

The Last Transparent Democratic Electoral System in the United States of America Cannot Be Allowed to Perish

By Andrea Novick, Esq. Founder Election Transparency Coalition
www.ETCNYC.org, <http://nylevers.wordpress.com/>.

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

The legislature therefore declares that government is the public's business.¹

Not only is government the public's business, we own it. We created it, long before the above-cited legislative declaration recognized "government is the public's business." Elections are the means by which we select public servants to protect our inalienable rights. Indeed, it is "to secure these rights that governments are instituted ... deriving their just powers from the consent of the governed."²

It bears repeating: The public owns its elections and the electoral process. Elections are a public event and what transpires at the election is public property. We pay for them with public funds. We entrust our public election officials with constitutional authority to conduct our elections and we have "every right to ascertain by personal observation whether [our] officials are properly carrying out their duties..."³ Such a system enables the transparency and checks required by our constitutional form of government.

But when the Legislature enacts a concealed vote counting system it blindfolds our election officials and unconstitutionally nullifies their duties to the People. Software-based voting systems, which invisibly tabulate the votes, also violate the public's constitutional right to observe the conduct of its public business in a transparent accountable and safeguarded manner and disregards the core of self-government in which the "citizenry is the final judge of the proper conduct of public business."⁴

¹ New York's Freedom of Information Law, Public Officers Law § 84, Legislative declaration

² Declaration of Independence

³ *Gannett Co. v. DePasquale*, 443 U.S. 368

⁴ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, at 495

New York has a proud and rich history of electoral reforms, born of necessity. This State did not shy away from the pervasiveness of electoral fraud during the 19th century. We met it head on, producing comprehensive legislation so successful in preventing fraud that New York's 1896 electoral reforms remain with us to date. The famous observation of Justice Louis Brandeis regarding the benefits of publicity, to wit, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman", was not lost on successive generations of New York State's Legislature. In New York "the election law has endeavored to safeguard an election, in explicit directions as to the performance of the duties by the election officials" ⁵ which duties are then witnessed and scrutinized by observers in order "that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."⁶

The right to a maximally safeguarded transparent electoral system has been respected for all of New York's history until now. In 2005 New York's Legislature passed the Election Reform and Modernization Act (ERMA)⁷ which violates every fundamental aspect of our Election Laws and the principles upon which our democracy is founded, surrendering the observable duties of election officials to invisibly programmed software. Two centuries of safeguards, that have prevented fraud in New York's elections, rely on the public's ability to observe and evaluate those very duties which our election officials will be precluded from performing. Americans have long recognized that secrecy is suspect by nature and that, "Public confidence cannot long be maintained where important ... decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the ... decision sealed from public view."⁸

It is the affirmative responsibility of the Legislature to prevent dilution of the franchise from fraud.⁹ Instead ERMA eviscerates every safeguard that has protected New York for centuries, encouraging the very opportunities for fraud those safeguards were intended to prevent, while exposing our election outcomes to new and greater risks made possible by secret vote counting and mutable software. These provisions of ERMA are scheduled to go into effect in 2010.

⁵ *In re Hearst*, 183 N.Y. 274 (1905)

⁶ *Gannett Co. v. DePasquale*, 443 U.S. 368, citing Mr. Justice Holmes in *Cowley v. Pulsifer*, 137 Mass. 392 (1884)

⁷ ERMA requires the replacement of the lever voting machines with software-driven voting machines and requires the unknowable results of the software-driven machines be "audited" by hand counting ballots from 3% of the machines. EL 9-211

⁸ *United States v. Cianfrani*, 573 F.2d 835 (CA3 1978)

⁹ New York's Constitution recognizes two explicit rights protecting the franchise: Article I, §1, the right against disfranchisement and Article II, § 1, the guaranteed right to vote. Both rights have been interpreted as the right to vote free from dilution by electoral fraud and irregularities. Article II § 8 further protects the franchise by giving constitutional status to bipartisan election officials requiring that public officers have authority for the integrity of conducting the public's business and accountability to the public.

The Freedom of Information Law, cited at the top of this article, is premised on the public's inherent right to know and the understanding that secrecy is anathematic to our form of government.¹⁰ An open electoral system enables election officials to detect fraud while providing the additional benefit of public scrutiny: guarding against abuse while serving to guarantee the fairness and accuracy of the election results. Such a transparent system is an indispensable precondition of our system of government established by the Constitution. New York's jurists and legislators have respected our constitution's wisdom and transparency, enacting safeguards which form New York's electoral system today. Every last one of these protections,¹¹ by which the government has successfully protected our inalienable right to choose our representatives, is about to be eliminated – stolen out from under us by arguably one of the most unconstitutional pieces of election legislation ever imposed on the citizens of New York.

A) The counting process, also referred to as the canvass, must be publicly conducted and accurately completed on election night at the poll site by bipartisan election officials, under the watchful eyes of poll workers and observers - all of whom are required to safeguard the casting and counting of our votes. With lever machines public observability begins before election day: election officials and observers witness the programming of each individual lever machine before every election. During the inspection every part of the lever machine is visible so that the machine's proper functioning can be verified, ensuring the results on election night are accurate and safe from fraud.

B) Election officials, poll workers, party representatives and watchers have a duty to participate in the electoral process so that errors and fraud can be exposed and detected, deterred and corrected. In this way the election night results are demonstrably knowable, reliable and conclusive at the place where the ballots are cast and counted before the ongoing public surveillance ends.

C) The results of the count from each poll site have to be certain and publicly announced on election night *before* the aggregate results of the other precincts are known, closing off the temptation to tampering that a knowledge of what is needed to alter the outcome of the election might induce.

D) Physical, reliable record evidence, revealing how the votes were counted at the election, must be contemporaneously and publicly created and then preserved inviolate for the benefit of the public and the candidates. Such evidence prevails over unobserved evidence, thus protecting the count from corruption by fabricated evidence.

E) Since before the adoption of New York's first Constitution in 1777, the publicly observed at-elections count has been unalterable. The count must be verified and certain on election

¹⁰ *Fink v Lefkowitz*, 47 NY2d 567 (1979)

¹¹ These enumerated safeguards represent only the broadest outline of safeguards. New York's election law is replete with numerous pain-stakingly detailed procedures designed to ensure that every step of our electoral process is transparent (that is unless it follows through with its new plan to eliminate transparency in favor of secret vote counting on computers).

night. If a recount of paper ballots is necessary to justify the results, it must be concluded before any adjournment because paper ballots are fragile: vulnerable to unseen tampering. Mathematical or transcription errors made by hand can be subsequently corrected, but the transparent process by which the ballots are counted cannot be exposed to what has historically been understood to be heightened and unprotectable opportunities for post-election tampering. That is, until now!

In any voting system one never actually sees one's vote being counted. It is the uninterrupted public observability from the moment fraud could potentially infect the system until the count is completed combined with the safeguards designed to insure 100% knowledge of the accuracy of the count, including knowledge of error or fraud, that satisfies the constitution and provides a rational basis for public confidence in the election outcomes. Both New York's manual paper ballot and lever counting systems have satisfied these constitutional imperatives. New York's new computerized counting system prevents the ability for election officials, candidates or the public to know the election outcome is accurate or reliable. The Legislature has no such power to undermine New York's Constitution.

New York's Constitutionally Compliant Manual Paper Ballot System:

For most of the 19th century far too many elections were marred by rampant fraud, thievery and bribery. Dilution of the count by spurious votes undermined the very first Article of New York's Constitution which guarantees that voters be protected against disfranchisement. Over the first century of our statehood numerous safeguards were enacted to prevent fraud. It was understood that what we couldn't see we couldn't trust and that what we couldn't see was likely to be affected by fraud. Therefore the canvass was always made in public and always completed on election night, before the temptation of just how many votes was needed to alter the outcome was known. Once the officials and observers went home, post-election fraud was considered so difficult to prevent that until 1896 (1872 in Brooklyn) we burned the ballots and memoranda of the canvass in order to protect the first count from subsequent corruption. We no longer burn the evidence, but we still continue protecting the publicly scrutinized at-elections count from opportunities for post-election night alteration.

We learned through experience that **when a few people are permitted to control the evidence of the election they can control the count and substitute their will for the will of the people.** The method of counting prior to 1896 was not particularly described. "The inspectors made up a statement of the result, and immediately thereafter all the ballots and memoranda of the canvass were destroyed."¹² Observers were present for the count, but the inspectors were responsible for creating the returns (the memoranda of the canvass).

"In the event of a fraudulent return made by the inspectors to the county board of canvassers, it was exceedingly difficult to make the necessary proofs in the absence of

¹² *In re Stewart*, 155 N.Y. 545, 549 (1898)

record evidence."¹³ Such a method of voting was said to render "**voting ... a useless formality, as it depended upon the will of the inspectors of election as to who should hold the offices, and not upon the vote of the People.**"¹⁴

An so in 1896 New York closed off another critical opening for fraud by mandating that a contemporaneously created physical record of the public canvass be kept which would prevail over a subsequently fabricated return. And we stopped burning and started preserving the paper ballots. The ballots along with the other record evidence of election night count were to be safely locked away ensuring they could not be used to change the at-elections count, but preserved as evidence for use in a criminal proceeding or a proceeding to challenge the election outcome.

New York's manual paper counting system is secure and reliable because our election officials, watched over by observers, control every aspect of the system. This is how it works:

1-3) Election Day Safeguards Enabling Observability and Control over the Entire Electoral Process Prevents Fraud and Demonstrates a Rational Basis for Public Confidence in The Results

The laws of 1896 imposed minutely detailed duties on bipartisan election officers so that each step of the process could be observed and enforced by officials and observers. Every duty involved in the canvass is sufficiently detailed to ensure that "the inspectors are responsible for the correctness of the tally sheet, and are afforded every opportunity to know that it speaks the truth."¹⁵ **In order to prevent opportunities for fraud the entire proceeding had to be held:**

"at the place where voted, in the presence of the voters, candidates, and officials of the election and of the watchers of the several political parties, and before the importance of a few votes one way or the other is understood, and where there is less incentive to misconduct...when the whole election force of officers and party watchers and the public are present and when there is the least chance for improper conduct or tampering with ballot boxes and before it is known that the vote is likely to be close between certain candidates."¹⁶

To further guard the count from fraud and to limit the Legislature's power to interfere with our sovereign right to vote, we secured a constitutional amendment in 1894 mandating that bipartisan

¹³ *In re Stewart, supra* at 549

¹⁴ *In re Stewart* 48 N.Y.S. 957 (1897)

¹⁵ *In re Stewart, supra* at 551

¹⁶ *In re Park*, 74 N.Y.S. 915, 916 (1902) (emphasis supplied)

election boards and officers supervise the duties of election officials "charged with the duty of... receiving, recording or counting of votes at elections."¹⁷

Amongst the most important of these constitutional duties is the mandate to create and preserve the evidence of the public canvass. The laws of 1896 implemented the requirement that a contemporaneously created tally sheet notoriously record the count as it proceeds: "As each vote... is announced, a clerk, or ... inspector, under the scrutiny of a clerk or inspector of opposite political faith immediately shall tally it in black ink, with a downward stroke from right to left upon the official tally sheet. Each such clerk or inspector, as he tallies a vote, shall announce clearly the name of the person for whom he tallies it".¹⁸ The publicly witnessed recordation of the votes also commits the count to physical evidence before the aggregate of all votes are known.

The first count, made under the watchfulness of the public eye and memorialized in immutable physical form, was thus locked in and safely protected from subsequent alteration at the hands of what was understood to be "a far greater evil"¹⁹: the opportunities for post-election fraud. In the case of any discrepancy the tally sheet controls over the subsequently created return, thus disabling the power of a few people to control the count by controlling the evidence of the count. Never again would New York permit a few unobserved individuals to control the outcome of the election; that is, until ERMA.

4) The Election Night Count Must Be a Secure, Reliable, Verified and Completed Tally

"As soon as the polls of an election are closed, the inspectors of election thereat **shall publicly canvass** and ascertain the votes, **and not adjourn or postpone the canvass until it shall be fully completed.**"²⁰ "When all the votes... shall have been canvassed the tally thereof shall be verified by adding together all the votes tallied thereupon. Whenever the total number of votes tallied ... does not exactly equal the number of ballots cast ... **A recanvass must be made immediately in order to correct the error.**"²¹ "Thus, the total vote for each office, as disclosed by the tally sheet, is placed on file while the canvass is in progress, and before the tally sheet is completed. An accurate

¹⁷ New York's Constitution Article 2, § 8.

¹⁸ Election Law ("EL") 9-116 (1)

¹⁹ *Dailey v Livingston*, 79 N.Y. 279 (1879)

²⁰ *In re Hearst*, 96 N.Y.S. 341, 345, rev'd on other grounds, 183 N.Y. 274 (1905) (emphasis supplied)

²¹ EL 9-116 (2). There were always a small portion of ballots which were disputed during a hand count that could not be counted. Those ballots were separately safeguarded; not to be returned to the ballots boxes, but sealed in a separate envelope for later judicial review and recount.

account of ballots is kept ... and the canvass is complete. **Each step has been taken, and announcement made, in the presence of officials and watchers.**"²²

Our electoral system gives us one shot to get it right. The count at the election is the only count that counts. It is the count where we witness those ballots actually cast at the election being publicly canvassed and publicly recorded under maximally safeguarded conditions. The publicity that attends the count serves to deter fraud during the count, but once the officials and watchers adjourn, the best protection ends and the opportunities for corruption increase. We can no longer be certain that the sealed ballot boxes will remain undisturbed. That is why any recounts are only allowed as part of the first count *before* the ballots leave the public view. That is why New York's law has always required that the count on election-night be a public, verified, confirmed and completed count. This is the "elaborate scheme worked out by degrees by successive Legislatures to secure a prompt and simultaneous count and declaration of the result on election night."²³

5) Post-election Procedures Protect the Manual Paper Ballot System's Secure Observable First Count from Post-election Tampering

Paper ballots are fragile in the hands of the wrong people: insiders can alter, destroy or switch paper ballots during and after the count. Having decided in 1896 that preserving the ballots could provide an additional deterrent against fraud, "operat[ing] as a check upon those who might otherwise be persuaded into wrongdoing"²⁴ the transparent election-night count still needed the same level of protection from post-election opportunities for fraud as when we burned the ballots. Accordingly given the "the great temptation and danger of fraud in tampering with ballots"²⁵ after the election is over, New York has *never* permitted the post-election ballots to be used to affect the election night count.

The counted ballots must be preserved inviolate. Their preservation must be scrupulous; the invasion of the ballot box permitted only pursuant to court order and then only for purposes of

²² *In re Stewart, supra* at 551 (emphasis supplied)

²³ *In re Hearst et al.*, 110 A.D. 346, 96 N.Y.S. 341, 346, aff'd 183 N.Y. 274 (1905) (emphasis supplied)

²⁴ *Brink v Way*, 179 N.Y. 174, 180 (1904):

"The object of the preservation of the ballots, [is] that it furnishes a further check upon the perpetration of fraud ... It accomplishes this, necessarily, because the evidence of how the people voted is to be preserved in such form that it may be used not only to deprive, possibly, the intended beneficiary of the fruit of his office, but also that it may be used ... in criminal proceedings. That, of course, must necessarily operate as a check upon those who might otherwise be persuaded into wrongdoing."

²⁵ *Dailey v Livingston*, 34 Sickels 279, 284

examination. Post-election ballots are considered to be “fraught with such serious consequences”²⁶ that they can only be used to affect the at-elections count if a jury were to determine “that the ballots cast at that election are intact and in the same condition as when cast, that they have not been altered or in any manner tampered with since they were deposited by the electors in the ballot boxes.”²⁷ For 113 years - as long as New York’s been preserving the paper ballots cast at the election – the Law has rigorously maintained this safeguard against fraud.

The ballots are to be preserved only as evidence for litigation in the exceptional event that the election fails or to be used in criminal proceedings. Preserving the contemporaneously made tally sheet prevents subsequently fabricated election returns from undermining the will of the people. Preserving the paper ballots provides “the highest and best evidence **if** they are actually preserved.”²⁸

The creation and preservation of all evidence demonstrating how the votes had been publicly canvassed along with the minutely described duties imposed on election officials, were the main achievements of the laws of 1896. For more than a century they have effectively safeguarded New York’s guaranteed right to vote. Every last one of these safeguards will be eviscerated by New York’s new computerized electoral system, thereby encouraging the very fraud New York has successfully prevented to the present moment. But this time the fraud invited by the destruction of our safeguards will be on a massive scale never before possible, enabled by the introduction of software into our voting system.

6) The Creation and Preservation of the Evidence of How the Votes Were Publicly Canvassed Protects the People's Right to a Judicial Proceeding to Further Ensure the Will of the People Prevails

Safeguarding the evidence of how the ballots were counted as well as the ballots themselves are critical duties of the Boards of Election not only because this deters fraud, but also because it preserves the “necessary proofs”²⁹ should the People need to challenge the election results in a

²⁶ *In re Hearst*, 21 Bedell 274, 286

²⁷ *Metz v Maddox*, 105 N.Y.S. 702, 709, rev’d on other grounds, 189 N.Y. 460 (1907)

²⁸ *Dailey v Livingston*, 34 Sickels 279, 286:

The ballots themselves are of course the highest and best evidence **if** they are actually preserved, but the liabilities of tampering and fraud doubtless induced the Legislature to require their destruction. (emphasis supplied)

²⁹ "The old law provided no adequate restraints upon the officials whose duty it was to canvass the votes. The inspectors made up a statement of the result, and immediately thereafter all the ballots and memoranda of the canvass were destroyed... In the event of a fraudulent return made by the inspectors to the county board of canvassers, **it was exceedingly difficult to make the necessary proofs in the absence of record**

judicial proceeding.³⁰ The problem with the method of voting prior to 1896 was that there was no requirement that a physical record of the count be made and that after the election the ballots were burned. This enabled the few who were responsible for creating the returns to control the evidence and hence the outcome of the election, leaving the People without the means to overcome the fraudulently created “proof” of the election results.³¹

Since 1896 New York has successfully prevented the ability for fabricated evidence to succeed by requiring a public physical record be made of the transparent election-night count and by preserving that evidence. The first count on election night, safeguarded by the ongoing publicity facilitated by the poll site method of voting, is still the only count that matters. The public evidence justifying how the results were arrived as well as the ballots themselves must be *preserved* for judicial review, should litigation be necessary.

The preservation of the evidence is not to be construed as a license to freely use the ballots as part of the electoral process which determines the outcome or we would be inviting the very fraud that induced us to burn the ballots for a century. Only in a future legal proceeding might the post-election night ballots be used to potentially alter the first count, but only if it was proven to the satisfaction of a jury “that the ballots are genuine”: that they are in fact the same ballots that were cast at the election. Without such proof the ballots are not only valueless in a post-election night verification or recount, but represent “the most dangerous evidence.”³²

In fact post-election night ballots once removed from the public view, are considered so likely to be tampered with rules of evidence require that we presume fraud.³³ The legal presumption of fraud

evidence. *In re Stewart*, 155 N.Y. 545, 549, 553 (1898) (emphasis supplied)

³⁰ "The evidence thus preserved is the best and most conclusive in proceedings in the nature of quo warranto to try the title to public office, a proceeding formerly embarrassed by the fact that the ballots had been destroyed." *Brink v Way*, *supra* at 180.

³¹ *In re Stewart*, *supra*

³² *The statute requires the ballot-boxes to be preserved undisturbed and inviolate, and it is incumbent upon the party offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was upon the relator to satisfy the jury that the boxes had remained inviolate... Every consideration of public policy as well as the ordinary rules of evidence require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved the ballots are the best and highest evidence, but if not, they are not only the weakest but the most dangerous evidence.* -*Dailey v Livingston*, *supra* at 290, 291

³³ “*Before the ballot-boxes should be allowed in evidence to overturn the official count and return, it should appear affirmatively that they have been safely kept by the proper*

can potentially be overcome, but such factual issues as to whether the ballot boxes were in fact preserved inviolate, and hence whether the ballots contained in those boxes still represent the ballots cast at the election, can only be determined in a judicial proceeding.

As explained in this article New York's new method of voting not only impairs the evidence, which election commissioners are mandated to preserve inviolate, by requiring the routine use of the ballots for post-election night verification 'audits', but permits the unrestrained use of this most dangerous evidence to lend the appearance of legitimacy to the unreliable and unknowable software-generated results. Every aspect of ERMA violates all that we've learned is necessary to secure the franchise. For 232 years we have required a public canvass completed on election night because that is the only count that we can witness is maximally protected. After the evidence of the count is out of the public eye we can no longer know with sufficient certainty that the paper ballots will be preserved. Everything depends on getting it right on election night. Preservation of our evidence serves to deter fraud during the count and provides the means to challenge the results as a last resort, when the system has failed.

While it is imperative that our evidence of the count be preserved, our need of it reflects a potentially failed election. ERMA's routine use and indeed reliance on this evidence to verify the at-elections count is necessitated by the Legislature's enacting a failed method of voting.

New York's Constitutionally Compliant Manual Lever Voting System:

The lever voting machine was also a response to the 19th century crisis of democracy caused by electoral fraud. Because manipulation of the paper ballots had been the means used to steal elections in the 1800s, the lever machine sought to close off the opportunity for fraud by eliminating paper. But never did the lever system close off public observability of every aspect of the electoral process. The lever machine's interlocking mechanisms, manually programmed and checked by various persons of different political faiths, provide for an immutable mechanical operation that can be manually tested, secured and observed, thus satisfying the constitutional requirements enabling the public and its election officials to observe and protect the electoral process from dilution by fraud. And due to its immutable mechanical operation, physical evidence of the vote as cast on election day is preserved on the lever machine itself.

*custodian of the law, that they have not been exposed to the public or handled by unauthorized persons, and that no opportunity has been given for tampering with them. **If this is believed to be a rule founded upon the presumption that a fraud or crime has been committed the answer is that the rule does no more than make choice between two presumptions of law which in this instance come in conflict and cannot both prevail**...This rule applied to the subject is eminently just, while a different one requiring that the fact of tampering should be made to appear to warrant the rejection of the boxes would lead to fraudulent practices and would be a dangerous innovation upon established rules.” – Dailey v Livingston, 34 Sickels 279, 292 (emphasis supplied)*

New York's manual lever counting system is secure and reliable because our election officials, watched over by observers, control the system. This is how it works:

1) Pre-election Testing and Examination of the Lever Machines Is Observable and Can Reliably Demonstrate That the Machines Are Safe for Use on Election Day

Before each election bipartisan election technicians manually prepare the voting machines for the next election. It is the legal duty of party representatives to be present at the preparation of the machines to verify with their own eyes that each machine is properly programmed to count the votes; check that the ballot text is correct and that the ballots are correctly positioned; check that each individual little lever properly works; check that the counters are reset to zero after testing, etc. If there's any problems observed during the legally mandated inspection, the bipartisan technicians are there to correct it.³⁴

All parts of the lever voting machine are plainly visible and can be visually tested. The lever machine was designed to be transparent so that opening the back of the machine reveals all the working parts. Nothing is hidden, nothing is secret and every aspect of the finite possibilities for error and fraud can be openly examined and observed. Testing is reliable to demonstrate how the machine will perform on election day because the mechanical parts, once tested and programmed, can't move on their own. After each machine is thoroughly checked the top of the machine is cranked down into the bottom, metal-strapped and sealed until election day.

It is a highly time consuming process, but in New York it is the system we've enjoyed thanks to successive legislatures that recognized democracy demands no less, and thanks to the thousands of technicians and election workers who diligently ensure each lever machine is properly prepared and then demonstrate and recheck the machines with candidates and party representatives who must be given free access to thoroughly examine all machines. Such an open system discourages fraud, "serv[ing] to assure the integrity of what goes on."³⁵

2) Tampering to the Lever Machine Is Visible and New York's Election Law Is Designed to Detect and Expose Fraud - Thereby Minimizing its Intervention

The lever machine itself, designed to be theft-detering with its 28,000 interlocking mechanical parts, can't simply be reprogrammed the way one can program software. Unlike the systematic exploits possible with software voting machines, there is no possibility for such a multiplier affect with lever voting machines. Each lever machine has to be manually and individually programmed. In addition to the observable breaking of the seal, manipulating the mechanisms within the lever

³⁴ Election Law 7-207

³⁵ *Richmond Newspapers Inc. v Virginia*, 448 U.S. 555, 600 (1980). In *Richmond* the US Supreme Court recognized the public had a constitutionally protected right to observe and attend criminal trials because, *inter alia*, "Open trials give assurance that the proceedings were conducted fairly ... and discourage...misconduct."

machine will usually adversely affect the machine's operation, alerting election officials to open the lever machine and thus reveal the tampering.

Historically tampering to manual lever machines has not involved enough votes to alter the outcome of a race because each lever machine contains only a small fraction of the total votes and each lever machine would have to be separately rigged. One would need to gain access to each machine, manually manipulate the mechanical parts and put the machine back together, increasing the likelihood of detection because of the hours it would take to modify each machine. And the more machines which have to be rigged the greater the chance of detection, further discouraging fraud. As an additional check enabling the detection of fraud, the labor intensive effort to manually manipulate a lever voting machine means only a percentage of the machines can be 'fixed', sending up a red flag when the results of the 'fixed' machines are compared to the thousands of machines not tampered with.

Unlike software, there are a finite number of exploits possible on a lever machine and each one of them is visible and discoverable, particularly the ability to observe and reveal fraud, permitting election officials and the public control over the system. If our election officials were unable to observe each step of the process, they would be powerless to prevent fraud. It is the public's right to know that this is being effectively done that ultimately enables the will of the people to prevail.

3) Election Day Safeguards Requiring Observability of the Lever Voting Machines Enable Detection to Prevent Tampering

The lever machines arrive at the poll site locked and sealed. Broken seals would create signs of breaking and entry, again enabling detection. Bipartisan election officials and watchers are also able to observe that the lever machines arrive at the poll site with their counters set at zero. The mechanism that controls the registering counters cannot be manipulated without adversely affecting the machine's operation. Efforts to fake the counters have only been accomplished by gluing phony paper numbers over the counters so that the counters look like they're set to zero, but this known exploit is easily detected.

Having observable procedures and safeguards to this point, the ongoing publicity of the poll site ensures that no one can gain access to tamper with the lever machine during the election. New York's Laws require that "The exterior of the voting machine ... shall be in plain view of the election inspectors and watchers"³⁶ and further directs "The election inspector or clerk attending [each] machine shall inspect the face of the machine after each voter has cast his vote, to see that the ballot labels are in their proper places and that the machine has not been injured or tampered with."³⁷

³⁶ EL 8- 202 (2)

³⁷ EL 8- 202 (2)

It is because New York's Laws are designed to detect tampering and because tampering is visible on the lever machine, that the system has the ability to effectively prevent fraud.

4) The Election Night Count Produced by the Lever Voting System Is a Secure, Reliable, Verified and Completed Tally

Once the polls close the lever machines are locked, securing the results in place. The reliability of these results has been established by the aforesaid transparent steps designed to detect and reveal fraud as well as enable the public to observe "that the proceedings were conducted fairly."³⁸ Because every part of the manual lever voting machine is visible and publicly observable and because the Law requires public participation, New York's lever voting system permits the potential for 100% knowledge of the security and reliability of the recorded results.

On election night the tallies as recorded on the lever machine are publicly transcribed onto paper by election workers (the returns) overseen by watchers, party representatives and the press. The theft-detering safeguards of our manual paper system are preserved: the count of the ballots cast on the lever voting machine is a secure, verified and completed count, which is then publicly announced before the aggregate results of other precincts are known.³⁹

5) Post-election Procedures Protects the Lever Machine's Secure, Observable Election Night Count from Post-election Tampering

Having publicly observed a maximally safeguarded electoral proceeding to the conclusion of the election, New York's lever voting system continues to protect the at-elections count from post-election night alteration of that count, just as we do with our hand count system. In the weeks following an election the Boards of Election must finalize the canvass, count military absentee and affidavit ballots that were not cast and canvassed at the polling site, await resolution of disputed paper ballots, etc. As is the case with our manual paper system, our lever system permits a post-election recount of only those few paper ballots segregated from those that were cast and recorded on election day. But the super majority of ballots as securely counted and recorded on the lever machine cannot be recounted, continuing to enjoy New York's 232 year history of protection from post-election fraud.

The essential responsibility to preserve immutable record evidence of the count is also continued in the lever voting system. Whereas voted paper ballots, vulnerable to undetectable alteration, destruction and loss, must be preserved inviolate, the recordation of the count on the lever machines is more easily secured due to its immutable mechanical operation which when locked, stores and

³⁸ *Richmond Newspapers Inc. v Virginia*, *supra*, 556

³⁹ At the close of the polls the inspectors of election shall, in the order set forth herein, lock the machine against voting, account for the paper ballots, canvass the machine, cast and canvass all the ballots, canvass and ascertain the total vote and they shall not adjourn until the canvass be fully completed. EL §9-100

preserves the election results. The Boards of Election are required to preserve both those paper ballots New York still uses as well as the physical evidence of the count locked on the lever machines. The recordation on the lever machine, like the tally sheet in a hand count election, controls in the case of a discrepancy thus continuing still another of the fraud-detering safeguards implemented in 1896. The recorded tally of the at-elections count can only be altered to correct mathematical or transcription errors, as is the case with our manual paper system.

6) New York's Lever Voting System Includes Additional Safeguard to Ensure That the Will of the People Prevails

Once the election night canvass is completed the locked machines are returned to the warehouse where, using the number of the seal and the number on the protective counter of every lever voting machine, each machine is then publicly reexamined within 15 days (re-canvassed) in order to check that the hand written returns prepared by election workers on election night were properly transcribed. This is not a recount of the ballots counted on election day, but an additional safeguard to check transcription errors. The results recorded on the lever machine control over a discrepancy with the return as transcribed because the immutable operation of the machine is considered more reliable than the potential for human transcription errors. However, during the re-canvass, should any of the observers wish to personally examine the machine to account for an unexplained discrepancy between the paper return and the count as recorded on the lever machine, the machine is opened during the re-canvass and tested by bipartisan custodians, in the presence of the observers, to determine and reveal the cause, if any, of the discrepancy. The evidence of whether the machine counted is thus immediately visible and observable, revealing any error or tampering to the at-elections count.

In the event that fraud or error is revealed, summary judicial proceedings may be able to resolve the problem or quo warranto proceedings may be commenced by the Attorney General challenging the election outcome. Evidence or proof tending to demonstrate irregularity or fraud is necessary to warrant the discretion of the Attorney General. It is for this reason, as well as to serve as a deterrent against fraud, that preservation of immutable physical evidence is so important. Indeed it was precisely to address the People's need for necessary proofs in the face of unobserved fraudulently manufactured evidence that the election laws of 1896 mandated the creation and preservation of a physical record of how the count proceeded on election night. This evidence, along with the paper ballots, must be preserved inviolate and available to the People should it be needed in a judicial proceeding.

Now what would happen if after 232 years New York eliminated all the safeguards described above? What if New York's Legislature decided that from now on transparency would be replaced by the government's word that the levers were 'certified' as safe for use, but no one was permitted to see how the levers were programmed to count votes before the election nor see how the computer counted the votes during the election? What if only a few people were allowed

access to secretly program all the lever machines to count the votes and all of the 327,000⁴⁰ bipartisan election commissioners, technicians, custodians, party representatives, watchers, inspectors and poll clerks – currently required to witness and examine each essential step of the process – were barred: unable to observe and thus prevent error or tampering?

Or imagine New York's Legislature decided to return to a paper-based voting system, but the counting and the creation of the tally sheet would now be done by a few people in a concealed room: election officials and observers no longer able to observe the count or the creation of the tally sheet.

Either scenario seems outrageous, not to mention unconstitutional, but New York plans to replace our lever voting machines with software-driven paper ballot optical scanners that conceal both the vote counting process and the creation of evidence of how the scanner counted our votes. Those who control the software control the count, the evidence and the outcome of the elections.

*Putting aside the constitutional offenses, what impact does concealed vote counting have on the election returns generated by the software? In 1874, in the case of *Judson v Thacher*⁴¹, a hand count of paper ballots was in progress when suddenly the lights went out and there was a short interval of complete darkness. When the lights came back the count concluded. In a subsequent judicial challenge it was determined that ballots had been removed from the ballot box and that other ballots had been placed in the box. The count consisted of spurious and genuine votes, but it was not possible to determine the extent of the vote switching. That is precisely the situation we are in whenever software counts our votes. If the software was manipulated to switch votes,*

⁴⁰ Under our current electoral system there are 16, 324 election districts (EDs). EL 8-500 permits 3 watchers/ candidate on the ballot for each ED. Figuring on 4 parties that would permit 12 watchers/ED or 196,000 watchers. EL 3-400 requires 2 clerks and 4 inspectors/ED where two voting machines are used or where paper ballots in addition to one voting machine are used. In each ED where paper ballots, in addition to more than one voting machine is used, there shall be 4 clerks in addition to the 4 inspectors and when deemed necessary the BoE may require additional poll clerks. EL 3-408 permits two additional clerks/ED where absentee and military ballots have been mailed to 25 or more registrants. Figuring conservatively on 8 clerks and inspectors/ED that's an additional 130,000 people. There are 62 counties, including 5 boroughs, so there are 124 election commissioners plus 4 SBoE commissioners and 124 deputies in the counties in addition to other staff and directors, etc. There are also hundreds of bipartisan technicians and bipartisan custodians of the machines. Conservatively counting 750 full or part time technicians and custodians and not including any staff, plus 250 commissioners, plus 196,000 watchers and 130,000 inspectors and poll clerks, **there are at least 327,000 people who currently observe and safeguard aspects of each election, all of whom will see nothing on software-based voting machines!**

⁴¹ 55 N.Y. 525 (Court of Appeals 1874)

"There would be no way to know that any of these attacks occurred; the canvass procedure would not detect any anomalies, and would just produce incorrect results."⁴²

The Judson Court ruled that:

- 1) During the time it wasn't possible to observe the count – when the lights were out – the opportunity to commit fraud existed;***
- 2) There was no proof that any fraud was committed by the election inspectors counting the votes;***
- 3) Because it could not be determined what percentage of the count represented spurious ballots and what percentage were genuine "[T]he return was no longer entitled to be regarded. It was rendered wholly uncertain to what extent the fraudulent substitution had been carried."***⁴³

Such valueless returns are the very ones New York's Legislature will have the State of New York using to determine the outcome of all of our elections starting in 2010!

New York's Computerized Voting System:

Software-driven voting systems conceal every aspect of the process election officials and the public are constitutionally required to observe and check in order to guarantee the integrity of our public elections. Not only will election officials and observers be prohibited from observing and hence unable to prevent the intervention of fraud, but dozens of independent computer scientists have studied these computers and found that they are vulnerable to massive undetectable fraud, far greater than any fraud which could be committed in a manual voting system.

We have no control over a system that can't be observed or safeguarded and we understand from our history and experience that such loss of control invites the very fraud two centuries of legislation have sought to prevent:

⁴² California Voting Systems Technology Assessment Advisory Board (VSTAAB), 2/14/06:

“There would be no way to know that any of these attacks occurred; the canvass procedure would not detect any anomalies, and would just produce incorrect results. The only way to detect and correct the problem would be by recount of the original paper ballots.”

http://www.sos.ca.gov/elections/voting_systems/security_analysis_of_the_diebold_accubasic_interpreter.pdf

⁴³ *Judson v Thacher, supra*, at 534

"If we destroy any of the safeguards erected and intended to be maintained about the voter, for his protection ... we at once do an act in encouragement of the very evil sought to be prevented."⁴⁴

This is how it will work:

1) Certification\ Testing of Software-based Optical Scanners and DREs Is Not Observable and Cannot Reliably Demonstrate That the Machines Are Safe for Use -- In Fact The Testing Has Proven That Optical Scanner and DREs Results Can Be Infected by Undetectable Tampering

The pre-election testing and examination that can demonstrate how our lever machines' immutable mechanized parts will function on election day cannot possibly demonstrate how software-driven machines will perform on election day because software, by its nature, is mutable.⁴⁵ Computers can change their own programming and those changes to the software cannot be observed. Software can be programmed to appear to be in working order, when in fact it has been compromised.

"[C]orruptions can lay dormant until Election Day, thus avoiding detection through pre-election tests."⁴⁶ The National Institute of Standards and Technology has acknowledged that:

"[E]xperience in **testing software and systems has shown** that testing to high degrees of **security and reliability** is from a practical perspective **not possible**."⁴⁷

⁴⁴ *Nichols v Board of Canvassers of Onondaga County*, 129 N.Y. 395 1891

⁴⁵ "The current certification process may have been appropriate when a 900 lb lever voting machine was deployed. The machine could be tested every which way, and if it met the criteria, it could be certified because it was not likely to change. But software is different. The software lifecycle is dynamic...[Y]ou cannot certify an electronic voting machine the way you certify a lever machine.... [W]e absolutely expect that vulnerabilities will be discovered all the time. ... A certification system that requires freezing a version in stone is doomed to failure because of the inherent nature of software."

Avi Rubin, (Professor of Computer Science at Johns Hopkins Univ.) Secretary Bowen's Clever Insight, August 7, 2007 available at <http://avi-rubin.blogspot.com/2007/08/secretary-bowens-clever-insight.html>

⁴⁶ Univ. of Connecticut Voting Technology Research Center, Security Assessment of the Diebold Optical Scan Voting Terminal, October 30, 2006

⁴⁷ National Institute of Standards and Technology (NIST) report on computerized voting systems, Requiring Software Independence in VVSG 2007: STS Recommendations for the TGDC, November 2006 available at <http://vote.nist.gov/DraftWhitePaperOnSIIinVVSG2007-20061120.pdf>,(emphasis supplied).

Malicious coding, or malware (also called Trojan Horse software) can be inserted without any person even needing to gain physical access to a computer, or by gaining access to one computer and inserting a virus that will spread to all computers, “Malware can also be designed to be adaptive - changing what it does depending on the direction of the tally. It could also potentially be inserted at any of a number of different stages in the development and implementation process - from the precinct all the way back to initial manufacture - and lie in wait for the appropriate moment.”⁴⁸ “The damage could be extensive – malicious code could spread to every voting machine in polling places and to county election servers.”⁴⁹ No amount of testing and no government seal of approval (otherwise known as ‘certification’) can detect malicious coding.⁵⁰

The very integrity and constitutionality of New York’s electoral system depends on the ability of monitored election officers to be able to meaningfully observe a transparent process so they can prevent tampering. “[B]ut the lack of capability to detect and report potential malware attacks against the system makes it the single largest threat”⁵¹; a threat election officials are powerless to prevent. Thus the State’s ‘certification’ of software-based voting systems provides absolutely no assurance that the computerized count doesn't include switched or fraudulent ballots, rendering the count “so uncertain and unreliable that.... it's value as evidence [is] wholly destroyed.”⁵²

2) Tampering of the Voting Software Is Not Visible - Undetectable Systematic Exploits Cannot Be Prevented

The history of elections in New York is dominated by relentless efforts to undermine the will of the electorate through fraudulent means. It has been the Legislature’s responsibility to regulate elections

⁴⁸ Congressional Research Service, November 4, 2003

⁴⁹ California Secretary of State, Source Code Review of the Diebold Voting System, July 20, 2007 http://www.sos.ca.gov/elections/voting_systems/ttbr/diebold-source-public-jul29.pdf

⁵⁰ “This is a classic computer security problem. Whoever gets into the machine first wins. So if the Trojan horse software is in there first, you ask it to test itself -- it will always lie to you and tell you everything is fine. And no matter what testing code you try to add after the fact, it's too late. It can now create a world where the testing software can't tell that the machine has been compromised, even though it has....” - Dan Wallach, Rice University computer security expert May 27, 2007

⁵¹ “The ability of malware to affect the integrity and availability of the elections process is profound and disturbing, but the lack of capability to detect and report potential malware attacks against the system makes it the single largest threat.” -Ohio Secretary of State, Project EVEREST Report of Findings, December 14, 2007 available at <http://www.sos.state.oh.us/sos/info/EVEREST/00-SecretarysEVERESTExecutiveReport.pdf>

⁵² *Judson v Thacher*, 55 N.Y. 525 (1874)

in order to prevent and minimize opportunities for fraud. Since fraud is enabled and encouraged by cover of concealment, such regulation has always required full transparency.

However, under the new legislation, no longer will anyone with a constitutional responsibility to protect the electoral process be able to see how the computerized voting machine has been programmed to count the votes. The very set up of the voting machine and ballot, which with lever machines is statutorily required to be checked by bipartisan election officials and party representatives, is now invisible, as are any errors or tampering to that programming. And unlike levers, where errors or tampering is limited to a single machine and is visible and therefore discoverable, if there is a problem on the unobservable software, it will not only be hidden, but can infect every voting machine. Software can be infected by a rogue code - which can disguise its tracks and force the machine to mimic normal behavior – and there’s no way for anyone to detect or prevent the software from miscounting the votes.

Nor can those charged with the duty to ensure the machine will accurately record votes or guard against fraud even see how the software has been programmed to interpret the ballots. It will no longer be possible for election workers, who are statutorily required to check the ballot text on the lever machine before each voter casts a vote, to perform this duty. The ballot text on the paper ballot appears one way to the voter, but none of the officials charged with the constitutional duty "of receiving, recording or counting votes at elections"⁵³ can see how the optical scanner was programmed to interpret the ballot.

3) Election Day Safeguards Enabling Observability and Detection to Prevent Tampering Are Futile with Software Systems Where Tampering Goes Unseen Within the Black Box of the Computer

Without the ability to observe how the software has been programmed to count the votes, or see how the software has been tampered with, permitting election officials and watchers the ability to observe the outside of a voting machine is a futile gesture. The visible locks and seals on a mechanical lever voting machine, which provide the security to both deter and enable the detection of fraud, are non-existent on software systems which know no physical boundaries. The security controls which sufficiently protected the lever machines are eliminated on software machines: “All of the studied [software] systems possess critical security failures that render their technical controls **insufficient to guarantee a trustworthy election.**”⁵⁴

The mechanical counters on the lever machine, which can be observed as registering zero and then compared to the protective counter (mechanically riveted to the framework and impossible to reset)

⁵³ New York Constitution, Art II § 8

⁵⁴ Ohio Secretary of State, Project EVEREST Report of Findings, December 14, 2007 available at <http://www.sos.state.oh.us/sos/info/EVEREST/00-SecretarysEVERESTExecutiveReport.pdf> (emphasis supplied)

do not exist on DREs or optical scanners. Thus the election workers' and watchers' responsibility to verify the integrity of the software-based machine's functioning on election day is no longer possible, since any rogue program can instruct a software-based machine to display zero when the count is actually -150. Again this tampering is undetectable.

As explained by New York's SBoE Commissioner and Co-chair Douglas Kellner:

“Machines similar to today's lever machines were at the center of a voter-fraud scandal in the 1940s. The machines had mechanical counters similar to odometers that recorded how many votes were cast for each candidate. Some of the people responsible for counting the votes used pen knives to change the counters and thus the votes. Similarly, the counters used on today's machines could be adjusted prior to the opening of polls to provide an artificial advantage to a candidate. **Unlike e-voting machines, which have all of its inner-workings hidden away as code, the working parts of lever machines are exposed to the world.** The fraud of the 1940s was uncovered because volunteers from the polling stations noticed that the numbers on their machines at the counting location were not the same as when they left the polling station. **Similarly, any tampering with a lever machine today would be plainly visible to the volunteer preparing it for poll opening. Becoming aware of fraud on an e-voting machine would be much more difficult, because so much of their inner-workings are invisible to all but the software programmers.**

Fighting fraud carried out by code is also particularly expensive. Some e-voting systems run on 150,000 lines of code and to uncover whether fraud has occurred, or by whom and how, requires an army of programmers, a number of years, and millions of dollars. Even then, there is no guarantee that their examination will produce results.”⁵⁵

Thus unobservable software make it impossible for election officers to detect and prevent an unlimited number of exploits, leaving the software-based systems unsecured and exposed to unseen and unpreventable tampering.

4) The Election Night Count Produced by Software Is Not a Reliable or Completed Tally and Has Been Exposed to Undetectable Tampering Rendering Its Value Worthless

For the first time in 232 years the election night count will disregard New York's requirement that the at-elections count be a publicly observed, secure and completed count. For the first time in 232 years post-election opportunities for fraud – historically understood to be so dangerous and difficult to prevent that we have never permitted subsequent alteration of the first count – will be openly

⁵⁵ Cairn's, The First Amendment, Democratic Design and Civic Innovation for the Digital Age, Interview with SBoE Commissioner Douglas Kellner, November 16, 2005, http://cairns.typepad.com/blog/2005/11/an_afternoon_wi.html (emphasis supplied)

invited into the electoral process. For the first time in New York's history we will have a method of voting that renders it impossible to know if the election night results have been polluted by unseen manipulation. And we will never know if the count is diluted with unknown numbers of spurious ballots because the new electoral scheme accepts an unknowable software-generated result, which is to be "audited" after election night, using ballots that were never determined to be the ballots cast on that machine and which the law therefore presumes do **not** represent the ballots cast on election night.⁵⁶

Moreover since election officials and the public are no longer able to see how the software-based machine has been programmed, and since compromised machines can disguise the fact that they have been compromised, there is no way to know that the indicated totals correspond to the votes cast. If the software was manipulated, "There would be no way to know that any of these attacks occurred."⁵⁷

When election officials are precluded from effectively participating in the electoral process and the public is unable to observe the performance of those duties, the potential for 100% knowledge of the security and reliability of our electoral system, which exists with our lever system, is reduced to 0%. Not even the "experts" know whether fraud has occurred and the extent of the fraud enabled by software is on a scale never before possible. A single individual "with temporary access to a single voting machine..... could spread [malicious code] to every voting machine in the polling places and to county election servers."⁵⁸

Thus the election night tallies as recorded on the DRE or optical scanner are no longer a secure, verified or completed count, as has been required for 232 years. In fact **the election-night count is now legally worthless because the software renders it "wholly uncertain to what extent the fraudulent substitution had been carried"**⁵⁹ thus making it impossible to ascertain the will of the people.

5) New York's New Post-election Procedures Encourage Disfranchising Fraud, Further Undermining the Will of the People

⁵⁶ Having created a method of voting in which the first count, produced by the software, is unreliable and open to fraud, the new statutory scheme attempts to compensate by verifying the software results by manually "auditing" 3% of the post-election night ballots.

⁵⁷ California Voting Systems Technology Assessment Advisory Board (VSTAAB), 2/14/06

⁵⁸ California Secretary of State, Source Code Review of the Diebold Voting System, July 20, 2007 http://www.sos.ca.gov/elections/voting_systems/ttbr/diebold-source-public-jul29.pdf

⁵⁹ *Judson v Thacher*, 55 N.Y. 525 (1874)

Whereas lever machines securely retained the evidence of the at-elections count immutably locked on the machine, along with the written evidence of those results (publicly created returns), undetectably mutable software systems leave no reliable or observable evidence of how the votes were counted on election night. The software programmer or hacker can program the software to literally erase evidence of tampering. **Without simultaneously created immutable evidence, the new statutory scheme returns New Yorkers to the pre-1896 method of voting wherein the court recognized “voting is a useless formality, as it depends upon the will of the [the few] as to who shall hold the offices, and not upon the vote of the people.”**⁶⁰ Under the new law a few people (the software programmer or hacker and possibly a few government insiders) control the count as well as the evidence of the count!

Such an unconstitutional method of voting was corrected 113 years ago, never again permitting a few unobserved people to control the election outcome. The People are entitled to a publicly observed canvass that is witnessed, recorded and preserved in incorruptible form. Software destroys the constitutional safeguards requiring that the public witness the process and creation of evidence of how our votes are counted.

Not only did the 2005 legislature destroy our constitutional safeguards, but the new legislation also violates the mandate to preserve the paper ballots inviolate. For 113 years bipartisan boards of election have been required to safeguard the counted ballots, never permitting the boxes to be opened except pursuant to a court order, and then only for the purpose of examination. The ballots are to be preserved for possible use in a criminal proceeding or for the rare case when the election process sufficiently fails, warranting the Attorney General’s commencing a quo warranto proceeding challenging the title of the purported winner. But New York’s new law directs that the ballot boxes be openly invaded, in flagrant disregard of the constitutional duty mandating that this evidence be preserved inviolate.

These post-election ballots, considered potentially "not only the weakest but the most dangerous evidence,"⁶¹ are the very ones New York’s new electoral scheme will require us to use to "audit" the legally valueless computerized results. Thus the new Law permits the at-elections count, which has been exposed to unseen opportunities for fraud, to be salvaged by purporting to verify it using post-election night ballots which have also been exposed to unseen opportunities for fraud! It is difficult to conceive of a more fraud-inviting and unconstitutional method of voting.

If instead of having software count the ballots we returned to a manually counted election, but permitted a few people behind closed doors to do the counting only to have the results

⁶⁰ *In re Stewart*, 24 A.D. 201, 48 N.Y.S. 957, 960 (1st Dept. 1897), aff’d 155 N.Y. 545 (Ct of Appeals 1898)

⁶¹ *Dailey v Livingston*, 34 Sickels 279 (1879)

subsequently 'audited' after the election was over by counting 3% of the ballots, we would have a more secure system than the one New York State plans on implementing this year!⁶²

6) New York's New Method of Voting Disenfranchises the Electorate and Effectively Prevents Their Ability to Legally Challenge the Deprivation of Their Constitutional Right

The purpose of preserving evidence of the count is to deter fraud and provide that the People will have the record evidence they require to challenge the election if their will is undermined. By failing to create and by destroying this evidence the new legislative scheme prevents this precondition to a judicial challenge, effectively depriving citizens of their liberty without due process of law. With no evidence of an observable count and no evidence of the fraud there is little to persuade the Attorney General of the need to challenge the results.

By violating the express injunction to preserve the ballots inviolate, not only has the State jeopardized the future admissibility of this evidence, but it has permitted the use of presumably fraudulent ballots to verify our election results or arrive at a new result. Until the factual issues of the condition of the post-election ballots have been judicially determined, those ballots are not admissible as evidence of the ballots cast on the machine being audited nor evidence of voters intention as expressed on election day. The new Law makes no provision for ascertaining the condition of the post-election ballots; a particularly blatant violation of the most fundamental requirements of due process.

In the exceptional case where the results of an election have been challenged, a jury had to "ascertain whether the [ballot] box has been tampered with by unlawful hands or remains in the same condition as when locked and sealed after the count of the ballots on election night."⁶³ Indeed a jury had to determine whether even the "opportunity has been given for tampering with them."⁶⁴

Writing about the dangers of using sealed, post-election night ballots to affect an election the Court of Appeals observed:

"Thieves will break through and steal, and no legislative enactment can prevent them. The same is true with reference to guarding the ballots from substitution by interested and evil-disposed persons. The result of an important election, state and national, may be changed by the disclosures made upon the opening of one of these boxes."⁶⁵

⁶² Manipulation of manual counts require many people in conspiracy to sufficiently alter the outcome of a race whereas software can be systematically exploited by a single individual with a few minutes of access, affecting million of votes.

⁶³ *Brink v. Way*, 17 Bedell 174, N.Y. (1904)

⁶⁴ *Dailey v Livingston*, 34 Sickels 279 (1879)

⁶⁵ *Brink v Way*, 17 Bedell 174, 184 (1904) (emphasis supplied)

Apparently our 21st century legislators believe these thieves have all disappeared and we can all rest assured that the propensity for fraud, which has predominated our electoral system for centuries, no longer exists.

Putting aside the legislation's blatant affront to due process, what if 232 years of history is correct? What if the ballots used in the audit have been altered to conform to the results produced by a rogue count? Or what if the computerized count and the post-election ballots have both been tampered with while hidden from view? Then what? What evidence of the will of the people exists after a software-run election?

There will be no evidence of the will of the people and no evidence of the fraud committed upon our very sovereignty. It is indeed the perfect crime, made all the more offensive by its subversion of our democracy. Blinded by invisible vote counting and bereft of evidence we are left without legal recourse to vindicate our inalienable right. The new statutory scheme permits precisely that which the first article of New York's Constitution proscribes: disfranchisement without legal redress. It is the Attorney General, as representative of the People, who decides in his discretion whether there is sufficient evidence to bring a proceeding "on behalf of the sovereign" to challenge the results of the election. But it is the Attorney General who is currently supporting the sovereign's disfranchisement and the destruction of evidence by invisibly programmed software-based voting systems.

CONCLUSION

With our manual counting systems we observe the count and the creation of evidence as the canvass proceeds, or we observe the programming of the lever machine and we observe that it is then locked, or we observed when there is tampering to these transparent systems. At the end of the process we have seen that the safeguards were observed or we have had the opportunity to prevent fraud and error, and we have preserved the evidence should it be necessary to challenge the results in a judicial proceeding. With the new software system we have nothing: not only can we not observe, but we have no evidence that will enable us to challenge the results.

Without reliable evidence we are unable to seek legal redress in a court of law. This represents the ultimate deprivation of due process and contravenes the first substantive right mentioned in New York's Constitution: "No member of this state shall be disfranchised.... unless by law of the land."⁶⁶ The 'law of the land' is synonymous with due process and was meant to restrict the power of the legislature and forbid any act depriving a citizen of rights prior to a judicial determination.

Due process of the law is not limited to a denial of judicial redress but extends to every proceeding which may interfere with a citizen's right to vote and right "to see that his vote has been given full

⁶⁶ New York Constitution, Article I, §1

force and effect.”⁶⁷ History has shown us what happens when the method of voting “provided no adequate restraints”⁶⁸ and a few people were able to control the evidence of the count, unobserved by the public. We understand from two centuries of experience that fraud will occur in the absence of open safeguarded proceedings, designed to expose and deter the propensity for tampering. Experience also teaches that only the People, who alone are the source of all power,⁶⁹ can through their presence provide the indispensable scrutiny which concomitantly satisfies “the objective of maintaining public confidence.”⁷⁰

In *Richmond Newspapers Inc. v Virginia, supra*,⁷¹ the U.S. Supreme Court found the public had a First Amendment right to attend and observe criminal trials, although the Constitution contains no explicit provision guaranteeing such a right. Among the bases for the Court’s holding was the historical evidence, which is also true of our public elections, “demonstrates conclusively that at the time when our organic laws were adopted, criminal trials ... had long been presumptively open.” The *Richmond* Court described “the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” Certainly such openness serves the identical function in elections. New York’s election laws have long recognized the importance publicity accomplishes by discouraging fraud in the electoral process. Indeed as the *Richmond* Court observed:

“Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.”⁷²

The right to observe a transparent electoral process is at least as deserving of constitutional protection as the right to observe a trial. Not merely silent trial observers providing a check against abuse, the public has historically played an active role in securing the integrity of New York’s electoral system.

⁶⁷ *Deister v Wintermute*, 194 NY 99, 108 (1909)

⁶⁸ *In re Stewart*, 155 N.Y. 545, 549, 553 (1898)

⁶⁹ “The source of all power is the people, as represented by the electors.” *Matter of Callahan* 200 N.Y. 59, 63 (1910)

⁷⁰ *Richmond Newspapers Inc. v Virginia, supra* at 600

⁷¹ *Richmond Newspapers Inc. v Virginia, supra* at 569

⁷² *Richmond Newspapers Inc. v Virginia, supra*, citing *In re Oliver*, 333 U.S., at 271, quoting 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827)

Having robbed the public of its role, concealed that which must be witnessed, destroyed the People's evidence and prevented our public election officials from being able to perform those duties essential to safeguard the process, the State offers certification in exchange for transparency.⁷³ But government control of an essential step of the electoral process has long since been recognized as rendering voting a "useless formality"⁷⁴ and transparency cannot be denied to a people whose form of self-government secures the inalienable rights to life, liberty and the pursuit of happiness.⁷⁵

Our Republican form of government depends on checks and balances, not trust. The very essence of our constitution requires that we eschew state-approved vote counting systems which invisibly tabulate the vote and control the evidence of the count. The public has an independent protected right of access to observe and participate in the counting and the creation of evidence. The SBoE's admission: "*And therefore, because it's not a transparent process, we have to substitute for the transparency the certification process*" can never redress the constitutional deprivation of being shut out of our own electoral process.

Characterizing the indispensable role public access has played in advancing the trial's aim at the accurate discovery of truth, the *Richmond* Court rejected a trial transcript as inadequate to compensate for the loss of first hand observation, reiterating the admonishment of false checks:

"The availability of a trial transcript is no substitute for a public presence at the trial itself. ... the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, "[r]ecordation . . . would be found to operate rather as a cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance."

Certainly a trial transcript trumps the State's 'certification', but neither can compensate for the public's constitutional right of access to observe an open process as fundamental as elections (and

⁷³ New York State Board of Elections Commissioner and Co-chair Douglas Kellner stated at the June 19, 2008 Board of Elections meeting that the electronic optical scan voting system New York plans on using is "not a transparent process". Conceding that voting on optical scanners (or DREs) conceals how our votes are counted, Commissioner Kellner stated:

And therefore, because it's not a transparent process, we have to substitute for the transparency the certification process.

<http://www.elections.state.ny.us/NYSBOE/News/MeetingMinutes/CCTranscriptions06192008.pdf>

⁷⁴ *In re Stewart, supra* at footnote 14

⁷⁵ "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." To take away the right to vote "is to reduce a man to slavery, for slavery consists in being subject to the will of another"-- Thomas Paine

trials) are to our system of government. "Integrity of our government can be no greater than the integrity of elections which put our government officials in office."⁷⁶

The People, as sovereign, must be able to judge for themselves how well or poorly its public servants are protecting the process by which they are re-elected to office. The People cannot accept the State's unobserved certification process- its personal assurance that these computers are safe for use - particularly when the evidence proves they are highly unsafe for use! The government must demonstrate, through a transparent process, that it is properly protecting the public's business and must not be able to hide behind a government seal of approval called certification. An "open...process is essential to fulfill "the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions."⁷⁷

To learn more go to the Election Transparency Coalition at www.etcnys.org and Resolved: NY Communities Want Levers at <http://nylevers.wordpress.com/>

Sign the Petition in support of our constitutional right to a transparent, secure, theft-detering electoral system at: http://www.electiondefensealliance.org/ny_levers_petition

⁷⁶ *Waters v. Gnemi*, 907 So. 2d 307, 336 (Miss. Sup. Ct. 2005) citing *Riley v. Clayton*, 441 So. 2d 1322, 1328 (Miss. Sup. Ct. 1983)

⁷⁷ *Richmond Newspapers Inc. v Virginia*, *supra*, citing *Time, Inc. v. Firestone*, 424 U.S. 448, 473-474, 476-478, 96 S.Ct. 958, 974, 975-977, 47 L.Ed.2d 154 (1976)