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A RESPONSE TO BURT NEUBORNE

*Rolando T. Acosta**

In distinguishing between the improper conduct of individuals who caused a human rights violation and the derivative liability of an employer, Professor Burt Neuborne's proposal[1] goes too far and sacrifices the interests of individual victims of discrimination for the almost impossible goal of preventing future acts of discrimination. That is, Neuborne asks whether it continues to make sense for the Commission on Human Rights to focus on remedying past acts of discrimination rather than on preventing future unlawful discriminatory acts from occurring, given the complexity of such cases, the well-developed constitutional and statutory law in the area, the shrinking resources for human rights agencies, and the moral difficulty of civil rights cases today. Neuborne suggests that given these four considerations, we must make serious choices between remedying acts of discrimination ("remedial approach") and preventing future acts from occurring ("preventive approach").

He concludes that within the context of derivative liability for employee violations of human rights norms, we should focus Commission resources on the "preventive" rather than the "remedial" approach. Some of the Commission's resources, Professor Neuborne posits, should be shifted from traditional civil-rights enforcement to the designing, supervising, and certifying of employer plans to prevent discrimination.

Neuborne argues that we should distinguish between the unlawful discriminatory conduct of an individual employee and the derivative liability of the employer based on such unlawful behavior. We should place liability on the morally culpable actor and make him/her pay the financial price of making the complainant whole. Employer liability would be triggered only when the resources of the culpable actor become exhausted, in which case one of two things happens: (1) if the employer does not have an effective plan for the prevention of discrimination in the workplace, strict respondeat superior liability would be imposed, relying on the appropri-

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1. *See* Burt Neuborne, *Who's Afraid of the Human Rights Commission?*, 23 FORDHAM URB. L. J. 1139 (1996).

ate traditional sanctions to induce compliance; or (2) if an effective plan is in place, the employer would be relieved of liability as long as it is not also morally culpable in some way for the discriminatory acts.

Finally, Neuborne suggests two caveats to his proposal. First, that his proposal may be less applicable to privately represented complainants proceeding under a private right of action; and second, that his proposal is merely a response to inadequate public resources to conduct effective civil rights law enforcement.

We can all agree that encouraging voluntary compliance is more effective than remedying discrimination on a case-by-case basis. The question, however, is how do we encourage compliance without upsetting the balance between prevention and remedy in the current New York City Human Rights Law? Professor Neuborne's proposal inevitably results in the shift of already inadequate resources to administrative monitoring functions and thereby risks precluding effective civil rights law enforcement in New York City. The result of his proposal would be a powerless City Commission serving as an administrative compliance agency with little, if any, ability to investigate, prosecute, and adjudicate cases of discrimination.

Professor Neuborne is right about the inevitable choices we must make between conducting adequate remedial investigations and prosecutions and ensuring the preventive compliance. Given the choices, however, I prefer an approach which safeguards the rights of victims of discrimination and does not accept Professor Neuborne's invitation to create additional inducements for employers.

To be sure, I would frame the question differently from Professor Neuborne. I do not believe the choice is between effective enforcement on the one hand and the valuable preventive functions on the other. The choice should be between a reactive agency that processes individual cases—the overwhelming majority of which are ultimately found to be without merit—and a proactive agency that identifies systemic discrimination and brings affirmative cases to remedy those patterns and practices.

I have a few additional concerns about Professor Neuborne's proposal. First, it is unclear to me whether human rights commissions generally, and the City Commission particularly, are the agencies best suited to the preventive functions at issue. I wonder if private actors, including law firms concentrating on defending employers, are not in a better position and have more credibility

with employers than human rights commissions, which have traditionally been perceived as adversaries. Indeed, there are currently private law firms designing and developing corrective plans for private employers. They should continue to do this work with assistance and guidance from the City Commission and other governmental agencies with similar functions (e.g., the Equal Employment Opportunity Commission).

Second, while Professor Neuborne is correct to be concerned about the allocation of resources to human rights agencies, including the City Commission, it seems more prudent to deal with the issue directly. For example, we would move to amend the City Human Rights Law to relieve the Commission of its current obligation to accept for investigation each and every complaint filed, regardless of its merit. This discretion would permit the Commission to use its scarce resources more proactively in implementing its enforcement strategy.[2] This is not the forum to flesh out the merits of this modest proposal. It suffices to say that the way to deal with the resources issue is not to do away with enforcement altogether. Rather, we should give the Commission staff, with proper administrative and judicial review, the ability to effectively (not to mention lawfully) triage complaints filed before the Commission based on clearly articulated standards.

Third, I do not believe that the problem has ever been with the remedial focus of the Commission's enforcement mechanism. The main obstacle to eradicating discrimination is not the mechanism used, but the underlying beliefs we have about delivering justice. Human rights agencies have never been taken seriously by a system generally threatened by effective efforts to enforce civil rights laws. The goal should not be to abandon effective enforcement to give employers more incentives to do something they already have a moral and legal responsibility to do. Nor is it to relieve employers of liability by throwing more obstacles in the already difficult path victims of discrimination must travel.

Certainly, before we entertain notions such as those contained in Professor Neuborne's proposal, we must fight to level the playing field by providing more resources and, as importantly, to induce stakeholders in this process (judges and legislators, among others) to treat an affront to a person's dignity at least as seriously as a parking ticket. Someone humilated and irreparably damaged by a

2. I must credit this idea to Craig Gurian, the principal drafter of the current Human Rights Law. He unsuccessfully advanced this idea in 1991 during the delicate and arduous process of amending the City Human Rights Law.

discriminatory act is awarded significantly less money and treated with less respect than a person stupid enough to walk into a McDonald's and not expect hot coffee to be hot.

Fourth, the current Human Rights Law contains adequate incentives to induce employers to establish plans to prevent and detect unlawful discriminatory practices. Section 8-107(13) holds employers liable for acts of co-employees when the employer knew, or should have known, of the employee's discriminatory conduct and failed to exercise reasonable diligence to prevent it.[3] An employer who had "established and complied with policies, programs and procedures for the prevention and detention of unlawful discriminatory practices by employees"[4] is allowed to plead and prove the same, possibly reducing or avoiding both civil penalties and punitive damages.[5]

The practical aspect of these provisions is that the employer is spared the penalty she/he fears the most, namely uncapped punitive damages. However, the responsible employer with a preventive plan could be relieved of even the usually smaller compensatory damages. In reality, an employer with an effective preventive plan who neither knew nor should have known of the discriminatory act, or knew and took reasonable preventive measures, would likely be found not liable.

The current Human Rights Law's safe harbor provisions, however, differ from Professor Neuborne's proposal in that the current law is predicated on aggressive civil-rights enforcement coupled with adequate inducement to the responsible employer. Neuborne's proposal, on the other hand, is based on little or no actual enforcement. The Commission's inadequate law enforcement resources would be almost totally engaged designing, supervising, and certifying preventive human rights plans established by employers.

Finally, perhaps the most problematic aspect of Professor Neuborne's proposal is that it unnecessarily sacrifices the interest of an individual victim of discrimination at the altar of employer safe harbors. The proposal ignores the balance struck by the current law to encourage responsible employer conduct by mitigating punitive damages and to ensure that the victim of discrimination—certainly the most innocent party—be made whole. We did not base this most important social policy choice on "moral culpabil-

3. NEW YORK, N.Y., ADMIN. CODE § 8-107(13) (1996).
4. § 8-107(13)(d)(1).
5. § 107(13)(e).

ity," but rather on where it is more appropriate to locate the risks attending discriminatory behavior.

Accordingly, if the employer in *Ruiz v. Arcade Elevator*[6] had had a preventive plan in effect and had not been "morally culpable," Ms. Ruiz would not have been made whole. She would have had to seek satisfaction of the $450,000 award against the very same individuals who had raped her, held her at gun point, and otherwise humilated her. It would have been Ms. Ruiz's burden to show that the resources of the morally culpable employee were exhausted before she would have been allowed to go after the employer. This is a very high price to pay to induce employer responsibility.

Additionally, under the Neuborne proposal, some victims of discrimination may be left without redress because private lawyers will agree to represent only those complainants with the strongest cases; that is, those cases of overt discrimination requiring little investigation or discovery. Cases which are more subtle and complex, requiring thorough investigation and expertise, would be left unresolved. Although a few lawyers will accept these cases on a contingency basis, some complainants may not be able to afford the costs associated with such litigation.

In conclusion, although I agree with Professor Neuborne that a "post-event" approach to dealing with unacceptable behavior often swallows any "pre-event" efforts to prevent the unacceptable conduct in the first place, we differ on the solution. Whereas Professor Neuborne would have us abandon traditional aggressive civil rights law enforcement, I simply recommend that we remain vigilant and find ways of encouraging human rights agencies to combine aggressive enforcement with effective pre-event efforts. I am convinced that the "natural bridge" between pre- and post-event functions of the law, to which Professor Neuborne alludes, is still viable. Efforts to eradicate discrimination in the workplace can be most effective when we combine an aggressive and hard-hitting approach to deal with unacceptable behavior with a means of providing clear guidelines for what is acceptable. To go too far in either direction leads down the wrong path.

6. Compl. No. EM 00465-08/29/88, Rec. Dec. & Ord. (Dec. 5, 1994), *adopted as modified*, Dec. & Ord. (N.Y.C.C.H.R. Feb. 28, 1995).