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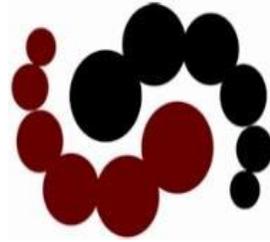
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# Civil Rights Law Section

## Washington State Bar Association

## Executive Committee 2019-2020

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## WSBA Civil Rights Law Section Newsletter

September 2020

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

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## WSBA Civil Rights Law Section Annual Awards

Each year, the Civil Rights Law Section recognizes individuals or organizations who have made a notable contribution to the cause of civil rights. Recipients are persons or entities who have championed the cause of equality for impoverished, underserved, minority, or disabled populations in Washington state. Examples of exemplary work in this area would include, but are not limited to, those who regularly fight on local or state government levels for expansion or defense of civil rights protections, or who represent or advocate on behalf of people or issues concerning civil rights or basic human rights.

### Distinguished Service Award

Recipients are attorneys who have demonstrated throughout their career perseverance and commitment to the expansion or defense of civil rights protections at the local, state, or national level.

### Keeper of the Flame Award

Recipients are legal professionals or legal organizations whose work carries forward civil rights protection, keeping the flame alive of past civil rights movements for future generations. Nominees are legal professionals or legal organizations whose demonstrated commitment to protecting and advancing civil rights brings hope to members of the Civil Rights Law Section that our futures are in good hands.

The Civil Rights Law Section Executive Committee created this award in 2020 to encourage and honor those in the first half of their careers who use the tools of the legal profession toward societal healing and justice. The first person to receive this award will be honored at the [Civil Rights Law Section's Annual Membership Meeting and Reception on Sept. 24, 2020](#).

### Frances B. North Civic Leader Award

Recipients are attorneys, individuals, or organizations that represent or advocate on behalf of people or legal issues regarding civil rights, civil liberties, or basic human rights such as freedom from discrimination, protection from abuse, or obtaining essential human services such as food, health care, and shelter.

The Civil Rights Law Section renamed its Civic Leader Award in 2019 to honor the life of [Frances B. North](#) (1919-2017), a Seattle civic leader known for her role in uniting the business sector, public schools, and city government to end segregation. Frances North was the first African American woman *allowed* to work on the sales floor of Bests/Nordstrom. Frances brought friends, relations, and colleagues of diverse economic, cultural, religious and ancestral backgrounds together to fight for civil rights and to celebrate in style. We honor those who carry her spirit and fortitude with this award.



**Thurs., September 24, 2020**

Please join us for our virtual annual meeting & celebration of civil rights champions.

• Awards & Virtual Concert at 4:00 PM • Happy Hour & Meeting at 5:00 PM •

RSVP via the [Google Form here](#) (or via the link in the email) to receive the concert, ceremony, and Zoom social event and meeting links.



## Special Performance by *Naomi Wachira*



An acclaimed Seattle-based folk artist, Naomi Wachira was born in Kenya and grew up singing gospel music in a choir of family and friends. Her discography includes four albums, the latest of which, *Song of Lament*, was released in 2017.



## 2019 & 2020 Honorees

*Rev. Harriet Walden*

2019 Frances B. North Civic Leader Award

• *Neil Fox & Lila Silverstein*

2019 Distinguished Service Award

*Maru Mora Villalpando*

2020 Frances B. North Civic Leader Award

• *Ron Ward*

2020 Distinguished Service Award

• *Sandy Restrepo*

2020 Keeper of the Flame Award

## 2019 Award Recipients

### **DISTINGUISHED**

**SERVICE AWARD:** Neil Fox and Lila Silverstein for their successful work to stop capital punishment and contribute to racial disparity research.

### **FRANCES B. NORTH CIVIC LEADER AWARD:**

Reverend Harriett Walden for her tireless work on police accountability and police-community relations.

## 2020 Award Recipients

### **DISTINGUISHED**

**SERVICE AWARD:** Ron Ward for his trailblazing success and leadership to increase racial diversity and participation by those who have been traditionally under-represented.

**FRANCES B. NORTH CIVIC LEADER AWARD:** Maru Mora Villalpando for her tireless work advocating for immigrants, refugees, and those detained at the Northwest Detention Center and for showing us how mutual aid looks in practice.

**KEEPER OF THE FLAME AWARD:** Sandy Restrepo for her tireless work organizing, empowering, and advocating for immigrants and those who seek refuge and asylum.

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## WSBA Chair's Parting Words

Molly P. Matter

Dear Members of the Civil Rights Law Section,

Espero que tú y tu familia están sanos y salvos.

I hope that this newsletter finds you, your family, and your community safe as we experience together the multiple threats to our health, safety, and our civil rights.

The main focus of this newsletter is the doctrine of qualified immunity. As part of our commitment to bringing young lawyers and students into the Civil Rights Law Section, my summer interns dived into the doctrine. Melissa London, a 2L at the University of Washington School of Law, is pursuing a career in civil rights law. Natalie Sokol-Snyder, a sophomore at Pomona College studying public policy analysis, is interested in gender and racial justice issues. We are thankful for their research and excellent writing and hope that as a Section, we continue to provide opportunities for students to grapple with pressing civil rights issues, creating a collaborative learning community.

For the past 25 years, I have thought long and hard about how we eradicate white supremacy and how we eradicate the conditioning of American white supremacy not just from the body politic as a whole, but from our individual physical bodies and consciousness - and more specifically, the responsibility of white people to educate their/our fellow white families, friends, and colleagues.

Instead of giving a status report on the Civil Rights Law Section's work of 2020, I am going to share some personal thoughts in hope that it provides, if nothing else, solace that we are in this together.

The dehumanizing, racialized administration of justice<sup>1</sup> and its waste of human potential and human imagination is a catastrophe that on a good day finds me teaching my daughter how to stand up and carry the torch and on a bad day finds me browsing real estate in Uruguay.

I talk to my 7-year-old daughter a lot about what's going on and have been since she was about 3 years old. As a white-identified person living in America raising a white child, the most important education I can give her is real American history, teaching her to know her own ancestry, and empowering her to fight racism and stand up for justice.

She and I talk about the genocide of indigenous people, about how some of our first ancestors were from Ireland and Belgium. We talk about the Battle of New Ulm, how one of her female ancestors sat on dynamite in a bunker with all the township's women and children, holding the match while the Lakota/Sioux fought to defend the lives of their children after our ancestors starved them off their land. When I bring this story up, she says, "I wouldn't do that" and then starts to list her friends who have brown skin. "Sybil is my friend...Valen and Nela are my sisters..." connecting the dots. We talk about slavery and the Underground Railroad and how people with pale skin like us and

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<sup>1</sup> See Washington State Supreme Court Letter (June 4, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf> ("The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding. But recent events have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge: the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.").

people with brown skin worked together to free slaves. We talk about the never-ending exploitation of migrant labor and about what “fair trade” means and how food gets to our table. We talk about money and why some people think money matters more than human dignity or safety.

We talk about what Black Lives Matter means, about why people are protesting, about why people are choosing to not wear masks, about what the Confederate flag stands for and why the statues are falling. I learn a lot from her. Children are uniquely in tune to balance and imbalance, to fairness and unfairness, providing mirrors to the dysfunctional system, acting out what they see and feel, not overintellectualizing a problem, but instead coming at it with raw heart.

When I interviewed children separated from their families in the summer of 2018 and returned home exhausted and traumatized from what I had seen, she asked me, “Mama, why won’t they take me away from you? Is it because I’m white?” I paused and realized that answering, “We were born in America,” was not the whole truth. I told her she was safe, but that many children with brown skin were not safe because our system of justice is indeed racialized. When I spoke at a protest before the pandemic in Tacoma about what I had seen inside detention centers, a young Black woman (high schooler) approached me and genuinely asked if she was going to be put in a detention center. I was surprised by the question and assured her that she would not be taken by ICE because of the color of her skin, but it profoundly struck me. Can I assure her? Does her question represent the sentiment of youth of color today?

When I was 15, I was visiting the death camps of Dachau and Bergen-Belsen, Germany, (walking the grounds covered in purple heather and viewing the wall-sized black and white photo exhibit of bodies in mass graves) while simultaneously reading *The Autobiography of Malcolm X* (that my sister had brought home from college). It dawned on me then that how this country would ever heal from slavery<sup>2</sup> and indigenous genocide<sup>3</sup> would be to face it head on.

The phrase “unprecedented times” is tossed around a lot these days, and I recently took it out of my vocabulary not because it is an inaccurate description of where we are at, but because it encourages us to detach. And distancing ourselves from the real and present danger we are in—as a democracy, as a Republic, as Americans—is the same sentiment of “all lives matter.” It is a way to shut down from feeling the very real human suffering we are witnessing. Mechanisms of denial have overstayed their welcome. We must accept reality as it is.

Reality as it is today: Nearly 200,000 deaths in the United States have resulted from a global pandemic with no uniform federal policy on how to prevent or contain it.<sup>4</sup> COVID-19 is projected to be the third leading cause of death in 2020.<sup>5</sup> Due to the lack of any uniform federal policy to curtail the spread of the virus, states are unilaterally engaging in high risk behavior that threatens national public health and our economy. In South Dakota, the Sturgis motorcycle rally spread

<sup>2</sup> *Id.* (“Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.”).

<sup>3</sup> See e.g., Angelique Townsend EagleWoman, *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the United Nations Declaration on the Rights of Indigenous Peoples*, 3 AM. INDIAN L. J. 424, 429, 439 (2015) (“Spanish authorized genocide of Native Americans carried out by Columbus was fueled by greed, perversion and the ability to dehumanize and deny human status to others from a different culture.”) (“Since the formation of the United States on July 4, 1776, the settler-nation has engaged in a long term and persistent policy of genocide against American Indians.”); Ann Piccard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013). Gary Clayton Anderson, *The Native Peoples of the American West: Genocide or Ethnic Cleansing?*, 47 W. HIST. Q. 407–33 (2016); Lindsay Glauner, Comment, *The Need for Accountability and Reparations: 1830-1976 The United States Government’s Role in the Promotion, Implementation, and Executive of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 929-34 (2002). See generally JEFF BENVENUTO ET AL., COLONIAL GENOCIDE IN INDIGENOUS NORTH AMERICA (Alexander Laban Hinton, Andrew Woolford & Jeff Benvenuto eds., 2014). In the 2010 Department of Defense Appropriations Act, the U.S. Senate finally apologized for the *mistreatment* of Native Americans but has yet to define its actions as genocide, “The United States, acting through Congress . . . (3) recognizes that there have been years of official depredations, ill-conceived policies, and the breaking of covenants . . . (4) apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect . . . (5) expresses its regret for the ramifications of former wrongs . . .” H.R. 3326, 111th Cong. § 8113 (2009).

<sup>4</sup> Worldometer, *United States*, <https://www.worldometers.info/coronavirus/country/us/>; Nurith Aizenman, *300,000 Deaths by December? 9 Takeaways From the Newest COVID-19 Projections*, NPR (Aug. 6, 2020, 9:10 PM), <https://www.npr.org/sections/health-shots/2020/08/06/900000671/300-000-deaths-by-december-9-takeaways-of-the-newest-covid-19-projections>.

<sup>5</sup> *Id.*

250,000 cases across the country, which economists estimate will cost \$12.2 billion.<sup>6</sup> Reality as it is today: Detention centers and prisons are the top 100 epicenters of the virus.<sup>7</sup> About half of all states do not even require prison staff to wear masks.<sup>8</sup> As a person who has been incarcerated and institutionalized, this data hits hard.

Reality as it is today: The highest rate of COVID-19 in our state is among Latinx farmworkers, who have been historically underrepresented, who have suffered substandard housing and oppressive working conditions, who harvest and package the food that end up on our kitchen tables.<sup>9</sup>

Reality as it is today: The United States is allegedly in violation of multiple international human rights treaties.<sup>10</sup> Reality is the cruel and inhumane separation of children from their families seeking asylum, the ongoing imprisonment of refugee children, and indefinite detainment of families.<sup>11</sup> Under United States federal law, according to the United Nations, some have defined the separation of young children from their parents as torture.<sup>12</sup>

Reality as it is today: The ongoing killing of unarmed Black people and other people of color by law enforcement<sup>13</sup> and the killing of peaceful protestors by white supremacist armed militia.<sup>14</sup> Reality as it is today: The drastic rise of white nationalism and hate crimes against people of color since 2016.<sup>15</sup> Reality: 93 percent of the 7,750 protests over this summer to demand justice since the killing of George Floyd have been peaceful protests.<sup>16</sup> Americans have been actively engaged in freedom of assembly protected under the 1<sup>st</sup> Amendment.

Reality is that the rate of violence increases when the Trump Administration deploys federal agents to peaceful protests.<sup>17</sup> According to the nonprofit Armed Conflict Location and Event Data Project, which monitors war zones and political upheaval around the world (which launched the [US Crisis Monitor report](#) with Princeton University's Bridging Divides Initiative), the number of "violent" demonstrations increased from 17 percent to 42 percent after the federal deployment

<sup>6</sup> Economists state that it would have been more cost effective to pay each person attending the rally \$26,000.00 for the economic hit taken by the spread of 250,000 cases. See Tommy Beer, *Sturgis Motorcycle Rally May Have Caused 250,000 Coronavirus Cases, Economists Say*, FORBES (Sept. 8, 2020, 4:36 PM), <https://www.forbes.com/sites/tommybeer/2020/09/08/sturgis-motorcycle-rally-may-have-caused-250000-coronavirus-cases-economists-say/#73e0c13645fa>.

<sup>7</sup> *Coronavirus Cases in Prisons are Exploding: More People Need to be Let Out*, THE WASH. POST (Aug. 21, 2020, 1:25 PM), [https://www.washingtonpost.com/opinions/coronavirus-cases-in-prisons-are-exploding-more-people-need-to-be-let-out/2020/08/21/711b7b9a-e306-11ea-8dd2-d07812bf00f7\\_story.html](https://www.washingtonpost.com/opinions/coronavirus-cases-in-prisons-are-exploding-more-people-need-to-be-let-out/2020/08/21/711b7b9a-e306-11ea-8dd2-d07812bf00f7_story.html).

<sup>8</sup> Emily Widra & Tiana Herring, *Half of States Fail to Require Mask Use by Correctional Staff*, PRISON POL'Y INITIATIVE (Aug. 4, 2020), <https://www.prisonpolicy.org/blog/2020/08/14/masks-in-prisons/>.

<sup>9</sup> Hal Bernton, *Farmworker Death Draws State Scrutiny in Okanogan County Where COVID-19 Cases are Spiking*, THE SEATTLE TIMES (July 26, 2020, 10:20 AM), [www.seattletimes.com/seattle-news/health/farmworker-death-draws-state-scrutiny-in-okanogan-county-where-covid-19-cases-are-spiking/](http://www.seattletimes.com/seattle-news/health/farmworker-death-draws-state-scrutiny-in-okanogan-county-where-covid-19-cases-are-spiking/).

<sup>10</sup> The United States has withdrawn from several international accords since 2016, causing great concern globally to human rights advocates. The U.S. is allegedly in violation of the UN Universal Declaration of Human Rights, the 1955 Treaty of Amity, the UN Convention on the Rights of the Child, and the UN Convention on the Status of Refugees. See Nick Cummings-Bruce, *Taking Migrant Children From Parents is Illegal, U.N. Tells U.S.*, THE N.Y. TIMES (June 5, 2018), [www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html](http://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html); *The 1951 Refugee Convention*, UNCHR, <https://www.unhcr.org/en-us/1951-refugee-convention.html>.

<sup>11</sup> See Devin Miller, *AAP a Leading Voice Against Separating Children, Parents at the Border*, AAP (June 14, 2018), <https://www.aappublications.org/news/2018/06/14/washington061418>; Richard Gonzales, *19 States and D.C. Sue Administration to Stop Indefinite Detention of Migrant Children*, NPR (Aug. 26, 2019, 6:57 PM), <https://www.npr.org/2019/08/26/754518950/19-states-and-dc-sue-administration-over-plan-to-detain-migrant-children-indefinite>.

<sup>12</sup> Some human rights advocates have referred to the policy not just as cruel and inhumane but also as torture under the definition of the United Nations' definition of torture. See Jaana Juvonen & Jennifer Silvers, *Separating Children From Parents at the Border Isn't Just Cruel. It's Torture.*, THE WASH. POST (May 14, 2018, 9:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/05/15/separating-children-from-parents-at-the-border-isnt-just-cruel-its-torture/>.

<sup>13</sup> See *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at \*2 (S.D. Miss. Aug. 4, 2020).

<sup>14</sup> Eric Levenson, Alisha Ebrahimji & Christina Maxouris, *Illinois Teen Arrested in Fatal Shooting at Kenosha Protest, Police Say*, CNN (Aug. 26, 2020, 5:00 PM), [www.cnn.com/2020/08/26/us/kenosha-wisconsin-wednesday-shooting/index.html](http://www.cnn.com/2020/08/26/us/kenosha-wisconsin-wednesday-shooting/index.html).

<sup>15</sup> Hate Crimes and the Rise of White Nationalism: Hearing Before the Comm. on the Judiciary, 116th Cong. (2019), available at <https://judiciary.house.gov/legislation/hearings/hate-crimes-and-rise-white-nationalism> [https://perma.cc/38UA-MN9L]; (statement of Witness, Kristen Clarke, President and Executive Director, Lawyers' Committee for Civil Rights Under Law, available at <https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>) [https://perma.cc/8TM8-7HKP]. See *World Report 2019*, HUM. RTS. WATCH, at 619, available at [https://www.hrw.org/sites/default/files/world\\_report\\_download/hrw\\_world\\_report\\_2019.pdf](https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf) [https://perma.cc/2XST-RUHQ]; Simon Romero, Caitlin Dickerson, Miriam Jordan & Patricia Mazzei, *'It Feels Like Being Hunted': Latinos Across U.S. in Fear After El Paso Massacre*, THE N.Y. TIMES (Aug. 6, 2019), [www.nytimes.com/2019/08/06/us/el-paso-shooting-latino-anxiety.html](http://www.nytimes.com/2019/08/06/us/el-paso-shooting-latino-anxiety.html) [https://perma.cc/JZ27-TU8G].

<sup>16</sup> Brandi Buchman, *In Summer of Political Vitriol, 93% of Protests Were Peaceful*, COURTHOUSE NEWS SERV. (Sept. 4, 2020), <https://www.courthousenews.com/in-summer-of-political-vitriol-93-of-protests-were-peaceful/>; Tim Craig, *The United States is in Crisis': Report Tracks Thousands of Summer Protests, Most Nonviolent*, THE WASH. POST (Sept. 3, 2020, 2:57 PM), [https://www.washingtonpost.com/national/the-united-states-is-in-crisis-report-tracks-thousands-of-summer-protests-most-nonviolent/2020/09/03/b43c359a-edec-11ea-99a1-71343d03bc29\\_story.html](https://www.washingtonpost.com/national/the-united-states-is-in-crisis-report-tracks-thousands-of-summer-protests-most-nonviolent/2020/09/03/b43c359a-edec-11ea-99a1-71343d03bc29_story.html);

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

began in Oregon.<sup>18</sup> Reality is that we are all at risk for more political violence and instability as we head toward the election.

Reality as it is today: 40 percent of Americans receive their local news from Sinclair Broadcast Group (which owned nearly 200 local news stations nationwide in 2018).<sup>19</sup> Sinclair Broadcasting was on track to reach 70% of all United States' households in a merger but the attempted acquisition resulted in the largest civil penalty involving a broadcaster in the Federal Communications Commission's history.<sup>20</sup> Also within the context of our First Amendment right to receive information, legal questions surround social media's First Amendment right to ensure that accurate information—about how to register to vote and successfully cast a ballot by Election Day—is not undermined by misinformation on online platforms such as Facebook, Twitter and Instagram.<sup>21</sup>

Reality as it is today: Hundreds of lawsuits have been filed during the pandemic to defend our most vital lifeline in our democracy -- the right to vote.<sup>22</sup> Reality as it has always been: our right to vote has historically been enforced by communities of color, various civil legal aid organizations and the private bar (law firms and private practitioners) who have filed nearly 90 percent of all voting rights claims since the enactment of the Voting Rights Act.<sup>23</sup> Only 10% of all voting rights claims have been initiated by the Department of Justice since 1965.<sup>24</sup> Reality as it is today: Around-the-clock litigation (400 lawsuits by the ACLU alone<sup>25</sup>) and the constant fight by governors to simply enforce the rule of law, defend the United States Constitution, defend our political and civil rights, and protect the public from lawlessness and public health risks.<sup>26</sup>

Reality as it exists today is testing our deepest values and strengths. What we are experiencing is not normal; nothing about it is. We are in this together.

<sup>18</sup> *Id.*

<sup>19</sup> Bob Bryan, *Sinclair Broadcast Group Owns Local News Stations Across the US – Find Out Whether Your Local Station is One of Them*, BUS. INSIDER (April 3, 2020, 9:49 AM), [www.businessinsider.com/sinclair-broadcast-group-stations-by-state-list-2018-4](http://www.businessinsider.com/sinclair-broadcast-group-stations-by-state-list-2018-4). In Washington state, the following stations are owned: KUNS (Univision), KOMO (ABC), KLEW (CBS), KEPR (CBS), KEPR-2 (CW), KIMA (CBS), KIMA-2 (CW), KORX (Univision), and KUNW (Univision).

<sup>20</sup> Rob McLean, *Sinclair Broadcasting Will Pay \$48 Million Civil Penalty to FCC*, CNN (May 7, 2020, 10:30 AM), <https://www.cnn.com/2020/05/06/media/fcc-sinclair-broadcasting-civil-penalty/index.html>. Sinclair Broadcasting applied to merge with Tribune Media to control 70% all household media in the country. This acquisition resulted in three FCC investigations.

<sup>21</sup> Complaint at 33, *Rock the Vote v. Trump* (Case 3:20-cv-06021), [https://www.freepress.net/sites/default/files/2020-08/lawsuit\\_against\\_trump\\_executive\\_order\\_0.pdf](https://www.freepress.net/sites/default/files/2020-08/lawsuit_against_trump_executive_order_0.pdf).

<sup>22</sup> Sylvia Albert, *Secure, Safe, and Auditable: Protecting the Integrity of the 2020 Elections*, COMMON CAUSE (August 4, 2020, 10:00 AM), <https://homeland.house.gov/imo/media/doc/Testimony%20-%20Albert.pdf>; *Ensuring a Free, Fair and Safe Election during the Coronavirus Pandemic: Hearing Before the Subcommittee on the Coronavirus Crisis*, SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS (Sept. 9, 2020, 1:00 PM), <https://coronavirus.house.gov/subcommittee-activity/hearings/remote-hearing-ensuring-free-fair-and-safe-election-during.?bbeml=tp-bMioW136HU-N8RUoZ8vFlg.jglPvBqqwak2fPwJSNopD9g.mGq1FGe7Y06xcGxSqryFIA.liZiXlb0-PkWKVMzv7sTdkA>.

<sup>23</sup> This percentage is derived from data compiled using the Annual Reports of the Director of the Administrative Office of the United States Courts, Judicial Business of the United States, years 1977 to 2019. U.S. COURTS, <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> [<https://perma.cc/KN3Q-HNEA>].

<sup>24</sup> *Id.*

<sup>25</sup> David Crary, *'See You in Court': ACLU Files Nearly 400 Cases Versus Trump*, ABC (Aug. 6, 2020, 5:27 PM), <https://abcnews.go.com/Politics/wireStory/court-aclu-files-400-cases-versus-trump-72210401>.

<sup>26</sup> Groups of states sued the Trump Administration 36 times during its first year. Governors have filed over 50 lawsuits just in the last two years. See Alan Greenblatt, *How Governors, Not Congress, Emerged as Trump's Main Opposition*, GOVERNING (April 28, 2020), [www.governing.com/now/How-Governors-Not-Congress-Emerged-as-Trumps-Main-Opposition.html](http://www.governing.com/now/How-Governors-Not-Congress-Emerged-as-Trumps-Main-Opposition.html). Chandelis Duster, *17 States, DC Sue Trump Administration Over Visa Rules for College Students*, CNN (July 13, 2020, 2:35 PM),

<https://www.cnn.com/2020/07/13/politics/trump-administration-visa-rules-lawsuit/index.html>; Matt Zapotosky, *17 States and D.C. Sue Over Trump's Family Separation Policy*, THE WASH. POST (June 26, 2018, 2:01 PM), [https://www.washingtonpost.com/world/national-security/17-states-and-dc-sue-over-trumps-family-separation-policy/2018/06/26/b32d2a6c-7975-11e8-80be-6d32e182a3bc\\_story.html](https://www.washingtonpost.com/world/national-security/17-states-and-dc-sue-over-trumps-family-separation-policy/2018/06/26/b32d2a6c-7975-11e8-80be-6d32e182a3bc_story.html); Richard Gonzales, *19 States and D.C. Sue Administration to Stop Indefinite Detention of Migrant Children*, NPR (Aug. 26, 2019, 6:57 PM), <https://www.npr.org/2019/08/26/754518950/19-states-and-dc-sue-administration-over-plan-to-detain-migrant-children-indefinite>;

Scott Neuman, *Governors Push Back on Trump's Threat to Deploy Federal Troops to Quell Unrest*, NPR (June 2, 2020, 5:57 AM), <https://www.npr.org/2020/06/02/867565338/governors-push-back-on-trumps-threat-to-deploy-federal-troops-to- quell-unrest>; Gov. Whitmer Calls for Unity

Following President Trump's Call for Governors to 'Dominate' Protesters, THE OFFICE OF GOV. GRETCHEN WHITMER (June 1, 2020), <https://www.michigan.gov/whitmer/0,9309,7-387-90499-530589--,00.html>. See also Pete Williams, *Supreme Court Tosses Citizenship Question From 2020 Census Forms, a Victory for Democratic States*, NBC (June 27, 2019, 2:59 PM), <https://www.nbcnews.com/politics/supreme-court/supreme-court-tosses-citizenship-question-2020-census-forms-victory-democratic-n1014651>; Mike Schneider, *Census Bureau Must Temporarily Halt Winding Down Operations*, AP (Sept. 6, 2020), <https://apnews.com/d133f212cd8849aebd423908b8fb0e6d?bbeml=tp-bMioW136HU-N8RUoZ8vFlg.jglPvBqqwak2fPwJSNopD9g.mGq1FGe7Y06xcGxSqryFIA.lkNzr11GL50uk9d1byCcepw> (regarding lawsuits for accurate Census count).

Many of us are asking the question, “Can we endure?” Some of our leaders are reminding us that the question itself is irrelevant to indigenous and Black people. Because for many, it’s just another day. Same story, different cast of characters. Many people warn that we have yet to come to our true reckoning, that this is only the beginning.

So, for today, I am asking, “Can we envision ourselves and our children not just surviving these multiple assaults on health and safety, but thriving despite them?” As a mother, I try to do it by being honest with exactly where I am, by naming my own mistakes and forgiving myself, by showing empathy and teaching empathy, by modeling that I too continue to learn and grow up.

Arundhati Roy once said, “The American way of life is not sustainable. It doesn’t acknowledge that there is a world beyond America.” In 2020, we realize not only that the American way of life is unsustainable for the rest of the world, but it is deadly to all of us within America whether it be death by an uncontained virus, death by law enforcement, or death by what I call a “dis-membering,” a forgetting that we all belong. Each one of us belongs to and are responsible for one another. There is no going back to a time before the pandemic, to a time before children were separated from their families at the border, to a time before impending environmental collapse, to a time before Tamir Rice, Travon Martin, Breonna Taylor and George Floyd.

We are collectively and individually responsible for administering justice. We are accountable to the public we serve. It is a privilege. If we inhabit this soil, pay taxes, vote, and exist as Americans, we are complicit. But it’s this nugget of cognitive dissonance that is the key to facing it head on, not just our survival, but our evolution: the awareness and acknowledgment of how we can thrive with eyes wide open to the suffering, despite injustice; maintain our gratitude; understand our privilege; and raise conscious beings that will find their own path of what it means to live a liberated human life. And probably teach us a few things we never dreamed of.

Humbly,

Your Chair,

**Molly Peach Matter**

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## **Qualified Immunity and Police Accountability 2020**

**Melissa London & Natalie Sokol-Snyder**

**August 10, 2020**

## Introduction:

The Black Lives Matter movement and the recent civil rights political unrest and protests have brought the issue of qualified immunity to center stage. The purpose of this newsletter is to educate our members on (1) the doctrine itself, its legal premise and development; (2) current state and congressional action to address police accountability; (3) and the nexus between qualified immunity and the administration of justice.

The qualified immunity doctrine has been heavily critiqued for decades by civil rights advocates and constitutional law scholars. The doctrine is familiar to family members of loved ones killed by police who have sought justice by holding officers criminally liable. At this turning point in history, qualified immunity is one of the most pressing civil rights issues facing the legal community. As the Civil Rights Law Section, it is incumbent upon us to be part of the solution rather than be complacent in the face of the roadblock to justice that the legal community created.

## U.S. Supreme Court Qualified Immunity Timeline:<sup>27</sup>

*Pierson v. Ray*, 386 U.S. 547 (1967)

(Supreme Court allows qualified immunity to a state court judge who is sued by civil rights activists. The judge was alleged to have impermissibly allowed a prosecutor to cross examine African-American ministers and others who had participated in bus boycotts.)

*Scheuer v. Rhodes*, 416 U.S. 232 (1974)

(Ohio governor and other high level executive officials insulated from a lawsuit brought by the surviving families of Kent State University students killed on campus during anti-war protests in May 1970.)

*Harlow v. Fitzgerald*, 457 U.S. 800, 817–18, 102 S. Ct. 2727 (1982)

(Modern standard of qualified immunity, rejecting “good faith” and subjective standards, replacing them with “objective reasonableness of an official’s conduct” based on a violation of “clearly established” law.)

*Malley v. Briggs*, 475 U.S. 335, 344-45 (1986)

(Qualified immunity extended to line level officers. Court concluded that the doctrine protects “all but the plainly incompetent or those who knowingly violate the law.”)

*Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001)

(Required courts to undertake a two-step sequential analysis, to determine: (1) whether the plaintiff’s allegations, if true, violate an identified constitutional right, and (2) if so, whether the right was “clearly established” at the time of the violation.)

*Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002)

(Qualified immunity denied to correction officers who handcuffed a prisoner to a hitching post for seven hours. New bizarre facts do not require finding that right has not been clearly established.)

*Pearson v. Callahan*, 555 U.S. 223, 123 S. Ct. 808 (2009)

(*Saucier*’s two-step analysis does not have to be analyzed in order. Qualified immunity granted for warrantless home invasion because the right was not “clearly established.”)

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<sup>27</sup> The Massachusetts Chapter and the National Civil Rights Committee of the Federal Bar Association, *A Conversation About Police Violence and Police Misconduct Litigation in Boston*, July 30, 2020.

*Ashcroft v. al-Kidd*, 536 U.S. 731, 740, 131 S. Ct. 2074 (2011)

(Justice Scalia subtly revises clearly established standard—the contours of the right must be “sufficiently clear such that every reasonable official would have understood that what he was doing violated that right.”)

*Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam)

(Qualified immunity granted to an officer who gunned down a fleeing driver during a high-speed chase, reversing the circuit court. Reiterated that qualified immunity protects all but the “plainly incompetent” or “who knowingly violate the law” and does “not [ ] define clearly established law at a high level of generality.”)

## What is the Qualified Immunity Doctrine?

Qualified immunity is a doctrine that can protect government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>28</sup> The doctrine attempts to balance “the need to hold public officials accountable when they exercise power irresponsibly” with “the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>29</sup> Qualified immunity is raised as an affirmative defense, but when granted operates as an immunity from suit rather than a defense to liability.<sup>30</sup> Accordingly, courts seek to resolve the question of qualified immunity as early as possible in the litigation.<sup>31</sup>

The Supreme Court first created the doctrine of qualified immunity in 1967,<sup>32</sup> then significantly expanded it in 1982 in *Harlow v. Fitzgerald*. For the past four decades, the doctrine has undergone several modifications. In 2001, the Court set out a two-step analysis in *Saucier v. Katz* for qualified immunity claims against officials: (1) whether a constitutional violation occurred, and (2) whether the right was “clearly established” at the time of the violation.<sup>33</sup> In 2009, the Court allowed the qualified immunity doctrine to become even more unwieldy in *Pearson v. Callahan*, holding that lower courts are permitted to “exercise their sound discretion in deciding which of the two prongs ... should be addressed first in light of the circumstances of the particular case at hand.”<sup>34</sup> Accordingly, courts were provided an easier path to dismiss claims rather than having to follow the *Saucier* two-step analysis. Given that either prong can be addressed first, a claim can be dismissed without even assessing whether a constitutional violation occurred.<sup>35</sup> While the Court reasoned that this method is beneficial so as to not “expend[] ‘scarce judicial resources’ to resolve difficult and novel questions of constitutional or statutory interpretation,”<sup>36</sup> it has more notably allowed for the dismissal of constitutional violations due to the interpretation of whether a right is “clearly established.” If the two-prong analysis is followed sequentially, the first inquiry turns on “whether [the] plaintiff’s allegations, if true, establish a constitutional violation.”<sup>37</sup> However, even if answered in the affirmative, the plaintiff must then prove that the right was “clearly established” in order to hold an

<sup>28</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also 42 U.S.C. § 1983 (“every person who...causes to be subjected, any citizen of the United States...[to a] deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured...except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity”) (italics added).

<sup>29</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>30</sup> *Harlow*, 457 U.S. at 815; *Pearson*, 555 U.S. at 231.

<sup>31</sup> *Pearson*, 555 U.S. at 232.

<sup>32</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>33</sup> *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

<sup>34</sup> *Pearson*, 555 U.S. at 236.

<sup>35</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

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

<sup>37</sup> *Hope v. Pelzer*, 536 U.S. 730, 736 (2002).

officer criminally liable.<sup>38</sup> If the plaintiff cannot prove that the right was clearly established, then qualified immunity is granted. A right is clearly established when “every reasonable official would have understood that what [they were] doing violate[d] that right.”<sup>39</sup> Further, the right at issue must be defined with specificity rather than a “high level of generality.”<sup>40</sup>

If it is alleged that an officer violated a clearly established right, then existing precedent must be presented that “placed the statutory or constitutional question beyond debate” to ensure that the officer had fair warning.<sup>41</sup> A lower court can find existing precedent from decisions of the Supreme Court, its own precedent, or decisions by other courts of appeal so long as the facts are “materially similar.”<sup>42</sup> If materially similar cases do not exist, then the court concludes that the law was not clearly established at the time of the officer’s conduct such that a reasonable officer in their position would have known that such actions were unconstitutional.<sup>43</sup> Effectively, the flexibility of the two-step analysis protects all officials except “the plainly incompetent or those who knowingly violate the law.”<sup>44</sup>

## Is Qualified Immunity No Longer Justified?

The qualified immunity doctrine enables the disproportionate use of deadly force by police officers against people of color.<sup>45</sup> The flawed development and application of this doctrine has been recently brought to our attention by the unjustified killings of Black Americans at the hands of police officers: George Floyd, Ahmaud Arbery, Tony McDade, Wayne Jones, and Breonna Taylor, to name a few. So long as those officers did not violate “clearly established” law, they are protected. Due to the flexibility of the two-step *Saucier* analysis, in addition to the precise qualifications imposed by the Court (e.g., defining the law with “specificity,” “putting the constitutional question beyond debate,” presenting precedent of “materially similar” cases), there are a variety of ways for a court to dismiss a claim once qualified immunity is raised. In effect, this doctrine provides officers a shield from suit.

Due to the Court’s decision in *Pearson*, a claim can be dismissed without even determining whether a constitutional violation occurred. For example, the Sixth Circuit Court of Appeals in *Baxter v. Bracey* declined to answer the “complex constitutional question” of whether a police officer’s release of a canine on an already surrendering suspect violated the suspect’s constitutional right to be free from excessive force.<sup>46</sup> Instead, the court dismissed the claim under the “clearly established” prong, unable to find any prior case law with similar facts.<sup>47</sup> This case was recently appealed to the Supreme Court, but the petition for writ of certiorari was denied.<sup>48</sup>

A notable decision out of the Ninth Circuit Court of Appeals highlights the dangerous development of the qualified immunity doctrine to not only require that the law at issue be “clearly established,” but that it must be enough to put the “constitutional question beyond debate.”<sup>49</sup> In *Jessop v. City of*

<sup>38</sup> *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019).

<sup>39</sup> *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

<sup>40</sup> See, e.g., *Ashcroft*, 563 U.S. at 742 (finding that the fact that an unreasonable search or seizure violates the Fourth Amendment is not indicative of whether the official’s particular conduct at issue violated a clearly established law); *City of Escondido*, 139 S. Ct. at 503 (holding that the “right to be free from excessive force” was too general for purposes of qualified immunity and instead had to be particularized to the official’s conduct).

<sup>41</sup> *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>42</sup> *Hope*, 536 U.S. at 736.

<sup>43</sup> *A.D. v. California Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013).

<sup>44</sup> *Ashcroft*, 563 U.S. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

<sup>45</sup> See generally Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793 (2019) (“We find that African American men and women, American Indian/Alaska Native men and women, and Latino men face higher lifetime risk of being killed by police than do their white peers. Risk is highest for black men who...face about a 1 in 1,000 chance of being killed by police over the life course.”). See also *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at \*2 (S.D. Miss. Aug. 4, 2020).

<sup>46</sup> *Baxter v. Bracey*, 751 Fed. Appx. 869, 870-71 (6th Cir. 2018).

<sup>47</sup> *Id.* at 873.

<sup>48</sup> See *Baxter v. Bracey*, 751 Fed. Appx. 869 (6th Cir. 2018), cert. denied, 140 S. Ct. 1862.

<sup>49</sup> *Ashcroft*, 563 U.S. at 741.

*Fresno*, two officers were alleged of stealing \$225,000 worth of assets while executing a search warrant, an unreasonable seizure under the Fourth Amendment.<sup>50</sup> Even when the court was presented with a prior case in support of the appellants' argument, the court granted qualified immunity, finding that although the officers' conduct was "morally wrong," the precedent was not enough to put "the constitutional question beyond debate" such that every reasonable officer would have known that the conduct was prohibited.<sup>51</sup> Simply put, because there was only one case on point that proved such thefts violate Fourth Amendment rights, the officers escaped liability.

The "clearly established" prong has resulted in police being above the law. Even if a court determines that a constitutional violation occurred, qualified immunity will still protect the officer unless the right was clearly established such that any reasonable officer would have known. This was the case in *Armstrong v. Village of Pinehurst* when a police officer used excessive force against an individual who suffered from bipolar disorder and paranoid schizophrenia.<sup>52</sup> The officer violated the victim's Fourth Amendment rights by tasing him multiple times and putting him in a chokehold, which eventually killed him.<sup>53</sup> However, the court concluded that there were no preceding cases that offered materially similar facts to that situation, which allowed for a grant of qualified immunity to the officer.<sup>54</sup> Such interpretation of the "clearly established" prong has created absolute immunity.

## How are Federal Courts Addressing Qualified Immunity?

Qualified immunity may be coming to an end due to its arbitrary and inconsistent application within and among federal courts, and how it functions to maintain systemic injustice: police use of deadly force with impunity.

The same circuit that granted qualified immunity in *Armstrong v. Village of Pinehurst* recently reevaluated the justification of qualified immunity in June 2020. In *Jones v. City of Martinsburg*, the Fourth Circuit held that officers who had shot an African American homeless man 22 times would not be shielded by the doctrine.<sup>55</sup> Jones lay motionless and secured on the ground after officers had approached him because he was walking on the side of the road and not *walking on the sidewalk*.<sup>56</sup> The court found it was clearly established law that an officer should not shoot an injured and incapacitated person, drawing from a 1993 case where an officer had pinned a 100-pound woman to the ground and then continued to use excessive force while shoving her into the pavement.<sup>57</sup> While the precedent did not match the facts of Jones exactly, the court nevertheless concluded that the law was clearly established such that a reasonable officer should have known that Jones was secured at the time he was shot.<sup>58</sup> The Fourth Circuit not only dismissed granting qualified immunity but took it one step further to state, "Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop."<sup>59</sup>

In June 2020, the Sixth Circuit overturned a lower court's grant of qualified immunity of several officers who had tased and pepper-sprayed an unarmed Black man, stating in their opinion that the

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<sup>50</sup> *Jessop v. City of Fresno*, 936 F.3d 937, 939–40 (9th Cir. 2019).

<sup>51</sup> *Id.* at 942.

<sup>52</sup> *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 898 (4th Cir. 2016).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 910.

<sup>55</sup> *Estate of Jones by Jones v. City of Martinsburg*, W. Virginia, 961 F.3d 661, 664 (4th Cir. 2020).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 668.

<sup>58</sup> *Id.* at 669.

<sup>59</sup> *Id.* at 673.

use of force by police officers is a “gravely important issue ... that has dominated the nation’s attention.”<sup>60</sup> In August 2020, the Southern District of Mississippi warned that the qualified immunity doctrine “operates like absolute immunity” and “has served as a shield for [police] officers, protecting them from accountability.”<sup>61</sup> Yet, the court was forced to follow the Supreme Court’s precedent and grant qualified immunity to a police officer who had arbitrarily stopped and searched the vehicle of Clarence Jamison, a Black man, for nearly two hours. In a powerful rebuke of the qualified immunity doctrine, the federal court began its opinion listing the children, women, and men who have died at the hands of police officers for simply jaywalking, driving under the speed limit, driving with a broken tail light, sleeping in bed, eating ice cream at home, or walking home from an after-school job, etc.<sup>62</sup> Finally, a series of circuit courts of appeal and federal district courts are remarking on the problematic nature of the doctrine, and specifically commenting on how it enables the unequal treatment of people of color.

## How are States Addressing Qualified Immunity?

In the midst of widespread calls for police reform, Colorado passed SB 20-217, ending qualified immunity, on June 19, 2020. This bill provides important insight into Washington’s current police accountability legislation (HB 1064). Under CO SB20-217, if an officer violates someone’s constitutional rights, they are criminally liable and “qualified immunity is not a defense.”<sup>63</sup> In Washington’s legislation, qualified immunity is not mentioned; instead, the bill describes where deadly force is permitted, assuming the “good faith” of the officer.<sup>64</sup> However, in Washington, even when acting outside of these situations or without “good faith,” officers may still have qualified immunity.

I-940 (HB 1064) was passed to address multiple issues in police accountability, most importantly: the burden of proving malice. Prior to HB 1064, an officer could only be liable to criminal charges if the victim’s family could prove that the officer acted with malice. This was a complete bar. Families of those killed by police were front and center in drafting the legislation and have continued to demand that the state involve and consult with them in decision-making regarding the implementation of the new law.<sup>65</sup> But Washington law permits deadly force and allows officers the protection of qualified immunity.

CO SB20-217 goes beyond HB 1064 by stating that force must be only used if “nonviolent means would be ineffective”<sup>66</sup> and that “failing to intervene” in the violation of someone’s constitutional rights, including an excessive use of force, makes an officer “liable to the injured party.”<sup>67</sup> In contrast, while de-escalation is a stated priority in HB 1064, there is little substantive procedure or funding to ensure that it is carried out. We foresee the issue of qualified immunity being brought forward in upcoming legislation, as the coalition behind I-940 continues discussions on further changes to Washington’s police accountability laws.

These state by state changes, however, do not affect federal law. Federal qualified immunity remains a barrier to any claim based on federal civil rights law.

<sup>60</sup> *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 860 (6th Cir. 2020).

<sup>61</sup> *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at \*2 (S.D. Miss. Aug. 4, 2020).

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

<sup>63</sup> Colorado Rev. Stat., §13-21-131 (2)(b) (2020).

<sup>64</sup> Wash. Rev. Code, §3 (4) (2019).

<sup>65</sup> <https://crosscut.com/2019/05/wa-implements-new-police-accountability-law-some-advocates-feel-left-out>.

<sup>66</sup> Colorado Rev. Stat., §18-1-797 (1) (2020).

<sup>67</sup> Colorado Rev. Stat., §13-21-131 (1) (2020).

## How is Congress Addressing Qualified Immunity?

At a congressional level, the House of Representatives passed the Justice in Policing Act of 2020, which would end qualified immunity stating that “acting in good faith” and a lack of “clearly established” statutory or constitutional rights “shall not be a defense or immunity in any action brought under this section against a local law enforcement officer.”<sup>68</sup> In addition, the Act will “establish a national standard for the operation of police departments; mandate data collection on police encounters; reprogram existing funds to invest in transformative community-based policing programs; and streamline federal law to prosecute excessive force and establish independent prosecutors for police investigations.”<sup>69</sup> Even with amendments, the Justice in Policing Act is highly unlikely to pass in the Senate, stalling federal action on qualified immunity. The Civil Rights Law Section, after consultation with and authorization from the Board of Governors, can weigh in on upcoming state and federal legislation that pertains to the administration of justice.

Kimberlé Crenshaw’s testimony before the House Committee on Oversight and Reform on the Justice in Policing Act 2020 can be found [here](#). A fact sheet on the Justice in Policing Act can be found [here](#).

## How is the American Bar Association Addressing Qualified Immunity?

This month, August 2020, the ABA House of Delegates voted to adopt a resolution calling for the curtailing of the qualified immunity doctrine. Resolution 301A and report can be found [here](#). A related article can be found [here](#).

### Learn More:

Relevant CLEs from the Civil Rights Law Section:

- [Pressing Issues in Civil Rights Enforcement](#) - more information on Washington state Police Accountability law, I-940
- [Addressing Racial Inequity](#)
- [Decoding the Law: Race Relations, Policing, and the Law](#)

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## Legislative Update 2020

The Civil Rights Law Section reviewed numerous bills related to civil rights and monitored 36.

Out of the 36 monitored, the Civil Rights Law Section engaged in the WSBA legislative comment process and submitted comments to the Legislature on four bills, which passed the Legislature. With the support of WSBA staff, we determined that four bills involved access to courts, the administration of justice and/or practice of law and obtained approval from the WSBA Board of Governor’s (BOG) Legislative Committee.

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<sup>68</sup> George Floyd Justice in Policing Act of 2020, H.R.7120, 116th Cong. §102 (2020).

<sup>69</sup> [judiciary.house.gov/uploadedfiles/fact\\_sheet\\_justice\\_in\\_policing\\_act\\_of\\_2020.pdf](https://judiciary.house.gov/uploadedfiles/fact_sheet_justice_in_policing_act_of_2020.pdf).

We especially thank WSBA Outreach and Legislative Affairs Manager, Sanjay Walvekar, and Outreach and Legislative Affairs Coordinator, Russell Johnson, for their assistance in the past two years in sharing information with the Section and facilitating our communications with the BOG and former BOG Legislative Committee Chair and WSBA President-Elect Kyle Sciuchetti.

We submitted comments to the relevant Senate and/or House committees on the following four bills that passed in 2020, as part of the legislative process:

1. HB 2793 - a bill to establish new procedures to vacate conviction records, which more fully restores the rights of formerly convicted persons.
2. HB 2567 – a bill to provide for courthouse security, which has the effect of protecting the rights of individuals to access the courts and to come to court as witnesses or parties, with less fear of being arrested by federal immigration officers.
3. HB 2576 – a bill to prohibit the contracting of private detention centers.
4. SB 5165 – a bill to amend RCW 49.60 to add immigration status as a protected class.

HB 2793 would have established a procedure for the courts and Administrative Office of the Courts to make vacation of conviction records a regular process and practice and to establish regularly scheduled hearings to effectuate that process. The bill passed the Legislature, but was vetoed by the governor, due to revenue and cost concerns related to the COVID-19 pandemic.

HB 2567, the Courts Open to All Act, as enacted, prevents judges, court staff, prosecutors and court security personnel from inquiring about and collecting information about immigration or citizenship status or place of birth, unless necessary for adjudication of matters in court and to limit disclosure of such information and otherwise limit disclosure of such information to federal law enforcement or immigration authorities unless required by federal law or court order. The bill has additional provisions to gather information about law enforcement authorities entering courthouses as to the purpose for their entry and to bar civil arrests on courthouse grounds and parking areas, except in limited, defined circumstances. The bill passed the Legislature and was signed by the governor.

HB 2576, as initially proposed, would have prohibited the operation of for-profit and private immigration detention and prison facilities in the state of Washington. The proposed bill would have addressed concerns about practices at for-profit detention facilities and the impact on the civil rights of pre-trial detainees and convicted persons in those facilities. The bill, as passed, instead provides for a Department of Health study and report to the governor and appropriate committees of the Legislature by Dec. 1, 2020. That study and report is to be based on inspection of such facilities. The purpose is to evaluate whether private facilities are in compliance with state and local statutes, codes, rules, and policies. The report is also to consider recommended changes to statutes, rules, or policies to ensure the health, safety, and welfare of detainees. The bill was enacted and signed by the governor.

SB 5165, which we endorsed when it was before the Legislature in 2019, was passed and enacted into law in 2020. This bill adds immigration status as a protected class to RCW Chapter 49.60, except in those cases where federal law requires otherwise.

We recognize those on the Executive Committee: Chalia Stallings-Ala'ilima, Fred Diamondstone, Leticia Hernandez, Molly Matter, and Jaime Hawk for prioritizing civil rights legislative monitoring in 2020.



## Civil Rights Law Section

### PRESS RELEASE

June 5, 2020

This letter is written solely on behalf of the Civil Rights Law Section of the Washington State Bar Association. This does not express the views of the Washington State Bar Association, nor its Board of Governors.

The Executive Committee acknowledges the outrageous injustice we are witnessing and living – disrupting the administration of justice.

The killing of George Floyd, Ahmaud Arbery, Tony McDade, Dion Johnson, and Breonna Taylor have rightfully outraged our nation and the cities within Washington State. Breonna Taylor's 27<sup>th</sup> birthday is today, Friday, June 5<sup>th</sup>, 2020. She was an emergency medical technician, an essential worker during the current COVID global pandemic. She died from the bullets of three plainclothes officers who arrived in her apartment at 12:30 am. The officers have yet to be arrested or charged.

Here at home, we add the name Manual Ellis, a father of two and talented musician from Tacoma, WA whose last words were also, "I can't breathe." His cause of death: asphyxiation due to physical restraint.

On Monday, we saw images of a 9-year-old girl who was pepper sprayed by police officers in Seattle while she peacefully protested with her parents, signaling a message to Mayor Durken to withdraw her application to wind down federal oversight – reminding us of the unjust killing of indigenous (Ditidaht and Cowichan) gifted carver, John T. Williams – reminding us of Charleena Lyles, a pregnant mother who had called 911 in 2017 to report a burglary and was unjustly killed in front of her own children.

On Tuesday, we saw the resignation of James Miller, former Under Secretary of Defense of Policy, in protest – a rare action – whose letter to Secretary of Defense, Mark T. Esper stated, "You may be asked to take, or to direct the men and women serving in the U.S. military to take, actions that further undermine the Constitution and harm Americans."

On Wednesday, Former Secretary of Defense, James Mattis, who resigned in 2018, wrote, "We do not need to militarize our response to protests. We need to unite around a common purpose." The same day, we saw Mark Esper oppose invoking the Insurrection Act, against the direction of the Executive Branch.

On Thursday, protesters - who were attacked by federal troops as they demonstrated nonviolently against police brutality - sued President Donald Trump, Attorney General William Barr, and Secretary Mark Esper for violating their constitutional rights, namely the 1<sup>st</sup> Amendment right to peacefully assemble. <https://lawyerscommittee.org/civil-rights-groups-sue-trump-barr-for-tear-gassing-peaceful-protesters-outside-white-house/>

All of this against the backdrop of a global pandemic. The framing of COVID first ignited racism against Asian Americans and now the virus itself spotlights racial disparity in healthcare, racial disparity in the criminal justice system, and racial disparity in access to fundamental political rights. Inmates are 85% more likely to contract the virus given prison conditions. Here at home, Yakima County, WA has the highest rate of the virus on the West Coast due to the unsafe working conditions for farmworkers and agricultural workers. Yakima County also has one of the greatest racial disparities in our state in voting: persons with Spanish surnames are seven times more likely to have their ballots rejected.

As we move toward the November election, it is clear that all voters in the nation must have access to mail-in or absentee ballots in order to uphold the federal Voting Rights Act, our fundamental right to vote, which is preservative of all other rights and directly relates to the administration of justice. Voting and civic engagement promote the development of freedom and liberty, the heart of American democracy codified in the 14<sup>th</sup> and 15<sup>th</sup> Amendments.

The places where BIPOC (Black, Indigenous, People of Color) communities are hit the hardest by COVID are also the places where there are no mechanisms in place for people to vote by mail. Lawsuits have been filed in states where it is practically impossible to receive absentee ballots (e.g., *O'Neil v. Hosemann*, a Mississippi case involving undue burden regarding the state's requirement to have both the request for an absentee ballot and the actual ballot itself notarized). Due to COVID, voter registration has plummeted and voting itself has become a life or death decision as we saw in the primary in Wisconsin, where in the peak of the pandemic, people were unable to vote by mail and risked their own health going to the polls.

Our human rights crisis at the border during COVID has become a national shame: EOIR (Executive Office for Immigration Review) and ORR (Office of Refugee Resettlement) have no uniform policy on sanitation, cleaning, social distancing or testing for the virus as we imprison 55,000 refugees on any given day. We are not only endangering those detained and working within detention centers but exporting the virus to countries who are far less resourced to manage it (75% of all deportees in a recent flight to Guatemala tested positive). Although 90% of all people seeking asylum in this country have friends or relatives to be released to, our government is continuing to detain people in hazardous conditions which the United Nations and constitutional scholars nationwide are defining as unlawful detention. ORR is continuing to prolong the detention of children and youth in violation of domestic children's human rights standard, the Flores Agreement.

The Civil Rights Law Section of the WSBA supported legislation this year to prohibit the contracting of private detention centers within WA because of the incentive of profit over human health and safety. On March 20, 2020, the US closed its borders to all people seeking asylum and deported 20,000 people, in violation of international law, Declaration of Universal Human Rights, Declaration of the Rights of the Child, Declaration of the Convention relating to the Status of Refugees.

We are inundated with images, news, town hall meetings, social media, texts, emails, webinars, and videocalls on what's unfolding before our eyes.

We are here. As lawyers, we will continue to work in defense of the United States Constitution and the administration of justice through the trinity of direct action, litigation and policy change. As humans, we will continue to uphold human dignity in times of crisis.

## Black Lives Matter.

As Executive Committee members of the Civil Rights Law Section of the WSBA, we undertake the following action:

- Publish this letter to the WSBA Board of Governors, WSBA Section Leaders, statewide and national organizations
- Provide updates on important litigation regarding voting rights, 1<sup>st</sup> amendment right to peacefully assemble, and police brutality
- Organize volunteer opportunities to assist protesters and advocates working for the release of detainees and inmates within our state institutions during COVID pandemic
- Share information regarding national civil rights organizing calls
- Share resources to assist firms and organizations in responding to our civil rights crisis
- Demand a recommitment of Racial Equity, Diversity and Inclusion at all levels of the WSBA
- Share resources on how to sustain our physical and mental health

In solidarity,

Molly P. Matter, *Chair, Civil Rights Law Section, WSBA*

Leticia Hernández, *Chair-Elect*

Sarah Derry, *Former Chair*

Fred Diamondstone, *Secretary*

Bridget Bourgette, *Treasurer*

Chalia Stallings-Ala'ilima, *At-Large member*

Kathleen Kline, *At-Large member*

Jaime Hawk, *At-Large member*

Trena Berton, *At-Large member*

Alec Stephens, *WSBA Board of Governors Liaison*