Civil Rights Law in Transition: The Forty-Fifth Anniversary of the New York City Commission on Human Rights

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CIVIL RIGHTS LAW IN TRANSITION:
THE FORTY-FIFTH ANNIVERSARY OF THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS

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NEW YORK CITY COMMISSION ON HUMAN RIGHTS
AND THE FORDHAM URBAN LAW JOURNAL
# Civil Rights Law in Transition:

The Forty-Fifth Anniversary of the New York City Commission on Human Rights

This Symposium is Co-Sponsored by the:

New York City Commission on Human Rights

and the

Fordham Urban Law Journal

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<td>Director, ADR Program, U.S. EEOC, N.Y. District Office</td>
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<td>LUCIA DAVIS-RAIFORD</td>
<td>Assistant Program Counsel, Domestic Violence Unit, N.Y.C. Police Department</td>
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<td>JOHN D. FEERICK</td>
<td>Dean, Fordham University School of Law</td>
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<td>ALFRED G. FELIU, ESQ.</td>
<td>General Counsel, N.Y.C. Commission on Human Rights, Vandenberg &amp; Feliu, LLP</td>
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<td>DONI GEWIRZTMAN, ESQ.</td>
<td>Assistant Program Counsel, Eastern Paralyzed Veterans Association, Lambda Legal Defense and Education Fund</td>
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<td>JULIE GOLDSCHEID, ESQ.</td>
<td>General Counsel, N.Y.S. Division of Human Rights, NOW Legal Defense and Education Fund</td>
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<td>LOUIS GRAZIANO, ESQ.</td>
<td>Assistant Program Counsel, Eastern Paralyzed Veterans Association, Lambda Legal Defense and Education Fund</td>
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<td>JOHN P. HERRION, ESQ.</td>
<td>General Counsel, N.Y.C. Commission on Human Rights, Outten &amp; Golden, LLP</td>
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<td>SUSAN T. MACKENZIE, ESQ.</td>
<td>Arbitrator and Mediator, Susan T. MacKenzie, P.C.</td>
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<td>WAYNE N. OUTTEN, ESQ.</td>
<td>Outten &amp; Golden, LLP</td>
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<td>RUSSELL PEARCE</td>
<td>Professor, Fordham University School of Law</td>
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<td>NADINE STROSSEN</td>
<td>Professor, New York Law School</td>
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<td>MARTA B. VARELA, ESQ.</td>
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<td>RANDOLPH E. WILLS, ESQ.</td>
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MS. VARELA: Some of you may have seen Barney’s windows on Madison Avenue that are celebrating talk. Windows designed by Simon Doonan celebrate talk. The talk today, however, I think you will find is, paradoxically, valuable yet cheap. We are offering it at low cost since, as a municipal agency, we have a stake in public education on civil rights. It is our view that the better members of the public, and, not incidentally, practitioners, understand the complexities of issues in civil rights law, the more equipped our society is to grapple with them.

Hence, for its Forty-Fifth Anniversary, the New York City Commission on Human Rights (the “Commission”) wanted to offer a Symposium on topics that lie at the intersection of law and policy. The panel topics all touch upon areas that generate enormous interest: sexual orientation, sexual harassment, disability, mediation, domestic violence and hate crimes. As the Chair, it is my hope that by offering discussions of these topics within the context of recent legal developments, the legal personnel of the Agency, along with our distinguished colleagues, can shed some light on these difficult issues which matter so much to so many of us.

I want to express my thanks to the Fordham Urban Law Journal for doing all the spade work to get the conference up and running, particularly to Alicia Mioli, who worked tirelessly to make sure that all of the details were in place. I look forward to a very successful conference today and a volume to appear sometime later next year, which will flesh out much of the discussions today in legal, footnoted detail.

With that, it is my pleasure to introduce the Dean of Fordham Law School, Dean John Feerick, to say a few remarks. I am very glad to see him today.

DEAN FEERICK: Thank you very much.

On behalf of Fordham Law School, I would like to welcome you to this very important Symposium on Civil Rights Law in Transition, celebrating at the same time the Forty-Fifth Anniversary of the Commission.

It is certainly a distinct pleasure and privilege for our Urban Law Journal and our Law School to co-sponsor this event with the Commission and, as I said before, to be so much a part of an important anniversary celebration.

I would like to extend a special welcome to the moderators of the various panels in today’s program, to all the panelists in addition to the moderators who will be presenting different points of
view, and I would like to recognize as well the participants in your very interesting luncheon program.

Let me conclude with just a few brief reflections. The Commission has been rightly heralded as one of the stellar organizations of its kind in this nation. It has earned a reputation as a leader in the struggle for justice and human dignity, and it has inspired many other organizations and individuals by its shining example of, and I use the word deliberately, compassion and concern for others, particularly many vulnerable communities out there.

This Symposium reflects the diversity and reach of the Commission’s mission through addressing developments in such areas as mediation, domestic violence, disability law, hate crimes legislation, sexual harassment, and sexual orientation law. It also reveals the Commission’s continuing commitment to the fundamental principles of justice that lie at the core of our society and its tireless dedication to assuring that all citizens are equal under the law.

Those of us who work at Fordham Law School are extremely proud of the magnificent work and achievements of the Commission, and we take particular delight in the fact that its current Chair is a graduate of our school. We salute her and we salute all those associated with the Commission on this very special occasion. We wish all of you a most enjoyable and successful participation in this program today.

Let me end by saying that outside on the table there are two important documents, obviously among many other important documents, but two that I was asked to call your attention to. One is a time line of international human rights milestones over a period of time that starts with the Administration of Franklin Roosevelt and comes right down to the present by different time periods. There is also a time line with respect to the development of the Commission and the human rights law here in New York City. You will most likely want to capture those two documents, among others, as you leave the program today.

Thank you very much. I hope all goes well for you.

PROFESSOR PEARCE: Hi. My name is Russ Pearce. I am a Professor here at the Law School. I want to add a welcome on behalf of the Law School's Louis Stein Center for Ethics and Law. The Stein Center is committed to encouraging collaboration between the Law School, practicing lawyers, government institutions and judges in exploring issues of ethics and public policy. I think that this Symposium represents the best of what we are trying to foster. My particular role was, I think, quite minimal here. I am a
former counsel to the Commission on Human Rights and I think I helped make the *shidduch*, or the match, between the Commission and the *Fordham Urban Law Journal*.

I just want to add a few words of thanks to the people who made this possible. The students of the *Urban Law Journal* have once again done their exemplary job in helping to put together a very important Symposium on this topic. I would especially like to single out Bob Schumacher and Alicia Mioli, who have worked tirelessly on this project and has done wonderful work. I would also like to acknowledge and thank Helen Herman, Director of our Office of Academic Support, without whose efforts this conference and other conferences that we hold here at Fordham would not be possible.

My most important thanks goes to Commissioner Marta Varela. She is a model of a public servant who is not afraid to explore the most complex and challenging intellectual implications of public policy issues. Indeed, in my experience she is one of the best read and most thoughtful public servants I have ever met. In addition to exploring these issues, she is also very committed, as you have heard this morning, to fostering public dialogue. We are very appreciative that she has invited Fordham to collaborate on this project. I would like to thank her for sharing her efforts and sharing the work of the Commission, which we will all learn much more about today.

Welcome.
MS. HOWARD: This is a panel on mediation in New York State. Mediation has grown in prominence and use throughout the legal profession as a way to resolve disputes quickly, efficiently, and economically. Although it has been around for a long time, it is still in its infancy.

Mediation has only recently begun to move into institutions throughout the nation, and it is taking on different forms. It is important for practitioners to know that the practice of mediation varies depending on the practitioner. Mediation is shaped by the institution in which it is practiced.

Today, we have a panel consisting of representatives from the New York City Commission on Human Rights (the “Commission”), the New York State Division of Human Rights (the “State Division”) and the U.S. Equal Opportunity Employment Commission (“EEOC”), as well as a noted private mediator, Susan Mackenzie. We will discuss the different types of mediation available in New York State.

I would like to take this opportunity to introduce our panelists. I am Cheryl Howard, the General Counsel and the Director of Mediation at the Commission. I first became interested in mediation when I worked on an Apache Reservation, where they avoid legal channels and rely on mediation and facilitation to resolve important tribal disputes. After I came to the Commission as an administrative law judge (“ALJ”), I received mediation training from Ms. Mackenzie. The Commission’s Office of Mediation and Conflict Resolution grew out of the ALJ mediation program.

Gina Lopez is the General Counsel at the State Division and a former member of the staff at the Commission. Ms. Lopez is experienced in mediation and discrimination law and has recently come to the State Division in an effort to institute more mediation and conciliation there.

Michael Bertty is the distinguished Director of the EEOC’s Mediation Program. The EEOC’s newly launched mediation program has been very successful. The New York office is the second-most productive office in the nation. Their mediation program has caused quite a buzz in the community because it has provided many opportunities for mediators throughout the City to practice, and it promises to be one of the real engines for integrating mediation into the practice of law in New York.

Susan Mackenzie, despite her youth, is in some ways the mother of us all because she trained all of us to mediate. She trained the
administrative law judges at the Commission, as well as the mediators at the EEOC, and is a noted and very well-respected mediator herself. She is a member of the Committee on Labor and Employment Law at the Association of the Bar, the Board of Governors of the National Academy of Arbitrators, the NASD National Arbitration and Mediation Committee, and the NASDR Working Group in Employment Discrimination Claims. She has been a strong influence on the practice of mediation by qualified, well-trained mediators in New York City. We are going to depend upon her, after we all make our presentations, to make sense of all the different methods of mediation available, and to explain how mediation in an agency works in contrast to private mediation.

Without further ado, let us get started.

The Commission's Office of Mediation and Conflict Resolution is an integral part of the agency's effort to enforce the New York City Human Rights Law (the "Human Rights Law").\footnote{1} Our mediation staff is available to mediate cases filed at the Commission.

The Commission is charged with enforcement of the Human Rights Law.\footnote{2} The Human Rights Law prohibits discrimination in employment, housing, and public accommodation.\footnote{3} Discrimination is prohibited on the basis of actual or perceived race, color, creed, age, national origin, citizenship status, gender, sexual orientation, disability, marital status, criminal conviction or arrest record, the presence of children in the household, and relationship or association with a member of a protected class.\footnote{4} Acts evincing bias as well as discriminatory harassment are prohibited. It is also illegal to discriminate against any person due to his or her opposition to a practice prohibited under the Human Rights Law.\footnote{5}

Pursuant to the terms of a work-sharing agreement with the EEOC, the Commission is designated a Fair Employment Practices Agency. We have, therefore, the authority to file and process complaints alleging violations under Title VII of the Civil Rights Act of 1964\footnote{6} and under the Americans with Disabilities Act.\footnote{7} Cases filed under both statutes are generally investigated by the Commission's Law Enforcement Bureau (the "Bureau") rather than the EEOC, and may be mediated at the Commission.

\footnote{1}{See N.Y.C. ADMIN. CODE § 8 (1996).}
\footnote{2}{See id. § 8-105.}
\footnote{3}{See id. § 8-107.}
\footnote{4}{See id.}
\footnote{5}{See id.}
\footnote{6}{PUB. L. No. 101-336, 104 STAT. 327 (1990); 42 U.S.C. § 2000(e) (1964).}
\footnote{7}{42 U.S.C. § 12102 (1994).}
As mentioned earlier, the creation of the Commission’s Office of Mediation and Conflict Resolution was based upon the success of a pilot mediation program involving the ALJ’s. In January 1997, the Office of Mediation and Conflict Resolution was placed under the authority of the General Counsel’s office, and at that time we imposed a number of changes. The two most important changes were the creation of a brochure allowing the parties to choose mediation, and the formulation of rules for mediation.

The Office of Mediation and Conflict Resolution consists of three full-time mediators who are employees of the Commission. That we have full-time mediators on staff sets us apart from most agencies. Most agencies have per diem mediators or contract out for mediation. The Commission has funded the Office of Mediation and Conflict Resolution as a demonstration of our commitment to alternative dispute resolution. We believe that having our mediators on-staff enables them to become experts in the narrow area of the law with which the Commission’s mediation program deals so that the Office of Mediation and Conflict Resolution functions more efficiently.

The Office of Mediation and Conflict Resolution is completely separate from the Bureau, which investigates and prosecutes cases, and the office of Administrative Trials and Hearings, which conducts administrative hearings on cases. The Office of Mediation and Conflict Resolution reports to the General Counsel, who reports directly to the Commissioner. In this way the Commission avoids the possibility of conflicts of interest.

Since its inception at the Commission, mediation has proven a fast and effective method for resolving complaints. Cases can be referred to the Office of Mediation and Conflict Resolution at any stage in the process. We do not limit mediation to a particular class of cases or any particular stage in the process. The great majority of our cases, however, are referred to mediation from the Bureau at the pre-investigation stage.

The Bureau and the Office of Mediation and Conflict Resolution recently started a program where we review cases jointly and, based upon a joint assessment, refer cases for mediation. Cases may also be referred at the discretion of the Deputy Commissioner for Law Enforcement or his designated staff. Parties may also request mediation by speaking to the Bureau or attorneys assigned to a case, or by filling out our brochure, which allows parties to request mediation. Those referrals are sent to us along with the cases if the Bureau deems the case appropriate for mediation. Once a
case is referred to the Office of Mediation and Conflict Resolution, we send out an opening letter, as well as a brochure explaining the program and the rules. If the parties agree, the case is scheduled for mediation.

Mediation is totally voluntary. If the parties decide against mediation, the case just continues in the process and is investigated and a decision is made in turn. If the parties agree to mediate, but the mediation is unsuccessful, there are no consequences for the failure to reach an agreement at the Commission. The case simply goes back into the process, as if no referral to mediation had been made. Most mediations are held at the Commission. If, however, circumstances warrant it, our mediators will meet with parties on-site.

In mediations held at the Commission, the Commission itself may be a party to the complaint, so it may have an independent interest in the case pursuant to the Commission Law. Our mediations, therefore, look somewhat different than other mediations because we have three parties: the Bureau, the complainant, and the respondent. No agreement can be reached at the Commission without the consent of all three parties.

Our mediators are neutral third parties and their only responsibility is to facilitate settlement discussions among the parties. They will not take sides and they do not make decisions. Confidential information disclosed to a mediator by parties or witnesses during the course of a mediation will not be divulged by the mediator. It is the policy of the Commission that we will resist any effort to have a mediator disclose information. In the seven years that the program has been in existence, no mediator has ever been subpoenaed.

If a case is settled in mediation, the parties draft an agreement. Commission-generated conciliation agreements, unlike settlements negotiated privately between complainants and respondents, are executed by all of the parties and the Chair of the Commission. Once signed by the Chair, an agreement becomes an enforceable order of the Commission. Any party who fails to comply with the order may be liable for civil penalties of not more than $50,000 and an additional penalty of not more than $100 per day.

Complainant and respondent may agree that they will not disclose the terms of an agreement. The agreements, however, are public documents and are subject to the Freedom of Information

9. See id. § 8-124.
Accordingly, the Commission can rarely agree to nondisclosure. In some instances to ensure nondisclosure subsequent to a successful mediation, parties withdraw their case with the Bureau's consent and draft a private agreement. Those agreements, however, are not enforceable by the Commission.

In our seven years, we have found that the greatest resistance to mediation generally comes from attorneys. Over time, we realized that the resistance is due to unfamiliarity more than outright hostility. The Commission, in an effort to overcome that resistance, developed a checklist for attorneys that informs them about the process and answers most of the commonly asked questions.

Our mediation program is somewhat different than others in that we spend a lot of time up-front talking to the parties before they mediate. We want to be sure that the procedures are clear and people understand what they are getting into. We are available to talk extensively to any attorneys who would like to understand our program better. We do our best to be sure there are no surprises.

The Bureau is also available to the parties and their attorneys, and is very helpful in preparing cases for mediation. We, at the Commission, believe that mediation is an effective way to resolve cases, and that it gives the parties much more power to resolve their own disputes than going through the administrative process.

Now Gina Lopez will describe the efforts of the State Division at conciliation and mediation.

MS. LOPEZ: The State Division also recognizes that mediation is an effective manner of resolving disputes quickly prior to investigation or a hearing. Unlike the Commission's Office of Mediation and Conflict Resolution and the Bureau, which is located in one office, the State Division has nine offices across the state that conduct investigations. The State Division's early resolution programs need to take into account the different regions in which the offices are located.

The State Division uses two techniques for early case resolution, mediation and conciliation. The State Division also uses a pre-hearing settlement calendar, which is a conciliation attempt post-probable cause determination. Nearly our entire staff of investigators and attorneys have been trained in mediation, and those skills are used to conduct mediation and/or conciliation sessions.

At the investigative stage of a case, each of the nine offices engages in conciliation efforts, and some regional offices engage in

mediation. The process works as follows: when a complaint is served on the parties, a letter is also sent asking the parties if they are interested in engaging in alternative dispute resolution or conciliation efforts. If the parties are amenable, they contact the regional office, and a conciliation session is scheduled. In most cases, the conciliation session is held at a State Division office. In areas, such as Buffalo, Binghamton, and offices upstate, where the regional offices cover a wide area, conciliation sessions may occasionally be held over the telephone, as it may not be practical for the parties to travel to the office.

The State Division engages in conciliation rather than mediation, because frequently the investigator assigned to a case will conduct the conciliation. The number of cases assigned to each investigator and the number of staff members at each office also contributes to the decision to hold conciliation sessions rather than mediation sessions. Some directors believe that having the investigator assigned to the case conduct the conciliation session has practical benefits. They believe it expedites an investigation, in that if a case is not resolved, the issues are hashed out and they are brought to light and an investigative plan can be drawn narrowly to explore the pertinent issues in the case.

The State Division uses two types of mediation: in-house and contracted-out mediation. The in-house mediation is currently used by the Brooklyn and Buffalo offices. In those offices, a letter is sent to the parties inquiring whether they would be interested in mediation. This is separate from the original letter offering conciliation, which goes out with the complaint. If the parties are amenable to mediation, a session will be scheduled. In those cases, the director or an investigator not assigned to the case will conduct the mediation. If it is successful, the parties will draft an agreement in plain language and the mediator will sign off on the agreement.

This differs from the conciliation sessions in that the mediator does not conduct the investigation. If the case is assigned to an investigator, a different person will conduct the mediation. If it is pre-assignment, the mediator of a case will not conduct the investigation of the case. This policy upholds the confidentiality of the mediation. Because everything is confidential and no notes are taken, there is nothing put in a file unless a mediated agreement is reached.

In the past, the State Division has had contracts with Victim Services. Victim Services conducted mediations for the Brooklyn office as well as the Office of Sexual Harassment Issues, which is
located in Brooklyn as well. In Rochester, the Center for Dispute Resolution conducted mediations.

The director reviews cases for referral and if it appears as if the case would be appropriate for mediation, it is referred. The respective Centers then contact the parties and conduct the mediation. If mediation results in a resolution of the matter, a letter is sent to the State Division so stating, and the case is withdrawn.

At present there is a new pilot program in the Long Island Regional Office. The Office is working in conjunction with the Nassau County Bar Association, particularly the Labor and Employment Committee. The Labor and Employment Committee now has fifteen certified mediators, and has agreed to mediate between fifteen and twenty cases for the State Division. The State Division submits cases to the Committee for mediation, and the Committee sends out a list of fifteen mediators to the parties, who then rate mediators in order of preference. When that information is returned, a mediation session is scheduled. The mediation sessions are held at the State Division offices, but there is no State Division representative at the session.

Although conciliation is used rather than mediation, all of the regional directors have reported an increase in the number of respondents requesting conciliation or mediation. They attribute the increase to education and familiarity with the process. Especially in Rochester and Brooklyn, parties who have gone to Victim Services or the Center for Dispute Resolution are now more familiar with mediation and are more open to alternative methods for case resolution. The directors have also reported that attorneys who have come to the State Division and engaged in either conciliation or mediation continue to request those services. Again, education and experience with the process seem to be the cause of the increased awareness and interest in early case resolution.

The other resolution effort I wanted to speak about is the Pre-Hearing Settlement Unit (the “Unit”). The Unit attempts to mediate or otherwise resolve cases after a probable cause determination has been issued. All cases where probable cause has been issued are invited to participate in the settlement process. The Unit is staffed by an ALJ, as well as two human rights specialists who are located in the Legal Unit and act as State Division representatives. Settlement conferences are scheduled two to three times per month, and are conducted throughout New York State. The Unit travels statewide to conduct settlement conferences.
At a conference, settlement options are discussed. The role of the ALJ is to facilitate the settlement discussions. Rose Ferradina, an ALJ, conducts the conferences, and, rather than arbitrate the cases, she conducts mediations. Although she does not call herself a "mediator," in essence that is what she does, because if a case does not settle, there are no notes taken and she does not have the file. As a result, whatever was discussed remains confidential and a different ALJ is assigned to hear the case. The State Division representative at the conference is not an attorney, and does not prosecute the case. The conference is entirely confidential and separate from any subsequent legal action.

If a case is settled the parties can either put the settlement on the record or draft a settlement agreement. Unlike the Commission, the State Division does not sign off on any agreements. The State Division annexes a Commissioner's order to the agreement. Cheryl Howard mentioned earlier that the State Division is currently reviewing its mediation and conciliation efforts and assessing the feasibility of instituting a formal mediation unit.

Thank you.

MR. BERTTY:11 I am the ADR Program Coordinator for the New York District Office of the EEOC (the "New York District Office").

The New York District consists of three offices: one in New York City, one in Boston, Massachusetts, and one in Buffalo, New York. The District covers the states of Connecticut, Maine, Massachusetts, New Hampshire, New York, Puerto Rico, Rhode Island, the United States Virgin Islands, and Vermont, making it the most populous EEOC District in the nation.

The mission of the EEOC is to promote equal opportunity in employment through administrative and judicial enforcement of the Federal Civil Rights laws12 and through education and technical assistance. The EEOC utilizes a multi-pronged approach in its efforts to eliminate employment discrimination: prevention of discrimination through education and outreach, the voluntary resolution of disputes when possible, and, where voluntary resolution fails, strong and fair enforcement.

11. The views expressed by Mr. Bertty are his own. No official support or endorsement by the United States Equal Employment Opportunity Commission or any other agency of the United States Government is intended or should be inferred.

In 1995, the EEOC adopted the Priority Charge Handling Procedures ("PCHP") to address a growing backlog of charges, while effectively achieving the EEOC's mission of eradicating employment discrimination. The PCHP standards give field personnel flexible procedures for processing charges, including the discretion to decide the appropriate level of resources to be utilized for each charge based upon its merit. Charges are prioritized with those that are most likely to result in a finding of a violation given priority.

Because charge intake is critical to the effectiveness of the PCHP, our intake staff obtains early, in-depth information from charging parties. Detailed interviews are conducted, and all relevant information available is gathered from the charging parties. As appropriate, attorneys are involved in the intake of charges that are complex or require legal input.

Potential charging parties are not discouraged from filing charges. Where, based upon the initial interviews, the charges appear to be without merit, the individuals are so advised, and counseled about our process. If they wish nonetheless to file charges, they are told that the charges will be served on the respondents and may be dismissed at that time or shortly thereafter. A charge may be filed in person at one of our offices, by telephone, or by mail.

Mediation is a form of dispute resolution that is offered by the EEOC as an alternative to the traditional investigative process. Mediation does not replace an investigation. It is a supplement to the EEOC's toolbox that allows parties to have a choice between mediation and an investigation. There are many benefits to mediation. First, there is no finding of fact. Second, there is no position statement required of the respondent if he agrees to participate in mediation. There is no right or wrong, and it is a speedy process. We can process a case through mediation within thirty days. If the parties are willing, we can do it even more quickly than that.

The mediation process allows a win/win situation. In one of our training programs we employ a principle that we refer to as the "YTT" formula. YTT stands for "Yesterday," "Today" and "Tomorrow." During a mediation session, we stand "Today" looking briefly back at "Yesterday" in the hope of resolving the dispute for "Tomorrow." Our focus is on tomorrow, however, not yesterday.

The parties in a mediation decide the settlement, not the mediator. Before we begin our mediation sessions and after we have discussed the ground rules with the parties, we verify that the
participants at the mediation table have the authority to make a
decision that would resolve the issues of the charge. Mediation
sessions are informal and the entire process is confidential. Prior
to commencing a mediation session, all participants must sign a
confidentiality agreement as well as an agreement to mediate.

In the New York District Office, all case files that go through
mediation and are closed with a settlement are kept in yellow fold-
ers. The yellow folders send a message to staff that the contents of
the folders are confidential. A case closed though our mediation
program stays in the yellow file folder and is placed in a special
section of our control room. Those cases are not touched by any of
the investigators or anyone other than the staff of our ADR Unit.

At the beginning of a mediation session we give the participants
paper so they may take notes. We encourage participants to take
as many notes as they wish. Each participant, however, is re-
minded that the paper is ours, and at the end of the mediation ses-
tion we want our paper back. While we cannot erase from their
minds the things that take place in a session, we collect the notes as
a reminder of our confidentiality policy. At the conclusion of a
mediated case, our files only contain the charge, the confidentiality
agreement, an agreement to mediate, and the settlement agree-
ment. All notes are destroyed. If a case is unsuccessful in media-
tion, the charging party and the respondent lose nothing as the case
is then referred to our Enforcement Unit for investigation. No in-
formation obtained during the course of the mediation process fol-
lows the case file to the Enforcement Unit.

There is a wall around our mediation program. In our mediation
program, the charging party and respondent are bound by a confi-
dentiality agreement and agree not to share any information
learned during the mediation session. The mediators (staff, pro
bono, and contractors) also agree that they will not share any infor-
mation learned during the mediation in compliance with our confi-
dentiality agreement. It is fairly easy to safe-guard this policy
because our pro bono and contract mediators are not EEOC em-
ployees and do not know the staff or to whom the case would be
referred were mediation unsuccessful.

For EEOC staff mediators, there is an additional safe-guard.
First, there is a policy that, if not followed, may result in the staff
member losing his or her job for breaching confidentiality. Second,
there is a fine. More important than a fine, however, is the fact
that a breach of confidentiality may result in imprisonment. If the
other safe-guards fail, the threat of imprisonment will certainly keep us on the straight and narrow.

The New York District Office has a viable program in each of its three offices (Boston, Buffalo and New York City). Staff mediation is augmented by pro bono and contract mediation services.

One of the roles of the mediator is to gently guide the charging party and the respondent through the mediation process, looking at the events of yesterday, but focusing on tomorrow. It is often necessary to have some discussion about what has transpired. You must remember that parties may have carried whatever they are feeling for a while, and may need to get it out of their systems so they can go forward. We understand this and allow time for the process.

During conversations prior to mediation the parties often discuss the terms of agreements. Sometimes coming to the mediation table is just a formality and we immediately write up an agreement. At the close of our 1999 fiscal year, the New York District Office secured $6.7 million in monetary benefits for charging parties. This does not take into account non-monetary settlements that resulted in changes in working conditions, shift changes, a smooth separation, neutral job references, reasonable accommodation, or other benefits.

Mediations are occasionally unsuccessful because parties sometimes feel that they have to prove the rectitude of their positions. In those cases, an opportunity to bring closure to a dispute is lost. Opportunities are also lost when mediation is offered to both parties, but they take an extended period of time to make a decision, or feel that to agree to mediation first is a sign of a weak case. Mediation is designed to allow individuals to look at differences, arrive at a settlement, and move forward.

The New York District Office’s Mediation Program has four components. The first is training. Training is provided to all mediators in various forms. We provide classroom training, on-the-job training, and co-mediation experiences. Our training is ongoing. Through a collaborative effort with Cornell University School of Industrial Relations here in New York City, we have developed a two-day training program that focuses on mediation techniques, employment law, and policies and procedures enforced by the EEOC. While training does not guarantee an expert mediator, we believe that standardized training fosters uniformity within our mediation program. Our training program has proven very effective. We have had eleven classes to date, of between thirty and
thirty-five people each. We are very proud of the work that our graduates have done and the contributions they have made to the EEOC. Training is very high on our list of priorities.

Second, we have an educational component. You can be the best mediator in the world, but that does not mean you will settle every case, because you need to educate the potential parties. The education component allows us to go out to respondents, respondents' representatives, and charging parties and educate them on the subject of mediation. This process has increased the interest and participation levels in our mediation program.

The third component is the actual mediation. The fourth component is an evaluation process. Through our evaluation process, we learn first hand from the participants whether the process is effective and what changes, if any, may enhance the program.

The EEOC is committed to increasing the number of mediations we perform in the fiscal year 2000. We believe that through a comprehensive education and outreach effort, more people will learn about our mediation program and consider utilizing it to resolve charges filed at the EEOC. It is through forums like this one that we are able to share with the general public the new programs and initiatives the EEOC is commencing. With your help in sharing this information with others, you can assist the EEOC in better serving the public. It was a pleasure participating in this panel today, and we welcome your input.

MS. MACKENZIE: It is, of course, a pleasure for me to be here today, because for years I have been a proponent of mediation as opposed to the litigation of employment discrimination cases. Now, as you can see, I am not alone. Just hearing about the differences in the three programs described, the flexibility and effectiveness of mediation is apparent. In New York, the impetus to mediate is coming not only from the oversight agencies, but also from court-mandated programs such as that in the Eastern District (where mediators are required to have subject matter expertise) and in the Southern District (where there is no subject matter expertise requirement for mediators). I will focus on some of the distinctions between "public policy" mediation — agency or court-sponsored — and private mediation from my perspective, and some of the ethical and professional responsibility issues we face when mediating statute-based claims.

Before I talk about my own practice as a private mediator, I will say a few words about effective mediation in general. It is my firm view that focusing on those aspects of mediation that are distinct
from litigation promote the efficacy of the process. Mediation is flexible, informal, and non-confrontational. It promotes active party participation, party control over the outcome, and creative settlements. In mediation, we also focus on party interests and concerns rather than legal "technicalities," and on the present and future rather than the past or on assessing or assigning blame.

I adhere to three principles that help promote effective mediation in employment discrimination cases. First, all employment discrimination claims involve workplace disputes. The workplace environment is the starting point of the dispute, and my starting point as well. I think it is critical for mediators and parties not to lose sight of non-legal workplace issues. Non-legal issues may be a critical aspect of the case, and by addressing them we may, at times, resolve the case. Moreover, they are frequently issues one cannot address in litigation.

Second, employment discrimination disputes are almost always amenable to resolution in an informal setting. Sometimes the timing of the mediation may affect the structure of the mediation process. I am increasingly spending time with party counsel prior to the actual mediation session, not only to identify necessary or helpful participants and address other procedural issues, but also to explore counsel and party expectations and concerns. It is important to ensure that the process is structured to allow the parties to address all of their legal and non-legal issues.

Third, an essential consideration of an effective mediation is the tone and demeanor of those involved and the process. Advocacy in mediation is very distinct from advocacy in litigation, and too little attention has been paid to these distinctions in our law schools as well as in our continuing legal education. We must integrate mediation and this different approach, a kinder and gentler approach, into our practice.

Considerations in private mediation include:

Selection: As a private mediator, most of my work is "in lieu of litigation," that is, the parties have at some point in the process of litigation decided that they want to attempt to resolve a matter before trial, and at times even before a formal complaint has been filed. The parties come to me voluntarily, so I know there is at least some motivation to settle a case. I have never been involved in a case where mediation has been mandated.

Parties may come to me personally, or I may be selected pursuant to a program administered by such organizations as the Ameri-
can Arbitration Association or JAMS,\(^ {13}\) where panels of mediators are available for party selection. The parties will be given a list of mediators, with experience in both the process and the law. The list of potential mediators also indicates their backgrounds and experience. The parties then select a mediator appropriate for their particular case. We in the field recognize that one mediator may not be the best "fit" for a particular case. Some cases require more specialized knowledge, and I have turned down appointments and recommended other mediators in those circumstances.

**Party Contact:** Once a mediation is scheduled, it is important for a private mediator to recognize the "repeat player syndrome" that we generally associate with arbitration, that is, the concern that the mediator may have had more contact with one attorney than others involved in the process. The mediator must fully disclose any contact that could give the appearance of partiality. Imagine the discomfort of a party who, during a mediation session, hears the opposing party's counsel joke with the mediator about time they have spent together in the past. I always make certain such disclosures are made not only to counsel, but also to the clients. At times, on the other hand, I spend pre-mediation time with one party to develop the necessary level of trust. I always make counsel aware of every contact I have with the opposing party and the topic of the conversation, if not the specific content.

**Sufficient Time:** I am reluctant to set a specific time framework for mediation. There are times when one party will say "I only have five hours" or "we only have one day, and if there is no deal today, we are going to court." Given the emotional content of the plaintiff's or claimant's case in a discrimination case, as well as that of the respondent, the one-day time framework is not necessarily going to be sufficient. We are finding that mediations may take more than one session - often a "one-day plus" scenario, where it is necessary for the mediator to have follow-up contact with one or both of the parties to reach a resolution. Or it may be that a settlement proposal requires review or approval that cannot take place at the time of the mediation.

**Settlements:** Creative settlement structuring is one of the clear advantages of mediation. For example, I have had several cases where a financial package included a contribution to a not-for-profit organization or charity. This arrangement has helped overcome an employer's resistance to the amount of the monetary set-

\(^ {13}\) Judicial Arbitration and Mediation Services, Inc.
tlement going directly to the plaintiff or claimant. In one case recently, the entire settlement amount, which was substantial, went to establish a chair at a women’s college in a field that was of interest to the plaintiff. Assistance in finding new employment, as opposed to a strictly cash settlement, can also be instrumental, particularly where a return to the original workplace would be difficult.

In many cases today, we find that not only are there multiple parties on either side, but also insurance companies are increasingly finding or demanding a place at the table. Certainly, from the mediator’s perspective, the case still belongs to the parties rather than the attorneys or the insurance companies. The insurance companies are usually holding the purse strings, however, and that could drive the mediation in certain directions. Maintaining the appropriate balance and focus is a challenge in such an environment.

Non-Legal Issues: In most of the mediations with which I have been involved, we tend to start out from a non-legal perspective. I usually request and receive pre-mediation submissions that spell out the factual background as well as the legal issues in the case. I find that by focusing on the law at the beginning of the process, the value of the mediation may be lost. While I believe it is critical for mediators to have a real grounding in the applicable law, particularly in the field of employment discrimination, the law serves only as a background to assist in assessing all that you are hearing.

Knowledge of the Law: Once you have established general parameters and some areas of commonality, or if you are getting close to a settlement but are unable to bridge a gap, more specific assessment of case theories and alternatives to settling in mediation may be necessary. At this juncture, an understanding of the law can be critical. It may even involve a review of the law in a particular jurisdiction. While traditionally the theory has been that a mediator does not need subject matter expertise, it is essential in statutory dispute mediation. From an ethical standpoint, mediators in this field have a role in ensuring and promoting settlements that are consistent with public policy goals.

Professional Responsibility: As private mediators, we do not have the legal authority or degree of persuasion that a judge, agency, or court-mandated mediator may have. Confidentiality is clearly a key in private mediation. At times settlements are driven by goals other than those that the law was intended to promote, such as concern over publicity or counsel fees. The profession is
now starting to grapple with these and other issues as mediation becomes a more accepted alternative to litigation. The proposed Uniform Mediation Act\textsuperscript{14} now under consideration, as well as the Georgetown-CPR Proposed Standards of Professional Responsibility for Mediators, are two such efforts.

Another professional concern as mediation gains popularity is the level of expertise and experience of practicing mediators. Should mediation be considered the practice of law, as it is in some jurisdictions? I find this trend unfortunate as many of the most effective mediators I know are not attorneys. They have, however, the background, understanding of the law, and skills necessary to promote appropriate and good resolutions. We do not want to see mediation become another "litigation look-alike."

A new and different concern is the content of agreements to mediate. Under some of the new internal ADR programs in particular, circumstances may arise that pose ethical issues for mediators as well as arbitrators. I, for example, was recently selected to mediate a case under an agency list selection process. I later learned that under the respondent company's unilaterally imposed ADR Program, the claimant agreed that if he did not settle his claim in mediation and chose to pursue the claim in court, should he lose in court he would pay all costs and attorney's fees for the employer. This is a rather draconian requirement, and one that the claimant did not fully understand. I withdrew from serving in that case.

Mediation, however, is a great field. For those who may be interested, I cannot commend it enough. I find particularly in employment disputes that the process addresses both individuals' needs as well as the public policy goals of the anti-discrimination laws. A lot of education and refocusing can take place in this non-adversarial setting. In many instances mediation, as opposed to litigation, helps to foster workplaces free of discrimination, which is a goal we all share.

Thank you.

MS. HOWARD: I would like to entertain questions from the audience at this point.

**QUESTIONS AND ANSWERS**

AUDIENCE: I was curious about the Commission's program in terms of the Bureau signing off on a mediated agreement. If the

\textsuperscript{14} See American B. Ass'n Section of Dispute Resolution and the National Conf. of Comm'rs on Unif. State Laws.
Bureau does not approve a mediated settlement and goes forward with a case, is it correct to say that the Bureau would have access to or knowledge of information divulged during the mediation? I wonder whether that is an impediment to the process at your agency.

MS. HOWARD: You have raised an interesting issue, one with which we have been grappling. We mediators debate whether the Bureau’s involvement in the process is appropriate. We do not have any evidence that the involvement is an impediment. Recently, I was part of a Symposium at New York University the topic of which was law and social justice, and it caused me to think more about the benefits and drawbacks of the Bureau’s participation in mediations. The Bureau does approach mediation as a neutral party, especially in pre-investigation cases. As no investigation has been done, the Bureau does not have a stake in a certain position at that point, and that mitigates the problem.

There is a lot of concern among academics in the field of mediation that complainants may be at a disadvantage due to a disparity in resources and knowledge. As a mediator is neutral, he or she cannot also make a judgement about whether or not an agreement is fair. The Bureau plays that role in our mediations. The Bureau is the social justice element; the ones who say, “No, this is not fair. More needs to be done in this situation.”

I believe that their role of upholding the law and assessing the basic fairness of an agreement is more a benefit than an impediment. The debate, however, is ongoing, and the problem is a very interesting one.

AUDIENCE: Are there time limits at the Commission within which a case must be mediated?

MS. HOWARD: No, there are no time limits.

AUDIENCE: If a party is dissatisfied with one agency, can he transfer his case to another for mediation?

MS. HOWARD: No, not ordinarily. Once a case is filed in one agency is stays there unless, due to special circumstances, the case is administratively dismissed. The complainant chooses his forum, and it then is then bound by that choice.

If you have a case that is appropriate for mediation, and you would like to mediate it, you can call the Office of Mediation and Conflict Resolution at the Commission. If you would like one of our brochures, you may use the brochure to send in your request and the Bureau will follow-up with you.
AUDIENCE: What role do you expect the State Division will play as the State Commission reorganizes itself in response to the judge's order in the NOW lawsuit?¹⁵

MS. LOPEZ: The judge's order is on appeal, so I cannot address any plans the State Division may have in terms of responding to that order. I can say that mediation is being looked at, and I have to end my comment there.

AUDIENCE: If, at the Commission, a mediation takes place, are there ever circumstances in which an agreement between the parties is not approved by the Bureau? Additionally, either post-or pre-investigation, are there any circumstances in which parties, both represented by counsel, reach an agreement, but the Bureau does not approve the agreement?

MS. HOWARD: In answer to your second question, when both parties are represented by counsel, there is usually no problem with Bureau approval of an agreement. Counsel are ordinarily very knowledgeable, they know the law and its parameters. The Bureau, however, does have an independent stake in enforcing the Human Rights Law.¹⁶ Where the Bureau finds that the agreement undermines its ability to enforce the law, it has the option of withholding its approval. It is very rare, however, that the Bureau exercises that option. I think our Deputy Commissioner for Law Enforcement, Randy Wills would be able to add to our discussion.

MR. WILLS: It is possible for the Bureau to refuse to sign-off on an agreement reached between a complainant and a respondent. If the parties are represented by counsel, however, that would be a very, very rare occurrence. I cannot think of a case in which we have done that in the past six or seven years.

Until the Bureau has enough information as a result of our investigations to conclude otherwise, parties are, of course, free to settle on their own. If, however, the Bureau has enough information about a case to determine that some form of permanent, affirmative relief, such as changing hiring policies, promotional policies, or sexual harassment policies, is called for, the Bureau will encourage the parties to include it in their settlement agreement. If the parties do not, the Bureau may file an independent suit based to obtain affirmative relief.

I have not seen that happen, certainly not since I have been Deputy Commissioner, and I was a managing attorney for quite a while before that.

MS. HOWARD: Generally the parties come to an agreement and the Bureau then discusses any affirmative relief it deems necessary. We must stress how rare this is. This discussion is theoretical. Usually the parties come before the mediator, settle the dispute, draft an agreement, and walk away. That is 99.9% of the agreements.

I would like to thank you all for your attention and our panelists for participating.
DOMESTIC VIOLENCE AND THE HUMAN RIGHTS LAW

MS. VARELA: This is the panel for policy works, because we are actually going to talk about legislation, advocacy and the law.

The problem of domestic violence, a term that has come to describe violence directed at women perpetrated by their intimate partners, is a vexing one for the legal system, whether under a criminal or civil law framework.

Until recently, most states did not convey to police officers called to the scene of a domestic dispute the authority to take the perpetrator into custody unless the police officers had direct evidence of “wife battering,” as the behavior is also known. Only after an active, concerted campaign by feminists, was legislation enacted in Minneapolis, Minnesota, which gave police officers the authority to take a batterer into custody on the strength of circumstantial evidence of domestic violence.17

Domestic violence was not traditionally regarded as a crime, due to the historic status of women as chattel in many countries, including many modern ones. Domestic violence is a crime against women that is not committed by a stranger, rather, by its very definition, is perpetrated by a person with whom the victim is on intimate terms. Like sexual harassment, domestic violence is a manifestation of one person’s desire to dominate and control the other, rather than the outgrowth of strictly sexual phenomena between two persons.

Traditionally viewed as a problem affecting primarily the poor, domestic violence has been redefined as a problem affecting women from all strata of the socio-economic ladder. Due in part to the redefinition, domestic violence is the object of new scrutiny by lawmakers who are wrestling with the problem of whether the provisions of the criminal law which currently apply to domestic violence perpetrators, go far enough in addressing societal attitudes which may contribute to its spread.

Members of the City Council of the City of New York, prompted by advocates for domestic violence victims, have introduced legislation, Introduction Number 400 (“Int. No. 400”),18 to amend New

18. Draft of Introduction No. 400 (introduced Aug. 6, 1998) [hereinafter Int. No. 400] (proposing an amendment to section 8-107 of the New York City Administration Code introduced by the Public Advocate, Mr. Green, and Council Members Eldridge, DiBrienza, Lefler, Cruz, Boyland, Marshall, Duane, Robinson, Freed, Henry, Linares, Lopez, Perkins, Finkett and Reed, as well as Council Members Carrion, Clarke, Eisland, Fisher, Foster, Koslowitz, Michels, Miller, Quinn, Rivera and Sabini, which was referred to the Committee on General Welfare).
York City's Human Rights Law (the "Human Rights Law")\textsuperscript{19} to add domestic violence victims to the City's list of thirteen protected classes.

This panel proposes to: (1) set out and analyze the terms and implications of Int. No. 400; (2) review in a general way current thinking about domestic violence in the context of New York State's Penal Code; (3) examine what extra-legal protections are afforded domestic violence victims by both social service providers and law enforcement; and (4) finally, evaluate the potential for further innovation in the field of domestic violence victim advocacy.

We begin our discussion with consideration of domestic violence in the context of the criminal law, with remarks by Ms. Lucia Davis-Raiford. Lucia is the civilian member of the New York Police Department's ("NYPD" or "Police Department") Domestic Violence Unit, a relatively new unit within the NYPD. Lucia is the Director of the Domestic Violence Unit there, and in that capacity develops domestic violence policy, advises the Chief of the Department on emerging domestic violence issues, and develops training and procedure for field operations. She was formerly Director of the Legal Bureau for the New York City Transit Police.

Following remarks by Lucia, we will have the opportunity to hear from Julie Goldscheid, a distinguished lawyer on the staff of the National Organization of Women's Legal Defense and Education Fund ("NOW LDEF"). Julie is the Co-Chair of the Violence Against Women Task Force of NOW LDEF, spearheading legislative and litigation efforts on matters relating to violence against women. Julie practiced law privately, was a clerk of the New Jersey Supreme Court, and is a graduate of New York University School of Law. She was a social worker prior to entering law school and holds a MSW degree from Hunter College. She earned her undergraduate degree at Cornell University.

Following our speakers' remarks, we will have time for questions. Let us begin with Lucia.

MS. DAVIS-RAIFORD: Good morning. I am Lucia Davis-Raiford and I am the Director of the NYPD's Domestic Violence Unit. I was in a unique position, as a civilian, being asked to create a unit within a para-military organization with one hundred years of history. Part of the challenge, structurally, was to facilitate change. It is like turning a supertanker around, in terms of developing and improving the response of the Police Department to Do-

\textsuperscript{19} N.Y.C. \textsc{Admin. Code} § 8 (1999).
mestic Violence and other issues. The Police Department, as you know, is absolutely huge.

There was, however, an institutional commitment to change. In 1994, the Police Department developed seven major crime-fighting strategies to help bring crime under control in New York City. I am proud to say that Police Strategy Number Four ("Strategy Four") was "Breaking the Cycle of Domestic Violence." Strategy Four set forth the Police Department's policy and commitment to improve its response to domestic violence. It details how the response will be improved in terms of policy and procedure. Included are steps such as improving the monitoring and tracking of domestic violence cases and ensuring appropriate follow-up on those cases that require law-enforcement intervention. Where actions are not necessarily criminal, we are moving from a law enforcement venue to more support, intervention, and social service referrals. Strategy Four also set forth the Department's mandatory arrest policy, which requires an arrest in certain domestic cases. The circumstances under which arrest is mandatory are as follows:

First, there must be an arrest if there is probable cause to believe that a felony has been committed. Neither the victim/complainant nor the police officer has discretion.

Second, there must be an arrest if there has been a violation of an order of protection. There is no discretion in those cases.

Third, there is a mandatory arrest requirement in misdemeanor cases when the victim requests that an arrest be made. If the victim/complainant does not request that the alleged perpetrator be arrested, the officer will make a discretionary determination based on various factors (i.e. likelihood of further violence, past history, survey of the scene). He/she may or may not affect an arrest in this scenario. The officer, however, may not ask the victim if he/she wants to have the offender arrested or inform him/her of the choice. Under CPL 140.10, this is known as the "don't ask, don't tell" rule. There is no discretion for these circumstances under the Mandatory Arrest Law. As New York State enacted the Mandatory Arrest Law in 1996, I am proud to say our policy far predated that statute.

Strategy Four represents a major strategy change in how the NYPD does business. We had a mandatory arrest policy before, but it was not applicable to crimes that occurred behind closed doors. Strategy Four was a statement that the Police Department

20. See N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1998).
21. See id.
would take seriously and criminalize behavior that previously might have been brushed off or not taken as seriously as another type of crime. It also mandates that we have in each precinct a domestic violence prevention officer and a domestic violence investigator. All precincts have at least one domestic violence prevention officer. Most have two to three. In some precincts where the incidence of domestic violence crime is very high, there are as many as nine or ten.

We are also required, in circumstances of misdemeanor cross-complaints, to determine, if possible, the primary physical aggressor. We have to look at the past histories of the parties and assess the comparative extent of the injuries to see whether parties have offensive or defensive wounds (for instance whether we have a woman with one black eye and the other eye hanging out and a guy with scratches on his arm). It is also very important that we take into account threats of harm or threats of future harm. The determination is not solely based on who initiated the physical attack.

Prior to the advent of the “primary physical aggressor” analysis, in cases of misdemeanor cross-complaints, both parties were arrested. Often this meant that the victim was arrested with the offender. The challenge in the cross-complaint scenario is for the officer to make the proper determination regarding which party gets arrested for that particular incident.

Police respond to domestic calls whether or not the call has come from the victim. If a child calls, the police respond. If a friend calls, the police respond. If a neighbor calls, the police respond. If a stranger calls, the police respond. A domestic incident report is recorded and given to the victim. A complaint report is prepared in cases where there is criminal behavior. An arrest may be made if the perpetrator is still present, particularly in cases involving a felony, a misdemeanor where the victim says “lock him up,” or a violation of an order of protection, as required by the Mandatory Arrest Law.

We also have to consider how we prosecute and investigate cases, particularly regarding working women and women with children. The NYPD tries to avoid having large numbers of investigators going in and out of a woman’s workplace, as this could cause her to become less desirable as an employee. Investigators should also be mindful of the possible negative impact of an ongoing investigation on children and schedule visits and appointments accordingly.
One of the challenges that we face now is how to become more sophisticated about investigating what we call “twilight” domestic violence, rather than the physical abuse that occurs in the home. Examples of twilight domestic violence include: being called and harassed at work, as well as being sent letters or e-mail. These things are more difficult to investigate and prosecute particularly when the victim prefers to maintain some level of privacy.

One of the things we have to think about as we develop policy is the impact on the victim, are we helping her or are we hurting her?

Thank you.

MS. GOLDSCHEID: Good morning. On behalf of NOW LDEF, I want to start by thanking the organizers and the New York City Commission on Human Rights (the “Commission”) for inviting us to participate in this forum, and particularly, for addressing the very important issue of why domestic violence victims should be protected by the Human Rights Law.

The impact of domestic violence on the workplace has come into particularly sharp focus for us as a result of NOW LDEF’s Battered Women Employed project. This is a pilot bi-coastal project that we began last year with the Employment Law Center of the Legal Aid Society of San Francisco. It is funded by the U.S. Department of Justice, and is geared toward helping battered women keep their jobs. Toward that end we offer technical assistance and training for advocates and provide direct services for battered women — of course we support them in leaving violent relationships, but our project focuses on helping them negotiate issues related to their jobs, some of which were just alluded to and of which I will discuss in more detail.

One of the things that we are learning is that battered women are often discriminated against in the workplace, in circumstances suggesting that the discrimination occurs simply because of their actual or perceived status as a victim of domestic violence. You can imagine how difficult it is for a woman, particularly if she is trying to negotiate leaving a violent relationship, to come to work and then to be penalized again as a result of the violence. This

22. I would like to thank Mary McGowan Davis, Visiting Attorney, and Marcellene Hearn, Staff Attorney, NOW LDEF, who edited these remarks and provided accompanying citations.

23. The Battered Women Employed Project is supported by Grant No. 98-WL-UX-0007, awarded by the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice. Points of view in this article are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.
creates a Catch 22, because a woman's job is frequently the key factor that will enable her to leave a violent relationship and move into safety.

In many cases a battered woman may be afraid that her batterer will come find her at work. She may simply want her employer to figure out how the company can make the workplace more safe by taking simple, low-cost steps such as changing her phone number or desk location or registering her protective order with security. What makes sense in any particular workplace and what an employer may be able to do to help varies in each situation. The bottom line, however, is that a battered woman should be able to talk to her boss about the feasibility of taking such steps without fear of reprisal. Yet, when a woman comes to us and tells us she is afraid she will be retaliated against if she asks her employer to help, we cannot assure her that no one can take an adverse job action against her just for asking.

Int. No. 400, which has been introduced in the City Council, addresses the problem of retaliation head-on; it would prohibit employers from discriminating against battered women in the terms and conditions of their employment. In essence, it would give battered women the assurance they need to be able to approach their employers about developing workplace safety plans. In the few minutes I have, I will provide some background on what happens to battered women at work; address the extent of coverage under existing laws; and discuss Int. No. 400.

As you know, domestic violence is rampant. We have seen changes over the last twenty-some-odd years in increased public awareness about the prevalence of domestic violence. Many statistics, including government statistics, show that approximately one

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25. After this Symposium, Introduction No. 400-A was introduced replacing Int. No. 400. While the concept is largely the same, the precise language has changed. Compare Int. No. 400 (N.Y. City Council 1998), with Introduction No. 400-A (N.Y. City Council 1999).

26. For information concerning battered women's employment rights, including victim protection laws, the Family and Medical Leave Act, the Americans with Disabilities Act, sex discrimination laws, unemployment insurance and welfare to work programs, see Runge & Hearn, supra note 24, at 26-29.
in four women will be abused in her lifetime. In a workplace employing more than four women, one of them is likely to have a problem at some point. Those facts alone should give employers reason to be attentive to, and to think about, the problem.

Domestic violence has a dramatic impact on women's work lives because of the specific way batterers interfere with and frequently try to sabotage women's ability to go to work and do their jobs. Studies show that batterers can be relentless in harassing women at work, for example, through telephone calls or other abuse. E-mail increases the potential for constant harassment. Batterers may go to great lengths to keep women from getting to their jobs, including physically abusing them to such a degree that they are unable to go to work.

Studies show that women are at increased risk of violence at the hands of their batterers at the very time they try to leave an abusive relationship. A woman leaving her abuser obviously needs her job for economic independence, but her workplace may be the only place her batterer knows where to find her. A woman in that situation is frequently faced with very difficult decisions about how to keep her job, leave the violence, and try to keep the workplace.


28. In one study, 70% of employed battered women reported that their abusers harassed them at work by telephone. See Connie Stanley, Domestic Violence: An Occupational Impact Study 17 (1992) (study on file with author). Another study showed that between 35 to 56% of employed battered women were harassed at work by their batterers; between 55 to 85% missed work due to the abuse; and between 24 to 52% of employed battered women have lost a job due at least in part to domestic violence. See United States General Accounting Office, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 18 (GAO Rep. to Congressional Committees Nov. 1998) (summarizing four studies of employed battered women and one study of battered women participating in a job training program).

29. See Thomas Moore & Vicky Selkow, The Institute for Wisconsin's Future, Domestic Violence Victims in Transition from Welfare to Work: Barriers to Self-Sufficiency and the W-2 Response 5-6 (1999) (More than half of women surveyed reported that their batterer threatened them to the point that they were afraid to go to school or to work).

as safe as possible for herself and her co-workers. This applies to women in work-training programs as well as to those in private and public sector jobs.\textsuperscript{31} The approach that makes the most sense is for battered women to be able to go to their bosses and tell them about the problem, suggest ways to reduce the risk of violence at work, and work together to create what we call a safety plan.\textsuperscript{32}

Many employers have begun to address the issue by learning about domestic violence and taking important steps to help women in their work forces. One study showed that approximately one-third of business executives think that domestic violence affects their balance sheets; about half of these business executives believe that domestic violence harms productivity; and two-thirds agree that their companies' financial health would improve if the company addressed domestic violence.\textsuperscript{33} Employers are starting to adopt policies providing leave time or assurances against discrimination to battered women.\textsuperscript{34} Many are training employees about the problem and how to respond to it, and are supporting local domestic violence service providers.

Government initiatives are addressing the problem as well. For example, pursuant to New York State law, Governor Pataki commissioned the New York State Office for the Prevention of Domestic Violence to develop model policies addressing domestic violence in the workplace for county employers, public employers, and private employers.\textsuperscript{35} The state has already issued the \textit{Model

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\item \textsuperscript{31} See Catherine T. Kenney & Karen R. Brown, NOW Legal Defense and Education Fund, \textit{Report from the Front Lines: The Impact of Violence on Poor Women} 7 (1996) (reporting that job training providers interviewed concerning the prevalence of domestic violence among the participants in their programs estimated that from 30 to 75% of the participants were currently being abused by a partner). Providers reported that batterers would withhold child care, and abuse their partners or keep them up all night at critical junctures in the job training program or before a job interview. See \textit{id.} at 14-16.
\item \textsuperscript{32} For more information on work safety plans, see NOW LDEF Workplace Safety Manual, \textit{supra} note 24 (describing the process for creating a work safety plan).
\item \textsuperscript{34} See e.g., Polaroid Employee Assistance Program, \textit{reprinted} in NOW LDEF, \textit{The Impact in the Lives of Working Women: Creating Solutions-Creating Change} (1st ed. 1996).
\item \textsuperscript{35} See N.Y. Exec. Law § 575(7) (Consol. 1999).
\end{itemize}
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Domestic Violence Policy for Counties. Notably, the draft version of the model policy for private employers prohibits discrimination against victims of domestic violence in the terms and conditions of employment. Not all employers, however, have taken those steps, leaving women to face these difficulties alone.

A few examples may clarify the need for laws like Int. No. 400 and policies prohibiting employment discrimination against battered women. For example, NOW LDEF, along with Oregon Legal Services and a private attorney, represented a woman in Oregon who worked at the same job site as her batterer. He drove a truck that delivered trusses, part of the roofs of houses, and she drove a car that followed behind and announced that the truck was carrying a wide load. Their employer knew the man was abusive, because he was violent toward her in the workplace. He eventually confronted the office manager at work, threatening that if the company allowed the woman to continue to work there, he would kill her. In response, the company fired our client, leaving her with five children, and without a job. No disciplinary action was taken against the batterer.

We represented her in a case claiming that the employer discriminated against her on the basis of sex by firing her and not taking any meaningful disciplinary action against the batterer. In our view, it was sex discrimination because of the disparate treatment of the two employees; one a man, the other a woman. He was violent in the workplace, yet she was penalized.

In another case in New York, we assisted a woman who worked for the business department of a small clothing manufacturer. On the day she left her batterer she was worried that he was going to come find her at work, as he had previously worked there as well. She asked the office manager if the office could simply lock the door. That way she would know if her batterer had come to find her. As it was not a retail establishment, locking the door would not interrupt the business. The manager agreed to lock the door,


37. See Office for the Prevention of Domestic Violence, Model Domestic Violence Employee Awareness and Assistance Policy for Private Businesses (Draft Sept. 1999) (on file with author). ("[Employer x] will not discriminate against a victim of domestic violence in hiring, staffing, or other terms, conditions, or privileges of employment.").

and the day proceeded without incident. The woman went home and, luckily, the evening proceeded without incident as well. At about 9:00 that night, however, she got a phone call from the company president saying that she was going to be fired because the company could not tolerate having her in the workplace. 39

While much progress has been made in establishing legal protection for victims of domestic violence, certain problems affecting battered women in the workplace have not yet been addressed. For example, many states have enacted victim protection laws. As of July, 1999, approximately twenty-five states prohibit an employer from firing or discriminating against a crime victim who takes time off to testify in a criminal proceeding. 40 New York has a similar law, New York Penal Law Section 215.14, which makes it a misdemeanor for an employer to fire or penalize an employee who is a crime victim because that employee took time off to appear in criminal court. 41 This law also covers employees who appear in court to “exercise [their] rights . . . under the Family Court Act . . .” so it also applies to domestic violence victims who are petitioning for civil orders of protection. 42 California and Rhode Island have similar statutes, which prohibit employers from discriminating against employees who have sought to obtain or have obtained orders of protection. 43 These statutes, however, do not help a woman

39. See Complaint at 1-2, Oliver v. Craig Taylor, Craig Taylor Shirts, State Division of Human Rights No. 1A-EOC MS-98-2305980 (filed June 16, 1998).

40. See ALASKA STAT. § 12.61.017 (Michie 1999); ALA. STAT. § 15-23-81 (Michie 1999); ARK. CODE ANN. § 6-90-1105 (Michie 1997); CAL. LAB. CODE § 230(b) (West 1999); COLO. REV. STAT. ANN. § 24-4-1-303(8); CONN. GEN. STAT. ANN. § 54-203(b) (West 1999); DEL. CODE ANN. tit. 11, ch. 94 § 9409 (1998); GA. CODE ANN. § 11A.036 (1998); HAW. REV. STAT. § 621-10.5(b) (West 1998); IOWA CODE ANN. § 915.23 (West 1998); IND. CODE § 35-44-311.1 (1999); MASS. GEN. LAWS ANN. ch. 258B § 3k (West 1999); MINN. STAT. ANN. § 611A.036 (West 1998); MISS. CODE ANN. § 19-43-45 (1998); VA. CODE ANN. § 595.209 (Michie 1998); MONT. CODE ANN. § 46-24-205 (1997); NEV. REV. STAT § 50.070 (1997); N.Y. PENAL LAW § 215.14 (McKinney 1999); OHIO REV. CODE ANN. § 2930.18 (Anderson 1999); 18 PA. CONS. STAT. ANN. §4957 (West 1998); S.C. CODE ANN. § 16-3-1550 (Law Co-op. 1998); TENN. CODE ANN. § 4-4-122(1998) (applies to state employees only); VT. STAT. ANN. tit. 13, § 5313 (1998); VA. CODE ANN. §19.2-11.01 (Michie 1999); V.I. CODE ANN. tit. 34 § 203 (1999); WYO. STAT. ANN. § 1-40-203 (Michie 1999); WYO. STAT. ANN. §1-40-209 (Michie 1999).


42. Id.

who is afraid of simply talking to her boss about how she might safely get to the subway from work.

Some circumstances in which domestic violence impacts the workplace may result in violations of sex discrimination laws. For example, some cases involve sexual harassment. Domestic violence between co-workers, whether between a supervisor who sexually harasses a subordinate or two co-workers, as in the cases that I mentioned before, may constitute either *quid pro quo* or hostile environment sexual harassment.\(^4\) Other circumstances might present claims of disparate treatment in cases where, for example, an employer treats a female employee who is battered differently from a male batterer.\(^5\)

As we have heard, battered women who have become disabled as a result of the abuse may have recourse under disability discrimination laws. Certainly, anti-discrimination provisions based on disability should apply to battered women just as they would in any other case of disability.\(^6\) However, not all battered women are disabled, and a woman should not have to get to the point where

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\(^4\) See, e.g., Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999) (affirming hostile environment claim when plaintiff's ex-husband sexually harassed plaintiff at work); Fuller v. City of Oakland, 47 F. 3d 1522 (9th Cir. 1995) (upholding sexual harassment claim where male police officer committed violent acts against female coworker after they ended an intimate relationship). *But see* Galloway v. General Motors Svc. Parts, 78 F.3d 1164 (7th Cir. 1996) (holding that it was not sexual harassment when verbal conduct arose from a "failed relationship" and not from a belief that women do not belong in the workplace).

\(^5\) See, e.g., Rohde v. K.O. Steel Castings, 649 F.2d 317, 322 (5th Cir. 1981) (upholding a disparate treatment claim where the employer fired a female employee and retained a male employee after the male employee assaulted the female employee at home and at work); *see* Battered Women Employed, Domestic Violence and Work: Workplace Discrimination Against Battered Women (fact sheet Feb. 1999) (on file with the author).

\(^6\) An employer may not discriminate in employment against a domestic violence victim who has a qualifying disability caused by the violence under the Human Rights Law. Under the Human Rights Law, a disability is defined as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." N.Y.C. ADMIN. CODE § 8-102 (16). In addition, an employer must provide a reasonable accommodation to enable a disabled individual to work. *See* N.Y.C. ADMIN. CODE §§ 8-102 (18), 8-107(1)(a). For example, if a woman has a back injury due to the violence, her employer may not fire her simply because she has a back injury. In addition, domestic violence victims who have disabilities caused by domestic violence may qualify for protection from discrimination in employment and reasonable accommodations in the workplace under the Americans with Disabilities Act ("ADA"). *See* 42 U.S.C. §§ 12111(9), 12112(a) (1994). However, the ADA's definition of disability is quite narrow: the domestic violence victim must have a physical or mental impairment that "substantially limits a major life activity," or "must [be] regarded as having such impairment." 42 U.S.C. § 12102(2)(A)-(C) (1994). *See also* NOW LDEF Workplace Safety Manual, *supra* note 24.
she becomes disabled before she is free from discrimination in the workplace. That is why the disability provisions of the Human Rights Law do not sufficiently help battered women.

Int. No. 400 would amend the Human Rights Law by prohibiting employment discrimination against battered women because of their actual or perceived status as victims of domestic violence. It was introduced last year in the City Council. It has the support of a good number of Council members, and we have heard that there may be public hearings scheduled regarding the proposed amendment in the near future. Int. No. 400 gives women redress if they are subject to an adverse job action because of their status as domestic violence victims, and offers them the assurance that they can come forward and negotiate a safety plan with their employers without fear of retaliation.

The following is a summary of where this proposal stands relative to the rest of the country. In Maryland, the Governor issued an Executive Order prohibiting unfair treatment of state employees based on their status as domestic violence victims. Texas has enacted a law prohibiting discrimination against victims of family violence who are participating in Welfare-to-Work programs. California, Maine, and the City of Miami prohibit discrimination against people who are taking domestic violence-related leave. Those jurisdictions have leave provisions under which battered women can get employment-related leave to deal with domestic violence in their lives.

There are also provisions pending in Congress. The 1999 Violence Against Women Act ( "VAWA II") introduced in the House

47. See generally Mary Ann Dutton, Empowering and Healing the Battered Woman 10, 76-86 (1997) (explaining that abuse impacts each victim differently).
48. A hearing was held on Int. No. 400-A before the Joint General Welfare and Women's Issues Committees on January 26, 2000.
51. See Cal. Lab. Code § 230 (West 1999) (prohibiting an employer from discharging or discriminating in employment against a domestic violence victim who has taken time off to appear in court to obtain protective orders or other civil relief); Maine Act to Protect Victims of Crime in the Workplace, 1999 Me. Laws 435 (providing job protected leave to domestic violence victims to testify in court, receive medical treatment or obtain services and prohibiting employers from discriminating against employees who took the leave); Miami-Dade County, Fla. Code, art VII, ch. 11A (1999) (same); see also R.I. Gen. Laws § 12-28-11 (1998) (prohibiting an employer from discriminating in employment against an employee who has obtained or sought to obtain an order of protection).
contains a Title addressing the workplace. One of its provisions, called the Victims’ Employment Rights Act ("VERA"),\textsuperscript{53} would accomplish what Int. No. 400 is designed to do, and would prohibit discrimination against battered women in the terms and conditions of their employment.\textsuperscript{54}

**MS. VARELA:** I am going to respond to Julie’s presentation, and then I will take some questions.

I just want to underline for everybody here that the Giuliani Administration has not taken a position on Int. No. 400 as yet. I have my own opinions about the draft bill, which I will share with you today, but those are my personal opinions and are not to be construed as my speaking for the Administration.

Let me first specify the points on which I agree with Lucia and Julie. I agree that attention definitely needs to be paid to the problem of domestic violence at all levels, and I am very gratified by the fact that Lucia is a civilian working at the NYPD working on how the Police Department can become more responsive to a problem that it has frequently not had enough time for. That is a very positive development.

Comparisons between Int. No. 400 and what other states are doing and what Congress is considering are helpful in providing background, but they do not really address the specific question of whether there should be another protected class under the Human Rights Law specifically for domestic violence victims.

In order to understand what the City would be doing if this legislation were enacted, it would be helpful to talk a little bit about New York City’s Disability Law (the “Disability Law”),\textsuperscript{55} which is really \textit{sui generis}. It is very unusual for Disability Laws around the country and does not closely resemble the Americans with Disabilities Act,\textsuperscript{56} because the definition of “disability” under the Human Rights Law does not require a “substantial life impairment.” Rather, the language is specifically “any physical or psychological disability,” which means that the threshold for establishing a disability is about as low as it can be.\textsuperscript{57}

The Disability Law permits a domestic violence victim who is experiencing any form of consequence as a result of domestic vio-

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  \item \textsuperscript{54}  See id.
  \item \textsuperscript{55}  N.Y.C. Admin. Code § 8-102 (1999).
  \item \textsuperscript{56}  42 U.S.C. § 12101 (1999).
  \item \textsuperscript{57}  N.Y.C. Admin. Code § 8-102.
\end{itemize}
lence to ask an employer for reasonable accommodations on the basis of mental suffering, anxiety, shortness of breath, headaches, and/or any type of stress-related syndrome that is a consequence of domestic violence. The Disability Law is superior to Int. No. 400 in that, like all disability laws, it is imperative that the employer respect the confidentiality of the person requesting the accommodation, which gives the domestic violence victim something that Int. No. 400 does not.\textsuperscript{58}

Int. No. 400 requires that the domestic violence victim self-identify to the employer as a domestic violence victim.\textsuperscript{59} I think that can be a disadvantage for the domestic violence victim. I admit that my presumption is that there is no domestic violence victim that does not have some psychological or physical symptom, who does not feel at some level, physically or psychologically, the effect of domestic violence. The Disability Law permits the domestic violence victim to ask for accommodation under the without having to disclose anything about the history of the domestic violence. I view that as positive in terms of the recovery of the domestic violence victim. That is what makes the Disability Law unique and not comparable to the Americans with Disabilities Act, and probably many of the statutes cited by Julie.

There is a very powerful incentive under the Disability Laws to educate employers. There are corporations, like Polaroid, which in their employee assistance plan has a specific component that addresses domestic violence victims' issues.\textsuperscript{60} Creating a protected class within an adversarial framework to protect domestic violence victims can create unintended negative consequences for that domestic violence victim by thrusting the employer into an adversarial relationship with the employee, whereas most employers are already familiar with their obligations to accommodate under the Disability Law.

In our experience, more employers are receptive to incorporating into their workplace policies accommodation provisions for employees across a wide range of disabilities under the City's incredibly expansive law. This is a more positive approach that, in the long run, benefits domestic violence victims more than does the ability to file a complaint at the Commission as a domestic violence victim.

\textsuperscript{58} Compare Int. No. 400, supra note 18, with N.Y.C. Admin. Code § 8-102.

\textsuperscript{59} See Int. No. 400, supra note 18.

There are other issues relating to the draftsmanship of the ordinance itself. It does not resemble the Disability Law, in that there is no language associated with "reasonable accommodation" that I have been able to make out.\textsuperscript{61} The courts might find themselves in a quandary, since surely we will find ourselves receiving both disability and domestic violence victims. We will have complaints that will cite both protected classes without any appreciable distinction between the remedies that are sought. Those, however, are largely technical, "how many angels can dance on the head of a pin" arguments. Although I should mention that if Int. No. 400 is enacted, District Attorney's offices in the five boroughs will have the authority to determine whether a breach of the penal code has been committed.\textsuperscript{62}

The goal is to help domestic violence victims. The question is whether Int. No. 400 the right remedy.

\textbf{QUESTIONS AND ANSWERS}

\textbf{AUDIENCE:} Just a quick question in reference to the scenario where the woman requested that her employer lock the door. Is the gist that the employer is going to be required to make a reasonable accommodation in the situation where there is a direct threat to fellow employees? What is the employer’s responsibility to provide reasonable accommodation?

\textbf{MS. GOLDSCHEID:} These are difficult situations. I am glad you asked the question, because Int. No. 400 does not impose a duty on an employer to make reasonable accommodations when an employee has been threatened. I think we agree that Int. No. 400 accomplishes less than what many advocates urge is a desirable goal — and may well be a good policy solution — which is to require an employer to provide reasonable accommodations to battered women.

What Int. No. 400 does say is that a woman should not be penalized for asking for a reasonable accommodation. We work with women and employers to develop policies and responses to particular circumstances. These situations are complex, difficult and very fact-specific. We certainly respect employers who want to take reasonable steps, both to try to help victims of domestic violence, and to try to safeguard the entire workplace. It is a very tough balancing judgment that plays out differently in each situation.

\textsuperscript{61} See N.Y.C. ADMIN. CODE § 8-102.
\textsuperscript{62} See Int. No. 400, supra note 18.
The specific assurance that Int. No. 400 provides is that a woman could talk to her employer about domestic violence or safety in the workplace, without fearing retaliation just for asking. Each individual employer determines what makes sense and what is possible under the circumstances. It does not impose a duty on the employer to make any particular accommodation.

I am interested in hearing how the Commission would respond to the reasonable accommodation point.

MS. VARELA: Well, the circumstance that the gentleman referred to raises a superseding issue, which is the safety of everyone in the workplace. That tends to supersede the issue at hand, since you have offered an example in which an employer who might not otherwise be sensitive to the fact that a perpetrator of violence may enter the workplace would face liability for all the employer’s affected employees. Even with Int. No. 400, the employer would face liability for having inadequately protected his workplace.

I do not agree with Julie that we need Int. No. 400 to do this, because I think the Disability Law already provides this protection. As she indicated, this is a conversation that the employer needs to have with the managers in the workplace in terms of devising a solution. Maybe the accommodation that is requested by the employee is not the best one in the circumstances, but an accommodation that an employer could come up with can be one that would be considered reasonable by an independent third party reviewing what the employer had done under the City’s law.

MS. GOLDSCHEID: In our experience in working with women and employers, in the vast majority of cases employers who have the good will to act can work something out that helps a woman feel safer. There may well be circumstances in which people disagree about what accommodations an employer can make, but in most situations something can be done to help a woman keep her job while taking steps to safeguard the workplace. Usually, there is no need to demote, fire or put the woman on probation, which, unfortunately, is what we often see. The reality is that what frequently happens to women when they do come forward and ask for some kind of modification at work is out of proportion with what would be necessary to ensure safety.

MS. VARELA: Although it would be clearly illegal under the City’s law to retaliate against someone requesting that kind of accommodation by taking any type of adverse employment action against them.
MS. GOLDSCHEID: If a woman tells her employer that she needs to file for an order of protection and does not make a statement about her mental or physical state, but is subjected to an adverse job action as a result, would you still see her as covered under the Disability Law?

MS. VARELA: No, but the employer's obligation would be triggered under the order for protection. What the domestic violence victim who wants to supplement her coverage under the protective order with the Disability Law would do would be provide her employer with the request for reasonable accommodations along with a doctor's note underpinning the request.

MS. GOLDSCHEID: Sometimes, though, women have not gone to the doctor, and they may not see themselves as disabled. What they want is to be able to ask their employer about such things as registering a protective order with the people who sit at the security desk. In other words, domestic violence may impact the workplace in ways that have nothing to do with a disability. That is why the Disability Law may not always be appropriate.

MS. VARELA: Yes, but the nature of domestic violence is such a complex problem. We have not, for example, talked about the circumstance where the victim returns to the batterer, which is a phenomenon that takes place within the broader rubric of domestic violence.

To some extent, are money damages the wrong remedy for the problem under these circumstances? I think that allowing money damages for the victim does not do anything to enhance the protection that that victim needs right now.

MS. GOLDSCHEID: I agree that domestic violence is complex. Int. No. 400 addresses one aspect of the problem. The availability of legal recourse in the event that she faces discrimination may help her keep her job, which often can help her leave an abusive relationship.

MS. VARELA: I find that if we would expect someone who is making a claim under the Disability Law to visit a doctor as a requirement of that accommodation, you are saying to me that it makes sense to you that an employee should be able to come to an employer and simply, without providing anything further, impose upon the employer a requirement that that employer do what that employee wants for fear of being sued for discrimination.

MS. GOLDSCHEID: First, as I said before, women may not go to the doctor. In many situations they may, but it might not be a precipitating event. There may be circumstances in which a woman
does not see herself as disabled and, therefore, does not seek intervention at the workplace based upon a disability; she may really just be seeking to register her protective order, or change her desk location, or have a morning off, or something like that, which has nothing to do with a physical or emotional condition that would be covered by the Disability Law. Some women may be disabled as a result of the abuse, but many are not. And all victims of domestic violence should be able to talk to their employers about their situations without fear of reprisal.

A woman may not even be asking for a reasonable accommodation. Prohibiting discrimination and requiring employers to make reasonable accommodations are two separate issues. Some advocates might want to see a reasonable accommodation provision built in to new legislative proposals. As a policy matter, it is a very good idea. Int. No. 400 provides a lesser, but nonetheless important, protection.

MS. VARELA: We need to do a better job educating domestic violence victims about the protections that are afforded them under the Disability Law. I think that that should be the Commission's role in terms of encouraging employers to help domestic violence victims.

MS. GOLDSCHEID: So that a woman who is not suffering from some pressing physical or emotional impairment would still make a claim under the Disability Law?

MS. VARELA: You believe that that is possible. I think that is where our assumptions are different. I find it difficult to believe that, under the City's broad provisions under the Disability Law, that there is anyone who is a domestic violence victim who is not captured under the definition of "disabled."

AUDIENCE: In a case like that in Oregon, where there is domestic violence between two co-workers but no physical or mental disability, had that case occurred in New York City, could that woman, without a doctor's note or any physical manifestations, have filed a complaint with the Commission?

MS. VARELA: Yes. We would have to take that complaint.

AUDIENCE: On what basis?

MS. VARELA: We are required to take any complaint that comes to us that states a cause of action for employment discrimination that has taken place within the five boroughs. We are not like an advocacy organization, like the NOW LDEF, where there is discretion as to which cases to add to the case load. We must take all complaints that come in and add them to the docket.
AUDIENCE: Would you have considered that situation to be covered by the Disability Law? The woman says, "I was fired because my co-worker was threatening me. I do not have any medical situation, but that is why I was fired by my private employer" putting aside that it is covered by sex discrimination, would you consider that to be covered by the disability language in the Human Rights Law?

MS. VARELA: Not unless she articulates a specific disability-related manifestation.

AUDIENCE: Well, is that not the problem that Int. No. 400 attempts to address? That gap, where a woman who is being stalked but not abused, not touched, is going neither to a therapist nor a doctor, a woman whose phone is ringing all the time at work and is getting a lot of e-mails at work, and needs to talk to her employer about it but fears she will be fired?

MS. VARELA: I understand your question. My reservation is whether under our framework, we are the best equipped to address that issue inasmuch as there are a host of related issues, which we unfortunately we do not have time to go into it now. The situation that you are asking about is not specifically covered, but I am not sure that legislating Int. No. 400 is going to provide the benefits that its advocates believe it will.

As I say, that is based on my perception that there is nothing wrong with domestic violence victims making claims under the Disability Law. It is specious to suggest that domestic violence victims have no psychological or physical symptoms.

MS. DAVIS-RAIFORD: I want to weigh in very, very carefully, because I have been very careful not to take a position on either side of this debate. I have to say in our involvement with domestic violence victims, one of the things that we see is that most victims, especially female victims, do not see themselves as disabled. They refuse medical attention most of the time, regardless of the extent of their injuries, unless they just cannot avoid it.

The difficulty in dealing with domestic violence victims is that they do not assume victim status, so it is very difficult for us to negotiate under the penal codes and criminal law. Having been a victim of domestic violence myself, I speak from personal experience. It is very rare that you find a victim who is ready to say, "Yes, I am a victim" and accept that status, even accept temporary medical assistance, much less view herself as disabled.

63. See N.Y.C. ADMIN. CODE § 8-102.
MS. VARELA: It is a supreme, and to employers by no means welcome, irony that the Americans with Disabilities Act (the “ADA”), 64 enacted by Congress in 1991 to bring the most disabled Americans into the mainstream workplace, has, in consequence of broad judicial interpretations of the definition of “disabled,” become more than an act to help those with impairments, such as deafness, blindness, paralysis, et cetera. The legislation imposes a powerful requirement on employers to accommodate that has changed the workplace, albeit it not without attendant controversy. This panel seeks to concentrate on developments and interpretation of the ADA alongside parallel trends in interpretation of the much more broadly defined meaning of disability under New York State and New York City laws.

To lay the groundwork, we will hear first from Lou Graziano of the New York District Office of the Equal Employment Opportunity Commission (“EEOC”), followed by Al Kostelny of the New York State Division of Human Rights (the “State Division”) and John Herrion of the Eastern Paralyzed Veterans Association (the “EPVA”).

Lou has been a litigator with the New York Office of the EEOC for the last twelve years. He previously worked as an investigator with the U.S. Department of Labor’s Wage and Hour Division. He received his undergraduate and law degrees from St. John’s University and is a contributing editor to the New York State Bar Association’s journal, Public Sector Labor and Employment Law.

Al Kostelny is a litigator at the State Division and has been with the agency since 1979, when he graduated from Fordham University School of Law. He is a graduate of the University of Pennsylvania, having earned both an undergraduate degree and a Masters degree in international relations there. He is advisor to and member of the editorial board of New York Law and Practice Monthly.

Last but not least, we will hear an advocate for the disabled, John Herrion of the EPVA. John is Assistant Program Counsel of the EPVA. He is secretary to the New York State Bar Association’s Committee on Legal Issues Affecting Persons with Disabilities and is a graduate of Pace University School of Law.

I should note that, as counsel to the EPVA, John has represented, among others, Ronnie Ellen Raymond, in her suit to obtain

an accommodation to permit her to safely enter her cooperative
apartment at 325 Central Park West. That suit, which was jointly
litigated with attorneys from the Law Enforcement Bureau of the
New York City Commission on Human Rights (the "Commission"),
was characterized by The New York Times as a wake-up call
to housing providers that the New York City Human Rights Law
(the "Human Rights Law")\textsuperscript{65} prohibits discrimination against per-
sons with disabilities, and we mean it.\textsuperscript{66}

We will start with Lou.

MR. GRAZIANO: Sir Isaac Newton once said that he could
see further since he stood on the shoulders of giants. Next year, the
EEOC will celebrate its thirty-fifth anniversary as the federal
agency that enforces federal anti-discrimination laws.\textsuperscript{68} The EEOC
and the federal anti-discrimination laws have benefited from the
experience and efforts of Fair Employment Practice Agencies, such
as the Commission. It is appropriate to remember on this, the
forty-fifth anniversary of the Commission's successful education of
the public on the value of equal employment opportunity for all,
that it is the efforts of those who have preceded EEOC that have
permitted the federal government to go farther. As with Newton,
EEOC has succeeded because it has followed giants.

Baseball, for some, is a metaphor. Some of the advice and ad-
ages extend beyond the baseball field and have application in other
areas. There are two sayings that I believe have particular applica-
tion in the discrimination law setting, especially the ADA. In base-
ball you are taught "see the ball, hit the ball" and "if you think
long, you think wrong." These sayings have some value in viewing
the appropriate way to approach the ADA. All too often, lawyers
and judges make claims more complex and fail to focus on the fact
that the ADA is meant to prevent discrimination based upon disa-
bility.\textsuperscript{69} In truth, keeping it simple is the best way to approach
claims of discrimination.

\begin{itemize}
  \item[66.] See Jay Romano, A Ruling on Co-ops and Disability, N.Y. Times, May 23,
            1999, at 1.
  \item[67.] The views expressed in these remarks are held by Louis Graziano in his pri-
            vate capacity. No official support or endorsement by the United States Equal Em-
            ployment Opportunity Commission or any other agency of the United States
            Government is intended or should be inferred.
  \item[69.] See 42 U.S.C. § 12101 (stating "It is the purpose of this chapter — (1) to pro-
            vide a clear and comprehensive national mandate for the elimination of discrimina-
            tion against individuals with disabilities").
\end{itemize}
The goal in determining whether there is a violation of the statute should first and foremost be whether there has been discrimination. U.S. District Court Judge Denny Chin appropriately places the examination focus on whether there was discrimination, although his analysis concerns a related issue, on the burden of proof. He re-examines the basic framework used by the courts to determine whether there is liability — the McDonnell Douglas burden of proof allocation.

Judge Chin concludes that it makes more sense for the courts, and, I would add, lawyers litigating in this area, to recognize that discrimination is what matters. “[C]ourts instead should focus on the ‘ultimate issue’- whether the plaintiff has proven that it is more likely than not that an employer’s decision was motivated, at least in part, by an ‘impermissible’ or discriminatory reason.”71 This streamlined approach would strip away tangential and distracting questions concerning the minutiae of the test’s inner workings and reaffirm the purpose of Title VII: remedying discrimination, “subtle or otherwise.”72

The same logic that drives the inquiry should be present in determining whether a violation of the ADA has occurred. The ADA was passed to prevent people from discriminating based upon disability, and I think that is where the focus should be when you start to examine a claim under this law. In large measure, that is what I do when I start to look at a charge, because it is my view that if you can establish that the person is being discriminated against because of disability, and I am very careful in how I say that because there are different prongs as to establishing whether a person has a disability, generally speaking, a lot of the other issues are going to fall into place. I think you have to look at what the law was meant to do and how it makes sense.

Keeping the focus on the ultimate issue is important in ADA claims. In fact, the ADA creates more distractions when evaluating the ultimate issue than any other anti-discrimination law. I am not saying that you should ignore the statutory definition of “disability,”73 “major life activity”74 or “essential function.”75 Understanding their relevance to a lawsuit is important because they are

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73. See 42 U.S.C. § 12102(2) (1999) (defining “disability” to mean “with respect to an individual (A) a physical or mental impairment that substantially limits one or
often jurisdictional. They should not, however, become the over-
riding concern. Indeed if there is direct evidence that an employer
denied someone a job because of a disability, issues such as
whether that person had a disability may be less crucial because
jurisdiction will likely also attach under one of the other prongs of
disability. There may be no need to pursue questions of what ma-
jor life activity is affected because the employer admits to consider-
ning the person as having a disability. In this scenario, there is no
need to establish the essential functions of the job since the em-
ployer considers the individual unfit. By attacking the litigation
from the direction of whether there was discrimination you are be-
ing faithful to the law’s purpose while finding a solution to many of
the problems that distract from the question of discrimination.

The Supreme Court demonstrates this view in several cases it
recently decided. One case is Cleveland v. Policy Management Sys-
tems Corp. This was a case where, once again, we found the ever-
imaginative respondents’ bar developing another theory to quickly
resolve discrimination cases, in this particular case, disability
claims.

Several years before, the respondents’ bar brought us a new legal
theory that became known as “after acquired evidence” as a great
way of eliminating discrimination cases. That theory was based
upon the discovery of adverse evidence against the employee after
the discriminatory act had taken place. The theory was that ad-
verse evidence, such as lying on a resume, would excuse any illegal
acts of the employer — essentially creating a case of two wrongs do
make a right. After causing a split in the circuits, this theory ap-
peared before the U.S. Supreme Court in McKennon v. Nashville
Banner Publishing Co. While the Court agreed that it was a very
interesting and innovative policy, and that it did have a limited role
in the issue of damages, it would not be the magic bullet that would

74. See 29 C.F.R. § 1230.2(i) (1999) (defining “major life activity” as “[a] function
such as caring for oneself, performing manual tasks, walking, seeing, hearing, speak-
ing, breathing, learning and working”).

75. See 29 C.F.R. § 1630.2(n) (1999) (defining “essential function” as “the funda-
mental job duties of the employment position the individual with a disability holds or
desires[,] “essential function” does not include the marginal functions of the
position”).


deny a plaintiff from proving discrimination by the employer.\textsuperscript{78} The Supreme Court was keeping an eye on the discrimination ball.

Respondents' bar tried again, this time under a concept that was a little bit more tried and true, called judicial estoppel. Under this theory, a plaintiff who brought an ADA claim of discrimination against an employer could lose the case before the issue of discrimination was ever decided. An employee with a disability who was fired might apply to Social Security or similar agencies to receive disability payments because of an inability to work. Under these circumstances, the claimant had to make a sworn statement that he had a disability that prevented him from working. Armed with this statement, the respondents' bar took the position that under those circumstances, you have admitted that you cannot work; therefore, you cannot be a qualified individual with a disability. You do not have a lawsuit; you lose.

Once again the Federal Circuit Courts were split on this issue, some agreeing that the plaintiff was estopped,\textsuperscript{79} some did not find that the plaintiff was estopped.\textsuperscript{80} In \textit{Cleveland}, the Supreme Court again would find that judicial estoppel was not a magic bullet that threw a plaintiff out of court without any thought to whether there was discrimination.\textsuperscript{81} The Court stated that this too was another very innovative and interesting argument, and that, while it did have a place in litigation, it would not be an automatic bar in all cases.\textsuperscript{82} There is a good reason for such a conclusion. The Court reasoned that while a claim of disability by an employee may be evidence of whether that person can work, you have to look at the circumstances on a case-by-case basis. Indeed the Court recognized it may have been the employer's failure to provide an accommodation that forced an employee to claim that he could no longer work.\textsuperscript{83}

Slowly but surely, as the courts, respondents and plaintiffs all start to realize that the ADA is just not a law where one size fits all,
but that each case has to be judged upon its own merits, maybe we can get down to what the law is really meant to do. As in baseball, if you think too long you think wrong.

The Supreme Court case I want to talk about for a few moments is a case that has probably received a lot more attention. *Sutton v. United Airlines* was the lead case of three that were decided in 1999 where the Court examined the issue of who is disabled. In *Sutton*, the Supreme Court concluded that people who have eyeglasses do not have disabilities in circumstances where, with eyeglasses, the individual can adequately see. This was not a very neutral fact pattern, as the case concerned a couple of applicants who wanted to become global airline pilots. Whenever you start talking about safety affecting circumstances, especially with airline pilots, you are already skewing the analysis. Decisions are not made in a vacuum.

The Court concluded that defining whether or not a person has a disability must include any corrective medication or devices. Therefore, if by wearing eyeglasses you no longer were disabled, you no longer fit within the first prong of the disability definition. While most news from this decision has focused upon the Court's narrowing of the disability definition, disagreeing with the position taken by EEOC and many plaintiffs, there was more to this opinion. While on the one hand, the Court narrowed the window for individuals with impairments to argue that they have been discriminated against under the ADA, another window under the "regarded as" prong is given greater vitality. This gets to the heart of what I have been talking about, which is: is the employer discriminating? Under these circumstances, we start to not just look at what is or is not wrong with the employee, but we start to look at what is or is not wrong with the employer. In many cases the person suffering from a impairment is the employer who thinks that someone with a disability cannot work. That impairment is fear and ignorance on the part of the employer.

Along those lines, let me just cite what the Supreme Court said concerning the definition of the "regarded as" prong of disability. There are two ways in which an individual may fall within the stat-

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84. 119 S. Ct. 2139 (1999).
87. *See id.* at 2147.
88. *See id.* at 2146.
utory definition: "[A] covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or [sic] a covered entity mistakenly believes that an actual non-limiting impairment substantially limits one or more major life activities."^89

I do not know yet where this definition and where this analysis, which the Supreme Court touches on in *Sutton*, is going to take us, because I think the law is going to have to evolve in this area. I do think, however, that the Supreme Court is opening up a very interesting window. There also was some discussion during the oral argument, with the Supreme Court suggesting that maybe you do not fit in as disabled, but we do not want to ignore the fact that the employer may be who is creating a discriminatory environment, and we still think that is something that needs to be actionable. I continue to believe that the ADA will remain sufficiently expansive to include discriminators if the right approach is taken, and that approach is to view the events from what did the employer believe.

With that in mind, let me finally cite two cases that I believe will be useful when attacking the problem of whether there was discrimination under the 'regarded as' prong. Quite often what happens under this analysis is you end up seeing working as a major life activity. Some employers may be accommodating enough to admit that they consider an employee disabled. Often, though, the fall back position under the 'regarded as' prong results in claiming that work is as the major life activity affected. A number of courts, including the Second Circuit,^90 have made it difficult to establish a case where working is the major life activity. In denying the ADA claim, many courts have used an expansive view of what jobs someone with a disability can find. There are two recent cases that I believe offer a better analysis of working.

In *Fellestad v. Pizza Hut of America, Inc.*,^91 the Eighth Circuit reversed a summary judgment decision for the defendant. The court concluded that you could not just look at whether there were any job opportunities that someone with a disability could have undertaken, but you also had to examine the employee’s particular work history.^92 In that case, the plaintiff had worked in the restaurant management business for twenty years. Her entire work train-

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89. Id. at 2149-2150; see also 42 U.S.C. § 12102(2)(A), (C) (1999).
90. See Daly v. Koch, 892 F.2d 212 (2d Cir. 1989).
91. 188 F.3d 944 (8th Cir. 1999).
92. See id. at 945-55.
ing, experience and expectations were in restaurant management. Therefore, there should be an individual assessment of whether the employer’s action resulted in discrimination.93 A similar result can be found in Mondzelewski v. Pathmark Stores, Inc.94 There, the court concluded that any evaluation of whether working was substantially affected by the discrimination should include an analysis of the plaintiff's limited job skills, education and age.95 I think those are the cases that are leading us in the right direction because they are typified by individualized plaintiff assessment when determining whether there has been discrimination on their behalf.

Thank you.

MS. VARELA: Thank you, Lou.

MR. KOSTELNY: I will not presume to discuss the ADA after Mr. Graziano’s presentation, so I will confine my remarks to the New York State Human Rights Law (the “NYS Human Rights Law”).96

The NYS Human Rights Law differs in three material aspects from the ADA:

First, the definition of disability is markedly broader under the NYS Human Rights Law than it is under the ADA.

Second, the analysis of what constitutes discrimination under the NYS Human Rights Law is more flexible than it is under the ADA.

Finally, the scope of activities protected by the NYS Human Rights Law is broader than the scope of activities protected by the ADA.

The NYS Human Rights Law defines disability as “[any] physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . .”97 The dependent clause is the most important part of the definition. Just as Commissioner Varela made plain with respect to the Human Rights Law, the NYS Human Rights Law covers all diagnosable medical condition.

Mitigating measures, such as the eyeglasses that the Supreme Court fixated on in Sutton v. United Airlines, Inc.98 are irrelevant to

93. See id. at 955.
94. 162 F.3d 778 (3d Cir. 1998).
95. See id. at 782.
97. See id. § 292(21).
the definition of whether a person is disabled under the NYS Human Rights Law, because the treatment of a condition does not affect the diagnosis of it.

There is no requirement that the diagnosable medical condition substantially limit a major life activity of the individual, as the Supreme Court held in *Albertsons, Inc. v. Kirkingburg*, because all diagnosable conditions are covered without restriction. Indeed, the NYS Human Rights Law goes on to specifically provide that employment discrimination against individuals, simply because of their genetic predisposition or carrier status with respect to a physical, mental, or medical impairment, is specifically prohibited.

Finally, the NYS Human Rights Law focuses on the impact of the disability on the job or occupation sought or held by the disabled individual, as opposed to the broad categories of types of employment that the Supreme Court focused on in *Murphy v. United Parcel Service, Inc.*

In analyzing when discrimination occurs under the NYS Human Rights Law, the federal courts, the State Division and the New York State Courts have all mandated an individualized inquiry. What, however, constitutes an individualized inquiry is markedly different under federal and state law. The ADA poses the following questions with respect to the individual plaintiff: does that individual have an impairment; is that impairment substantial; does that substantial impairment significantly limit a major life activity; and, if that major life activity is not working, then and only then, does the federal court focus on the question of whether or not that individual can reasonably perform the job duties of that position with or without reasonable accommodation.

If, however, the major life activity impacted by a disability under the ADA is working, then the plaintiff must jump over one further hoop: he/she must show that he/she is disqualified from a broad spectrum of jobs, not simply the job for which the plaintiff was actually applying, before the federal court even gets to the question of analyzing whether or not that person can actually do the job notwithstanding their disability.

100. See N.Y. Exec. Law § 292(21); *Albertsons, Inc.*, 119 S. Ct. at 2168-69.
101. See N.Y. Exec. Law § 296(1).
102. See id. § 292(21).
Under the NYS Human Rights Law, there is a more abbreviated inquiry. Indeed, the approach that federal district Judge Chin recommended has always been the focus of disability litigation under the NYS Human Rights Law: 1) does the individual have a disability; i.e., does that individual have a medically recognized and diagnosable condition; 2) did the employer make an adverse employment decision based on that disability; 3) is the individual not hired, denied a promotion, or fired because of that disability; and finally, 4) does that disability impact that individual’s ability to reasonably perform the job duties of the position at issue?105

I would note that, under the NYS Human Rights Law, that decision has to be made after the employer provides reasonable accommodation. The State Division’s Interim Guidelines outline what the employer’s required reasonable accommodations are.106

Finally, although the ADA is not purely a fair employment practices statute, as the Supreme Court’s decision in Olmstead v. Zimring107 made quite clear, both the New York State and the New York City Human Rights Laws are true omnibus statutes. They mandate not only fair employment practices, but also prohibit discrimination against individuals on the basis of disability in housing, public accommodations, and credit.

In closing, I would like to note, particularly for those who are, or may be, litigating these types of claims, that disability discrimination litigation under either federal, state, or local law is fundamentally different than the classic Title VII litigation. For example, a third of a century after the enactment of Title VII, and well over half-a-century after the enactment of the NYS Human Rights Law, affirmative action remains a hotly debated afterthought to those statutes.

With respect to the disability discrimination provisions of both the ADA and the NYS Human Rights Law, affirmative action in the form of reasonable accommodation is the heart and soul of these statutes. Reasonable accommodation is the essential demand placed upon employers and the essential requirement that employers have to meet in order to stay in compliance with federal, state, and local law in this area.

MS. VARELA: Thank you.

MR. HERRION: I want to express my gratitude to the Commission and Commissioner Varela for the opportunity to speak at this important anniversary commemorating forty-five years of this Commission's service to the citizens of New York.

I was asked to speak today on disability rights and the developments that have been made thereunder. I think the word "developments" is appropriate. As I have begun to practice in this area of law, I have learned that disability rights is very much a work in progress, and there is a tremendous amount of education, advocacy, and good legal representation that needs to be done in order to continue to expand upon the scope of protections and rights that are afforded to people with disabilities under the city, state, and federal laws.

One such opportunity came my way two years ago. It was the Raymond v. 325 Central Park West case. The case began with Ms. Raymond calling EPVA. She was very upset because the Board of Directors (the "Board") denied her request for a ramp.

I went out to meet with Ms. Raymond. She lives in a beautiful apartment that looks out on Central Park on Central Park West. She had run a successful business in New York City and is extremely active in her community. She has lived in the building for a number of years, and served on the Board in 1995. In 1995, the Board realized that they needed to do some work to the facade of the building.

The building is not uncommon, in terms of design, to that of many buildings in New York City. It features a moat in front of the building that is covered by two steps and a concrete platform that leads to the lobby door. The structural beam within the moat needed to have some work done, so they needed to demolish this platform and reconstruct it.

Ms. Raymond was on the Board at this time, and asked them to consider putting in a ramp. Seeing that the work needed to be done, it was a good opportunity to have it all taken care of in one shot. For two years, it looked like the Board was going to do the right thing. They hired an architect who drew designs for both the job that featured the ramp design as well as the job that featured the steps that were going to be reconstructed. They secured bids and made permit applications to the New York City Department of Buildings.

In September of 1997, however, the Board held a shareholders’ meeting in the cooperative lobby, and at that meeting the shareholders raised a number of concerns with regard to the ramp design. Some concerns include: the increased cost; others included security and liability issues; concerns that there would be skateboarders on the ramp; and some people did not want the building to look like a hospital.

Ms. Raymond sat through this entire meeting listening to all of these concerns, none of which addressed her quality of life, her access to the building, her ability to independently exit and enter her own home. After the meeting, Ms. Raymond drafted a concise memo that she sent to the Board president, which addressed each and every one of these concerns and included an offer to pay for the entire cost of the ramp.

I bring that up because the issue of who pays for the reasonable accommodation has been distinguished in New York City within the housing context. It has been distinguished from the federal and state requirements, and is certainly an area that has been developed in disability rights law. I will come back to that issue, but it is important to note that she did offer to pay for it.

The Board met, agreed with their shareholders’ concerns and voted down the request for the ramp. They were going to go ahead with construction that would include putting the steps back in at the platform. Ms. Raymond then filed her complaint with the Commission. Rachel Pomerantz became involved as the Law Enforcement Bureau’s attorney; an investigation was conducted, and probable cause was found, crediting Ms. Raymond’s allegations that the cooperative was discriminating against her, based upon their refusing her request for reasonable accommodation.

The Board then got together a second time in January of 1998, to discuss access for the building. They came up with the following idea: they were going to provide Ms. Raymond with an exterior elevator lift that would platform itself out on the bridge that goes over the moat. She would then be lowered on the lift in her wheelchair into the moat, down one story, where she could gain access to the basement door. She could then use the basement corridors, passing the various storage bins and garbage that is down there, to access the elevator door which would then bring her up to her apartment. The Commission found this offer to be unreasonable, citing safety and dignity concerns for Ms. Raymond.109 I will fast-

109. See id. at *11-13.
forward here, because we were successful in winning the case. The Commission ordered the cooperative board to install a ramp and automatic door openers.\textsuperscript{110}

The issue of damages is interesting, because what happened was the administrative law judge recommended that Ms. Raymond be compensated by the amount of $10,000 for the pain and suffering she endured in terms of getting in and out of the building without assistance, waiting for people to help her get in and out, over the past couple of years.\textsuperscript{111} The Commission looked at the recommendation and increased it by $5000, because they noted from the record that Ms. Raymond truly did feel worse about the possibility of getting in and out of her home through the basement on this lift contraption. I remember Ms. Raymond telling me that she would rather climb up the stairs to get in through the front door than be left on this elevator lift to enter and exit her building. I also recall discussing the Board's offer with my boss at EPVA, Jim Weisman. He said he had no problem with their offer so long as they boarded up the front door and everybody got on the elevator and went down into the basement to get in and out.

Another issue I want to mention with regard to how the Raymond case has developed disability rights is the scope of the Commission's order. There is a provision in the New York City Administrative Code that deals with the scope of a decision and order of the Commission.\textsuperscript{112} It says that the responding party can be ordered to take affirmative action, and that includes extending equal and unsegregated accommodations, services, and privileges to the aggrieved party.\textsuperscript{113}

I think the Commission noted that in increasing the damages and looking at the overall case, what we are talking about is equal, unsegregated access, not what is the best offer or what somebody thinks is reasonable. We are really looking at all the facts and elements of the case and ensuring that an individual with a disability has equal access that is dignified and safe, similar to the way that everybody gets in and out of their own home.

The Raymond case bears out a number of elements concerning disability discrimination rights.\textsuperscript{114} Mrs. Raymond had requested a

\begin{itemize}
  \item \textsuperscript{110} See id. at *1.
  \item \textsuperscript{111} See id. at *12.
  \item \textsuperscript{112} See N.Y.C. ADMIN. CODE § 8-120(a)(5) (stating that the Commission may order a respondent to extend “full, equal and unsegregated accommodations, advantages, facilities and privileges” to the other party).
  \item \textsuperscript{113} See id.
  \item \textsuperscript{114} See Raymond, 1999 WL 156021, at *10.
\end{itemize}
reasonable accommodation, and offered to pay for it. Usually in these cases, and what is established under the Human Rights Law, is that a reasonable accommodation is such accommodation that would permit an individual to enjoy the right or rights in question, so long as it does not create an undue hardship. An undue hardship takes into consideration such things as cost, the financial impact on the building or the covered entity that is involved, and practical concerns — you could not have a hundred-yard ramp going across Central Park West and consider that a reasonable request.

None of those elements were really addressed by the Board. They were well off financially. There were no apparent problems with the cost of the ramp construction. Ms. Raymond's offer to pay for the reasonable accommodation eliminated the undue hardship obstacle.

What ended up coming about — and I want to briefly touch on this, because when you are talking about developing rights around disability, you also need to understand what are the discriminatory practices that are out there — what the Board ended up doing was they raised a business judgment rule defense. They said that they had made a good faith, lawful decision to accommodate Ms. Raymond and thus were protected from judicial review by the business judgment rule. The Commission disregarded the respondent's business judgment rule defense and ordered the accommodation that Ms. Raymond requested.

I know that I am down to my last minute here, so I will close it up with this in terms of the development of disability rights. New York City has distinguished itself in the country with regard to obligating property owners and housing providers to pay for reasonable accommodations. The federal and state laws require persons to provide reasonable accommodations at the expense of the individual with the disability, whereas the Human Rights Law places the obligation on the housing provider.

116. See id. § 8-102(18)(a)-(b).
117. See Raymond, 1999 WL 156021, at *10; see also Levandusky v. One Fifth Ave. Apartment Corp., 554 N.Y.S.2d 807 (1990) (discussing the co-op board's use of the business judgment rule as a defense).
120. See N.Y.C. Admin. Code § 8-120(a)(5).
In coming here today and in working on the Raymond case, I think we have set a good foundation that puts cooperatives housing providers and others on notice that you cannot simply offer to provide access through the back door or through the basement door; you have to ensure that people with disabilities that are your neighbors and tenants are given equal access to use and enjoy their homes just as everybody else in the building is.

Thank you very much.

MS. VARELA: Thank you, John.

I just wanted to say, for your information, disability is the fastest-growing area of our docket. Two other cases, which those of you who like to play with LEXIS might be interested in, are the Torres case, that involved a similar accessibility issue, and our decision in Pathmark, which was recently upheld by the State Supreme Court, that raised the issue of whether the defense of substantial performance will be admitted. That was a case in which the court imposed $25,000 damages and a $100-a-day fine after ninety days for failure to comply with an order relating to supermarket cart corrals. Hence, it is the fastest-growing area, not least because EPVA is very, very enthusiastic and energetic in bringing those cases and bringing them to our attention when appropriate. So thank you.

I have two quick questions before throwing it open to the floor. My first question is to Lou. Lou, I had recently heard Chris Kucynski of the Washington Office of the EEOC talk a little bit about the Sutton case and the two prongs you referred to, but he talked about an implication of the Sutton case that had to do with asserting jurisdiction on the basis of secondary effects of medication, something that would present a new opportunity for jurisdiction under the ADA. I was wondering whether in your office you have seen any cases lately, any filings on substantially life-impairing secondary effects of corrective procedures or medication?

MR. GRAZIANO: Offhand, I cannot think of any that have made it up to review by our office. Certainly one of the things we have looked at in the past, and I think there have been some cases


in the past, is where someone who may have had cancer and is taking radiation therapy. In fact, we litigated a case along this line. The after-effects of radiation, especially when you are dealing in areas like long-term chemotherapy, where someone may have to continue to take certain types of medication that have in circumstances prevented someone, or where it is recommended that someone not become pregnant because of the type of medication you are taking, especially where you have had cervical or breast cancer or something like that, is one of the issues where I think *Sutton* actually expands the area, although we had been kind of pursuing that even before *Sutton* had come down. Thus, it does happen occasionally. The difficulty with it is being able to identify it. A lot of times, because that is secondary, you do not always know what you have until you start asking all the right questions and find out: “Well, what is happening to you now? What does that medication do?” Hence, it is usually not why the person is coming in here to start with when they come to EEOC. They usually are coming in saying, “I have had this condition or this disability,” and they do not talk about their medication. That is something that we have to try to get out of them.

It will have its place, but I am not quite sure how big it will be yet.

**MS. VARELA:** We will stay tuned. I have a question for Al, as well. Al, you have certainly made clear to us the implications of the broad definition of disability under the NYS Human Rights Law on it, as well as the Human Rights Law. Do you have any statistics about claimants making claims on the basis of disabilities that would not meet the ADA’s definition of disability? Have you kept track of how many filings would be actionable by the State Division that would not be actionable by the EEOC?

**MR. KOSTELNY:** Because the Supreme Court has, in a trilogy of cases only decided this year, only just highlighted these differences between the ADA and the NYS Human Rights Law, we do not have those statistics yet, although that is certainly something that we will be tracking in the future.

**MS. VARELA:** Great. Thank you.

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QUESTIONS AND ANSWERS

AUDIENCE: Can you talk about the question of access to commercial establishments and how that differs from access issues with regard to a condominium or an apartment building?

MR. HERRION: There is not much of a difference. It is covered under different areas of the law, but the analysis always comes down to what is reasonable, what is readily achievable, in terms of removing obstacles or barriers that are in front of a business: is it a mom-and-pop operation; is it a chain store that has funds and ability to pay for this accommodation; and what creatively can be done to remove those obstacles or to provide alternative goods and services in terms of ensuring that somebody with a disability can access that on as equal a basis as possible?

MS. VARELA: Other questions?

AUDIENCE: I just wanted to take your question about medications one step further. You used the example of radiation treatments of cancer patients. What about persons who have illnesses or conditions in which they are asymptotic?

In my case, I represent people who are HIV positive, and many of them have been asymptotic for many years but still must take medications that can create or cause a temporary illness, for example, a two- or three-hour period where, instead of being able to go to work at 9 o’clock in the morning, they may request an accommodation to come to work at 11 o’clock in the morning so that the effects of their medication wear off. I believe that would be covered under the NYS Human Rights Law, but I am wondering if that is something that would be covered under the Human Rights Law.

MS. VARELA: The Human Rights Law, yes. Any comments on that?

MR. GRAZIANO: I think it’s the same thing under federal law. It is EEOC’s view that someone who is HIV, and I think Bragdon kind of upholds this, automatically has a disability, so under those circumstances, the medication, we would not need to have that trigger the disability claim. That would probably trigger issues of accommodation, circumstances where someone might have to alter the work schedule, which is quite often the most difficult thing to have happen, because employers do not mind spending some money to do something, but they really get upset where they lose

control. They just need more education in this area, and we are prepared to try to help them out.

MS. VARELA: Great. Thank you. Lou, Al, John, thank you very much.
DIALOGUE ON HATE CRIMES LEGISLATION

PROFESSOR STROSSEN: Good afternoon, everybody.

I am pleased to serve as the moderator for this dialogue. I am a Professor of Law at New York Law School and also president of the American Civil Liberties Union (the "ACLU"). The ACLU is usually not described as being moderate on any issue, but on this one I think our position actually could fairly be described as moderate. I am just going to tell you briefly what that is, before introducing the panelists.

A distinction must be drawn between so-called "hate crimes" and "hate speech." The ACLU has taken the lead in absolutely opposing laws that restrict hate speech — or speech that expresses hatred or bias on the basis of race, religion, gender, and other societal categories — all around the country. In contrast, after long debates, the ACLU National Board decided that we could not absolutely oppose enhanced penalty laws, which are usually described as "hate crime" laws, and that impose a more severe penalty on an act that is already a crime when the victim is intentionally selected on the basis of discrimination. In our view, when these laws are written and enforced appropriately, to focus on intentional discrimination in committing a crime, they are a species of civil rights laws, which we have always supported.

I do not like the term "hate crime," because it suggests that what is being punished is an idea, attitude, or expression, which would be unconstitutional. What is actually being punished, though, is a violent or other criminal act, which our legal system already has deemed a crime. By enhancing the penalty for an extant crime when the victim is intentionally singled out because of racial or other invidious discrimination, government officials are reflecting society's judgment that the crime is more serious, and does more harm both to its individual victim and to society as a whole, than when the victim is targeted randomly or for non-discriminatory reasons. Accordingly, a more accurate label than "hate crimes" would be "discriminatory crimes."

Although the ACLU national leadership concluded that enhanced penalty laws do not inherently, inevitably create thought crimes — which would be unconstitutional — we do recognize that these laws can well be written or enforced in overbroad ways,

126. See ACLU, Policy Guide No. 72a, Free Speech and Bias on College Campuses 159 (on file with Fordham Urban Law Journal).
which would violate First Amendment freedoms of expression or association. This would be the case, for example, if someone were subjected to an enhanced penalty just because of something he had said, even if there was no close, direct causal connection between the statement and the selection of the victim in committing the crime. Therefore, we take a very hard look at each particular statute and each particular enforcement of it.

Just as we do not absolutely oppose any and all enhanced penalty laws or prosecutions, we certainly do not unqualifiedly endorse all of them either. A case-by-case examination is required. We have opposed both particular laws and particular prosecutions. For example, with respect to the proposed new federal hate crimes legislation, the ACLU supports the law’s general thrust, but we are concerned that it is written too broadly, and therefore could well be enforced in ways that would violate First Amendment rights. We support the legislation’s extension of enhanced penalties to crimes where the victim is intentionally selected on the basis of gender, disability, or sexual orientation, which are not now included in the federal law. We, however, also are calling for an amendment that would make it clear that no prosecution could be based on a mere abstract belief, expression or association, but that there would have to be a tight and direct causal link between the evidence showing discrimination and the crime being prosecuted.  

We have two excellent speakers, one who is much more opposed to the concept of hate crimes laws than the ACLU is, and the other who is much more tolerant of these laws. They have written two leading and respected books espousing those positions, order forms for which are out on the table. I highly commend these books to you. I will now introduce both speakers in the order in which they will make their opening remarks, by prior agreement.

Our first speaker is Professor Frederick Lawrence. Fred, if I may be so informal, is a law professor at Boston University School of Law, having received distinguished degrees from Williams College and Yale Law School. After law school, Fred was a law clerk for Judge Amalya Kearse on the Second Circuit Court of Appeals here in New York. Following his clerkship, Fred was associated

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with the Kramer, Levin law firm, and then became an Assistant U.S. Attorney for the Southern District of New York, where he ultimately became Chief of the Civil Rights Unit in that office. Fred has had a distinguished academic career as both a teacher and a scholar, winning outstanding teaching awards and also fellowships for advanced studies, including the Inns of Court Fellowship and a Ford Foundation grant.

Fred’s book on the topic of this panel, which was just published by Harvard University Press, is called *Punishing Hate: Bias Crimes Under American Law*. I also have to add that Fred has worked for the New York Civil Liberties Union.

James Jacobs is a Professor of Law at New York University School of Law, where he is the Director of the Center for Research in Crime and Justice, an outstanding program with which many of you have had some contact. Jim is a prolific author in the areas of criminology and law and sociology. He has a Ph.D. in sociology as well as a law degree, both of which he earned with distinction from the University of Chicago, having done his undergraduate studies at Johns Hopkins University. Before Jim joined the NYU faculty, he was on the faculty at Cornell, where he taught both law and sociology. He has also been a visiting professor at Columbia Law School and a Fulbright Fellow at the University of Capetown, South Africa.

As I said, Jim is extremely prolific, having written countless articles and books. One of his articles I find particularly noteworthy because I happen to have been its co-author! It was the umpteenth article Jim had written, as he got into academia much earlier than I did, but it was my very first law journal publication after I started teaching. Right after I began my career as a law professor, Jim honored me by inviting me to join him as co-author of this article, which a fine law review had already agreed to publish. So Jim was my first mentor in my academic career, and I will always remain very grateful to him. Jim’s particular piece that is relevant to today’s discussion is a book published by Oxford University Press last year, *Hate Crimes: Criminal Law & Identity Politics*.

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It was co-authored by Kimberly Potter, a recent graduate of New York Law School, I am proud to say.

By mutual agreement, each of our distinguished panelists will make opening remarks of no more than fifteen minutes, then they will have an opportunity to respond to each other quite briefly, and then we want to open it up for some interaction with the audience.

Fred?

PROFESSOR LAWRENCE: Thank you. Nadine has started the electronic egg timer on me, so I hope I will not use up too much time if I quickly say that it is a delight to be here. In my former life, I was an adjunct professor at this very Law School, and it is a delight to be back.

In *Punishing Hate*, I refer to the Jacobs and Potter *Hate Crimes* as "the other book on hate crimes."¹³¹ I hope Jim feels the same way. I recommend that the interested reader buy and read both books and make up her own mind on this subject, and hopefully, decide that I got it right. I suspect that Jim will be concurring in part and dissenting in part.

I use the expression "bias crimes," not "hate crimes," for the following reason. The expression "hate crimes," is more popular, but I think that "hate crimes" is an expression that actually obfuscates more than it clarifies. A "hate crime" tends to make us think of an act of hatred of one individual for another. This may be true some of the time with bias crimes, but not necessarily all of the time. "Hate crimes" includes a lot of other things, such as personal hatred of one another, which are not part of our discussion today.

A "bias crime," on the other hand, embodies an act of prejudice. This is why I focus on the term "bias crime." It is an act of prejudice that involves violent behavior aimed at a person or property of the person because of prejudice directed against the group to which that person belongs or is perceived to belong. By "prejudice," I mean a false, stereotypical belief about an individual because of his or her real or perceived membership in a group.

If we are to talk about punishing bias crimes differently with enhanced sentencing, it requires just a very brief discussion, and that is all we have time for, of first principles. Why do we punish at all? We punish for a number of reasons, depending on one's theory of punishment. One theory is that people deserve to be punished. Another theory is that punishment will deter future behavior of this kind by others or by that individual. A third theory is that

¹³¹ LAWRENCE, supra note 128, at 253.
punishment expresses societal values in the starkest form when we denounce a certain type of behavior that we as a society punish criminally.

Nevertheless, any theory of punishment requires some measurement of harm. We all know that the "punishment has to fit the crime." Therefore, we need some measurement of how much harm has been caused by an act. Harm, itself, is a function of both the culpability or state of mind of the actor, as well as the actual result of the act. Due to these dual functions, we punish intentional acts, such as murder, more than a negligent act, such as careless driving, even if in both cases the victim is dead and, therefore, the result of the two acts is the same. The culpability of the actor is the reason why one act is clearly worse than the other act and is punished more than the other. Similarly, we look to the actual result to determine the extent of the harm, even if the culpability were the same. Hence, an intentional mugging is not punished as severely as an intentional murder in any civilized system of criminal justice.

Sometimes, however, culpability and harm actually interact. It was Oliver Wendell Holmes who said that even a dog knows the difference between being tripped over and being kicked. Like most of Holmes's expressions, it has sort of a cute first take on it, but there is a great wisdom underneath it. If we think about a crime involving precisely the same harm without intent, such as being hit in the head with a bat such that one experiences great pain, an enormous lump on the head, and a tremendous feeling of having been hurt. If we say that happens as the result of an accident in a baseball game, at least in my family, that calls for an "I'm sorry," which is usually met with a "say it like you mean it," followed by "I'm sorry," and then the event is done. I do not wish to belabor it, but obviously no one would refer to that as a criminal event.

If, however, we hit the head with the exact same velocity of the bat and the exact same size of the lump on the head but this time we have an intent to cause harm, it is a worse event. The actual harm to the victim is dramatically different. Even though the physiological signs are the same, the psychological harm is tremendously different. Therefore, even a dog knows the difference between being tripped over and kicked. How much more does a human being know the difference between being tripped over and kicked and, being kicked for no reason whatsoever, or being kicked because of one's membership in a particular group?

This brings us to bias crimes. Bias crimes are different from what I will call "parallel crimes," which are crimes that have the same physical manifestation but do not have the bias motivation, in three different ways. Let me just briefly tick them off, and perhaps during the question time we can go into them in more detail. First, individual victims of bias crimes respond with a greater sense of victimization than victims of parallel crimes. That is, victims of bias crimes respond with a greater sense of withdrawal from society, a greater sense of depression, and a greater sense of literal disintegration from society because they have been targeted, not because of where they happen to be or who they are, but because of what they are. Hence, in addition to the psychological and physical damage of the parallel crime, the individual victim of a bias crime experiences a greater damage because of the "spirit murdering," as it has been described, that takes place with what is communicated with the bias crime. The difference between a bias crime and a parallel crime is fairly intuitive and is what most people think of when they think of the difference.

There are, however, two other levels, and let me just refer to them briefly. One is the impact on the target community. Here, no parallel with a parallel crime really exists. The many members of target community, meaning those who share the characteristic as the victim of a bias crime, will respond not only with a sense of sympathy ("that is a terrible thing that happened"), or even a sense of empathy ("there, but for the grace of God, go I"), but also with an actual victimization behavior set of symptoms themselves. Thus, they react as if they themselves were the victim. For example, studies have shown that in the aftermath of cross burnings on the lawn of a black family, other black families in the area, and sometimes not even in the area, respond not only with a sense of empathy. They also respond as if they themselves were attacked, of actual personal victimization. This is evident with other ethnic and other groups as well. Consequently, bias crimes affect the target community in such a way that there is no equivalent with parallel crimes.

Finally, bias crimes affect society at large differently from the way parallel crimes do. The way I demonstrate this to students is that if you see a report of a bias crime on the front page of the paper and continue to read the rest of the paper, invariably you will find an article of a crime where the physical harm was greater but lacks the prejudiced intent much further in the paper. There is a sense that the crime with the greater manifestation of physical
harm but lacking the prejudiced intent is less of a crime than the bias crime.

Why is that? It could just be that the racially-motivated arson on page one appeals to our prurient interest more than the murder on page twenty-seven, but I do not think so. What it represents is that the bias crime has implicated a social fissure line, a line on which society splits in a particularly dangerous and deep way. In fact, when society enacts a bias crime law on a federal, state, or local level, it is making a normative statement of where the fissure lines are in that society, where crimes implicate a deeper kind of harm. This is because those crimes violate not only the general social contract that we ought not harm one another, but a specific and additional social contract in this society and in other similar societies, that we are committed to a multiracial society and to the equality and egalitarian ideal. We could argue late into the night as to specifically what the egalitarian ideal means, but we could not have a meaningful argument as to whether or not it is part of the American commitment to social justice.

Let me respond to questions that are often asked about enactment of bias crime statutes, which are: Does recognizing a crime as a bias crime and focusing on it that way in fact make the problem worse? Does it exacerbate racial tension when you talk about the James Byrd case as not just a murder but a case of racially motivated murder? Does it exacerbate relations between the gay community and the rest of the community when we look at the Matthew Shepard case as a case of sexual orientation-motivated murder and not just a case of murder?

My response to these questions is that it is similar to not going to the doctor because you do not want to find out that you are sick. It may very well be that in the short run focusing on the racial, sexual orientation, gender, ethnic, or religious aspects of a bias crime will cause society to focus more on those things than it otherwise would. Rather, it is in fact realizing, recognizing, and validating a harm that the individual victim feels and the harm that the community feels. The absence of such recognition creates a kind of social insanity on the part of the victim group that says, "We feel a harm, we feel a hurt, we feel an injury, that the society is not recognizing." It is in fact the double harm experienced by the narrator in

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133. See 3rd Conviction in Dragging Death, CHIC. TRIB., Nov. 19, 1999, at 3.
134. See, e.g., Achy Obejas, Student's Funeral Becomes Unity Rally; Mourners Gather To Decry Hatred, CHIC. TRIB., Oct. 17, 1998, at 1.
Invisible Man,\textsuperscript{135} where Ralph Ellison teaches us that the harm of the discrimination being rendered invisible in society is even worse than being discriminated.\textsuperscript{136}

Let me end on a somewhat smaller note. I have no illusions about the role of what bias crime laws can achieve. I do not believe that bias crime laws will solve bigotry in society. The criminal justice system is in fact a blunt tool and a clunky instrument for fine social planning. It is, however, where we express our deepest and firmest-held commitments. If in fact we can do something as to one piece of the problem, then it is incumbent upon us to do that. Certainly there are other aspects of society, all aspects of society, private and public, that must be involved in the fight against bigotry. Nevertheless, bias crime laws have a role to play, and where there is some role to play, then there is an obligation to see that that role is played.

PROFESSOR STROSSEN: Thank you very much, Fred. Jim?

PROFESSOR JACOBS: I appreciate the introduction and having been invited to participate. I want to start out by asking what the problem is. We are not experiencing some kind of epidemic of hate crimes. Despite a plethora of rhetoric to the contrary, I believe that there is less virulent racism, anti-Semitism, homophobia, etc., now than in the nineteenth and first half of the twentieth century. In my view, the drive to pass hate crime legislation basically represents greater societal commitment towards tolerance and diversity, rather than a deterioration of inter-group relations.

Fortunately, there are very few instances of neo-Nazi-type ideologically-driven haters committing murders and atrocious crimes. Where arrests have been made in hate crime cases, about sixty percent of the arrestees are juveniles, and more than half of these under the age of sixteen. The vast majority of reported hate crimes are vandalism, graffiti and harassment. The people who engage in such acts are usually confused generally and or sociopathic; they are not committed ideologues. If anything, they are more like T.V. sitcom character, Archie Bunker than like neo-Nazi leader, Tom Metzger.

Our criminal justice system is more than adequate to respond to these offenses. American society cannot seriously be accused of having inadequate or lenient criminal laws. We clearly have adequate sentencing laws to deal with biased and other criminals. The more serious criminal justice problem today is over-criminalization.

\textsuperscript{135} RALPH ELLISON, INVISIBLE MAN (1953).

\textsuperscript{136} See id.
and excessive punitiveness. We cannot even carry out the sentences that we now have on paper because of prison and jail space. Prison crowding is a problem all over the country.

Are bias crimes being inadequately punished because of weak sentencing options? I don’t think so. For the kind of atrocious murders exemplified by the Shepard\textsuperscript{137} and Byrd\textsuperscript{138} cases, all states already provide for life imprisonment or the death penalty. Further, the defendants in those cases have received those sentences. Some states, driven by the desire to do something about hate crimes, have added bias motivation as an aggravating circumstance that makes defendants eligible for the death penalty.\textsuperscript{139} Isn’t it ironic that in the name of tolerance, in the name of building a more tolerant society, we are going to execute more people?

Perhaps you agree that our homicide sentencing does not need enhancing, but that we could and should enhance criminal sentences for otherwise minor offenses when the perpetrators are motivated by bias. In New York State, the maximum punishment for vandalism is already four years in the penitentiary.\textsuperscript{140} Is that not adequate? What about that graffiti artist who writes epithets in the subway or on public buildings or on an abortion clinic, epithets that might or might not trigger hate crime punishment? The maximum penalty in New York for graffiti is one year in jail.\textsuperscript{141} Do you really think that for justice to be served, a person who writes biased graffiti should be sent to jail for more than one year? In \textit{Hate Crimes: Criminal Law & Identity Politics},\textsuperscript{142} Kimberly Potter and I argue that re-criminalizing criminal conduct as hate crimes is unnecessary.\textsuperscript{143} What we have here is a solution in search of a problem. The problem, however, cannot be inadequate sentencing power.

We also argue that hate crime laws could be counterproductive.\textsuperscript{144} For one thing, the controversy over hate crime laws distracts attention from concern for the even-handed, non-biased

\textsuperscript{137} See Obejas, \textit{Student's Funeral}, supra note 134.
\textsuperscript{138} See \textit{3rd Conviction}, supra note 133.
\textsuperscript{139} Tom Kenworthy, \textit{Slain Gay Man's Mother Tries to Show Hate's 'Real' Cost}, \textit{WASH. POST}, Oct. 10, 1999, at A2 ("In the wake of the Shepard murder and the national outcry that ensued, 26 states considered legislation dealing with hate crimes . . . .").
\textsuperscript{140} See \textit{N.Y. PENAL LAW} § 70.00-2(e) (Gould 2000).
\textsuperscript{141} See id. § 70.15-1.
\textsuperscript{142} See \textit{JACOBS & POTTER, HATE CRIMES}, supra note 130.
\textsuperscript{143} See id.
\textsuperscript{144} See id. at 102-10.
enforcement of the law.\textsuperscript{145} That some offenders harbor racial biases or sexual orientation biases or religious biases, is bad; but, after all, many criminals have many anti-social values and attitudes. We can only do so much to create bias-free, equal opportunity offenders. Sending more such people to prison for longer is ironic and counter-productive, because prisons are the most biased arenas in the entire society. Indeed, many biased hate organizations in American society have been spawned in prisons.

Purging bias from the criminal justice system is so much more important. We cannot have a viable and an effective democracy if we have discriminatory police, prosecutors, courts, prisons and jails. Therefore, we constantly have to scrutinize those institutions to make sure that they are enforcing and implementing the law even-handedly.

In addition to expanding the death penalty, bias crimes raise another civil liberties issue — punishing people more for having the wrong biases. In effect, the hate crime enhancement laws tell us that some biases are okay, and some are not. If you hit somebody because they are a member of a labor union or because they believe in the right to work, you are punished $X$ amount; if you hit them because you do not like their religion, then you will be punished $3X$ amount. Remember, in \textit{Wisconsin v. Mitchell},\textsuperscript{146} the youthful black defendant received triple the punishment for assault because his motivation was racial bias rather than "mere" dislike of the victim's face, the part of town where he lived or high school he attended.\textsuperscript{147} Isn't this, in effect, punishing people for having the wrong views?

The First Amendment is called into question even more dramatically in sentencing biased graffiti artists.\textsuperscript{148} Consider the following: if you splatter paint on a car, without indication of bias, the punishment is a $500$ fine.\textsuperscript{149} But if you paint a swastika, a caricature of a racial group, and perhaps a cross, you get a year in jail.\textsuperscript{150} Is that anything other than punishment for disfavored expression? Furthermore, we need to consider two other categories of graffiti. How about splattering paint on a church or gay rights office? Should that get you the $500$ fine, the year in jail or something in

\begin{itemize}
\item \textsuperscript{145} See \textit{id}.
\item \textsuperscript{146} 508 U.S. 476 (1993).
\item \textsuperscript{147} See \textit{id} at 480.
\item \textsuperscript{148} See U.S. \textsc{Const.} amend. I (protecting freedom of speech).
\item \textsuperscript{149} See N.Y. \textsc{Penal Law} § 80.05-1 (McKinney 1999).
\item \textsuperscript{150} See \textit{id} at § 70.15-1.
\end{itemize}
between? Finally, what should the punishment be, if instead of paint, the perpetrator writes words or symbols on a symbolically meaningful structure, such as writing “down with the Pope” on a church or “queer” on the gay and lesbian rights office? Does this warrant a double or triple enhancement, say two years in jail? Is there no threat to the First Amendment in all of this?

My last concern is that the development of new hate crime jurisprudence will further politicize the criminal justice system, especially along racial and ethnic lines. Multiracial and multiethnic juries may fracture over calling defendants racists, sexists, homophobes and so forth. Jurors may come to see criminal trials as a form of intergroup conflict. This would be very unfortunate indeed.

PROFESSOR STROSSEN: Thank you, Jim. Fred?

PROFESSOR LAWRENCE: I am reminded of a comment that my teacher and mentor, Charles Black, wrote after his good friend, and often adversary, Alexander Bickel, passed away. He said, “Bickel and I agreed on everything except for our opinions.” So Jacobs and I agree on everything except for our opinions. I certainly share with him the commitment to not having bias in the law enforcement system, to having equal enforcement by police officers, by prison officials, by courts, by juries. I will quibble a little bit when he said all our energy has to go into that.

Let me first say a word about the statistics. I certainly agree with Jim that the line makes it very hard to know for sure if the problem is getting worse. I think, for certain, the problem is real. The incident levels, measured by the Federal Government under the Hate Crime Statistics Act, tell us anywhere from 8,000 to 9,000 hate crimes per year. 151 Alabama and Mississippi each reported zero hate crimes. 152 Now, it could be they had a very good year in Alabama and Mississippi; that is possible. I have another theory, and that suggests that those numbers are conservative, if not low. We need not say that the problem is overwhelming or that it is out of control. Nevertheless it is a problem, a real problem, in search of a solution, not a solution in search of a problem. I will come back at the end of remarks as to another way of going about what the problem is.


152. See id.
Are most of the incidents vandalism? Many of the incidents are vandalism, but again, I am not sure that tells us that there is not a problem. Racially or religiously motivated vandalism is a different and worse crime from parallel vandalism, and in instances where it is not bias-motivated, then it simply is not a bias crime. Hence, any act of violence that happens to be interracial or that happens to be interreligious or the victim happens to be a gay or a lesbian is not, per se, a bias crime. Motivation has to be proven. Without the bias motivation, there is, in fact, no bias crime.

Several patterns follow from that. One is the idea that bias crimes will be very hard to prove. As a former prosecutor, that is a concern that is near and dear to my heart. Sometimes it will be hard to prove, and those are cases in which there ought to be an acquittal on the bias crime charge. Better yet, it will be a case where a rational prosecutor will say, “this is probably not one that ought to be charged as a bias crime.” More often than one would imagine, it turns out bias motivation is not hard to prove. Matthew Shepard would not have been hard to prove as a case of sexual orientation-motivated murder. Cases of gay bashing in my own city of Boston are often not hard to prove. Sometimes they are, and in those cases, they ought not to be charged as a bias crime.

A word or two about the civil liberties concerns, which I think are real ones. First of all, a bias crime is not a crime committed by a racist. It is a crime committed with racial motivation. A racist who commits an interracial crime has not committed a bias crime if there is no connection with racial motivation. A perfect example of that is a Supreme Court case upholding the use of racial animus as a capital punishment consideration, but striking down the use in a particular case because a member of the Aryan Brotherhood who committed an interractial murder while in prison, there was no proof that animus was what drove the murder. Because of that lack of proof, the defendant can not be convicted of a bias crime. Even if we think in our heart of hearts it is probably what did it, that is not beyond a reasonable doubt, nor should it be considered beyond a reasonable doubt. Hence, we require not a mere holding of beliefs, but a motivation based on those beliefs in order to be properly convicted of a bias crime.

Secondly, if we are concerned about treating conduct differently because of the beliefs that motivate it, let us just be clear how much we are taking down with us. We are not just taking down

153. See Obejas, Student's Funeral, supra note 134.
bias crime laws. We are taking down employment discrimination laws, housing discrimination laws, and the greater part of our discrimination law jurisprudence. In most states, unless a collective bargaining agreement says to the contrary, it is perfectly legitimate to fire an at-will employee for no reason at all or a particularly bad reason unless it happens to be one that triggers the discrimination law. Can you fire an at-will employee because you do not happen to like the way he looks or you do not happen to like the sport team she supports? You bet, unless the collective bargaining agreement or some labor regulation says to the contrary. You, however, cannot do it on the basis of race, creed, color, national origin, et cetera. Thus, punishing or treating motivation acts differently from other acts is not new to the law and will take all of those down if we have the same concern.

With respect to sentences, I might agree with Jim more than he thinks I do. The truth of the matter is, for now, I am agnostic on the question as to whether our sentences are too high or too low. At another time and with more time, I will probably suggest I agree with Jim that our sentences are too high, but that is not my argument today. My argument today is that sentences should be higher for bias crimes to demonstrate that a worse crime has happened. If the entire structure is too high, that may perfectly well be true, and the entire structure should be lowered.

If we are worried about how do you enhance a penalty for murder, let me say two things. One is I am unalterably opposed to the death penalty, so I may be the wrong guy to ask. Secondly, murders, fortunately, turn out to be the tiny minority of bias crimes in our society. They are the ones we talk about the most; they are the ones we hear about the most; but they are the tiny minority. Assault and vandalism are the vast bulk of bias crimes and are where enhancement would indicate the harm is greater.

Finally, what is the problem in search of a solution? The problem is that the criminal law, by its very existence, demonstrates what the society considers to be social harm. We punish because something is considered a harm to the society. The fact that something is not punished differently, that it is not identified differently in the criminal law, is also a statement of the society’s values. Put differently, there is no neutral position on bias crimes. If a state says “we have no position on bias crimes,” that is a position on bias crimes. Further, the position is that in that state, the harm to indi-

individuals and to the group, and, I would argue, to the society, by the
violation of that fissure line, goes unrecognized if that harm is not
seen.

That is the problem in search of a solution, and a solution is care-
fully crafted laws that understand the civil liberties concern but
take into account the greater harm caused by bias-motivated
violence.

PROFESSOR JACOBS: Do the hate crime offenders deserve
greater punishment because they are more culpable? In my book,
I argue that the hate crime offender is not always more culpable.156
Some hate crime offenders are very culpable, and so are some vi-
cious non-biased offenders. Suppose an Albanian-American
comes up and punches a Serbian-American, and there is ethnic
name-calling. Let’s imagine his defense to be “I am prejudiced
against Serbs. We have a long history of conflict. The Serbs have
killed my friends and family members. I was brought up to hate
Serbs. Am I more culpable than other offenders are? Should I be
punished twice as severely for the same crime?” What about an
Arab-American charged with a bias-motivated burglary of a Jew-
ish-American home? The Arab-American says, “You know, I am
so sick of the Jews and the Israelis. Their injustice to my people
has gone on for fifty years so I always burgle Jewish homes.”
Should that defendant get a double punishment?

Some hate crime defendants may say that they are less culpable
because their prejudice was not freely chosen. He might say, “I
was deeply wired to be a prejudiced person. You feel good to beat
your chest at what a righteous and unbiased person you are. But I
was raised in an environment where we were taught in Sunday
school that homosexuality was wrong, that it was linked to Satan,
and my pastor used to read me Biblical chapters. My parents also
hated homosexuals. I think I am less culpable because, in effect, I
was brainwashed.”

Should hate crime offenders be punished more severely because
they do greater harm? I do not think that such offenders invariable
do greater harm either to victims or third parties. When you talk
about the most serious crimes, this claim makes little sense. If we
compare a hate crime murder and garden variety-for-the-hell-of-it,
both victims are dead; the harm is the same. Will a rape victim be
more harmed because the defendant was motivated by racial or
religious prejudice? I think not.

156. See Jacobs & Potter, Hate Crimes, supra note 130, at 79-81.
The more serious the injury, the less significant the motivation. Thus, the motivation is most significant in low level offenses. A shove accompanied by an anti-Semitic epithet will be experienced as more injurious than a shove unaccompanied by any comment. This difference, however, proves no more than that expression can be very hurtful, whether or not accompanied by shoves or other criminal conduct. The Nazis marching in Skokie caused people a lot of pain, but we put up with that expressive kind of pain in a democratic society.

How about justifying greater punishments for bias offenders because of the fear and hurt their conduct causes third parties? Bias crimes are hardly unique in sometimes affecting third parties. Perhaps it is even a major cause of the so-called “white flight” from the city. Car-jackings send shock waves through society. The kidnapping/murder of Megan Konka lead to a nation wide movement to pass Megan’s Laws. A heinous crime in Central Park will deter some people from using the Park.

What about a judge who said to a young black defendant, “You know, I am going to sentence you three times more seriously than I sentence other robbers because you are robbing white people, you are sending fear into the hearts of the white community. Those whites are moving out to suburbs, thus harming our economy and our tax base. Because of these indirect affects of your crime, you are going to serve three times as much of a term in our penitentiary.” I think you would call that judge an active racist: I would. Yet it follows if we allow third parties’ fear to justify enhanced punishment

PROFESSOR STROSSEN: Thank you very much for an excellent dialogue. Now it is time for the audience to jump in.

QUESTIONS AND ANSWERS

AUDIENCE: Do you have any concerns about political pressure being applied on D.A.’s offices in terms of their discretion to charge cases appropriately, where a particular act may inflame a community to pressure the D.A.’s office to bring a hate crime prosecution that might not be as advisable in another context?

PROFESSOR LAWRENCE: To answer the question do I have concern about political pressure in District Attorney’s offices, yes, I think it is a very real issue. The real question would be, is there

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any alternative to that; would the cure be worse than the disease? The cure would be to say, "Let's stay away from hot button social issues in the criminal law." I think, however, that is sizably worse. I think the truth is that kind of pressure happens now. When you have any kind of a crime that implicates certain communities perhaps more than others, those communities will bring pressure to bear on the District Attorney's office. In some ways, having the discussion take place around the issue of a bias crime law so that the District Attorney's Office can take head-on the question of "was this motivated this way; was it not motivated that way?" can have a salutary effect on the issue.

I am thinking particularly of cases in Boston involving either interracial violence or gay bashing, where tremendous pressure was brought on the District Attorney's Office and by and large, for the good. Sometimes, the District Attorney's Office has responded by saying, "We do not think prejudice is what this is about and we are not going to charge them with an interference with constitutional rights." We are just going to charge them with simple assault." As a result, they take some heat from the gay and lesbian community on that. I think that is appropriate, too. That is what it means to be a district attorney. I think to a certain extent what the pressure does is it focuses a discussion that is very, very sensitive and sometimes makes us all very uncomfortable, and, for the most part, I think that is a good thing.

PROFESSOR STROSSEN: Jim, did you want to comment?

PROFESSOR JACOBS: I do think widespread use of hate crime prosecutions would contribute to further politicizing the criminal justice system. A Brooklyn prosecutor told me that she

158. See, e.g., Brian MacQuarie, RI Police Officer Mistakenly Stain: Racial Issue Raised, BOSTON GLOBE, Jan. 29, 2000, at A1 (discussing the similarities between the death of the Black Rhode Island officer killed by friendly fire and the beating of a Black Boston police officer by fellow officers who mistook the Boston police officer for a suspect).

159. See, e.g., Francie Latour, Family Says Girl Still Afraid, BOSTON GLOBE, Feb. 2, 2000, at B5 (discussing an attack on a high school student by classmates who thought she was gay); Commonwealth v. LaFaille, 704 N.E.2d 206 (Mass. App. Ct. 1999) (adjudicating a case where the defendant was charged with shooting the victim during a fight started because he was part of a group of predominantly black men who approached a group of white women); Commonwealth v. Troika, 571 N.E.2d 391 (Mass. 1991) (affirming conviction of the defendant who killed the victim because the victim was gay).

160. Under Massachusetts law, a bias crime is considered an interference with the victim's constitutional rights, whether or not the crime is committed under color of law. See MASS. GEN. LAWS ch. 265, §§ 37 (1999); see also id. § 39 (punishing assault or battery for the purpose of bias-motivated intimidation).
encountered a great deal of cynicism about use of hate crime laws. Some people complained that the D.A.’s Office responded more to some groups’ demands for hate crime prosecutions than to others.

The point that I made before about the politicization of jury trials cannot be emphasized too strongly. Remember the Reginald Denny case. Denny, a white driver, was pulled out of his truck by a group of black men in the midst of the 1992 L.A. riots and beaten over the head with a brick. What prosecutor would wish to try this as an anti-white hate crime? Would a prosecutor prefer to attempt to persuade a multi-racial jury that this case involved a straightforward assault or attempted murder? Or would a prosecutor like to try to make the following argument: “This was a racially motivated crime. The victim was pulled out of that car solely because he was a white man driving through a black area during a race riot. We, the prosecution, are going to prove that these defendants are cold-blooded racists.” Don’t you think at least some jurors would interpret this strategy as some kind of a political attack on black people generally?

AUDIENCE: I would like to ask the panelists to speak to the fact that the issue of bias crimes is gaining prominence throughout the country at a time when affirmative action has been virtually eliminated, when feminist history is being rewritten and downgraded, and when you see the courts interpreting civil rights laws more conservatively. Why is this something that is gaining prominence and such a wide bearing?

PROFESSOR JACOBS: This is just politics. The President can look good standing up and shaking his finger, proclaiming, “I am against the killers of Matthew Shepard.” There are no political costs to excoriating horrendous criminal conduct, and there may be political benefits.

AUDIENCE: But what I am asking is why is there no political debate.

PROFESSOR JACOBS: Nobody stands up for hate-motivated criminals.

PROFESSOR STROSSEN: I would like to comment on this issue. Jim, it ties into a larger pattern that you and I talked about before this panel started, which is the over-use of the criminal justice system to criminalize every social problem in this society. The pattern applies to any vexing, frustrating, upsetting phenomenon,

including violence where the victim is selected on a discriminatory basis. Yet we as a society, and our political “leaders,” choose not to address the root causes of the problems — in this case, violence and discrimination. We, however, can show that we really oppose discriminatory violence, and we are tough on crime, so we will turn this social problem into a crime.

There was an article in The New York Times, I think it was yesterday or the day before, about how we are now starting to see criminal prosecutions against the parents of chronically truant students. Now, we might well be dealing with dysfunctional families here, or perhaps dysfunctional schools. The mindset of our politicians, however, in this situation is all-too-typical: rather than addressing these underlying problems, they want to throw the parents in jail.

And why is that such a popular strategy? Number one, because everybody is against crime, so if you use the political rhetoric of being tough on crime, you are likely to get elected. Number two, it’s a “quick fix.” No complications in terms of trying to understand and influence human motivations and behavior. Number three, it’s cheap — or, at least, it seems cheap. People do not think in terms of the increased taxes that go into criminal law enforcement in the way that they would think about the increased taxes that go into more proactive educational-type strategies to combat the underlying causes of societal problems such as discrimination and truancy. Obviously, a lot of our tax dollars are going into the criminal justice system, but that seems not to be the political hot-button issue that taxation is in other contexts.

PROFESSOR LAWRENCE: I would agree with a lot of what has been said. In response to your question, in some ways one can build a consensus around criminal enforcement where one could not build an equal or parallel consensus for civil enforcement. I tell my students to keep track of a list of issues that exist throughout society but suddenly become hard where civil rights is concerned. I certainly share a concern of an over-criminalization of society, and I certainly share a concern of using the criminal justice system for fine social tuning. Hate crime laws are not an example of that and are a funny lightning rod for this particular problem.

I testified in favor of the federal Hate Crimes Prevention Act\textsuperscript{163} before the Judiciary Committee.\textsuperscript{164} There are members of the Judiciary Committee who voted in favor of the federal car-jacking statute but have severe federalism problems where hate crime laws are concerned. I certainly understand that there are people who think that the criminal law is used too much. My guess is that both Nadine and Jim are examples of people who would apply this generally, and not just to hate crimes. This is really not directed at them. Nevertheless, one ought to be careful about how that argument is used in the hate crimes area, because we do in fact have criminal statutes where many are doing very little work. A federal hate crimes law would do very important work and ought not to be tarred with that.

PROFESSOR STROSSEN: Yes, sir?

AUDIENCE: I just want to identify myself. I am Howard Katz from the Anti-Defamation League. I also previously worked for the New York City Gas and Lesbian Anti-Violence Project. I am also the leader of the New York State Hate Crimes Coalition, so I do have a bias on this subject. My question refers, Professor Jacobs, to your arguments about how these laws will be used and who they would be used against. Specifically, I am referring to the young people who do not commit the crimes that rise to the level of capital punishment, but the much smaller crimes, such as aggravated harassment, graffiti. I am also referring to the people without a prior criminal record that come in front of a judicial system, or are well-connected to their community. Under today’s New York State law, if you put a daisy on a house of worship or a swastika on a house of worship, these acts would be considered the exact same crime. If there was no hate crimes law, someone who put the swastika on the house of worship would not be treated differently than someone who put the daisy on the house of worship.

Do you feel that the laws are adequate? Do you believe that the impact on the victim, meaning the house of worship and the community, is the same if they see a daisy or a swastika, or do you think the fact that these laws are not in place sends a message to communities that have always felt victimized that the law is not there to protect them?

\textsuperscript{163} S. 618, 106th Cong. (1999).

PROFESSOR JACOBS: Our real debate is over low-level offenses because it makes no sense to talk about enhancing sentences for murder and the other most serious crimes. There is room to enhance sentences for bias-motivated vandalism and graffiti. Nonetheless, ordinary sentencing law provides more than enough punishment for such conduct.

PROFESSOR LAWRENCE: There is another solution. The solution is to focus on the mental state of the actor, the *mens rea* of the actor, which we do in criminal law all the time, and not just on the result. I do not care whether the graffiti is a daisy or "bitch" or a swastika, except that those will probably help me prove what the state of mind of the actor was. If the act was religiously or racially motivated, then it is different. That is what the question is probing for when it looks for a distinction between the daisy and the swastika.

Let us take the bigger example, which makes the point really in an unassailable way. To describe Kristallnacht merely as a case of arson is not to describe the crime at all; it is to miss completely what happened. It was not just about arson; it was arson in a particular social context. That is why it caused a greater harm than merely burning down a whole series of buildings and shops.

AUDIENCE: There has been significant increases in hate crimes, not in terms of numbers but to the extent of the damage that is inflicted on the civilians, such as the recent killing in Los Angeles by a former member of the National Alliance. Do you believe that the current federal laws are adequate to deal with these kinds of crimes, or do you believe that we should enhance the federal statute on hate crimes so that the establishment can better deal with these national racist groups, which are operating in several different states?

PROFESSOR JACOBS: I do not believe that there has been an increase in the number of hate crime incidents, nor do I believe that there has been an increase in the virulence of bias crimes. I am an agnostic on the numbers. We have no real way of determining how many hate crimes there are because the definition is weak, and we do not know the motivation of most offenders. Consider the 1992 south central Los Angeles riots. There were forty-seven people killed, and $1 billion of property damage. There were scores of assaults, thousands of vandalisms. How many of those were hate crimes? How many intergroup muggings in New York

City are hate crimes? We rarely have the opportunities for long interviews with the people, to determine their prejudice against whites, blacks, Asians, and homosexuals.

Do we want that information? Do we want to tease out the maximum amount of prejudice in every one of our criminals to prove to ourselves what a prejudiced society we are? Some people do. They think that exposing the prejudice of our criminals would make us a better society. I disagree. We should focus instead on purging bias and discrimination from our government, major corporations, universities, and so forth.

I am opposed to a federal hate crimes law. I think that there is enough police power and sentencing power in the states to deal with hate crimes. In the worst crimes, the Shepard case, the Byrd case, local law enforcement showed itself quite capable of apprehending, convicting, and perhaps even executing the offenders.

PROFESSOR LAWRENCE: Briefly, I agree with Jim on the issue of numbers. I think it is very hard to know whether the numbers are more than they were or less than they were. Are we measuring accurately? Perhaps we understand things to be hate crimes now that we did not understand to be hate crimes before. As a result, it is hard to know whether the problem is worsening or ameliorating. It is not hard for me to know there is a problem, thus I take the numbers at least to mean that.

With regards to the virulence of recent hate crimes, if I were to have given this talk here a year ago, I would have said one of the ways we describe bias crimes is that typically they are committed up close and personal. That is what the perpetrator is trying to achieve, which is why assault and vandalism were the two prime ways in which bias crimes were committed. It was very unusual for bias crimes to be committed with guns. That is not so true today. It is too early to know whether that is a trend or just a couple of blips on the screen. If it is a trend, it is a very scary one, because we also know that bias crimes have a history of copy-cat crimes thereafter. Hence, if suddenly bias crimes are combined with use of firearms, then the potential for more serious harm is certainly there. In terms of federal law enforcement, I do think there ought to be a federal bias crime statute, but primarily to fill gaps for the states that do not have such a statute. Federal hate crimes legislation would also demonstrate a national commitment to these is-

166. See Obejas, *Student's Funeral*, supra note 134.
167. See *3rd Conviction*, supra note 133.
sues, that it is not just a regional issue, certainly with respect to race, creed, color, national origin, religion, and probably sexual orientation and gender as well.

One last thing to point out is that the *Byrd* case,\textsuperscript{168} which is often used as an example of why we do not need a federal bias crime statute, is in fact a very good example of why we do. The James Byrd\textsuperscript{169} case was in fact handled by Texas state authorities. The perpetrators were in fact found, apprehended, and convicted under Texas state law, but with substantial help from the Federal Bureau of Investigation operating without any real authority to do so. The FBI had no real reason to believe a federal statute had been violated there. Nonetheless, a federal investigation went forward under very, very murky circumstances. I could tell you the federal predicate they used. Take my word for it that it is a stretch to say that was a federal crime. They did that in order to be able to cooperate with state authorities, to give them the backup that they needed.

I am enough of a civil libertarian to prefer federal law enforcement agents to operate under federal statutes and not where they think it might be a good idea in the absence of a federal statute. I would rather have a narrowly tailored federal statute that gives federal authority to federal law enforcement to fill gaps where necessary.

PROFESSOR STROSSEN: This very provocative discussion is bringing back for me memories of the ACLU National Board debates on this topic, which were among the longest and hardest we have ever had. We ended up with a policy statement that is in some sense middle-of-the-road, as I explained earlier — neither condemning all hate crimes laws or prosecutions nor championing all of them. Moreover, the policy is tentative, in the sense that it expressly calls for re-examination in light of actual enforcement experience with enhanced penalty laws, recognizing the laws' potential pitfalls.

I think a good way to end this session is with the last cautionary note in the ACLU's policy statement, raising a potential concern that was not expressly discussed by our panelists:

We are aware that the discrimination that infuses our criminal justice system . . . may well result . . . in enforcement patterns that discriminate against minorities. Therefore, [and for the First Amendment reasons cited above], we will continue to

\textsuperscript{168} See id.
\textsuperscript{169} See id.
monitor the actual implementation of enhancement statutes and review our position if experience warrants.\textsuperscript{170}

As Jim mentioned, in the very first enhanced penalty case that went to the Supreme Court, it was yet another young African-American man who was the target of the prosecution. So, for all of us who are committed to free speech and to ending discrimination, there are, alas, no easy solutions.

I want to thank both of our outstanding speakers and the members of the audience for helping to highlight the complexities of this important issue.

\textsuperscript{170} ACLU, Policy Guide No. 332, \textit{supra} note 125, at 499.
MR. WILLS: Good afternoon. I am here with my colleagues, Wayne Outten and Al Feliu, two of the most distinguished employment attorneys in New York. We are going to be discussing sexual harassment law and employer liability after last year's Supreme Court cases.

Wayne Outten is a member of the law firm of Outten & Golden, where he represents employees in employment law matters and civil litigation. In addition, Mr. Outten has co-founded and continues to serve on the boards of numerous professional organizations, including the National Employment Lawyers Association, known to most of us as NELA, the National Employment Lawyers Association of New York, the National Employment Lawyers Association Referral Service, and National Employees Rights Institute. Mr. Outten's other professional affiliations include the American Bar Association's Section on Labor and Employment Law, where he is a member of the Committee on Employee Rights and Responsibilities; he also serves as Co-Chair of its subcommittees on Alternative Dispute Resolution and on Drug Use in the Workplace. He is also a member of the New York State Bar Association Committee on Individual Rights and Responsibilities in the Workplace Ad Hoc Committee on Long-Range Planning and Future Directions. He has been a member of the Committee on Labor and Employment Law at the Association of the Bar of the City of New York; the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts; and the Center for Public Resources. Mr. Outten's published works include The Rights of Employees, published in 1994, and Privacy in the Employment Relationship, which was published in Privacy Law and Practice, a Matthew Bender publication.

Al Feliu is a member of Vandenberg & Feliu, where he principally represents management in all aspects of labor and employment law, including equal employment opportunity litigation and administrative proceedings, National Labor Relations Board proceedings, labor negotiations, and arbitrations. Prior to becoming a

member of Vandenberg & Feliu, Al was a partner at Paul, Hastings, Janofsky & Walker. Mr. Feliu’s publications include the Primer on Individual Employee Rights\(^{175}\) and Resolving Employment Disputes Without Litigation,\(^{176}\) which he co-authored with Dr. Alan F. Weston. Al is the Editor-in-Chief of the New York Employment Law and Practice Bulletin, and has also written numerous articles and spoken widely on such current workplace issues as violence in the workplace, sexual harassment, employee privacy, litigation strategy, and alternative dispute resolution.\(^{177}\)

I am Randy Wills, the Deputy Commissioner of the Law Enforcement Bureau of the New York City Commission on Human Rights (the “Commission”).

In June of 1998, at the close of its term, the Supreme Court handed a joint holding in two cases concerning hostile work environment sexual harassment. It set out new rules for employer liability for supervisory employees’ sexual harassment of their subordinates. In Burlington Industries v. Ellerth\(^{178}\) and Faragher v. City of Boca Raton,\(^{179}\) the Court revisited employer liability for a discriminatory environment for the first time since its 1986 decision in Meritor Savings Bank, FSB v. Vinson.\(^{180}\)

You may recall that in Meritor, the Court held that traditional agency principles were relevant for determining employer liability.\(^{181}\) Although the Court cited the restatement of agency with general approval, the Meritor Court also cautioned that common law agency principles might not be transferable in all of their particulars to the Title VII context.\(^{182}\)

Heeding its earlier caution with regard to the applicability of agency principles, the Faragher/Ellerth Court crafted, not without

\(^{175}\) Alfred G. Feliu, Primer on Individual Employee Rights (2d ed. 1996).
\(^{180}\) 477 U.S. 57 (1986).
\(^{181}\) See id. at 72.
\(^{182}\) See id.
some difficulty, an agency-based rule for determining employer liability for the actionable hostile environment created by a supervisor. In doing so, the Court also acknowledged the aversion expressed in the *Meritor* decision to strict liability imposition, by creating, ironically, as some have observed, a two-pronged negligence-based affirmative defense to liability or damages.

Thus, here we have the *Faragher/Ellerth* Court relying on its earlier analysis in *Meritor* to say, "yes, we can use these agency principles to determine employer liability, but we must be cautious; we cannot have strict liability in all contexts, as was announced in *Meritor*, so we must have a way to limit liability and damages. In order to do that, we will create an affirmative defense that employers must plead and prove if they wish to limit either liability or damages."

In our presentation today we are going to examine some of the concerns that were initially raised by both plaintiffs' and defendants' attorneys regarding the *Faragher/Ellerth* twins; we are going to close with some remarks on the New York City Human Rights Law (the "Human Rights Law") in light of these two decisions.

The employee in *Faragher*, who was a lifeguard for the City of Boca Raton, quit her job after enduring five years of sexual harassment from two of her supervisors. Ms. Faragher's supervisors repeatedly touched her and other female employees without invitation and they made crudely demeaning references to women in general. During a job interview with a woman he later hired as a lifeguard, one of her supervisors said that female lifeguards had sex with the male lifeguards at the beach at Boca Raton and asked whether she would do the same thing.

Ms. Faragher did not complain to higher management about her supervisors, although she did have certain what she described as "informal conversations" with some of her colleagues in the workplace. Ultimately, she resigned her employment.

Now, although the City of Boca Raton had adopted a sexual harassment policy many years before Ms. Faragher resigned, it had completely failed to disseminate that policy to anyone who worked in the Marine Safety Section, with the consequence that none of

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183. See *Ellerth*, 524 U.S. at 760-66; *Faragher*, 524 U.S. at 793-805.
184. See *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807.
186. See *Faragher*, 524 U.S. at 780.
187. See *id.* at 780-82.
188. See *id.* at 782.
189. See *id.* at 780.
the lifeguards, including the supervisors who really were at issue in this case, were aware of it in any way.\footnote{190}

Ms. Ellerth quit her job after fifteen months as a sales person for one of Burlington Industries' divisions allegedly because she had been subjected to constant sexual harassment by one of her supervisors.\footnote{191} The supervisor was a mid-level manager who had the power to hire, promote and fire, subject to higher approval, but he was not a policy maker for Burlington Industries. Ms. Ellerth endured repeated boorish and offensive remarks and gestures, as well as uninvited physical contact. Her supervisor once told her to "loosen up," and warned her that he could make her life "very easy or very hard at Burlington."\footnote{192} He also once said to Ms. Ellerth, in response to a request that she made of him, "Are you wearing shorter skirts yet, because it would make your job a heck of a lot easier if you did?"\footnote{193} Ms. Ellerth quit her job soon thereafter.

During her tenure at Burlington, Ms. Ellerth did not inform anyone in authority about her supervisor's conduct, despite knowing that Burlington had a policy against sexual harassment. In addition, although Ms. Ellerth had refused all of her supervisor's advances, she suffered no tangible retaliation as a result of refusing those advances, and in fact she was promoted once.\footnote{194}

After a very lengthy analysis of the principles of agency law as they may or may not apply to the hostile environment context, and acknowledging that it was bound by its holding in Meritor that agency principles constrain the imposition of "vicarious liability" in the cases of supervisory harassment, the Court reached an accommodation between those agency principles and the equally basic policies of Title VII that encourage forethought and preventive action by employers and saving action, or avoidance of harm, by employees.\footnote{195}

In its joint holding in Faragher and Ellerth, the Court stated that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with authority over the employee.\footnote{196} When no tangible employment action is taken by the employer, the defending em-

\footnote{190. See id. at 781-82.}
\footnote{191. See Ellerth, 524 U.S. at 747-749.}
\footnote{192. Id. at 748.}
\footnote{193. Id.}
\footnote{194. See id. at 749.}
\footnote{195. See id. at 755-65.}
\footnote{196. See id. at 769-71; Faragher, 524 U.S. at 802-03.}
As the Court stated, this defense "comprises two necessary elements: [1]) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and [2]) that the employer must plead and prove that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective action or opportunities offered by the employer, or to avoid harm otherwise." \(^{198}\)

Although the issue of co-worker-created liability was not before the \textit{Faragher/Ellerth} Court, the Court did reiterate the well-settled principle that when harassment is attributable to a co-worker, rather than a supervisor, the employer will be held liable only for its own negligence; that is, if the employer knew or should have known of the harassing behavior and failed to take prompt remedial action. \(^{199}\) In addition, the Court provided some guidance as to what constitutes a tangible employment action - the taking of which by a supervisor will automatically subject the employer to liability. According to the Court and the guidelines that it set forth, a tangible employment action constitutes a significant change in employment status, such as a hiring, a firing, failure to promote, a reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. \(^{200}\) We are going to revisit this notion of tangible employment action later in our discussion.

Initial reaction to \textit{Faragher} and \textit{Ellerth} was generally positive. Whatever its doctrinal faults and inconsistencies, the holding had seemingly eliminated the sometimes unrealistic and tortuous analysis that some lower courts often evinced when faced with the issue of employer liability for certain types of supervisory misconduct. Nevertheless, as is often the case in our learned yet contentious profession, the praise was not universal. Some members of the plaintiffs' bar, of the employees' bar, contended that the affirmative defense, actually the second prong of the affirmative defense, places some responsibility on the shoulders of the alleged victim of harassment to take steps or to complain about the harassment. Some members of the plaintiffs' bar contended that the second prong of the affirmative defense, based as it is on the doctrine of

\(^{197}\) See \textit{Ellerth}, 524 U.S. at 765.

\(^{198}\) See \textit{id}. The Court used this standard in \textit{Faragher} as well. See \textit{Faragher}, 524 U.S. at 805.


\(^{200}\) See \textit{Faragher}, 524 U.S. at 790; \textit{Ellerth}, 524 U.S. at 760-61.
avoidable consequences, would have been more grounded in the law if the Court had limited the defense to damages instead of extending it to liability. They reasoned that because “avoidable consequences” is actually a doctrine applicable to the doctrine of mitigation of damages, it was inappropriate for the Court to extend its reach to defeating liability, or at least to potentially defeating liability, on the part of an employer.201

Other members of the plaintiffs’ bar expressed concern that the courts would grant summary judgment based on the mere existence of a sexual harassment policy, however inadequate and poorly implemented that policy may be. As we will soon see when we discuss some of the cases that the Second Circuit has dealt with, this fear is basically unfounded.

Some employers’ advocates have expressed a similar concern regarding the difficulty of obtaining summary judgment. Their concern was that the announcement of an absolute principle of vicarious liability would make it next to impossible for employers to prevail in summary judgment motions. That fear, now a year and a half later, also has proven unfounded.202


202. District courts in the Second Circuit have addressed the Faragher/Ellerth affirmative defense in 14 cases: summary judgment was granted in five of them, denied in nine. Of the five Court of Appeals cases that have addressed (or made mention of) Faragher/Ellerth, one decision reversed the lower court’s granting of summary judgment. See Richardson v. New York State Dep’t of Correctional Servs., 180 F.3d 426 (2d Cir. 1999). One case has upheld the lower court’s granting of summary judgment. See Caridad v. Metro-North Commuter Railroad, 191 F.3d 283 (2d Cir. 1999). In Richardson, the Court reversed the granting of summary judgement by the lower court because there was a question as to whether the employer’s response to plaintiff’s complaints of harassment was reasonable and adequate, thus precluding the employer from asserting that as a matter of law it “exercised reasonable care” under Faragher. See Richardson, 180 F.3d at 450. Specifically, the court found that at least some of Ms. Richardson’s complaints of racial harassment had not been adequately addressed by her employer; for example, a promised training in cultural awareness was not conducted until three years after Ms. Richardson filed one of her complaints, during that period of time other incidents of harassment occurred. See id.

In Caridad, the court upheld the granting of summary judgment by the district court because it found that the plaintiff unreasonably failed to take advantage of preventive and corrective opportunities provided by the employer. Ms. Caridad had asserted that she did not want Metro-North to investigate her complaints because she did not think that an investigation would improve matters; she further stated that she did not trust Metro-North or its equal employment office. The Court found that Caridad’s reluctance to complain was not based on a credible fear that her complaint would not be taken seriously or that she would suffer some adverse employment action as a result of filing a complaint.

Now we are going to talk to Al and Wayne about responses to *Faragher* and *Ellerth*; I am going to pose some of the questions that have been raised by *Faragher* and *Ellerth*.

Notwithstanding the *Faragher/Ellerth* efforts to clarify responsibilities of employers and employees, there are a number of issues that the Court, not surprisingly, did not resolve that will assuredly be the subject of litigation for years to come.

One of the most salient of those that leaps to mind immediately is: What does a good employer policy look like?

MR. OUTTEN: A good starting point on this is the guidance that the U.S. Equal Opportunity Employment Commission (the "EEOC") issued last June. On all the issues that we are talking about today, I would commend to your reading the EEOC's *Enforcement Guidance: Vicarious Employer Liability For Unlawful Harassment by Supervisors*. It is available on the EEOC's Web (S.D.N.Y. 1999) (applying the pre-*Faragher/Ellerth* standard that an "employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it"), most federal courts have assumed that because New York courts require the same standard of proof for claims brought under the New York State Human Rights Law (the "NYS Human Rights Law"). *See N.Y. EXEC. LAW § 296 (McKinney 1999).* As for those brought under Title VII, state and local claims should be analyzed under the *Faragher/Ellerth* standards. *See Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d. Cir. 1998).*

Only one New York State court decision has addressed the applicability of the *Faragher/Ellerth* standards to a claim brought pursuant to the NYS Human Rights Law. *See Pace v. Ogden Servs. Corp., 692 N.Y.S.2d 220 (App. Div. 1999).* Ms. Ogden had complained that her supervisor sexually harassed her over a period of a year. The employer immediately informed the supervisor that the alleged sexually harassing behavior would not be tolerated, enrolled the supervisor in a sensitivity training session, and conducted sensitivity training for all employees. In reaching its conclusion that the lower court's granting of summary judgment was appropriate, the Third Department employed the negligence standard, finding that the employer neither knew nor should have known of the alleged harassment until plaintiff complained. In addition, it found that the employer took immediate and adequate measures to ensure that the offensive behavior would cease. Although the court did not employ the *Faragher/Ellerth* standards, it stated in a footnote that it did not view either *Faragher* or *Ellerth* as requiring a contrary result. Nevertheless, identity of result is not the same as identity of analysis. Although the court did not explicitly accept or reject the *Faragher/Ellerth* standards, the fact that it did not employ them in reaching its decision suggests that the issue of their applicability to state law claims remains unresolved.

There, the EEOC provides a long and detailed breakdown of each of the elements of the *Faragher* and *Ellerth* cases.

Obviously, the EEOC guidance is not a statement of the law and it is not binding on the courts. In fact, there have been some notable instances in the last couple of years in which the courts have not adopted, or have outright rejected, certain EEOC guidance. That has not happened, to my knowledge, on any appreciable level to this particular guidance, which has been out only about five months. Nevertheless, it provides an excellent road map to analyze and understand the issues.

On the issue that you asked about, the EEOC guidance addresses the minimum elements of an anti-harassment policy and complaint procedure. Those include the following:

- a clear explanation of prohibited conduct;
- assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- a clearly described complaint process that provides accessible avenues of complaint;
- assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- a complaint process that provides a prompt, thorough, and impartial investigation;
- assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred

One important exception to these general principles, however, is that all of these things are context-related. As the Supreme Court expressly acknowledged in *Faragher*, even these minimum standards for good policies may not be applicable to small employers.

Where there are only fifteen or twenty employees, for example, the company may not have, or have the need for, such elaborate, detailed, written procedures. So in that context, it may be sufficient if, at a monthly staff meeting, the owner of the company or the CEO simply says, “This is what harassment is about and I am not going to tolerate it. If any of you experiences anything that you do not like, come right to the top, come to me.” That could be sufficient in that context.

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For most larger employers, however, something along the lines of what the EEOC sets forth provides a starting point.

MR. FELIU: I agree the context is very important. I would add to that, but let me hold that thought for a second.

In terms of the particular provisions, having drafted a number of these over the years, the "model" policy has changed, at least for me, in what I recommend. I have added over the years, not a duty to report, but an encouragement to employees to report what they believe to be improper or offensive behavior. The goal is not to take punitive measures necessarily, but to help create a positive workplace atmosphere. When I do training for clients, I try to communicate to employees that if we are going to have a discrimination-free or harassment-free workplace, it is the job of all of us in the room to make it be so. Hence, I like to have that notion embodied in the policy.

In addition, traditionally there are separate discrimination and sexual harassment policies. You may recall a number of years back, the EEOC tried to encourage broader anti-harassment policies but Congress objected and the EEOC withdrew its proposal. I did think at the time, and I think now, that the EEOC's notion was a very good one. Harassment law is now well-established, not limited to the sexual context but applicable to all categories of discrimination. Thus, now I draft broad-based harassment policies, although I do very often carve out a sexual harassment subsection to the policy because there are some issues, welcomeness and the like, that are somewhat unique or more prevalent in that context.

I used to also be of the view that a standardized model EEO policy was sufficient, "Here is Al's super-duper, cure-all policy; all you need is to insert it into your handbook and that will take care of your needs." With time, I have become far less interested in giving a client my super-duper model than in working with the client to draft a tailored policy that fits its workplace.

As Wayne indicated, certainly the size of the employer and sophistication of the employer are considerations. There have been a number of cases recently where the employer has damaged itself by having a "super-duper" policy with all the bells and whistles and not lived up to its terms. In those cases, the courts have used the employer's policies against them, arguing that the policies raised the bar, finding that the employer created false expectations, and punishing the employer and used the policies as evidence of, if not malfeasance, a lack of due diligence. Hence, I am very careful in trying to ensure that the policy fits the needs and capabilities of the
employer. If the employer is unsophisticated, then it is probably going to be a less detailed policy, because the smaller employer will generally devote fewer resources to EEOC matters than larger employers.

The other concern I have is to whom a complaint should be directed. A few years back, any person in authority was sufficient. The concern was to give the employee as many options as possible, let him or her decide where to go with the complaint, rather than have the employer designate the recipient. I am less supportive of that viewpoint today because the person to whom the report goes, given the obligation to respond promptly and effectively to a complaint, is crucial. Therefore, I am much more circumspect on this topic in drafting a policy, by limiting the number of approved percipients of complaints.

There was a case in federal court recently where the Human Resource Director received a complaint and came on to the complaining employee.207 Thus, obviously he was the wrong person in that context. It is, however, certainly somebody with the sophistication to understand what he or she is supposed to do with the complaint.

MR. OUTTEN: There is one thing that is important to emphasize from the plaintiffs' point of view: it is not enough for the company to have good policies and procedures on the books. The policies and procedures have to be properly communicated, people have to be trained in what they say and how they work, they have to be actually implemented, and they have to be followed. In harassment cases, it is often appropriate for the plaintiff to seek discovery about not just what policies are promulgated, but also what is done with policies: what kind of training and educational and counseling programs does the company have, and what does the company in fact do when people make complaints? Does the company follow its published policy, or is there some supplemental or different policy or practice that is followed instead of what is on paper?

MR. FELIU: I agree one hundred percent. I think that it is less the policy than its implementation that matters. I dare you all to pull up fifty post-Ellerth/Faragher cases and find more than one or two that address the specific language of a policy. What you are going to find ninety percent of the time are cases addressing how the policy was or was not give effect in those cases.

MR. WILLS: That is exactly right, and that is precisely the problem that the City of Boca Raton faced, you will recall from the little exposition of facts I did earlier. They had a policy, they had had one for years; it did not get to anybody.208 The supervisors who ultimately were responsible for the misconduct in the workplace never even received the policy.209 I agree that policy implementation cannot be emphasized too much.

Most policies now are going to say the right thing, to the extent that people write a policy. There are many models available. Most of them say the right thing. It is a question of are they implemented, are they implemented effectively.

You are absolutely right, Al, you can look through fifty post-Ellerth cases and you will not find anything about language of the policy. You will find “well, they never got it,” or “it was on page thirty-eight of the employees’ manual and they did not make me sign for the manual, I never read it” or something like that. A very important point.

MR. OUTTEN: All of this relates to a cutting-edge issue, which is the extent to which, in trials of harassment cases, “management practices” experts are appropriate to come in and criticize or compliment, first, the policies and procedures that are on the books; and, second, the way the company has actually gone about implementing those.

Under the standards set forth by the Supreme Court recently in *Kumho Tire Co. v. Carmichael*,210 following up on *Daubert v. Merrell Dow Pharmaceuticals*,211 I think there is room for the courts, as gatekeepers, to allow such expert testimony, because we are getting to the point where there is some “state-of-the-art” on what are good policies and practices and how they should be implemented.

MR. FELIU: Once again, I agree. I agree that there is a place in a trial for such a person, but it goes both ways. Obviously, the employer is going to want to show that its policy is on the cutting edge and that it has done everything required under the law, and certainly the employee will try to do the reverse.

MR. WILLS: With regard to the second prong of the affirmative defense, where the employer needs to show that the objecting or victimized employee unreasonably failed to complain or unreasonably failed to avail herself or himself of corrective opportunities

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208. See *Faragher*, 524 U.S. at 782.
209. See id.
offered by the employer or otherwise to avoid harm, that is the affirmative defense as it has been stated.

What about the situation, when is it reasonable for an employee not to complain about harassment? Are there situations where an employee can legitimately say, “I did not complain about harassment for the following reasons,” and we do not have too many cases in this area yet, where you think the court might uphold?

MR. FELIU: I am supposed to say, “no,” but of course, there is the “smell test.” It would be difficult to say to the court or jury with a straight face that “this employee should have gone to her supervisor, who has been harassing her systematically for the last five years, and complained, ladies and gentlemen of the jury.” That is one circumstance, back to my earlier point, where designating the wrong person causes the employer problems. If there is a history of retaliation, courts will generally find the employee who has failed in this context to bring his or her claim forward, to be relieved of that burden.

Back to Faragher, if the policy was not circulated, the employee does not know where to go with her complaint, the employer is purposely evasive, etc., I would think that might be another circumstance.

MR. OUTTEN: As in most issues on this topic, the EEOC has addressed it and the EEOC Enforcement Guidance spells out nicely the circumstances under which failure to complain would be perfectly reasonable.212

First, understandably, is when the plaintiff reasonably believes there is a risk of retaliation. Thus, in litigation, an appropriate area for inquiry and discovery is the basis for the plaintiff to fear retaliation: (a) does the policy explicitly prohibit retaliation; (b) is that the way it really works; (c) what has been the experience of this plaintiff in the past when she or he complained; and (d) what has been the experience of other people who have engaged in protected conduct — have they been retaliated against? All of these are fair grounds for discovery and for evidence at trial.

Second is when there are obstacles to complaint. For example, if the person you are supposed to complain to works only 9:00 to 5:00 and you are on the night shift, that makes it difficult to comply. If the person you are supposed to complain to is in the headquarters office on the other side of the country and you have no way to get

212. See supra note 203.
to that person, then it is reasonable for you not to have followed
the procedure.

Third is when the plaintiff reasonably believes that the complaint
process is ineffective. If employees have come to believe, based on
their own experience or the experience of others in the workplace,
that the process does not work, that it is a waste of time, and that it
can only get you in trouble, perhaps (which relates to the retalia-
tion) it may be perfectly reasonable in those circumstances to say,
"Well, it is reasonable not to make a complaint." Again, this inef-
effectiveness argument is grounds for discovery and litigation over
the extent to which the process has been used, and has been used
effectively.

MR. WILLS: Bearing mind, of course, and this is all embedded
in what Wayne just had to say, that the reasons a plaintiff may
choose not to use the process must actually be credible. There is
some Second Circuit law on that now, that the mere assertion that
"I do not trust the EEO office at my company" or "I do not trust
the company to investigate my complaint properly" without more
is insufficient to show that reasonable care has been exercised. So
again, I want to underscore that part of what Wayne just said, that
it is a matter of proving this, of showing that there is a history of
being retaliated against if you bring a complaint, or of unavailabil-
ity of the process, no effective implementation of a sexual harass-
ment policy.

MR. OUTTEN: Notably, the EEOC uses a "reasonable belief"
standard for both the fear-of-retaliation and the ineffectiveness
ground for not using the complaint process. The standard is both
subjective and objective. The employee has to believe it and the
belief has to be reasonable.

MR. FELIU: I think it is a very important point for the whole
affirmative defense concept, the whole Faragher/Ellerth infrastruc-
ture. The manifesto for that is a decision from last year issued by
Judge Brieant, called Fierro v. Saks Fifth Avenue.213 Every em-
ployers' counsel holds this case dear to their hearts. It really goes
to the argument that if there is going to be an effective affirmative
defense, the employee simply cannot use the defense of a genera-
lized fear of retaliation.

Judge Brieant wrote that at one point,

employees must be required to accept responsibility for alerting
their employers to the possibility of harassment. Without such a

requirement, it is difficult to see how Title VII’s deterrent purposes are to be served, or how employers can possibly avoid liability in Title VII cases. Put simply, an employer cannot combat harassment of which it is unaware.\textsuperscript{214}

That really is the core of the affirmative defense, I thought, and a very succinct exposition of it.

MR. WILLS: What do you think the Court will do, and this would be a fairly rare scenario, but an interesting one nonetheless, in light of what \textit{Faragher/Ellerth} announces by way of vicarious liability and affirmative defenses. What if a plaintiff were subjected to one violent act of harassment, such as sexual assault in the workplace by her supervisor, and she did not complain about it? Would it be fair for the employer to defeat liability because, under \textit{Faragher} and \textit{Ellerth}, she did not complain?

MR. OUTTEN: Let’s go through the steps. To pick up on something you did not actually mention in the overview, the first question is, is this person an alter-ego of the employer? Is this the president or some senior officer, owner, or partner? In a case where there is strict liability, no defenses, that is it.

The second step is the analysis of whether there was a tangible employment action? In this case, there are no affirmative defenses. I assume in your hypothetical that there have not been any tangible employment actions.

MR. WILLS: Right.

MR. OUTTEN: So we get squarely into \textit{Faragher} and \textit{Ellerth} and the affirmative defenses. The question is whether the employee unreasonably fail to take corrective or preventive measures. Well, if there is a single episode and there was no expectation or warning that this was going to happen, there was no prior experience, then there is nothing the employee could reasonably have been expected to do to prevent it from happening.

This reminds me of the old law school adage that “every dog gets one bite.” Once it has happened one time, or some arguable precursor to it has happened, then it may be reasonable to expect that the person should have stepped forward, and, if she did not, then she is responsible for not complaining.

MR. FELIU: I think it is the toughest set of facts, and a most problematic one to have to defend. Let’s go back to the beginning in terms of \textit{Faragher} and \textit{Ellerth}. Justice Thomas in dissent essentially writes, ‘Where did this case come from? Where did this anal-

\textsuperscript{214} \textit{Id.} at 492.
ysis come from? This is just some policy statement with no foundation in law.\textsuperscript{215} To a certain extent, I agree with him. I think it really was more a public policy decision by the Supreme Court than a case based on the jurisprudence to that point.

The Court said that the primary objective of Title VII is not to provide redress but to avoid harm.\textsuperscript{216} If that is true, that is a different notion than I think many of us were working under for a good number of years. Assuming that the primary objective of Title VII is not to provide redress but to avoid harm, then taking preventive measures becomes a priority, and the affirmative defense becomes more comprehensible.

If that is true and, as Wayne said, if there was no notice, no reason to believe that there was going to be an incident, it should not much matter how heinous the crime may be because it could not have been prevented. Employers have seen sort of the flip side of that over the years, where they have done everything right, where there is nothing more a reasonable city commission, court, or other agency could ask of the employer. Nonetheless, they are held liable because some fool does something foolish and happens to be a supervisor. In this case, it is the employee who suffers that indignity; namely, the victim who has done nothing wrong is a victim in any sense of the word, but there is no remedy, at least if we all agree on the \textit{Ellerth} and \textit{Faragher} standard.

MR. OUTTEN: It is important to emphasize that the Supreme Court made it clear that a primary purpose, if not the primary purpose, of the discrimination laws is to prevent harm, not just to provide remedies.\textsuperscript{217} As between the employee and the employer in this hypothetical, which of those two has the greater opportunity, limited though it may be, to prevent this harm from happening? Well, obviously that is the employer, through who it hires, how it trains them, how it supervises them, how it counsels them. Even if the employer in fact had no reason to think that the harasser was going to engage in this kind of conduct, still as between the two of them, the employer is the one best able to do something about it, and therefore is strictly responsible.

MR. FELIU: When an employer hires an employee, he or she comes full of prejudices, full of experiences, full of biases. There are only so many questions that can be asked in an interview; there


\textsuperscript{216} See \textit{Faragher}, 524 U.S. at 806; \textit{Ellerth}, 524 U.S. at 764.

\textsuperscript{217} See \textit{Faragher}, 524 U.S. at 805; \textit{Ellerth}, 524 U.S. at 763.
is only so far you can get into a psyche. If the greater good is to incentivize employers who, I agree with Wayne, are uniquely in a position to help create, enforce, promote discrimination-free and harassment-free workplaces, then everything should be done to encourage those employers.

It is very discouraging to try to counsel employers and, if they do not already understand the wisdom of that, try to share with them the wisdom of that approach, and still say to them that “no matter what you do, no matter what the circumstances, if something hideous like that happens because someone violates everything you have told them, every effort you have made to prevent them from doing so, you are still going to be liable.”

Strict liability is one of the problems I have with the Human Rights Law. The strict liability notion is a problematic approach with the greater good in mind, in my opinion. It is certainly the better approach to remedy an individual harm and, as between injured parties, certainly if that is the focus, the employee, the victim, wins.

When looking at the greater good, however, I think it is a problematic jurisprudence.

MR. WILLS: Let us turn and take a look at that now. Before I do, however, just one comment on something that Wayne said earlier regarding the alter-ego of the employer. If somebody who is high enough up in the company hierarchy makes certain kinds of decisions, that individual is treated as the alter-ego of the employer for purposes of liability, making it very easy to find the employer liable under those circumstances. The language of Faragher and Ellerth, though, is a little troubling there because it suggests an employer is subject to vicarious liability for an actionable hostile environment created by “an individual with immediate or successively higher authority over an individual.” Now, immediate authority over an individual can be a very low-level supervisor who may have immediate authority.

Now, what the Court meant by “authority” we do not know yet. What the Court means by “supervisor” and who is a supervisor and what is “authority” and what is “control,” we do not know. It may be suggesting, however, that in order for vicarious liability to attach, this can be misconduct engaged in by a lower-level supervisory employee. That is certainly the case under the Human Rights

218. See Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
Law, and the language in *Faragher* and *Ellerth* suggests that it may be the case under federal law.

MR. OUTTEN: It is important to keep in mind two different things. One is the alter-ego. The alter-ego does not relate at all to the definition of supervisor. An alter-ego is the person who is the company, that is a proxy for the corporation. You do not have any agency analysis. There is no agent. This is the principal acting. The EEOC uses the examples of the president, the owner, the partner, or the corporate officer. It is not a “supervisor” analysis.

MR. WILLS: I was just clarifying that, in case people were confused, because it was used in a context that suggested that it is the very highest level.

MR. OUTTEN: For the alter-ego, it is. The *Faragher* and *Ellerth* cases, however, dealt with agency principles. The bad actor was not a principal; he was an agent.

MR. WILLS: That is absolutely correct.

MR. OUTTEN: That is where we get to the supervisor issue.

MR. WILLS: Just so that we do not confuse that, although we do not really know what level supervisor we are actually dealing with here, it is an “immediate or higher authority.” The question is, what is “authority,” and that remains to be determined.

MR. OUTTEN: Again, the EEOC addresses that in its guidance. The EEOC says that a person qualifies as an employee’s supervisor if either of two criteria are met: (1) “the individual has authority to undertake or recommend tangible employment decisions affecting the employee,” such as hiring, firing, demotion, promotion, compensation, or (2) “the individual has authority to direct the employee’s daily work activities,” even if that individual has no say over tangible employment actions.\(^{219}\)

MR. WILLS: Right, even though they cannot hire and fire.

MR. OUTTEN: Either one constitutes a supervisor, and the individual can be very low level.

MR. WILLS: One quick point. We have a few minutes left. I am not going to go through the Second Circuit cases. They are, in the main, not all that interesting, except for the fact that some of the fears of not being able to prevail in a summary judgment motion or concerns that the other side would always win in a summary judgment motion have not been borne out. The courts have taken a fairly even-handed look at the issue of vicarious liability, in particular the affirmative defenses.

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\(^{219}\) *Enforcement Guidance, supra* note 203, § III(A).
There was, however, one important and interesting case that came out of the Second Circuit a few months ago, by the name of *Caridad v. Metro-North Commuter Railroad*,\(^{220}\) where, among other things, the court was reviewing the grant of summary judgment. Nevertheless, most significant for that particular case was the court's holding that a constructive discharge was definitely not a tangible employment action.\(^{221}\) You will recall that a tangible employment action, taken by a supervisor, triggers automatic liability under the quid pro quo analysis. In the Second Circuit at least, and we do not know how the other circuits will come out on this, there may have been some decisions since I looked at them, constructive discharge is not a tangible employment action.

So what is left of constructive discharge in our circuit?

MR. OUTTEN: Of course, the Second Circuit is wrong, which surprises me, because generally it is reasonably good on these things. We have to wait for other circuits to disagree and for the Supreme Court eventually to pronounce the Second Circuit wrong about that. That decision does add another nail in the coffin of the constructive discharge doctrine, which is already tough enough in the Second Circuit, and that already causes us plaintiffs' lawyers to admonish our clients to think eighty-five times before considering constructive discharge. As a matter of fact, one of the common alternatives to that is to go out on sick leave, mental health leave, because the constructive discharge doctrine is so tough in the Second Circuit. This just makes it tougher in the context of sexual harassment.

MR. FELIU: I would be more genteel and say it was not wrong, it was just overstated. A per se rule is ridiculous. To say that in all circumstances any constructive discharge, by definition, cannot be a tangible employment action, that is just silly. In the abstract, it would provide employers with an incentive to torture employees if that is their way to encourage them to resign. It is a silly decision.

That is not to say that in many, most, some — you pick — cases where the employee simply does not like the atmosphere, does not make the effort to correct it, and then walks away and then sues. That is a weak constructive discharge case and that person should have his or her hand slapped. There was no tangible employment action by that person's actions, but I think a per se rule was clearly inappropriate in that case.

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\(^{220}\) 191 F.3d 283 (2d Cir. 1999).

\(^{221}\) See id. at 294.
MR. WILLS: It leaves plaintiffs in the awkward position of, enduring a certain amount of sexual harassment until you cannot stand it any longer and, leaving without complaining, and assuming the employer has an effective policy, the employee has no cause of action. If, however, you stay long enough and endure it long enough and it makes you feel worse and worse and worse until finally one day you get fired, you will have a cause of action. It is a bizarre result. It might have been that they wanted to raise the bar quite high in the Second Circuit for proving constructive discharge, but the per se rule is, in my opinion, too broad.

We are coming to the end of our session. I just want to make a few comments about the Human Rights Law that we alluded to earlier. The Human Rights Law for employer liability was written and promulgated in 1991. It literally took the EEOC Enforcement Guidance as of 1991 and made it law for the City of New York in terms of employer liability.\cite{222} In the context of superior harassment, there is only strict liability.\cite{223} When a manager or a supervisor, the statute says "a person with managerial or supervisory authority," engages in actionable or unlawful discriminatory conduct, the employer is automatically liable, there is no possibility of defeating liability; nor is there a possibility under the current law for either reducing or eliminating damages.\cite{224} The only mitigation provision that exists in the Human Rights Law right now, or safe harbor provision as it is sometimes known, is with reference to civil penalties that the City may assess for certain types of discrimination, or punitive damages if the case is brought as a private right of action.\cite{225}

The City has a very strict law for the imposition of employer liability.\cite{226} If a manager or a supervisor did it, the employer is liable — no possibility of defeating liability, no real mitigation of damages. A respondent’s only safe harbor is to show that it has effective policies in place and they are effectively communicated; it may reduce or eliminate civil penalties or punitive damages.\cite{227}

The Human Rights Law’s imposition of strict liability has been praised by a number of people, along the lines of, “Well, it is, after all, the employer who really has control of the workplace, who is

\begin{footnotes}
\item[223] See id.
\item[224] Id. §8-107(13)(b)(1).
\item[225] See id. § 8-107(13)(e).
\item[226] See id. §8-107(13)(b)(1).
\item[227] See id. § 8-107(13)(d). (e).
\end{footnotes}
able to control what happens in the workplace, able to provide training, able to supervise employees, able to correct errant employees.” That was the argument that certainly prevailed when the law was first amended in 1991.

Others have criticized the law, claiming that it saddles employers with economic consequences that it really should not be responsible for; because if an employer does all the right things and has a good policy and makes every effort to make sure that discrimination does not take place in that workplace, and when it does addresses it promptly and effectively, why should that employer then be held liable for something that really sometimes is out of its control?

Another criticism that has been leveled against the Human Rights Law is that it does not provide sufficient inducement for employers to do the right thing. Saying that you might be able to reduce civil penalties, which are seldom awarded, by the way; or punitive damages, which are similarly seldom awarded in private rights of action in state court under our law, really does not provide enough inducement for an employer to go out and actually get a good policy and be serious about making it as effective as possible.

I just lay out what the current state of the law is. I do not know if anybody has any further comments on that.

MR. FELIU: I think at this point the Human Rights Law is not dictating employers' actions.

MR. WILLS: I am quite sure of that.

MR. FELIU: The employers are going to do what they are going to do. If the City is going to come after them, I view it as being like the New York State Division of Human Rights was a number of years back on the drug testing issue, and they took some stands that were inconsistent with the federal and the Human Rights Law at the time. Over time, the State fell into line. I would hope at some point the City would as well. It does not make sense to have such inconsistency among the various laws. At this point, I think the net result has been that the Human Rights Law is not being paid attention to by employers in developing their EEO policies and practices. It is not driving what employers are doing in terms of their policies.

MR. OUTTEN: I think it is fine. I have not had this happen, but I bet you when you get in front of a jury, there will be arguments about fairness, and jurors would in fact take into account whether it is fair to hold the company responsible to some degree.
They would probably take it into account in assessing damages, if not liability.

MR. WILLS: Yes, de facto.

MR. OUTEN: As a practical matter.

MR. WILLS: Sure. Very good. Any questions?

QUESTIONS AND ANSWERS

AUDIENCE: If the violent act you described was a rape in the workplace by the supervisor, then the employer would be exposed to punitive damages as well as a violation of the Human Rights Law?

MR. WILLS: Under the Human Rights Law, yes. If the victim of that act prosecuted her claim in State court, or if she had another federal claim and this were a supplemental claim, she could prosecute it in federal court under the City’s law, and punitive damages would be available.

MR. OUTTEN: And under the federal law; of course, there are the caps. Also, there is the Supreme Court’s Kolstad decision about seven or eight months ago, which would allow punitive damages if the employer basically knowingly allowed the law to be violated . . .

MR. WILLS: Recklessly.

MR. OUTTEN: . . . recklessly allowed the law to be violated, subject to the employer’s ability to prove good-faith efforts. That would probably tie us back into the whole adequate policies and procedures issue.

MR. WILLS: My point about the Human Rights Law was that affirmative defenses are not available to an employer under the Human Rights Law for a supervisor-created hostile environment.

AUDIENCE: And as I understand plaintiffs’ attorney Wayne Outten’s position, she would not have to report the rape because she could figure it is not going to happen again?

MR. OUTTEN: No, no. The rape has already happened, the harm has been done, and the fact that she did not promptly report it does not obviate the liability of the employer for the act that occurred. That was my point. If she failed to report it and it happened again, the employer might not be responsible for the injury from a second episode.

MR. WILLS: We disagree.

229. See id. at 2121.
AUDIENCE: She can, however, fail to report the rape the first time because she does not expect it to happen again?

MR. OUTTEN: Sure she could.

MR. WILLS: The question is — what would the court do with that? Nevertheless, this is Wayne’s opinion as to what a possible solution to that by the court might be.

AUDIENCE: This is a follow-up question to that question. Essentially you are suggesting that in an isolated incident, in order for the employer to be vicariously liable, this isolated incident would have to be tantamount to a criminal act, an assault or a rape?

MR. WILLS: Not necessarily. You understand the law of hostile environment, which is copious at this point, looks to a number of factors, particularly the severity or pervasiveness of the harassing acts. It is certainly possible to imagine one very severe act, such as a sexual assault, creating actionable hostile environment. That is why I used this example. Obviously, isolated incidents of much less significance, much less weight, may not be sufficient to create a hostile environment. But the court looks always to severity or pervasiveness, and one very severe act may well create an actionable environment.

MR. OUTTEN: It is worth nothing that, as the EEOC noted in its Enforcement Guidance, there is no reason to encourage people to come forth and complain about routine, ordinary, episodic, minor things that you might loosely call harassment. That would be going too far. It would disrupt the work force. In addition, it is not going to be deemed to be unreasonable for somebody to endure a certain amount of such conduct and not complain about it, because otherwise it would just be too much.

AUDIENCE: On federal law, in terms of either an alter-ego or a model employee, terminating the sexual harasser to mitigate the damages versus any another remedial action, there have been a number of publicly reported cases of this. Do you advise that, or do you see that as not the easiest way to mitigate the damages over other alternative remedies?

MR. FELIU: I do not analyze it in terms of mitigating damages. There has been an act of harassment, the complainant has come forward, an investigation has been conducted, the supervisor who is accused is in fact guilty of the crime. The question is, does the punishment, the termination, fit the crime? Was the harassment severe enough, was it persistent enough, etc.? Some employers have over-reacted by immediately terminating the alleged harasser thinking that it will somehow clean their houses, it will insulate
them from all liability, and then they get sued for defamation or on some other basis by the alleged harasser. Certainly, if the employer wants to go that way, I think ultimately they will prevail in that counter-suit, so it is rather a safe strategy for employers.

Nevertheless, the alleged harasser has rights as well, legal or otherwise. I think that there are certainly more than a few occasions where employers have arguably punished the alleged harassers beyond what the allegations warranted. Sometimes "zero tolerance" policies go too far. I am troubled by the notion that a dirty joke or a stupid remark can result in the loss of twenty-year career. That person should be counseled, or have a pay raise withheld. There are a variety of things that can be done. In any event, I think the punishment should fit the crime.

Now, if there is a fear that person does not "get it" and will continue, that is different. That is certainly a good argument for either transferring that person as far away as you can from the victim or getting rid of the harasser. Assuming, however, the person has been humbly corrected and recognizes the error of his or her ways, then I would suggest termination would be an overreaction.

MR. OUTTEN: I represent primarily victims of harassment, but I also represent the alleged harassers on occasion, when I feel that they are innocent, when I feel that the punishment does not fit the crime, or when I think it is just unfair. I think it is just fundamentally unfair, as a matter of human dignity and fairness, to fire somebody for a minor episode, particularly when there is a reasonable chance of remediation and the person has been a long-term contributor to the company.

The alleged harasser does not have many legal rights in that situation, but I have had some success in arguing with companies just to make the punishment fit the crime. Again, the EEOC Enforcement Guidance does not suggest otherwise. The remedy should be what is "appropriate in the circumstances." Plainly, firing somebody after a long and successful career over something that is relatively minor is not necessary to "prevent or remedy" in many situations. Sometimes it is.

There are lots of effective steps short of termination, such as suspension, loss of pay, reduction of bonus, forfeiture of stock options, reassignment, transfer, demotion, loss of having direct reports for awhile, together with counseling, training, and supervision. Those are the kinds of things that can be very effective and fair.

AUDIENCE: If the City were to adopt the Faragher/Ellerth standard, could it do so without the need to change the Adminis-
trative Code? Could the administrative law judge decide to apply that standard?

MR. WILLS: My belief is that the answer is no, based on the doctrine of *inclusio unius est exclusio alterius*; they were so specific about including provisions for the mitigation only of civil penalties and only of punitive damages and only in this context, context B and C, not context A, that I think that if the Commission were to adopt the articulated by *Faragher/Ellerth*, it may be defeated on appeal.

I do not think it could be done that way; if it is to be done at all, and I take no position on that here, it will need to be done legislatively.

If there is nothing else, thank you all very much.
MR. WILLS: We are going to begin our last panel of the day. By way of brief introduction, in April of 1986, New York City became one of the first political jurisdictions in the United States to enact a law prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodations. Now nearly fourteen years old, the law has proven to be an important means of securing equal opportunity not only for members of the gay and lesbian community, but also members of many other communities because it defines sexual orientation as heterosexuality, homosexuality, or bisexuality. The importance of this law is evident in light of the fact that only eleven states, not New York State, afford such protection, and that efforts to pass the Employment Non-discrimination Act, which would prohibit employment discrimination on the basis of sexual orientation, have proven unsuccessful. Similarly, efforts to litigate sexual orientation discrimination claims based on Title VII sexual harassment law have generally met discouraging ends.

Nevertheless, we are not going to end on that discouraging note. I am very pleased that we are joined today by Doni Gewirtzman, who is a staff attorney at the New York Headquarters of Lambda Legal Defense and Education Fund, the nation's oldest and largest legal organization dedicated to the full recognition of civil rights of lesbians, gay men and persons with HIV/AIDS. Since joining Lambda in 1998, Mr. Gewirtzman has represented a Salt Lake City High School Gay/Straight Alliance in their lawsuit against their school district, which banned all extracurricular student groups in order to prevent the club from meeting. Mr. Gewirtzman also authored Lambda's brief in Arzig v. Benkendorf and has coordinated Lambda's efforts on behalf of older lesbians and gay men, as well as the regulations concerning reproductive technologies.

231. See id. at § 8-102.
232. The eleven states are California, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin.
Mr. Gewirtzman graduated from the University of California at Berkeley School of Law in 1998. He was the Senior Notes and Comments Editor of the California Law Review.

MR. GEWIRTZMAN: Thank you all for waiting around. It is really delightful to speak with you today.

As many of you know, federal and New York State law provide no explicit statutory remedies for discrimination based on sexual orientation. Consequently, the New York City Commission Human Rights (the “Commission”) is often the sole resource available to victims of sexual orientation discrimination—particularly poor victims—within New York City. The Commission does tremendous work and I just want to express our appreciation.

Randy asked me initially to talk a little bit about whatever progress has been made on federal or state anti-discrimination legislation. Upon hearing this request, I had a flashback to a “Simpsons” episode. You may know this one. It is the one where Lisa becomes a finalist for a magazine-sponsored essay contest about “Why I Love America.” She flies down to D.C. with Homer, Marge, and Bart. Right after arriving, she discovers with horror that Washington is awash in corrupt, high-priced lobbyists. Instead of giving her inspirational speech on diversity, “Bubble On, Oh Melting Pot,” she gets up to the podium and delivers a series of extemporaneous remarks, entitled “Cesspool on the Potomac.” I promised myself that I was not going to engage in this sort of diatribe, so I am going to briefly touch on the current status of state and federal anti-discrimination legislation, and then I am going to talk about recent developments in equal protection law, specifically in the area of public employment.

The bill in Washington is known as the Employment Non-Discrimination Act (“ENDA”). If passed, this bill would provide federal protections against employment discrimination based on sexual orientation. I would note that this bill will not amend Title VII, which is not limited to employment. Instead, ENDA will be a separate universe unto itself, largely for political reasons.

ENDA is obviously very important to the thirty-nine states, including New York, that do not provide any legal remedies for em-

237. The panelist wishes to thank David Buckel and Robert Schonberg for their assistance and insights in preparing these remarks.
238. For a complete list of episodes, scripts and other “Simpsoniana,” see <www.snpp.com>.
239. S. 2238.
240. See id. § 3.
Employment discrimination based on sexual orientation. I also want to note that this bill is not a panacea for anti-gay discrimination. ENDA only covers employment.\textsuperscript{241} It does not cover housing, public accommodations, or employment benefits.\textsuperscript{242} Furthermore, ENDA has a large exemption for religious organizations.\textsuperscript{243} Senator Jeffords introduced ENDA again in the past legislative session,\textsuperscript{244} but the Republican leadership prevented it from getting to the floor in either the House or the Senate for a vote. My sense is that ENDA has taken a back seat to hate crimes legislation, but that did not seem to go anywhere this year either.

On the State level, the State Assembly once again passed the State anti-discrimination bill, but Republican leadership in the State Senate has refused to allow the bill to go for a vote in the State Senate. It is believed that, if passed, the Governor would sign the bill, but who knows? For consolation, I personally take great strength in knowing that, outside of my immediate family, the New York State Legislature is the single most dysfunctional group of people I have ever interacted with.

Hence, given the current lack of federal and state remedies in New York State, the main thrust of my remarks, given the transitional theme of today's Symposium, will be on how recent developments in constitutional theory, specifically the Equal Protection Clause\textsuperscript{245} and the First Amendment,\textsuperscript{246} are allowing us to break new ground in the fight against anti-gay discrimination in public employment. There is a huge legal framework that is relevant in public employment cases, including collective bargaining agreements, state law, etc. This framework is outside the scope of my remarks.

What I am going to do is focus on four recent cases. Along with giving you a sense of the way that sexual orientation discrimination plays itself out in a public employment context, two major themes I hope will emerge. First, we have reached the dawn of a new day with regard to sexual orientation discrimination in public employment outside of the military. With solid facts and with good lawyering, cases that would have been lost as recently as five years ago are now able to go forward, and some are actually obtaining sub-

\begin{itemize}
\item \textsuperscript{241} See id.
\item \textsuperscript{242} See id. § 4.
\item \textsuperscript{243} See id. § 7.
\item \textsuperscript{244} See 145 CONG. REC. S. 7596 (1999).
\item \textsuperscript{245} U.S. CONST. amend. XIV, § 1.
\item \textsuperscript{246} U.S. CONST. amend. I.
\end{itemize}
stantial damage awards. Second, as litigators, we no longer have to run in fear from the “rational basis” test in equal protection doctrine. We have received repeated indications from lower courts in the area of public employment law that the Supreme Court’s decision in Romer v. Evans, overturning Colorado’s discriminatory Amendment 2, was a real watershed in this area, and it is helping to finally turn the tide.

The first case is Quinn v. Nassau County Police Department, which was decided this past June by a federal district court out on Long Island. James Quinn joined the Nassau County Police Department in 1986 and a year later his fellow officers found out he is gay. From 1987 to when he left the force in 1996, Quinn’s fellow officers subjected Quinn to a steady stream of harassment and abuse and Quinn’s supervisors did nothing to stop the harassment. For example, Quinn introduced at trial nineteen cartoons that were posted on the precinct bulletin board depicting him as, “a homosexual, a child molester, a transvestite, and a sado-masochist” among other things. His fellow officers also put rocks in the hubcaps of his car so that when Quinn pursued criminals, the rocks would make noise and the criminals would escape. On one occasion, Quinn found his nightstick in his patrol car with the words “P.O. Quinn’s dildo” carved into it. Eventually, the Police Department transferred Quinn to a precinct far from his home.

Had Officer Quinn walked into your law office five years ago, you probably would not have agreed to take this case. Why not? The first thing you would have done is run to your statute book and look up Title VII, and the New York State anti-discrimination law, only to discover that they provide no legal protections against sexual orientation discrimination. Depressing. Then, all of a sudden, a big red sign would begin flashing above your head. You would think to yourself, “Okay, this is a public employer. Maybe I have a constitutional claim here. Why don’t I take this research a step further?” At that point, you would have another weird flashback to the nightmare that was your first-year constitutional law

249. See id. at 351.
250. See id.
251. Id.
252. See id.
253. See id.
254. See id. at 352.
class. You begin to recall, in horror, your professor talking about the “rational basis” test and using the Socratic Method to torture your classmate into demonstrating something along the lines of “you have to show that the state legislature was legally insane in order to win an equal protection case where the rational basis standard applies.” This throws you into fits of depression, and you promptly show Officer Quinn the door.

Nevertheless, the district court in this case ruled in Officer Quinn’s favor on the Equal Protection claim.\footnote{256. See id. at 357.} This is huge. Why is this huge? For the first time that we are aware of, a court specifically found that a hostile work environment based on sexual orientation harassment can rise to the level of a constitutional violation.\footnote{257. See id. at 358-59.} In public employment context, this case partially fills the gap in Title VII protection.\footnote{258. See Civil Rights Act of 1964, 42 U.S.C. § 2000e (1999).} Although the Supreme Court recently held that same-sex sexual harassment is actionable under Title VII in \textit{Oncale v. Sundowner Offshore Services, Inc.},\footnote{259. 523 U.S. 75 (1998).} the Court also held that the harassment has to be based on sex.\footnote{260. See id. at 1002. Query whether or not calling somebody a “faggot” every day for eight years is based on sex, which is actionable under Title VII, or sexual orientation, which is not.} Beyond this hostile work environment issue, the \textit{Quinn} court also said that, under \textit{Romer},\footnote{261. 517 U.S. 620 (1996)} this sort of harassment cannot even pass rational basis review.\footnote{262. See Quinn, 53 F. Supp. 2d at 356-58.} This is not the insanity test anymore. You can actually win an Equal Protection claim in a sexual orientation discrimination case where the rational basis test applies.

The court let stand a jury award of $360,000 in compensatory and punitive damages.\footnote{263. See id. at 1002. Query whether or not calling somebody a “faggot” every day for eight years is based on sex, which is actionable under Title VII, or sexual orientation, which is not.} This decision, along with two others I am going to talk about, would have been impossible without \textit{Romer},\footnote{264. 517 U.S. at 620.} and collectively they demonstrate the potentially tremendous impact that \textit{Romer} could have as it is applied in more and more lower courts.

The second case, \textit{Weaver v. Nebo School District},\footnote{265. Id.} was decided last year by a federal district court in Utah. Wendy Weaver was a public school teacher at an Utah high school who also coached the

\begin{thebibliography}{99}
\bibitem{256} See id. at 357.
\bibitem{257} See id. at 358-59.
\bibitem{259} 523 U.S. 75 (1998).
\bibitem{260} See id. at 1002. Query whether or not calling somebody a “faggot” every day for eight years is based on sex, which is actionable under Title VII, or sexual orientation, which is not.
\bibitem{261} 517 U.S. 620 (1996)
\bibitem{262} See Quinn, 53 F. Supp. 2d at 356-58.
\bibitem{263} See id. at 353, 363.
\bibitem{264} 517 U.S. at 620.
\bibitem{265} Id.
\bibitem{266} 29 F. Supp. 2d 1279 (D. Utah 1998).
\end{thebibliography}
girls' volleyball team. As coach of the volleyball team, she organized a summer volleyball camp for the team, and she called up all the team members to let them know when the camp was to start. During one of these calls, one of the team members asked her, "Are you gay?" Ms. Weaver responded, "Yes." This set off a whole series of meetings, and eventually the school district removed Weaver as volleyball coach. Later, the Directors of the Nebo School District gave Weaver a letter stating that she was "not to make any comments, announcements, or statements to students, staff members, or parents of students regarding [her] homosexual orientation or lifestyle. If students, staff members, or parents of students ask about [her] sexual orientation, [she was to] tell them that the subject is private and personal and inappropriate to discuss with them." This letter was placed in Weaver's personal file. As a consequence, Weaver filed a suit based on a First Amendment and an Equal Protection claim, and she won on both.

I want to talk about the First Amendment claim here for a second. Because Weaver was a public employee, the court used Pickering v. Board of Education of Township High School to deal with the First Amendment claim. Under Pickering, the court had to determine whether the employee's speech is on a matter of public concern, and whether the employee's interest in speaking outweighs the employer's interest in regulating the speech.

I want to focus on the first element, speaking on a matter of public concern. After noting that the issue in the case was speech that occurred outside the classroom, this court did a groundbreaking thing. The court found that Weaver's speech about her sexual orientation was a matter of public concern and was pro-

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267. See id. at 1280.
268. See id. at 1281. Actually, school officials had been discussing her sexual orientation for some time in response to phone calls from a number of people, including her ex-husband. See id.
269. See id. at 1282.
270. Id.
271. See id. Among other things, it appears that the school officials in Utah were worried that Weaver might see students in public places, like the supermarket, and suddenly and spontaneously blurt out that she is a lesbian. In the district's defense, we have to acknowledge that this has long been a problem with heterosexuals, who compulsively blurt out their sexual orientation in all sorts of public places, particularly supermarkets.
272. See Weaver, 29 F. Supp. 2d at 1291.
274. See id.
275. See Weaver, 29 F. Supp. 2d at 1284 If she was getting up and saying "I am a lesbian" in the middle of class, there would be different concerns.
tected under the First Amendment. The court did so first because “coming out” necessarily involves you in a larger public debate about gay people. This is amazing. It is as if somebody paid attention during their queer theory course and then became a federal judge. The court also found constitutional liability because internal discussions within the school district about the case had elevated this issue out of the realm of the private into a matter of public concern.

On the Equal Protection claim, after referencing Matthew Shepard, the court did the same thing as the Quinn court: it relied upon Romer to hold that anti-gay bias can never be a legitimate basis for a state action. The judge then ordered the district to remove the nasty letters they had placed in Wendy Weaver’s file, gave her the volleyball job back, and gave her $1500 in damages, the stipend she lost for coaching the team. Piece of good news number two.

Case number three, another teacher case decided by a federal district court in Ohio, is Glover v. Williamsburg School District. Bruce Glover was a teacher at an elementary school in Ohio. He received above-average performance evaluations during his first semester teaching at the school. In the middle of the school year, however, the district superintendent received a call reporting that Glover had been seen holding hands with his male partner at a Christmas party for sixth graders. As it turned out, this rumor was totally and entirely false. But who cares?

276. See id. ("Indeed, the public reaction in the Nebo School District to rumors about Ms. Weaver’s sexual orientation clearly is evidence of public concern over her sexual orientation.").
277. See id. at 1284 n.3.
278. See id. As for the second element, because the defendants could not “point to any actual disruptive events” since the situation began, the court found that Weaver’s interests outweighed those of the defendants. Id. at 1284-85.
279. See id. at 1287.
282. See id. at 1287-89.
283. See id. at 1291.
285. See id. at 1162.
286. See id. at 1163-64.
287. See id. at 1164.
288. See id. at 1164-65.
Glover’s performance reviews for the second semester were significantly worse.\textsuperscript{289} Instead of getting observed two times, which was the legal requirement, the principal visited his class six times.\textsuperscript{290} Glover claimed the lower ratings and these increased visits were due to discrimination,\textsuperscript{291} but the Board chose not to investigate his claims and decided not to renew his contract, claiming that Glover had problems with classroom management.\textsuperscript{292} After, Glover brought an Equal Protection claim in this case and was successful.\textsuperscript{293}

What I want to emphasize here, for those practitioners out there, is how good lawyering was able to convince the judge that the defendant’s stated explanation for not renewing the contract was pretext for sexual orientation discrimination. Glover’s attorney did four really smart things here. First, he showed that the defendants had renewed the contract of another new teacher whose ratings were lower than Glover’s for behavior management.\textsuperscript{294} As a result, Glover established a benchmark, a similarly situated individual by which the judge can assess the differential treatment. That is key. Second, the attorney had teachers in neighboring classrooms testify that there were no disturbances overheard from Glover’s classroom, but they heard screaming kids or chaos or a ruckus from the renewed teacher’s classroom.\textsuperscript{295} Third, an expert witness testified that classroom management is a common problem for new teachers and there was no reason to treat Glover differently for renewal purposes than any other teacher.\textsuperscript{296} Finally, Glover showed that the district’s rationale for not renewing the contract had shifted over time and used this shifting to establish pretext.\textsuperscript{297} After rejecting the defendant’s explanation, the court, like the court in Quinn,\textsuperscript{298} used Romer to show that sexual orientation can never be a legitimate government purpose,\textsuperscript{299} reinstated Glover, and gave

\textsuperscript{290} See id. at 1165.
\textsuperscript{291} See id. at 1166.
\textsuperscript{292} See id. at 1167.
\textsuperscript{293} See id. at 1174.
\textsuperscript{295} See id. at 1172.
\textsuperscript{296} See id.
\textsuperscript{297} See id. at 1172-73.
\textsuperscript{298} 53 F. Supp. 2d 347, 356-58 (E.D.N.Y. 1999)
\textsuperscript{299} See id. at 1169.
him back pay, emotional distress damages, and attorney’s fees and costs.300 Yes, take these cases.

Thus far, smooth sailing, right? I want to put one final case on your radar screen. It is an Eleventh Circuit case called Shahar v. Bowers.301 Robin Shahar clerked for the Georgia State Attorney General’s Office while she was a law student and was offered a job as an Assistant Attorney General after graduation.302 Before starting her job, Shahar got engaged to her female partner and they planned a marriage ceremony.303 The Attorney General at the time, Michael Bowers, of Bowers v. Hardwick,304 found out about her engagement plans and revoked the job offer.305 Shahar sued the state for violating her First Amendment and Equal Protection rights.306

The Eleventh Circuit’s decision was a setback on both counts. On the First Amendment claim, the decision turned on that balancing part of the Pickering test.307 The court agreed with the Attorney General’s argument that he could not carry out the mission of his office to uphold the law if he had an attorney on staff who holds herself out as married when Georgia law does not allow gay people to get married.308

With regards to the Equal Protection claim, the Eleventh Circuit, unsurprisingly, was totally dismissive of Romer, holding that Romer was not an employment case and did not apply, and that this case is about conduct, a commitment ceremony, and not an across-the-board denial of rights the way Romer was.309 Note, though, that the court ignored the differential treatment with regard to conduct, namely, partners in opposite-sex couples can have as many commitment ceremonies as they want and not get their job offers revoked, but partners in same-sex couples cannot. The best thing to do with this case is to argue that the case is limited to the government lawyer setting, where the mission of the organization

300. See id. at 1175-76.
301. 114 F.3d 1097 (11th Cir. 1997).
302. See id. at 1100.
303. See id.
305. See Shahar, 114 F.3d at 1100-01.
306. See id.
307. See id. at 1110
308. See id. Adultery is illegal within the State of Georgia, and three days after the Eleventh Circuit rendered its decision, Michael Bowers held a press conference and admitted that he had a ten-year adulterous affair while he was the Attorney General. The adultery must also have cramped his ability to carry out the mission of his office.
309. See Shahar, 114 F.3d at 1110.
is to uphold the law. Nevertheless, it is important to keep in mind that Shahar could have an impact on other public employment cases.

This concludes the update on the equal protection front, but I am happy to take questions on any number of issues that we are dealing with, including marriage, talking about how sexual orientation discrimination can be sex discrimination, for those of you that are stuck with litigating under federal and state laws, or anything else that comes to mind.

Thanks so much.

**QUESTIONS AND ANSWERS**

AUDIENCE: Some of the issues that have come up in the last couple of years have involved the New York State education law. These have been the cases where people, who have applied to teach in New York City or New York State public schools, have had sodomy convictions in other jurisdictions. Because that is a criminal conviction, they have not been permitted to teach in the State of New York or have not been permitted to have licenses. I am wondering whether that issue has come up at Lambda and what your strategies are?

MR. GEWIRTZMAN: I am not aware of any case that we have litigated on this issue. Many states have passed these sex offender reporting statutes, and very often these poor guys who were picked up forty years ago in a parking lot and given some sort of lewd conduct arrest now have “sex offender” stamped all over every public record they have. Very often, this information ends up getting exposed to employers and can really be disastrous for some of them. We have, at times, been able to get in at the right time and added our input to the drafting process. In deciding which offenses should be reported, you might want to exclude these.

AUDIENCE: Can you give us an example of sexual orientation brought as a sex discrimination case?

MR. GEWIRTZMAN: That is a great question because I get to talk about our marriage work, which is terrific. As you know, Lambda has been involved in a number of cases trying to ensure that lesbians and gay men are able to enjoy the freedom to marry. The success, to the extent that we have had success in this area, has come from making sex discrimination arguments under state constitutional provisions.
We brought a lawsuit in Hawaii. We believed that the Hawaii Supreme Court was poised at any moment to rule in our favor and accept our argument that depriving same-sex couples the right to marry constitutes sex discrimination because the denial was entirely based on the sex of the partner. If the couple suing was of different sexes, there would not be any problem. During this time, the Mormon Church and a number of other religious organizations dropped a ton of money into a ballot initiative in Hawaii, and last November the initiative passed. The initiative was worded so that the Hawaii State Constitution is amended to say that the Hawaii State Legislature has the power to define marriage as being between a man and a woman. Thus far, the Hawaii State Legislature, for whatever reason, bad legal advice; who knows, has not acted. So this case is continuing to go on. We could get a ruling from the Hawaii Supreme Court any day.

At the same time, there is another case currently being litigated in front of the Vermont Supreme Court called Baker v. State of Vermont. This is not our case, but we filed an amicus in this case on the same sort of state constitutional principles. The Vermont Supreme Court could rule any day. I saw a tape of the oral argument there. It was really exciting, because the State’s attorney is in there arguing that they are not allowing the marriage because none of the other forty-nine states and no country in the world allows these kind of marriages and they should not either. One of the five Vermont Supreme Court justices looks at him and says, “Well, somebody has to be first.” I thought that was an exciting possibility. At any rate, that is where we have been most successful.

But in terms of thinking about this in the context of Title VII, look at Price Waterhouse and what it has to say about gender stereotyping. If you are firing somebody because they are not living up to the employer’s expectations about what a man or a wo-

310. See Baehr v. Miike, No. 91-1394-05, slip op. (Haw. 1999).
312. See Baehr, No. 91-1394-05, slip op. at 1.
313. Shortly after this Symposium, the Hawaii Supreme Court issued its decision in Baehr v. Miike. See infra App. A for the unpublished opinion.
man is supposed to behave like, it is possible that you could construe a Title VII claim under gender stereotyping.\textsuperscript{316}

MR. WILLS: This, however, is extraordinarily difficult. In fact, there are several recent decisions, very disappointing ones for plaintiffs, where it has been attempted.\textsuperscript{317} In one, the court actually, this was bringing a sexual orientation claim basically under the guise of, if you will, sexual harassment law and trying to bring it in under sex. Nevertheless, it has been extraordinarily difficult to bring those claims pursuant to Title VII, given the very narrow construction the courts give to sex, as opposed to even gender. In fact, some courts make that distinction and say, "Title VII uses the word 'sex' for a reason; it is not gender and it does not encompass an area as broad as gender." So it is quite difficult, but not impossible.

AUDIENCE: Looking to the future, say you win one of these cases and Vermont recognizes marriage between same-sex couples; what happens when they move out of state? Have you projected a strategy of how you are going to deal with that?

MR. GEWIRZMAN: Massive unprecedented civil litigation. What will happen, I would imagine, is that couples, some working with legal organizations, some not, will immediately fly to Vermont from all over the country, get married, go home, and try to have their marriages enforced within the state. Thirty-some-odd states already have anti-marriage legislation; some do not. So there will likely be litigation on this issue in the other forty-nine states on a variety of different issues. It is very, very complicated. There are giant workbooks that we have about this stuff, looking at different states and what is promising and what is not. But there are so many different variables involved, who knows what is going to happen. It will be exciting, though.

I just wanted to leave with one note. If you have cases involving sexual orientation discrimination, please call us. This is what we do for a living. The law in this area is not easy. It really requires creative approaches and risk taking, and often it is helpful to work with attorneys with experience in this area.

AUDIENCE: Do you also litigate transgender cases?

MR. GEWIRZMAN: That is a phenomenal question. The answer is yes, we do litigate transgender cases. At the same time, our

\textsuperscript{316} See id. at 250.

mission statement does not specifically include transgender which upsets some. We have, however, always given a broad reading to our mission – we have been involved in all sorts of civil rights cases, including reproductive rights and race related cases. So within the organization, we don’t see our mission to further the civil rights of lesbians, gay men, and persons with HIV/AIDS as limiting us from taking transgender cases.

Thanks.

MR. WILLS: Thank you all very much.
APPENDIX A

Baehr v. Miike

The following is the opinion of the Supreme Court of the State of Hawaii in Baehr v. Miike, dated December 9, 1999:

Summary Disposition Order

Pursuant to Hawaii Rules of Evidence (HRE) Rules 201 and 202 (1993), this court takes judicial notice of the following: On April 29, 1997, both houses of the Hawaii legislature passed, upon final reading, House Bill No. 117 proposing an amendment to the Hawaii Constitution (the marriage amendment). See 1997 House Journal at 922; 1997 Senate Journal at 766. The bill proposed the addition of the following language to article I of the Constitution: “Section 23. The legislature shall have the power to reserve marriage to opposite-sex couples.” See 1997 Haw. Sess. L. H.B. 117 § 2, at 1247. The marriage amendment was ratified by the electorate in November 1998.

In light of the foregoing, and upon carefully reviewing the record and the briefs and supplemental briefs submitted by the parties and amicus curiae and having given due consideration to the arguments made and the issues raised by the parties, we resolve the defendant-appellant Lawrence Mike’s appeal as follows:

On December 11, 1996, the first circuit court entered judgement in favor of plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon and Joseph Melillo (collectively the “plaintiffs”) and against Miike, ruling (1) that the sex-based classification in Hawaii Revised Statutes (HRS) § 572-1 (1985) was “unconstitutional” by virtue of being “in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution,” (2) that Miike, his agents and any person acting in concert with or by or through Miike were enjoined from denying an application for a marriage license because applicants were of the same sex, and (3) that costs should be awarded against Miike and in favor of the plaintiffs. The circuit court subsequently stayed enforcement of the injunction against Miike.

The passage of the marriage amendment placed HRS § 572-1 on new footing. The marriage amendment validating HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it
was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is.\textsuperscript{318} In light of the marriage amendment, HRS § 572-1 must be given full force and effect.

The plaintiffs seek a limited scope of relief in the present lawsuit, i.e., access to applications for marriage licenses and the consequent legally recognized marital status. Inasmuch as HRS § 572-1 is now a valid statute, the relief sought by the plaintiffs is unavailable. The marriage amendment has rendered the plaintiffs' complaint moot. Therefore,

IT IS HEREBY ORDERED that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

IT IS FURTHER ORDERED that the circuit court shall not enter costs or attorneys' fees against the plaintiffs.


\textsuperscript{318} In this connection, we feel compelled to address two fundamental misapprehensions advanced by Justice Ramil in his concurrence in the result that we reach today. First, Justice Ramil appears to misread the plurality opinion in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, reconsideration and clarification granted in part, 74 Haw. 650, 875 P.2d 225 (1993) [hereinafter, "Baehr I"], to stand for the proposition that HRS § 572-1 (1985) defines the legal status of marriage "to include unions between persons of the same sex." Concurrence at 1. Actually, that opinion expressly acknowledged that "[r]udimentary principles of statutory construction renders manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female." Baehr I, 74 Haw. at 563, 852 P.2d at 60. Second, because, in his view, HRS § 572-1 limits access to a marriage license on the basis of "sexual orientation," rather than "sex," see concurrence at 1 n.1, Justice Ramil asserts that the plurality opinion in Baehr I mistakenly subjected the statute to strict scrutiny, see id. at 2-3. Notwithstanding the fact that HRS § 572-1 obviously does not forbid a homosexual person from marrying a person of the opposite sex, but assuming arguendo that Justice Ramil is correct that the touchstone of the statute is sexual orientation, rather than sex, it would still have been necessary, prior to the ratification of the marriage amendment, to subject HRS § 572-1 to strict scrutiny in order to assess its constitutionality for purposes of the equal protection clause of article I, section 5 of the Hawaii Constitution. This is so because the framers of the 1978 Hawaii Constitution, sitting as a committee of the whole, expressly declared their intention that a proscription against discrimination based on sexual orientation be subsumed within the clause's prohibition against discrimination based on sex. See Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 675 (1980). Indeed, citing the foregoing constitutional history, Lewin conceded that very point in his answering brief in Baehr I when he argued that article I, section 6 of the Hawaii Constitution (containing on express right "to privacy") did not protect sexual orientation because it was already protected under article I, section 5. Lewin could hardly have done otherwise, inasmuch as his proposed order granting his motion for judgment on the pleadings in Baehr I contained the statement that "[u]ndoubtedly, the delegates (to the convention) meant what they said; Sexual orientation [i]s already covered under Article I, Section 5 of the State Constitution."