CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 21 SPRING 2022 NUMBER 2

CONTENTS

ARTICLES

Bridging Health Equity and Civil Rights: How Federal Funding Agencies Can Reduce Disparities and Discrimination in Healthcare Using Civil Rights Mechanisms 1

Neelam Salman, Golda Philip & Sarah Williams

Barring Diversity? The American Bar Exam as Initiation Rite and Its Eugenics Origin..... 38

Mary Szto

NOTES & COMMENTS

One Step Forward, Two Steps Backward: Will Connecticut Accept the Ongoing Legacy of Racial Discrimination in Jury Selection..... 63

Hope J. Estrella

A Vehicle to Inequity: Law School Merit Scholarships 96

Luke Reynolds

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 21 SPRING - SUMMER 2022 NUMBER 2

Associate Editors

Prabisha Bhandari
Olivia Burley
Alorah Connolly-Pelletier
Laura David
Grace Denny
Danielle Erickson
Briana Fernald
Zoe Heard
Magdalena Klin
Zachary Kranc
Hannah Lauer
Emily Leen
Enrique Lopez-Ramirez
Christopher Mannion
Forrest Noirot
Curtis Rew
Danielle Sturgeon
Julia Suesser

Faculty Advisor

Bethany Berger

The Connecticut Public Interest Law Journal (ISSN 1932-2038) is published in the fall and spring of each year by the Connecticut Public Interest Law Journal, University of Connecticut School of Law, 55 Elizabeth Street, Hartford, Connecticut 06105, and printed by Western Newspaper Publishing Company, Inc., 537 East Ohio Street, Indianapolis, Indiana 46204. Periodical's postage paid at Hartford, Connecticut, and additional mailing offices.

Postmaster: Send address changes to the Connecticut Public Interest Law Journal, 55 Elizabeth Street, Hartford, Connecticut 06105.

The subscription price is $20.00 per year. Absent timely notice of termination, subscriptions are renewed annually. Please address all subscriptions and inquiries to the Administrative Editor at the Journal's office. Advertising rates available upon request.

UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW

FACULTY AND OFFICERS OF ADMINISTRATION
FOR THE ACADEMIC YEAR 2021 - 2022

Officers of Administration

Radenka Maric, Ph.D., *Interim President, University of Connecticut*
John A. Elliot, Ph.D., *Interim Provost and Executive Vice President for Academic Affairs*
Eboni S. Nelson, J.D., *Dean, University of Connecticut School of Law*
Paul Chill, J.D., *Associate Dean for Academic Affairs*
Jennifer Mailly, J.D., *Associate Dean, Experiential Education*
Richard Wilson, Ph.D., *Associate Dean for Faculty Development and Intellectual Life*
Jennifer Cerny, J.D., *Executive Director, Student Affairs and Assistant Dean of Students*
Karen L. DeMeola, J.D., *Assistant Dean for Finance, Administration and Enrollment*

Faculty Emeriti

Loftus E. Becker, Jr., A.B., LL.B., *Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Deborah A. Calloway, B.A., J.D., *Professor of Law Emerita*
Clifford Davis, S.B., LL.B., *Professor of Law Emeritus*
Todd D. Fernow, B.A., J.D, *Professor of Law Emeritus and Former Director, Criminal Law Clinic*
Richard S. Kay, A.B., M.A., J.D., *Wallace Stevens Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Lewis S. Kurlantzick, B.A., LL.B., *Zephaniah Swift Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
James Kwak, A.B., Ph.D., J.D., *Jesse Root Professor of Law Emeritus*
Hon. Ellen Ash Peters, B.A., LL.B., LL.D., *Visiting Professor of Law*
Patricia A. McCoy, B.A., J.D., *Professor of Law Emerita*
R. Kent Newmyer, Ph.D., *Professor of Law and History Emeritus*
Nell J. Newton, B.A., J.D., *Dean and Professor of Law Emerita*
Leonard Orland, B.A., LL.B., *Professor of Law Emeritus*
Jeremy R. Paul, A.B., J.D., *Dean and Professor of Law Emeritus*
Howard Sacks, A.B., LL.B., *Dean and Professor of Law Emeritus*
Eileen Silverstein, A.D., J.D., *Professor of Law Emerita*
Lester B. Snyder, B.S., LL.B., LL.M., *Professor of Law Emeritus*
James H. Stark, A.B., J.D., *Roger Sherman Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Kurt A. Strasser, B.A., J.D., LL.M., J.S.D., *Phillip Blumberg Professor of Law Emeritus*
Colin C. Tait, B.A., LL.B., *Professor of Law Emeritus*
Carol Ann Weisbrod, J.D., *Professor of Law Emerita*
Nicholas Wolfson, A.B., J.D., *Professor of Law Emeritus*

Faculty of Law

Jill C. Anderson, B.A., University of Washington; J.D., Columbia Law School; *Professor of Law*
Jon Bauer, A.B., Cornell University; J.D., Yale Law School; *Richard D. Tulisano '69 Human Rights Scholar and Clinical Professor of Law*
Mary Beattie, B.A., Providence College; J.D., University of Bridgeport; *Assistant Clinical Professor of Law and Director, Academic Support*
Bethany Berger, B.A., Wesleyan University; J.D., Yale Law School; *Wallace Stevens Professor of Law*
Robert L. Birmingham, A.B., J.D., Ph.D. (Econ.), Ph.D. (Phil.), University of Pittsburgh; LL.M., Harvard Law School; *Professor of Law*
Kiel Brennan-Marquez, B.A., Pomona College; J.D., Yale Law School; *Associate Professor of Law and William T. Golden Scholar and Faculty Director, Center on Community Safety, Policing and Inequality*
Sara C. Bronin, B.A., University of Texas; M.Sc., University of Oxford (Magdalen College); J.D., Yale Law School; *Thomas F. Gallivan, Jr. Chair in Real Property Law and Faculty Director, Center for Energy and Environmental Law*
Paul Chill, B.A., Wesleyan University; J.D., University of Connecticut School of Law; *Associate Dean for Academic Affairs and Clinical Professor of Law*

John A. Cogan, Jr., B.A., University of Massachusetts, Amherst; M.A., University of Texas; J.D., University of Texas School of Law; *Associate Professor of Law and Roger S. Baldwin Scholar*

Mathilde Cohen, B.A., M.A., L.L.B., Sorbonne-École Normale Supérieure; LL.M., J.S.D., Columbia Law School; *George Williamson Crawford Professor of Law*

Tara Cooley, B.A., J.D., Golden Gate University; L.L.M., Lewis & Clark Law School; *Teaching Fellow*

Diane F. Covello, B.S., University of Kansas; J.D., Duke University School of Law; *Assistant Clinical Professor of Law and Co-Director, Intellectual Property and Entrepreneurship Law Clinic*

Anne C. Dailey, B.A., Yale University; J.D., Harvard Law School; *Evangeline Starr Professor of Law*

Miguel F. P. de Figueiredo, B.A., Johns Hopkins University; M.A., University of Chicago; Ph.D., University of California, Berkeley; J.D., Yale Law School; *Associate Professor of Law and Terry J. Tondro Research Scholar*

Jessica de Perio Wittman, B.A., State University of New York at Stony Brook; B.A, M.L.S., State University of New York at Buffalo; J.D., Seattle University School of Law; *Associate Professor of Law, Cornelius J. Scanlon Scholar and Director, Law Library*

Richard Michael Fischl, B.A., University of Illinois; J.D., Harvard Law School; *Professor of Law*

Timothy Fisher, B.A., Yale University; J.D., Columbia Law School; *Professor of Law and Dean Emeritus*

Valeria Gomez, B.A., Belmont University; J.D., University of Tennessee College of Law; *Visiting Assistant Clinical Professor of Law and William R. Davis Clinical Teaching Fellow*

Hillary Greene, B.A., Yale University; J.D., Yale Law School; *Zephaniah Swift Professor of Law*

Dirk Hanschel, B.A. Universities of Marburg and Heidelberg and London School of Economics; M.A., Ph.D., University of Mannheim/Adelaide; *Martin-Flynn Global Law Professor*

An-Ping Hsieh, B.A., Yale University; J.D., Boston College Law School; *Visiting Professor from Practice*

Nadiyah J. Humber, B.S., Vanderbilt University; J.D., Suffolk University School of Law; *Associate Professor of Law*

Mark W. Janis, A.B., Princeton University; B.A., M.A., Oxford University; J.D., Harvard Law School; *William F. Starr Professor of Law*

Maureen Johnson, B.A., M.F.A., University of California, Los Angeles; J.D., Loyola Law School, Los Angeles; *Assistant Clinical Professor*

Darcy Kirk, A.B., Vassar College; M.S., M.B.A., Simmons College; J.D., Boston College School of Law; *Distinguished Professor of Law, Associate Dean for Academic Affairs and Associate Dean for Library and Technology*

Peter R. Kochenburger, A.B., Yale University; J.D., Harvard Law School; *Associate Clinical Professor of Law and Executive Director, Insurance LL.M. Program and Deputy Director, Insurance Law Center*

Alexandra D. Lahav, A.B., Brown University; J.D., Harvard Law School; *Ellen Ash Peters Professor of Law*

Molly K. Land, B.A., Hamline University; J.D., Yale Law School; *Catherine Roraback Professor of Law*

Leslie C. Levin, B.S.J., Northwestern University; J.D., Columbia Law School; *Hugh Macgill Professor of Law*

Peter L. Lindseth, B.A., Cornell University; J.D., Cornell Law School; M.A., M.Phil., Ph.D., Columbia University; *Olimpiad S. Ioffe Professor of International and Comparative Law and Director, Graduate, International, and Non-J.D. Programs*

Richard Luedeman, A.B., Harvard University; J.D., Yale Law School; *Assistant Clinical Professor*

Joseph A. MacDougald, A.B., Brown University; M.B.A., New York University; J.D., University of Connecticut School of Law; M.E.M., Yale University; *Professor-in-Residence; Executive Director, Center for Energy and Environmental Law*

Jennifer Brown Mailly, A.B., Brown University; J.D., Ohio State University Moritz School of Law; *Associate Dean for Experiential Education and Director, Clinical Professor of Law and Field Placement Program*

Willajeanne F. McLean, B.A., Wellesley College; B.S., University of Massachusetts; J.D., Fordham University School of Law; LL.M., Free University of Brussels; *Distinguished Professor of Law*

Thomas H. Morawetz, A.B., Harvard College; J.D., Yale Law School; M.Phil., Ph.D., Yale University; *Tapping Reeve Professor of Law and Ethics*

Minor Myers, B.A., Connecticut College; J.D., Yale Law School; *Professor of Law*

Eboni S. Nelson, B.A., Wake Forest University; J.D., Harvard Law School; *Dean and Professor of Law*

Ángel R. Oquendo, A.B., M.A., Ph.D., Harvard University; J.D., Yale Law School; *George J. and Helen M. England Professor of Law*

Sachin S. Pandya, B.A., University of California, Berkeley; M.A., Columbia University; J.D., Yale Law School; *Professor of Law*

Travis Pantin, B.A., University of Chicago; J.D., Yale Law School; *Director, Insurance Law Center and Associate Professor of Law*

Lisa Perkins, B.S., J.D., Michigan State University; LL.M., Georgetown University Law Center; *Clinical Professor of Law and Director, Tax Clinic*

Richard D. Pomp, B.S., University of Michigan; J.D., Harvard Law School; *Alva P. Loiselle Professor of Law*

Jessica S. Rubin, B.S., Cornell University; J.D., Cornell University School of Law; *Clinical Professor of Law and Director, Legal Practice Program*

Susan R. Schmeiser, A.B., Princeton University; J.D., Yale Law School; Ph.D., Brown University; *Professor of Law*

Peter Siegelman, B.A., Swarthmore College; M.S.L., Yale Law School; Ph.D., Yale University; *Phillip I. Blumberg Professor of Law*

Julia Simon-Kerr, B.A., Wesleyan University; J.D., Yale Law School; *Professor of Law*

Rachel Timm, *Assistant Clinical Professor*

Stephen G. Utz, B.A., Louisiana State University; J.D., University of Texas School of Law; Ph.D., Cambridge University; *Roger Sherman Professor of Law*

Anna VanCleave, B.A., M.A., University of Michigan; J.D., New York University School of Law; *Director, Criminal Defense Clinic and Associate Professor of Law*

Steven Wilf, B.S., Arizona State University; Ph.D., Yale University; J.D., Yale School of Law; *Anthony J. Smits Professor of Global Commerce*

Richard A. Wilson, BSc., Ph.D., London School of Economics and Political Science; *Associate Dean, Faculty Development and Intellectual Life and Gladstein Chair of Human Rights and Board of Trustees Distinguished Professor of Law and Anthropology*

Carleen Zubrzycki, B.A., Yale University; J.D., Yale School of Law; *Associate Professor of Law*

Adjunct Faculty of Law

Bethany Barrese, B.S., University of Connecticut; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Anne D. Barry, B.S., University of Connecticut; M.S., Union College; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

James W. Bergenn, B.A., Catholic University; J.D., Columbia Law School; *Adjunct Professor of Law*

Susana Bidstrup, LL.B., Universitat Pompeu Fabra; Postgraduate Diploma, ESADE Law School; LL.M., Fordham University, School of Law; *Adjunct Professor of Law*

John Buchanan, III, A.B., Princeton University & University of Oxford; J.D., Harvard Law School; *Adjunct Professor of Law*

Michael A. Cantor, B.S., University of Connecticut; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Audrey Chapman, A.B. Wellesley College; M.A., Ph.D., Columbia University; New York Theological Seminary & Union Theological Seminary; *Adjunct Professor of Law*

Andy Corea, B.A., College of William and Mary; J.D., George Mason University School of Law; *Adjunct Professor of Law*

Marina Cunningham, B.S., Columbia University; M.S., Massachusetts Institute of Technology; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Hon. Michael Darby, B.A., University of Hartford; J.D., Duke University School of Law; *Adjunct Professor of Law*

Gerald Dwyer, Jr., A.B., Colgate University; J.D., Gonzaga University School of Law; LL.M., Georgetown University Law Center; *Adjunct Professor of Law*

Michael Eisele, B.S., U.S. Merchant Marine Academy; J.D., Georgetown University; *Adjunct Professor of Law*

Natalie Elicker, B.A., University of Virginia; J.D., University of Virginia; *Adjunct Professor of Law*

Steven Fast, Choate Scholar, Dartmouth College; J.D., Columbia Law School; *Adjunct Professor of Law*

Michael Gailor, B.A. Cornell University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Donald Gershman, B.A., Tufts University; J.D., Boston College Law School; *Adjunct Professor of Law*

William D. Goddard, B.A., M.B.A., Dartmouth College; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Dan Goren, B.A., Dartmouth College; M.S., Columbia University Graduate School of Journalism; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

James Greenfield, A.B., Brown University; M.B.A., J.D. Columbia University School of Law; *Adjunct Professor of Law*

Andrew S. Groher, B.A., University of Virginia; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Wesley Horton, B.A., Harvard University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

John J. Houlihan, Jr., B.A., Providence College; J.D., St. John's University; *Adjunct Professor of Law*

Jared Howenstine, B.S. University of Massachusetts; J.D. South Texas College of Law; *Adjunct Professor of Law*

Nancy Kennedy, B.A., University of Massachusetts; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Daniel Klau, B.A., University of California; J.D., Boston University School of Law; *Adjunct Professor of Law*

Charles Klippel, B.A., Harvard University; M.E., Harvard University Graduate School of Education; M.P.H., Harvard T.H. Chan School of Public Health; J.D., Harvard Law School; *Adjunct Professor of Law*

Brendon Levesque, B.S., Saint Michael's College; J.D., Quinnipiac University School of Law; *Adjunct Professor of Law*

Erik T. Lohr, B.S., Thomas A. Edison State College; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Kathleen Lombardi, University of Massachusetts Lowell; J.D., New England School of Law; *Adjunct Professor of Law*

Robert Marconi, B.A., Yale University; M.A., Georgetown University; J.D., LL.M., University of Connecticut School of Law; *Adjunct Professor of Law*

Thomas S. Marrion, A.B., College of the Holy Cross; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Amber Martin Stone; B.A., Rutgers University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Kirt Mayland, Dartmouth College; M.F., Instituto Technologico de Estudios Superiores; J.D., University of Connecticut School of Law; LL.M., Vermont Law School; *Adjunct Professor of Law*

Barbara McGrath, B.A., Yale University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Marcos Mendoza, B.A., Baker University; J.D., Washburn University School of Law; LL.M., University of Connecticut School of Law; *Adjunct Professor of Law*

Mary Miller, B.A., Swarthmore College; J.D., William & Mary Law School; *Adjunct Professor of Law*

Steven Mirmina, B.A., Brandeis University; J.D., University of Connecticut School of Law; LL.M., Leiden University Faculty of Law; LL.M., Georgetown University Law Center; *Adjunct Professor of Law*

Umar Moghul, B.A., M.A., University of Pennsylvania; J.D., Temple University Law School; *Adjunct Professor of Law*

Thomas B. Mooney, B.A., Yale University; J.D., Harvard Law School; *Adjunct Professor of Law*

Paul Narducci, B.A., College of the Holy Cross; J.D., Suffolk University Law School; *Adjunct Professor of Law*

Cornelius O'Leary, B.A., Williams College; M.A., Trinity College; J.D., University of Connecticut School of Law; *Adjunct Professor of Law and Mark A. Weinstein Clinical Teaching Fellow*

Vincent Pace, B.A., Fairfield University; J.D., LL.M., S.J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Adele Patterson, B.A., Brown University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Humbert J. Polito, Jr., A.B., College of the Holy Cross; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Leah M. Reimer, B.S. Baylor University; J.D., University of Connecticut School of Law; Ph.D., Stanford University; *Adjunct Professor of Law*

Roger Reynolds, B.A., Macalester College; J.D., New York University Law School; *Adjunct Professor of Law*

Barbara Rezner, B.A., Gettysburg College; J.D., Washington and Lee University; *Adjunct Professor of Law*

Christopher J. Rooney, B.A., University of Virginia; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Hon. Stuart Rosen, B.A., University of Connecticut; J.D., Columbus School of Law, The Catholic University of America; *Adjunct Professor of Law*

Patrick J. Salve, B.S., J.D., University of Pennsylvania; *Adjunct Professor of Law*

Carl Schiessl, B.A., Trinity College; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Angelo Sevarino, B.A., M.A., University of Connecticut; J.D., Western New England School of Law; *Adjunct Professor of Law*

Hon. Michael R. Sheldon, A.B., Princeton University; J.D., Yale Law School; *Adjunct Professor of Law*

Sandra Sherlock-White, B.A., Central Connecticut State University; J.D., Western New England College; *Adjunct Professor of Law*

David Sherwood, B.A., University of Pennsylvania; M.Phil., Yale University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Douglas Simpson, A.B., Dartmouth College; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

David Smith, B.A., M.S., Fairfield University; J.D., New York University Law School; *Adjunct Professor of Law*

Joshua Stein, B.A., Yale University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

Daniel Steinbock, B.A., Yale University; J.D., Yale Law School; *Adjunct Professor of Law*

Martha Stone, B.A., Wheaton College; J.D., LL.M., Georgetown University Law Center; *Adjunct Professor of Law*

Tahlia Townsend, B.S., Carnegie Melon University; J.D., Yale Law School; *Adjunct Professor of Law*

Walter C. Welsh, B.S., Tufts Engineering; J.D., University of Connecticut School of Law; LL.M., New York University Law School; *Adjunct Professor of Law*

Robert Werner, B.A., Amherst College; M.A., Columbia University; J.D., New York University School of Law; *Adjunct Professor of Law*

Wesley Whitmyer, Jr., B.A., Ohio Wesleyan University, J.D., Ohio State University Moritz College of Law; *Adjunct Professor of Law*

David Wilfert, B.A., University of Virginia; J.D., University of Virginia School of Law; *Adjunct Professor of Law*

Robert Yass, B.A., Binghamton University; J.D., New York University Law School; LL.M., University of Connecticut School of Law; *Adjunct Professor of Law*

Peter Zarella, B.S., Northeastern University; J.D., Suffolk University Law School; *Adjunct Professor of Law*

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 21 SPRING - SUMMER 2022 NUMBER 2

Bridging Health Equity and Civil Rights: How Federal Funding Agencies Can Reduce Disparities and Discrimination in Healthcare Using Civil Rights Mechanisms

NEELAM SALMAN,[†] GOLDA PHILIP[††] & SARAH WILLIAMS[†††]

[†] Neelam Salman is the Section Chief for Civil Rights Coordination and Compliance within HRSA's Office of Civil Rights, Diversity, and Inclusion, where she serves as an agency expert in federal civil rights laws as they relate to diversity, equity, inclusion, and accessibility. Neelam began her federal career as a Presidential Management Fellow at the HHS Office for Civil Rights and continued post-fellowship advancing civil rights regulatory and enforcement initiatives. Neelam received her Juris Doctor from American University Washington College of Law and her Bachelor of Arts from the University of Maryland, College Park. Neelam is honored to have written and published this article alongside her mentors.

[††] Golda Philip is the Senior Advisor for Equity for the HRSA Maternal and Child Health Bureau where she works to reduce disparities and achieve health equity in maternal and child health. Golda has served in leadership positions across several federal agencies with a focus on advancing equity, diversity, and inclusion for the federal workforce and for individuals accessing services funded by the federal government. Golda received a Bachelor of Arts with honors from Stanford University, a Masters of Public Health from Tufts University School of Medicine, and a Juris Doctor from Northeastern University School of Law.

[†††] Sarah Williams serves as acting Deputy Office Head of the National Science Foundation's Office of Equity and Civil Rights. For over a decade, Sarah has worked to promote Civil Rights, Equal Employment Opportunity, and Diversity, Equity, Inclusion, and Accessibility in federally funded programs and federally conducted activities. Sarah earned her Bachelor of Arts from Missouri State University and a Juris Doctor from Saint Louis University School of Law with a Certificate in Health Law. Despite Sarah's passion for equity and civil rights, she believes that the full credit for this article lies with Neelam Salman and Golda Philip. Their ferocious minds and generous hearts conceived and nurtured this article to completion; Sarah merely babysat on occasion.

INTRODUCTION

> Of all the forms of inequality, injustice in health is the most shocking and the most inhuman because it often results in physical death. I see no alternative to direct action [in order to] raise the conscience of the nation.[1]

The civil rights movement was a social, legal, and political struggle by communities that are underserved to achieve equality across all facets of life. For decades, civil rights leaders advocated for legal protections based on individual characteristics, such as race, which formed the foundation of discriminatory structures and practices in the United States. The push to end inequality and segregation resulted in the passing of the Civil Rights Act of 1964, a landmark legislation outlawing discrimination on the basis of race, color, religion, sex, and national origin.[2] Thereafter, Congress enacted supplementary civil rights laws that extend protections to individuals discriminated against due to disability, age, race, familial status, and other bases.[3]

Congress charged Executive departments to use federal civil rights laws as a tool to address discrimination across healthcare, housing, education, and other social determinants of health ("SDOH") that improve well-being and quality-of-life.[4] SDOH, or the conditions in a social environment in which people are born, live, work, and play, affect a wide range of health and

---

[1] Charlene Galarneau, *Getting King's Words Right*, 29 J. HEALTH CARE FOR POOR & UNDERSERVED 5, 5 (2018).

[2] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C., ch. 21) (quoting Dr. Martin Luther King, Jr., Press Conference for the Medical Committee for Human Rights, 1966).

[3] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, 252 (codified as amended at 42 U.S.C. § 2000d); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794); Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688); Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 713 (codified as amended at 42 U.S.C. §§ 6101–6107); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C., ch. 126); Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 42 U.S.C., ch. 45).

[4] *See* Title VI of the Civil Rights Act of 1964 at 45 C.F.R. pts. 80, 81; Section 504 of Rehabilitation Act of 1973 at 45 C.F.R. pts. 84, 85; Title IX of the Education Amendments of 1972 at 45 C.F.R. pt. 86; Age Discrimination Act of 1975 at 45 C.F.R. pts. 90, 91; Title II of the Americans with Disabilities Act of 1990 at 28 C.F.R. pt. 35; FHA complaint processing procedures at 24 C.F.R. pt. 103; Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000) (requiring federal agencies to take reasonable steps to provide meaningful access to services by individuals who have limited English proficiency); Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962) (prohibiting discrimination in the sale, leasing, rental, or other disposition of properties and facilities owned or operated by the federal government or federally funded); Exec. Order No. 12,892, 59 Fed. Reg. 2,939 (Jan. 17, 1994) (requiring federal agencies to affirmatively further fair housing in their programs and activities); Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994) (requiring federal agencies to conduct programs, policies, and activities that substantially affect human health or the environment in a manner that does not exclude or other subject people to discrimination based on race, color, or national origin); and Exec. Order No. 13,217, 3 C.F.R. 774 (2001) (requiring federal agencies to evaluate their policies and programs to determine if any can be revised or modified to improve the availability of community-based living arrangements for people with disabilities).

quality-of-life outcomes.[5] Studies have shown that certain populations who have systematically experienced discrimination, based on race, sex,[6] gender, age, disability, or other characteristics, also suffer disparities in health.[7] Federal efforts to eliminate health disparities have taken an expansive approach given the complex relationship that exists between health disparities, access to care, socioeconomic status, and the environment.[8] Because discrimination adversely affects health at the structural level (e.g., limiting opportunities, resources, and well-being of certain groups) and the individual level (e.g., being subjected to insensitive comments, violence, or other kinds of harm), federal civil rights laws play a significant role in the healthcare context.[9]

Federal civil rights laws promote access for communities that are underserved[10] to population-level SDOH, such as safe and affordable housing, higher education, and quality health care services, through two methods: enforcement and proactive education.[11] Civil rights enforcement offices respond to specific instances of discrimination and the laws they enforce provide potential remedies for victims of discrimination when there is a violation. Members of the public have several options to initiate the enforcement process. Depending on the law, they may sue the discriminatory entity in federal court, file a complaint with a federal civil rights enforcement agency, or both.[12] Federal agencies may also begin the enforcement process by initiating a compliance review[13] to determine

---

[5] U.S. DEP'T OF HEALTH & HUM. SERVS., THE SECRETARY'S ADVISORY COMMITTEE ON NATIONAL HEALTH PROMOTION AND DISEASE PREVENTION OBJECTIVES FOR 2020: PHASE I REPORT: RECOMMENDATIONS FOR THE FRAMEWORK AND FORMAT OF HEALTHY PEOPLE 2020 21 (2008).

[6] It is important to note that sex and gender are not analogous terms and have distinct implications in the context of SDOH, public health, and health care. The Centers for Disease Control and Prevention define sex as an individual's biological status (e.g., male, female, intersex, etc.), which is assigned at birth and associated with physical attributes, such as anatomy and chromosomes. Gender is defined as the cultural roles, behaviors, activities, and attributes expected of people based on their sex. This paper includes sex to remain consistent with its use in civil rights laws (e.g., Title IX of the Education Amendments' prohibition on the basis of "sex").

[7] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 5.

[8] *Disparities*, HEALTHY PEOPLE 2020, https://www.healthypeople.gov/2020/about/foundation-health-measures/Disparities (last visited Mar. 31, 2022).

[9] *Discrimination*, HEALTHY PEOPLE 2020, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination (last visited Mar. 31, 2022).

[10] The term "underserved communities" refers to "populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life." Exec. Order No. 13,985, 86 Fed. Reg. 57,848 (Oct. 19, 2021). Examples of such communities include Black, Latino, Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. *Id.*

[11] *Social Determinants of Health*, HEALTHY PEOPLE 2020, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health (last visited Mar. 31, 2022).

[12] *Civil Rights Offices of Federal Agencies*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/Agency-OCR-Offices (last visited Mar. 31, 2022).

[13] U.S. COMM'N ON C.R., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2019 STATUTORY ENFORCEMENT REPORT 15 (2019). Some federal civil rights regulations require enforcement offices to conduct proactive compliance monitoring to address

whether a federally funded entity is meeting its requirements under one or more civil rights laws.

Typically, the federal agency that provides financial assistance to a recipient is responsible for enforcing civil rights laws as appropriate.[14] Outside of civil rights enforcement offices, funding agencies have several mechanisms available to strategically complement and enhance enforcement efforts to help recipients comply with federal civil rights laws. This article will cover what funding agencies currently do and how they can use proactive approaches—such as providing technical assistance, conducting data collection and research, and utilizing grant process mechanisms—to assist funding recipients with compliance and avoid civil rights violations.

This article will use the Department of Health and Human Services ("HHS")[15] and one of its funding agencies, the Health Resources and Services Administration ("HRSA"), as a case study to demonstrate how HRSA uses civil rights laws, proactive efforts, and funding mechanisms to promote health equity and reduce health disparities. In addition to highlighting HRSA's work, this article will explore approaches that funding agencies across the federal government can utilize to promote compliance and reduce health disparities.

On a departmental level, HHS incorporates advancing community health and well-being into its mission, focusing on providing effective health and human services, and fostering developments in medicine, public health, and social services.[16] "Achieving health equity, . . . eliminating health disparities, and ensuring optimal health for all Americans are overarching goals of [HHS sub-agencies.]"[17]

HRSA is the primary funding agency for HHS focused on improving access to healthcare by people who are geographically isolated and economically or medically vulnerable. In addition to funding affordable and quality healthcare programs, HRSA educates recipients on civil rights laws as a means of reducing health disparities, achieving health equity, and

---

comprehensive systemic issues. Enforcement offices may periodically initiate compliance reviews to evaluate the policies, procedures, and practices of funding recipients to ensure they are fulfilling their civil rights obligations. *See id.*

[14] Recipients, such as universities, sometimes receive grants from multiple federal departments and, as a result, are under overlapping federal jurisdictions. Although there are no formal federal guidelines that delineate multiple departmental jurisdictions, civil rights enforcement offices coordinate to determine which office will investigate certain elements of each case. In 2019, Michigan State University, a recipient of funding from HHS and the Department of Education, entered into separate resolution agreements with the two departmental entities based on violations under Title IX of the Education Amendments. *More Than 30 Tasks Completed in First Year of Federal Review*, MICH. STATE UNIV. (Sept. 1, 2020), https://msutoday.msu.edu/news/2020/tasks-completed-first-year-federal-review.

[15] Disclaimer: The views expressed in this publication are solely the opinions of the authors and do not necessarily reflect the official policies of HHS or HRSA, nor does mention of the department or agency names imply endorsement by the U.S. Government.

[16] *About HHS*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/index.html (last visited Mar. 31, 2022).

[17] OFF. OF HEALTH EQUITY, HEALTH RES. & SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH EQUITY REPORT 6 (2017).

ensuring compliance with federal law.[18] Specifically, HRSA's Office of Civil Rights, Diversity, and Inclusion ("OCRDI") provides funding recipients with resources, consultations, and technical assistance to help prevent discrimination before it results in harm to a person seeking health care and a costly enforcement action. Beyond avoiding harm, preventative interventions can result in more efficient spending by funding recipients on accessibility services and reduces the risk of liability-based actions related to discriminatory treatment.

Fifty years after Congress passed the Civil Rights Act, the federal government's efforts to fulfill its promise—to increase access by populations that are underserved to the conditions and services that improve the lives of every American—continue. Funding agencies have the unique opportunity to utilize methods outside of civil rights enforcement, such as providing technical assistance, conducting research/data collection, and utilizing grants mechanisms, to assist specific groups of funding recipients in ensuring compliance with the law. The implications of discrimination and mistreatment of certain populations are profound and require a multi-level approach on health that addresses the needs of all members of the population. The federal government's efforts are crucial in achieving these goals.[19]

I. DEFINING EQUITY AND HEALTH DISPARITIES

For purposes of this article, the table below defines key terms and definitions that will be used frequently throughout this paper.

TABLE 1.

Key Terms	Definitions
Equity	The consistent and systematic fair, just, and impartial treatment of all individuals.[20]
Health Disparity	A particular type of health difference that is closely linked with social, economic, and/or environmental disadvantage.[21] Health disparities often adversely affect groups of people who have systematically experienced greater obstacles to health based on race, ethnicity, gender, age, disability, or other characteristics historically linked to discrimination or exclusion.[22]

[18] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 16.

[19] The information provided in this article is not intended to be, nor should it be construed as, legal advice. The views expressed do not necessarily represent the views of the HHS or the United States. Instead, all content and links in this article are for general informational purposes only.

[20] Exec. Order No. 14,035, 86 Fed. Reg. 34593 (2021).

[21] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 5.

[22] *Id.*

Social Determinants of Health	Conditions in the social environment in which people are born, live, learn, work, and play that affect a wide range of health, functioning, and quality-of-life outcomes and risks. These social and demographic characteristics have been shown to have powerful influences on health and well-being at the individual level (e.g., gender, race, ethnicity, socioeconomic status, education, language, disability status, etc.) and population level (e.g., higher education, affordable housing, access to health care, transportation infrastructure, etc.).[23]
Health Equity	The absence of disparities or avoidable differences among socioeconomic and demographic groups or geographic areas in health status and health outcomes, such as disease, disability, or mortality.[24]

Health disparities are rooted in a complicated system of social, cultural, economic, political, medical, and legal issues that result in poorer health outcomes for populations that are underserved. Analyzing disparities in health and improvements in SDOH are critical components in achieving health equity.[25] Healthcare providers, researchers, and policymakers recognize that conditions outside of a physician's office have an adverse impact on patients' health.[26] While a person may spend an hour in a healthcare provider's office, they reside in communities with different levels of access to education, housing, quality healthcare, transportation, and other population-level SDOH.

Addressing health disparities requires a comprehensive look at society as well as the impact of federal policies and programs on the health of the population. Many individuals in the United States face inequity in sectors that influence health, such as housing, employment, access to care, transportation, and other population-level SDOH. Civil rights laws provide protections based on race, national origin, disability status, age, sex, and primary language by prohibiting discrimination based on these characteristics, many of which are SDOH linked to health disparities.

While civil rights laws have combatted many instances of overt racist policies,[27] institutionalized racism—the systematic laws, policies, and procedures that lead to differential access to goods, services, and opportunities—can still be found in everyday structures, conditions, and facets of life.[28] Some health disparities can be traced to policies that

[23] OFF. OF HEALTH EQUITY, *supra* note 17, at 9.
[24] *Id.* at 6.
[25] *Id.* at 4.
[26] CODE, LEVERAGING DATA ON THE SOCIAL DETERMINANTS OF HEALTH (2019).
[27] *See infra* Part II.
[28] Camarilla Phyllis Jones, *Levels of Racism: A Theoretic Framework and a Gardener's Tale*, 90 AM. J. PUB. HEALTH 1212, 1212 (2000).

(intentionally or unintentionally) exclude communities based on race, immigration status, or other characteristics. The connection between social inequalities and health can be described as a "stream" of causation.[29] Living conditions, institutional power, and social inequalities are factors "upstream" to the individual—meaning mostly out of his or her control—that influence health behavior (e.g., smoking, physical activity), likelihood of disease and injury, and life expectancy. The collection of these upstream factors may be characterized as SDOH.

Health disparities affecting racial/ethnic minorities such as Black, Asian, Indigenous, and Latino individuals are well-documented. Studies have shown that these groups have a higher prevalence of chronic conditions along with higher rates of mortality and poorer health outcomes, when compared with Whites.[30] For example, there is a higher incidence of aggressive forms of cancer (such as breast cancer, prostate cancer, and cervical cancer) in Black communities than in other racial groups due to higher rate of late diagnoses and infrequent use of screening tests.[31]

Health disparities are not limited to race.[32] A 2011 study by Johns Hopkins University of White and Black residents in a low-income, integrated neighborhood concluded that one of the chief contributors to healthcare disparities was not race, but access to quality health care services.[33] Other studies have reached the same conclusion.[34] Some healthcare experts have linked lack of access to healthcare to unemployment, finding that most Americans rely on employer-provided insurance; therefore, unemployed adults have poorer mental and physical health and are less likely to receive needed medical care and prescription drugs due to cost.[35] Additionally, workplace policies and factors—such as working hazardous jobs, access to safety equipment, and exposure to toxins—all have significant impacts on health.[36]

---

[29] BAY AREA REGIONAL HEALTH INEQUITIES INITIATIVE, APPLYING SOCIAL DETERMINANTS OF HEALTH INDICATOR DATA FOR ADVANCING HEALTH EQUITY 4 (2015).

[30] Ananya Mandal, *What are Health Disparities?*, NEWS MEDICAL (Feb. 26, 2019), https://www.news-medical.net/health/What-are-Health-Disparities.aspx.

[31] *Why Research on Cancer Health Disparities Is Critical to Progress Against the Disease*, NAT'L CANCER INST. (Sept. 1, 2021), https://www.cancer.gov/research/areas/disparities.

[32] *Tackling Cancer Heath Disparities: Small Steps, Big Hopes*, NAT'L CANCER INST. (July 24, 2017), https://www.cancer.gov/research/areas/disparities/health-disparity-studies.

[33] Thomas LaVeist et al., *Place Not Race: Disparities Dissipate in Southwest Baltimore When Blacks and Whites Live Under Similar Conditions*, 30 HEALTH AFFS. 1880, 1884 (2011).

[34] Edward Kennedy, *The Role of the Federal Government in Eliminating Health Disparities*, 24 HEALTH AFFS. 452, 452 (2005); *see also* a 2013 study found that women who had longer travel times to reach radiation therapy facilities and rely on public transportation have difficulty in completing recommended radiation therapy due to inadequate access to radiation facilities. Lucy A. Pepins et al., *Racial Disparities in Travel Time to Radiotherapy Facilities in the Atlanta Metropolitan Area*, 89 SOC. SCI. & MED. 32 (2013).

[35] ANNE K. DRISCOLL & AMY B. BERNSTEIN, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH AND ACCESS TO CARE AMONG EMPLOYED AND UNEMPLOYED ADULTS: UNITED STATES, 2009-2010 (2012).

[36] THE CTR. FOR POPULAR DEMOCRACY, FATAL INEQUALITY: WORKPLACE SAFETY ELUDES CONSTRUCTION WORKERS OF COLOR IN NEW YORK STATE (2013).

Americans spend ninety percent of their time indoors—with two-thirds of that in their own homes—meaning housing is a very strong predictor of health outcomes.[37] Decent, affordable, and safe housing is, therefore, another significant population-level SDOH. Studies have linked a high risk of homelessness with a greater likelihood of experiencing poor mental health, preventable hospitalizations, and negative health outcomes for all family members, including children.[38]

Researchers also identify education as a vital SDOH. Higher education can lead to improved physical and mental health through informing decisions regarding a person's health and shaping employment opportunities.[39] Conversely, people with low levels of education are more likely to experience a number of health risks, such as obesity and substance use compared with individuals with high levels of education. [40] Education as well as employment are noteworthy SDOH because they are two of the most modifiable indicators of health, and strongly correlate with life expectancy and other health status measures.[41]

It is important to note that SDOH often intersect and shape experiences in healthcare and overall health in disadvantageous ways. Intersectionality refers to how different identities simultaneously affect an individual's experiences through overlapping systems of oppression.[42] Angela P. Harris and Aysha Pamukcu identify three distinct but interrelated pathways—population, place, and exercise of power—that produce health disparities through intersectionality within each pathway and across multiple pathways.[43] A well-documented example of intersectionality within a pathway—population—arises for racial and ethnic minorities who are also part of the LGBTQ+ community.[44] Racial/ethnic minorities across the U.S. are less likely to have health insurance and access to quality healthcare.[45]

---

[37] Lindsey Wahowiak, *Healthy, Safe Housing Linked to Healthier, Longer Lives: Housing a Social Determinant of Health*, 46 THE NATION'S HEALTH 1 (2016).

[38] MARJORY GIVENS ET AL., UNIV. WIS. POPULATION HEALTH INST., 2019 COUNTY HEALTH RANKINGS: KEY FINDINGS REPORT (2019).

[39] Janki Shankar et al., *Education as a Social Determinant of Health: Issues Facing Indigenous and Visible Minority Students in Postsecondary Education in Western Canada*, 10 INT. J. ENV'T RSCH. PUB. HEALTH 3908, 3908–09 (2013).

[40] *Health Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 24, 2020) https://www.cdc.gov/healthyyouth/disparities/.

[41] Wahowiak, *supra* note 37, at 1.

[42] Stephanie Bi et al., *Teaching Intersectionality of Sexual Orientation, Gender Identity, and Race/Ethnicity in a Health Disparities Course*, THE ASS'N AM. MED. COLLS. J. OF TEACHING & LEARNING RES. 1 (2020).

[43] Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 770 (2020).

[44] *Id.* at 771 (citing Black Americans and sexual minorities as examples); *see also* Kathryn Macapagal et al., *Differences in Healthcare Access, Use, and Experiences Within a Community Sample of Racially Diverse Lesbian, Gay, Bisexual, Transgender, and Questioning Emerging Adults*, 3 LESBIAN GAY BISEXUAL TRANSGENDER HEALTH 434, 435 (2016) ("sexual minority women and LGBTQ people of color report worse health status, more unmet healthcare needs, and perceived and actual discrimination or substandard care than sexual minority men and White, LGBTQ people, respectively").

[45] Samantha Artiga et al., *Health Coverage by Race and Ethnicity, 2010-2019*, KKF (July 16, 2021), https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity/.

These disparities are exacerbated for LGBTQ+ racial and ethnic minorities. LGBTQ+ emerging adults (age eighteen to twenty-nine) face additional challenges in receiving healthcare; they are more likely to avoid healthcare visits and face difficulties disclosing their sexual orientation and/or gender identity due to stigma, discrimination, and social/cultural myths.[46] As an individual occupies more disadvantaged population categories, the likelihood of this person experiencing health disparities grows higher (e.g., an LGBTQ+ racial and ethnic minority who has a disability).[47]

Similarly, Harris and Pamukcu argue, the pathways through which SDOH produce health disparities also overlap and interact.[48] Recent research has found that individuals who lack the ability to vote and influence the political process are more likely to experience negative health outcomes.[49] For example, while there are multiple issues that contribute to voter suppression in Black communities, redlining—a practice by which banks denied mortgages to primarily racial and ethnic minorities in urban areas to prevent them from buying a home in certain neighborhoods—has been the most historically detrimental practice.[50] Although redlining was banned by Congress in 1968 through the passing of the Fair Housing Act, the impact of this practice is still seen today; many historically redlined communities remain significantly racially segregated and experience low homeownership rates, home values, and credit scores.[51] This example showcases the intersection of all three pathways: population (e.g., racial/ethnic minorities), place (e.g., urban areas; lack of access to desirable neighborhoods and to resources such as nutritious food, clean water, and quality healthcare), and power (e.g., voter suppression). It also highlights the need to more closely examine one of the major contributors of health disparities—discrimination.[52]

In 2003, a report published by the Institute of Medicine of the National Academies of Science, Engineering, and Medicine highlighted the equal importance of "education and training of healthcare professionals" and "enforcement of regulation and statute" in building a "comprehensive, multi-level intervention strategy to address . . . disparities in healthcare."[53] The report found strong evidence regarding "the role of bias, stereotyping,

---

[46] Macapagal et al., *supra* note 44, at 434–35.

[47] Cailin O'Connor et al., *The Emergence of Intersectional Disadvantage*, 33 SOC. EPISTEMOLOGY 23 (2019).

[48] Harris & Pamukcu, *supra* note 43, at 782.

[49] Jonathan Purtle, *Felon Disenfranchisement in the United States: A Health Equality Perspective*, 103 AM. J. PUB. HEALTH 632 (2013).

[50] Khristopher J. Brooks, *Redlining Legacy: Maps are Gone, but the Problem Hasn't Disappeared*, CBS NEWS (June 12, 2020), https://www.cbsnews.com/news/redlining-what-is-history-mike-bloomberg-comments/.

[51] Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasted-for-decades.html.

[52] Charity Scott, *Incorporating Lawyers on the Interprofessional Team to Promote Health and Health Equity*, 14 IND. HEALTH L. REV. 54 (2017).

[53] Report at 187 (Report on file with author).

prejudice, and clinical uncertainty" in healthcare services[54] and focused on discrimination in healthcare as a major contributor to health disparities.[55] Using civil rights laws and mechanisms to address discrimination can reduce disparities in SDOH, such as access to quality healthcare, education, employment, housing, transportation, and other conditions that significantly impact health. Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act are two of the leading statutes that mandate nondiscrimination in federally funded programs and activities based on an individual's race, color, national origin (Title VI) or disability (Rehabilitation Act). To further understand the federal government's efforts in combatting health disparities requires a deeper look at the civil rights movement and the implementation of federal civil rights laws that promote access to improved population-level SDOH.

II. OUTLINING THE FEDERAL CIVIL RIGHTS FRAMEWORK

A. The Civil Rights Movement

At the turn of the twentieth century, the United States began to acknowledge, study, and eventually combat health disparities, beginning with race- and sex-based barriers in health outcomes. In May 1868, the American Medical Association ("AMA") held one of its most controversial meetings documented in history, in which it denied the right of qualified female, Black physicians to be admitted into the organization.[56] In 1870 and 1872, the AMA refused to seat three Black delegates at its annual meetings.[57] In response to the AMA's racial barriers, the National Medical Association was founded in 1895 to train Black physicians and study diseases disproportionately contracted by minorities.[58]

One year after the National Medical Association was established, Frederick L. Hoffman, a statistician and renowned expert on health disparities, published a troubling report entitled *Race Traits and Tendencies of the American Negro*.[59] Using statistics, eugenics theory, observation, and speculation, Hoffman concluded that the poor health status of Black individuals was due to inherent racial inferiority.[60] In 1906, W.E.B. DuBois, a prominent Black scholar, discredited Hoffman's theories, stating that the mortality of minorities would decrease with "improved sanitary condition,

---

[54] Report at 178 (Report on file with author).

[55] Scott, *supra* note 52, at 58.

[56] Robert B. Baker, *The American Medical Association and Race*, 16 AM. MED. ASS'N J. ETHICS 479, 479 (2014).

[57] Harriet A. Washington, *Apology Shines Light on Racial Schism in Medicine*, N.Y. TIMES (July 29, 2008), https://www.nytimes.com/2008/07/29/health/views/29essa.html.

[58] Daryll C. Dykes, *Health Injustice and Justice in Health: The Role of Law and Public Policy in Generating, Perpetuating, and Responding to Racial and Ethnic Health Disparities Before and After the Affordable Care Act*, 41 WILLIAM MITCHEL L. REV. 1129, 1135 (2015).

[59] FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (1896).

[60] *Id.* at 95.

improved education, and better economic opportunities."[61] In 1944, Nobel-laureate economist Gunnar Myrdal concurred with DuBois' findings, stating:

> Medical knowledge has advanced beyond medical practice, and medical practice has advanced far beyond most people's opportunity to take advantage of it. A reduction in these lags would have tremendous consequences for the well-being and happiness of every person in the nation. Of special significance to the [minorities] is the lag of opportunity for some people to obtain the advantage of medical practices available to other people. Area for area, class for class, [minorities] cannot get the same advantages in the way of prevention and cure of disease that the whites can. There is discrimination against [minorities] in the availability . . . of medical facilities.[62]

The civil rights movement continued to gain strength in the 1950s and 1960s. Civil rights advocates pushed for social, legislative, and judicial milestones to combat disparities in health, housing, education,[63] and public accommodations.[64] Across the nation, protesters used nonviolent tactics, such as marches, sit-ins, and boycotts of businesses that perpetuated segregation.[65] They focused on equality of rights in every area of life, including the right to quality healthcare. The disenfranchisement of Black persons seeking healthcare began to shift in the early 1960s when the federal government ended "separate but equal" access to healthcare.[66]

B. Introduction to Civil Rights Laws

On June 11, 1963, in his address to the American people, President John F. Kennedy introduced a bill that would "[give] all Americans the right to be served in facilities which are open to the public—hotels, restaurants, theaters, retail stores, and similar establishments" as well as "greater protection for the right to vote."[67] The bill was known as the Civil Rights Act, a landmark legislation outlawing discrimination on the basis of race, color, religion, sex, and national origin. The bill faced strong opposition in

---

[61] W. E. Burghardt DuBois, *The Health and Physique of the Negro American*, 93 AM. J. PUB. HEALTH 272, 276 (2003).

[62] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 171–72 (1944).

[63] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (ruling that racial segregation in schools was unconstitutional).

[64] Dykes, *supra* note 58, at 1138.

[65] Cheryl Bond-Nelms, *Boycotts, Movements, and Marches*, AM. ASS'N FOR RETIRED PERSONS (Feb. 9, 2018), https://www.aarp.org/politics-society/history/info-2018/civil-rights-events-fd.html.

[66] Ruqaiijah Yearby, *Breaking the Cycle of "Unequal Treatment" with Health Care Reform: Acknowledging and Addressing the Continuation of Racial Bias*, 44 CONN. L. REV. 1281, 1289 (2012).

[67] President John F. Kennedy, Radio and Television Address on Civil Rights (June 11, 1963).

the House of Representatives and was the subject of a heated debate in the Senate.[68] In November 1963, President Kennedy was assassinated, and Vice President Lyndon Johnson became President.[69]

In his first address to a joint session of Congress following Kennedy's death, President Johnson stated, "[N]o memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long . . . John Kennedy's death commands what his life conveyed: that America must move forward."[70]

From its inception, President Johnson and proponents of the Civil Rights Act demonstrated their intent to use Title VI of the Act as a tool to reduce health disparities and achieve health equity. During the Senate floor debate, proponents of the bill repeatedly referenced a Fourth Circuit case, *Simkins v. Moses H. Cone Memorial Hospital*, brought by Black physicians, dentists, and patients to challenge racial segregation in a federally funded hospital under the Hill-Burton Act.[71] Under the Hill-Burton Act, Congress allowed the distribution of federal funds to racially segregated hospitals;[72] however, the Fourth Circuit held that the "separate-but-equal" language within the Hill-Burton Act was unconstitutional.[73] The case was appealed to the U.S. Supreme Court, which denied review, allowing the Fourth Circuit's conclusion that the "separate but equal doctrine" was illegal to stand, validating the nondiscrimination objectives laid out in the Civil Rights Act.[74] Senator John Pastore of Rhode Island, a major proponent of the Civil Rights Act, elaborated:

> [D]espite the effort of the Court of Appeals to strike down discrimination in the *Simkins* case, the same court was forced last week to rule again in a Wilmington, N.C., suit that a private hospital operated with public funds must desist from barring Negro physicians from staff membership. That is why we need Title VI of the Civil Rights Act—to prevent such discrimination where Federal funds are involved. Title VI intends to insure once and for all that the financial resources of the Federal Government—the commonwealth of Negro and White alike—will no longer subsidize racial discrimination.[75]

---

[68] *President Johnson Signs Civil Rights Act*, HISTORY, https://www.history.com/this-day-in-history/johnson-signs-civil-rights-act (last visited Mar. 22, 2022).

[69] *Id.*

[70] President Lyndon B. Johnson, Address to a Joint Session of Congress (Nov. 27, 1963).

[71] Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959 (4th Cir. 1963).

[72] 42 U.S.C. § 291f (2006).

[73] *Simkins*, 323 F.2d at 969.

[74] Moses H. Cone Mem'l Hosp. v. Simkins, 376 U.S. 938 (1964).

[75] 110 CONG. REC. 7054–55 (1964).

In July 1964, Congress passed, and President Lyndon Johnson signed the Civil Rights Act, expanding its predecessors' prohibitions against discrimination based on race to include sex and religion.[76] Title VI of the Act forbids the distribution of federal funds to discriminatory programs and institutions. Section 601 of the Act declares that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[77] Section 602 goes on to state that "[e]ach federal department and agency. . . is authorized and directed to effectuate the provisions of section 2000d [Section 601] of this title . . . [,]" thus giving administrative agencies the authority to promulgate regulations and establish standards of nondiscrimination consistent with the intent of the law.[78]

For the first time, civil rights advocates and public officials could rely upon a legislative mandate guaranteeing equal access to federally funded programs, which reached virtually every hospital in the United States. Prior to the Civil Rights Act, most hospitals located in the northern part of the United States were integrated, but hospitals in the south remained primarily segregated, either outright refusing admission to minorities based on race or sending them to separate, substandard facilities.[79] The national strategy to eliminate discrimination in healthcare focused on an expansive approach, using enforcement by federal agencies using the Civil Rights Act as the foundation. Subsequent to the Civil Rights Act, members of the public were now able to assert their rights directly in federal court through litigation or rely upon executive action and administrative proceedings.[80]

By 1966, over eighty-five percent of hospitals were desegregated and no longer refusing patients based on the grounds outlined under the Civil Rights Act.[81] Federal efforts to desegregate hospitals followed the flow of federal dollars, first to facilities operated by the federal government, then to medical schools, and finally to the vast majority of acute care hospitals through the implementation of Medicare.[82] Within a few years, overt racial discrimination diminished within publicly funded programs and services; however, less obvious discriminatory actions based on race as well as other traits remained, forcing Congress to take action.[83] Following the Civil Rights Act, Congress enacted foundational civil rights laws that extend protections

---

[76] George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733, 743 (2015); 42 U.S.C. § 2000e-2 (1964).

[77] 42 U.S.C. § 2000d (1964); Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252.

[78] 42 U.S.C. § 2000d-1 (1964); Civil Rights Act of 1964, Pub. L. 88-352, § 602, 78 Stat. 252.

[79] P. Preston Reynolds, *The Federal Government's Use of Title VI and Medicare to Racially Integrate Hospitals in the United States, 1963 Through 1967*, 87 AM. J. PUB. HEALTH 1850, 1850 (1997).

[80] Rutherglen, *supra* note 76, at 743; 42 U.S.C. § 2000a-3; 42 U.S.C. § 2000a-5; 42 U.S.C. § 2000e-5; 42 U.S.C. § 2000e-6.

[81] Reynolds, *supra* note 79, at 1855.

[82] David Barton Smith, *Racial and Ethnic Health Disparities and the Unfinished Civil Rights Agenda*, 24 HEALTH AFFS. 317 (2005).

[83] Sara Rosenbaum & Sara Schmucker, *Viewing Health Equity Through a Legal Lens: Title VI of the 1964 Civil Rights Act*, 42 J. HEALTH POL., POL'Y, & L. 771 (2017).

to individuals based on disability, age, native language, familial status, and other bases.

TABLE 2.

Law	Year Enacted	Protected Population(s)	Requirements
Civil Rights Act (Title VI)	1964	All individuals	Prohibits discrimination based on race, color, or national origin in federally funded programs and activities.[84] Funding recipients must take reasonable steps necessary to provide persons with limited English proficiency a "meaningful opportunity to participate."[85]
Title IX of the Education Amendments	1972	All individuals	Prohibits sex discrimination in education programs and activities conducted by federally funded entities.[86] These includes traditional educational institutions (e.g., colleges and universities) as well as HHS funded educational programs, such as research and occupational training.[87]
Rehabilitation Act	1973	People with disabilities	Act broadly prohibits discrimination by federal agencies and its funding recipients against otherwise qualified individuals based on disability.[88] Section 508 of the Rehabilitation Act requires federal agencies

[84] 42 U.S.C. § 2000d.
[85] Lau v. Nichols, 414 U.S. 563, 568 (1974).
[86] 20 U.S.C. § 1681.
[87] *Id.*
[88] 29 U.S.C. § 701.

			to make their electronic and information technology, such as their websites and other online materials, accessible to people with disabilities.[89]
Age Discrimination Act	1975	Older adults	Prohibits discrimination based on age in federally funded programs or activities.[90]
Americans with Disabilities Act ("ADA")	1990	People with disabilities	Expands the Rehabilitation Act's reach beyond federally funded programs to all businesses and services available to the general public, including physicians in private practice and both public and private insurers. Title I of the ADA covers employment and mandates employers to reasonably accommodate known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless it would impose an undue hardship on the operation of the employer's business.[91] Title II of the ADA covers services, programs, and activities operated by State and local government entities.[92] Title III of the ADA prohibits discrimination based on disability in public

[89] 29 U.S.C. § 794d.
[90] 42 U.S.C. § 6101.
[91] 42 U.S.C. §§ 12111–12117.
[92] 42 U.S.C. §§ 12131–12165.

			accommodations operated by private entities, such as places of lodging, entertainment, public gathering, education, exercise, restaurants, and other facilities.[93] Title IV focuses on telecommunications to ensure functionally equivalent services for people with disabilities[94] and Title V covers miscellaneous provisions, including a prohibition against retaliation or coercion against individuals who exercise their rights under the ADA.[95]
Section 1557 of the Affordable Care Act	2016	All individuals	Prohibits discrimination in health programs and activities (both federally conducted and funded) based on race, color, national origin, sex, disability, and age.[96]

For many of these civil rights statutes, federal departments have their own implementing regulations that provide a framework for how funding recipients can comply with the laws and how departments will enforce their requirements.[97] In addition, Executive Orders—or directives published by the U.S. President—have played a key role in the civil rights movement under multiple presidencies.[98] In 1957, after

[93] 42 U.S.C. §§ 12181–12189.
[94] 47 U.S.C. § 225.
[95] 42 U.S.C. §§ 12201–12213.
[96] 42 U.S.C. § 18116.
[97] For example, Title VI of the Civil Rights of 1964 has been implemented by the Department of Justice, 28 C.F.R. § 42.101, Health & Human Services, 45 C.F.R. § 80, the Department of Education, 34 C.F.R. § 100, the Department of Labor, 29 C.F.R. § 31, and other federal departments.
[98] *What is an Executive Order?*, AM. BAR ASS'N (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/.

the U.S. Supreme Court ruled in *Brown v. Board of Education*[99] that segregated schools were "inherently unequal" and ordered that U.S. public schools be desegregated "with all deliberate speed,"[100] President Eisenhower supplemented this ruling with an Executive Order directing the Arkansas National Guard to ensure the safety of nine Black high school students at the center of an integration crisis in Little Rock, Arkansas.[101] In the following decades, Presidents Kennedy and Johnson used Executive Orders to publish affirmative action and equal employment opportunity actions.[102] As discussed later in this article, President Clinton issued an Executive Order requiring federal agencies to work to ensure that funding recipients provide meaningful access to their limited English proficient ("LEP") applicants and beneficiaries.[103] Under the current Administration, President Biden has used multiple Executive Orders to signal and lead significant efforts to further civil rights protections and to promote health equity, specifically with regard to race, color, national origin, sexual orientation, and gender identity.[104]

To supplement these efforts, there is a growing consensus among federal agencies and Congress that "since the key drivers of good health lie in the social determinants of health, [federal agencies] need to look 'upstream' and intervene on the conditions of life in our homes, neighborhoods, schools, and workplaces."[105] To achieve health equity, federal departments must not only enforce civil rights laws, but also study and establish policies and practices that create

---

[99] Brown v. Bd. of Educ., 347 U.S. 483, 484 (1954).

[100] *History – Brown v. Board of Education Re-enactment*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment (last visited Mar. 9, 2022).

[101] *Civil Rights: The Little Rock School Integration Crisis*, DWIGHT D. EISENHOWER PRESIDENTIAL LIBR., MUSEUM, & BOYHOOD HOME, https://www.eisenhowerlibrary.gov/research/online-documents/civil-rights-little-rock-school-integration-crisis (last visited Mar. 9, 2022).

[102] *Executive Orders 101: What Are They and How Do Presidents Use Them?*, NAT'L CONST. CTR. (Jan. 23, 2017), https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/.

[103] Exec. Order No. 13166, 3 C.F.R. 50121 (2000).

[104] *See* Exec. Order No. 13,988, 86 Fed. Reg. 7023 (2021). Among other things, the Order directs agencies to "consider whether to revise, suspend, or rescind such agency actions [regulations, guidance documents, policies, programs, or other agency actions], or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order" (prohibit discrimination on the basis of sex, including sexual orientation and gender identification); Exec. Order No. 13,985, 86 F.R. 7009 (2021). Among other things, the Order requires all agency heads to study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals.

[105] David R. Williams & Valerie Purdie-Vaughns, *Needed Interventions to Reduce Racial/Ethnic Disparities in Health*, 41 J. HEALTH POL., POL'Y & L., 627, 629 (2016).

positive social and economic conditions accessible by all individuals.[106]

III. A MULTIFACETED AND PROACTIVE FEDERAL APPROACH TO ACHIEVE HEALTH EQUITY

> "[D]iscrimination is a root cause of health disparities, and a comprehensive strategy to eliminate disparities must incorporate a strong civil rights component."[107]

Due to the persistent and pervasive health disparities that continue to exist in the United States today, Congress has charged federal departments to take a multifaceted approach to reduce health disparities and achieve health equity.[108] One of the root causes of health disparities is discrimination, which is prohibited by federal civil rights laws on protected bases such as race, color, national origin, sex, age, and disability. In prohibiting federal agencies and recipients of federal funds from engaging in differential treatment (whether intentional or unintentional) of certain individuals or groups of people, federal civil rights laws promote access by underserved populations to improved population-level SDOH, such as safe and affordable housing, high-level higher education, and availability of quality health care services, through enforcement and proactive education.[109] When a SDOH is improved in a population, so is population health.[110]

HHS, alongside other federal departments, uses civil rights mechanisms to both educate funding recipients and enforce against discriminatory practices in federally funded programs and activities. Given its financial footprint, HHS's efforts are especially critical in providing baseline support to eliminate health disparities and achieve health equity across all improved SDOH. HHS's budget accounts for almost one out of every four federal dollars and its eleven operating divisions administer more grant dollars than all other federal agencies combined.[111] In fiscal year ("FY") 2021, HHS awarded over 125,000 grants, totaling over $800 billion (see *Figure 1*).[112]

---

[106] *Social Determinants of Health*, HEALTHYPEOPLE.GOV, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health (last visited Mar. 9, 2022).

[107] INST. OF MED., UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 628 (Brian D. Smedley et al. eds., 2003) (quoting Tom Perez, the former Assistant Attorney General for Civil Rights at the U.S. Department of Justice).

[108] *Id.* at 455.

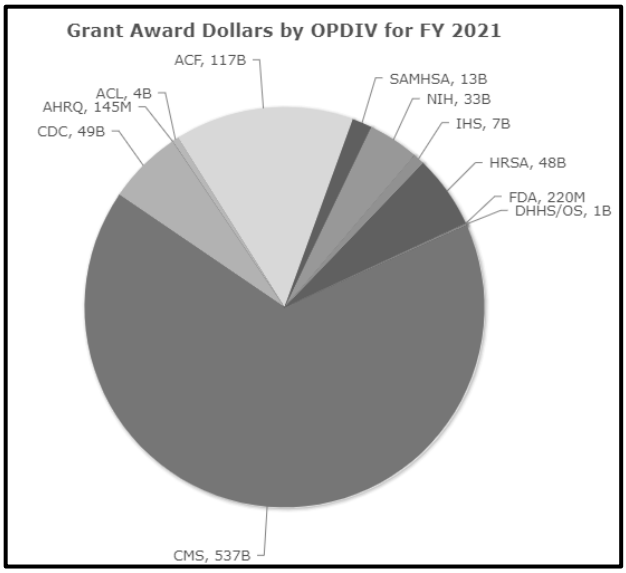
[109] HEALTHYPEOPLE.GOV, *supra* note 106.

[110] Robert A. Hahn, Benedict I. Truman & David R. Williams, *Civil Rights as Determinants of Public Health and Racial and Ethnic Health Equity: Health Care, Education, Employment, and Housing in the United States*, 4 SOC. SCI. & MED. - POPULATION HEALTH 17, 20 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5730086.

[111] *Introduction: About HHS*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/strategic-plan/introduction/index.html (last visited Mar. 9, 2022).

[112] *Grants by OPDIV*, TRACKING ACCOUNTABILITY IN GOV'T GRANT SYS., https://taggs.hhs.gov/ReportsGrants/GrantsByOPDIV (last visited June 15, 2022).

FIGURE 1.



Recipients of HHS funds include hospitals, health centers, extended care facilities, family and children programs, alcohol and drug treatment programs, public assistance agencies, adoption and foster care programs, and senior citizen programs.[113] In addition to administrative requirements, HHS funding recipients are obligated to comply with civil rights laws prohibiting discrimination on the basis of race, color, national origin, disability, sex, age, and other protected bases.[114]

HHS has eleven operating divisions that oversee a wide variety of health and human services, and encourages open communication channels between the government, federally funded programs, and protected populations to promote accessibility to quality healthcare.[115] Some agencies award grants specifically focused on reaching populations that are underserved. For example, over the last ten years, the Indian Health Service awarded multiple grants for accessible and affordable HIV/AIDS services to at-risk Native American communities in the Southwest region.[116] The National Institutes of Health ("NIH") has awarded millions of dollars to

[113] *Mission and Vision*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.grants.gov/learn-grants/grant-making-agencies/department-of-health-and-human-services.html (last visited Mar. 9, 2022).

[114] *Civil Rights for Individuals and Advocates*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/civil-rights/for-individuals/index.html (last visited Mar. 9, 2022).

[115] *HHS Agencies & Offices*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html (last visited Mar. 9, 2022).

[116] *To Offer Accessible, Affordable HIV/AIDS Services to At-Risk Urban, Native Americans in Flagstaff, Coconino County, Arizona.* U.S. DEP'T OF HEALTH & HUM. SERVS., https://taggs.hhs.gov/Detail/AwardDetail?arg_AwardNum=H721IHS0002&arg_ProgOfficeCode=3 (last visited Mar. 10, 2022).

recipients developing software to promote accessibility by people who are blind or have low vision.[117] The Administration for Community Living ("ACL") awards more than one billion dollars in grants to provide services, conduct research, and develop innovative approaches to support older adults and people with disabilities.[118] Other funding agencies, such as HRSA, more broadly focus on addressing health disparities for populations that are underserved. In FY 2019, HRSA awarded nearly $10 billion in grants[119] specifically to improve access to quality healthcare by people who are geographically isolated and those who are economically or medically vulnerable, such as people with HIV/AIDS, pregnant people, rural communities, and other populations that are underserved.[120]

Given this article's focus on HHS activities, this section discusses how HHS—through its Office for Civil Rights—uses enforcement procedures to address specific instances of discrimination amongst its funding recipients. Congress charged the federal government with enforcing federal civil rights laws that protect individuals from discrimination on the bases of race, color, national origin, religion, sex, disability, and age across a broad range of areas. Each major federal department has delegated authority to an internal office to enforce its civil rights regulations by investigating complaints, conducting compliance reviews, or using other forms of corrective action.[121]

This section will then move into general limitations of civil rights enforcement and evaluate how federal funding agencies can complement civil rights compliance efforts. HRSA will be used as a case study to analyze and discuss federal efforts focusing on prevention and proactive education as critical supplements of health reform and civil rights coordination. Through targeted grants, funding agencies assist populations that are underserved and beneficiaries by encouraging applicants to actively plan on how they can maximize the reach of the funding and meet their civil rights obligations. HRSA grantees, like all recipients of federal funds, must comply with federal civil rights laws that promote accessibility to healthcare and prohibit discrimination based on race, color, national origin, disability, age, sex, and religion.[122] Through OCRDI, HRSA continuously provides consultations and technical assistance to its funding recipients on how to meet their civil rights obligations to help prevent potential discrimination,

---

[117] *Designing Visually Accessible Spaces*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://taggs.hhs.gov/Detail/AwardDetail?arg_AwardNum=R01EY017835&arg_ProgOfficeCode=124 (last visited Mar. 9, 2022); Gordon E. Legge, *Designing Visually Accessible Spaces*, NAT'L INST. OF HEALTH, https://grantome.com/grant/NIH/R01-EY017835-06A1 (last visited Mar. 9, 2022).

[118] *Grants*, ADMIN. FOR CMTY. LIVING, https://acl.gov/grants (Sept. 15, 2021).

[119] *Number of Grant Awards by OPDIV for FY 2020*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://taggs.hhs.gov/ReportsGrants/GrantsByOPDIV (last visited Mar. 10, 2022).

[120] *HRSA Programs*, HEALTH RES. & SERVS. ADMIN. (2021), https://www.hrsa.gov/sites/default/files/hrsa/about/hrsa-agency-overview.pdf.

[121] *Civil Rights Office of Federal Agencies*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/Agency-OCR-Offices (last visited Mar. 9, 2022).

[122] *Office of Civil Rights, Diversity and Inclusion*, HEALTH RES. & SERVS. ADMIN. (2021), https://www.hrsa.gov/about/organization/bureaus/ocrdi.

correct misunderstandings about accessibility, and equip recipients with strategies on how to apply the law in their programs.

This section will conclude by providing general recommendations for federal funding agencies to help "eliminate health disparities, achieve health equity, [and] create social, physical, and economic environments that promote attaining the full potential for health and well-being for all."[123]

A. Overview of Civil Rights Enforcement and Litigation

For the last six decades, Congress has expanded the federal government's role in its fight against discrimination with each major piece of civil rights legislation. Internal civil rights offices were established to ensure federal funding recipients' compliance with federal civil rights laws. Some civil rights statutes, such as Title VI of the Civil Rights Act, apply across major federal departments, each of which have each issued nondiscrimination regulations for the programs they fund according to Title VI's requirements.[124] Depending on the law, the specific jurisdiction and duties of civil rights enforcement offices vary, but generally include investigating civil rights complaints, monitoring compliance by federally funded and other covered entities, and issuing guidance or other policy documents.[125]

The HHS Office for Civil Rights ("OCR") retains enforcement authority over Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, the Age Discrimination Act, Section 1557 of the Affordable Care Act, and other federal laws that prohibit discrimination by providers of healthcare and social services.[126] Members of the public who experience discrimination by a funding recipient may initiate the civil rights enforcement process by filing a complaint with OCR.[127] OCR's enforcement mechanisms include conducting investigations of funding recipients based on complaints[128] and initiating periodic compliance reviews to determine whether a recipient of HHS funding is complying with federal civil rights laws.[129]

---

[123] *Healthy People 2030 Framework*, HEALTH.GOV., https://health.gov/healthypeople/about/healthy-people-2030-framework (last visited Mar. 9, 2022).

[124] 42 U.S.C. §§ 2000a-h(6).

[125] *Are Rights a Reality: Evaluating Federal Civil Rights Enforcement*, U.S. COMM'N ON C.R. (2019), https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf.

[126] *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, CTR. FOR MEDICARE & MEDICAID SERVS. (Jun. 19, 2020), https://www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority.

[127] *What to Expect: How OCR Investigates a Civil Rights Complaint*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/civil-rights/filing-a-complaint/what-to-expect/index.html (last visited Mar. 9, 2022).

[128] 45 C.F.R. § 80.7(b) (1964); 45 C.F.R § 83.20 (1975); 45 C.F.R § 84.61 (1977); 45 C.F.R § 85.61(d) (2022); 45 C.F.R § 86.71 (2022); 45 C.F.R. § 88.2 (2019); 45 C.F.R. § 91.42 (2022).

[129] 45 C.F.R. §§ 80.7(a), (c) (2022) (regarding proactive compliance review leading to investigation, which can lead to enforcement actions for noncompliance at the end of the process).

In 2017, HHS OCR reports that it received 30,166 civil rights complaints against HHS funding recipients and that the number is growing.[130] OCR attempts to resolve noncompliance through various means, such as a voluntary agreement between the agency and funding recipient, providing technical assistance to the recipient, or another form of corrective action.[131] In some instances, OCR works with the funding agency to bring the recipient into compliance.[132] If OCR issues a violation finding and the funding recipient refuses to come into compliance by taking corrective action, the matter is referred to the HHS Office of General Counsel for administrative enforcement (litigation) and an administrative law judge may order termination of funding.[133] However, this situation is rare given OCR's primary practice is helping recipients achieve compliance with civil rights laws and, as a result, the vast majority of complaints are resolved through voluntary efforts.[134]

Outside of utilizing federal civil rights enforcement mechanisms, members of the public may choose to enforce a private right of action by suing the discriminatory entity in federal court, depending on the law.[135] Under some civil rights laws,[136] the legal system has recognized the effect of discrimination on an individual's mental health by awarding monetary damages to victims for emotional distress and psychiatric harms, such as humiliation, depression, and post-traumatic stress.[137]

Disparate impact claims allow plaintiffs to extend claims beyond intentional discrimination; instead, a plaintiff may make a prima facie showing of discrimination by proving that a policy or practice has an adverse impact on a protected group, thus creating a presumption of discrimination.[138] The integration of hospitals and healthcare facilities in the 1960s addressed the most overt forms of discrimination; unfortunately, health disparities and de facto segregation, or segregation by practice, has

---

[130] U.S. COMM'N ON C.R., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 206 (2019), https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf.

[131] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 127.

[132] 2011 Conscience Rule, 45 C.F.R § 88.1 (2022).

[133] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 127.

[134] U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDANCE TO FEDERAL FINANCIAL ASSISTANCE RECIPIENTS REGARDING TITLE VI PROHIBITION AGAINST NATIONAL ORIGIN DISCRIMINATION AFFECTING LIMITED ENGLISH PROFICIENT PERSONS (July 26, 2019), https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-vi/index.html.

[135] For example, Title IX of the Education Amendments permits a private right of action (20 U.S.C. § 1683 (judicial review)), as well as the Rehabilitation Act (29 U.S.C. § 794(a)(2) (remedies and attorney fees)).

[136] For example, the Fair Housing Act (42 U.S.C. §§ 3601–19).

[137] Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R. C.L. L. REV., 279, 290–91 (2001); Margalynne J. Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 924 (1991); Larry R. Rogers & Kelly N. Kalus, *From One Dollar to $2.4 Million: Narrowing the Spectrum of Damage Awards in Fair Housing Cases Through Basic Tort Litigation Tactics*, 26 J. MARSHALL L. REV. 29, 30 (1991).

[138] Alexander v. Sandoval, 532 U.S. 275 (2001).

survived.[139] For instance, in 2011, several hospital systems in New York separated patients seeking cardiac and endocrine treatment according to their source of payment; patients relying on public assistance received lower quality health care than patients using private health insurance. Specifically, Medicaid beneficiaries received services at cardiology and endocrinology clinics, where they do not receive care comparable to that received by privately insured patients seen in faculty practices.[140] Because patients using public assistance were disproportionately Black or Latino, the hospitals' separation policy disparately and negatively impacted these minority groups.[141]

Additionally, recent studies have shown that physicians who treat minority patients are less likely to be board certified and more likely to lack access to quality medical equipment, compared to physicians treating White patients.[142] Researchers have determined that bias, discrimination, and stereotyping may cause providers to treat patients differently based on race or another federally protected status.[143] Providers may also not understand their civil rights obligations and, accordingly, may be unintentionally discriminating against patients. For example, making their facilities physically accessible for people with mobility limitations or providing translated materials to a Spanish-speaking patient may be required under some circumstances. It may also be the case that providers are aware of their obligations, but do not know how to comply with federal civil rights laws using the funds that are available to them.

Modern forms of discrimination require complex interventions that cannot be resolved by enforcement or litigation alone. The historical civil rights movement and trends in health disparities assist us in determining how to address modern forms of discrimination in healthcare and work to achieve health equity. The civil rights movement used numerous strategies, such as litigation, the passage of civil rights legislation, and its subsequent implementation by federal agencies through outreach and education, to dismantle de jure segregation, otherwise known as segregation by law. Today, as mandated by Congress, the federal government continues to use multiple strategies to combat discrimination in health, alleviate health disparities, and achieve health equity through civil rights laws, which will be discussed in the next section.

---

[139] Amitabh Chandra, et al., *Challenges to Reducing Discrimination and Health Inequity Through Existing Civil Rights Laws*, 36 HEALTH AFFS. 1041 (2017).

[140] Complaint at 21, 23–24, Bronx Health Reach v. New York Presbyterian et al. (2008), https://www.nylpi.org/images/FE/chain234siteType8/site203/client/COMPLAINT-FINAL-FULL.pdf.

[141] Adrian D. Samuels & Mariah L. Cole, *Utilizing Title VI as a Means to Eradicate Health Discrimination*, 10 J. HEALTH DISPARITIES RSCH. & PRAC. 30, 32 (2017).

[142] Chandra, *supra* note 139, at 1041.

[143] *Id.*

B. Limitations of Enforcement

In addition to limited financial resources and staffing, enforcement efforts can include difficulties establishing proof, obtaining effective remedies, and overcoming legal challenges to disparate impact complaints.[144] Furthermore, as discussed in the previous section, while disparate treatment—or intentional discrimination—is more straightforward to establish, disparate impact discrimination—a less overt form of discrimination—focuses on the consequences of a funding recipient's practices rather than the motivation. It occurs when a recipient has a facially neutral policy or practice that has a disproportionate and adverse effect on members of a group that are underserved, such as Black individuals, as compared to individuals of a different race.[145] The same analysis applies to people with disabilities.[146] Common examples include a hospital's decision to limit its number of Medicaid beds, relocate to a wealthier neighborhood, or refuse to participate in the Medicaid program.[147]

Cases under the HHS Title VI regulation also include discrimination against individuals who are limited English proficient who cannot access healthcare services for reasons such as a lack of language assistance services, including a qualified professional interpreter to communicate with a physician or translated materials to understand discharge directions. LEP cases may be argued using a disparate impact analysis; unfortunately, "numbers are at the heart" of a disparate impact case.[148] Statistical evidence is heavily relied upon in disparate impact cases to prove that not "just a single" or "very few" individuals were impacted by a funding recipient's policy or practice.[149] Additionally, private individuals may not file complaints of disparate impact discrimination based on race, color, or national origin in federal court under Title VI; therefore, the role of HHS and its funding components for ensuring recipients of HHS funds comply with Title VI is especially critical.

In *Alexander v. Sandoval*, the Supreme Court foreclosed private rights of action alleging disparate impact discrimination under the Title VI regulation.[150] Before the Supreme Court's ruling, federal agencies relied upon a dual enforcement system in which agencies and private individuals shared the burden of enforcing Title VI's disparate impact regulations; now relief for disparate impact claims under Title VI may be achieved only through federal administrative enforcement processes.[151]

---

[144] Rosenbaum & Schmucker, *supra* note 83, at 771.

[145] *See* 28 C.F.R. § 42.104(b)(2) (2022); 45 C.F.R. § 80.3(b)(2) (2022).

[146] Under 504 (Alexander v. Choate, 469 U.S. 287 (1985)), and 1557 for tbl.6, 504, and tbl.9.

[147] Sarah G. Steege, *Finding a Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care*, 16 MICH. J. RACE & L. 439, 443 (2011).

[148] Lau v. Nichols, 414 U.S. 563, 572 (1974) (Blackmun, J., concurring).

[149] *Id.*

[150] Alexander v. Sandoval, 532 U.S. 275 (2001); Rosenbaum & Schmucker, *supra* note 83, at 782.

[151] Jessica Rubin-Wills, *Language Access Advocacy After* Sandoval*: A Case Study of Administrative Enforcement Outside the Shadow of Judicial Review*, 36 N.Y.U. REV. L. & SOC. CHANGE 465, 485–86 (2012).

Disparate treatment LEP cases can still be brought to court using a private right of action to enforce Section 601 of Title VI; however, federal courts have set a high standard in proving intentional discrimination, requiring plaintiffs to show that the defendant's action was taken with a discriminatory motive.[152] Because LEP cases typically focus on a funding recipient's failure to provide certain language assistance services, such as interpretation or translation, this increases the difficulty for plaintiffs to show discriminatory motive when the plaintiff is challenging inaction rather than action.[153]

Despite *Alexander v. Sandoval*, individuals can continue to use private litigation for disability discrimination claims of disparate impact under Section 504 of the Rehabilitation Act.[154] The Supreme Court allowed this approach in *Alexander v. Choate*,[155] analyzing whether Tennessee's reduction in the number of annual inpatient hospital days covered by Medicaid caused a disparate and negative impact on people with disabilities under Section 504.[156]

Alexander v. Sandoval eliminated one avenue available to private litigants to achieve relief for discrimination based on race, color, or national origin.[157] Nonetheless, in addition to their enforcement authority, federal departments impact health disparities through a variety of preventative methods to remove discriminatory barriers to federally funded services and benefits such as: providing technical assistance, education, and outreach, and managing a compliance review system for ensuring recipients are operating in compliance with the law.[158] HHS has and continues to use its civil rights authorities to provide education, outreach, monitoring, and other proactive methods to help funding recipients prevent modern forms of discrimination in healthcare.

C. Federal Funding Agencies as Promoters of Health Equity and Civil Rights

> "I will prevent disease whenever I can, for prevention is preferable to cure."[159]

Congress charged federal departments to promote positive health outcomes through wide-scale efforts, such as preventing discrimination and reducing health disparities in SDOH, including employment, education,

---

[152] *Id.* at 480.
[153] *Id.* at 482.
[154] Steege, *supra* note 147, at 468.
[155] Alexander v. Choate, 469 U.S. 287 (1985).
[156] Steege, *supra* note 147, at 449.
[157] Rosenbaum & Schmucker, *supra* note 83, at 782.
[158] U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?: EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 16 (2019).
[159] Louis Lasagna, *The Hippocratic Oath: Modern Version*, PBS: NOVA, https://www.pbs.org/wgbh/nova/doctors/oath_modern.html (last visited Mar. 10, 2022) (quoting the 1964 Revised Hippocratic Oath).

healthcare, transportation, and other conditions.[160] Health is determined in part by the conditions in which we live, work, learn, and play.[161] In recognition of this, the federal government's focus on studying health disparities has increased over the last decade. Since 2003, the HHS Agency for Healthcare Research and Quality has issued yearly National Health Disparities Reports, which document trends related to access to care, effective treatment, healthy living, and person-centered care.[162] Additionally, the Healthy People Initiative, managed by HHS, sets out goals and objectives for each decade (currently 2020–2030), including an overarching goal to "eliminate health disparities, achieve health equity, . . . [and c]reate social, physical, and economic environments that promote attaining the full potential for health and well-being for all."[163]

Access to quality health care services and other SDOH provide opportunities to create a healthy population for all individuals, regardless of race, sex, disability status, or other federally protected bases. To ensure equal access to care and prevent discrimination in healthcare, major federal departments use civil rights laws as a tool to establish, enforce, and educate funding recipients on federal nondiscrimination standards, and how to administer their programs and services in a manner that promotes equality.

Civil rights enforcement offices are often isolated from day-to-day administrative authority over federal spending.[164] Given the magnitude of health disparities and the vast number of positive SDOH that influence health outcomes, there is a need for federal funding agencies to assist recipients of their funds with developing tailored approaches to comply with their civil rights laws.[165] HHS demonstrates how parallel efforts between its civil rights enforcement office and funding agencies can address the larger

---

[160] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §601, 78 Stat. 252, 252 (codified as amended at 42 U.S.C. § 2000d). Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794); Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688); Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 713 (codified as amended at 42 U.S.C. §§ 6101–6107); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. Ch. 126); and Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 42 U.S.C. Ch. 45). Brooks, *supra* note 50.

[161] OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, *Social Detriments of Health*, HEALTHYPEOPLE (Feb. 6, 2022), https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health.

[162] AGENCY FOR HEALTHCARE RSCH. & QUALITY, NAT'L HEALTHCARE QUALITY & DISPARITIES REP. 1 (2021).

[163] U.S. DEP'T OF HEALTH & HUM. SERVS., *Healthy People 2030 Framework*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, https://health.gov/healthypeople/about/healthy-people-2030-framework (last visited Mar. 14, 2022).

[164] Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of* Alexander v. Sandoval, 3 YALE J. HEALTH POL'Y, L. & ETHICS 215, 246 (2003).

[165] *Id.* To strengthen enforcement efforts, "the task of forcing large interests to confront and remedy the [] harms that can flow from facially neutral practices is surely best achieved through concerted action by government agencies [such as funding agencies] which can use their spending powers to generate systemic and structural changes." *Id.* at 245–46.

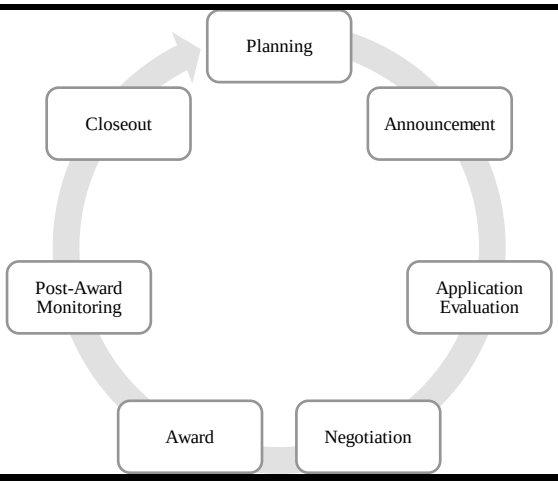
issue of health equity by helping recipients achieve compliance with federal civil rights laws through guidance, technical assistance, and outreach.

HRSA will be used as a case study to analyze how it as a funding agency employs education around proactive nondiscrimination measures as a critical part of health reform and civil rights advocacy. HRSA, through its OCRDI uses civil rights laws to educate funding recipients on their civil rights obligations to ensure compliance with federal law, advance health equity, and promote accessibility to HRSA conducted and assisted programs.[166]

The initiatives adopted by HRSA showcase how federal outreach, technical assistance, and other strategies outside of civil rights enforcement can address potential discrimination and help advance health equity. This is demonstrated by HRSA's efforts to promote compliance with civil rights laws through the grants process, planning, accessibility consultations, and technical assistance.

1. Grants Lifecycle

FIGURE 2.



Grants are used by many agencies in the federal government as a financial assistance tool to fund projects, such as innovative research, data collection, clinical programs, or other activities that benefit the general public.[167]

The grant lifecycle includes planning for and announcing the funding opportunity, applying for the grant, making award decisions, successfully implementing the award, monitoring, and closing out the lifecycle (see *Figure 2*). These specific actions along the lifecycle are grouped into three

[166] *About HRSA*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN. (2021), https://www.hrsa.gov/about/index.html.

[167] *What is a Grant?*, GRANTS.GOV (Feb. 7, 2017), https://grantsgovprod.wordpress.com/2017/02/07/new-series-what-is-a-grant/.

main phases—the pre-award phase, the award phase, and the post-award phase.[168] This section will go into further detail about each phase and what interventions HRSA utilizes to prevent discrimination and promote accessibility by all individuals receiving health care services funded by HRSA.

2. Pre-award phase: Planning, Announcement, Application Evaluation, Negotiation

The pre-award phase represents the beginning of the grant lifecycle, which includes announcing opportunities and reviewing applications. Awarding agencies must prepare and publish a Notice of Funding Opportunity ("NOFO") announcement based on authorizing legislation and the agency's budget. A NOFO includes all the relevant information and requirements for an applicant to assess their eligibility, competency, and interest in the funding opportunity.[169] Once the application submission deadline passes, the awarding agency reviews the applications for their technical and programmatic quality, and competency. "Federal agencies also conduct a cost analysis, reviewing each line item and the overall proposed budget," as well as an assessment of an applicant's financial risk and its possible impact on program performance.[170]

Funding agencies may use NOFOs to encourage or require applicants to incorporate certain services or expenses into their work plans and budgets that can promote access by populations that are underserved to the funded program. HRSA, as part of their NOFOs, includes a section on accessibility provisions and nondiscrimination requirements, stating, "Federal funding recipients must comply with applicable federal civil rights laws. HRSA supports its recipients in preventing discrimination, reducing barriers to care, and promoting health equity" followed by a link to HRSA OCRDI's website.[171] OCRDI's website is regularly updated with plain language resources for HRSA funding recipients on civil rights obligations and provides OCRDI's contact information for further inquiries.[172]

In addition to a general statement on civil rights obligations, funding agencies may choose to specify accessibility services that would be necessary to ensure nondiscrimination in certain programs. For example,

---

[168] *The Grant Lifecycle*, GRANTS.GOV, https://www.grants.gov/learn-grants/grants-101/grant-lifecycle.html (last visited Mar. 14, 2022).

[169] *Pre-Award Phase*, GRANTS.GOV, https://www.grants.gov/web/grants/learn-grants/grants-101/pre-award-phase.html (last visited Mar. 10, 2022).

[170] *Id.*

[171] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *View Grant Opportunity: HRSA-22-082 Sudden Unexpected Infant Death Prevention Department of Health and Human Services Health Resources and Services Administration*, GRANTS.GOV (Nov. 5, 2021), https://www.grants.gov/web/grants/view-opportunity.html?oppId=334390; *see also* U.S. DEP'T OF HEALTH & HUM. SERVS., *View Grant Opportunity: HRSA-22-058 Rural Veterans Health Access Program Department of Health and Human Services Health Resources and Services Administration*, GRANTS.GOV (Sept. 9, 2021), https://www.grants.gov/web/grants/view-opportunity.html?oppId=334414.

[172] *Office of Civil Rights, Diversity & Inclusion*, *supra* note 122.

NOFOs under HRSA's Early Hearing Detection and Intervention program state that the funding agency expects applicants to "[i]nclude the cost of access accommodations as part of [the recipient's] project's budget [which may include] language interpreters; plain language and health literate print materials in alternate formats; and cultural/linguistic competence modifications such as use of . . . translation or interpretation services[.]"[173]

As a grant-making agency, HRSA funds programs to improve health and achieve health equity through access to quality services, "a skilled health workforce, and innovative programs."[174] In HRSA's guide for preparing grant applications, the agency outlines specific accessibility provisions and nondiscrimination requirements that grantees must comply with to help ensure accessibility by all individuals regardless of race, color, national origin, sex, age, and disability.[175] It also lists the contact information for HHS OCR and HRSA OCRDI for applicants and funding recipients who need assistance in understanding their civil rights obligations.[176]

Some HRSA programs also include nondiscrimination statements in their site agreements. The National Health Service Corps, a HRSA program that offers loan repayments and scholarships to healthcare providers in exchange for working in areas with limited access to quality healthcare, outlines certain requirements that must be met by site applicants at the time of application and throughout the award period. Specifically, the National Health Service Corps sites must,

> Provide services without regard to: a) the individual's inability to pay; . . . or c) the individual's race, color, sex, national origin, disability, religion, age, sexual orientation, or gender identity.[177]

Additionally, it is important to note that in order to diversify its grant application review process, HRSA has publicly stated that it seeks "reviewers who have expertise in social, cultural, or health care issues of people in rural areas, migrants, or Native Americans."[178] HRSA has opened its grant reviewer applications to the public to help ensure a greater likelihood of retaining "experts from a wide variety of professions, work

---

[173] *Early Hearing Detection and Intervention Program*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/grants/find-funding/hrsa-20-047 (click on the "Notice of Funding Opportunity" hyperlink under the "Apply" subheading) (last visited Mar. 20, 2022).

[174] *Communicating and Acknowledging Federal Funding*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/grants/manage/acknowledge-hrsa-funding (last visited Mar. 18, 2022).

[175] U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., SF-242 APPLICATION GUIDE 3 (2022).

[176] *Id.* at 4.

[177] *How to Meet NHSC Site Eligibility Requirements*, NAT'L HEALTH SERV. CORPS, HEALTH RES. & SERVS. ADMIN., https://nhsc.hrsa.gov/sites/eligibility-requirements (last visited Mar. 20, 2022).

[178] *How to Become a Grant Reviewer*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/grants/reviewers (last visited Mar. 18, 2022).

settings, and cultural backgrounds,"[179] and reflecting the diversity of the grantee pool and subjects of the proposed funded projects.[180]

3. Award Phase - Award Decisions and Notifications

Once a funding agency completes the application review process, the award phase begins. Grant reviewers make award recommendations based on programmatic and financial reviews of the applications. They also review an applicant organization's financial risk and its possible impact on program performance and federal funds. These recommendations are reviewed at multiple levels within the agency "to ensure high-quality, fair, and unbiased decisions."[181]

Once final award decisions are made, the funding agency issues a Notice of Award to the entity selected for funding. The Notice of Award is the official, legally binding issuance of the award. When an entity accepts the grant by signing the agreement or drawing down federal funds, they "become legally obligated to carry out the full terms and conditions of the grant."[182]

The Office of Management and Budget has developed draft language for federal agencies to use in the award terms and conditions in which funding recipients acknowledge that they must provide, for example, "meaningful access" to individuals who are LEP to comply with Title VI of the Civil Rights Act and the implementing regulation of the specific Department.[183] This written commitment serves multiple purposes: it provides recipients with the opportunity to become aware of and learn more about their civil rights obligations and allows both the funding agency and civil rights enforcement office the authority to rescind funding in response to noncompliance.

4. Post Award - Monitoring (Data Collection) and Closeout

The post award phase includes implementing the grant, monitoring progress, and completing the closeout requirements. Funding agencies monitor awardees' progress and expenditures through various programmatic and financial reporting procedures and using performance metrics per the grant agreement.

To help funding recipients promote compliance with federal civil rights laws, some funding agencies provide technical assistance and trainings on how to address and prevent potential risk factors related to the success of

---

[179] Mary K. Wakefield, *Letter to Health Care Professional*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/sites/default/files/hrsa/grants/reviewers/letter.pdf (last visited Mar. 18, 2022).

[180] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 178.

[181] *Award Phase*, GRANTS.GOV, https://www.grants.gov/web/grants/learn-grants/grants-101/award-phase.html (last visited Mar. 10, 2022).

[182] *Id.*

[183] Rubin-Wills, *supra* note 151, at 490.

their grant.[184] Recipients may be hesitant to contact civil rights enforcement offices for questions regarding accessibility and compliance out of fear of initiating a review of their program. However, because many funding subcomponents within larger agencies do not have civil rights enforcement authority and are in direct contact with their recipients, recipients are more likely to approach those subcomponents directly with questions around providing nondiscriminatory services.

HRSA OCRDI provides tailored technical assistance and resources to its funding recipients upon request and assists in identifying solutions and strategies to promote accessibility in HRSA programs. OCRDI has provided training to its recipients on complex areas of the law, including recipients' language access obligations under Title VI of the Civil Rights Act and disability access under Section 504 of the Rehabilitation Act.[185] It has presented at recipient-focused conferences, such as the annual HRSA Healthy Grants Workshops (assisting recipients in managing their grants)[186] and the National Ryan White Conference on HIV Care and Treatment (providing training and technical assistance to Ryan White HIV/AIDS Program recipients).[187] OCRDI's consultations also inform its fact sheets, which are frequently uploaded and updated on its website.[188]

Additionally, through recipients in the post-award phase, funding agencies monitor both the health status of different population groups and programmatic impact to reduce inequities to inform ongoing federal interventions.[189] HRSA's Office of Health Equity publishes Health Equity Reports that specifically analyze HRSA's program efforts on "reducing health disparities and promoting health equity for various populations at the national, state, and local levels."[190] The Office of Health Equity develops its report in partnership with HRSA's Bureaus and Offices to examine improvements in health equity stratified by socioeconomic and demographic characteristics of populations that are underserved, such as gender, race, education, employment status, rural-urban residence, income, and other factors.[191] The 2019–2020 Report included a specific chapter on the impact of civil rights on health equity focusing in particular on affordable and safe housing.[192]

---

[184] *Office of Civil Rights, Diversity & Inclusion*, *supra* note 122.

[185] *Healthy Grants Workshops*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN. (2022), https://www.hrsa.gov/grants/manage-your-grant/training/workshops.

[186] *Id.*

[187] *Virtual 2022 National Ryan White Conference on HIV Care & Treatment*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., https://ryanwhiteconference.hrsa.gov/ (last visited Mar. 19, 2022).

[188] *Office of Civil Rights, Diversity & Inclusion*, *supra* note 122.

[189] Erik Blas et al., *Addressing Social Determinants of Health Inequities: What Can the State and Civil Society Do?*, 372 THE LANCET 1684 (2008).

[190] OFF. OF HEALTH EQUITY, *supra* note 17, at 117.

[191] *Id.* at 5.

[192] *Health Equity Report 2019-2020: Special Feature on Housing and Health Inequalities*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN. (2020), https://hrsa.gov/sites/default/files/hrsa/health-equity/HRSA-health-equity-repoty-printer.pdf.

Alongside civil rights enforcement, funding agencies must continue to engage in deeper research and empirical data collection in a civil rights context to understand gaps in access to federal programs by populations that are underserved and what interventions are needed to address them.[193] Each year, the HRSA Maternal and Child Health Bureau ("MCHB") is the primary sponsor and overseer of the National Survey of Children's Health, a national and state-level survey, which collects information on the health and health care needs of children zero to seventeen years old, including children with disabilities.[194] This information is used to inform federal and state-level policy and program development[195] and provide key measures to track improved health outcomes.[196] Funding agencies should expand their resource allocation to commission similar empirical research that tests the effectiveness of grants and recipient policies in reducing health disparities and discrimination.

5. Agency and Recipient Planning

As part of their various roles, funding agencies act as consultants to recipients on accessibility challenges and advise on how to prevent discrimination in their programs.[197] Funding recipients are encouraged by federal agencies, such as HRSA, to draft implementation plans that address the identified needs of populations that are underserved, such as people who are LEP or people with disabilities, and how recipients will respond to them.[198] Recipients have broad flexibility in developing implementation plans given factors such as, in the language access context, the number of LEP beneficiaries that are likely to be encountered by the recipient's program, the frequency with which LEP beneficiaries come into contact with the program, the nature and importance of the program, and the resources available to the recipient.[199] In most cases, however, recipients must provide some form of language assistance service to ensure their programs and activities are accessible to persons with LEP. A similar analysis may be used to plan on increasing program accessibility by other communities that are underserved, such as people with disabilities.

---

[193] Rosenbaum & Schmucker, *supra* note 81.

[194] *Participants Frequently Asked Questions*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN. (2021), https://mchb.hrsa.gov/data/national-surveys/participants.

[195] *The National Survey of Children's Health*, DATA RES. CTR. FOR CHILD & ADOLESCENT HEALTH (2022), https://www.childhealthdata.org/learn-about-the-nsch/NSCH.

[196] *Children and Youth with Special Health Care Needs*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN. (2021), https://mchb.hrsa.gov/maternal-child-health-topics/children-and-youth-special-health-needs.

[197] Rubin-Wills, *supra* note 151, at 485–86.

[198] U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDANCE TO FEDERAL FINANCIAL ASSISTANCE RECIPIENTS REGARDING TITLE VI PROHIBITION AGAINST NATIONAL ORIGIN DISCRIMINATION AFFECTING LIMITED ENGLISH PROFICIENT PERSONS 24 (July 26, 2019), https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-...ncy/guidance-federal-financial-assistance-recipients-title-vi/index.html.

[199] *Id.* at 4.

Although it is not a legal requirement for funding recipients to draft and implement language access or disability access plans, both federal agencies and their recipients are obliged to ensure accessibility by populations that are underserved, such as people who are LEP or with disabilities, to federally administered and funded programs and activities.[200] All HHS agencies, including HRSA, have developed accessibility plans that provide a framework for ensuring meaningful access to populations that are underserved.[201] Additionally, some HHS funding agencies, such as the Centers for Medicare & Medicaid Services and the NIH, have developed resources to assist recipients in creating language access plans that ensure high-quality language assistance.[202] Similarly, HRSA has developed a Language Access Worksheet, Disability Access Worksheet, and related resources to assist recipients in conducting needs assessments of populations that they serve and how to, based on that assessment, develop written accessibility plans.[203]

The creation, maintenance, and wide distribution of a periodically updated accessibility plan is a cost-effective means of promoting compliance with federal civil rights laws and the timely provision of language assistance or reasonable accommodations.[204] These plans may provide additional benefits to funding recipients in areas such as training, administering, planning, and budgeting for accessibility services.[205] For example, a language access plan may include organizing translated resources and documents in a central location for staff to easily determine what translated resources are available and current. This would increase data consistency, limit redundant translation costs, and reduce reliance on outdated materials.

Appropriate planning also allows funding recipients to include costs in their grant budget application, which in turn would allow them to utilize federal funds for accessibility related costs, such as interpreters. By adopting systematic policies, procedures, and staff trainings on promoting accessibility, recipients' programs and operations run more effectively and efficiently.[206] For example, if an entity purchases an accessible exam table or implements a contract to provide language assistance services but does

---

[200] 45 C.F.R. § 85.61(d) (2022); Executive Order 13,166: Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50, 121 (Aug. 16, 2000).

[201] U.S. DEP'T OF HEALTH & HUM. SERVS., LANGUAGE ACCESS PLAN 3 (2013).

[202] *Guide to Developing a Language Access Plan*, CTRS. FOR MEDICARE & MEDICAID SERVS. (2022), https://www.cms.gov/About-CMS/Agency-Information/OMH/Downloads/Language-Access-Plan-508.pdf; *Language Access in Clear Communication*, NAT'L INSTS. HEALTH (2021), https://www.nih.gov/institutes-nih/nih-office-director/office-communications-public-liason/clear-communication/language-access-clear-commnication.

[203] *Language Access Plan Worksheet*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/sites/default/files/hrsa/grants/manage/technicalassistance/language-access-plan-worksheet.pdf (last visited Mar. 26, 2022).

[204] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 198, at 3.

[205] *Id.*

[206] Rubin-Wills, *supra* note 151, at 502.

not develop policies and trainings for how to utilize these resources, that entity runs the risk of wasting resources.

One of the most significant benefits to funding recipients in creating accessibility plans is ensuring compliance with relevant federal civil rights laws. Conversely, recipients are at risk of non-compliance with federal civil rights laws, civil liabilities related to injury or other harms resulting from discriminatory conduct (e.g., medical malpractice claims), and adverse enforcement actions without proper accessibility plans and nondiscrimination protocols. Additionally, the benefits of planning effectively extend to recipient operations. For example, when recipients cannot communicate effectively with LEP individuals, they can end up with longer lines, wasted staff time, duplicated efforts, and costly delays. By adopting systematic language access policies and training staff on how to implement them, recipients can run their operations more effectively and efficiently by serving all populations.[207]

6. Accessibility Reviews of Funded Programs

Federal civil rights enforcement offices are directed to periodically initiate compliance reviews[208] of entities to review their policies, procedures, and practices, and address "comprehensive, systemic issues."[209] While enforcement offices have the authority to use compliance reviews as an enforcement tool to gather information for determining whether an entity is violating federal civil rights laws,[210] they may achieve broader recipient compliance by providing technical assistance, consultations, and education. Additionally, as indicated earlier, recipients may be more candid with staff employed by a funding agency, as opposed to civil rights investigators, in asking questions about promoting accessibility and implementing mechanisms to ensure meaningful access by populations that are underserved.

Federal funding agencies may consider integrating accessibility and civil rights related protocols into recipient site visits. For example, HRSA's Bureau of Primary Health Care provides funding to health centers, which are community-based and patient-directed organizations that deliver comprehensive, culturally competent, and high-quality healthcare services.[211] Notably, health centers provide services regardless of patients' ability to pay and charge for services on a sliding fee scale. Some health centers receive funding to focus on special populations, such as individuals

---

[207] *Id.*; OFF. OF MGMT. & BUDGET, ASSESSMENT TOTAL BENEFITS & COSTS IMPLEMENTING E.O. 13,166: IMPROVING ACCESS TO SERVICES FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY (Mar. 14, 2002).

[208] 45 C.F.R. § 80.7 (2022); Section 504 of the Rehabilitation Act (45 C.F.R § 84 app. A).

[209] U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?: EVALUATING FEDERAL AND CIVIL RIGHTS ENFORCEMENT 228 (2019).

[210] *Id.*

[211] *What is a Health Center?*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN., https://bphc.hrsa.gov/about/what-is-a-health-center/index.html (last visited Mar. 19, 2022).

experiencing homelessness, migratory and seasonal agricultural workers, and residents of public housing.[212] The Bureau of Primary Health Care conducts regular operational site visits to objectively assess and verify the status of each Health Center Program awardee's compliance with HRSA's program requirements. As an additional layer of assistance with compliance, federal funding agencies may consider developing and incorporating materials that address accessibility by people who are LEP or with disabilities, as well as resources for recipients to address potential gaps in access to care.

Federal funding agencies can also partner with civil rights enforcement offices to conduct compliance reviews. Funding agencies can bridge gaps in programmatic knowledge between enforcement offices and recipients. They can also provide targeted trainings and technical assistance, alongside enforcement offices, to recipients with specific needs or population demographics. By assisting funding recipients in updating policies and procedures to prevent discrimination, compliance reviews (or an added accessibility component to site visits) would lead to more efficient, effective, and accessible federally funded programs and services.

7. Resource Development and Coordination

In addition to funding recipients' federal civil rights law compliance obligations, civil rights advocates continue to push federal agencies to tailor their regulations and guidance more clearly and specifically to recipients to prevent discrimination and reduce reliance on enforcement. The majority of federal civil rights regulations were written several decades ago and contain little instruction on how recipients can implement their programs in a manner compliant with the law.

Federal guidance provides examples of best practices and a useful analytical framework that can help funding recipients determine how best to comply with statutory and regulatory obligations given their individual resources and the populations they serve. To further clarify the nondiscrimination mandate in the Title VI regulation,[213] President Clinton issued Executive Order 13,166, which directed each federal agency to "develop and implement a system by which LEP persons can meaningfully access" programs and services; this included creating guidance for funding recipients.[214] Shortly thereafter, HHS established the Departmental Language Access Steering Committee, which is responsible for supporting the development and implementation of HHS language access initiatives and collaborations across the Department, and evaluating HHS's progress in

[212] *Id.*

[213] 45 C.F.R § 80.3(b)(2) (stating that a recipient cannot "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin").

[214] Executive Order 13,166: Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

meeting its obligations under Executive Order 13,166.[215] The HHS Departmental Language Access Steering Committee is led by the Director of HHS OCR and is comprised of representatives from every HHS operational and staff division, including HRSA.[216] Additionally, to further the directives in Executive Order 13,166, HHS published its Title VI guidance covering: (1) the four-factor analysis to help recipients determine how best to provide meaningful access; (2) standards for oral interpretation and written translation; (3) elements of an effective language access plan; and other assistance still referenced over two decades after its publication.

Unfortunately, with various competing legal obligations placed upon recipients, it can be difficult for funded entities to parse through hefty policy documents that sometimes contain legal terms unknown to the average educated reader (e.g., "disparate impact," "effective communication," etc.). HRSA has created a frequently updated library of technical assistance materials written to assist HRSA recipients in understanding their civil rights obligations.[217] Topics include how to create disability and language access plans, service animals, video remote interpreting, and other areas that are frequently unknown or misunderstood by recipients. These fact sheets are intentionally written in plain language, under five pages long, and provide "bite-sized" information about potential strategies that recipients can utilize to comply with the law.

HRSA also consults with funding recipients that are seeking help in allocating limited budget funds towards services that help increase access by populations that are underserved. HRSA assists recipients in strategizing how to meet the needs of their service populations in a cost-effective manner.[218] For instance, HRSA encourages recipients, as appropriate, to seek out organizations in their localities or with similar missions to negotiate resource sharing agreements. Such arrangements take shape in a variety of ways, such as cost sharing on a contract for interpreter services to communicate with patients with disabilities or who are LEP or sharing translated informational materials. Cost sharing may result in lower rates from increased volume or dividing the cost of one service among multiple organizations.

Similarly, as a means of accessing a wide range of information without incurring additional cost, HRSA encourages funding recipients to utilize connections within their communities. Recipients can utilize expertise from local organizations, such as HHS/ACL-funded Centers for Independent Living on disability issues or coordinate with religious entities to disseminate materials and reach all segments of the community. It is important to note that when utilizing these strategies, HRSA strongly

---

[215] U.S. DEP'T OF HEALTH & HUM. SERVS., LANGUAGE ACCESS PLAN 3 (2013), https://www.hhs.gov/sites/default/files/open/pres-actions/2013-hhs-language-access-plan.pdf.

[216] *Id.* at 4.

[217] *Office of Civil Rights, Diversity, & Inclusion*, *supra* note 122.

[218] *Healthy Grants Workshops*, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH RES. & SERVS. ADMIN. (2020), https://www.hrsa.gov/grants/manage-your-grant/training/workshops.

promotes implementing quality assurance mechanisms, such as including a statement on borrowed translated materials that requests feedback from consumers to help the entity ensure that the documents are accurate and effective.

To reduce modern health inequities, it is not enough for funding agencies to simply request that entities sign grant agreements; funding agencies should also continue to assist recipients in the post-award phase in understanding legal directives and federal civil rights guidance to help them achieve compliance, dismantle health disparities among the populations they serve, and reduce discrimination in funded programs and activities.

CONCLUSION

Systemic discrimination and widespread health disparities demand federal action in addition to enforcement. Federal funding agencies—through grants, technical assistance, outreach, and partnerships with civil rights enforcement offices—can help achieve equity across publicly funded programs and services. Through civil rights laws, federal funding influences policies that affect SDOH such as healthcare, education, climate, transportation, and other critical areas that impact health. Funding agencies provide a strategic complement to civil rights enforcement by not only affirming nondiscrimination in federally funded programs, but also educating funding recipients on how to devise, adapt, or extend programs and services in ways that *prevent* discrimination, increase access to healthcare, and promote health equity.

HRSA is in a unique position to help its funding recipients proactively integrate civil rights compliance in its policies, programs, and services. Interweaving civil rights requirements into grant administrative requirements supports applicants and recipients in understanding what is expected of them. HRSA takes this one step further by inviting its recipients to ask questions or request consultations on civil rights implementation in funded programs. Modern forms of discrimination and health inequities require federal departments, such as HHS, to extend nondiscrimination efforts beyond investigations of individual cases and towards guiding recipients, using funding mechanisms, on how to apply civil rights standards in their programs. The reach of civil rights laws through proactive efforts by federal funding agencies is significant, transformative, and necessary to further health equity.

Barring Diversity? The American Bar Exam as Initiation Rite and Its Eugenics Origin

MARY SZTO[†]

INTRODUCTION

According to the 2020 census, the U.S. population is over 42% minorities,[1] however, only 14% of the legal profession is.[2] In 2020, the first-time bar taker pass rate was 88% for Whites, 80% for Asians, 78% for Native Americans, 76% for Hispanics, and 66% for Blacks.[3] The COVID-19 pandemic has also thrown state bar exams into crisis. Some states allowed graduates a diploma privilege and many administered online exams. At the same time, anti-Asian violence, disproportionate COVID deaths in communities of color, Black Lives Matters protests, and the Capitol Insurrection have further exposed systemic racism in the U.S. This article will argue that racial disparities in first-time bar passage rates are not coincidental but rooted in the eugenics origin of the bar exam. The bar exam is an initiation rite that bars diversity in the legal profession. The exam requires costly isolated study for several months that privileges young White graduates with few family or financial obligations and those who have assimilated to such status.

Eugenics theory held that Whites were superior, and others should be denied access to property ownership, education, and the legal profession.[4] Therefore, to diversify the legal profession, we must acknowledge these origins in eugenics and institute the diploma privilege or create sequenced exams or other alternatives that do not require costly isolated study and bar preparation courses.

This article will first discuss what states did to administer the bar during the pandemic. Then, the article will discuss the state of racial diversity in the

---

[†] Teaching Professor, Syracuse University College of Law. B.A., Wellesley College. M.A.R., Westminster Theological Seminary. J.D., Columbia Law School. This article is for my students. Thank you to Richard E. DeMaris, Gwendolyn Majette, Kathleen O'Neill, Jeremy Paul, Steve Ramirez, Jennifer Prough, Margaret Woo, and those who provided helpful comments at both the Association of American Law Schools annual conference and MidWestern People of Color Legal Scholarship Conference.

[1] Connie Hanzhang Jin et al., *What the New Census Data Shows About Race Depends on How You Look at It*, NPR (Aug. 13, 2021, 5:01AM), https://www.npr.org/2021/08/13/1014710483/2020-census-data-us-race-ethnicity-diversity (last visited Mar. 5, 2022).

[2] AM. BAR ASS'N, NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf.

[3] AM. BAR ASS'N, LEGAL EDUCATION AND ADMISSIONS TO THE BAR, SUMMARY BAR PASSAGE DATA: RACE, ETHNICITY, AND GENDER, 2020 AND 2021 BAR PASSAGE QUESTIONNAIRE, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf.

[4] *See* Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 12 SEATTLE J. FOR SOC. JUST. 1, 11–14 (2013).

legal profession and chronicle the American Bar Association's ("ABA") efforts since the 1970s to diversify the profession. Then, we will delve into the history of the bar exam as an initiation rite. I will discuss how bar admissions standards arose amid teachings about Anglo-Saxon White supremacy in the late 1800s and early 1900s. Minorities were excluded from most law schools, and there was widespread fear of immigrants diluting the U.S. White population and the legal profession.

I will also discuss anthropological findings that initiation rites mark entry into a privileged group. These findings signify identity change through a costly, lengthy, communal, and painful event. They involve a separation from society, a liminal period, an ordeal, and then reincorporation into society. The bar exam follows this pattern. Many minority candidates cannot afford months of unpaid isolated study, much less multiple bar attempts. This is because of racial wealth gaps[5] fueled by eugenics-inspired federal redlining policies from the 1930s.[6] In pre-pandemic 2019, "the typical White family [had] eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family."[7] "The median young Black family has almost no wealth ($600). In contrast, the median young White family has a wealth of $25,400."[8] These wealth gaps will only be exacerbated by the pandemic.

I conclude that the pandemic and heightened awareness of systemic racism in the U.S. provide an opportunity to make permanent changes to bar admission and the diversity of the profession. Three years of law school are already a ritual liminal period with multiple ordeals. I propose either the diploma privilege or an open book exam focused on essential subjects for all candidates, and specialty exams for some. This can be administered frequently and online, and candidates, including current law students, need only retake subjects that they have not passed. All alternatives should not have a disproportionate financial and social burden on candidates of color, including costly bar preparation courses. Then, the bar exam can be part of a strategy to diversify the profession, and not a bar to it. Thus, this initiation rite can be liberating, transformative, and healing. Otherwise, we will continue to see huge racial disparities in first-time bar passage rates and

---

[5] LAURA SULLIVAN ET AL., THE RACIAL WEALTH GAP: WHY PUBLIC POLICY MATTERS (Amy Traub et al. eds., 2015), https://www.demos.org/research/racial-wealth-gap-why-policy-matters; NEIL BHUTTA ET AL., DISPARITIES IN WEALTH BY RACE AND ETHNICITY IN THE 2019 SURVEY OF CONSUMER FINANCES, FEDS NOTES (2020), https://doi.org/10.17016/2380-7172.2797 ("White families have the highest level of both median and mean family wealth: $188,200 and $983,400, respectively …Black families' median and mean wealth is less than 15 percent that of White families, at $24,100 and $142,500, respectively. Hispanic families' median and mean wealth is $36,100 and $165,500, respectively.").

[6] In the U.S., homeownership is the chief means of generational transfer of wealth. Eugenic beliefs fueled federal redlining policies in the 1930's which denied federally subsidized home mortgages to non-Whites and ensured segregated neighborhoods and schools. Federal appraisal manuals stated that racially mixed neighborhoods had lower value. Education resources are based on property taxes, which are based on appraisal values. *See* Szto, *supra* note 4, at 11–14.

[7] BHUTTA, *supra* note 5, at 1, 4.

[8] *Id.*

crushing financial and familial burdens on minority candidates. Reform will also benefit all bar candidates.

I. PANDEMIC BAR APPROACHES

The COVID-19 pandemic has shown us that bold and swift changes can be made to bar admissions. Some states announced a diploma privilege, e.g, Washington,[9] Utah,[10] Oregon,[11] and Louisiana.[12]

Other states administered an online bar exam; however, there were issues not only with technology in general, but with racial discrimination in proctoring software. Future online bar exams must eliminate these proctoring flaws.

In a survey of New York online bar exam takers, 41% experienced internet or software issues.[13] The survey represented around ten percent of the 5,165 people who took the exam.[14] Twenty-nine percent thought that their personal data was compromised when they downloaded the exam software.[15] Seventy-one percent were concerned about cheating.[16] Anne Simon, disability rights attorney and New York State assemblywoman who co-sponsored the survey, stated,

> The profound lack of decency in this process and the unwillingness of the [New York State Board of Law Examiners] to consider equitable solutions for [New York] bar examinees this month has been appalling . . . From those who were forced to use urinals, or suffer embarrassing accidents to avoid leaving camera frame, we saw an utter failure to provide safe, responsible, and fair testing conditions to law school grads taking the most important test of their careers.[17]

With regard to racial discrimination, proctoring software could not recognize candidates with darker skin tones. For example, Areeb Khan, a

---

[9] Order Granting Diploma Privilege and Temporarily Modifying Admission & Practice Rules, Supreme Court of Washington (June 12, 2020).

[10] Stephanie Francis Ward, *Utah is First State to Grant Diploma Privilege During Novel Coronavirus Pandemic*, AM. BAR ASS'N (Apr. 22, 2020, 11:05 AM), https://www.abajournal.com/news/article/utah-first-state-to-grant-diploma-privilege-during-the-coronavirus-pandemic.

[11] Attorney General Rosenblum Statement on 'Oregon Emergency Diploma Privilege' for 2020 Oregon Law Graduates (July 6, 2020), https://www.doj.state.or.us/media-home/news-media-releases/ag-rosenblum-statement-on-oregon-emergency-diploma-privilege-for-2020-oregon-law-school-graduates/.

[12] Supreme Court of Louisiana Order (July 22, 2020), https://www.lascba.org/docs/News/2020_07-22_ORDER-EmergencyAdmission.pdf.

[13] Karen Sloan, *Test Takers Slam New York's First Online Bar Exam in New Survey*, N.Y. L.J. (Oct. 16, 2020, 12:47 PM), https://www.law.com/newyorklawjournal/2020/10/16/test-takers-slam-new-yorks-first-online-bar-exam-in-new-survey/.

[14] *Id.*

[15] *Id.* at 2.

[16] *Id.*

[17] *Id.*

New York bar candidate, was told by his software, "[d]ue to poor lighting, we are unable to identify your face."[18] The problem was not the lighting in his room.[19] There is growing awareness of racial bias in facial recognition algorithms because they appear to take White males as normative. In one study, darker-skinned females were the most misclassified group (with error rates of up to 34.7%).[20] Apple iPhone's facial recognition system has also allowed Chinese users to unlock others' phones.[21] This perpetuates the stereotype that all Asians look alike. Proctoring software contains the implicit values of "discriminatory exclusion, the pedagogy of punishment, technological solutionism, and the Eugenic Gaze."[22]

This article will now focus on the state of racial diversity in today's legal profession and bar passage rates. The issues of racial discrimination in proctoring software and today's online bar exams harken back to the reasons for historic discrimination in the legal profession.

II. THE STATE OF RACIAL DIVERSITY IN THE LEGAL PROFESSION AND BAR PASSAGE

According to the 2020 census, the U.S. population was 57.8% White, 12.1% Black, 18.7% Hispanic, 5.9% Asian, and 7% Native American.[23] However, the attorney population does not reflect this racial diversity. In 2020, the U.S. attorney population was 86% White, 5% Black, 5% Hispanic, 2% Asian and 1% Native American.[24] Other professions are more diverse, e.g., in 2019 doctors were 72% White, 8.2% Black, 18.0% Asian, and 7.6% Hispanic; and social workers were 69.6% White, 23.0% Black; 3.7% Asian, and 14.3% Hispanic.[25]

It is estimated that in 1969, minority lawyers made up less than 1% of the profession,[26] although minorities were then 17% of the population.[27]

---

[18] Avi Asher-Schapiro, '*Unfair Surveillance'? Online Exam Software Sparks Global Student Revolt*, REUTERS (Nov. 10, 2020, 7:24 AM), https://www.reuters.com/article/global-tech-education/feature-unfair-surveillance-online-exam-software-sparks-global-student-revolt-idUSL8N2HP5DS.

[19] *Id.*

[20] Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 1, 8 (2018).

[21] Guy Birchall & Tom Michael, *Chinese Users Claim IPhone X Face Recognition Can't Tell Them Apart*, N.Y. POST (Dec. 21, 2017, 3:11 PM), https://nypost.com/2017/12/21/chinese-users-claim-iphone-x-face-recognition-cant-tell-them-apart/.

[22] Shea Swauger, *Our Bodies Encoded: Algorithmic Test Proctoring in Higher Education*, HYBRID PEDAGOGY (Apr. 2, 2020), https://hybridpedagogy.org/our-bodies-encoded-algorithmic-test-proctoring-in-higher-education/.

[23] Jin, *supra* note 1.

[24] AM. BAR ASS'N, *supra* note 3.

[25] BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2019), https://www.bls.gov/cps/aa2019/cpsaat11.pdf (explaining how other professions are also more diverse: architects are 82.6% White, clergy, 79.1%; electric engineers, 71.3%; and accountants and auditors, 77.1%).

[26] Henry Ramsey, Jr., *Historical Introduction*, *in* LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY iii, iv (L. SCH. ADMISSION COUNCIL ed., 1998).

[27] BRIAN GRATTON & MYRON P. GUTMANN, HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT, 1-177–1-179 (Susan B. Carter et al. eds., 1st ed. 2006).

After Dr. Martin Luther King, Jr.'s assassination in 1968, many law schools began affirmative action programs to admit minority students.[28]

As mentioned above, bar passage rates show striking racial disparities. In July 2015, the first-time taker California pass rate for Whites was 71.8% for California ABA-accredited schools; for Blacks, 53.4%; for Hispanics, 61.3%, and for Asians, 65.9%.[29] As mentioned above, in 2020, the first-time test taker pass rate across the nation was 88% for Whites, 80% for Asians, 78% for Native Americans, 76% for Hispanics, and 66% for Blacks.[30]

Racial disparities were studied years earlier in the 1998 Law School Admissions Council ("LSAC") Longitudinal Bar Passage Study. This study examined national bar passage rates for approximately 23,000 students who began law school in 1991.[31] This study found that among first-time bar takers, approximately 92% of Whites passed, 75% of Hispanics, 61% of Blacks, 81% of Asians, and 66% of "American Indians."[32]

Taking into account multiple attempts, Whites passed at a rate of 96.7%, Blacks, 77.6%, Asians 91.9%, Hispanics 89.9%, and Native Americans at 82.2%.[33] Of minority candidates who passed, 99% passed by the third attempt. However, many minority candidates who failed the first time never retook the bar.[34]

The study concluded that law school grade-point average ("LGPA") and Law School Admission Test ("LSAT") scores were the strongest predictors of bar examination passage.[35] Even though minority students entered law school with lower undergraduate GPA's and LSAT scores, the study also concluded that their eventual bar passage rates justified their law school admission.[36]

What is most striking, however, and not mentioned in the study's executive summary,[37] is that even Whites with LSAT scores below the mean passed at 86.9% on their first attempt.[38] Therefore, one's race appears to be more critical than one's LSAT score in passing on the first attempt. Age was another critical factor in bar passage. For all groups, the older the candidate,

---

[28] Ramsey, *supra* note 26.

[29] STATE BAR OF CAL., JULY 2015 CALIFORNIA BAR EXAMINATION NUMBER OF TAKERS AND PERCENT PASSING BY RACIAL/ETHNIC GROUP (2015), https://www.calbar.ca.gov/Portals/0/documents/admissions/Statistics/JULY2015STATS.121715.pdf.

[30] AM. BAR ASS'N, *supra* note 3.

[31] Ramsey, *supra* note 26, at viii.

[32] *Id.* at 27. There were slight gender variations: among first-time takers, 91.5% of White females passed; 92.2% of White males passed; 81.8% of Asian females passed; 79.7% of Asian males passed; 71.2% of Hispanic females passed; 78.1% of Hispanic males passed; 62.5% of Black females passed; 59.7% of Black males passed; 65.8% of Native American women passed; and 66.6% of Native American males passed. *Id*. at 26.

[33] *Id.* at viii.

[34] Of those who failed and never retook the bar, 2% of Whites and Asians fell into this category; unfortunately, 5% of Hispanics and 11% of Blacks failed on their first attempt and never retook the bar. *Id.* at 56.

[35] *Id.* at viii.

[36] *Id.* at ix.

[37] *Id.* at viii–ix.

[38] *Id.* at 30.

the lower their bar passage rate.[39] Bar passage rates are highest for those under the age of twenty-two.[40] For older candidates, Whites fare the best.[41]

Black candidates had the highest percentage of persons who had full-time jobs for at least two years prior to law school, 45%, compared to 32% to 36% for the other groups.[42] Asians (83.5%) and Hispanics (77.8%) had very high percentages of candidates who grew up in homes where another language besides English was spoken.[43]

Also striking were data on socioeconomic status. Regardless of their socioeconomic status, first-time passers among Whites and Blacks passed at relatively the same rates.[44] In contrast, Asians and Hispanics at higher socioeconomic status levels did significantly better.[45] This possibly reflects how Asians and Hispanics in higher socioeconomic status levels can assimilate into White neighborhoods with educational practices that are ultimately tested on the LSAT and bar exam.

If White candidates under the age of twenty-two had the highest first-time pass rates and Black candidates over the age of twenty-nine had the lowest, then why are costly multiple bar attempts necessary for a large percentage of minority candidates? And why subject minority students to multiple ordeals?

We will now discuss, in general, American Bar Association strategies to diversify the legal profession since the 1970s, before discussing the history of admission to the bar. This history will explain that today's bar racial disparities are not coincidental. Fortunately, reform to the bar exam will not only benefit minorities, but all bar candidates.

III. STRATEGIES TO DIVERSIFY THE PROFESSION

The American legal profession has a long history of excluding minorities. The American Bar Association was founded in 1878 but did not remove all restrictions on Black membership until 1955.[46] Chinese students were barred from admission to law school and to the bar because of anti-siniticism and the Chinese Exclusion Act.[47]

---

[39] *Id.* at 57.

[40] *Id.* For candidates under the age of 22, pass rates for Whites were 94.5%; Asian American, 85.8%; Blacks, 68.3%; and Hispanics, 79.8%.

[41] *Id.* For White bar candidates over 29 years old, their first-time pass rate was 86.5%, and only 6.5% never passed. The first-time pass rates and never pass rates for minority candidates over the age of 29 were respectively, Asian Americans 66.6% and 14.1%; Blacks, 54.9% and 28.4%; and Hispanics, 79.3% and 9.5%.

[42] Ramsey, *supra* note 26, at 60.

[43] *Id.* at 59.

[44] *Id.* at 58. The range for Whites was 91% for the lowest bracket to 92% for the highest. The range for Blacks was 61% to 65%.

[45] *Id.* The range for first time passers among Asians was 73% to 83% from the lowest to the highest bracket. The range for first time passers from Hispanics was 66% to 83%. *Id.*

[46] SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 3, 101 (AM. BAR ASS'N ed., 1993).

[47] Li Chen, *Pioneers in the Fight for the Inclusion of Chinese Students in American Legal Education and Legal Profession*, 22 ASIAN AM. L.J. 5 (2015).

In 1911, three Black lawyers were admitted to membership, but when their race was discovered, their membership was voided because the "settled practice of the Association ha[d] been to select only White men as members."[48] After dissent from some ABA leaders, the three Black lawyers were allowed to become members, but future Black candidates were not.[49] In 1912 the ABA passed a resolution to exclude Blacks.[50]

It was not until 1979 that the ABA began to make "a concerted effort to involve minority lawyers."[51] A Minorities in the Profession Committee was formed.[52] In 1980, the ABA adopted Standard 212, which required law schools to provide opportunities for law study and entry into the profession for racial and ethnic minorities.[53]

In 1986, the ABA formed the Commission on Opportunities for Minorities in the Profession.[54] It also adopted Goal IX to achieve diversity in "leadership, membership, programming activities and other objectives."[55]

In 2010, the Presidential Diversity Initiative of the American Bar Association issued its report and recommendations entitled "Diversity in the Legal Profession: The Next Steps." Among its new directions was #17, "[c]an, or should, the bar exam evaluate the skills necessary to deliver services in diverse legal environments?"[56] This question has apparently not been answered to this day. The ABA's 2011 Commitment to Diversity promotes "full and equal participation in the Association, our profession, and the justice system by all persons."[57] This is a noble commitment, because as stated at the beginning of this article, the legal profession is not representative of the nation's racial composition.

In 2016, the ABA Diversity & Inclusion 360 Commission reported that it had produced an online database of pipeline programs, prepared a template for strategic diversity plans, and developed implicit bias training materials.[58] The Commission acknowledged slow progress in diversifying the profession, but did not state why progress was slow.[59]

---

[48] BOYD, *supra* note 46, at 101.

[49] *Id.*

[50] David Kenneth Pye, Legal Subversives: African American Lawyers in the Jim Crow South 46 (2010) (Ph.D. dissertation, University of California, San Diego).

[51] BOYD, *supra* note 46, at 101.

[52] *Id.* at 102.

[53] *Id.* at 104.

[54] *Id.* at 102.

[55] AM. BAR ASS'N, DIVERSITY PLAN 2 (2011).

[56] AM. BAR ASS'N, PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 16 (2010), https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/next-steps-report.pdf.

[57] AM. BAR ASS'N, *supra* note 56, at 1.

[58] KAREN CLANTON, DIVERSITY & INCLUSION 360 COMMISSION: EXECUTIVE SUMMARY 2 (AM. BAR ASS'N ed., 2016), https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/di-360-commission-executive-summary.pdf.

[59] *Id.*

In 2018, the ABA established the Center for Diversity and Inclusion in the Profession.[60] The ABA Commission on Racial and Ethnic Diversity in the Profession's 2020 ABA Model Diversity Survey found that firm leadership "overwhelmingly consisted of White men," "representation of minority groups . . . is growing at the bottom levels of Associates, but is declining at the higher levels of Non-Equity and Equity Partners," and "[a]ttrition rates were substantially larger for non-White attorneys."[61]

This article seeks to address why progress is slow. To address obstacles to diversifying the profession, we must examine the history of admission to the American legal profession, the use of ritual, and the unfortunate role of eugenics and racial hierarchy theory. Unless these origins are addressed, progress will remain slow.

IV. THE HISTORY OF ADMISSION TO THE AMERICAN LEGAL PROFESSION

This section will first discuss the English ritual origins of the American legal profession, then the role of early apprenticeships in the U.S., before turning to the role of eugenics and racial hierarchy theory and the bar exam. With no apprenticeship requirement today, the bar exam is a critical ritual in admission to the bar.

The American legal profession can be traced to English professions and guilds, which had their origins in monastic rituals. In general, entry into English guilds involved apprenticeships and ceremonies, sometimes of a religious nature.[62] Apprenticeships included separation from families, which ended with incorporation into a guild with a common meal.[63]

A. English Inns of Court

"The origins of the English Bar are traceable to . . . monastic orders, whose members regularly acted as advocates in local disputes and whose legal advice was routinely heeded by potential litigants."[64] *Advocatus* denoted a person in the ecclesiastical courts[65] and lawyers were considered priests who imparted common law whose origin was divine.[66] Due to this divine origin, there were three daily masses in the Inns of Courts.[67]

---

[60] AM. BAR ASS'N, *Center for Diversity and Inclusion in the Profession High-Level Overview 2021-2022 Bar Year 3*, available at https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2020-aba-diversity-high-level-overview.pdf.

[61] AM. BAR ASS'N, 2020 ABA MODEL DIVERSITY SURVEY 19 (Am. Bar Ass'n ed., 2020), https://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/aba/credp_2020_mds_report.pdf.

[62] ARNOLD VAN GENNEP, THE RITES OF PASSAGE 103 (Monika B. Vizedom & Gabrielle L. Caffee, trans., 1960).

[63] *Id.*

[64] PAUL RAFFIELD, IMAGES AND CULTURES OF LAW IN EARLY MODERN ENGLAND: JUSTICE AND POLITICAL POWER, 1558–1660 11 (2004).

[65] *Id*. at 11–12.

[66] *Id*. at 9.

[67] *Id*. at 17.

"Communion rites were enacted during commons, at which senior and junior members shared a mandatory, frugal meal."[68] As in Benedictine practices, the law was supposed to be "spoken and eaten."[69] Therefore, the bread eaten during commons was equivalent to the sacred Host eaten in Holy Communion.[70] These common meals simultaneously symbolized the divine origin of law, and also the "Christian injunction against pride."[71]

After meals, students argued cases.[72] In fact, before being called to the bar, students had to engage in "twelve grand moots and twenty-four petty moots at the Inn of Chancery."[73] The moot was the most important exercise in their legal training.[74] Before readers delivered lectures they were isolated for a week in chambers; during lectures their status was "almost sacred," and they were incorporated with common meals and feasting.[75]

The Inns of Courts rites thus included rites of separation, transition, and incorporation for admission to the bar[76] where common sacramental meals and moots were key. I will discuss separation, transition, and incorporation rites further below.

B. U.S. Apprenticeship, Self-Study, and Bar Admission for White Male Citizens

Until the late 1800s, admission to practice law in the U.S. mainly involved apprenticeships, self-study,[77] and oral examinations with local judges.[78] The U.S. apprenticeship was the ritual equivalent of the Inns of Courts practices of separation, transition, and incorporation. As the 1790 Naturalization Act limited U.S. citizenship to free Whites, many states expressly limited bar admission to White male citizens. For example, in 1851, the Iowa Code stated, "[a]ny [W]hite male citizen . . . who satisfies any district court . . . that he possesses the requisite learning and . . . good moral character, may . . . be permitted to practice . . . ."[79]

The emancipation of Black slaves and mass immigration to the U.S. from Eastern and Southern Europe, however, led to changes in bar admission. In 1870, African descendants and African immigrants were

---

[68] *Id*. at 9.
[69] *Id*. at 10–11.
[70] *Id*. at 14.
[71] *Id*. at 10.
[72] *Id*. at 20–21.
[73] *Id*. at 21.
[74] *Id*.
[75] David Lemmings, *Ritual, Majesty and Mystery: Collective Life and Culture Among English Barristers, Serjeants and Judges, c. 1500-c.1830, in* LAWYERS AND VAMPIRES: CULTURAL HISTORIES OF LEGAL PROFESSIONS 31 (W. Wesley Pue & David Sugarman eds., 2003).
[76] *Id.*
[77] *See* ESTHER LUCILE BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 22–23 (1938) (describing early apprenticeships).
[78] *See* Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335, 346 (2006).
[79] IOWA CODE § 1610 (1851).

allowed to become citizens;[80]as mentioned earlier, they were not welcomed into the ranks of attorneys. Other minorities were excluded as well. Despite their contributions to building the transcontinental railroad and land reclamation in California, Chinese were scapegoated and excluded from immigration and citizenship from 1882 to 1943[81] and from becoming attorneys.[82] While large numbers of Jewish and Catholic immigrants from Eastern and Southern Europe did enter the U.S., fears of them flooding the legal profession led to calls for required legal study within universities, and standardized testing. These requirements disadvantaged Blacks and recent immigrants with few resources. In fact, less than 4% of the U.S. population attended college.[83] The calls for university based legal education, and standardized testing were steeped in eugenics theory which posited that intelligence and moral character were based on race. The Jim Crow South and professionalism barriers raised by the ABA and the American Association of Law Schools thus deterred African Americans and other minorities from entering the legal profession.[84]

C. Eugenics, Immigration, and Standardized Testing

Industrialization in the U.S. required more workers, and immigration filled this need.[85] In the 1880s, the U.S. saw a surge in immigration from Eastern and Southern Europe;[86] these immigrants were considered non-White.[87] Workers poured in from Italy, Poland, Greece, and other such countries.[88] To illustrate the magnitude of this influx, in 1882, 87% of European immigrants came from Northern and Western Europe, and only 13% from Southern and Eastern Europe.[89] In 1907, 81% came from Southern and Eastern Europe and 19% from Northern and Western Europe.[90] Unfortunately, this increased immigration brought fears that urban Catholic and Jewish lawyers would besmirch a White Protestant profession and represent injured workers and consumers against corporate interests.[91]

During this time, proponents of eugenics promoted theories of a racial hierarchy with Anglo-Saxons as the superior race, followed by northern

---

[80] Naturalization Act of 1870, ch. 254, 16 Stat. 25 (1870).

[81] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

[82] *In re* Hong Yen Chang, 60 Cal. 4th 1169, 1170 (2015) (describing Hong Yen Chang, the first attorney of Chinese descent in the U.S., who was denied admission to State of California bar in 1890 but granted posthumous admission in 2015).

[83] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 29 (1976).

[84] Pye, *supra* note 50, at 59.

[85] JAMES MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE 21 (2013).

[86] *Id.* at 20.

[87] *Id.* at 22.

[88] *Id.* at 21.

[89] CARL KAESTLE, TESTING POLICY IN THE UNITED STATES: A HISTORICAL PERSPECTIVE, (Gordon Comm'n on the Future of Assessment in Educ. ed., 2012).

[90] *Id.*

[91] MOLITERNO, *supra* note 85.

Europeans, Asians, Black, and Hispanics.[92] Eugenicists warned that unless the races were segregated and immigration was curtailed, the American population would suffer a decrease in intelligence.[93] Therefore, eugenicists promoted: breeding White babies, sterilizing the so-called feeble-minded,[94] prohibitions against miscegenation, racial residential and education segregation, and curtailing immigration from inferior groups, i.e., non-Anglo-Saxons. This curtailment of immigration culminated in the 1924 Immigration Control Act.

At the height of its influence in the U.S., the first part of the twentieth century,[95] eugenics was considered to be mainstream science. Eugenics was funded by J.H. Kellogg and the Race Betterment Foundation in Battle Creek, Michigan, and the Harriman railroad fortune, which helped create the Eugenics Record Office ("ERO") in Cold Spring Harbor, NY.[96] Belief in eugenics was so widespread that the Encyclopedia Britannica stated that "mentally the negro is inferior to the [W]hite."[97]

D. Eugenics and the Creation of Standardized Testing

The eugenicists promoted the IQ test and standardized testing in order to bolster their assertions that Whites were superior. Lewis Terman, Stanford psychology professor and one of Stanford's first nationally known scholars,[98] spread the term "intelligence quotient," and by 1916, had created the Stanford-Binet intelligence test.[99] He was an "eugenics enthusiast, favoring immigration restriction and sterilization of low IQ people to save society from the 'menace of the feeble-minded.'"[100] Achievement tests, which used multiple-choice questions, were also developed in the 1920s.[101] They were supported by the "same intellectual and institutional framework" as the IQ tests.[102]

In 1923, Carl Brigham, Princeton University professor, published "A Study of American Intelligence." Although he later recanted his views, this study was instrumental in the passage of the 1924 Immigration Control Act.[103] Based on an extensive study of members of the U.S. Army, Brigham

---

[92] CHARLES A. GALLAGHER, HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 360 (Hernán Vera & Joe R. Feagin eds., 2007); Robert M. Yerkes, *Eugenic Bearing of Measurements of Intelligence in the United States Army*, 14 EUGENICS REV. 225, 242 (1923).

[93] *See* CARL C. BRIGHAM, STUDY OF AMERICAN INTELLIGENCE 210 (Humphrey Milford ed., 1923).

[94] *See* Daniel J. Kevles, *Eugenics and Human Rights*, 319 BMJ 435, 436 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1127045/pdf/435.pdf.

[95] Steven Selden, *Transforming Better Babies into Fitter Families: Archival Resources and the History of the American Eugenics Movement, 1908-1930*, 149 PROC. OF THE AM. PHIL. SOC'Y 199, 202 (2005).

[96] *Id.* at 202.

[97] KAESTLE, *supra* note 89.

[98] Mitchell Leslie, *The Vexing Legacy of Lewis Terman*, STANFORD MAGAZINE, July/August 2000, https://alumni.stanford.edu/get/page/magazine/article/?article_id=40678.

[99] KAESTLE, *supra* note 89.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Carl C. Brigham, *Intelligence Tests of Immigrant Groups*, 37 PSYCH. REV. 158, 158–65 (1930).

wrote that the Nordic race was intellectually superior to the Alpine and Mediterranean races and the American Negro.[104] He proposed not only legal control of immigration but impeding propagation of the inferior races.[105]

In 1924, the U.S. enacted the Immigration Control Act, which created a quota system based on the national origin of the 1890 population make-up.[106] Future immigration was limited to 2% of the number of persons from a given country in 1890.[107] This meant that 70% of immigration would come from Northern Europe.[108] This quota based system did not change until 1965, with the passage of the Hart-Cellar Immigration Act.[109] At the time of the passage of the 1965 Act, President Johnson wrote that its goal was to "repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American nation."[110]

In 1926, eugenicist Brigham originated the SAT, the college admissions test.[111] In the 1930s, based on eugenics theory, the Federal government decided to subsidize home mortgages for only White families and required racial restrictive covenants in their deeds.[112] The Federal government accomplished this by drawing maps of neighborhoods around the country; and rating them on creditworthiness. Maps of minority neighborhoods literally had red lines around them and were shaded in red. This redlining prevented minority neighborhoods from receiving federally subsidized bank loans for home ownership, and federal appraisal standards were based on White ownership.[113] Home ownership is the chief means by which Americans create intergenerational wealth.[114] Thus, subsidizing mortgages for only White families led to generations of wealth transfer for White families and poverty for minority families and segregated neighborhoods and schools, which persist to this day.

Eugenics in the U.S. came into disfavor only with discovery of the cruel practices of Nazi Germany; however, sterilization of the mentally ill and racial minorities continued into the 1970s.[115] Unfortunately, eugenics teachings were the backdrop of exclusion of minorities from the legal profession at the end of the late 1800s and early 1900s.

---

[104] *See* BRIGHAM, *supra* note 93, at 210.

[105] *Id.* at 210.

[106] MOLITERNO, *supra* note 85, at 21.

[107] *Id.* at 21.

[108] Jerry Kammer, *The Hart-Celler Immigration Act of 1965*, CTR. FOR IMMIGR. STUD. 1, (2015), http://cis.org/sites/cis.org/files/kammer-hart-celler.pdf.

[109] Immigration and Nationality Act §201, 8 U.S.C. § 1152 (1965).

[110] Kammer, *supra* note 108.

[111] Although the SAT is supposed to be an aptitude test, today many students benefit from expensive preparatory courses.

[112] *See* Szto, *supra* note 4, at 11–16.

[113] FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT (1936).

[114] Szto, *supra* note 4 at 11–14, *see also*, Sullivan, *supra* note 6.

[115] Leslie, *supra* note 98, at 15.

E. Bar Standards and Immigration

As mentioned earlier, before the Civil War, many states had restricted bar admission to White male citizens. In response to emancipation and increased immigration from eastern and southern Europe, bar associations also raised bars to entry to the legal profession and prohibited advertising.[116] "Although lawyers spoke the language of professionalism, their vocabulary often masked hostility toward those who threatened the hegemony of Anglo-Saxon Protestant culture. Professionalism and xenophobia were mutually reinforcing."[117] For example, bar associations excluded the new immigrants.[118] The first bar association was in New York, where most new immigrants arrived.[119] The new immigrant attorneys received their training in part-time law schools, or night schools, in urban centers.[120] Some of these were run by the YMCA.[121]

In 1879, these immigrant lawyers were described by the President of the New York State Bar Association as "slovenly in dress, uncouth in manners and habits, ignorant even of the English language, jostling, crowding, [and] vulgarizing the profession."[122] In 1880, New Hampshire was the first state to have a state board of bar examiners.[123] Other states soon followed.

In 1915, esteemed statesman, Nobel peace prize winner, and then ABA president, Elihu Root, decried this development: 15% of New York lawyers were foreign-born, and another third had immigrant parents.[124] Root stated that foreign influences must be "expelled by the spirit of American institutions." [125] Root also "endorsed immigration restriction and the popular racist theories expounded in Madison Grant's The Passing of the Great Race in his attempt to return to the bygone age of Anglo-Saxon Protestant hegemony."[126]

Between 1890 and 1910, the number of day law schools increased by 60%, while night schools, which educated immigrants and their children, increased by 350%.[127] From 1900 to 1910, the number of immigrant attorneys in Boston increased by 77%; similar figures appeared across the country.[128]

---

[116] MOLITERNO, *supra* note 85, at 19.
[117] AUERBACH, *supra* note 83, at 99.
[118] MOLITERNO, *supra* note 85, at 22.
[119] *Id.* at 22.
[120] *Id.* at 19.
[121] *See* Steven C. Bahls & David C. Jackson, *The Legacy of the YMCA Night Law Schools*, 26 CAP. U.L. REV. 235, 235–39 (1997).
[122] AUERBACH, *supra* note 83, at 51.
[123] Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, THE GARGOYLE 4 (1990), https://media.law.wisc.edu/m/ywq4n/gargoyle_21_1_2.
[124] AUERBACH, *supra* note 83, at 94.
[125] *Id.*
[126] *Id.* at 117.
[127] *Id.* at 95.
[128] *Id.*

Between 1905 and 1925, "the structure of the modern legal profession was designed and built. . . . These were . . . the peak years of the 'new' immigration from southern and eastern Europe."[129] At this time, as a result of industrialization, the corporate law firm came to prominence, and the Cravath model hired recent law school graduates so they could be "made to order."[130] Thus, a channel between law schools and law firms developed.[131] Although corporate lawyers were criticized for greed, other attorneys joined with them to block immigrants and minorities from the profession and to preserve the profession as an "Anglo-Saxon Protestant enclave."[132] This resulted in professional canons of ethics that held contingent fees suspect,[133] and requirements for an undergraduate education before law school. As mentioned earlier, only 4% of the population had finished college.[134] Thus, this requirement excluded racial minorities, children of immigrants, and women.[135] Immigrants, such as Italians, Polish or Greeks, and blacks and other minorities, had almost no chance of going to college.[136] Academic achievement standards thus "camouflage[d] prejudice."[137] The standardized legal curriculum also emphasized business practice.[138]

Chronicling this era, Susan Boyd, author of the ABA Section of Legal Education and Admission to the Bar's history, wrote,

> Bigotry and prejudice permeated the established bar and law school world. There clearly was egregious discrimination against African-Americans, Jews, Catholics, and immigrants from places other than Northern Europe. A great deal of the criticism of night and proprietary law schools stemmed from the fact that these institutions provided access for a vast section of the population.[139]

For example, the Dean of the University of Wisconsin stated,

> . . . night schools enrolled a very large proportion of foreign names . . . emigrants[sic] covet the title [of attorney] as a badge of distinction. The result is a host of shrewd young men, imperfectly educated . . . viewing the Code of Ethics with uncomprehending eyes.[140]

---

[129] *Id.* at 5.
[130] *Id.* at 24.
[131] *Id.* at 28.
[132] *Id.* at 52.
[133] *Id.* at 50.
[134] *Id.* at 29.
[135] *Id.*
[136] *Id.* at 117.
[137] *Id.* at 27.
[138] *Id.*
[139] BOYD, *supra* note 46, at 16.
[140] *Id.* at 17.

Another Dean stated that "We have plenty of lawyers, and we do not need to sit up nights devising ways for poor and worthy individuals to get to the Bar."[141]

Immigrant lawyers were also soundly denounced as being "ambulance chasers."[142] In 1929, after seventy-four lawyers were disciplined in a New York investigation, the chief counsel stated that the attorneys "could not speak the King's English correctly . . . These men by character, by background, by environment, by education were unfitted to be lawyers."[143]

When the ABA Root Committee proposed requiring two years of college and three years of full-time law study, Dean Edward T. Lee of John Marshall Law school spoke on behalf of night schools.[144] He stated that such a proposal would allow "deans of a few large day law schools" to control legal education and would limit the law profession "to all save the leisure class of youth."[145]

F. The Bar Examination Designed to Bar Immigrant Ambulance Chasers and other Minorities

By 1928, all states except for Indiana required a bar examination.[146] In 1931 the National Conference of Bar Examiners was founded.[147] The examiners were advised to make test questions look like test questions from the "better schools."[148] This meant schools that were inaccessible to immigrants and minority candidates. However, in the 1930s commercial cram courses were already a concern. In 1936, H. Claude Horack, then Dean of Duke Law School, wrote that a graduate of a "good law school" should be able to pass the bar examination with little time in "special review."[149] He expressed concern that cram courses were necessary to pass the bar: "It is difficult to answer the boy who asks, 'Why is it necessary, after three years of hard study in a good law school, that I spend from six weeks to three months, and a considerable sum of money, in preparing for the bar examinations?'"[150] Horack wrote that bar examiners needed to write better exams, "With the right sort of an examination, the commercialized cram course would not long remain a profitable institution."[151] Unfortunately, this problem still exists today.

In a 1936 report by the Russell Sage Foundation, it was noted that the average bar examination covered nineteen subjects and was two to three

---

[141] *Id.* at 26.
[142] AUERBACH, *supra* note 83, at 48–49.
[143] *Id.*
[144] *Id.* at 113.
[145] *Id.*
[146] ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 174 (3d ed. 1983).
[147] Melli, *supra* note 123, at 4.
[148] STEVENS, *supra* note 146, at 177.
[149] H. Claude Horack, *The Bar Examiner and the Law Schools*, 8 AM. L. SCH. REV. 611, 612 (1936).
[150] *Id.*
[151] *Id.* at 613.

days long; questions usually took eighteen minutes to answer.[152] This format lends itself to promoting commercial cram courses.

In 1939, Dean Horack wrote that "the graduate of the better law school would pass [the bar exam] with flying colors while the office-trained man and the graduate of poor quality or of a commercialized law school would fail."[153] Also, that law schools developed curricula for training for the "high class lawyer."[154] The good bar exam would "protect the well-trained applicant and eliminate the memorizer who must become an ambulance chaser because he does not have the ability to be a real lawyer."[155] Horack also wrote that "There should be a standard everywhere which would be fair to the young man who has ability, a good educational background, has chosen his law school wisely and has put in three years of conscientious study."[156]

G. Other Racial Discrimination in Bar Administration

Unlike the young man that Horack described, minorities faced huge barriers to bar admission. Until the 1960s, many southern law schools did not admit Blacks or other minorities.[157] Black law students in the south thus had the expense of traveling to northern schools.[158] African Americans were also excluded from southern bar associations with law libraries and study courses, which made bar exam preparation even more difficult.[159]

Between 1933 and 1943, Pennsylvania did not admit any Black lawyers.[160] This was achieved through requiring prelaw students to register with the State Board of Law Examiners with three sponsors, at least two of whom were members of the bar, and to find a preceptor with at least five years' practice experience to give them a six-month clerkship after graduation.[161]

Black candidates also faced discrimination during the Georgia bar exam.[162] A White legal secretary who took the exam testified at a hearing that she saw White applicants during the bar exam using law books, obtaining aid from proctors on difficult questions, and taking extra time.[163]

In 1948, the LSAT came into use in law school admissions.[164] Professor Willis Reese, then chair of the Admissions Committee of the AALS and Dean Young Smith of Columbia Law School, wanted additional criteria to

---

[152] ESTHER LUCILE BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 119–120 (1st ed. 1938).
[153] H. Claude Horack, *Admission to the Bar: Many Are Chosen* 33 ILL. L. REV. 891, 891 (1939).
[154] *Id.* at 892.
[155] *Id.* at 897.
[156] *Id.*
[157] Pye, *supra* note 50.
[158] *Id.* at 36.
[159] *Id.* at 38.
[160] AUERBACH, *supra* note 83, at 128.
[161] *Id.* at 126.
[162] Pye, *supra* note 50, at 40.
[163] *Id.* at 41.
[164] BOYD, *supra* note 46, at 52.

evaluate applicants who were not from Ivy League Schools.[165] Due to the G.I. Bill, they had begun to receive applications from graduates of other schools.[166] Columbia, Harvard, and Yale asked the Educational Testing Service ("ETS") to develop a test for law school admission.[167] Thus, the LSAT was designed to test if candidates had the equivalent of educational practices in an elitist White Ivy League school.

In 1958, the National Conference of Bar Examiners, in conjunction with the ABA Section on Legal Education and Admission to the Bar and the Association of American Law Schools, wrote a Code of Recommended Standards for Bar Examiners.[168] The Code "emphasized that the exam questions should be hypothetical fact situations requiring essay answers."[169] Standard 16 on "Purpose of Examination" stated:

> The bar examination should test the applicant's ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and their application. The examination should not be designed primarily for the purpose of testing information, memory, or experience.[170]

In general, from 1959 to 1968, bar passage rates varied widely from state to state, from as low as 28% to as high as 98%.[171] These reflected a "lack of uniformity of quality and grading of bar examinations among the states."[172] Eventually, 85% to 90% of takers passed after repeated attempts.[173]

Despite this progress, discriminatory bar exam practices persisted. In the 1960s, 75% of White applicants passed the bar exam, but only 50% of Black applicants did.[174] In Philadelphia, bar examiners photographed Black applicants and seated them in the same row to aid the grading of their exams.[175] From 1957 to 1974, Delaware did not pass a single Black bar applicant.[176] Ohio only passed one out of three Black applicants.[177] In South Carolina, while 98% of White applicants passed, only 50% of Blacks did.[178]

---

[165] *Id.* at 51.
[166] *Id.*
[167] *Id.* at 52.
[168] Melli, *supra* note 123, at 4.
[169] *Id.*
[170] *Id.*
[171] Michael Bard, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV. 392, 417 (1970).
[172] *Id.* at 419.
[173] *Id.* at 420.
[174] AUERBACH, *supra* note 83, at 294.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*

H. Development of the MultiState Bar Examination and Current Bar Review Courses

In the 1970s, the National Conference of Bar Examiners ("NCBE"), with a grant from the American Bar Foundation, developed the Multistate Bar Examination.[179] This was composed of two-hundred multiple choice questions to be taken over six hours.[180] Each jurisdiction could still set its own passing score.[181] A machine-graded exam eased the burden of the increase of bar applicants from 16,000 in 1960 to over 58,000 in 1980.[182] In 1980, the NCBE introduced the Multistate Professional Responsibility Exam ("MPRE"), a two-hour, fifty-question exam.[183] In 1988, the NCBE introduced the Multistate Essay Exam ("MEE").[184] The MEE today consists of six essays to be answered in thirty minutes each.[185] In 1997, the NCBE introduced the Multistate Performance Test ("MPT").[186] As of 2021, thirty-eight jurisdictions had adopted the Uniform Bar Exam ("UBE"), which consists of the MBE, the MEE, and the MPT.[187]

State bar application fees are high, e.g., Illinois' fee is $950.[188] Commercial bar review courses are also costly. In 2021 the popular Barbri bar preparation course advertised courses ranging from $1,999 for the "Self Pass" course to $3,999 for the "Ultimate Pass" course.[189] Barbri states, "[Bar preparation] should be treated like a full-time job. You should plan on spending approximately 40 hours per week over 8 to 10 weeks studying for the bar exam.[190] Barbri also states how the bar exam differs from law school exams, and therefore why a commercial preparation course is necessary,

> In law school, students who know the most about a subject are typically those who achieve the highest grades on final exams. A detailed, thorough understanding of the course material is the goal of every top law student. This is not so when it comes to studying for the bar exam. In fact, using

---

[179] Melli, *supra* note 123, at 4.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 5.
[184] *Id.*
[185] Judith Gundersen, *The MEE Marks a Major Milestone*, 82 THE BAR EXAMINER 17, 19 (2019).
[186] National Conference of Bar Examiners, *2016 Statistics*, 86 THE BAR EXAMINER 14, 48 (2017), http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F205.
[187] National Conference of Bar Examiners, *Jurisdictions That Have Adopted the UBE*, https://www.ncbex.org/exams/ube/ (last visited Feb. 12, 2022).
[188] Illinois Board of Admissions to the Bar, *Information & Applications: Filing Deadlines and Fees*, https://www.ilbaradmissions.org/appinfo.action?id=1 (last visited Feb. 12, 2022).
[189] BARBRI, *Enroll in Barbri Bar Review*, https://www.barbri.com/bar-review-course/bar-review-course-details/#enroll (last visited Apr. 5, 2021).
[190] *Bar Review FAQ's: Is the Barbri Course Flexible?*, BARBRI, https://www.barbri.com/barbri-bar-review-faq/ (last visited Apr. 10, 2021).

> this same approach to study for your bar exam can actually be hurtful.[191]

Barbri explains how the bar requires a "completely different mindset and preparation approach":

> To pass the bar, you don't have to be great in any one area. The key to passing is simply doing well enough, in enough areas, to land on the passing side of the bar exam curve. You want to build a base of knowledge that is wide and shallow rather than narrow and deep.[192]

Even essay writing is different on the bar exam. According to Barbri,

> Essay writing for the bar exam is different than the final exams you experienced in law school. It's an acquired skill you must strengthen. For example, on most bar exam essays, there's actually a "right" answer. Also, to maximize your point potential on bar exam essays, you'll need to provide an answer to the call of the question in the format the bar examiners want and expect to see.[193]

Also, Barbri acknowledges that the multiple-choice portion of the bar exam, the MBE, was originally designed to defy logic,

> BARBRI has helped students pass the MBE since it was first administered in 1972 and, once upon a time, this exam did have a well-deserved reputation as being tricky. There were bar exam questions that required leaps of logic through double-conditional hoops. Today, the MBE is much fairer and more straightforward.[194]

Bar review courses were necessary in the 1930s and today. The bar exam is different from law school exams. This is because the bar examination is an initiation rite that requires high stakes decoding and enormous expense in preparing for it, including the cost of bar review courses. It was designed to privilege young White candidates with economic means.

---

[191] *U.S. Bar Exam Study Tips*, BARBRI, https://www.barbri.com/us-bar-exam-study-tips/ (last visited Apr. 10, 2021).

[192] *How Hard is the Bar Exam?*, BARBRI, https://www.barbri.com/about-the-bar-exam/ (last visited Mar. 13, 2021).

[193] *Don't Wait to Develop your Bar Writing Skills*, BARBRI, https://www.barbri.com/us-bar-exam-study-tips/ (last visited Apr. 10, 2021).

[194] *Approach the MBE Systematically*, BARBRI, https://www.barbri.com/us-bar-exam-study-tips/ (last visited Apr. 10, 2021).

This article will now focus on initiation rites in general, and why the American bar examination is an initiation rite. Moreover, because the bar exam is an initiation rite birthed in eugenics theory, it is a very effective rite in maintaining a primarily White legal profession. It accomplishes this by requiring months of costly, isolated study. This is possible for those with vast economic resources and few familial obligations, but much more difficult for minorities with few economic resources. Retaking the bar is often not an option for minority candidates.

V. INITIATION RITES

Initiation rites are rites of passage. As mentioned earlier, apprenticeships often included ceremonies to mark entry into a guild or profession. The English Inns of Courts were modeled after monasteries and their rituals. The American bar examination bears remarkable resemblance to an initiation rite with a separation from society, a liminal stage, an ordeal, and reincorporation into society, as described below. However, because standardized testing was birthed in the eugenics movement, the bar examination as an initiation rite privileged, and still privileges a leisure class of young White candidates with deep financial resources and few familial obligations, and minorities who have assimilated to this lifestyle.

Ethnographer Arnold van Gennep, in his seminal book published in 1960, "The Rites of Passage," describes rites as parallel to periodicity in nature.[195] While daily and weekly rituals renew, rites of passage transform.[196]

Rites of passage can both promote an existing order or create new ones. According to structural functional theory, rituals reflect and reinforce social integration.[197] However, anthropologist Victor Turner posited that ritual creates sociocultural arrangements.[198] The American bar exam maintains an existing social order of White majority attorneys by requiring isolated study for several months. Due to the racial wealth gap, many minorities cannot afford this isolated study and must work during this period before the bar examination.

Rites of passage involve separation from society, transition, and reincorporation into society.[199] A prime example of a separation rite is a funeral; incorporation rites include weddings. Initiation rites are transition rites. Separation rites are pre-liminal, transition rites are liminal, and incorporation rites are post-liminal.[200]

---

[195] GENNEP, *supra* note 62, at 3.

[196] RONALD L. GRIMES, DEEPLY INTO THE BONE 7 (2000).

[197] BOBBY C. ALEXANDER, VICTOR TURNER REVISITED: RITUAL AS SOCIAL CHANGE 28 (Susan Thistlethwaite ed., 1991).

[198] *Id.* at 29.

[199] GENNEP, *supra* note 62, at 11.

[200] *Id.*

A. Liminality

In an initiation rite, initiates, or novices, separate from society so they may enter a liminal period to receive sacred teachings and texts. After receiving such teachings, they reenter society with their new identities and corresponding powers.

Novices are sometimes considered dead.[201] They die to their former way of life and thinking, then are taught the law of their community before they are resurrected and reincorporated.[202] During this liminal period they are separated from family, particularly women and children.[203] They are in a sacred environment.[204] "[U]sual economic and legal ties are modified, sometimes broken altogether."[205] "Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial."[206] How long does liminality last? Around the world, transition ceremonies have lasted from two months to several years.[207]

Bar candidates enter a liminal period. They must isolate themselves for at least two months and separate themselves from family, especially any caregiving activities. They must refrain from working, thus breaking economic ties. Although they have received their J.D. degrees, bar candidates are not admitted to practice law. Many employers will not consider hiring them until they have passed the bar. They have no professional status. They are "betwixt and between."

Unfortunately, those who do not pass on their first attempt must repeat this isolation and economic deprivation on each attempt. Liminality and lack of employability lengthens with each bar failure. Such isolation, or repeated isolation will not be possible for bar candidates with limited financial resources, and deep familial and financial obligations. This disproportionately affects minorities because of the racial wealth gap described in the introduction to this article.

B. Sacred Learning and Instructors During Liminality

During the liminal period, initiates master sacred learning. They must submit to rigorous instruction as they are molded into a uniform state. Instructors possess complete authority and neophyte's absolute submission.[208] Neophytes must accept "arbitrary punishment without complaint."[209] Novices are also subject to negative rites or taboos; they may

---

[201] *Id.* at 75.
[202] *Id.*
[203] *Id.* at 76.
[204] *Id.*
[205] *Id.* at 114.
[206] VICTOR W. TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 95 (1969).
[207] GENNEP, *supra* note 62, at 82.
[208] VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 99 (1967).
[209] TURNER, *supra* note 206 at 95.

speak a special language or eat a special diet.[210] However, the authority of the elders is based on the common good.[211]

Barbri's description of why their training is necessary, even if candidates have done well on law school exams, invokes a sacred instruction in a liminal period. Bar review courses also dictate how time should be spent for at least two months in order to pass the bar. During bar review courses, the sacra candidates are taught are hundreds of rules, multiple choice questions, and dozens of performance tests and bar essays. In bar review, candidates memorize pneumonics, songs, and other methods to retain law. Most troubling, however, is that while bar review content is related to the bar, in the legal academy there is much speculation that bar study does not correlate well with the proper practice of law.[212]

Thus, the bar examination is an initiation rite. It involves liminality, i.e., a separation from society, family, and economic limbo, learning sacred texts, an ordeal, and then reincorporation into society. Due to the bar exam's origins in eugenic theory, this initiation rite successfully maintains an existing White majority attorney population. This is accomplished by requiring months of familial isolation and economic deprivation that many minority candidates cannot afford. This is not coincidental; the racial wealth gap was also framed by eugenics theory in the 1930s with residential racial segregation. Residential racial segregation enabled White families to pass on intergenerational wealth.[213] Mortgage policies and redlining prevented minority families from owning homes. Can the bar exam be a transformative ritual instead, that promotes racial diversity in the profession? The answer is yes, if we remove its familial isolation and economic deprivation aspects.

VI. PROPOSALS

To counter the economic and social barriers that the ritual bar examination presents, I propose the formation of a joint committee of organizations such as the American Bar Association, the Association of American Law Schools, Society of American Law Teachers, the National Native American Bar Association, National Bar Association, the Hispanic Bar Association, the Asian Pacific American Bar Association, and student bar associations to present alternatives to the current bar examination format. Ritual experts should also be on this committee. This Committee should issue a report that will first tell the history of the bar examination; a history that was birthed in the climate of closing the profession to recent immigrants and minorities. Then this committee must examine the content of the current

---

[210] GENNEP, *supra* note 62 at 82.

[211] TURNER, *supra* note 206 at 100.

[212] *See, e.g.*, Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS 11 (2017); Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47 (2015); Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to 'MacCrate' Entry to the Profession*, 23 PACE L. REV. 343 (2003); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002).

[213] Szto, *supra* note 4 at 11–14.

exam and decide which subject matter every lawyer must master, and which subjects a specialist should master.

These study committees may consider proposing reinstating the diploma privilege in more states than Wisconsin, which not coincidentally is the home state of the National Conference of Bar Examiners. After deciding which subjects should be required for all attorneys, the Committee may consider additional exams and certifications for specialists in criminal law, administrative law, commercial law, family law, etc.

Lawyers do not practice law by memorizing statutes, therefore, all exams should be open-book. Additionally, if a candidate does not receive a passing score in one subject, that candidate may retake that subject only, without having to retake all other subjects. The bar exam should be administered more frequently, or even online, so there are not long gaps when a person must wait for results and cannot practice law. Such gaps disproportionately affect candidates who must support extended families.

Law students may take parts of the bar examination, as they master subjects in school. By changing the bar examination's format, we thus eliminate the financial and social barriers to preparing for it. Of course, other formats may be considered, as long as they do not place undue financial and familial burdens on communities of color and other economically deprived communities, and require expensive bar preparation courses. Three years of law school are an initiation rite in itself, without requiring an additional liminality for the bar exam.

The test of any helpful bar examination reform is whether commercial bar review courses will become superfluous. If, however, changes to the bar examination do not make commercial bar review courses superfluous, then the revised bar exam will still advantage economically privileged candidates.

CONCLUSION

The coronavirus pandemic and heightened awareness of systemic racism provide an opportunity to make permanent changes to bar admission. During the pandemic, states temporarily enacted the diploma privilege and online exams. I propose that these changes become permanent because, among other reasons, the bar exam has been a ritual that has barred diversity to the profession.

In this article I first discussed the state of diversity in the legal profession today, diversity initiatives within the American Bar Association, and the history of admission to the bar. I then discussed initiation rites, and how studying for the bar exam closely resembles the pattern used in many initiation rites: separation and isolation from family and society, liminality for several months, an ordeal, and reincorporation into society. However, it is precisely this pattern that disadvantages many minority candidates.

Today, the American legal profession does not reflect the racial diversity of the US population. Despite diversity initiatives within the ABA

and elsewhere since the 1970s, although over 42% of the U.S. population is composed of racial minorities, only 14% of the legal profession is.[214] Minority candidates pass the bar at significantly lower rates on the first attempt and must retake it to pass. Unfortunately, this is not a coincidence, but part of the sad legacy of eugenics theories from the late 1800s and early 1900s. Eugenicists not only limited U.S. immigration in 1924 from outside northern and western Europe, but instituted standardized testing. Their teachings also led to racial residential segregation, which through redlining and governmental policies helped create today's huge racial wealth and achievement gaps.

As a result of this legacy, the bar examination's ritual aspect privileges those who have the economic means not to work for several months while preparing for the bar; and those who do not have or can postpone significant social and family commitments. Due to today's racial wealth gaps, this disproportionately affects minority candidates and other economically deprived populations.

How can the bar examination be an aid and not hindrance to diversity? Initiation rites can be transformative by creating community and reflection on sacred texts. If we have a bar exam, it can be transformative as well. In order for this to happen we must acknowledge its origins in eugenics theories of White superiority. We must also decrease the financial, familial, and social cost of the bar exam. We must focus the period of reflection not on legal minutiae but on principles of access to justice.

Both the diploma privilege and online exams can help eliminate the structural barriers of the bar exam. I have proposed a multi-organizational task force, including ritual experts, that will issue a report on the history of the bar exam, and structural changes such as an open-book exam with required essential subjects for all candidates, and additional certification exams for specialties such as criminal law, family law, securities law, etc. Subjects may be taken as students master them in law school, and a candidate need only retake subjects that that candidate has failed. These exams should be administered frequently, and even on-line, so there are not long gaps between when a candidate can take the exam and when they can be admitted to practice law.

We may also consider the incorporation rituals of the Inns of Court, which focused on communal eating, moots, and discussion.

With these and other changes, we will hopefully see a bar admission process that welcomes candidates of color and does not bar them from the profession. Then, bar admission can be a transformative ritual that creates diversity; and not one that bars it. These changes will benefit all bar candidates, the profession, and the public. The pandemic has shown that we

[214] *See* Jin, *supra* note 1; *see also* AM. BAR. ASS'N, *supra* note 2.

can make swift changes to bar admission. Let's appropriate these lessons to truly make the legal profession diverse.

ONE STEP FORWARD, TWO STEPS BACKWARD: WILL CONNECTICUT ACCEPT THE ONGOING LEGACY OF RACIAL DISCRIMINATION IN JURY SELECTION?

HOPE J. ESTRELLA[†]

"The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box."[1]

INTRODUCTION

When the First Continental Congress met in Philadelphia in 1774, they decreed that the right to a jury of one's peers was a fundamental privilege.[2] King George III had deprived the colonists of this, and, thus, the Founding Fathers pledged "[their] lives, [their] fortunes, and [their] sacred honor" for the right to a trial by jury.[3] Since then, the right to a jury of one's peers has been at the cornerstone of American jurisprudence.[4] As the judicial system has progressed, it has become clear that the right to a jury of one's peers is not as fundamental as the Founding Fathers decreed it to be in 1774. Indeed, it was not fundamental to a large portion of the population for more than a hundred years.[5] Even after being explicitly granted the right to participate in their civic duty,[6] prosecutors and lawmakers routinely found ways to deny Black defendants a jury of their peers. Prosecutors would often use peremptory strikes to reject a juror based solely on their race, effectively excluding Black Americans from participating in juries and denying Black defendants a jury of their peers.[7]

[†] J.D. 2022, Quinnipiac University School of Law; Bachelor of Legal Studies Quinnipiac University 2020. Thank you to Professors Stephen Gilles and Emily Wagner, this Note would not be possible without their guidance and thoughtful feedback. Many thanks to the Connecticut Public Interest Law Journal editors for their edits and openness to exploring timely public interest topics.

[1] HARPER LEE, TO KILL A MOCKINGBIRD 233 (1960).

[2] *Trial by Jury: "Inherent and Invaluable"*, W. VA. ASS'N FOR JUST., https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury.

[3] *Id.*

[4] *Id.*

[5] Deborah A. Ramirez & Nancy Gertner, *Batson v. Kentucky in the First Circuit: "The Emperor Has No Clothes"*, 83 MASS. L. REV. 58 (1998). In some states—Ohio, for example—Black Americans were not allowed to vote and, thus, could not serve on juries. Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RSRV. L. REV. 373, 376 (2004).

[6] In *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), the Supreme Court "established that the exclusion of [Black Americans] from grand and petit juries . . . violated the Equal Protection Clause, but the fact that a particular jury . . . does not statistically reflect the racial composition of the community does not in itself make . . . discrimination forbidden by the Clause." Washington v. Davis, 426 U.S. 229, 239 (1976) (discussing *Strauder* and its implications).

[7] *See, e.g.*, State v. Robinson, 846 S.E.2d 711, 717 (N.C. 2020) (discussing how in 1995 and 2011, North Carolina prosecutors were given training on using peremptory challenges to dismiss Black jurors from juries).

Racial discrimination has plagued the United States judiciary since the Founding Fathers created the nation. Over time, the country has worked to eradicate unequal treatment in the law.[8] Nevertheless, the country is still perpetuating unequal treatment of defendants and jurors. One of the clearest examples of discrimination in the legal system is the use of race-based peremptory strikes. In 1986, the Supreme Court determined that excluding a juror based solely on their race was unconstitutional in *Batson v. Kentucky*.[9] This landmark case in combatting racial discrimination in jury selection made great strides to the promise of a fundamental right to a jury of one's peers.[10] Since *Batson*'s imposition, however, it has had lukewarm success at eliminating discrimination in jury selection.[11]

Connecticut is one of a few states that have recognized the *Batson* test's ineffectiveness in preventing discrimination based on implicit bias and unequal protection of the law. In December 2019, the Connecticut Supreme Court decided to create a Jury Selection Task Force to identify and implement corrective measures for combatting the discriminatory use of peremptory challenges in jury selection.[12] This decision culminated from prosecutors frequently dismissing jurors for "race-neutral" reasons that turned on racially motivated implicit biases.[13]

In Part II, this article will address the historical use of peremptory strikes.[14] In Part III, this article will discuss the Batson test's ineffectiveness at addressing implicit bias,[15] and in Part IV, this article will discuss the high bar that *Batson* sets.[16] The remaining parts, V-IX, will compare Connecticut's response to the continued problem of racial discrimination in jury selection to that of other states who have attempted to quell the injustice

---

[8] After the Civil Rights movement of the 1960s, the government progressed some and increased equal protection of the law. *See Civil Rights Movement*, HISTORY.COM (Jun. 23, 2020), https://www.history.com/topics/black-history/civil-rights-movement (commenting that at the end of the 1950s until the 1970s there was reform in equal protection of the law through education, enfranchisement, and protests that culminated in the 1964 Civil Rights Act which "guaranteed equal employment for all, limited the use of voter literacy tests and allowed federal authorities to ensure public facilities were integrated."). *Id.*

[9] Batson v. Kentucky, 476 U.S. 79, 79 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400, 402 (1991).

[10] *Batson*, 476 U.S. at 79.

[11] *See* Nathalie Greenfield et al., *Race-Based Peremptory Challenges*, CORNELL U. L. SCH., https://courses2.cit.cornell.edu/sociallaw/FlowersCase/peremptorychallenges.html (last visited Dec. 12, 2021) (examining the high bar that the *Batson* test presents but determining that the high bar is not enough to stop the discriminatory use of peremptory strikes). Specifically, the study examines the "legal ambiguity concerning evidentiary framework that is necessary for a proper understanding of empirical results in Batson cases." *Id.* It determined that the Supreme Court had upheld peremptory challenges when there was a racially motivated desire to remove African Americans from the Jury pool. *Id.*

[12] *See* State v. Holmes, 221 A.3d 407, 412 (2019).

[13] *Id.* at 411; *see also* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150–51 (2010); Tania Tetlow, *How Batson Spawned Shaw-Requiring the Government to Treat Citizens as Individuals When It Cannot*, 49 LOY. L. REV. 133, 149–50 (2003) (arguing that the colorblind logic of Batson, which established race consciousness as its own constitutional harm, paved the way for the more controversial racial-redistricting cases).

[14] *See infra* Part II.

[15] *See infra* Part III.

[16] *See infra* Part IV.

that the *Batson* test continues to let into the court systems.[17] In sum, this article will discuss Connecticut's future jury system as it moves forward with prospective legislation and why the legislature may want to consider adopting retroactive legislation to right the historical wrong that *Batson* perpetuated.[18]

I. THE PROGRESSION OF PEREMPTORY CHALLENGES

Peremptory strikes are strikes for which counsel need not provide a reason for dismissing a juror.[19] Attorneys use peremptory strikes for many different reasons, and, historically, the court could not scrutinize or control the use of those peremptory strikes.[20] Accordingly, many attorneys abused this power and would dismiss jurors for no reason except for the color of their skin.[21]

In *Swain v. Alabama*, decided in 1965, the Supreme Court first determined whether Black jurors' exclusion via peremptory strikes, based solely on their race, violated a Black defendants' Equal Protection rights.[22] In that case, a Black man was indicted and convicted of rape in Alabama and sentenced to death.[23] The defendant motioned to quash the indictment, strike the trial jury venire, and void the petit jury, claiming that the prosecuting attorney had selected the jurors via "invidious discrimination."[24] The defendant based his claims on the Court's decision in *Strauder v. State of West Virginia*, where the Court held that a state statute qualifying only White people for jury duty violated the Fourteenth Amendment's Equal Protection Clause.[25] Moreover, the defendant argued that the prosecutor violated his Equal Protection rights by using his peremptory strikes to strike all the Black potential jurors based on their race alone.[26] Despite these arguments, the Court held that the defendant's Equal Protection rights were not violated when the prosecutor struck all of the Black jurors, because the defendant was only entitled to an impartial jury, not a jury that was representative of his race.[27] The Court noted, however, that if the defendant could show that there was a historical pattern of prosecutorial discrimination against jurors based solely on their race, then the court may have to address the issue because it would raise different Equal Protection questions.[28]

---

[17] *See infra* Parts V–IX.

[18] *See infra* Part VI–IX.

[19] Ramirez & Gertner, *supra* note 5, at 58.

[20] H. Patrick Furman, *Peremptory Challenges: Free Strikes No More*, 22 COLO. LAW. 1449, 1449 (1993).

[21] All Things Considered, *Study: Blacks Routinely Excluded From Juries*, NAT'L PUB. RADIO (June 20, 2010, 2:18 PM), https://www.npr.org/templates/story/story.php?storyId=127969511.

[22] Swain v. Alabama, 380 U.S. 202 (1965).

[23] *Id.* at 203.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 209, 220–22.

[27] *Id.* at 208; *see also* Hugh Maddox, *Batson: From an Appellate Judge's Viewpoint*, 54 ALA. L. 316, 316 (1993) (stating, "Under *Swain*, a party could strike jurors because of their race, their color, their religion, their sex, their national origin, their economic status, or their eye color.").

[28] Furman, *supra* note 20, at 1449.

The next time the Court addressed the issue of discriminatory peremptory strikes came in *Batson v. Kentucky*.[29] The court ruled in *Batson* that prosecutors cannot dismiss jurors purely on the grounds of their race.[30] This holding held a promise of equality and the elimination of racial bias in jury selection.[31] Based on the ruling, defendants could now employ a new tool in their arsenal: a *Batson* challenge.[32] A court would still presume that prosecutors exercised peremptory strikes correctly, but now defendants could rebut the strikes with a *prima facie*[33] showing that the prosecutor issued a peremptory strike with the intent to discriminate.[34] The defendants could make a *prima facie* showing of discrimination by demonstrating that the defendant is a member of a cognizable racial group and that the prosecutor had used the peremptory strike to remove the venire person of that defendant's race.[35] *Batson*'s ruling, however, only applied to jurors who were within the same shared minority group as the defendant;[36] *Powers v. Ohio* expanded this requirement.[37]

Indeed, the *Powers* Court expanded defendants' and jurors' rights to focus on every citizen's Equal Protection right to sit on a jury.[38] This expansion solidified the Court's rationale that the juror's Equal Protection right is protected, not the defendant's Equal Protection right.[39] In sum, the court held the defendant and the juror shared a common interest in the discriminatory use of a peremptory strike.[40] The Court recognized that the Equal Protection Clause protected the juror from being discriminated against, but because it was unlikely that a juror would request remedy for being struck, the court grants the defendant standing to sue on behalf of the juror.[41] *Powers* rebutted the claim that a defendant can only object to a juror's peremptory strike who is within his shared minority status.[42] This holding led to the expansion of the right to challenge peremptory strikes

---

[29] Batson v. Kentucky, 476 U.S. 79 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991); Furman, *supra* note 20, at 1449.

[30] Furman, *supra* note 20, at 1449; *see* Maddox, *supra* note 27, at 317 (discussing how the Supreme Court further emphasized that *Batson* prohibits the striking of jurors based on the race of the juror or the racial stereotypes held by the party in *Georgia v. McCollum*); Georgia v. McCollum, 505 U.S. 42, 59 (1992).

[31] Furman, *supra* note 20, at 1449.

[32] *Id.*

[33] LEGAL INFO. INST., *Prima facie*, https://www.law.cornell.edu/wex/prima_facie (last visited Jan. 3, 2022) ("Prima facie may be used as an adjective meaning 'sufficient to establish a fact or raise a presumption unless disproved or rebutted."').

[34] Ramirez & Gertner, *supra* note 5, at 58–59.

[35] *Id.* at 58.

[36] *Id.*; Batson v. Kentucky, 476 U.S. 79, 79 (1986).

[37] *See* Powers v. Ohio, 499 U.S. 400, 402 (1991) (expanding *Batson* rights).

[38] Furman, *supra* note 20, at 1450.

[39] *Id.*

[40] *Powers*, 499 U.S. at 413.

[41] *Id.* at 413–14; *see also* Furman, *supra* note 20, at 1450.

[42] Patricia McHugh Lambert & Mindy Mintz, *Batson: It's Not Just for Criminals Anymore*, 25 MD. BAR J. 36 (1992).

based on discriminatorily motivated claims to any race or gender, regardless of the defendant's race or gender.[43]

To recap the process, once a defendant has made a challenge to a peremptory strike based on racially motivated claims, he must bring a *prima facie* case showing that the prosecutor dismissed the potential juror based on their race by a preponderance of the evidence.[44] Then, it is up to the judge to decide whether or not the defendant reaches that standard.[45] The Court stated in *Batson*, "we have confidence that trial judges experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenge creates a prima facie case of discrimination."[46] As such, it is the judge's discretion and ultimate judgment as to whether a peremptory strike was discriminatory and violated the venire person's Equal Protection rights, and, thus, the defendant's Equal Protection rights.[47] Unfortunately, not all judges live up to the confidences that the *Batson* court instilled into them.

II. THE INEFFECTIVENESS OF THE *BATSON* TEST AT RESOLVING RACIAL DISCRIMINATION IN JURIES

It has been the subject of many law review articles,[48] and a few scathing judicial opinions,[49] that the *Batson* test does little to eliminate racial discrimination in jury selection because it only applies to purposeful discrimination and does not address implicit bias.[50] The current test does a poor job of reducing the discrimination of defendants by juries because the

---

[43] *Id.* at 37.

[44] *Id.* at 36. This showing must be made by a preponderance of the evidence; not the highest standard possessed by the court. Under this standard it is, however, easy to rebut the challenge that a defendant makes and show that there was an underlying facially neutral reason that the prosecutor dismissed the juror. *Id.*

[45] *Id.*

[46] Batson v. Kentucky, 476 U.S. 79, 97 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).

[47] Cheryl A.C. Brown, Comment, *Challenging the Challenge: Twelve Years after Batson, Courts Are Still Struggling to Fill in the Gaps Left by the Supreme Court*, 28 U. BALT. L. Rev. 379, 419–20 (1999).

[48] *See* Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, WIS. L. REV. 501 (1999); Lynn E. Blais, *The Problem with Pretext*, 38 FORDHAM URB. L. J. 963, 978–79 (2011); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001); Tanya E. Coke, *Lady Justice May Be Blind, but is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 333–50 (1994); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMPLE L. REV. 369 (1992).

[49] *See* State v. Saintcalle, 309 P.3d 326 (Wash. 2013) (creating a jury-selection task force to address implicit bias not covered by *Batson*); State v. Robinson, 846 S.E.2d 711 (N.C. 2020) (discussing why North Carolina created legislation to combat racial discrimination in jury selection); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (claiming that the *Batson* rule "in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact" (quoting Brown v. North Carolina, 479 U.S. 940, 941–942 (1986))); United States v. Nelson, 277 F.3d 164, 207–08 (2d Cir. 2002) (holding that *Batson* forbids district courts from adding and subtracting jurors in order to achieve a racially and religiously diverse jury).

[50] Jigar Chotalia & Richard Martinez, *Limitations of the* Batson *Analysis in Addressing Racial Bias in Jury Selection*, 46 J. AMER. ACAD. PSYCH. L. 533 (2018) (discussing how a prosecutor can justify a strike with the presentation of a race-neutral reason).

test effectively eliminates diverse jurors.[51] The *Batson* test requires that the party challenging a peremptory strike make a prima facie case that the juror was dismissed based on their race.[52] This is not a high bar to meet. The prima facie requirement is easily dismissed if the party who issued the strike can present a "race-neutral"[53] reason for dismissing the juror.[54] As such, this requirement of presenting a "race-neutral" reason creates a problem because the courts overlook implicit biases and accept the pretextual "race-neutral" reason.

A. Purposeful Discrimination

The Equal Protection Clause's core guarantee is to ensure citizens that the United States will not—and cannot—discriminate based on race.[55] This Clause comes from the Fourteenth Amendment, which states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[56] The Supreme Court, in *Washington v. Davis*,[57] has interpreted the Equal Protection clause to require purposeful discrimination.[58]

In *Batson*, the Court held that the guarantee of the Equal Protection Clause would be meaningless if the Court approved of the exclusion of Black jurors based on assumptions that Black jurors would be biased toward a Black defendant solely because of his race.[59] Thus, the Court held that if a defendant makes a timely objection to the removal of all Black persons on the venire and the court decides that the facts establish, prima facie, purposeful discrimination, and the prosecutor does not have a race-neutral reason for the strike, the strike is unconstitutional based on the Equal Protection Clause.[60] The Supreme Court, however, has not acknowledged that implicit biases not covered by the *Batson* test violate the Equal Protection Clause as well.[61] In its interpretation of the Equal Protection Clause, the Supreme Court created a baseline protection for defendants and jurors but required other courts to adopt enhanced rules if they want a higher degree of protection. As such, *Batson* merely applies to the "purposeful discrimination" test put forth by the Supreme Court in *Washington v. Davis*

---

[51] One of Connecticut's issues was how to reduce implicit bias by jurors once they are in the jury box. To solve that issue, Connecticut implemented new jury instructions and other protections. *See infra* notes 239–252.

[52] Lambert & Mintz, *supra* note 42.

[53] A "race neutral" reason is any reason a prosecutor can put forth for dismissing the juror that does not turn on the juror's race (*e.g.*, fear or distrust of the police).

[54] Chotalia & Martinez, *supra* note 50.

[55] Batson v. Kentucky, 476 U.S. 79, 97–98 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).

[56] U.S. CONST. amend. XIV, § 1.

[57] Washington v. Davis, 426 U.S. 229 (1976).

[58] *Id.* at 253 (Stevens, J., concurring) (discussing the purposeful discrimination requirement that the court imposed in the majority opinion). The Supreme Court has not recognized implicit discrimination as violating the Equal Protection Clause. *Id.* at 239.

[59] *Batson*, 476 U.S. at 97–98.

[60] *Id.* at 100.

[61] *See infra* notes 64–69.

in the context of peremptory strikes, while ignoring the other forms of discrimination that come into play, such as implicit bias and disparate impact.[62]

B. Implicit Bias

The inherent problem with the Court's analysis in *Batson* is that it does not consider reasons for striking that *appear* to be race-neutral reasons but are, in fact, reasons for removal borne from implicit biases. Every person brings with them their own biases from their unique human experiences.[63] Some of those biases are implicit. Judge Mark W. Bennett describes implicit biases as "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement."[64] An example of implicit bias, given by Judge Bennett to explain his definition, is a White person walking down the street in a predominantly Black neighborhood, hearing footsteps behind him, and beginning to think he will be robbed, only to turn around and see a White person behind him and feel relieved and safe.[65] The implicit bias elicited here is that a White stranger is safer than a Black stranger.[66]

Implicit biases are mental shortcuts that provide faster ways to digest information and make connections, but they are not conscious connections.[67] Because implicit biases are subconscious, it is challenging to elucidate precise biases. These connections are made by stereotyping individuals and subconsciously making assumptions about the individual based on learned cultural and social cues.[68] In an attempt to research and study implicit biases, Project Implicit, "a non-profit organization and international collaborative network of researchers investigating implicit social cognition," was created in 1998 to advance scientific knowledge about stereotypes, prejudice, and other biases. Project Implicit has collected data via fourteen Implicit Association Tests ("IAT"); this paper will only discuss the Race IAT, which began in 2002.[69] The test includes one standard IAT, sets of explicit measures on racial attitude, personality and political opinion questions, and sets of demographic questions.[70] After taking the test, the website asks

---

[62] *See Batson*, 476 U.S. at 97–98; *Washington*, 426 U.S. at 245–46.

[63] Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1877 (2015).

[64] Bennett, *supra* note 13, at 149.

[65] *Id.*

[66] *Id.*

[67] Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 81–82 (2020).

[68] *Id.*

[69] Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36 (2007). The anonymous data collected on the Project Implicit Demonstration website is publicly available so that scientists, journalists, educators, and others can use it to understand attitudes and stereotypes better. Project Implicit also maintains a list of published research papers that utilize data from the Project Implicit Demonstration website. *Id.*

[70] *About the IAT*, PROJECT IMPLICIT, https://www.projectimplicit.net/resources/about-the-iat/ (last visited on May 21, 2022). "The Implicit Association Test (IAT) measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g.,

debriefing questions about how respondents thought about their IAT score after completion.[71] The IAT "measures the strength of associations between concepts (e.g., Black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)."[72] The main point is that it is easier to respond when closely connected objects have the same answer key.[73] The test then gives a score of "slight," "moderate," or "strong."[74] The labels "slight," "moderate," or "strong" reflect the implicit preference's strength based on how much faster the respondent responds to the stimulus.[75]

From 2002 to 2017, there were 7,569,219 session IDs created for the Race IAT, and the overall completion rate was 45.1%.[76] Over 4 million participants completed the standard IAT part of the test, or 60.9% of the participants.[77] The tests' results indicate that almost every person has implicit biases that affect their perception of race.[78] These biases are subconscious and affect the person's view of a race and the characteristics associated with that race.[79] These biases impact perception and, as Professor Jerry Kang, of UCLA Law, states:

> There is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category. This occurs notwithstanding contrary explicit commitments in favor of racial equality. In other words, even if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race, consistent with our racial schemas. Controlled, deliberative, rational processes are not the only forces guiding our behavior. That we are not even aware of, much less intending, such race-contingent behavior does not magically erase the harm.[80]

---

athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key." *Id.*

[71] *See id.* The Race IAT is available on the Project Implicit demonstration website, https://implicit.harvard.edu/implicit/selectatest.html. To try, click on "Race IAT". PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/selectatest.html (last visited Jan. 3, 2022).

[72] *Id.*

[73] *Id. See also* Artika R. Tyner, *Unconscious Bias, Implicit Bias, and Microaggressions: What Can We Do About Them?*, AMER. BAR ASS'N. (Aug. 26, 2019), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/july-august/unconscious-bias-implicit-bias-microaggressions-what-can-we-do-about-them/ (stating that "implicit and explicit biases are related but distinct mental constructs.").

[74] PROJECT IMPLICIT, *supra* note 70.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] PROJECT IMPLICIT, https://osf.io/acqrh/ (last visited Jan. 3, 2022).

[79] *Id.*; *see also* Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISC. 210, 220–22 (2012) (discussing how implicit bias, specifically in the tragic death of Trayvon Martin, impacts the perception of a person based on their race alone).

[80] Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005) (internal citations omitted). *See also* Feingold & Lorang, *supra* note 79, at 222.

The test raises awareness and understanding of what implicit biases are, but the awareness must stem further than just acknowledging the existence of implicit biases.[81] When examining the *Batson* test, it is essential to remember that prosecutors, defense attorneys, judges, and defendants are all imperfectly human. These people were all forged in different circumstances, and they all come into the same trial with different heuristics, views of the world, and understandings. People rely on social schemas, or heuristics, in order to make sense of, classify, and predict how people will act or behave.[82] Generally, a decision-maker will use a person's salient characteristics to categorize them.[83] A study by psychologist Patricia Devine showed that even when presented with material shown so quickly that the observer does not consciously register it, the observer may trigger racial heuristics.[84] Further, when an attorney must explain why he dismissed a juror, as he is required to do when challenged, the attorney may, in good faith, think that he has identified race-neutral reasons without understanding that his own heuristics and unconscious biases distorted his decision.[85] As Florida International University College of Law Professor Antony Page states, an attorney may have "actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a race- or gender- neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their Equal Protection rights."[86]

By allowing defendants to challenge a prosecutor's peremptory strike of a juror if the strike seems to be racially motivated but accepting a facially neutral reason, the court allows the attorneys' implicit biases to impact the jury.[87] Moreover, the person with the power to decide whether a peremptory strike was racially motivated, the judge, is also a victim of her own implicit biases. A 2009 study found that judges "harbor the same kinds of implicit biases as others; that these biases can influence their judgment."[88] Further, judges "probably engaged in cognitive correction to avoid the appearance of

---

[81] Project Implicit contends that no one should use the information from their data to determine someone's racial preference or determine if someone should or should not serve on juries. The test, however, can be used to understand implicit biases and help bring awareness to the potential effects of biases if left unchecked. As with any study, there is criticism of the methods and legitimacy of the test results. In general, the study has vastly expanded our knowledge and expectations of biases. For an in-depth look at the test's criticism, *see, e.g.*, Beth Azar, *IAT: Fad or Fabulous?*, APA (2008), https://www.apa.org/monitor/2008/07-08/psychometric.

[82] Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 210 (2005).

[83] *Id.* at 211 (finding that race, ethnicity, and gender are the most salient features).

[84] *Id.* at 213 (citing Patricia G. Devine, *Stereotypes and Prejudice: The Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5, 8–9 (1989)).

[85] *Id.* at 234–35.

[86] *Id.* at 235.

[87] *Id.*

[88] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1195 (2009) (stating, "but that given sufficient motivation, judges can compensate for the influence of these biases.").

bias."[89] The judge in any given case may not recognize that an attorney dismissed a juror for a racially motivated reason, and the judge may engage in cognitive correction and accept the race-neutral reason while dismissing the racial bias pretext.

The *Batson* test is flawed because it does not recognize pretextual, implicit biases.[90] The Supreme Court's interpretation of the Equal Protection Clause is limited solely to intentional discrimination and is too narrow to achieve racial justice.[91] Moreover, the *Batson* test requires a challenge to a peremptory strike, and the strike is only unconstitutional if the lawyer purposefully discriminates in that strike.[92] The courts that employ the test almost always find no purposeful discrimination because the discrimination itself is often not *purposeful*.[93] Nevertheless, biases, stereotypes, schemas, and heuristics, while not purposeful, can lead to the same discrimination as purposeful discrimination.[94] Justice Marshall forewarned of these biases in his concurrence in *Batson*, stating:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported**. . . .** Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels- a challenge I doubt all of them can meet.[95]

The *Batson* test perpetuates a legal fiction by allowing the attorneys' and judges' implicit biases to go unchecked during jury selection.[96] For courts to meet the Equal Protection Clause's underlying purpose, this test must be changed to include implicit bias, and the courts must remove the requirement that defendants show intentional discrimination by the prosecutor to succeed.

---

[89] *Id.* at 1223.
[90] *Id.*
[91] State v. Holmes, 221 A.3d 407, 411–12 (2018).
[92] Rachlinski et al., *supra* note 88; *see also supra* notes 27–35 and accompanying text.
[93] Bennett, *supra* note 13, at 161.
[94] Page, *supra* note 82, at 208.
[95] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).
[96] Bennett, *supra* note 13.

III. THE HIGH BAR THAT *BATSON* SETS AND THE EFFECTS OF LOWERING IT TO INCLUDE IMPLICIT BIAS

The requirement of a prima facie case sets a high bar for success for defendants, but it also results in a potent remedy: a new trial.[97] Even when the defendant is found guilty, the court must order a new trial if it finds racial discrimination in the jury selection process.[98] The new trial for a guilty defendant may create an empirical loop of remand, a new trial, challenge, remand, a new trial, challenge, and onward because of continuing structural errors, not because the defendant is innocent. Indeed, even when there are explicit, purposeful discrimination cases, they may fail to produce infallible conclusions of a biased jury due to the "sensitive and subtle nature of the *Batson* inquiry, the passage of time, the fallibility of human memory, and the subconscious nature of racial bias."[99] Moreover, lowering the bar from purposeful discrimination to include implicit bias would burden judicial resources and give defendants who had been convicted based on overwhelming evidence of guilt a second chance. There is often a price to pay, however, when changing a flawed system so that it functions equally to everyone.

The Founding Fathers created this country on the belief that a defendant is innocent until found guilty.[100] While it may seem like a waste of resources to correct subtle mistakes of racism in jury selection when there is overwhelming evidence of guilt, the legal system was created in such a way that "it is better a hundred guilty persons should escape than one innocent person should suffer."[101] Moreover, it is impossible to effectively decide guilt under the shadow of racial discrimination. The legal system must adjust, even at the cost of judicial resources and time.

IV. OTHER STATES' LEGISLATION

It is not a novel idea that *Batson* is ineffective. Authors have written numerous articles, opinions, and papers about how ineffective the *Batson* test is in eliminating racial discrimination in jury selection.[102] This article

---

[97] William H. Burgess & Douglas G. Smith, *The Proper Remedy for a Lack of* Batson *Findings: The Fall-Out from* Snyder v. Louisiana, 101 J. CRIM. L. & CRIMINOLOGY 1, 3 (2011). Practically speaking, this seldom happens.

[98] It is the position of this article that a *Batson* violation can never be a harmless error, no matter how strong the evidence of the defendant's guilt.

[99] Burgess & Smith, *supra* note 97, at 27.

[100] *Id.* Of course, at the time of the county's founding there was unequal protection of the law that must be acknowledged. Looking to the "innocent until found guilty" notion alone we see that it has nevertheless persevered through the passage of time and is still a part of the judicial system today as the presumption of innocence. Kenneth Pennington, *Innocent until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 110 (2003).

[101] Letter from Benjamin Franklin to Benjamin Vaughn (Mar. 14, 1785), *in* THE WORKS OF BENJAMIN FRANKLIN, (John Bigelow ed., 11th ed. 1904).

[102] *See* Tania Tetlow, *Why* Batson *Misses the Point*, 97 IOWA L. REV. 1713 (2012) (discussing how *Batson*'s ineffectiveness means the courts and legislature must reevaluate the entire peremptory challenge system as a whole); Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise*

argues that the two approaches outlined below are better equipped to handle racial discrimination in jury selection—prospective approaches and retroactive approaches.

States that implement prospective approaches are focused on creating legislation that will eliminate racial discrimination in future trials.[103] States that implement retroactive approaches seek to give reparations to defendants who have been impacted by racial discrimination in their jury selection and subsequent trials.[104] Connecticut should consider implementing both approaches.

A. Prospective Approach: Washington

The first state to strengthen *Batson*'s intentional discrimination requirement and implement a prospective plan to address implicit bias in jury selection was Washington.[105] The Supreme Court of Washington became the first court to adopt a court rule, General rule 37 ("GR37"), to prevent implicit and institutional bias.[106] This decision stemmed from a 2011 task force report, which stated that implicit biases play a role "[w]hen policymakers determine policy, when official actors exercise discretion, and when citizens proffer testimony or jury service."[107] The Washington Supreme Court created its task force in the hopes of ending the pervasive role that racism and bias had been playing in Washington's legal system.[108]

The Washington Supreme Court used the case *State v. Saintcalle* to discuss the failures of *Batson* and expand protections against racial bias.[109]

Unfulfilled, 58 UMKC L. REV. 361 (1990) (analyzing how *Batson* reform fails to combat racial discrimination in juror selection); Robin Charlow, Batson *Blame and its Implications for Equal Protection Analysis*, 97 IOWA L. REV. 1489 (2012) (discussing how *Batson* failed to live up to its promise); Nancy S. Marder, Foster v. Chatman*: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137 (2017) (arguing that the Supreme Court must reexamine *Batson* and how it has failed to prohibit racial discrimination in jury selection); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters,* 1994 WISC. L. REV. 511, 524 (1994) (arguing that *Batson* is part of a "flawed methodology for eliminating racist influence in the jury selection process and supported by naive assumptions regarding the influence of race on the judicial process"); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 214 (2003) (arguing that *Batson's* burden-shifting framework makes trial judges "more willing to accept proffered race-neutral explanations for alleged discriminatory use of peremptory challenges, no matter how suspect"); Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective,* 64 U. CHI. L. REV. 809, 835 (1997) (attacking as absurd the idea that the court can abrogate a right to be on a jury for "a universe of other unstated and unstatable reasons" but not for other specific reasons).

[103] *See infra* notes 106–120 and accompanying text.

[104] *See infra* notes 154–152 and accompanying text.

[105] Annie Sloan, "*What to Do About* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CAL. L. REV. 233, 236 (2020).

[106] *New Rule Addresses the Failings of U.S. Supreme Court Decision,* AM. C.L. UNION (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury.

[107] Res. Working Grp. & Task Force on Race & The Crim. Just. Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 629 (2012).

[108] Sloan, *supra* note 1055, at 242.

[109] *Id.* at 245; *see* SeattleU, *Task Force 2.0*, KOREMATSU CTR. (Feb. 12, 2021), https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives-and-projects/race-and-criminal-justice-task-force/#d.en.3780216.

In that case, the jury convicted a Black man of first-degree felony murder.[110] The defendant raised a *Batson* challenge during *voir dire* after the state used a peremptory challenge to strike the only Black venireperson.[111] The state gave two "race-neutral" reasons for its strike.[112] The first reason was that the juror was inattentive during *voir dire*, and the second was that the juror's friend had recently been killed—making the juror biased vis-à-vis race-neutral reasons.[113] The trial court accepted these reasons as race-neutral and denied the *Batson* challenge.[114] The case was appealed and ended at the highest court of Washington where Justice Charlie Wiggins, writing for the Washington Supreme Court's plurality opinion, used this case to set forth recommendations on how to change *Batson*'s framework by abandoning the purposeful discrimination requirement and recognizing the problem of unconscious bias.[115] The problem with purposeful discrimination is, as Justice Wiggins stated, is that:

> [R]acism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.[116]

Even with Justice Wiggin's wise words ringing true, the court did not decide sua sponte to replace *Batson* and, instead, affirmed the conviction.[117] The court then began its task of creating a court rule by reaching out to the public for comments and solutions.[118]

Based on the decision in *Saintcalle*, the American Civil Liberties Union ("ACLU"), at the behest of Washington's Supreme Court, began drafting GR37, which included two significant changes: (1) it proposed a shift from the prevention of purposeful discrimination to the prevention of "intentional or unintentional, unconscious, or institutional bias," and (2) the ACLU

---

[110] State v. Saintcalle, 309 P.3d 326, 332–34 n.1 (Wash. 2013) (plurality opinion), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

[111] Sloan, *supra* note 105, at 245.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013) (plurality opinion), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

[117] *Id.* at 332 n.1 (discussing the 2011 report from Washington's Race and Equal Justice Task Force).

[118] AM. C.L. UNION WASH., *GR 9 Cover Sheet Suggested Change to the General Rules: Rule 36 Jury Selection* (July 14, 2016) (to be codified at Wash. Ct. Gen. R. 37), https://perma.cc/54WN-NCP4?type=image.

comments listed reasons that would *presumptively* be invalid because of bias.[119] After the ACLU submitted its work and the public comment period ended, the Washington Supreme Court created its task force to clarify the differing positions of prosecutors, judges, defense attorneys, bar associations, and others.[120] The group met and worked to create a rule that the Supreme Court could add to *Batson's* framework.[121] In April 2018, the Washington Supreme Court unanimously approved a highly protective rule.[122]

This new rule laid out the process for objecting: "[a] party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own."[123] Upon an objection to the use of a peremptory challenge, the party who exercised the peremptory challenge will then "articulate the reasons the peremptory challenge has been exercised."[124] The court will then decide, and if "the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied," and the judge will reinstate the juror to the trial.[125] Additionally, the rule explicitly states that everyone has implicit, institutional, and unconscious biases that result in the unfair exclusion of jurors, acknowledging that implicit bias plays a role in jury selection.[126] The rule then lays out the circumstances to be considered when making its determination:

> (g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:
>
> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
>
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

---

[119] *Id.*
[120] Sloan, *supra* note 105, at 250.
[121] *Id.* at 253.
[122] *Id.*
[123] WASH. CT. GEN. R. 37 (c).
[124] *Id.* at (d).
[125] *Id.* at (e).
[126] *Id.* at (f).

> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or past cases.[127]

Finally, the rule lays out reasons for peremptory strikes that are presumptively invalid due to their improper discrimination:

> (h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:
>
> (i) having prior contact with law enforcement officers;
> (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
> (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
> (iv) living in a high-crime neighborhood;
> (v) having a child outside of marriage;
> (vi) receiving state benefits; and
> (vii) not being a native English speaker.
>
> (i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed promptly. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.[128]

---

[127] *Id.* at (g).

[128] *Id.* at (h)–(i). This section is significant because it shows that some "race-neutral" reasons are grounded in implicit bias. Moreover, this section acknowledges that the court can recognize that these reasons for striking a juror are *presumptively* biased.

The Washington Supreme Court completed its new rule by implementing the objective test outlined in GR37 in *State v. Jefferson*.[129] *Jefferson* occurred before GR37 was added to the books; nevertheless, the Supreme Court of Washington rejected *Batson*'s purposeful discrimination requirement explicitly in that case and used the framework from GR37 in its decision.[130] In *Jefferson*, the majority explained that by applying the objective observer test, the prosecution's exclusion of a Black juror may result from implicit bias and needed to be reversed and remanded.[131]

While Washington created added protections against discrimination for jurors and defendants, Washington ultimately chose not to eliminate peremptory challenges. Despite this, two of Washington's Supreme Court Justices have openly expressed that they are in favor of eliminating peremptory challenges instead of reforming or "simply tinkering with" *Batson.*[132] In fact, Justices Yu and Stephens call for "complete abolishment of peremptory challenges."[133] The two main arguments for abolishing peremptory challenges are that (1) peremptory challenges continue the ongoing historical wrong of "underrepresentation of minority groups on juries," and (2) attorneys would still be able to remove jurors "for cause" if they deemed it necessary.[134] Furthermore, in *Batson*, Supreme Court Justice Marshall called to eliminate peremptory challenges because the goal of eliminating discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely."[135]

The working group for Washington's GR37 explained that they chose not to eliminate peremptory challenges because they "concluded that [peremptory challenges] are still useful as long as they are not based on the race or ethnicity of potential jurors."[136] Thus, Washington state determined that the benefits of keeping peremptory challenges outweighed the detriments.[137]

---

[129] Sloan, *supra* note 105, at 253; *see* State v. Jefferson, 429 P.3d 467, 470 (Wash. 2018) (plurality opinion).

[130] *Jefferson*, 429 P.3d at 470.

[131] *Id.*

[132] City of Seattle v. Erickson, 398 P.3d 1124, 1133 (Wash. 2017) (Stephens, J., concurring).

[133] *Id.* at 1134 (Yu, J., concurring) (citing State v. Saintcalle, 309 P.3d 326, 335 (2013) (González, J., concurring), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (2017)).

[134] *Id.*

[135] Batson v. Kentucky, 476 U.S. 79, 103–04 (1986) (Marshall, J., concurring).

[136] JURY SELECTION WORKGROUP, PROPOSED NEW GR 37—JURY SELECTION WORKGROUP FINAL REPORT 3 (2017).

[137] *Id.* The working group does not discuss what the benefits are for keeping peremptory challenges, but legal scholars generally agree that there are four purposes: "[1] The peremptory challenge allows litigants to secure a fair and impartial jury. [2] It gives the parties some control over the jury selection process. [3] It allows an attorney to search for biases during the selection process without fear of alienating a potential juror. If, for example, a juror appears offended by the nature of the questioning, that juror can be excluded even if the answers she gives do not demonstrate bias. Finally, [4] the peremptory challenge serves as an insurance policy when a challenge for cause is denied by the judge and the challenging party still believes that the juror is biased." *Jury - Should the Peremptory Challenge Be Abolished? - Batson, Challenges, Race, and Gender*, LAW JRANK, https://law.jrank.org/pages/7925/Jury-SHOULD-PEREMPTORY-CHALLENGE-BE-ABOLISHED.html (last visited Jan. 3, 2022).

It has been about three years since GR37's enactment, and it could be too early to accurately determine long-term effects or ramifications.[138] Annie Sloan of the California Law Review, however, interviewed members of the ACLU workgroup, leaders of the groups that engaged in the court's workgroup, and criminal lawyers who submitted public comments from September-November of 2018, to assess the effects of GR37 in the Washington court system.[139]

The first issue that Sloan reported concerned the administration of the new standard.[140] GR37 states that if a court decides that an impartial observer could see race as a consideration in using the peremptory challenge, the court would have to dismiss it.[141] Lawyers who Sloan interviewed discussed their uncertainty and unease about how judges would interpret this rule.[142] Specifically, the lawyers were concerned that some judges would interpret the rule differently than others, which would cause issues of uniformity and consistency in trials.[143]

Secondly, Sloan stated that prosecutors in Washington fear that any prosecutor's violation of the new rule will lead to a vacated conviction because *Jefferson* instructs the courts to review *Batson* and GR37 appeals *de novo*.[144] Because of the deferential treatment, prosecutors may feel it is risky to strike a juror of color or raise an objection against the defense.[145] As a result of these concerns, one immediate effect of GR37 was less use of peremptory challenges against jurors of color, specifically by prosecutors.[146] Moreover, even with fewer strikes, GR37 will likely lead to an increase in objections to strikes.[147] In fact, within the first six months of GR37's enactment, Washington experienced multiple objections to the use of peremptory strikes.[148] While there are clear impacts of GR37's enactment, it is uncertain, right now, whether these impacts are permanent or temporary.

B. A Retroactive Approach: North Carolina

The State of North Carolina created the Racial Justice Act ("RJA") in 2009 to abolish racial discrimination in capital sentencing.[149] This act

---

[138] Sloan, *supra* note 105, at 255.

[139] *Id.* at 255–56; *see* State v. Jefferson, 429 P.3d 467, 480–81 (Wash. 2018) (holding that "trial courts must ask if an objective observer could view race as a factor in the use of the peremptory challenge" and defining objective observer "as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways").

[140] Sloan, *supra* note 105, at 255–56.

[141] *Id*.

[142] *Id.* at 256.

[143] *Id.*; *see also* Eric F. Edmunds Jr., *Disparity and Discretion in Sentencing: A Proposal for Uniformity*, 25 UCLA L. REV. 323, 325 (1977) (discussing how judge's discretion can lead to different defendants getting different sentences for the same crime).

[144] Sloan, *supra* note 105, at 258.

[145] *Id.* at 258.

[146] *Id*. at 257.

[147] *Id.*

[148] *Id.* at 258.

[149] State v. Robinson, 846 S.E.2d 711, 714 (N.C. 2020).

prohibited the death sentence if race was "a significant factor in the decision to seek or impose the sentence of death."[150] Based on this act, prisoners on death row could file for relief under the RJA if they believed racial discrimination during jury selection impacted their trials.[151] The RJA was the first law in the country to challenge *Batson*'s purposeful discrimination test retroactively and allow for "a finding of racial discrimination during jury selection without requiring proof of intentional discrimination."[152] This new rule, however, did not give the standard remedy of a new trial for a *Batson* violation; instead, it merely took the defendant off of death row.[153]

This section will discuss a peculiar case from the state of North Carolina: *State v. Robinson*.[154] This case is an excellent example of a state recognizing the problem of implicit bias in the jury selection process and creating legislation to combat it retroactively.[155] In North Carolina, the courts took four defendants off death row because, under the state's implicit bias legislation, the state found racial discrimination in the selection of their juries.[156] In reaction to the court's taking four defendants off of death row, the legislature in North Carolina repealed the legislation and perversely attempted to put the defendants back on death row.[157]

In the case of *State v. Robinson*, Chief Justice Beasley, writing for the majority, emphasized throughout his opinion that racial discrimination continues to exclude Black citizens from serving on juries, despite the three-part test from *Batson*, and that the RJA was North Carolina's recognition that the *Batson* test was ineffective.[158] In 1994, defendant Robinson was convicted of first-degree murder and sentenced to death.[159] On August 6, 2010, he filed a motion for appropriate relief, pursuant to the RJA.[160] At his hearing, Robinson relied heavily upon a survey by Michigan State University College of Law, which found that Black jurors were more than two times as likely to be struck from the venire pool than other jurors.[161] Robinson also introduced evidence that prosecutors in North Carolina were trained to circumvent *Batson* by giving facially-neutral reasons for using peremptory strikes against Black jurors instead of complying with *Batson*.[162] Additionally, Robinson introduced evidence of implicit bias and how it can

---

[150] North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C.G.S. §§ 15A-2010, 2011 (2009)) (repealed 2013).

[151] *Id.*

[152] *Robinson*, 846 S.E.2d at 715.

[153] This paper does not endorse the decision not to impose a new trial for a *Batson* violation but instead recognizes that creating a new trial after enacting retroactive legislation may be difficult due to the passage of time, infallibility of juror's memories, lost evidence, etcetera. Any remedy is an improvement, but it is not the proper remedy for discrimination in jury selection.

[154] *Robinson*, 846 S.E.2d at 711.

[155] *Id.* at 714.

[156] *See id.*

[157] *Id.*

[158] *See generally Robinson*, 846 S.E.2d at 714–17.

[159] *Id.* at 717.

[160] *Id.*

[161] *Id.*

[162] *Id.*

influence a prosecutor's dismissal of Black jurors, and he showed specific instances where prosecutors used pretextual reasons to dismiss a juror.[163] The trial court found that Robinson had clearly shown that racial discrimination was evident in his jury selection.[164] As a result, the court reduced Robinson's death penalty to life imprisonment without the possibility of parole per the RJA.[165]

On October 1, 2012, an evidentiary hearing found that racially motivated peremptory strikes had influenced three other defendants' trials as well, and the court reduced their sentences from the death penalty to life imprisonment without the possibility of parole.[166] Soon after the four defendants—Robinson and the three others—were taken off of death row in June of 2013, North Carolina repealed the RJA.[167] The repeal was made to be retroactive and voided all pending motions;[168] thus, Robinson and the three other defendants were placed back on death row.[169] Robinson appealed his reinstated sentence, and the case ended up before the North Carolina Supreme Court, where Robinson asked whether or not the legislature could void Robinson's reduced sentence and claim of racial discrimination in jury selection because the state had repealed the RJA.[170] The Supreme Court of North Carolina ultimately found that the RJA's repeal and retroactive application violated double jeopardy, and the state could not put Robinson back on death row because the legislature repealed the act.[171] The court did not rule that the repeal of the RJA was invalid.[172]

The most important part of this case is not the fact that the Supreme Court of North Carolina held that Robinson's acquittal through the RJA could not be revoked retroactively, but it is the fact that the North Carolina Supreme Court *recognized* that *Batson* is ineffective at keeping discrimination out of jury selection.[173] This opinion, as the dissent in *State v. Robinson*, points out, has a larger purpose: "to establish that our criminal

---

[163] *Id.* at 718. Robinson's evidence of racial discrimination was as follows: "Robinson presented evidence that an African-American juror was struck from the jury because of his membership in a historic African-American civil rights organization, the NAACP, and that another juror was struck from the jury because she graduated from a historically black college and university, North Carolina A&T State University. Robinson further showed how African-American jurors were struck after being asked explicitly race-based questions, such as whether an African-American juror would be the "subject of criticism" by their "black friends" if they were to return a verdict of guilty. In multiple cases, prosecutors targeted African-American jurors by asking the jurors different questions than other jurors, such as whether their child's father was paying child support. African-American jurors were also struck for patently irrational reasons, such as membership in the armed forces. Robinson also showed more than thirty examples of prosecutors striking African-American jurors for objectionable characteristics yet passing on other similarly situated jurors." *Id.*

[164] *See id.* at 718.

[165] *Id.*

[166] *Id.*

[167] Act of June 13, 2013, S.L. 2013–154, § 5(a), 2013 N.C. Sess. Laws 368, 372.

[168] *Robinson*, 846 S.E.2d at 718.

[169] *Id.*

[170] *Id.* at 719.

[171] *Id.*

[172] *Id.* at 714.

[173] *See id.* at 726 (Newby, J., dissenting).

justice system is seriously—and perhaps irredeemably—infected by racial discrimination."[174]

North Carolina tried to right the historical wrong of racial discrimination in jury selection by retroactively changing defendants' sentences if they could show racial discrimination—including implicit discrimination—in their jury selection processes.[175] Nevertheless, once the legislation was proven to work, North Carolina repealed it.[176] In a devastating turn of events, North Carolina took one step forward and two steps backward. At the time of this Article's composition, there has been no further discussion in North Carolina of recognizing implicit bias in jury selection and applying either retroactive or prospective legislation to combat it.

V. WHAT IS HAPPENING IN CONNECTICUT?

In December 2019, the Connecticut Supreme Court recognized that the *Batson* test was insufficient in removing racial discrimination from jury selection.[177] In *State v. Holmes*, an African American juror, W.T., was struck from the jury pool by the prosecution.[178] The prosecution stated that they were dismissing him because W.T. had stated he had a fear and resentment of the police and distrust of law enforcement.[179] Defense counsel quickly filed a *Batson* challenge and argued that the prosecution actually only struck W.T. because W.T. was the only Black venireperson.[180] The defense counsel argued that W.T. had assured the court and the prosecutor that he could be a "fair and impartial juror."[181] The prosecution argued that they had a race-neutral reason for dismissing W.T. because W.T. commented about being fearful of police officers.[182] To counter the prosecution's argument, the defense compared the assurance from W.T., that he could be fair with the *voir dire* despite his fear of the police, to that of another, accepted, member of the venire, a young white man from New London, who had "said that he couldn't be fair because of incidents with . . . police officers."[183]

The trial court subsequently denied the *Batson* challenge, and the defendant was found guilty by the jury.[184] The defendant appealed, stating that the trial court improperly overruled his *Batson* challenge and argued that race disproportionately impacted his jury trial.[185] But the court found that the prosecution had produced a race-neutral reason for the strike: fear or

---

[174] *Id.* at 726.
[175] *Id.* at 715.
[176] North Carolina Racial Justice Act, S.L. 2009-464, § 1 (2009) (codified at N.C.G.S. §§ 15A-2010, 2011 (2009)) (repealed 2013).
[177] State v. Holmes, 221 A.3d 407, 411 (2019).
[178] *Id.* at 417.
[179] *Id. a*t 416.
[180] *Id.* at 415.
[181] *Id.*
[182] *Id.* at 416–18.
[183] *Id.* at 416.
[184] *Id.* at 417.
[185] *Id.* at 417–18.

distrust of the police.[186] The Appellate Court upheld the conviction that resentment and distrust of the police are a race-neutral reason for exemption.[187] While the Appellate Court supported the defendant's disproportionate impact argument, it was bound to reject the argument due to precedent.[188]

The case moved up to the Supreme Court, which upheld the conviction.[189] Relying on the cases of *State v. King*,[190] *State v. Edwards*,[191] and *Hernandez v. New York*,[192] all of which held that fear or distrust of the police was a race-neutral reason for a peremptory strike, the Connecticut Supreme Court was also constrained to follow binding precedent.[193] The court stated, however, that "resentment of police and distrust of the criminal justice system are not racially neutral justifications for exercising a peremptory challenge because there is a much higher prevalence of such beliefs among African-Americans."[194] In so ruling, the Supreme Court of Connecticut endorsed the defendant's argument, even though the court held that the defendant's argument was not legally cognizable under the *Batson* rubric's second step because that step only requires a facially valid explanation.[195]

The Supreme Court of Connecticut upheld the Appellate Court's conviction because the defendant's claim was limited to the Constitution's Equal Protection Clause and the Supreme Court's interpretation of it.[196] Thus, implicit bias was not enough to violate the Equal Protection Clause and grant the defendant's motion.[197] The "broader themes of disparate impact and implicit bias," however, allowed the court to consider whether further action on the court's part was required to create fairness to all defendants in light of *Batson*'s ineffectiveness.[198] Following the Washington Supreme Court's example, the Supreme Court of Connecticut took this opportunity to examine whether Connecticut's *Batson* challenges were strong enough.[199] Ultimately, the Supreme Court found that the *Batson* challenge was ineffective at reducing discrimination in jury selection and ordered the creation of a task force to study the problem and resolve it via the state's rulemaking process.[200] The Connecticut Supreme Court was nevertheless forced to uphold the conviction of Holmes, even though it

---

[186] *Id.* at 421.
[187] *Id.* at 418.
[188] *Id.* at 417–19.
[189] *Id.* at 439.
[190] 249 Conn. 645 (1999).
[191] 314 Conn. 465 (2014).
[192] 500 U.S. 352 (1991)
[193] *Holmes*, 221 A.3d at 420.
[194] *Id.* at 407.
[195] *Id.* at 420.
[196] *Id.* at 411–12.
[197] *Id.* at 412.
[198] *Id.* at 428.
[199] *Id.* at 434.
[200] *Id.* at 437.

recognized that *Batson* was ineffective at eliminating discrimination in jury selection and that Holmes' jury had been improperly infected with racial discrimination.[201]

A. What Connecticut can learn from other states and the future of the Batson test in Connecticut

As evident from the summer of 2020, the entire nation is still feeling the effects of racial discrimination. Following the deaths of George Floyd, Ahmaud Arbery, and Breonna Taylor, citizens of every state took to the streets to protests police officers' discriminatory practices in America.[202] The country understands the discrimination that led to the civil unrest of 2020 because it is explicit. What is less known, and a much more subtle form of discrimination is the discriminatory practices of using peremptory strikes based on facially race-neutral reasons (whether intentional or not) to discriminate against Black defendants and defendants of color. Connecticut is not alone in this practice, but as a state dedicated to constitutions,[203] it is imperative to uphold the values and dignity of Equal Protection and to remember how much weight the Founding Fathers placed in being tried against a jury of one's peers.[204]

The Connecticut task force implemented by the Supreme Court of Connecticut has met to determine what course Connecticut should take. The Supreme Court of Connecticut charged the task force to:

> Propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to General Statutes § 51-232(c) which governs the confirmation form and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross-section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate Batson's requirement of purposeful discrimination.[205]

---

[201] *Id.* at 411–12.

[202] *See* Janie Haseman et al., *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA TODAY (Jun. 29, 2020, 7:47 AM), https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/.

[203] Connecticut's official nickname is "The Constitution State." CT STATE LIBRARY, *Connecticut's Nicknames* (last visited Jan. 3, 2022), https://ctstatelibrary.org/CT-nicknames.

[204] W. VA. ASS'N FOR JUST., *supra* note 2.

[205] *Jury Selection Task Force*, CONN. JUD. BRANCH, https://www.jud.ct.gov/Committees/jury_taskforce/default.htm#Purpose (last visited Jan. 3, 2022).

For this article, the last two charges, drafting model jury instructions about implicit bias and creating new standards to eliminate the requirement of purposeful discrimination, will be discussed. Then, the benefits and detriments of the new legislation will be analyzed.[206] In *State v. Holmes*, the Supreme Court of Connecticut already hinted that the court would not entertain ideas of changing the law retroactively,[207] and, likely, the state will not enact retroactive legislation. Many people behind bars would benefit from legislation designed to help them because racial discrimination in jury selection impacted their trials. While Connecticut does not have the death penalty,[208] it does have life sentences, and a party whose trial was impacted by racial discrimination in his jury selection deserves to have a new trial, or at the very least, his sentence should be reexamined and possibly reduced or terminated because of that discrimination.[209]

B. The Task Force's Recommendations

At the Task Force's meeting on December 16, 2020, the group voted unanimously to send their final report and proposals to Chief Justice Richard Robinson to implement it in Connecticut's courts.[210] The group submitted proposals from the Data, Statutes & Rules Subcommittee, the Juror Summoning Process Subcommittee, the Implicit Bias and Batson Challenges Subcommittee, and the Jury Outreach and Education subcommittee.[211] The Final Report was made available on December 31, 2020.[212] The task force worked thoughtfully and diligently and effectively put forth recommendations, two of which will be discussed below.

1. Eliminating Discrimination

The task force recognized that the court must overcome *Batson*'s shortcomings by implementing a new general rule, similar to the Washington court's General Rule 37.[213] Though, there is a difference between Connecticut and Washington: Connecticut's peremptory challenges

---

[206] *See infra* Parts VII–IX.

[207] State v. Holmes, 221 A.3d 407, 434–35 (2019).

[208] *Connecticut Abolishes the Death Penalty*, NAT'L CONF. STATE LEGISLATURES (Aug. 13, 2015), https://www.ncsl.org/research/civil-and-criminal-justice/connecticut-abolishes-the-death-penalty.aspx (discussing how Connecticut's Governor Dan Malloy abolished capital punishment in Connecticut in 2012; the bill applied retroactively and the remaining inmates on death row had their sentences reduced to life without the possibility of parole).

[209] Following North Carolina's example, it appears that we should start applying retroactive legislation to those who were most disparately impacted by discrimination: those who have life sentences. If the legislation imposes retroactive legislation, it may consider beginning with the life-sentence cases and then move to cases with lower sentences.

[210] *Meeting of the Jury Selection Task Force*, YOUTUBE (Dec. 16, 2020), https://www.youtube.com/watch?v=F-l6hCsNplk&feature=youtu.be.

[211] *Id.*

[212] JURY SELECTION TASK FORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (Dec. 31, 2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf.

[213] *Meeting of the Jury Selection Task Force*, *supra* note 210.

are constitutionally, rather than statutorily, protected.[214] This created tension in the task force because it is more difficult to change the peremptory challenge rules in Connecticut.[215] The committee tasked with updating Connecticut's law on peremptory strikes, however, recognized that peremptory challenges contribute to implicit bias in Jury Selection.[216]

To recalibrate the state's peremptory challenges, the group first considered whether to eliminate them entirely.[217] The task force ultimately decided not to eliminate peremptory challenges for four reasons.[218] First, eliminating peremptory challenges would mean the Connecticut state constitution would have to be amended, which would be a "laborious process."[219] Second, peremptory challenges accomplish the aims of supplying parties and their counsel with a sense of power over their cases while simultaneously strengthening the public's perception of procedural justice; they safeguard against unchecked judicial authority and prohibit biased people from sitting on juries, and they save time.[220] Third, there is considerable resistance from judges and attorneys to removing peremptory challenges.[221] Finally, there was doubt regarding whether removing peremptory challenges would effectively eliminate unconscious bias in jury selection.[222]

Without eliminating peremptory challenges, the group still recommended changing the current system by creating a New General Rule on Jury Selection.[223] The New General Rule ("the Rule") starts in section (a) by stating its policy and purpose: "to eliminate the unfair exclusion of

---

[214] JURY SELECTION TASK FORCE, *supra* note 212, at 27. "Section 19 of article first of the constitution is amended to read as follows: The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate." CONN. CONST. amend. IV (amendment added 1972). The Amendment to make peremptory challenges constitutionally protected was threefold: "This bill does three things: one, it amends and amplifies Connecticut's constitutional guarantees of jury trial. It clearly permits juries of six men in all cases, civil and criminal, except in capital cases where the accused could agree to be tried by less than twelve but preserves his right to be tried by twelve; two, it continues to preserve the rights of litigants to challenge prospective jurors peremptorily when necessary; and three, it preserves the valuable rights of litigants to have their perspective jurors individually questioned by their counsel and apart from the other veniremen." CONN. STATE LIBRARY, LEGISLATIVE HISTORY FOR CONNECTICUT RESOLUTION AMENDMENT ART. IV CONST. ART. I, SEC. 19, TRANSCRIPTS FROM THE JOINT STANDING COMMITTEE PUBLIC HEARING(S) AND/OR SENATE AND HOUSE OF REPRESENTATIVES PROCEEDINGS 1971, HJR 83, 32, at 75 (May 10, 1971), *compiled in* S-80 CONN. GEN. ASSEMBLY SENATE PROCEEDINGS 1971 VOL. 14 PART 5 1921-2435.

[215] *Jury Selection Task Force*, CONN. JUD. BRANCH, https://www.jud.ct.gov/Committees/jury_taskforce/default.htm#Purpose (last visited Jan. 3, 2022).

[216] JURY SELECTION TASK FORCE, *supra* note 212, at 28.

[217] *Id.* at 30.

[218] *Id.*

[219] *Id.*

[220] *Id.* at 30–31.

[221] *Id.* at 31.

[222] *Id.*

[223] *Id.* at 15.

potential jurors based upon race or ethnicity."[224] Then, in section (b), the rule explains the scope of the Rule.[225] "The rule applies to all parties in all jury trials," and a denial of an objection will be reviewed by an appellate court *de novo*, "except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard."[226] The Rule states that any party may object to the improper use of a peremptory challenge, or the court may raise an objection on its own.[227]

Once a party or the court has objected, the party exercising the challenge will state why they are exercising the challenge.[228] Then the court shall "evaluate from the perspective of an objective observer, as defined in section (f) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances;" the court defines an objective observer in section (f) as:

> **Nature of Observer.** For the purpose of this rule, an objective observer (1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity; and (2) is deemed to be aware of and to have given due consideration to the circumstances set forth in section (g) herein. [229]

The court will then look at the circumstances of the case:

> (g) **Circumstances considered**. In making its determination, the circumstances the court should consider include, but are not limited to, the following: (i) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; (v) if the party has used

[224] *Id.* at 16.
[225] *Id*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.* at 16–17.

> peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case; (vi) whether issues concerning race or ethnicity play a part in the facts of the case to be tried; (vii) whether the reason given by the party exercising the peremptory challenge.[230]

The rule outlines reasons for issuing a peremptory challenge that are presumptively invalid in section (h), just as the Washington rule did, and includes reasons that are biased because they are entirely based on the conduct of the juror in section (i).

> (h) **Reasons Presumptively Invalid**. Because historically the following reasons for was contrary to or unsupported by the record, peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or maybe influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge: (1) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; (vii) not being a native English speaker; and (viii) having been a victim of a crime. The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.
>
> (i) **Reliance on Conduct**. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for

[230] *Id* at 17.

> a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a peremptory challenge for reasons relating to those listed above in (i) shall, as soon as practicable, notify the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity shall apply but may be overcome as set forth in subsection (h).[231]

The rule ends with a review process in section (j), stating that "[t]he chief justice shall appoint an individual or individuals to monitor issues relating to this rule."[232]

This new rule was created entirely in response to *Batson*'s failings.[233] It modifies Connecticut's current three-step *Batson* test and ensures that specific reasons for the exercise of peremptory challenges are presumptively invalid, following in Washington state's footsteps.[234] This legislation will prevent the exclusion of jurors of color who fear or distrust the police, as the juror in *Holmes* did, although it will not help Holmes himself. The committee unanimously adopted it.[235]

Although the committee unanimously adopted the legislation, there was some dissent among the committee during deliberations. The subcommittee's recommendation received some backlash concerning the new review method: reviewing a peremptory strike's credibility from the record, *de novo*.[236] Some committee members deeply contested the proposed appellate standard of review because they believed it to be an abuse of discretion.[237] The subcommittee tasked with creating this recommendation studied other states, including Washington, and concluded that the appellate standard of review was the best approach after calculating the feasibility and impact that judges' presence has on jury selection.[238]

2. Drafting Model Jury Instructions

While jury instructions impact the juror after attorneys utilize peremptory strikes, it is necessary to discuss the changes made to the jury instructions to illustrate how Connecticut is working to eliminate implicit bias from the courthouse in its entirety. As the group noted, "[i]mplicit bias

---

[231] *Id.* at 17–18.
[232] *Id.* at 18.
[233] *Id*. at 19; for more discussion of Batson's failings, *see* Tetlow, *supra* note 102, at 1719–35.
[234] JURY SELECTION TASK FORCE, *supra* note 212, at 20.
[235] *Id.*
[236] *Id.* at 16.
[237] *Id.* at 22.
[238] *Id.* at 20.

impacts every step," and it is equally crucial for the jury to be aware of their biases.[239] The role of jury instructions is to inform jurors and help them come to a verdict that follows the laws of the court's jurisdiction.[240] The task force determined that, while Connecticut is one of the best models for giving jurors instructions about implicit bias, there is still more to be done to enhance jurors' understanding of unconscious bias.[241] A suggestion from the task force is to insert a "Juror Bill of Rights" to help jurors understand their duties and responsibilities and educate them about their role in the legal system.[242] To implement their recommendation, the subcommittee reviewed the current jury instructions, implicit bias instructions from other jurisdictions, and empirical and scholarly literature to determine how they can draft the model jury instructions to educate jurors about implicit bias and avoid it in their deliberations.[243]

The task force has put forth three recommendations to recalibrate the jury instructions. First, the group recommends "making modest revisions" to the jury instructions.[244] The second recommendation is to instruct about implicit bias in civil cases in addition to criminal cases.[245] Finally, the group recommends giving the instructions at the beginning and the end of the trial.[246]

Concerning the first recommendation, the task force determined that the jury instructions' most helpful change is to draft implicit bias instruction properly.[247] The group further noted that the most critical features of the instruction should be "explaining implicit bias and its effects; motivating jurors to avoid it; offering specific techniques for debiasing; and being written in clear, plain English."[248] As a result, the group suggests fully explaining implicit bias to jurors and cites the American Bar Association's *Achieving an Impartial Jury* proposed instruction as a guide.[249] The task force wants to create an instruction that *motivates* jurors to "try to correct

---

[239] *Id.* at 30.

[240] *Jury Instructions and their Purpose*, USLEGAL, https://courts.uslegal.com/jury-system/jury-instructions-and-their-purpose/#:~:text=A%20jury%20instruction%20is%20a,the%20law%20of%20that%20jurisdiction (last visited Jan. 3, 2022).

[241] *Meeting of the Jury Task Force*, *supra* note 210.

[242] *Id.*

[243] JURY SELECTION TASK FORCE, *supra* note 212, at 34.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.* at 35.

[248] *Id.*

[249] *Id.* at 36; *Achieving an Impartial Jury (AIJ) Toolbox*, AMER. BAR ASSOC. 17–18 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf (last visited Jan. 3, 2022). "Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence." *Achieving an Impartial Jury (AIJ) Toolbox*, AMER. BAR ASSOC. 17–18 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf (last visited Jan. 3, 2022).

for the effects of the bias."[250] To do so, the group recommends explaining to jurors the goal they want to serve by eliminating implicit bias and including the jurors as part of an in-group together with the judge so that the jurors will be motivated to engage in the joint activity.[251] Moreover, the task force recommends providing specific examples of how to overcome or reduce juror bias in clear, direct, plain language so that it is easy to understand.[252] The committee believes that these changes will create changes in how jurors view bias, which will lead to a reduction, if not elimination, of implicit biases in the courtroom.

VI. PROSPECTIVE V. RETROACTIVE LEGISLATION

As the Connecticut courts look over the task force's recommendation, there is still part of the equation missing: the defendants whom implicit biases have already harmed. In *State v. Holmes*, the Connecticut Supreme Court stressed the fact that the *Batson* test was insufficient.[253] Nevertheless, the Court had to adhere to the precedent, which strictly interpreted that *Batson* protects against intentional discrimination, not implicit biases resulting in discrimination.[254] The Court reiterated this notion by stating:

> [T]he fundamental principle [is] that official action will not be held unconstitutional solely because it results in a racially disproportionate impact… Proof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause… Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the [decision maker] selected a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.[255]

By adhering strictly to the precedent, the Supreme Court of Connecticut followed jurisprudence, but the court ultimately failed the defendant. It is extraordinarily hopeful and vital that the court recognized *Batson*'s imperfections and chose, as a state, to offer more protection against implicit bias to defendants in the future. Still, the Court and the task force did not put forward legislation to address any retroactive solutions to help those who had implicit bias injure them in their trials.

---

[250] JURY SELECTION TASK FORCE, *supra* note 212, at 36.
[251] *Id.*
[252] *Id.* at 38–39.
[253] State v. Holmes, 221 A.3d 407, 411–12 (2019).
[254] *Id.* at 412.
[255] *Id.* at 424–25 (quoting Hernandez v. New York, 500 U.S. 352, 359–360 (1991)).

VII. WHY CONNECTICUT SHOULD CONSIDER RETROACTIVE LEGISLATION

As a state, there are other options that we could put forth besides prospective legislation. For example, Connecticut could finish what North Carolina started[256] and enact legislation to give relief to defendants who had their trials impacted by implicit bias. In fact, Connecticut can use the exact format that the task force has already created to do so. The task force has already outlined what conduct constitutes implicit bias in jury selection.[257] Thus, it would be simple to implement those rules retroactively; a defendant would apply for relief if they believe implicit bias impacted their trial during jury selection. After that, a panel would determine whether or not there is sufficient evidence of implicit bias in the jury selection to warrant a new trial or a reduction of sentence, just as the North Carolina panel did.[258] The task force has provided a powerful blueprint for how to determine if implicit bias impacted a trial's jury selection, and Connecticut should use it for defendants suffering in prison who were wrongly discriminated against in the jury selection process.

The task force proposed a curative act, designed to help future victims, but failed to recognize the disease and rot that is already inside Connecticut's judicial system. Moving forward, it is impossible to heal without first clearing out the old wounds. As Professor Stephen Munzer of UCLA Law states, "[c]urative acts are often, in an interesting way, both entrenching and disentrenching."[259] Here, the Connecticut task force has attempted to cure implicit discrimination by entrenching the idea that implicit bias in jury selection violates a defendant's rights.[260] Nevertheless, it is easy to see the inequity in depriving the prior defendants of a bias-free trial merely because they were the catalyst to creating change but denied the benefit of the change.[261] The legislation should be applied retroactively to avoid the disentrenching effects of this new rule.

Furthermore, another benefit of applying the legislation retroactively is that it reflects the rule of law to do so.[262] As an ideal, the rule of law seeks

---

[256] North Carolina Racial Justice Act, 2009 N.C. Sess. Laws 2009-464, § 1 (codified at N.C. GEN. STAT. § 15A-2010, 2011 (2009)) (repealed 2013).

[257] JURY SELECTION TASK FORCE, *supra* note 212, §§ (h)–(i), at 17.

[258] It would be up to the legislation to determine the remedy to be imposed upon the defendants retroactively. This article proposes a new trial, but that may not be feasible in some cases due to the passage of time, death of witnesses, impossibility of a fair trial, etcetera. Thus, this author understand why North Carolina decided to have a panel reduce sentences instead of imposing a new trial and would understand if the legislation in Connecticut determined that was the best approach as well.

[259] Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 469 (1982) (discussing how curative acts entrench perceived interests and expectations because they disentrench someone's actual legal position).

[260] JURY SELECTION TASK FORCE, *supra* note 212, at 19–22.

[261] *See* Munzer, *supra* note 259, at 469–70.

[262] There are different opinions on the rule of law. This article uses a liberal definition of the rule of law, for which the rule of law is a facilitator of justice and progress. *See, e.g.*, United Nations and the Rule of Law, *Rule of Law and Development*, UNITED NATIONS, https://www.un.org/ruleoflaw/rule-of-law-and-development/ (last visited Jan. 4, 2022). The argument against retroactive legislation given via

to promote utility and justice, which can be accomplished by enacting this legislation retroactively.[263] The rule of law is an individual's defensible right to have his acts controlled by publicly defined rules.[264] While retroactivity is generally frowned upon by legal entities who promote the rule of law because retroactivity unfairly punishes people who are unable to plan accordingly due to the law's unavailability when they are taking action, it would not be frowned upon here.[265] In this instance, retroactivity would not violate the rule of law because there would be no punishment to anyone for violating the defendant's rights. The only person affected by this legislation's retroactive application would be the defendant, who *would not be punished*.[266] As such, there would be no one held liable retroactively, and there would be no hindrance of persons' ability to form plans and carry them out with due regard to the current rights and privileges afforded to them.[267] Instead, a historical wrong would be corrected and the ideals that the rule of law seeks to advance would be promoted.[268] At the very least, retroactive legislation in this instance should be a particularly effective means of fostering fairness and usefulness to victims of discrimination in jury selection.[269]

Looking specifically at the case of *State v. Holmes*, the juror whom the court dismissed, W.T., was dismissed for something that the new rule

considers to be *presumptively invalid*.[270] It makes no sense for Holmes not to get a remedy for the implicit bias that was at play in his trial.[271] There is no justice in turning a blind eye to the defendants harmed by implicit bias before this legislation was drafted. Further, it is not a waste of judicial resources to allow these defendants to petition for a new trial or reduction in sentence because of the implicit discrimination they faced during and before their trial. It may even end up saving judicial resources if some defendants are released or given a reduced sentence because of implicit bias in their trials.[272] If one inmate is released just one year early, the state of Connecticut will save $62,159.[273] While it would be costly to have a new trial or hire a

---

the rule of law is a politically conservative view. *See, e.g.*, F.A. HAYEK, THE ROAD TO SERFDOM 72–84 (George Routledge & Sons, 1944).

[263] Munzer, *supra* note 259, at 471.

[264] *Id.*

[265] *Id.*

[266] Another way of expressing this sentiment is to say that ex post facto concerns would not be implicated in this scenario.

[267] Munzer, *supra* note 259, at 427.

[268] *Id.*

[269] *Id.* at 471.

[270] JURY SELECTION TASK FORCE, *supra* note 212, §§ (h)–(i), at 17.

[271] *See id.*

[272] "A common measure used by states to understand this cost is the 'average cost per inmate,' calculated by taking the total state spending on prisons and dividing it by the average daily prison population." *Prison Spending in 2015: The Price of Prisons*, VERA, https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending (last visited Jan. 4, 2022).

[273] *Id.*

panel to hear appeals, those precise costs are unknown. Simply speaking, it may be in Connecticut's best interest to reexamine whether these inmates should be kept in prison on the taxpayer's dime.

It is an unfortunate and sad part of the legal world that there is minimal retroactive action to help those who have already been sentenced. Few are upset about moving forward with progressive legislation, but many fear enacting that same legislation retroactively. Connecticut seems to be taking one step forward and two steps backward. It is unknown yet whether this legislation will actually cure the deficiencies of *Batson*, but it is clear that if Connecticut does not adopt retroactive legislation then the people already affected will remain stagnant. It is deeply upsetting that the court rules will only help the next generation of defendants from the harmful effects of implicit bias and ignore those whom are already injured.

VIII. THE FUTURE OF *BATSON* IN CONNECTICUT: PROSPECTIVE LEGISLATION

Since 1986, the Supreme Court has adhered to the Court's *Batson* test.[274] The Supreme Court's adherence to *Batson* is due to the Supreme Court's interpretation that the Equal Protection Clause is limited to intentional discrimination.[275] It is unknown, at present, if the Supreme Court will ever overrule that interpretation. In the meantime, the states are free to protect jurors and defendants from the harmful effects of implicit biases that result in racial discrimination. In their own ways, Washington and North Carolina correctly concluded that implicit biases in jury selection result in racial discrimination for defendants and jurors. Based on this evidence that implicit biases result in racial biases that the Equal Protection Clause should preclude, Connecticut should be persuaded and is on the path to adopting legislation designed to shield defendants and jurors from the harmful effects of implicit discrimination.

With the introduction of new legislation, it is worth discussing whether the reforms recommended will yield different results from *Batson.* The Connecticut courts should analyze whether the recommended legislation will actually impact the racial composition of juries or if this new legislation will once again be a placebo[276] to ending discrimination in jury selection, like *Batson* was.[277] Additionally, the court should consider broader

[274] North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C.G.S. §§ 15A-2010, 2011 (2009)) (repealed 2013).

[275] *Id.*

[276] A placebo is something that seems real but is not. Joseph Saling, *What Is the Placebo Effect?*, WEBMD (FEB. 8, 2020), https://www.webmd.com/pain-management/what-is-the-placebo-effect. In this case, *Batson* is a placebo because it has the appearance of treating racial discrimination in the court systems, but it has little to no effect. Only the blatantly racist or explicitly discriminatory peremptory challenges will be thrown out while others can hide under pretextual reasons. Tetlow, *supra* note 63, at 1946 ("The current *Batson* rule constitutes a placebo that purports to solve the problem of discrimination by juries but really focuses only on purported discrimination against jurors.").

[277] *See* Sloan, *supra* note 105, at 263.

consequences that the rule may have and the public's perception of the rule.[278] By doing so, the court will determine whether it is worthwhile to introduce this legislation or if the court and the task force have more work to do. Finally, it is worth once again considering if we should abandon peremptory challenges altogether. Perhaps we have reached a point where the only solution to ending racial discrimination is to abolish all jury strikes besides for cause strikes.

CONCLUSION

Connecticut does not accept the ongoing legacy of racial discrimination in jury selection.[279] Indeed, Connecticut has directly attacked this legacy by proposing prospective legislation that will lead to a fairer system for people of every race. It is unlikely that Connecticut courts will adopt retroactive legislation, but a step forward is a step in the right direction. Hopefully, this recommendation can rid the courts of unintentional racism and provide hope and growth for a nation with deep racial divisions.

Still, there are racial disparities within the criminal justice system. By working to address one of these racial disparities, Connecticut is headed in the right direction. The task force's recommendations provide hope that Connecticut will take a dramatic departure from *Batson* and reform peremptory challenges, although not eliminate them. At its core, however, any reform to *Batson* is reminiscent of Justice Marshall's concurrence in *Batson* in which he encouraged eliminating peremptory strikes.[280] For the moment, it appears that peremptory strikes are here to stay. Enacting legislation to combat the racial impacts of implicit bias in jury selection begins to address the systemic issues that plague the criminal justice world, and it will open the door to a fundamental privilege that has remained inequal for too long.[281]

---

[278] *Id.* at 261.

[279] This is a direct answer to Attorney Sloan's prompt after she declared that "the other forty-nine states [besides Washington] have a choice to make. They can accept [or reject] the ongoing legacy of racial discrimination in jury selection." *See id.* at 265.

[280] Batson v. Kentucky, 476 U.S. 79, 103 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991) (Marshall, J., concurring). It is worth considering eliminating peremptory strikes altogether, although that will be challenging to do in Connecticut.

[281] This author recognizes that enacting legislation is not a solution to eliminating racial bias in the court system as a whole. This is merely a step in the right direction; there is still much work to do to create equality within the law.

A Vehicle to Inequity: Law School Merit Scholarships

LUKE REYNOLDS[†]

INTRODUCTION

Law schools across the country suffer from inequities and a lack of diversity stemming from historically racist structures that determine the legal education funding. Although many law schools aspire to attract a diversity of students to the profession, the scholarship system is counteracting such ambitions. Specifically, as schools increase opportunities for merit scholarship, White applicants disproportionately serve as the dominant beneficiaries and recipients.[1] As a result, Black, Latinx, and first-generation applicants are disadvantaged to the benefit of students receiving merit-aid.

In 2016, 79% of all law school scholarships were merit-based.[2] Meanwhile, the percentage of need-based scholarships–just 19% of all scholarships–remained unchanged and continued to pull from a smaller financial pool.[3] In the last fifteen years, law schools have largely (but not entirely) shifted their need-based scholarship money to "merit-based."[4] The goal of merit aid has predominately been to attract students with scores that will boost a school's target Law School Admission's Test ("LSAT") range, and therefore, its national ranking and appeal.[5] Nevertheless, up close, "merit" is an objective notion as it is usually determined by those in power, not by those who are seeking social and educational mobility. Aaron Taylor, the Executive Director of the AccessLex Center for Legal Education Excellence, suggests that, "within social systems, notions of merit form the bases of dominant values, giving merit a moralistic, often sacrosanct character. But, at its core, merit is not about morality; it is about power."[6]

[†] Luke Reynolds received a J.D. from the University of Connecticut School of Law in 2022, is a former AmeriCorps Member, and is an alumnus of the College of the Holy Cross, with degrees in Political Science and Economics.

[1] *See generally* LSSSE, 2016 ANNUAL SURVEY RESULTS 9 (2016), http://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-2016-Annual-Report-1.pdf.

[2] *Id.* at 8.

[3] Aaron N. Taylor, *Robin Hood, in Reverse: How Law School Scholarships Compound Inequality*, 47 J.L. & EDUC. 41, 58 (2018) (citing AM. BAR ASS'N, TASK FORCE ON FIN. LEGAL EDUC. 29 (June 17, 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2).

[4] Diane Curtis, *The LSAT and the Reproduction of Hierarchy*, 41 W. NEW ENG. L. REV. 307, 322 (2019).

[5] Deborah Merritt, *Law School Rankings Still Drive Scholarship Awards (Perspective)*, BLOOMBERG L. (Feb. 10, 2017, 3:47 PM), https://news.bloomberglaw.com/business-and-practice/law-school-rankings-still-drive-scholarship-awards-perspective.

[6] Taylor, *supra* note 3, at 41; *see also* Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1455 (1997).

The general consensus is that merit aligns most closely with LSAT scores.[7] The LSAT is not an inclusive nor equitable assessment, and consequently is not the best way to assess tuition aid and large pools of money.

The American Bar Association ("ABA") has studied the issue of law firm attrition, non-diversity in law schools, and pipeline problems. The ABA set a goal to "promote full and equal participation in the association, our profession, and the justice system by all persons [and] [e]liminate bias in the legal profession and the justice system."[8] Although progress has been made, the ABA and law schools fail to examine and reverse the role merit scholarships play in the exacerbation of law school inequality. As a result, the status quo of racial exclusion in the legal profession persists. The wider impacts of increasing merit, but not need-based, scholarships are a lack of diversity in legal profession and significant wealth disparities—as Black and Latinx law students shoulder a disproportionate amount of debt.[9]

This article aims to analyze data gathered from students offered admission to law school and the scholarships that they were or were not offered. Through careful examination, Black and Latinx applicants are adversely impacted at a disproportionate rate compared to their White counterparts. The merit scholarship inequality is compounded for first-generation law students.[10]

If law schools continue to gatekeep the legal profession, the processes in which students are awarded scholarships, educated, and retained must be entrenched in equity and inclusion. At an extreme, law schools can eliminate merit-based scholarships full-stop and revert all scholarship funding into a need-based program that helps students based on financial status. Short of eliminating merit-scholarships, law schools can redefine merit so it does not align so closely with the LSAT—an exam that has a disparate impact on Black and Latinx students.[11] Outside of scholarship allocation, law schools could adopt loan forgiveness programs that make law school affordable for all students regardless of what, if any, scholarship they receive. Finally, law schools could encourage the ABA to require reporting of merit-scholarships awarded, broken down by race, class, socioeconomic status, and gender in the 509 report.[12] If legal education is to serve as a means of opportunity for

---

[7] Roithmayr, *supra* note 6, at 1452.

[8] AM. BAR ASS'N, *Goal III*, https://www.americanbar.org/groups/diversity/disabilityrights/initiatives_awards/goal_3/#:~:text=Objectives%3A&text=The%20tenets%20of%20ABA%20Goal,sexual%20orientations%20and%20gender%20identities.%22 (last visited May 1, 2021).

[9] LSSSE, *supra* note 1, at 12 (defining first generation law students as "respondents for whom neither parent has more than a high school diploma.").

[10] First generation Black students are the least likely to receive merit scholarships. *See infra*, at 12.

[11] Taylor, *supra* note 3, at 65.

[12] A 509 report is a required disclosure accredited law schools must submit to the ABA. The report includes breakdowns on admitted student grade point averages ("GPAs"), LSAT scores, gender, and other demographics. *See infra*, at 18.

individuals seeking better lives for themselves and others, equity must underlie how students are financially supported.

I. HISTORY OF LAW SCHOOL MERIT SCHOLARSHIPS

Becoming a lawyer originally consisted of a legal apprenticeship for working class opportunists,[13] but has turned into formalized education, rooted in elitism, adversarial rankings, and stringent professional standards. In 1891, 80% of lawyers entered the profession without any formalized legal education.[14] The rise of the ABA in the early twentieth century radically transformed the pipeline for lawyers. Legal education increasingly became a requirement of state bar admission and more law schools were created.[15] Today, all but four states require attendance at an ABA accredited school before taking the bar.[16] In turn, a hierarchy of prestige is inevitable. As a result of law school rankings, schools are competing to attract students with high LSAT scores with the hope that they will raise the school's ranking by gaining prestigious internships and post graduate positions. To attract the "best" future lawyers, schools offer merit scholarships for students who appear worthy of such investment.[17]

According to the 2015 ABA Report on Financing Legal Education, merit scholarship funding increased by 68% at public law schools and 53% at private law schools between 2005 and 2010.[18] Meanwhile, need-based funding has remained essentially flat.[19] To provide a local example, the University of Connecticut in 2016 awarded 60% of its class a merit scholarship; in 2019 over 90% of students received a merit-based scholarship.[20] In the last twenty-years, the total dollars for merit-based programs have grown roughly ten times faster than total dollars available for

---

[13] Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 945 (2014).

[14] *Id.* at 946.

[15] During the Depression the ABA was able to convince the federal and state governments to grant law licenses only to graduates of law schools that the ABA accredited, *see* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 112 (2003); Gabriel Kuris, *Law School Applicants and the Bar Exam*, U.S. NEWS EDUC. (July 19, 2021), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-law-school-applicants-should-know-about-the-bar-exam#:~:text=As%20a%20law%20school%20applicant,instead%2C%20like%20California%20and%20Washington.

[16] California, Virginia, Vermont, and Washington allow aspiring lawyers to take the bar exam without going to law school. Instead, they are given the option to apprentice with a practicing attorney or judge. Zachary Crokett, *How to Be a Lawyer Without Going to Law School*, PRICEONOMICS (Jan. 6, 2017), https://priceonomics.com/how-to-be-a-lawyer-without-going-to-law-school/.

[17] See Taylor, *supra* note 3, at 58.

[18] AM. BAR ASS'N, *supra* note 3, at 31.

[19] Taylor, *supra* note 3, at 58.

[20] Frequently Asked Questions (F.A.Q.), UNIV. CONN. SCH. L. (last visited May 10, 2021), https://web.archive.org/web/20210116150003/[https://www.law.uconn.edu/admissions/juris-doctor-admissions/frequently-asked-questions-faq#].

need-based grants.[21] As a result, merit has become a primary measure that determines how much law school is going to cost for students. When looking at what defines merit, Black, Latinx, and first-generation law students are disproportionately impacted and at a historic disadvantage.

II. MERIT DEFINED BY LSAT SCORES

The rise in law school merit scholarships positively aligns with increased reliance placed on the LSAT. The LSAT was first administered in 1948 and has remained the dominant entrance exam at all law schools.[22] For the vast majority of schools, law school applicants are required to take and submit their LSAT scores, in addition to the typical application requirements: a transcript, a personal statement, and letters of recommendation.[23] The LSAT is meant to test an applicant's ability to "[c]omprehend complex texts with accuracy and insight."[24] Although the LSAT has not been validated for any other purpose than the admissions process,[25] the heavy reliance placed on the test has profound financial impacts on prospective lawyers that ultimately affect legal careers.[26] As the pressure to attract the "best" students increases among law schools,[27] merit aid has grown as the predominant form of tuition discounting and it is directly tied to LSAT scores. Applicants with high LSAT scores are significantly more likely to receive merit scholarships than students with lower LSAT scores.[28]

In a 2016 survey, applicants in the highest LSAT band (scoring between a 166 and 180) were nearly 6 times more likely to receive merit scholarships than applicants in the lowest band (140 and under).[29] While the extremes do not seem that surprising, a closer look at the middle LSAT bands reveal a stark divide. For example, someone who scored between a 156 and 160 was

---

[21] Bill Henderson, *Rocks on the Back of First-Generation College Grads Attending Law School (182)*, LEGAL EVOLUTION (July 21, 2020), https://www.legalevolution.org/2020/07/rocks-on-the-back-of-first-generation-college-grads-attending-law-school-182/ (citing data from the American Bar Association).

[22] The LSAT is a requirement at the majority of law schools, while only a third of schools accept GRE scores. Ilana Kowarski, *9 Key Differences Between the LSAT and GRE*, U.S. NEWS (Jan. 21, 2021, 9:37 AM), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-06-11/10-key-differences-between-the-lsat-and-gre; *Mission & History*, L. SCH. ADMISSION COUNCIL, https://www.lsac.org/about/mission-history (last visited May 15, 2021).

[23] *J.D. Application Requirements*, L. SCH. ADMISSION COUNCIL, https://www.lsac.org/applying-law-school/jd-application-process/jd-application-requirements (last visited May 11, 2021).

[24] *The Law School Admission Test: Reliability and Validity in Brief*, L. SCH. ADMISSION COUNCIL, https://www.lsac.org/data-research/research/lsat-reliability-validity (last visited May 11, 2021).

[25] *Cautionary Policies Concerning LSAT Scores and Related Services*, L. SCH. ADMISSION COUNCIL (July 2014), http://www.lsac.org/docs/default-source/publications-(lsac-resources)/cautionarypolicies.pdf.

[26] *See* Taylor, *supra* note 3, at 59.

[27] Kyle McEntee, *The Law School Rankings Rat Race Has New Cheese*, ABOVE THE L. (Mar. 23, 2021, 11:43 AM), https://abovethelaw.com/2021/03/the-law-school-rankings-rat-race-has-new-cheese/.

[28] LSSSE, *supra* note 1, at 9.

[29] *Id.*

18 percentage points more likely to receive a scholarship than someone who scored between 151 and 155.[30] More specifically though, 69% of respondents who scored a 156 received merit scholarships, compared to 59% of those who scored a 155.[31] In comparison, undergraduate GPAs ("UGPAs") trended higher across the ranges in the form or merit-scholarships, but never exceeded one-tenth of one point between adjoining ranges.[32] Thus, a greater, and frankly unexplained, value is placed on LSAT scores compared to more common academic achievement metrics in the allocation of merit scholarships.

LSAT scores are also predictive of other law school attractions. Higher median scores are correlated with lower student to faculty ratios, more advanced courses, lower student attrition, and higher employment rates among graduates.[33] The higher a school's median LSAT scores, the higher the school's ranking will be compared to schools with the lowest median LSAT scores.[34] As schools vie for better rankings, a prisoner's dilemma spirals as schools choose prestige over affordability.[35] The unfortunate result is an adverse impact on embracing diversity—something law schools are in a unique position to foster rather than reject.

III. INCREASING MERIT SCHOLARSHIPS AND RELIANCE ON LSAT SCORES IS ACCELERATING RACIAL AND SOCIOECONOMIC EQUITY

A. Methodology

To convey the argument that merit scholarships have adverse impacts on Black and Latinx applicants, this article sourced data gathered from the 2016 Law School Survey of Student Engagement ("LSSSE"). The LSSSE is a roughly 100-item annual survey of the effects of legal education on law students. Although the LSSSE is an annual survey, 2016 was the most recent year that asked questions regarding law school financing. It was administered—on an opt-in basis—to 17,828 students from 72 ABA accredited schools in the United States and Canada.[36] The racial and ethnic demographics of LSSSE respondents align closely with legal education

[30] *Id.*

[31] Taylor, *supra* note 3, at 73.

[32] Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 505 (2019).

[33] *2020 Raw Data Law School Rankings*, PUB.LEGAL, https://www.ilrg.com/rankings/law/index/1/desc/LSATLow (last visited May 11, 2021).

[34] Curtis, *supra* note 4, at 322.

[35] Henderson, *supra* note 21.

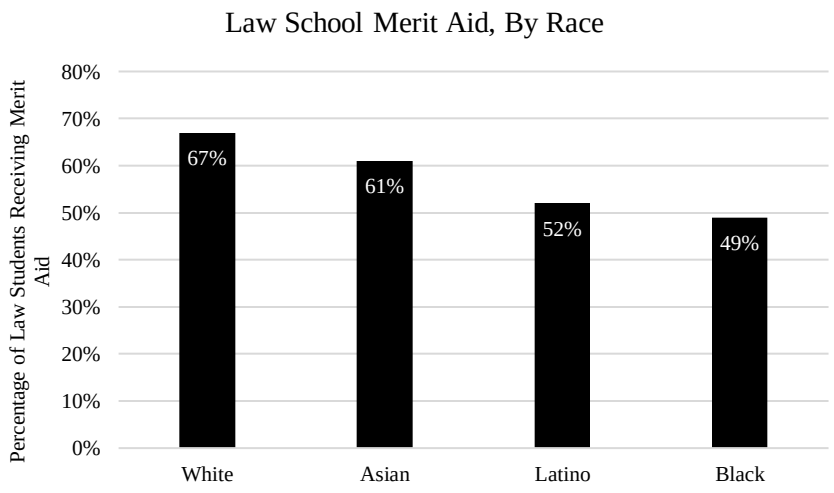
[36] LSSSE, *supra* note 1, at 4.

generally.[37] Fundamentally, the concepts surveyed capture the intricate web of individual and institutional decisions that reflect law school scholarships.

B. Merit Scholarships and Race

In 2016, White applicants were most likely to receive a scholarship.[38] The LSSSE calculates that 74% of White applicants were offered a scholarship.[39] Meanwhile, 65% of Black applicants and 66% of Latinx applicants were offered a scholarship.[40] When looking specifically at merit scholarships, the divide becomes more distinguishable. Although 67% of White applicants were offered merit-scholarships, only 49% of Black applicants and 52% of Latinx applicants were offered one.[41]

FIGURE 1.[42]



This begs the question, do White applicants actually exude more merit upon applying to law school? Closer analyses reveal a positive correlation between LSAT scores and merit-aid. White respondents had the highest average LSAT scores and the highest chance of receiving a merit

[37] Taylor, *supra* note 3, at 60.
[38] LSSSE, *supra* note 1, at 9.
[39] Aaron N. Taylor, *Law School Scholarships: Engines of Inequity?*, LSSSE, http://www.americanbarfoundation.org/uploads/cms/documents/taylor_lssse_scholarship_equity2a.pdf (last visited May 11, 2021).
[40] *Id.*
[41] LSSSE, *supra* note 1, at 9.
[42] *Id*. at 10, fig.7.

scholarship.[43] Conversely, Black respondents had both the lowest average LSAT scores and the lowest chance of receiving a merit scholarship. The scholarship chances among Asian and Latinx applicants were correlated.[44]

In terms of numbers, the average score for Black LSAT-takers is 142; this is 13 points lower than the 155 average for White test-takers and 12 points lower than the 154 average for Asian test-takers.[45] Latinx test-takers score an average of 146.[46] Some scholars explain these racial gaps with disparities in K-12 education and unequal access to LSAT prep.[47] This article does not venture to discover the root causes of LSAT score disparities. Rather, this article concedes that disparities do exist, and thus the LSAT is not the best benchmark to rely on when attempting to cultivate a more diverse and inclusive legal profession. By placing undue weight on the LSAT during scholarship appropriation decisions, accredited law schools feed into statistical norms that favor privilege and racially divided hierarchies.[48]

The derivative impact of linking LSAT scores to merit aid is felt in every step of the legal education process and beyond. Since schools with higher ranks also use a higher LSAT range to determine the applicants who receive merit, Black and Latinx students are less likely to receive a merit scholarship to schools with higher rankings. Studies suggest that the law school decision for Black, first-year, students is inexorably aligned with affordability.[49] As a result, Black, first year applicants are more likely to attend a school that offers aid, even if it has a lesser rank.[50] In 2010, 33% of Black first-year students were enrolled in schools with the two highest median LSAT groupings.[51] In 2015, that population declined to 29%.[52] On the flip side, 39% of White first-year students were enrolled in these schools in 2011, and in 2015 that proportion increased to 47%.[53] Consequently, White students are increasingly more likely to receive merit scholarships at higher ranked schools. As a result, the aid disproportionately shifted towards

---

[43] *Id.*

[44] *Id.*

[45] Taylor, *supra* note 3, at 64–65.

[46] *Id.*

[47] LaTasha Hill, *Less Talk, More Action: How Law Schools Can Counteract Racial Bias of LSAT Scores in the Admissions Process*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 313, 314 (2019).

[48] To the contrary, the LSAT has been touted by the Law School Admission Council as the best predictor of law school success, and more specifically first year grades. *See* Lily Knezevich & Wayne Camara, *The LSAT is Still the Most Accurate Predictor of Law School Success*, LSAC, https://www.lsac.org/data-research/research/lsat-still-most-accurate-predictor-law-school-success (last visited March 3, 2022). However, scholars have minimized this assessment, as the LSAT has no significant correlation with bar passage rates, legal skills, or legal performance. *See* discussion *infra* Section IV.B.

[49] Curtis, *supra* note 4, at 322–23.

[50] *Id.*

[51] Taylor, *supra* note 3, at 87.

[52] Taylor, *supra* note 32, at 500.

[53] *Id.* at 501.

White students is often subsidized by students with lower LSAT scores paying sticker price—most notably Black and Latinx students. This paradigm shift suppresses legal opportunities and generates higher levels of student loan debt for Black and Latinx law students.

C. The Influence of Merit Scholarships on Student Debt

Unsurprisingly, law school remains one of the most expensive forms of graduate education and places significant financial burdens on students. About 83% of applicants surveyed by the LSSSE reported that they incurred or expected to incur student debt.[54] In 2020, the average debt of law school students was 160,000.[55] The disproportionate allocation of merit-based scholarships has perpetuated a greater—and durational—law school debt divide along racial lines.[56] According to the LSSSE Survey, 95% of Black and 92% of Latinx applicants reported relying on student loans to pay for law school.[57] In 2021, Black law graduates expected to have 97% more student loan debt than White law school graduates.[58] The following chart from 2016 depicts the average debt carried by Black students being close to double the average debt carried by White students.[59]

[54] *Id.* at 506.

[55] Melanie Hanson, *Average Law School Debt*, EDUC.DATA (Dec. 5, 2021), https://educationdata.org/average-law-school-debt.

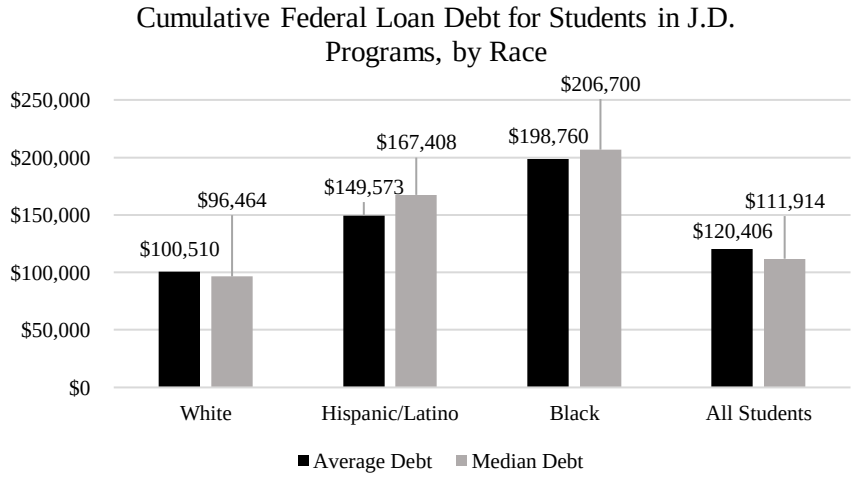
[56] Past LSSSE research has also found that Latino and Black women are more likely to borrow over $200,000 than men of the same race/ ethnicity or women from any other background. Longitudinal data show that this race and gender disparity is also consistent over time. Meera E. Deo, *Student Debt is a RaceXGender Issue*, LSSSE (July 9, 2021), https://lssse.indiana.edu/uncategorized/student-debt-is-a-racexgender-issue/.

[57] Taylor, *supra* note 32, at 507.

[58] Hanson, *supra* note 55.

[59] Henderson, *supra* note 21.

FIGURE 2.[60]



Data from After the J.D. (Wave III) reveals the decades long impact of student debt. Twelve years after graduation, 39.9% of Asian law graduates and 51.6% of White graduates had some student debt.[61] Disproportionately though, 69.6% of Hispanic and 76.7% of Black law graduates had student debt twelve years after graduation.[62]

While a myriad of other factors not discussed here contribute to disproportionate ratios of student debt,[63] merit scholarships play a prominent role in the widening of racial wealth gaps. Consequently, swift and comprehensive action is necessary to reverse the tides of inequity. If the legal community desires an inclusive and diverse profession, merit-

[60] *National Postsecondary Student Aid Study: 2016*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/surveys/npsas/ (last visited May 11, 2022). Reliable estimates of Asian J.D. graduates were unavailable at the time of this figure's creation. Black law school graduates carry twice the debt of White law students.

[61] Rebecca Sandefur et al., *Financing Legal Education – The View Twelve Years Out of Law School*, AM. BAR FOUND. & NALP FOUNDATION FOR L. CAREER RSCH. & EDUC. 80 (Gabriele Plickert et al., 2014), https://www.americanbarfoundation.org/uploads/cms/documents/ajd3report_final_for_distribution.pdf; Katharine W. Hannafor, *After the J.D. III: The Third Wave of a National Study of Legal Careers*, BAR EXAMINER (2015), https://thebarexaminer.ncbex.org/article/september-2015/after-the-jd-iii-the-third-wave-of-a-national-study-of-legal-careers/.

[62] Hannafor, *supra* note 60.

[63] Such as undergraduate education disparities, generational wealth gaps, loan qualification, access to high paying jobs.

scholarships should not act as a barrier to entry and success for prospective law students.

D. Compounding Inequity: First Generation Students

Being born from college educated parents is not meritorious—it is serendipitous. However, it does increase one's chances of receiving a merit-based scholarship. Looking at respondents to the LSSSE survey, first-generation law students (meaning their parents did not graduate college with a BS or BA) were the least likely to receive a merit scholarship.[64] In 2016, only 52% of all first-generation students received merit scholarships.[65] Broken down on racial lines, Black first-generation law students were the least likely out of all demographic groups surveyed to receive a scholarship at only 42%. Not far from it, only 44% of Latinx first-generation students received merit scholarships.[66] For White students with a college educated parent, 68% of students received a merit-based scholarship—the highest among any demographic studied.[67] The difference between Black and White first-generation students receiving a merit-scholarship also correlates positively with the LSAT. The average LSAT for first-generation students was 152, for Black first-generation students it was 148, and for White first-generation students it was a 156.[68]

The impact on first-generation students is magnified when looking at debt. Almost 50% of all first-generation students surveyed expected to be in over $100,000 of debt.[69] Contrarily, only 34% of students with at least one college parent expected to have $100,000 worth of debt.[70] Meanwhile, 62% of Latinx first-generation students expected to be in over $100,000 of debt.[71]

IV. FRAMEWORK FOR REFORM

Surely, there are alternative structural problems that create a disparate impact on the attainment of merit scholarships–such as LSAT framing, education achievement gaps, wealth gaps, and access to pre-law programs/classes. However, that does not change the fact that law school merit scholarships continue to perpetuate inequality at the detriment of Black, Latinx, and first-generation law students. This detriment carries to the legal profession and community. If the legal profession continues to adopt policies that exacerbate segregation for the sake of prestige, clients are

---

[64] LSSSE, *supra* note 1, at 10.
[65] *Id.*
[66] Taylor, *supra* note 3, at 75.
[67] *Id.*
[68] *Id.*
[69] LSSSE, *supra* note 1, at 12.
[70] *Id.*
[71] Taylor, *supra* note 3, at 78.

adversely affected and the lure of being a lawyer is less attractive to individuals from disadvantaged communities.

To prevent what is, essentially, price discrimination, law schools and regulatory bodies need to acknowledge and reform the way merit scholarships advance inequity. Black and Latinx lawyers are already underrepresented; a system that asks prospective Black and Latinx law students to subsidize the education of wealthier students from privileged backgrounds will only create greater underrepresentation. The following reforms are not exclusive nor comprehensive, but they offer an example and path for how the legal system can change for the betterment of all lawyers and future of our society.

A. Shift to Only Need-Based Aid

Need based scholarships are the most equitable way to award financial incentives to attend law school. Harvard, Yale and other law schools ranked in the top fourteen in the country ("T-14 law schools") already award scholarships primarily based on need.[72] This is possible due to the unique position (also could be deemed privilege) of Harvard and Yale, as they do not need merit scholarships to attract the best and the brightest. Looking beyond Harvard and Yale, just 19 to 21% of scholarships are need-based, which means the total pool of scholarship money solely for those with the greatest need is extremely limited.[73] Students expecting more than $200,000 in debt were five times more likely to have qualified for a need-based scholarship than those who had no debt.[74] That subgroup of student applicants disproportionately consisted of Black and Latinx individuals.[75] Unfortunately, many students who cannot access the need-based aid they require must instead seek schools that offer merit-based aid. For those who scored average or below on the LSAT, this means seeking a lower ranked school.[76]

Need-based scholarships would achieve the greatest equity. Those who could afford to pay sticker price would; all other students would receive scholarship funding in a manner that is fair and equitable. One policy solution proposed by Diane Curtis is to utilize the ABA's Section of Legal Education authority to require law schools to set a minimum percentage of need-based scholarships.[77]

---

[72] *Financial Aid Support*, YALE LAW SCHOOL, https://law.yale.edu/admissions/financial-aid (last visited, June 4, 2022); *Meeting Need*, HARVARD LAW SCHOOL, https://hls.harvard.edu/dept/sfs/basics-for-prospective-and-admitted-students/meeting-the-cost-of-attendance/meeting-need/ (last visited May June 4, 2022).

[73] LSSSE, *supra* note 1, at 8.

[74] *Id.* at 12.

[75] *Id.*

[76] Curtis, *supra* note 4, at 323.

[77] *Id.* at 330.

While this sounds like a compelling policy, law schools fighting to attract students "out of their league" are placed at a disadvantage if it cannot offer alternative incentives (like merit-based scholarships) to attract students. For a school in need of incentives to attract students beyond its current reach, a feasible compromise may be merit-based scholarships that are contingent on academic performance in law school. Thus, a student could receive a more lucrative scholarship depending on that student's performance in school. However, this solution may still present greater problems for students with considerable obligations outside of the legal classroom—like child support, caretaker obligations, or employment. Furthermore, a performance-based merit scholarship will likely not establish incentives robust enough to attract the students deciding between Harvard and Yale, and therefore, schools may have to innovate to establish programs that further appeal to students—like making joint degrees significantly more affordable and feasible. Regardless of if there is an absolute shift to need-based scholarships or a partial shift, more money needs to be allocated to meet students where they are, opposed to where schools expect them to be.

B. Adopt a Holistic Definition of Merit

A holistic approach in the law school admissions process would form a more equitable allocation of merit-aid. Such approach can apply directly to merit-based scholarships. Even though schools and employers are starting to consider individuals through a holistic lens, the LSAT remains the most significant criteria in scholarship awarding decisions,[78] if not the sole decision criteria in some cases. Oddly enough, the Law School Admission Council ("LSAC")—creators and administrators of the LSAT—recommend that the LSAT not be used outside the admissions context. The LSAC states that the LSAT is "designed to serve admissions functions only."[79] This recommendation likely stems from the fact that the LSAT does not predict future law school outcomes besides a positive correlation to first year grades.[80] Texas Tech professors found that the LSAT explained just 13% of variance in bar exam scores of its law graduates.[81] A team at the University of Cincinnati discovered that among its law graduates, the "LSAT score does not correlate with Ohio bar exam performance."[82] Professors from the University of California, Berkeley determined that the LSAT is not useful,

---

[78] Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 86 (2012) (arguing for a holistic review that deemphasizes the LSAT on the ground that the LSAT has a disparate impact on Blacks and Latinx students).

[79] L. SCH. ADMISSION COUNCIL, *supra* note 24.

[80] Curtis, *supra* note 4, at 324.

[81] Katherine A. Austin et al., *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 766 (2017).

[82] Taylor, *supra* note 3, at 99.

often showing zero correlations to twenty-six different effectiveness factors that correlate with strong performing lawyers.[83] Neither the LSAC nor any credible study suggests or claims that the LSAT translates to better performance during the entirety of law school or as a lawyer. Instead of using the LSAT as a criterion for "merit," law schools should adopt a holistic approach and look at what applicants did with what they were given.

Aaron Taylor proposes that an equitable merit-based system for both admissions and scholarships would recognize achievement in the context of socioeconomic factors and other obstacles.[84] For example, schools could award scholarships to "students who come from low-wealth and low-income backgrounds, first-generation students, Pell grant recipients, and graduates of under-resourced colleges and universities."[85] This could also extend to notable accomplishments outside school: those with a public service background; who are published authors; or even those who have impressive personal statements. In other words, schools could define merit on a range of different factors that contribute to successful students and individuals. Professor Diane Curtis aptly wrote, "scholarships could reward the true homerun hitters, rather than those who just trotted in from second or third base."[86]

C. Loan Forgiveness

A rather unpopular "solution" to the inequity of merit scholarships is to institute loan forgiveness programs. The unpopularity stems from the fact that it is not really a solution because it does little to address the problems of merit-based scholarships, but it does entice more students to attend law schools no matter the cost to them. Accreditation committees could push law schools and private lenders to offer all students the option of financing half the cost of law school through agreements that pay the school or private lender a fixed percentage of a student's income during the first decade after graduation. If timely payments are made after a decade, the loan should be forgiven no matter how much has been paid back. Such arrangements, which are becoming more common in undergraduate settings and for public interest jobs, give law schools an incentive to foster the long-term success of their students by allowing students to attend school and worry about payment later.[87] This allows students to invest their dollar wisely during school and

---

[83] MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 55 (2008), https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf.

[84] Taylor, *supra* note 3, at 101.

[85] *Id.*

[86] Curtis, *supra* note 4, at 330.

[87] *See generally* Katie Lobosco, *Nearly 30,000 Borrowers Awarded Public Service Loan Forgiveness So Far Under New Rules*, CNN (Nov. 23, 2021, 5:38 PM), https://www.cnn.com/2021/11/23/politics/public-service-loan-forgiveness-pslf/index.html; Richard H. Sander, *Are Law Schools Engines of Inequality?*, 48 J.L. & EDUC. 243, 263 (2019).

work fewer side jobs, rather than being broke and more likely to accept the highest paying job after school. This could make the "payback" portion more equitable across sectors and would entice students from different backgrounds to take on different jobs.

The drawback to loan forgiveness is that it essentially requires students disadvantaged by law school financing to bet on themselves and that they will both be able to repay their loans and make a satisfactory profit beyond their obligations. For students who have already been pushed down by systems, this is a significant risk. Loan forgiveness, while a step in the right direction, still requires an upfront investment for the opportunity to have upward socioeconomic success.

D. Reporting on the ABA 509

The final recommendation to improve scholarship equity focuses on equipping law schools with the knowledge to make an equitable and inclusive decision. 509 Reports are part of required disclosures accredited law schools must submit to the ABA.[88] Law schools directly submit data to the ABA in the Fall, after its most recent incoming class is solidified.[89] The reports provide information that is critical to understanding law school admissions and demographic breakdowns of prospective students. This includes, among other useful information: a breakdown of ethnicity and gender for each incoming class, the number of students who received grants or scholarships and in what amounts, and the GPA and LSAT percentiles for both full and part-time programs.[90] What the ABA 509 Report does not include is the racial or gender breakdown for scholarships, and specifically, merit-based scholarships.

The ABA should require schools to report what percentage of students, based on race and gender,[91] receive merit-aid. Although there would be no legal framework per se for a school to fix racially disproportionate scholarship funding, it would require schools to reflect on its complicity in a historically racist system. Furthermore, it would serve as another measure to rate and review law schools. By reporting the impacts scholarships have on race, it would create transparency among law schools and shine sunlight on racial disparities in the funding process. It could also be used as another public facing measure to show diversity, equity, and inclusion considered in national rankings and, most importantly, by prospective students.

---

[88] Rachel Margiewicz, *Why Every Law School Applicant Should Use ABA 509 Reports*, PREL. (May 4, 2020, 1:27 PM), https://nationaljurist.com/prelaw-why-every-law-school-applicant-should-use-aba-509-reports/.

[89] *Id.*

[90] *Id.*

[91] Gender identity, while not discussed at length here, has also been linked to disadvantages in the legal profession. Thus, it would be advantageous for empirical reasons to include within 509 reporting requirements.

While 509 reporting itself does not have enforcement power that would require schools to reverse its course of action, it could trigger other enforcement mechanisms set by the ABA under Standards 205 and 206. These standards require schools to create an environment that is equitable on a racial basis.[92] If schools overwhelmingly charge Black and Latinx students more than White students, the ABA could start enforcing standards 205 and 206, and schools could risk its accreditation statuses.[93] A revamped 509 reporting system, coupled with an affirmative duty to create equitable opportunity, might force law schools to look at itself as part of a transaction and not the sole arbiter of power.

CONCLUSION

Creating a more diverse, equitable, and inclusive legal community is an incremental process that constantly requires reforms and revisions. The parallels drawn between equity and merit scholarships in this article identify two major problems: (1) merit-based aid flows most lucratively to students who are either White or have college educated parents; and as a result (2) student debt for Black, Latinx, and first-generation lawyers is significantly higher. Consequently, objective notions that define merit have ignored fairness and equality.

If the legal community is to defend individuals and groups from oppression and inequity, the entire community must purport to address its own contributions to oppression and inequity. Merit-based scholarships increasingly have a disparate impact on Black and Latinx students who already face significant barriers in the legal profession. While this article proposes that law schools and the ABA reform how scholarships are awarded, it is incumbent on all lawyers and students to take an active role in ensuring that legal institutions truly provide for equal opportunity.

---

[92] AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–18 11–13 (2018), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter2.authcheckdam.pdf.

[93] *Id.*