section two of the VRA states:

No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.<sup>161</sup>

Although the Fifteenth Amendment to the Constitution already forbids the abridgement of the right to vote on the basis of race or previous condition of servitude, the amendment does not speak to what constitutes such an abridgement.<sup>162</sup> Thus, Congress included this language to the VRA to fortify the right to vote and narrowed the scope of the VRA to standards, practices, and procedures of states and political subdivisions.

The Reproductive Rights Act must similarly declare it unlawful for any state to impose standards and practices to deny women the right to abortion care. Such a requirement differs little from what the Supreme Court has already stated about the right to terminate one's pregnancy. The Court has affirmed that abortion is a fundamental right in several key decisions.<sup>163</sup> However, the Court's use of the undue burden standard to balance the right with state interests evidences its limitation. Furthermore, the history of violence toward abortion care seekers and providers, the sophisticated copycat legislation strategy employed by powerful anti-abortion special interest groups, and the brazen imposition of heartbeat legislation by an increasing number of states provide for exceptional conditions for which congressional intervention is necessary. Therefore, restrictions on abortion rights must be held to a higher standard.

## 2. The Preclearance Provision

The Reproductive Rights Act will set forth the requirement that states with a demonstrated history of restricting access to abortion care in violation of Supreme Court precedent be subject to a

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161. Voting Rights Act § 2.

162. U.S. CONST. amend. XV.

163. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992); *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020).

preclearance requirement, whereby any abortion-related laws passed by legislatures of these states be subject to Department of Justice approval.

When Congress enacted the VRA, it did so because racial discrimination in voting was more prevalent in certain areas of the country.<sup>164</sup> As a response, Congress included four special provisions to provide targeted remedies: (1) a five-year suspension of “a test or device,”<sup>165</sup> as a prerequisite to register to vote; (2) required review of any change affecting voting made by a covered area either by the United States District Court for the District of Columbia or by the Attorney General of the United States; (3) the ability of the Attorney General to certify that specified jurisdictions also required the appointment of federal examiners who would prepare and forward lists of persons qualified to vote; and (4) the authority of the Attorney General to send federal observers to those jurisdictions that had been certified for federal examiners.<sup>166</sup>

The RRA must replicate the first two special provisions of the VRA, but with a focus instead on burdensome requirements for abortion care providers rather than “tests and devices.” Admitting-privileges and surgical-center requirements like those seen in *Whole Women’s Health* and *June Medical Services*, along with heartbeat legislation establishing criminal liability for terminating a pregnancy after a fetal heartbeat can be detected, are chief among the burdensome requirements that the RRA should suspend.

Like the “tests and devices” included in the VRA, admitting-privileges and surgical-center requirements have the potential to severely limit access to safe exercise of a fundamental right. And although some of these requirements on abortion care providers were struck down in *Whole Women’s Health* and *June Medical Services*, those were just a few iterations of pernicious copycat laws designed to exploit the inherent limitations of the undue burden standard.<sup>167</sup> It remains conceivable that less stringent admitting-privileges and surgical-center requirements will virtually bar many women from exercising

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164. *Justice Dep’t*, *supra* note 143.

165. The VRA’s definition of a “test or device” included such requirements as the applicant being able to pass a literacy test, establish that he or she had good moral character, or have another registered voter vouch for his or her qualifications. *Id.*

166. *Id.*

167. Ryman & Wynn, *supra* note 24.

their right to abortion care, but will also pass muster under the flexible undue burden standard.

Heartbeat laws likewise pose a great enough threat to women's right to abortion care to be included in a special provision suspending the equivalent of "test and devices" hindering the right. Unlike such devices used to disenfranchise voters and restrictive requirements on abortion clinics, the Supreme Court has not evaluated heartbeat legislation. Moreover, the laws were designed to directly repudiate the fundamental holding of *Roe v. Wade*. Heartbeat laws place direct bans on the fundamental right to abortion care itself because they ban abortion care as early as six weeks after gestation.<sup>168</sup> Such restrictions must be explicitly rejected by the RRA because their primary purpose and effect is to strip women of their right to abortion care before they are aware they are pregnant.

Notably, only state surgical-center and admitting-privileges requirements should be suspended for the five-year period. State heartbeat legislation should be banned wholesale given the particular burden the laws pose on a woman's right to choose abortion care because she may not have the knowledge that such a choice is necessary.

The third and fourth special provisions of the VRA are unnecessary to include in the RRA because they were created to ensure that state polling places were compliant with the law.<sup>169</sup> Furthermore, Congress could count the number of registered voters around the country as a metric for the efficacy of state voting procedures. Congress need not rely on any analogous registration to determine the effect of state abortion legislation. The RRA should instead include a special provision allowing Congress to commission examiners to leverage the type of geographical data that was so pivotal in *Whole Women's Health* to monitor state abortion legislation.<sup>170</sup>

### 3. The Coverage Formula

The proposed legislation will outline the criteria, or coverage formula, under which states qualify as violators of the right to abortion care. As enacted in 1965, Section 4(a) of the VRA established a two-element coverage formula to identify the areas of the country to

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168. *Heartbeat Bans*, RH REALITY CHECK (May 30, 2019), <http://data.rhrealitycheck.org/law-topic/heartbeat-bans/>; see also *Roe*, 410 U.S. at 113 (acknowledging that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.")

169. *Justice Dep't*, *supra* note 143.

170. *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–11 (2016).

which the four special provisions would apply. The first element of the formula was whether, on November 1, 1964, the state or a political subdivision of the state maintained a “test or device” restricting the opportunity to register and vote.<sup>171</sup> The second element of the formula was whether the Director of the Census determined that less than fifty percent of persons of voting age were registered to vote on November 1, 1964, or that less than fifty percent of persons of voting age voted in the presidential election of November 1964.<sup>172</sup>

The coverage formula in the RRA will embody the two-element formula in the VRA. The first element should be satisfied if, on January 1 of the law’s effective year, a state imposed an admitting-privileges requirement or a surgical-center requirement restricting access to abortion care. The second element will be satisfied if less than forty-eight percent of women in a state live in a county with an abortion facility or if the number of clinics in a state drops below six — the medians for each measure in 2017.<sup>173</sup>

Both elements are critical to meeting the dictates of *Shelby County*, as the RRA must do. If a state meets the first element but not the second, then it can hardly be argued that the mere imposition of medical regulations violates anyone’s rights. As a routine practice, states may permissibly regulate medical procedures. The principle goal of the RRA should be to mitigate the outcomes stemming from restrictions enacted with the purpose or effect of limiting access to abortion care. As such, a law that punishes states for enacting routine regulation without evidence that rights are violated would not adequately respond to current conditions. Congressional action would be likewise improper if the second element is met in the absence of the first because the naked incidence of abortion clinics evades warranted suspicion without the context of unscrupulous legislation. In other words, the mere fact that a state may have fewer than six clinics does not mean that it is the result of that state’s attempt to restrict abortion access.<sup>174</sup>

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171. *Id.*

172. *Justice Dep’t, supra* note 143. In “fully covered” states, the state itself and all political subdivisions of the state are subject to the special provisions. In “partially covered” states, the special provisions applied only to the identified counties. Voting changes adopted by or to be implemented in covered political subdivisions, including changes applicable to the state as a whole, was subject to review under Section 5. *Id.* Because the most pernicious abortion laws are imposed statewide, a distinction in partial and full coverage is not applicable.

173. *Abortion Incidence in 2017, supra* note 81.

174. For example, there were four clinics in Washington, D.C. as of 2017, but those four clinics serve a population of approximately 705,000 people. By contrast, in Oklahoma, there

Essential to the constitutionality of the formula is the imperative to update its elements. Special interests in the anti-abortion movement are likely to push new substantive law not currently covered under the proposed legislation. Additionally, social, economic, and other trends may stimulate material changes in the number of clinics — or the percentage of women with access to them — in states and counties. A fixed formula cannot reflect these changes over time, as the Court admonished in *Shelby County*.<sup>175</sup> Therefore, the RRA must avoid the VRA’s fatal flaw by providing for a mechanism to monitor which state laws invidiously discriminate against abortion rights and what the effects they impose on access to clinics. Congress’s commissioned examiners must be given the responsibility for determining whether state abortion requirements restrict access to abortion and the effects of those laws based on geographical and other relevant empirical data.

#### 4. The Bail-Out Provision

Like the VRA, the RRA may also suffer from an over-inclusiveness problem. To avoid over-inclusiveness, a later amendment to the VRA created a “bail-out” provision.<sup>176</sup> Under this provision, a jurisdiction that successfully sought bail-out demonstrated to a three-judge panel that the jurisdiction avoided a litany of situations within a ten-year period prior to the bail-out request.<sup>177</sup> The bail-out provision provided relief for states that once met the elements of the coverage formula but had not in the preceding decade. Given the equal sovereignty issue the VRA presented, the bail-out provision helped ensure that the VRA applied only to jurisdictions guilty of discriminatory polling practices.

Borrowing from the VRA, the RRA should also include a bail-out provision. The goal of the bail-out provision is to allow a state — whose conduct does not justify federal interference — recourse to demonstrate this fact and exempt itself from federal preclearance authority. Some notable requirements for states to demonstrate are: (1) there are no pending lawsuits that allege violation of abortion care

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were also four clinics, but fifty-three percent of women between the ages of fifteen and forty-four lived in a county without a clinic. See *Abortion Incidence in 2017*, *supra* note 81; U.S. CENSUS BUREAU, *2019 Population Estimate for the District of Columbia* (accessed Feb. 1, 2020, 12:00 PM), <https://www.census.gov/quickfacts/DC>.

175. *Shelby Cnty. v. Holder*, 570 U.S. 529, 552–53 (2013).

176. *Justice Dep’t*, *supra* note 143.

177. *Id.*

access; (2) there have been no adverse judgments in lawsuits alleging infringement of access to abortion care; (3) no change affecting access to abortion care has been the subject of an objection by the Attorney General of the United States or the denial of a declaratory judgment from the U.S. District Court for the District of Columbia; (4) no requirement on physicians or clinics has been used within the state for the purpose or with the effect of limiting access to abortion care; and (5) all changes affecting access to abortion care have been pre-cleared prior to their implementation.

These bail-out criteria ensure that a state has not violated the Reproductive Rights Act. Moreover, even if a state has avoided violation of the tenets of preclearance, the criteria include states whose abortion laws either are pending before a court or previously received an adverse judgment. This additional criterion is significant because it allows federal authorities to account for anti-abortion laws not yet included in the coverage formula but that nonetheless impermissibly deny women access to abortion.

#### CONCLUSION

Women seek abortion care for diverse reasons. The Supreme Court declared abortion care a fundamental right in 1973 because privacy and bodily autonomy, like the right to vote, sit at the core of personal liberty. Despite their respective places in the pantheon of individual liberties, abortion and voting have been besieged by those interested in limiting access to fundamental rights. The history of violent and deft political opposition to African Americans' access to the ballot box moved Congress to exert unprecedented authority over states when it passed the VRA preclearance requirement. The history of violence toward abortion care seekers and providers in concert with the coordinated effort by powerful anti-abortion special interest groups to create state anti-abortion legislation are exceptional conditions for which similar congressional intervention is necessary. It is true that many women have the means to travel great distances and therefore may not fear these threats. However, many poor and rural women, urban women, and women of color will not have access to safe abortion care if these threats are not quickly neutralized. It is also true that VRA preclearance was not without controversy, and the Supreme Court eventually invalidated it. The measure was not invalidated because it did not work or because it inherently violated the strictures of the Constitution, but because Congress failed to update

*Facing Current Conditions*

its formula to reflect current conditions of voter disenfranchisement. The legislation proposed in this note predicts and accounts for that limitation. And in doing so, the Reproductive Rights Act promises to ease the heavy burden on those seeking abortion care.

