NBA
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2020

A YEAR OF CHALLENGES THROUGH THE PRISM OF SOCIAL JUSTICE

Kneel For Justice

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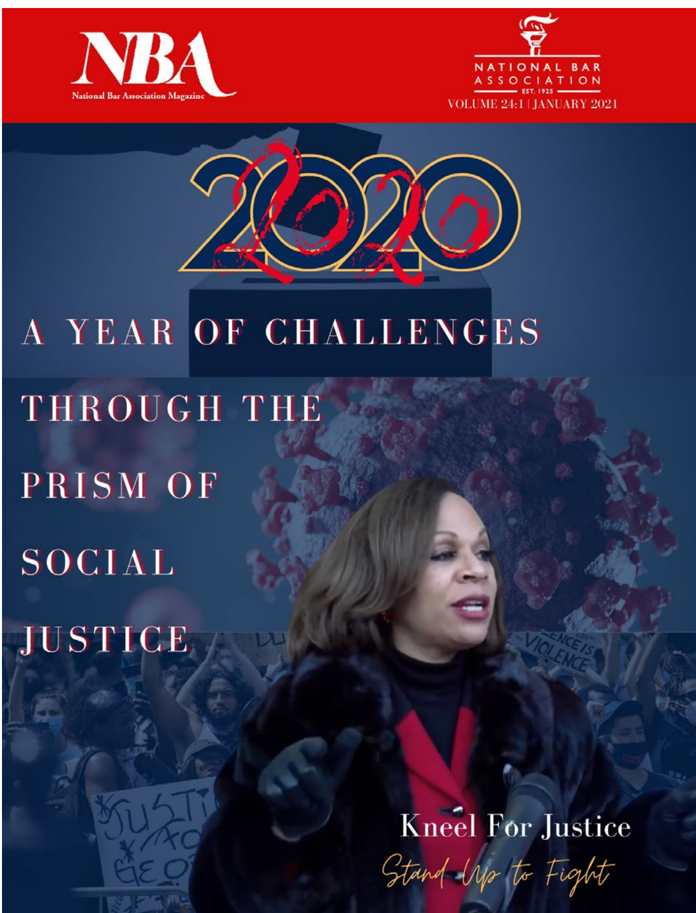

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MESSAGE FROM THE PRESIDENT

President CK Hoffler
The National Bar Association, 2020

Photography by Matt Odom

I pray that you and your families are safe and healthy during these uncertain times. COVID has changed how we live our lives and practice law, but it has not killed our ability to execute our aggressive social justice agenda this year. If anything, COVID and related challenges have reinforced the critical need for us to kneel for justice but stand up to fight!

The first half of this bar year has proven to be a success amid numerous triumphant NBA initiatives. Our 2020 Wiley Branton Symposium featured nationwide election protection training, equipping countless NBA lawyers and our partners to serve as election protection lawyers, poll watchers and hotline workers all across the country on Election Day. The NBA's efforts certainly contributed to record voter turnout in the 2020 Presidential Election, as well as the historic Senate run-off election in Georgia in January 2021. For the first time in our history, the NBA also had an Election Protection Fellow. The Fellow coordinated our efforts to protect the right to vote in response to the clarion call of the late Congressman John Lewis and Reverend Jesse Jackson on March 2, 2020. Both individuals provided valuable guidance to me about our civil and voting rights agenda during my bar year. These civil rights icons reminded me that we fought to get the right to vote and that it was up to African American lawyers to lead the charge in protecting the right to vote.

As the 78th President of the NBA, I have committed my time to increasing the NBA's public reach. I participated in numerous radio and TV interviews promoting the NBA's mission. These media events provided worldwide opportunities to share the NBA's vast history. I engaged these platforms as a vehicle for promoting my administration's efforts to address three pandemics- COVID-19, police brutality, and voter suppression.

The NBA's talented and dynamic lawyers have hosted numerous webinars on pressing issues including "Understanding and Adjusting to Remote Education in the COVID Era," The YLD program, "What Does Voter Suppression Look Like?", and "Managing Your Stress and Maintaining Your Mental Health in the COVID Era."

Additionally, our impactful townhall events including "Defining and Executing Your Voting Plan," "Corporate America Has Failed Black America," and "Honoring Living Legends" featured incredible professionals, trailblazing lawyers, national icons, and a wealth of knowledge and information. And, who could forget our historic townhall meeting with Vice-President Kamala Harris! That event represented the first time in American history that a Vice-Presidential candidate addressed her NBA colleagues. Indeed, the NBA has made history on so many levels!

We have also entered a monumental partnership with legal research giant, LexisNexis (LN) that will initially provide the opportunity for LN, as our Legal Technology and Rule of Law Partner, to support my Presidential areas of focus this year, election protection, police brutality reform, and COVID-19, and to explore other collaborative efforts including the potential to develop tools to combat systemic racism and racial inequality. LexisNexis stands firmly against racism and discrimination. Our partnership with them will be a key component of their broader efforts to continue to advance the rule of law, to promote equality, inclusion and diversity within our business and in the communities we both serve.

The National Bar Association and Arnold & Porter (A&P) support racial justice initiatives, including addressing pipeline diversity issues in BigLaw (e.g., the AmLaw 200 law firms). To that end, the NBA and Arnold & Porter have agreed to a three-year partnership to develop and implement an attorney advancement program specifically intended to facilitate the advancement and retention of Black attorneys in BigLaw firms. The Charlotte E. Ray Academy is named after the first Black woman lawyer in the United States. It is designed to support Black attorneys in BigLaw during their first three years at the firm and will engage attorneys in monthly courses for a one-year period. Charlotte E. Ray Fellows will also benefit from Career Advancement, Networking, and Mentoring/Service.

The NBA has also worked to increase its footprint amongst entering barristers by promoting our free law student membership and offering law students free attendance to some of our webinars and programming.

Recognizing the National Bar Association's profound history and appreciating the laborious efforts of the change agents before me, I am filled with immense gratitude and pride serving as the 78th President of the NBA. Not merely a social group or professional affiliation, the NBA creates leaders and effectuates meaningful change. I am honored to lead the NBA during this tumultuous time in our nation's history and am confident that we can harness the power of our membership to tackle the pandemics of our day - COVID-19, Police Brutality, and Election Suppression. These three issues have had an unprecedented effect on our communities, and I have charted a plan of action to address these issues during my administration. I am particularly proud about the surge in YLD participation in the NBA. Indeed, the YLD are our future and I am delighted that 6 officers of the NBA are YLD members and unprecedented numbers of YLD members have signed up for Committees and are aggressively promoting the NBA locally, state-wide and nationally.

If you are interested in getting actively involved with the NBA, contact Jamie Boston at jamie.boston@yahoo.com to explore options for NBA committee service. Also, if you are aware of events or opportunities for the NBA to use its voice to call for change, please feel free to email those suggestions to communications@nationalbar.org. We have work to do to protect our communities and move our people forward. I am calling on all African American lawyers to kneel for justice but stand up to fight!

CK Hoffler Leads NBA Lawyers in Historic Litigation in Georgia

By Jonathan Savage

The words of Reverend Jesse Jackson, "[*i*]*n politics, an organized minority is a political majority,*" motivated CK Hoffler to lead the effort to combat voter suppression in the State of Georgia. As the proud president of the National Bar Association (NBA), President Hoffler's first thought was to rely on the talent of the dynamic attorneys of the NBA in fighting the wrongful purging of nearly 200,000 votes in Georgia. Her first call in putting together a formidable team of attorneys was to the iconic Honorable Fred D. Gray, Sr. Born to be a civil rights attorney, Mr. Gray's legal career spans a time period of over 60 years. Shortly after graduating from law school, he began a dynamic civil rights career in 1954. He represented Claudette Colvin, a 15-year old African American high school student who refused to give up her seat on a city bus in Montgomery, Alabama in March 1955. Also in 1955, Gray represented Mrs. Rosa Parks who was arrested because she refused to give up her seat on a bus to a white man, an event igniting the Montgomery Bus Boycott and *City of Montgomery v. Rosa Parks*. Gray was also Dr. Martin Luther King, Jr.'s first civil rights attorney.

> *"It's a tough fight, but there's no better fight that I'd like to have than representing [these groups] because they represent the people…"*

Sworn in as the 78th President of the NBA on July 29, 2020, CK Hoffler is a trailblazing trial lawyer in her own right and has made a lifetime commitment to civil rights. She is also counsel to civil rights icon Reverend Jesse Jackson and has represented him and the Rainbow PUSH and related organizations for the past 30 years. She has received numerous accolades and awards for outstanding contributions to her profession and philanthropy. Along with CK Hoffler and Fred Gray, the plaintiffs' legal "dream team" included Gerald Griggs of Georgia, Maria Banjo of Georgia, Jonathan Savage of Missouri, Jeanne Mirer of New York, Brittany Brown of Louisiana, and Brittanie Allen of Georgia. Poised with the support of NBA attorneys, on December 2, 2020, the Black Voters Matter Fund, Transformative Justice Coalition (TJC), Southwest Voter Registration Education Project, and the Rainbow Push Coalition (Plaintiffs) filed a complaint against Georgia Secretary of State Brad Raffensperger alleging Georgia unlawfully purged almost 200,000 voters from the voter rolls based on the incorrect assumption the voters had moved. The lawsuit specifically calls out the Georgia Secretary of State's Office for not using the United States

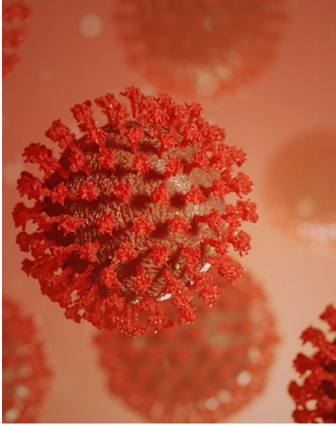
Postal Service's national change of address registry to verify whether the voters filed for a change of address, causing 68,930 voters to allegedly be wrongfully purged.

Plaintiffs believe that everyone who properly registered in the State of Georgia should be allowed to vote. "It's a tough fight, but there's no better fight that I'd like to have than representing [these groups] because they represent the people," President Hoffler exclaimed at a recent press conference discussing the litigation. President Hoffler also recounted a conversation with Civil Rights leaders Reverend Jesse Jackson and Congressman John Lewis in which they recalled that many bled and died in the fight for people of color to be able to vote and she charged the crowd, "No one said the fight would be easy, but we stand on the shoulders of Thurgood Marshall, Constance Baker Motley, Charles Hamilton Houston, Johnny Cochran, Willie Gary, and so many others in the fight and we don't have the right to say no to standing up to fight for justice!"

While on December 16, 2020, Federal District Court Judge Steve Jones denied the Plaintiffs' request for an injunction in this case, the Judge strongly encouraged the Parties to meet to address what the Court acknowledged were discrepancies between Plaintiffs' expert lists and the Secretary of State's list as to almost 200,000 voters. The battle to resolve the discrepancy continued through the runoff election on January 5, 2021, with such relentless leaders like Barbara Arnwine, president and founder of the Transformative Justice Coalition, Lydia Camarillo, president, Southwest Voter Registration Education Project and LaTosha Brown co-founder of Black Voters Matter Fund. In her commitment to *kneel for justice, but stand up to fight,* President Hoffler is steadfast in her pledge to see the fight until the end to make sure that citizens are not denied their lawful right to vote. She proclaims, "while the Judge has denied the injunction, the real fight has just begun."

CK Hoffler is a seasoned trial lawyer and the CEO of the CK Hoffler Firm, a trilingual law firm (English, French and Spanish) based in Atlanta Georgia. She specializes in commercial litigation, opioid litigation, catastrophic injury, civil rights, global commercial transactions, medical negligence, wrongful death, and employment cases. Ms. Hoffler is licensed in Georgia, Florida, Virginia, D.C., and Pennsylvania. To date, CK Hoffler (and her teams) has tried and/or settled cases totaling over $800 million. An accomplished attorney, Ms. Hoffler was previously a partner at Edmond, Lindsay & Hoffler, LLP and a partner at the Willie Gary Firm in Florida, where she ran the commercial and international litigation practice for 13 years. She is also counsel to civil rights icon Ms. Hoffler received a JD from Georgetown University, BA from Smith College and studied at College du Leman, University of Geneva in Switzerland and Branksome Hall in Canada. She speaks French fluently and is proficient in Spanish and Portuguese.

Jonathan Savage is an attorney in the St. Louis, Missouri area. Mr. Savage is the managing partner of Savage Law Group, LLC. His practice revolves around a variety of legal issues including medical malpractice, civil right, wrongful death, and personal injury claims. Mr. Savage serves as Deputy General Counsel for the National Bar Association (2020-2021). Currently, he serves as a board member on Mister HBCU Kings. Mr. Savage earned a Bachelor of Science degree in wildlife biology from Lincoln University of Missouri. He received his Juris Doctorate from North Carolina Central University School of Law, in 2014.



COVID-19 Pandemic and the Digital Divide: The NBA On The Frontlines

By Marlon A. Primes

When Tricia "CK" Hoffler was sworn in as president of the National Bar Association, she identified three priorities that she plans to address during the bar year: 1). Police Brutality

2). Election Protection; and 3). Covid-19. Laverne Largie, Karen Evans, and I are honored to serve as Co-Chairs of NBA Covid-19 Task Force, which has provided personal protective equipment (PPEs) to a variety of cities around the country and sponsored a webinar series with the NBA Health Law Section to address mental health wellness in our communities.

News broadcasts, online news publications, and social media remind us about the importance of using PPEs and wellness programs to reduce the large number of Americans that have been infected with the Covid-19 virus and have unfortunately died. Although these important precautions remind us of the grave danger that Covid-19 poses to our physical and mental health, far too little has been written about how Covid-19 is exacerbating the digital divide for African American students in grades K-12. This digital divide is depriving many students of the equal educational opportunities that Thurgood Marshall, Nathaniel Jones, Constance Baker Motley, and so many other lawyers fought so hard to obtain. The stark and cruel reality of the digital divide is much easier to ignore because, unlike the challenges faced by prior generations of African American students, the egregious disparities and intentional segregation carefully documented in *Brown v. Board of Education, Reed v. Rhodes,* and other desegregation cases were more plainly visible. *Brown v. Board of Education,* 347 U.S. 483, 495 (1954); Reed v. Rhodes, 422 F. Supp. 708, 755-56 & 796-97 (N.D. Ohio 1976); United States President Dwight D. Eisenhower Executive Order 10730: Desegregation of Central High School (September 23, 1957). In many of these cases, politicians boldly stood outside schools in front of television cameras, and they joined with school boards across the country to mandate or deliberately maintain dual school systems. These politicians used these disparities to advance their careers with the full understanding that schools for African American students were underfunded and overcrowded and schools for white students were fully funded.

When Covid-19 forced a number of school districts to remotely educate their students through laptops with internet connections, this condition exposed grave educational disparities that make it difficult for African American students to perform on the same level as their white counterparts. For example, 45% of African American K-12 students live and attend public school in districts with high-poverty rates. (Jinghon Cai, *Black Students in Condition of Education 2020,* National School Board Association (June 23, 2020), www.nsba.org). According to the Journal of Blacks in Higher Education, "The Census Bureau's latest survey found that there were more than 9.6 million African American households with children in K-12 public and private schools throughout the United States. Of these, only 61.6 percent said they had the technology to allow children to do their online schoolwork at all times." (*How the Racial Digital Divide Impacts Online Education during the Pandemic,* The Journal of Blacks in Higher Education (May 25, 2020), www.jbhe.com/2020/05/how-the-racial-digital-divide-impacts-online-education-during-the-pandemic).

At the beginning of the Covid-19 pandemic in the United States, teachers and administrators in wealthy school districts, with relatively few African Americans, were able to travel door-to-door to ensure that all of their students had laptops and hotspots to effectively participate in remote education. (Benjamin Herold, *The Disparities in Remote Learning under Coronavirus* (charts), (Apr. 10, 2020), **www.edweek.org/ew/articles/2020/04/10/the-disparities-in-remote-learning-under-coronavirus.html).** Meanwhile, the large percentage of African American students in high-poverty school districts received written packets, without the benefit of having teachers to assist them online. In fact, "of the K-12 school districts surveyed, 47% of high-poverty districts emphasized physically distributed materials such as paper packets as a 'primary component' of their distance learning rollout." (Pia Ceres, A Covid Slide Could Widen the Digital Divide for Students, Wired (Aug. 7, 2020), www.wired.com/story/schools-digital-divide-remote-learning). According to Dr. Ralph

L. Simpson, superintendent of Clayton County Schools in Georgia, this disparity is the hallmark of the "digital divide [that] highlights the inherent inequity that already exists in education. This is another reflection of the economic divide in impoverished communities."

African American students in high-poverty districts who are being relegated to learn from written packets have vastly different educational opportunities and outcomes than students in more affluent districts who are able to use laptops to continue to attend classes, complete homework assignments, and take tests during the midst of the Covid pandemic. These disparities are of even greater importance in light of the testing regime ushered in by the No Child Left Behind Act and its more flexible replacement, the Every Student Succeeds Act (ESSA). Pursuant to ESSA, students that are unable to master essential subjects can be forced to repeat grades and/or can be denied high school diplomas, which can bar entry to college that is a well-recognized gateway to substantially higher wages and career opportunities. (Jennifer Cheeseman Day, *Black High School Attainment Nearly on Par with National Average*. U.S. Census Bureau News (June 10, 2020), www.census.gov/library/stories/2020/06/black-high-school-attainment-nearly-on-par-with-national-average.html). For African American students who navigate through ESSA and are able to graduate from high school, nearly 60% of them are forced to collectively spend millions of dollars to take remedial, non-credit courses in college to make up for the substandard education often received in grades K-12, which has been exacerbated by the digital divide before and after the Covid pandemic. (Nate Davis, OP-ED: *We Have to Get Real about the Achievement Gap between Black and White Students*, National Newspaper Publishers Association (Aug. 31, 2018), www.nnpa.org/essa/op-ed-we-have-to-get-real-about-the-achievement-gap-between-black-and-white-students).

Through the leadership of NBA President CK Hoffler and the Covid-19 Task Force, the NBA has launched a laptop donation project with PCs for People. As a part of the project, the NBA is encouraging members to donate used laptops to PCs for People, which has the highest-available certification to remove all data from the donated laptop. (AAA certification from the National Association for Information Destruction). PCs for People can then load the donated laptop with Microsoft software, and donate it to urban school districts for students in need in the target cities of Cleveland/East Cleveland, Ohio; Atlanta, Georgia; Chicago, Illinois; Baltimore, Maryland; Detroit, Michigan; Memphis, Tennessee; Kansas City, Missouri; and Jackson, Mississippi. (**givecomputers.pcsforpeople.org**). Since PCs for People is a nonprofit organization, laptop donations are potentially tax deductible. In effort to ensure that every student in need has a laptop, PCs for People has also partnered with Go Fund Me to enable NBA members to donate money directly to this important effort, which can be directed to the school districts in the aforementioned target cities or a school district of choice.

The digital divide and the educational disparities were created long ago and cannot be completely solved by one NBA project. However, with your support and participation, we can continue the great work of so many iconic NBA lawyers, and each do our part to close the digital divide to enable a new generation of African American students to thrive today, tomorrow, and far into the future.

Marlon A. Primes has served as an Assistant U.S. Attorney for the Northern District of Ohio for the past twenty-nine years. Mr. Primes, who works in the Cleveland office, handles a wide variety of complex civil litigation in state and federal courts. Marlon A. Primes is Co-Chair NBA Covid-19 Task Force, Mr. Primes served as Vice President of the National Bar Association (NBA), and he served as President of the Cleveland Metropolitan Bar Association ("CMBA"), which is one of the largest associations of lawyers and judges in Ohio. Mr. Primes also served as President of the William K. Thomas Chapter of the American Inns of Court and as President of the Cleveland NBA affiliate chapter, the Norman S. Minor Bar Association. Mr. Primes served as the Chairman of the Litigation Section of the Ohio State Bar Association. Mr. Primes received his law degree from Georgetown University, and he received his undergraduate degree from Ohio University's E.W. Scripps School of Journalism.

America's Perfect Storm

by Clarence D. Williams, III

Our country has failed the basic tenants of its creed that "all men are created equal," and as a result, she is broken. During the course of my life, which includes more than four decades in law enforcement, I have had the opportunity to stand on both sides of the protest lines. I have stood shoulder to shoulder with community leaders demanding change in the aftermath of police brutality, and I have stood shoulder to shoulder with dedicated and committed fellow law enforcement professionals protecting the rights of citizens to petition their government for justice. It is critical now that both sides use their energy to move the nation toward criminal justice reform.

The path to this juncture could not have been predicted. Never before have we seen two separate and unrelated events combine to expose our country's deep racism. Black people have battled the disproportionate impacts of COVID-19, and Black communities across this nation are under the continued threat of state-sanctioned racism, demonstrated by the lawless behavior of a few police officers acting under the color of law in a broken criminal justice system. No one should be surprised by neither the adverse impacts of COVID-19 on the Black community nor the tragic death of yet another Black man for a "non-violent" violation of law. But these two events have created a perfect storm and America should take advantage of its timing.

With more than 20,000 law enforcement agencies in this country, there are thousands of hard-working officers and departments with excellent policies. But to begin comprehensive criminal justice reform, we must start with an examination of the awesome grant of authority given to law enforcement. This authority is protected by two powerful United States Supreme Court decisions: *Tennessee v. Garner* (1985) and *Graham v. Connor* (1989). The *Garner and Graham* cases are the cornerstone and foundation for modern police brutality. The recent deaths of George Floyd, Breanna Taylor, Ahmaud Arbery, Philando Castile, Freddie Gray, Walter Scott, Laquan McDonald, Michael Brown, Corey Jones and Eric Garner have revealed our unwillingness to confront this authority. There can be no true reform until both Supreme Court cases are overturned through legal action or amended through legislative actions.

With such an awesome grant of authority it is critically important that we demand thorough and transparent reviews, especially when the conduct of those entrusted with the power to use deadly force abuse, breach, misuse or misapply that authority. Additionally, to move forward on criminal justice reform we must:

- **Pass federal legislation creating a Uniform National Standard for law enforcement use of force, to include deadly force. The legislation should include provisions to:**

  Abolish the common law doctrine of use of deadly force

  Restrict the use of deadly applications for non-violent misdemeanors used to merely carry out an arrest or prevent the escape of a non-violent person.

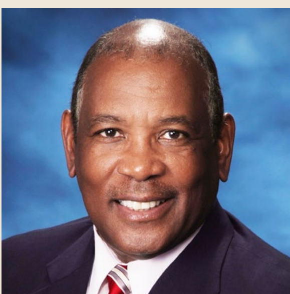
  Eliminate the common law use of the deadly force standard.

- **Immediately amend some state laws, such as Florida Statute§ 776.05, and eliminate the common law use of deadly force standards from these statutes.**
- **Establish citizen-controlled civilian complaint and oversight structures at every level of law enforcement. This entity would receive and investigate all civilian complaints, and should be funded at a minimum of 6% of the total law enforcement agency budget for its operations.**
- **Establish a citizen-controlled Police Commission body to determine policy for the police agency with community input.**
- **Conduct comprehensive examination of training policies, with a community-centric focus. Police training should focus more on the types of activities officers are more likely to encounter, and less on the types of activities that they rarely encounter.**
- **Restore residency requirements as a condition of employment for all law enforcement officers, in order to ensure that officers have a vested interest in serving and protecting the communities in which they live.**
- **Make open to the public all law enforcement union contract negotiations, providing timely public notice consistent with public meeting notice requirements.**
- **Prohibit officials who will vote on a law enforcement contract from seeking or receiving political contributions from law enforcement unions during contract negotiations and require full disclosure of contributions received for a one (1) year period prior to voting on any union contract.**
- **Support the George Floyd Law Enforcement Trust and Integrity Act - currently proposed federal legislation sponsored by the Congressional Black Caucus of the U.S. House of Representatives. The Act should provide U.S. Justice Department (DOJ) with use of force data.**

There are other measures, such as federal funding to study recruitment programs, which also need to be implemented. Our criminal justice system is broken because the applications of the current systems, processes and laws adversely affect Black people. Black people are disproportionately represented in every measurable negative category of the criminal justice system, and are underrepresented in all the measurable positive categories. So many high-profile deaths of Black Americans have revealed our unwillingness to confront our country's unhealed wounds. It's time to take the first real step toward healing.

As the Rev. Dr. Martin Luther King, Jr. once said: "Change does not roll in on the wheels of inevitability, but comes through continuous struggle."

We must take on this heavy lift. Our lives depend on it, and justice demands it.



Clarence D. Williams, III is an attorney and a retired police chief. Following a 44-year career in law enforcement, he retired in February of 2018. His law enforcement career included 28 years with the Cincinnati Police Department and the last 16 years as Chief of the Riviera Beach Police Department. Clarence became Chief of the Riviera Beach Police Department in 2002. He is a past President of the Palm Beach County Association of Chiefs of Police. In 2017, Clarence received the Urban League of Palm Beach County's Lifetime Achievement Award. Clarence is a graduate of the University of Cincinnati School of Arts and Sciences, where he earned a Bachelor of Science Degree in Criminal Justice / Political Science. He also earned a Juris Doctorate from the University of Cincinnati College of Law. From 1983 to 1989, Clarence successfully practiced law as Senior Partner in the law firm of Williams & Shabazz, L.P.A. His focus with the firm was on employment litigation, civil rights litigation and family law.

Qualified Immunity: History Demands Change

By Tilman J. Breckenridge

Race and policing have become ubiquitous topics in so many arenas: the media, discussions among lawyers, social gatherings, and general dinner table conversations. Within the context of these various discussions, qualified immunity enjoyed, in many respects, limited attention. Essentially, qualified immunity protects government officials from suit unless they violated a right in a way that is extremely obvious or expressly stated to be illegal by an appeals court or the Supreme Court.[1] It is most often applied to protect police officers, but it also applies to teachers, legislators, and a host of other government officials. It has no basis in any statute or Constitutional provision and since its inception by the Supreme Court, the doctrine has grown broader and more protective of government officials to the point that seemingly obviously absurd, egregious actions are protected.

In late 2019 and early 2020, the Supreme Court was carefully considering eight petitions for a writ of certiorari challenging the existence or boundaries of qualified immunity, having re-conferenced them for weeks and weeks.[2] Then, a Minneapolis police officer killed George Floyd and this issue discussed only by Supreme Court lawyers and civil rights lawyers went mainstream. Congresspeople declared their resolve to find a legislative solution, and the Supreme Court denied all the petitions—presumably deferring to the legislative process to fix the problem the Supreme Court had created.[3]

The conversation has petered out, and there is no clear indication that Congress will reform or eliminate qualified immunity. But to the extent the conversation arises again, it will be important not to misconstrue the most common applications of qualified immunity. Understandably, after George Floyd's death, along with the death of several other young Black men and women, the conversation focused on accountability for officers killing citizens. But the doctrine is applied far more often in cases where an officer violates a person's constitutional rights but does not kill the person or otherwise permanently injure the victim.

As the founder of the William and Mary Law School Appellate and Supreme Court Clinic, I stumbled into becoming very well-versed on qualified immunity. I was lead counsel (by informal count) in 17 appeals in federal courts involving the doctrine. One of those 17 cases was one of the eight cert petitions that were continually re-conferenced.[4] Those appeals, of course, led to reading hundreds of cases on qualified immunity.

The Clinic cases' fact patterns ranged, but our cert petition was about a person whose Fourth Amendment rights were violated when officers circled his house 5-10 times, banging on doors and windows and tore down his home security camera for an unauthorized probation check.[5] We have had a case of an officer allegedly texting nude photos from an arrestee's phone to his personal phone,[6] a case involving a teacher allegedly retaliating against a student for speaking her mind,[7] and a case where an officer allegedly slammed a compliant arrestee's face into a tree.[8] We have also had a shooting death case that arose from a man finding a stray dog, trying to drop it off at a dog shelter, and tensions inexplicably escalating from his refusal to provide identification for dropping off the stray dog.[9]

Of all the cases, I believe only two or three involved the governmental defendant arguing that there was an exigency where the officer had to make a snap decision to protect himself, herself, or others. But that is one of the primary defenses used to protect qualified immunity—officers often must make snap decisions in dangerous situations.[10] Most likely, the strength of this argument comes from our focus on deaths while ignoring the many, many more times people's constitutional rights are violated by an officer who had plenty of time to consider his or her actions.

This focus leads to suggested half-measures, like limiting qualified immunity only in excessive force cases, and to people throwing up their hands on the issue when faced with the possibility of making policing more dangerous by limiting qualified immunity. But for the vast majority of police misconduct victims, more must be done.

42 U.S.C. § 1983, originally known as the Ku Klux Klan Act,[11] forbids violation of constitutional rights under color of state law. For an innocent person mistreated by police—for DWBs and illegal searches and other harassment—it is the only federal remedy to hold police accountable. An innocent person obviously cannot take advantage of the exclusionary rule, and gutting Section 1983 with qualified immunity has meant that there is almost no redress for innocent victims of police misconduct. Meanwhile, I have never discussed the issue with another Black man without hearing a story of his reprehensible treatment received on the side of a road or outside of a store for which there was no way to hold the officer accountable. Hopefully, the Supreme Court will take the issue up soon and at least significantly limit the scope of this doctrine. But particularly for a legislative solution to arrive, we must consider and express the full panoply of qualified immunity's dangers so that they can be addressed accordingly, and straw man arguments can be put aside.

1 *Skevofilax v. Quigley,* 586 F. Supp. 532, 535 (D.N.J. 1984).

2 *See* Jay Schweikert, *As Qualified Immunity Takes Center Stage, More Delay from SCOTUS*, Cato at Liberty Blog, (June 1, 2020), https://www.cato.org/blog/qualified-immunity-takes-center-stage-more-delay-scotus?queryID=188cae2cf0d97c38452d2b861463cc3d.

3 *See* Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, Cato at Liberty Blog, (June 15, 2020), https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity.

4 *Brennan v. Dawson,* No. 18-913 (S. Ct. 2020).

5 *Id.*

6 *Britt v. Anderson,* No. 14-1613 (7th Cir. 2014).

7 *Crozier v. WCSD,* No. 19-1312 (8th Cir. 2019).

8 *Mena v. Massie,* No. 19-15214 (9th Cir. 2019).

9 *Cantu v. City of Dothan, Ala.,* No. 18-15071 (11th Cir. 2018).

10 *See IACP Statement on Qualified Immunity,* INT'L ASSOC. OF CHIEFS OF POLICE, https://www.theiacp.org/sites/default/files/IACP%20Statement%20on%20Qualified%20Immunity.pdf.

11 *Skevofilax v. Quigley,* 586 F. Supp. 532, 535 (D.N.J. 1984).

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The National Native American Bar Association Declares Takomni *Hasapa Wiconi Hecha* (Black Lives Matter)

Indian Country – June 15, 2020. Mitakuyapi (Relatives). It is with a heavy heart that we make this statement. As native people, we understand our world through kinship. We are heartbroken and offer our deepest condolences to those that mourn George Floyd, Breonna Taylor, Tony McDade, Renee Davis (Muckleshoot), Cecil Lacy, Jr. (Tulalip), John T. Williams (Nuu-chah-nulth), Jason Pero (Bad River Band Of Lake Superior Tribe of Chippewa Indians), Zachary Bearheels (Lakota, Kiowa, Apache) and the numerous others who have lost their lives at the hands of law enforcement.

The National Native American Bar Association (NNABA) stands in solidarity with the Black Community, the National Bar Association, the Minnesota American Indian Bar Association, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the American Bar Association, the Native American Bar Association of D.C. and each and every human being that has condemned the actions of law enforcement.

Study after study confirms what we already know to be true, and in some cases, have experienced ourselves – the bias against black and brown people in the criminal justice system corrupts nearly every encounter. From the treatment of victims, handling of suspects, stops for "suspicious activity," to any other type of encounter, racial biases are present. The constitutional and civil rights of black and brown people are violated on a daily basis. Law enforcement kill black and brown people at alarming rates. According to data from the Centers for Disease Control and Prevention, law enforcement killed Native Americans at the highest rate from 1999 to 2015, just above the rate for Black Americans. In the Ninth Circuit alone, Native Americans have 18 times as many fatal encounters per population as whites. Historic trauma and mental illness are pervasive factors in Native encounters with police, particularly those that result in death. The criminal justice system is out of balance and unjust, and the wounds run very deep.

We stand shoulder to shoulder with our relatives and demand justice for George Floyd and every other black and brown person who lost their lives at the hands of the unjust. NNABA joins our regional and sister bars in calling for true and meaningful reform. Reform that must include the elimination of federal qualified immunity defense and reallocation of governmental law enforcement resources towards mental health care. Let us all be moved to action to fix the plague of systematic racism, reject abuses of power, reject injustice, reject bias, and most of all reject even one more loss of life. We cannot postpone justice any longer. Takomni Hasapa Wiconi Hecha (Black Lives Matter).

The National Native American Bar Association was formed in 1973 with the mission of advancing justice for Native Americans. www.nativeamericanbar.org

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Native Americans Speak: The Emergence of the Voice of Generations

By Thomasina Real Bird

Since the arrival of Europeans on America soil, contrary to popular myth, Native American activism has always existed and continues. Despite efforts to dismiss or otherwise dimmish the efforts of those seeking to advocate for tribal interests, Native Americans have remained resilient. This advocacy, rooted social justice, has been and is the voice of generations. The 2020 Presidential election demonstrates how this advocacy has evolved to influence the ballot. According to High County News[1], the high turnout rate of democratic voting indigenous people; such as the Navajo Nation, Hopi Tribe, Tohono O'odham Nation, Apache Nation, Blackfeet Nation, and Oglala Sioux Tribe, contributed significantly to election results.

Native Americans continue to participate in efforts to bring about positive change. While not a monolithic group, America's indigenous people, generally understand injustices and civil rights struggles. It is against this background, in response to the death of George Floyd, the National Native American Bar Association declared, *Takomni Hasapa Wiconi Hecha* (Black Lives Matter.)

The voice of Native Americans is a voice that demands acknowledgement of history, and it is a declaration of change for the greater good of the entire nation.

[1] Smith, V. Smith, "How Indigenous Voters Swung the 2020 Election." *High Country News,* November 6, 2020, https://www.hcn.org/

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Censorship vs. Freedom of Speech: Unveiling the Tension Induced by Cyber Racism

by Valerie C. Hughes

One of the greatest gifts in America is the freedom of speech. However, some individuals in the United States have abused this liberty by sharing content that is hateful and discriminatory on online platforms. Recently, there has been a growing number of social networking websites seemingly devoted to sharing derogatory content that further perpetuates the marginalization and oppression of people of color. The sharing of content that is offensive, threatening, and discriminatory in nature has led to the emergence of the cyber racism term.[1] The term cyber racism is "racist rhetoric that is distributed through computer-mediated means and includes some or all of the following characteristics: ideas of racial uniqueness, nationalism and common destiny; racial supremacy, superiority, and separation."[2] Cyber racism has been demonstrated in the forms of email lists, social networking websites, blogs, chat rooms, images, and videos. However, in the United States, there continues to be a great deal of controversy and debate around how to censor hate speech that is shared online with the protections afforded by the First Amendment. The challenges that are posed by cyber racism sit between the values associated with freedom of expression and freedom from hate and maliciousness.

With the protections afforded by the First Amendment, a challenge has been created on how to censor cyber speech. The First Amendment of the U.S. Constitution states, "Congress shall make no law…abridging the freedom of speech."[3] With this protection, white supremacist and other hate groups continue to seek to provoke and incite fear, hatred, violence, and tension to further support racism, exclusion, and the demoralization of individuals because of their identification with a certain race, ethnicity, gender, religious affiliation, or sexual orientation. These hateful acts committed in the cyberspace are not harmless and need to be dealt with accordingly. Thus, it is time for work to be done to extend the purview of the civil rights laws and anti-harassment laws to protect against these hate crimes on the internet.

Victims of cyber racism are silenced by the protection of speech through the Fourth Amendment since there is little to no legislation or ramifications against cyber assaults and threats. [4] Thus, an issue is posed as to whether cyber racism infringes on human rights?[5] Human rights grant dignity and worth of the human person and in the equal rights of men and women … ." G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). Moreover, Article 1 declares that "all human beings are born free and equal in dignity and rights." Echoing the UDHR, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR") recognize that both "the inherent dignity and … the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and "that these rights derive from the inherent dignity of the human person." International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., at 52, U.N. Doc. A/6316 (1966); individuals a right to have freedom from discrimination along with the right to equality, which protects both individuals, and groups from disfavored treatment by others based upon their race, sex, or religion. Even though these harmful acts of cyber racism are taking place, the courts continue to uphold the protections of the First Amendment by placing speech up to the strictest judicial scrutiny.[6] In *United States v. Playboy Entertainment Group,* the Court said, "we are expected to protect our own sensibilities simply by averting [our] eyes."[7] The question is why should someone have to avert their eyes when the content is threatening, violent, abusive, and discriminatory.

Years ago, the Federally Protected Activities Act of 1968 was enacted during the Civil Rights movement in response to violent attacks on civil rights workers in the South.[8] Since this law does expressly imply the means by which this interference takes place, the Federally Protected Activities Act could be used to cover interference by means of electronic mail as it was in *United States. v. Machado*. In this case, the court convicted Richard Machado for sending a threatening, racist, and profane e-mail message from the computer lab at the University of California at Irvine (UCI) to approximately sixty Asian-American students in September 1996. [9] This is at least one case that began to address hate crimes that were being committed by use of the internet and how the internet started to become a vehicle for hate and vexation on others.

Although small steps have been taken to address cyber racism, the United States must place greater emphasis on putting additional legal safeguards in place to protect individuals from cyber racism. Sure, one could perhaps avoid certain websites that may contain expressions of racism and avert their attention. However, in some instances, it may be unavoidable, and an individual may come under direct attack through mediums such as emails or social media posts. In order to continue to combat this issue, we must continue to speak out against forms of cyber racism. Also, educating oneself on the subject matter is always a powerful tool when working to effectuate change. In the instance of cyber racism, we must focus our attention to continue to learn more about bullying, cyberbullying, harassment, and hate crimes. We may not be able to completely eliminate cyber racism, but through education, it can equip individuals to provide logical and cohesive arguments against allowing hate speech and racist content to be shared in the cyberspace.

International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., at 49, U.N. Doc. A/6316 (1966).

[1] Les Black`, *Aryans Reading Adorno: Cyber-culture and Twenty-first Century Racism,* Ethnic & Racial Stud. 628–51 (2002).

[2] *Id.*

[3] U.S. Const. Amend. IV.

[4] *Id.*

[5] Dutt, *supra* note 31, at 229. For example, the Preamble of the Universal Declaration of Human Rights ("UDHR") recognizes "the inherent dignity and … the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world," and reaffirms "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women … ." G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). Moreover, Article 1 declares that "all human beings are born free and equal in dignity and rights." Echoing the UDHR, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR") recognize that both "the inherent dignity and … the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and "that these rights derive from the inherent dignity of the human person." International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., at 52, U.N. Doc. A/6316 (1966);

[6] Julian Baumrin, *Internet Hate Speech & The First Amendment,* Revisited, 37 Rutgers Computer & Tech. L.J. at 241.

[7] U.S. v. Playboy Ent. Group, 529 U.S. 803, 813 (2003).

[8] 18 U.S.C. § 245 (2010).

[9] 195 F.3d 454, 455 (9th Cir. Cal. 1999).

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Defending The Right To Protest Through Intellectual Property Law

by Caleb L. Green

The death of George Floyd[1] has resulted in a recent international outcry for social and criminal justice reform, sparking a wave of creative protests and artistic expressions. Namely, protestors have embraced non-traditional means to amplify their voices and manifest their right to protest through street murals and related artworks. For example, artists in Washington D.C. created a "BLACK LIVES MATTER" street mural across two city blocks in the plaza area leading to the White House. Since then, artists and protesters in other cities have joined the movement and created street art and murals throughout the United States, including Brooklyn, San Francisco, Austin, Cincinnati, and Charlotte.[2] Several similar murals are planned to be installed on public streets in various other U.S. cities in effort to protest the ongoing social injustices in our country.

This wave of protest art not only demonstrates the powerful impact of creative expression, but also, reveals an underlying legal weapon that artists may use to preserve their right to protest through artistic expression. The unique case of *Castillo v. G&M Realty L.P.,* 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), provides guidance on how artists of protest art can use intellectual property rights against those who deface or destroy their artworks and defend their constitutional right to protest.

Facts & Background

In 2002, Gerald Wolkoff, the owner of several New York warehouses, enlisted Jonathan Cohen, a renowned New York artist, to turn Wolkoff's warehouses into an exhibition space for other artists.[3] Under Cohen's leadership, this exhibition space—known as 5Pointsz—evolved into an epicenter for street art in New York.[4] In fact, 5Pointsz has attracted thousands of visitors and received extensive media coverage, including creating vast buzz on social media.[5] In 2013, Cohen learned that Wolkoff sought to demolish 5Pointz and build luxury apartments in its place.[6] Wolkoff deployed a group of workers to whitewash and destroy all 49 existing artworks.[7] Cohen and his entourage of artists, whose

artworks were ultimately destroyed, successfully sued Wolkoff under the Visual Artists Rights Act (VARA) and were awarded $6.75 million in statutory damages.[8] On February 20, 2020, the Court of Appeals for the Second Circuit affirmed the judgment.[9]

What is VARA?

VARA is an amendment to the U.S. Copyright Act that was adopted in 1990 and provides protection for a limited set of moral rights for artists. Under VARA, the United States recognizes the right of integrity, which includes the right to prevent the modification, mutilation, or distortion of the artist's work as well as to prevent the destruction of works of "recognized stature." Courts have deemed "recognized stature" to mean meritorious work by art experts, other members of the artistic community, or some other cross-section of society.[10] Although the U.S. Copyright Act contains the operative provisions of VARA, its protection is restricted to specific categories of fine art (e.g., murals, sculptures, paintings, and photographs).

Intellectual Property Law Can Be a Tool to Prevent Vandalism or Destruction of Protest Art

As noted above, in the *Castillo* case, the Court of Appeals for the Second Circuit affirmed that the artists' street art adorning Wolkoff's building constituted art of "recognized stature"—a basic requirement for invoking VARA protection for destruction of an artwork.[11] The Second Circuit provided a clear definition of works of "recognized stature" as works of "high quality" that have been acknowledged as such by the relevant community.[12] The court went on to acknowledge that evidence from art historians, art critics, curators, and other experts supporting the quality of a work could demonstrate street art as a "recognized stature" warranting moral-right protections under VARA.[13] In fact, widespread sharing of artwork on social media and the Internet—like the Black Lives Matter and other social justice-inspired street murals—can evidence the high quality stature of artwork warranting moral-rights protections.[14]

In summary, protestors and artists can protect their right to protest through artistic expression using non-traditional legal mechanisms such as intellectual property law. *Castillo* illustrates that protest art, such as Black Lives Matter and related murals, can achieve "recognized stature" under VARA. As such, like in *Castillo*, protestors and artists may utilize VARA to bring civil action against counter-protestors who attempt to destroy, vandalize or otherwise modify their protest art.

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[1] On May 25, 2020, George Floyd, a 46-year-old black man, was killed in Minneapolis, Minnesota, during an arrest for allegedly using a counterfeit bill at a convenient store. His death has sparked, throughout the United States and in various other countries, a series of protests against police brutality and racism.

[2] D.C. Mayor Comments On 'Black Lives Matter' Road Banner And Funding The Police, NPR, https://www.npr.org/2020/06/09/873377522/d-c-mayor-comments-on-black-lives-matter-road-banner-and-funding-the-police (last visited on Nov. 20, 2020).

[3] *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *as amended* (Feb. 21, 2020), *cert. denied*, No. 20-66, 2020 WL 5883324 (U.S. Oct. 5, 2020).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 163.

[8] *Castillo*, 950 F.3d at 155.

[9] *Id.*

[10] *Id.* at 166

[11] *Castillo*, 950 F.3d at 161.

[12] *Id.*

[13] *Id.* at 162.

[14] *Id.* at 162.

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The Juvenile Justice System: Girls of Color and Disproportionate Impact

By Honorable Kathie E. Davidson

The number of girls of color in the juvenile justice system[1] has reached such an alarming level that it qualifies as a public health issue, due to the trauma suffered by the girls. For years, this public health crisis confronting our community has been documented in articles, research studies, and high-profile cases. The available information makes clear that not only are there a disproportionate number of young girls of color in the juvenile justice system, particularly black and Latina, but also these children suffer enduring stigma.

For over 15 years, I have served as a Family Court Judge and, prior to that, as an attorney representing children in Family Court cases. Despite the research urging the nation to address the disproportionate number of girls of color in the juvenile justice system, it is troubling to observe that this concern has not received due attention. While evidence compels our society to engage in efforts to modify these alarming statistics, this issue has not been adequately addressed. New York University conducted a research project reviewing petitions filed against youth in Westchester County between January 2016 and June 2017.[2] Some of the significant findings of this study include that once a girl is placed in a facility, that girl has a one in two chance of having a new juvenile delinquency petition filed against her compared to a one in eight chance for boys in placement. Additionally, the study found that most girls were in placement on misdemeanor charges, primarily the charge of simple assault. Also, the number of Persons in Need of Supervision (PINS) petitions filed against girls highly outnumber these filings

against boys. Although this is just a snapshot of what the research shows in Westchester County, it demonstrates that as a community, we need to foster a level of dialogue and support for these youth that will create change and sustain it.

Thus, the future of juvenile justice is to take our current system beyond the resolution of a youth's court case and beyond their time in detention. I was fortunate enough to be involved in the previously mentioned study conducted by New York University, under the New York State Girls' Justice Initiative. This project is a collaboration led by the New York State Unified Court System, implemented by the NYS Permanent Judicial Commission on Justice for Children in partnership with New York University and the New York State Division of Criminal Justice Services.

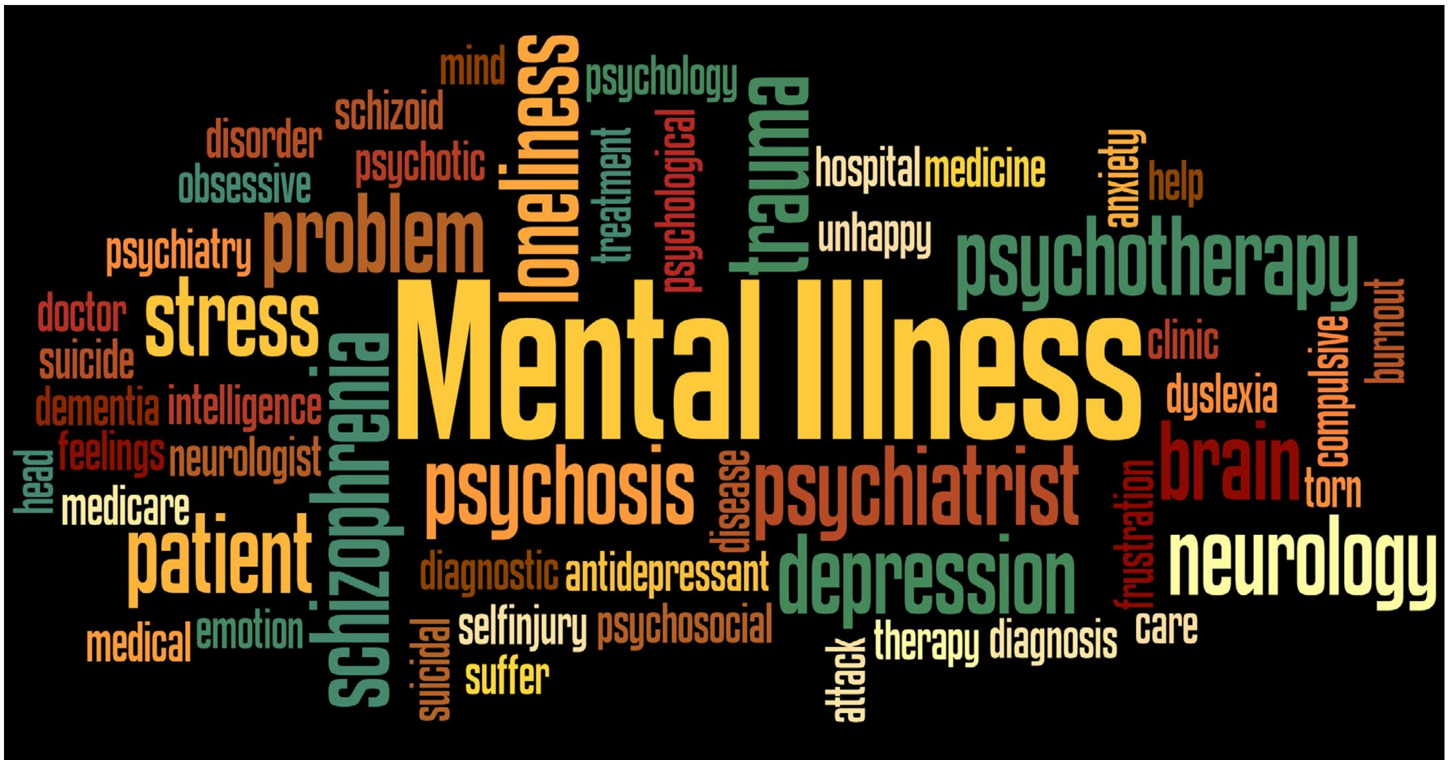
In October 2018, Westchester County used the data from that study to create the first gender-and-trauma-responsive court continuum in the state, called "GRIP" Court, an acronym for Gender Responsive Initiatives and Partnerships. The mission of GRIP Court is to promote healing and provide opportunities, justice and support that improve outcomes for girls, in particular, girls of color who are at risk or involved in the juvenile justice system. Instead of a one-size-fits-all approach, a holistic approach is taken to each case by including all the various stakeholders – the presentment agency, the attorney for the child, the probation department, and social workers– to identify how the specific needs of each youth can be met. What we have learned is that to create lasting change for the girls previously in detention, they must be provided with a level of stability and support in their communities that will exist long after their cases are resolved; this is where our responsibility lies.

We must look past the singular moment that brought the youth into the juvenile justice system and instead look at the larger context. We must ask ourselves, "What caused this particular child to commit this crime?" The answer may include sexual abuse, housing instability, living in poverty, immigration issues in a youth's family, a need for mental health treatment, unhealthy relationships with family members, or any number of traumatic experiences. It is by learning how a youth got to the point of contact with the juvenile justice system that we can determine what the appropriate intervention is to keep him or her out of the system permanently. Intervention may include having stable housing, having a tutor or a mentor, having a therapist or a counselor, taking dance classes, being involved in a drama club, or having an internship in a career path a youth wishes to pursue.

While intervention will be particularized according to the interests and needs of the person, overall efforts will share a commonality. That is, to provide young people with meaningful partnerships and equip them with the tools and resources to thrive far beyond the juvenile justice system. As national dialogue continues on issues of unfairness embedded in our legal system, let us not forget our girls, who, I believe, are the backbone of society.

1. Charles Puzzanchera, *Juvenile Arrests,* 2018 U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS (June 2020), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/254499.pdf
2. Dr. Shabnam Javdani, PowerPoint slides of *Get a GRIP: A Gender – and Trauma- Responsive Court* (2020).

Hon. Kathie E. Davidson, is the Administrative Judge of the Ninth Judicial District. In 2018, Judge Davidson was elected a Justice of the Supreme Court of the State of New York. Previously, Judge Davidson, who was first elected a Family Court Judge in 2003, served as the Supervising Judge for the Family Courts of the 9th Judicial District. She earned her Bachelor of Arts degree at Simmons College in Boston, Massachusetts, and her Juris Doctor at Howard University School of Law in Washington, D.C. Judge Davidson is the first woman to be appointed Administrative Judge in the Ninth Judicial District, and the first African-American to be appointed Administrative Judge outside of New York City.



Navigating Mental Health Issues in Litigation

By Allyce Bailey

It is a generally accepted observation that there is a stigma associated with discussing mental health in the African-American community, and this unfortunate reality impedes productive conversations. Mental Health for America reports that Black and African American men are particularly concerned about stigma and that most people of color are apprehensive to seek professional help for mental health issues.[1] Recent statistics on the mental health crisis in America reflect an increase in Americans suffering from diagnosed and undiagnosed mental illness. The possibility that a client or other key player involved in litigation may be battling a mental health issue is rapidly increasing. While attorneys may assume that natural emotional intelligence provides all the necessary tools to assist in navigating a client's mental state, if unprepared to address sensitive issues, the wrong response could derail litigation plans. However, being able to notice the unspoken warning signs, educating yourself on the facts surrounding the mental health crisis, and equipping yourself with knowledge of tactics to address the issue can make all the difference in ensuring that your case is not unnecessarily further complicated.

Mental health disorders account for several of the top causes of disability in the United States and include: clinical depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder.[2]

- **An estimated 26% of Americans ages 18 and older -- about 1 in 4 adults -- suffer from a diagnosable mental disorder in a given year.**[3]
- **Many people suffer from more than one mental disorder at a given time. In particular, depressive illnesses tend to co-occur with substance abuse and anxiety disorders.**[4]
- **Approximately 9.5% of American adults ages 18 and over will suffer from a depressive illness such as depression, bipolar disorder, or dysthymia each year.**[5]
- **Women are nearly twice as likely to suffer from major depression as men. However, men and women are equally likely to develop bipolar disorder.**[6]

When specifically focusing on the Black community, statistics show that Black Americans living below the poverty line are twice as likely to report serious psychological distress than those living over 2 times the poverty level.[7] With the amount of stress people of color generally carry in processing the social justice issues of our day, it is no surprise that it is also reported that African-Americans are more likely to have feelings of sadness, hopelessness, and worthlessness than adult

whites.[8] And while Black people are generally less likely to die from suicide, reports show that Black teenagers are more likely to attempt suicide than white teenagers.[9]

I have actually had a number of cases in which my client's or a witness's mental state was brought to my attention and played a part in how I handled the litigation. There have been numerous instances in which witnesses or parties had recently experienced deaths in their families unrelated to the litigation and their very fresh grief made for a somber and arguably awkward deposition or trial atmosphere. I will never forget questioning a key witness on the stand just hours after her finding out her mother had unexpectedly passed away. It was understandably difficult for her, but also a challenge for the lawyers on both sides of the case that desired to be considerate of her bereavement, but also considered her a key witness in the trial.

I also recall a situation when my client, visibly concerned and full of ungrounded fear of my reaction and her revelation's potential effect on the case, asked to speak to me before her deposition. Crying, she emotionally informed me of her long-standing use of antidepressants and diagnosis of bipolar disorder. This client was embarrassed, ashamed, and feared that opposing counsel would belittle her by asking probing questions about her mental health in the wake of her father's death.

While there is no perfect script to rely on, if you are placed in a similar situation, the following are a few suggestions that I have found helpful in dealing with witnesses struggling with a mental health challenge.

Suggestions for Dealing with Mental Illness In Litigation

1. Talk to your client beforehand.

If you have reason to believe your client has a mental health concern, address this matter as early as possible and gain their confidence to facilitate a productive exchange of necessary information. Some clients may require additional deposition preparation, patience, and empathy. Reassure the client or witness that you will be present throughout the deposition and that while the opposing counsel is permitted to ask questions, the focus of the deposition is not likely to be their mental state.

2. Take breaks during the deposition when necessary.

We have all given the general instruction at the beginning of a deposition that, "we can take a break if you need to," but be cognizant that your client or witness may need a "breather" from the pressures of litigation. Have water and tissue available and allow an emotional witness to take as much time as necessary to gather composure before going back on the record.

3. Talk to opposing counsel off the record.

Confer with your opposing counsel about your client's issue ahead of time. While the practice of law is adversarial in nature, there is no need to be unnecessarily antagonistic. Any civil and decent lawyer should be open to an off the record conversation about your client's testimony anxiety. While no one should be expected to sacrifice the quality of the information that they seek to obtain during the deposition, I recommend discussing the issue with opposing counsel and simply requesting that they be tactful and respectful of your client's mental state. If they are unnecessarily brash during the deposition, remind them of the Oath of Civility that is incorporated into most states' attorney's oath[10] and hold them to it. It is possible to obtain necessary deposition testimony without stripping someone of their dignity.

4. Incorporate motions practice/get the court involved when necessary.

If your client or witness's mental health is irrelevant to the litigation but opposing counsel insists on being unnecessarily invasive and insensitive in their questioning, this could cross the line of badgering the witness and may warrant suspension of the deposition. Federal Rule of Civil Procedure 30(d)(3)(A) allows an attorney to terminate a deposition if the opposing attorney is conducting the deposition in "bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent."[11]

My state's Supreme Court cautioned South Carolina lawyers to recognize both the power and responsibility that comes with taking a deposition:

> Depositions are widely recognized as one of the "most powerful and productive" devices used in discovery… Since depositions are so important in litigation, attorneys face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys. Claiming that any such improper behavior was merely "zealous advocacy" will not justify discovery abuse. When attorneys cross the line during a deposition, their actions do not promote

the "just, speedy, and inexpensive determination of every action."[12]

With broad judicial discretion, in addition to standard sanctions, improper deposition conduct could result in the court (1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees.

5. Remember the Golden Rule!

When all else fails, remember the Golden Rule[13] and be kind! With staggering statistics regarding the mental health of practicing lawyers, our profession should be the most empathetic to the problem. The ABA has reported that lawyers are 3.6 times more likely to be depressed as people in other jobs, 28 percent of licensed, employed lawyers suffer with depression, and 19 percent have symptoms of anxiety.[14] Perhaps an empathetic law partner or concerned coworker could open the door for those that need it to seek available help.

We should not assume that we have all relevant information about our client's circumstances or what they are currently walking through. Attorneys should endeavor to not feed into the stereotypes of being brash and insensitive. We must seek to foster an improved image of lawyers, one rooted in civility and integrity. With lawyer mental illness increasing as well, reciprocating compassion and a better understanding of mental health issues is imperative across the board in the legal field.

1 *Black and African American Communities And Mental Health,* MENTAL HEALTH AMERICA, https://www.mhanational.org/issues/black-and-african-american-communities-and-mental-health (last visited Oct. 3, 2020).

2 Mental Health Disorder Statistics & Facts, Is There Really Any Benefit to Multivitamins?, JOHN HOPKINS MEDICINE, https://www.hopkinsmedicine.org/healthlibrary/conditions/mental_health_disorders/mental_health_disorder_statistics_85,P00753 (last visited Jan 12, 2019).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Health United States, 2017: With Special Feature on Mortality,* NAT'L CENTER FOR HEALTH STAT., Table 46 (2018), https://www.cdc.gov/nchs/data/hus/hus17.pdf.

8 *Tables of Summary Health Statistics,* NAT'L CENTER FOR HEALTH STAT. ,Table A-7 (2018), https://www.cdc.gov/nchs/nhis/shs/tables.htm.

9 *High School YRBS,* U.S. DEPT. OF HEALTH & HUMAN SERV., (2019), https://nccd.cdc.gov/Youthonline/App/Default.aspx.

10 *South Carolina Attorney Oath of Civility,* SCBAR.ORG, https://www.scbar.org/media/filer_public/6c/82/6c82017a-a0a5-416b-beae-03b2dc2bcf94/oath.pdf (last visited Jan 12, 2019).

11 Fed. R. Civ. P. 30(d)(3)(A).

12 In Re: Anonymous Member of the South Carolina Bar, 346 S.C. 177 (2001).

13 Bill Puka, *The Golden Rule,* INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://www.iep.utm.edu/goldrule/ (last visited Jan 12, 2019).

14 Dina Roth Port, *Why Is There a Depression Epidemic in the Profession?,* ABAJOURNAL.COM, http://www.abajournal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession (last visited Jan 12, 2019).

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Executive Authority: An Examination of Race, Diversity Training and the Tangled Web of Legal Interventions

By Lynnae Thandiwe

Can the President decide how diversity training is conducted in the federal government? Yes, the President has broad powers to do so. The granting of broad presidential powers and the relaxed oversight of these powers have facilitated political entanglement in the day-to-day functions of procurement and services in the federal government. A recent example of this odd mix is from President Donald Trump's Executive order relating to diversity training.[1] On September 22, 2020, President Donald Trump signed an executive order restricting diversity training. President Trump issued this executive order under his power as the Commander-in-Chief. The United States Constitution vests law making power in the President with these simple words: "The executive power shall be vested in a President of the United States of America."[2] Based on this power Congress has granted the President the authority to "prescribe policies and authority to issue directives that the President considers necessary to carry out [the economic and efficient system] for procurement and services."[3]

Additionally, the Supreme Court has granted broad latitude to the President under the Procurement Act "to prescribe policies and directives that the President considers necessary to carry out," the Procurement Act's provisions, so long as the President's directives are "consistent" with the Act.[4] Accordingly, President Trump issued his order to "combat offensive and anti-American race and sex stereotyping and scapegoating" by claiming that he was promoting the economic and efficient system of order in the Federal workforce.[5]

Has diversity training become divisive or has executive authority overreached?

According to the executive order, diversity training cannot promote ideas that "the United States is fundamentally racist or sexist; or that an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconscious."[6] The order labels these concepts as "divisive" and part of a destructive "malign ideology" that may be "fashionable in the academy."[7]

The order does not cite facts to support its position, but provides a sweeping historical overview to support the American " belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world."[8]

The order goes on to condemn the "different vision of America that is grounded in hierarchies based on collective social and political identities …," claiming that "this ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans."[9]

How did diversity training get entangled with an Executive Order?

Diversity training has become entangled in an executive order because of the wide latitude given to presidents to execute these orders.[10] Executive orders are commands issued by the executive branch without the input of Congress.[11] Executive power is an exercise of the President's military power under several constitutional provisions.[12] The President's authority to create law is governed by the Constitution. The President's authority either comes from Congress or the United States Constitution.

Under the Procurement Act, the President has to state a nexus to the purpose of the act.[13] President Trump's stated nexus for the executive order on Combating Race and Sex Stereotyping is "to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating…"[14] The courts only require that the President can state a nexus. The courts do not require any factual support. The courts have used a rational basis standard of review in reviewing executive orders issued under the power of this Act.

Under a rational basis standard of review there is no requirement for factual support for the President's stated reasons. However, if the Court applied the arbitrary and capricious standard, the Court would require a stated rationale and factual finding. Depending on the underlying authority for the executive order, the Supreme Court has applied different standards of review. For example, the Supreme Court has affirmed that due process of law requires a stated rationale and factual findings when the President implements a statute.[15]

The current executive order can stand based on the court's exercising leniency to find executive orders legal under the Procurement Act.

The courts rely on the "lenien[cy]" of the nexus requirement and the "necessary flexibility" and "broad ranging authority" afforded the President under the statute.[16] This standard was the basis for finding valid an executive order regarding posting of labor notices in workplaces.

This particular labor notice was issued by President Obama. President Obama issued an executive order requiring that every government contract, unless exempted, include provisions mandating that federal contractors and subcontractors post a notice "describ[ing] the rights of employees under Federal labor laws." [17] The stated goal was "to promote economy and efficiency in government procurement." [18]

The President issued this order under his power granted under the Procurement Act. The President stated, "The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under federal labor laws, including the National Labor Relations Act. . . . Relying on contractors whose employees are informed of such rights under federal labor laws facilities the efficient and economical completion of the federal government's contracts." [19]

This order required the positing of a workplace notices informing workers of their rights under the National Labor Relations Act. The President's order was challenged. The plaintiffs included the Virginia Manufacturing Association and they filed a complaint challenging the lawfulness of the Posting Rule. Nat'l Ass'n of Mfrs. v. Perez, 103 F. S2015 U.S. Dist. LEXIS 60467, *3, 203 L.R.R.M. 3135, 165 Lab. Cas. (CCH) P10,770, 99 Empl. Prac. Dec. (CCH) P45,318

In *Perez*, the plaintiffs were concerned about the selective language of the Notice. For example, the language in the Notice did not mention an employee's right to object to payment of union dues in excess of the amounts required for representational purposes. [20] The court held the President had the authority under the Procurement Act to require the posting of a notice as a condition of federal contracts. President's exercise of authority, explaining that executive orders promulgated under the authority of the Procurement Act need only have a "sufficiently close nexus to the values of providing the government an economical and efficient system for . . . procurement and supply." [21]

Conclusion

If the diversity training is indeed destructive and divisive and a creation of a "malign ideology," then the country would be best served from preempting such training, but if the training is based on studies of implicit bias and other documented incidences of racists policies and laws, then the country is not best served through preemptive orders. Requiring executive orders to provide factual basis for the order might limit political intrigue in matters concerning the nation's welfare.

[1] Exec. Order. No.13950, 85 Fed. Reg. 60683(Sept. 28, 2020).

[2] *See* U.S. Const. art. II, § 1, cl. 1.

[3] 40 U.S.C. §§101,121(a) (2012).

[4] *Chamber of Commerce of the United States v. Napolitano,* 648 F. Supp.2d 726, 729 (2009).

[5] Supra note 1.

[6] *Id.*

[7] *Id.* Sec. 1. Purpose

[8] *Id.*

[9] *Id.*

[10] *Chamber of Commerce of the United States* at 729.

[11] See John C. Duncan, Jr., A Critical Consideration of Executive orders: Glimmerings of Autopoiesies in the Executive role, 35 Vt L.Rev. 333 (2010) (discussing in detail the history and scope of executive powers).

[12] See *Youngstown Sheet & Tube. Co. v. Sawyer,* 343 U.S. 579 (1952).

[13] *See Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159, 171 (3d Cir.), cert. denied, 404 U.S. 854 (1971). (Requiring a "close nexus between the efficiency and economy criteria of the Procurement Act and any exactions imposed upon federal contractors by Executive Orders promulgated under its authority").

[14] Supra note 1

[15] *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).

[16] UAW, 325 F.3d at 366, 367(D.C. Cir. 2003)

[17] Exec. Order No. 13496, 74 Fed. Reg. 6107 (Jan. 30, 2000).

[18] *Id.* at 6107

[19] 74 Fed. Reg. at 6107.

[20] Supra.

[21] *Perez* at 318 citing *UAW,* 325 F.3d at 366 (D.C. Cir. 2003).

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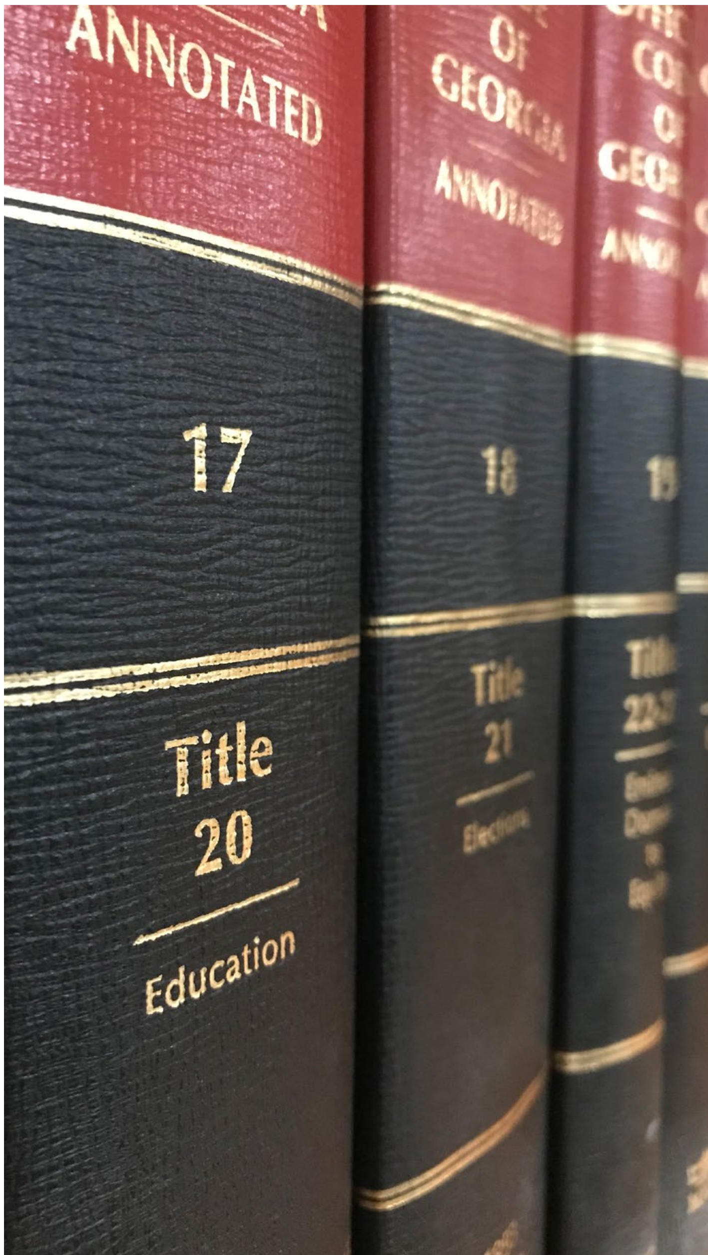

The Practice of Higher Education Law: A Roundtable Conversation with General Counsels

by Laverne Lewis Gaskins

A Juris Doctorate offers a multitude of career options and opportunities. In this inaugural section, the NBA magazine will endeavor to spotlight various practice areas, both traditional and non-traditional. In this issue we examine the legal profession in the context of an environment that has been responsible for the upward social mobility of generations of individuals: education. Utilizing a roundtable discussion format, we explore the careers of in-house higher education attorneys through the experiences of (in alphabetical order) Pamela F. Boston, University General Counsel, Norfolk State University; Andrew Hughey, Vice President and General Counsel of Ohio Northern University; and Charles Johnson, Vice President of External Affairs and General Counsel, Tuskegee University.

Laverne Lewis Gaskins, Editor-in-Chief, NBA Magazine: Prior to entering the practice of higher education law, what was your legal background?

P. Boston: I had worked as an attorney for legal aid for several years, then transitioned into working as a Technical Assistant in the area of EEO for a major fortune 500 company. As a result of the threat of potential layoffs due to several plant closures within the company, I applied for and was appointed as an Assistant Attorney General in the litigation unit of the Virginia Attorney General's Office. The primary purpose of the job was to represent the Commonwealth of Virginia, its institutions, employees and judicial officers in lawsuits and claims in state and federal courts which involved employment and/or personnel related disputes. I am a graduate of Bennett College in Greensboro, N.C. and Marshall Wythe School of Law, College of William and Mary, Williamsburg, VA.

A. Hughey: My experience was rare - my first higher education attorney position was at the University of Pittsburgh right after I graduated from Duquesne University School of Law. Prior to that opportunity, I had over two years' experience clerking at the Allegheny County Law Department in Pittsburgh. While clerking, I gained valuable experience handling an attorney's workload as a certified legal intern. After serving at the University of Pittsburgh for 13 years, I served as General Counsel at Central State University for 11 years and Texas Southern University for 8 years.

C. Johnson: After attending Fisk University and graduating from Bard College and Boston College Law School, I served as a partner in a succession of majority/corporate law firms in Atlanta, beginning with Alston & Bird and ending with Holland & Knight. My practice focused on complex business disputes and public policy, eventually concentrating in the areas of regulatory law, health care, economic development, higher education, and education finance. Over the years I came to do a lot of work for one of the Atlanta-based single-gender Historically Black Colleges and Universities (HBCUs).

Gaskins: What led you to become interested in your current position?

P. Boston: As part of my work in the litigation unit of the Virginia Attorney General's Office, I had an opportunity to represent a multitude of Virginia universities in litigation and grievance matters brought against them in state and federal courts and in government agencies. These cases included employment and/or personnel related disputes. The multitude of issues was fascinating to me. I recognized that that the work could enhance, impact, and hopefully improve not only the status of the students attending the university, but also their families.

A. Hughey: I have served as Vice President and General Counsel for Ohio Northern University (ONU) since May of 2020. I was attracted to this position, because I was recruited as the inaugural General Counsel at ONU. This presented an interesting challenge and the opportunity to establish the office and chart my own path.

C. Johnson: I am a product of HBCU culture, and I have always had a particular affinity for Tuskegee University. My grandfather was associated with one of Tuskegee University's key benefactors and did a lot of his social research in Macon County, where Tuskegee is located. My father attended the Tuskegee Demonstration School and participated in the university's aviation program during World War II. As a college student, I worked in Southwest Alabama as part of a field research team based at Tuskegee University and got to know this community. The university became a client of mine when I was in private law practice. Transitioning into the General Counsel role was a natural outgrowth of what I had been doing in private practice.

Gaskins: Would you agree that serving as in-house counsel at a university is unique when compared to the traditional practice of law?

P. Boston: I often respond when asked "What does an attorney do at a university?" that a university is like a "separate city" with laws, rules, and responsibilities that apply to all who are in the city. In-house counsel must address issues that impact the Board, the President and university administration, faculty, and students. The issues are diverse and expansive, including contract law, immigration, employment, student affairs, fund raising, foundation related issues, both state and national legal matters and policy issues.

A. Hughey: Yes and no. We have many of the same issues as other types of enterprises such as contracts and employment law, but we also have to handle matters related to the rights and responsibilities of students and faculty. Those might include matters related to student discipline and faculty issues related to tenure or academic freedom.

C. Johnson: Yes, to some degree. One obvious difference is that there is only one client, though you are sometimes called upon to balance the concerns of various internal constituencies to ascertain that client's essential interest.

Gaskins: Share some of the challenges of serving as a higher education attorney, as well the rewards.

P. Boston: *The work flow is constant, and I have l*earned to not expect an uneventful day. There is always some legal issue to be addressed - most times with very "short notice" and with a need for a quick legal opinion. This area of the law is "ever-changing" and there is a constant need to be aware of the changes - which may be impacted by politics or fluctuating attitudes of society. Yet, those same challenges are the reason it is so rewarding. You know that what you do can make a difference to some young person's life which will also likely impact the lives of the members of his family.

A. Hughey: The challenges include working in a fast paced, dynamic environment. You are constantly pulled in many different directions. Among the rewards is getting to work with smart people, who tend to be more progressive than many, promoting education, research and service.

C. Johnson: As an industry, higher education is beset with a highly complex and constantly shifting economic and regulatory environment, and that creates its own challenges. The reward at Tuskegee in particular comes from being able to provide guidance to an institution that, traditionally and currently, stays on the cutting edge of the advancement and diffusion of human knowledge and understanding. In the best tradition, higher education in this country, and in the tradition of HBCUs in particular, Tuskegee's educational mission is also a social justice mission. It's great to be a part of the University's work of changing lives and advancing social mobility.

Gaskins: We are in the midst of a global pandemic, and as is the case for most entities, revenue sources have been impacted. How are these conditions impacting the traditional learning delivery style, and what role does the General Counsel play in this regard?

P. Boston: As counsel, we are asked to provide both legal and non-legal advice on a variety of "potential"

issues, many of which have no clear-cut answers. We don't know how the courts will rule on potential claims by students, faculty and staff. We are asked to give some legal interpretation or at least potential "predictions" for situations that change daily. We know that it is important to students to be able to interact with each other - but the pandemic requires that their physical contact be limited. These restrictions are particularly difficult for students who attend an HBCU, where there is high expectation of interaction with faculty and students.

A. Hughey: University attorneys have had to be nimble in responding to unique pandemic related questions. Many students have legally challenged universities for offering virtual rather than live instruction. Other issues have included insurance claims, reductions in force and resistance to face coverings and COVID testing.

C. Johnson: In any institution with a limited endowment, financial management leaves little margin for error. We have to look closely at enrollment trends, and ancillary revenue from room and board is important. But in making our decisions about learning delivery style, none of these considerations is as important as the health and safety of our students and the other members of our community. This is my counsel, but it is also the University's mindset. At Tuskegee, we are fortunate to be able to make those decisions with the assistance of some of the best subject matter experts in the country.

Gaskins: Generally, speaking, what are some of the most pressing issues facing institutions of higher education?

P. Boston: Financial aid and monetary assistance for students and their parents who cannot afford to pay the costs of higher education. The constant struggle to maintain solid financial foundation, especially universities that are dependent upon state funding and do not have a robust independent endowment. Recruiting and retaining faculty and administrators who are leaders in their field.

A. Hughey: Pressing issues include promoting diversity among students, faculty and staff; the shrinking of the traditional-aged enrollment demographic and the disturbing anti-science/anti-intellectual climate infecting our country.

C. Johnson: The population of traditional students is declining, and policy-makers, families and funders are seriously questioning the value proposition in higher-education when costs are rising. The ability of any institution to succeed in this rapidly changing environment will depend on resources, creativity, and smart decision-making.

Gaskins: Do you have any advice for those seeking a career as a General Counsel in higher education law?

P. Boston: Attorneys who are interested in higher education law will discover that it can be difficult to get into this practice area of law. The sense of gratification and the feeling of making an impact on future leaders for our country, results in limited turnover, relatively few vacancies. I have noticed that those who intern or volunteer with a state attorney general or a university have an increased opportunity to be selected for a future legal position as in-house counsel.

A. Hughey: I would advise aspiring university counsel to apply for attorney fellowships. More and more institutions are using these positions to train the next generation of higher education attorneys.

C. Johnson: Ask yourself whether you are committed to the mission of higher education institutions in today's society, and whether you are committed to the mission of the particular institution you seek to serve. Then ask yourself if you are prepared to add value by supporting that mission in ways that call for more than mere legal skills.

Laverne Lewis Gaskins, is the Editor-In-Chief of the *National Bar Association Magazine*. She is a registered arbitrator with the American Arbitration Association and operates a private practice in Augusta, Georgia. She is a former Georgia Special Assistant Attorney General. Gaskins has extensive experience in higher education law. She has served as the University Attorney for Valdosta State, as a Senior Legal Advisor at Augusta University, and is currently Deputy General Counsel at Tuskegee University. In 2014, she presented at the Education/Constitution Conference in South Africa. A Fulbright grant recipient in law, Gaskins has lectured at universities in Hungary and Canada. She has traveled to Vienna, Austria, and to Geneva, Switzerland, as one of the American Bar Association's representatives to the United Nations' Economic and Social Council. A graduate of Florida State University College of Law, Gaskins is an emeritus member of its Alumni Board of Directors.

Pamela Finley Boston has served as the University Counsel and Senior Assistant Attorney General at Norfolk State University since January 2006. Before arriving at NSU, she served for 12 years as Associate General Counsel and Special Assistant Attorney General at Virginia Commonwealth University in Richmond, VA. Her prior experiences include five years employment as Assistant Attorney General with the Office of the Attorney General. In this capacity, she represented the Commonwealth of Virginia, its institutions, employees and judicial officers in state and federal courts for matters involving employment disputes. Her previously worked at Reynolds Metals Company in Richmond, Virginia as a Technical Specialist in their Equal Opportunity Affairs Department. Additionally, for seven years she worked as Supervising and Staff Attorney for Central Virginia Legal Aid Society, Inc. where she specialized in the employment law with emphasis on civil rights litigation. She earned a B.A. from Bennett College in Greensboro, N.C, majoring in Elementary Education with a Math/Science specialization. Her juris doctorate degree is from Marshall-Wythe School of Law, College of William and Mary, Williamsburg, VA.

Andrew C. Hughey has served as the inaugural vice president and general counsel at Ohio Northern University since May 2020. Before arriving at ONU, he served as special assistant to the president for diversity and inclusion at Community College of Allegheny County in Pittsburgh, Pa. His prior experience includes serving as general counsel at Texas Southern University in Houston for seven years, general counsel and secretary to the board of trustees at Central State University in Wilberforce for 12 years, and associate general counsel at the University of Pittsburgh for 13 years, in addition to being an adjunct professor and instructor of law. Andrew earned his BA from the University of Pittsburgh, majoring in rhetoric and communications with minors in economics and psychology. His juris doctor is from Duquesne University School of Law.

Charles S. Johnson currently serves as Vice President for External Affairs and General Counsel of Tuskegee University. A seasoned trial lawyer, he previously practiced in Atlanta as an equity partner with leading law firms including Holland & Knight LLP and Alston & Bird LLP in areas including health law, higher education law, dispute resolution, and public policy. He also served as Adjunct Professor of Antitrust Law at the University of Georgia. He advised Morehouse College in securing the Martin Luther King, Jr. Collection. Mr. Johnson is Chairman of the Board of the Georgia Budget and Policy Institute, President of the Southern Regional Council, Co-Convenor of Advocacy for Action, and a member of the Board of Trustees of Bard College (his *Alma Mater*). His community involvement is extensive: Previously chaired the Georgia State Board of Bar Examiners, the Board of Trustees of Leadership Atlanta, the ABA Committee on Insurance Regulation, the ABA Conference of Minority Partners in Majority/Corporate Law Firms, the Atlanta Judicial Commission, the Atlanta Urban League, the Atlanta Exchange and the Atlanta Region Open Housing Coalition. He also served as President of the Atlanta Legal Aid Society and the Gate City Bar Association. He formerly served as Vice President of the National Bar Association. *Atlanta* Magazine has recognized him as one of Atlanta's "Powers to Be" and one of Georgia's Super Lawyers, and the King Center has recognized him with its Martin Luther King, Jr. Peace and Justice Award. He has been inducted into the National Bar Association Hall of Fame and the Gate City Bar Association Hall of Fame.

From Prisons to Polls: An Analysis of the Unvested Voting Rights of Formerly Incarcerated Juveniles

By Radarius Morrow

I. Introduction

The right to vote is a fundamental right and "basic democratic principle that should be protected, promoted, and practiced."[1] However, when it comes to voting provisions for juveniles tried as adults and convicted of a felony, states leave the unvested right of juveniles unprotected, unpromoted, and -ensure once they reach the age of majority- unpracticed. Historically, the right to vote was exclusively held by wealthy white male property owners.[2] Excluded from the ballot box were women, Blacks . . . and persons with felony convictions.[3]

Between 1890 to 1908, ten of the eleven former Confederate states ratified new constitutions or amendments which incorporated provisions that included poll taxes . . . and felony disenfranchisement provisions that focused on crimes thought to be committed by Blacks.[4] As is the fate of adults convicted of a felony, minors who are tried as adults and convicted of a felony are also excluded from the ballot box in most states upon their release.[5] This essay will discuss the unvested right to vote by persons tried in the criminal justice system while a juvenile and subsequently lost their right to vote. Additionally, this essay will assert that laws that make it mandatory for formerly incarcerated juveniles to pay restitution and criminal court fees before having their right to vote restored is equivalent to an unconstitutional poll tax.

II. Criminal Debt and Poll Taxes

In several states, more than one in five Black citizens are prohibited from exercising their right to vote based on their ability to pay court fees and restitution payments.[6] Any law forcing former juvenile offenders to pay off all or criminal court fees and restitutions before being granted their right to vote is equivalent to a poll tax and is explicitly prohibited by the Twenty-Fourth Amendment of the U.S. Constitution.[7]

In accordance with past voting discrimination, current laws banning formerly incarcerated juveniles from voting based on wealth, disproportionately affects Black citizens and other established minority groups.[8] Justice Douglas asserted in *Harper v. Virginia Board of Elections,* "[w] ealth . . . is not germane to one's ability to participate intelligently in the electoral process."[9] When a state mandates that a former juvenile offender make payments prior to voting restoration, the state willfully neglects to consider the likelihood that the former offender would not be able to essentially "buy back" their fundamental right to vote.[10]

Also, juvenile payment requirements create two distinct groups: those who are of affluent backgrounds who qualify for voting restoration and can pay their criminal court fees and those who are from lower income backgrounds who also qualify for voting restoration but cannot pay their court fees. These "buy-back" provisions impact about ten million formerly incarcerated people that owe over fifty billion dollars in debt stemming from the criminal court system.[11] Further, this wealth based distinction effectively ensures that most of the former offenders will never be able to vote again because they will likely never be able to pay off their criminal debt due to being poor both before and after their incarceration.[12]

Most offenders remain unemployed for at least a year following their release from prison.[13] Thus, it is likely that if a person's restitution or court fees are too high, they will forgo an attempt to regain their voting rights in lieu of spending money on trying to reintegrate into society and pay for their necessities.[14] In addition, "formerly incarcerated people are unemployed at a rate of over 27% — higher than the total U.S. unemployment rate during any historical period, including the Great Depression." [15] Also, this wealth gap disproportionately affects Blacks and other people of color.[16] For Blacks and other formerly incarcerated [juveniles] of color, the status of "formerly incarcerated" reduces their chances of employment even more.[17]

In the alternative, states will likely assert that, "a state's decision to permanently disenfranchise convicted juvenile felons does not, in itself, constitute an Equal Protection violation."[18] Also, that disenfranchisement laws are narrowly tailored to fit the compelling government interest of insuring victims of the offenders' behavior are made whole via restitution and all court cost are paid in full. However, such an argument hinges on the financial ability of the juvenile felon to pay these debts and there is no guarantee that the formerly incarcerated juvenile will pay the fees.[19] Finally, there are other less restrictive methods to help ensure that the fees are paid without

denying a citizen the opportunity to have their right to vote reinstated; these include wage garnishment, debt collection, and liens on owned property. If it is to be believed that the right to vote is fundamental and it acts as a preservative of all [other] rights, wealth based voting laws that hinge on payment from formerly incarcerated juveniles and their unvested right to vote should be struck down.[20]

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[1] This writing is an excerpt of a larger work including topics related to the school to prison pipeline and the juvenile justice system.

[1] Fair Vote, RIGHT TO AMENDMENT, https://www.prisonpolicy.org/reports/outofwork.html (last visited Oct. 22, 2020).

[2] See generally, LIB OF CONG., THE FOUNDERS AND THE VOTE, https://www.loc.gov/classroom-materials/elections/right-to-vote/the-founders-and-the-vote/ (last visited Oct. 22, 2020).

[3] *Id*.

[4] See generally, DEPT. OF JUSTICE, https://www.justice.gov/crt/introduction-federal-voting-rights-laws (last visited Oct. 22, 2020).

[5] In the United States, there is no voting rights provision for juveniles tried as adults and convicted of a felony.

[6] Lawrence Mower and Langston Taylor, *Florida ruled felons must pay to vote. Now, it doesn't know how many can*, TAMPA BAY TIMES (Oct. 7, 2020), https://www.tampabay.com/news/florida-politics/elections/2020/10/07/florida-ruled-felons-must-pay-to-vote-now-it-doesnt-know-how-many-can/.

[7] Jonathan Soros, *The Missing Right: A constitutional Right to Vote*, DEMOCRACY (Spring 2013), https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote/.

[8] Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,* THE SENTENCING PROJECT (Oct. 14, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/.

[9] See Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966).

[10] Ginger Jackson-Gleich and Rev. Dr. S. Todd Yeary, *Eligible, but excluded: A guide to removing the barriers to jail voting,* PRISON POLICY INITIATIVE (Oct. 2, 2020), https://www.prisonpolicy.org/reports/jail_voting.html.

[11] Karin D. Martin, Sandra Susan Smith, and Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, NATIONAL INSTITUTE OF JUSTICE, https://www.ncjrs.gov/pdffiles1/nij/249976.pdf (last visited October 22, 2020).

[12] Douglas N. Evans, *The Debt Penalty: Exposing the Financial Barriers to Offender Reintegration,* (August 2014), https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf.

[13] *Id*.

[14] *Id*.

[15] Lucius Couloute and Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people* (July 2018), https://www.prisonpolicy.org/reports/outofwork.html.

[16] Bernadette Rabuy and Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned* (July 9, 2015), https://www.prisonpolicy.org/reports/income.html

[17] Fair Vote, RIGHT TO AMENDMENT, https://www.prisonpolicy.org/reports/outofwork.html (last visited Oct. 22, 2020).

[18] See Richardson v. Ramirez, 418 U.S. 24, 53-55 (1974).

[19] See Zablocki v. Redhail, 434 U.S. 374 (1978).

[20] See Harper v. Virginia Board of Elections, 383 U.S. 663, 667 (1966).

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Hurricane Katrina and COVID-19: Tax Legislation When the Primary Victim is Poor and Black

By Kyra Hudson

"The wind isn't racist, and the rain doesn't target the poor. But when hurricanes strike and cities flood, people who were already disadvantaged tend to suffer the most."[1]

On August 29th, 2005, Hurricane Katrina made its appearance in the city of New Orleans, Louisiana. Within hours, the category four hurricane left eighty percent of the city underwater, causing a nightmare among the city's residents.[2] The Hurricane left the city devastated and hoping for recovery. Before the storm, African Americans made up sixty-eight percent of the city of New Orleans.[3] Thirty-four percent of those families are poor, and seventeen percent of those households are below the poverty line.[4] Specifically, one out of every three people who lived in the hardest hit areas were African American.[5] Since African American individuals and families were largely affected by Hurricane Katrina, tax policies should have been tailored to provide relief to these primary victims. Although tax policies were put in place during these times to provide relief, some argue that these tax policies did not affect or relieve Hurricane Katrina's primary victims.[6]

One of the most popular tax legislation pieces after the hurricane was The Katrina Emergency Tax Relief Act of 2005 (KETRA). On September 23, 2005, President Bush signed the Katrina Emergency Tax Relief Act into law.[7] Although KETRA was an on-time response to tax victims after Hurricane Katrina, its tax policies failed to provide relief to the primary victims of the storm. The overarching issue with KETRA is that most of the legislation could not benefit primary victims because of the average victim's income. New Orleans, Louisiana, had a poverty rate that was more than nineteen percent at the time of the hurricane.[8] As stated above, African Americans made up sixty-eight percent of the New Orleans population, with thirty-four percent living in poverty.[9] Therefore, the average victim would not be in a financial position to take an itemized deduction over a standard deduction, resulting in the victim not receiving the benefit of KETRA's itemized deductions.[10] For example, the first title of the act provided victims access to their retirement accounts[11]; however, only those who had retirement plans or those victims well above the poverty line benefited. Additionally, since thirty-four percent of the primary victim class is poor, they are less likely to benefit from this title, which is a large chunk of people not benefitting.

While Hurricane Katrina happened years ago, it is important to note that the nation is facing a disaster right now. COVID-19, also known as the coronavirus, has begun to spread across the nation, leaving some dead and others in critical condition. The virus has devastated the Black community because of long-standing systemic health and social inequities. Notably, African Americans are five times more likely to contract the virus than White Americans.[12] Further, although African Americans make up thirteen percent of the United States population, one-third of the infections are carried by African Americans.[13]

On March 27, 2020, the CARES Act was passed and signed into law.[14] The Cares Act has provided some relief to individuals, but the provisions were not enough.[15] Specifically, while the stimulus check may have seemed like a great form of relief on its face, taxpayers claim it was not enough. Giving every individual the same amount of money to provide relief suggests that legislators think each household has the same amount of resources to survive the effects of this pandemic.[16] Further, although the CARES Act provided funds to help hospitals and health care providers[17], it did not include providing health care to those who cannot afford it and do not have insurance. Legislators have critically failed because a public health crisis is occurring, and individuals will likely need medical coverage to receive help.

Although providing for the poor after disasters through tax legislation is a complex issue, the first step legislators

should consider is highlighting the primary victims of disasters or emergencies. Additionally, legislators may want to consider drafting more direct relief policies when providing relief to primary victims who are poor or low-income, such as employment insurance, the Child Tax Credit, and the Earned Income Tax Credit.[18] Employment insurance is state-provided insurance that pays individuals when they have lost their job, and they met their eligibility requirements.[19] Moreover, the child tax credit provides a refundable $2,000 credit per child to qualifying individuals.[20] Legislators should consider the child tax credit when dealing with poor or low-income victims because it provides parents money to provide for their children affected by the storm. Further, it lifts the financial burden poor or low-income parents may experience after a disaster. Lastly, legislators can continue to build upon the earned income tax credit's success.[21]

Years have passed, and the potential for a rehash of the catastrophe remains in the city of New Orleans. Fifteen years ago, after Hurricane Katrina, legislators failed to provide tax relief to the primary victims through tax law and policies like The KETRA Act. Now during the current COVID 19 pandemic, the CARES Act has failed to include low-income individuals. Legislators need to start being more inclusive when drafting tax legislation in disasters or emergencies.

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2 Jonathan Jeanlouis, *Hurricane Katrina, Failed Tax Policies, and the New Orleans Recovery,* 44 S.U. L. REV. 85, 87 (2016).

3 U.S. Census Bureau (2005). Poverty Status. Retrieved from https://www.census.gov/topics/preparedness/events/hurricanes/katrina.html.

4 *Id.*

5 *Id.*

6 Meredith M. Stead, *Implementing Disaster Relief Through Tax Expenditures: An Assessment of the Katrina Emergency Tax Relief Measures,* 81 N.Y.U. L. REV. 2158, 2172 (2006).

7 Katrina Tax Emergency Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016 (2005).

8 U.S. Census Bureau (2005). Poverty Status. Retrieved from https://www.census.gov/topics/preparedness/events/hurricanes/katrina.html.

9 Id.

10 *See* What Are the Largest Tax Expenditures?, Tax Policy Center, (Jun. 24, 2020, 12:34 PM), http://www.taxpolicycenter.org/briefing-book/what-are-largest-tax-expenditures.

11 § 101 ,119 Stat. at 109-73 (2005)

12 COVID-19 in Racial and Ethnic Minority Groups, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Jun. 25 2020), www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html.

13 *Id.*

14 Coronavirus Aid, Relief, and Economic Security Act (CARES), Pub.L. 116-136, 134 Stat. 281 (2020)

15 Pamela Foohey & Dalié Jiménez, *Cares Act Gimmicks: How Not to Give People Money During a Pandemic and What to Do Instead,* 10 THE NAT'L L. REV. 102, http://www.natlawreview.com/article/cares-act-gimmicks-how-not-to-give-people-money-during-pandemic-and-what-to-do.

16 *Id.*

17 § 3211

18 See Garrett Watson, et al. "Congress Approves Economic Relief Plan for Individuals and Businesses." Tax Foundation, Apr. 22, 2020, taxfoundation.org/cares-act-senate-coronavirus-bill-economic-relief-plan/; see also, Institute for Family Studies, "Conservative Scholars and Leaders Call for Expanded EITC and CTC for Families," July 16, 2020, https://ifstudies.org/blog/conservative-scholars-and-leaders-call-for-expanded-eitc-and-ctc-for-families); *and* Lim, Y., et al. "Free Tax Assistance and the Earned Income Tax Credit: Vital Resources for Social Workers and Low-Income Families." Social Work, vol. 57, no. 2, 2012, pp. 175–184., doi:10.1093/sw/sws035.

19 Garrett Watson, et al. "Congress Approves Economic Relief Plan for Individuals and Businesses." Tax Foundation, Apr. 22, 2020, taxfoundation.org/cares-act-senate-coronavirus-bill-economic-relief-plan/ .

20 *Id.*

21 James D. Bryce, *A Critical Evaluation of the Tax Crits,* 76 N.C. L. REV. 1687, 1695 (1998).

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