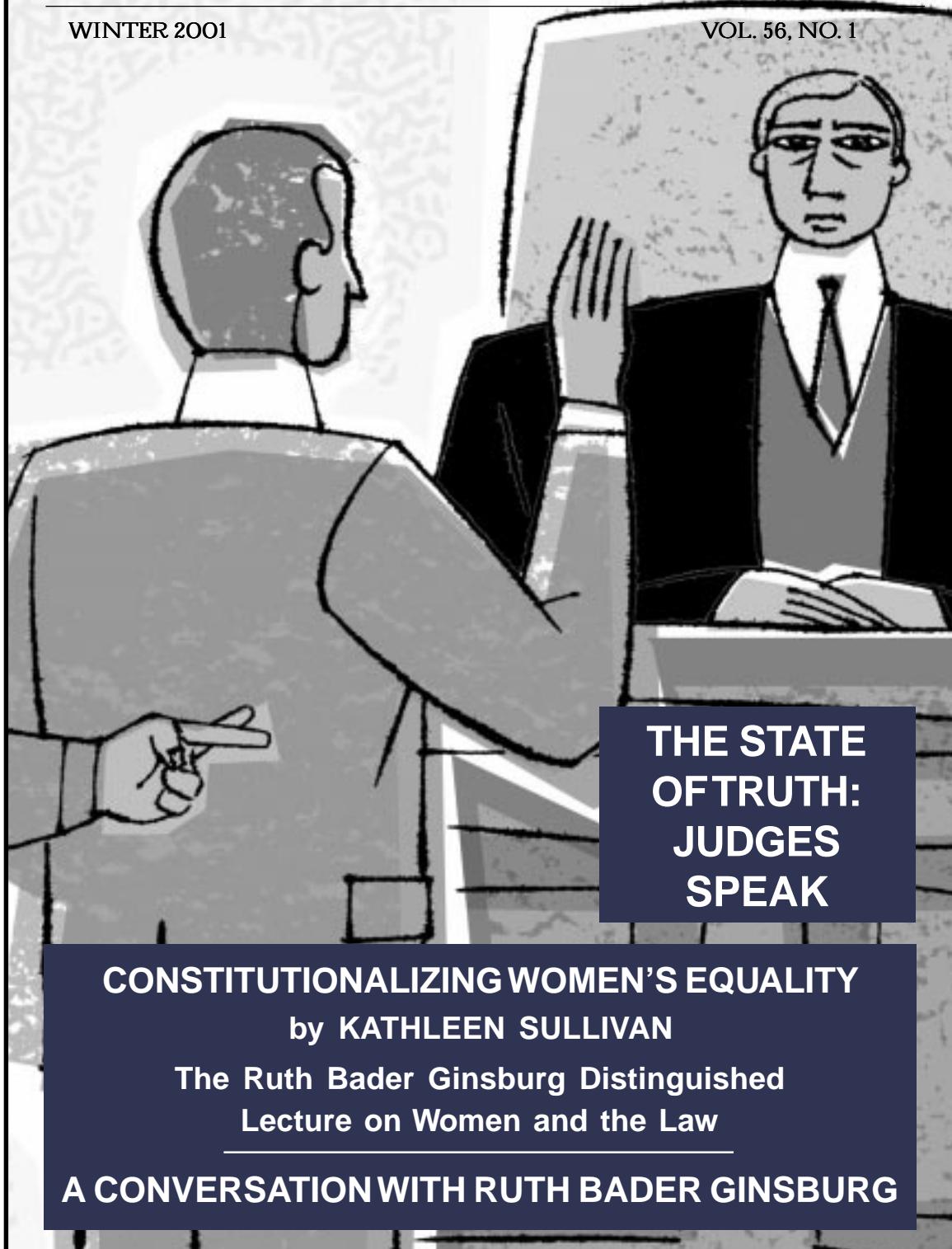


THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

WINTER 2001

VOL. 56, NO. 1



**THE STATE
OF TRUTH:
JUDGES
SPEAK**

CONSTITUTIONALIZING WOMEN'S EQUALITY

by **KATHLEEN SULLIVAN**

**The Ruth Bader Ginsburg Distinguished
Lecture on Women and the Law**

A CONVERSATION WITH RUTH BADER GINSBURG

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Of Note

THE DRAKE UNIVERSITY SCHOOL OF LAW IN DE MOINES, IOWA, BEAT out a field of 138 law schools to win the final rounds of the 51st Annual National Moot Court. The competition was sponsored by the Association's Young Lawyers Committee and the American College of Trial Lawyers. The case involved issues arising under the federal wiretapping statute.

Drake team members included Theodore C. Simms, II, William D. Schultz, and Jeffery Link. Robert Cowan, Ann E. Johnson and Mark Junell represented South Texas College of Law, the competition runner-up.

Drake and South Texas were two of 28 schools that competed in the final rounds. The competition, which began in regional rounds in November, featured 198 teams from 138 law schools throughout the U.S. Approximately 400 students participated in the overall competition.

"These competitions are a wonderful opportunity to bring together law students to show their advocacy skills," said Evan A. Davis, President of the Association. "This year's field of students proved to be exceptionally outstanding. They argued an interesting case before a panel that included five distinguished judges: Carol Bagley Amon of the U.S. District Court, Eastern District of New York; Victoria A. Graffeo of the New York State Court of Appeals; Howard A. Levine of the New York State Court of Appeals; Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit; and Victor Marrero of the U.S. District Court, Southern District of New York." The panel also included Earl Silbert, President of the American College of Trial Lawyers and Mr. Davis.

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THE ASSOCIATION SUBMITTED SEVERAL *AMICUS* BRIEFS IN RECENT months. In *Saucier v. Katz*, before the United States Supreme Court, the Civil Rights Committee argued that the qualified immunity defense merges with the merits of the case in excessive force suits against government officials brought under 42 U.S.C. Section 1983 or *Bivens v. Six Unknown Named Agents* (403 U.S. 388, 391-92 (1971)). According to the Committee, once a jury decides that an officer used excessive force, it essentially has made the determination that the officer's actions were not "objectively reasonable," which is also the standard for determining qualified immu-

nity. Extending a qualified immunity defense to excessive force cases will raise constitutional and practical problems which may be barriers to the assertion of constitutional rights.

In another *amicus* brief before the Supreme Court, the Corrections Committee addressed the exhaustion requirement of the federal Prison Litigation Reform Act. The Committee argued, in *Booth v. C.O. Churner*, that a prisoner should not have to exhaust his or her remedies to pursue an action for damages in court when such remedies do not include provision of damages. The Committee said it is unfair to force a prisoner through such a system, such as the New York correctional system administrative process, with the attendant risks of pursuing a claim, when in the end the prisoner cannot possibly receive the remedy sought and would be channelled into the courts in any event.

The Capital Punishment Committee submitted an *amicus* brief to the New York Court of Appeals in *People v. Harris*, the first capital punishment case to reach the state's highest court on the merits since the death penalty was reinstated in 1994. The brief urged the Court to apply strict scrutiny to substantive due process claims involving the death penalty, and to find that the capital punishment statute violates the due process provisions of the State's constitution.

The New York Court of Appeals also received an *amicus* brief from the Civil Rights Committee in *Levin v. Yeshiva University*. The case involved a claim of discrimination on the basis of marital status under the New York City Human Rights Law. The Committee argued that the City's law should be interpreted independently of federal and civil human rights laws, and that it prohibits discrimination against unmarried couples.

In *Symbol Technologies v. Lemelson Medical, Education & Research Foundation, Ltd.*, before the United States Court of Appeals for the Federal Circuit, the Patents Committee argued that the doctrine of laches may be asserted to bar the enforceability of patent claims that were presented to the Patent Office after an unreasonable and unexplained delay, and where such enforcement would cause injury to a third party in the form of infringement liability.

Copies of these briefs may be obtained from the Executive Director's office.

Recent Committee Reports

Alternative Dispute Resolution

Comments on the Interim Draft Uniform Mediation Act

Letter to U.S. Justice Department on Federal ADR Council Report

Capital Punishment

Amicus Brief: People of the State of New York v. Darrel K. Harris

Civil Rights

Amicus Brief: Levin v. Yeshiva

Amicus Brief: Saucier v. Katz

Communications and Media Law

Comment letter to Administrative Office of the United States Courts Regarding Privacy and Public Access to Electronic Case Files

Condemnation & Tax Certiorari

Report S.1627: An Act to Amend Section 718 of the Real Property Tax Law in Relation to When a Proceeding is Deemed Abandoned

Corrections

Amicus Brief: Booth v. C.O. Churner

Criminal Advocacy

The State of Truth: Judges Speak

Criminal Law

Letter to Governor Pataki re: Rockefeller Drug Laws

Domestic Violence Task Force/Immigration & Nationality Law

Letter to U.S. Representative Maloney in Support of Battered Women's Protection Act of 1999 (H.R. 3083)

Energy

Restructuring New York's Electric Power Industry: A Progress Report

Executive

Comment Letter to the Commission on Fiduciary Appointments

Amicus Brief: United States v. Hatter

Federal Courts

Letter to Judicial Conference of the United States re: Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure

Letter Hon. Lewis Kaplan re: Electronic Filing in the Southern District of New York

Comment Letter to Administrative Office of the United States Courts Regarding Privacy and Public Access to Electronic Case Files

Futures Regulation

Letter to the Commodity Futures Trading Commission Regarding Proposed Revisions to Rule 4-22—Distribution of Annual Reports by Commodity Pool Operators

Immigration and Nationality Law

Comment Letter to the Director of the Policy Directives and Instructions Branch of the INS re: No. 2004-99, Clarification of Parole Authority

International Environmental Law

Letter to Secretary of State Colin Powell Regarding Russia's Plan to Abolish the Russian State Committee for Environmental Protection and Forestry Service

International Security Affairs

Letter to ABA Section of International Law & Practice re: Comprehensive Test Ban Treaty

Judicial Administration, Council on

Report on the 2001-2002 State Judiciary Budget Request

Legal Issues Pertaining to Animals

Letter to New York City Council Speaker Peter Vallone Regarding Carriage Horses

Card for Use by NYPD Regarding Mistreatment of Animals

Legal Problems of the Aging/Legal Issues Pertaining to Animals/Legal Issues Affecting People with Disabilities

Letter to New York City Council Speaker Peter Vallone Regarding Legislation on New York City Pet Law

New York City Affairs

Letter to City Council re: Term Limits

R E C E N T C O M M I T T E E R E P O R T S

Letter to New York City Council Speaker Peter Vallone Regarding Lawsuit Challenging Four-to-One Public Campaign Financing Program

Non-Profit Organizations

Letter to Governor Pataki Urging Repeal of the Newly Enacted Provisions of the EPTL Section 8-1.8(b-1) and Not-for-Profit Corporation Law Section 406(b-1)

Patents

Comment Paper on Hague Convention on Enforcement of Judgments

Amicus Brief: Symbol Technologies Inc. et al v. Lemelson Medical, Education and Research Foundation

State & Local Taxation

Letter to New York State Department of Taxation & Finance re: Overlapping Audit Guidelines

State Governance Reform

Proposal to Strengthen the Legislature

Trusts, Estates, and Surrogate's Courts

Report on A.3523—An Act to Amend the Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act in Relation to the Treatment of Revocable Lifetime Trusts

Draft Legislation to Amend Section 2-1.15 of the Estates, Powers & Trusts Law

Uniform State Laws

Report on Revised Article 9 of the Uniform Commercial Code

Letter to Counsel to the Governor James McGuire Regarding Electronic Signature and Records Act, Federal Preemption and the Uniform Electronic Transactions Act

Copies of any of the above reports are available to members by calling (212) 382-6624, or by e-mail, at kbopp@abcny.org.

Justice Ruth Bader Ginsburg
Distinguished Lecture on Women and the Law

A Conversation with Justice Ruth Bader Ginsburg

The Inaugural Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law was delivered at the Association, November 15, 2000. Prior to the Lecture, Justice Ginsburg was interviewed by ABC News Correspondent Lynn Sherr.

EVAN A. DAVIS: Justice Ginsburg, I want to note the presence here tonight of four former Presidents of the Association: Bob Kaufman, Michael Cooper, John Feerick and Barbara Paul Robinson. It's not often that we have four former Presidents present, which shows what a stellar evening we have tonight. I had the pleasure at 2:00 to welcome the audience for the symposium and there I gave the overall welcoming speech for this event. But now it is my particular pleasure to be able to welcome Justice Ginsburg to our House tonight for the Inaugural Ruth Bader Ginsburg Distinguished Lecture.

I think that Justice Ginsburg is a national treasure and both of the sponsoring organizations feel that particularly because we also think of her as one of our own treasures. Justice Ginsburg was a member of the Executive Committee of this Association from 1974 to 1978 and in 1999 she delivered the Cardozo Lecture, our premiere lectureship here at this Association. With respect to the NOW Legal Defense and Education Fund, Justice Ginsburg was one of the founding Board of Director members of that organization, and served on the Advisory Committee for its judicial education project.

I want to read a letter that I received from someone who cannot be

here tonight, who is a person who is also dear to all of us here at the Association. *"Dear Evan, I am thrilled that on November 15th the Bar Association will be the site of the Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law, and that all afternoon an incredible galaxy of women and non-women will gather to discuss profound issues relative to women, society and the law. Sadly, the State of New York made other plans for me that day. The Court of Appeals will be in session hearing cases in Albany. I greatly appreciate your offer to convey my regrets and apologies to Justice Ginsburg, to your distinguished inaugural lecturer, Dean Sullivan, and to all of the assembled guests. What a great day. I am indeed sorry that I cannot be with you. Sincerely, Judith."* And Judith is, of course, Judith S. Kaye, the Chief Judge of the State of New York.

So I suggest that we all welcome Justice Ginsburg up to the dais here and I will introduce in a moment the person who will conduct the interview with Justice Ginsburg, but as she comes up, I think we should all give her a great round of applause.

Now it is my pleasure to introduce the person, Lynn Sherr, who is going to interview Justice Ginsburg. She is a very appropriate choice, and the assignment to do this interview is in itself a special honor. Lynn Sherr, as we all know, is a key correspondent of ABC News and the "20/20" Program. She's a winner of the Peabody Award, a winner of the Emmy Award, a winner of the Maggie Award from Planned Parenthood and a great student of Susan B. Anthony. Lynn Sherr, would you please come up for the interview.

LYNN SHERR: Evan, thank you. Thank you all. I am so delighted to be in the only room in America with more lawyers than there are in Florida right now. I am, in fact, honored to be with you, and I'd actually like to start by saying that I'd rather think of this as a conversation than an interview because I know that Justice Ginsburg is in friendly territory and I think of it as an opportunity for me to talk to her about a few things and to, with luck, draw a few things out of her that maybe you haven't heard before, or that you would like to hear right from her lips.

In any event, I am honored to be here with the woman whose extraordinary legal mind and personal grit have utterly transformed our lives. That is, the lives of all American women, and of course, by extension, all American men as well. Our time is short this evening and I do want to get right to our guest, but I also want to make clear to the audience that there are some ground rules. Unfortunately, for those whose hopes may be pegged to one or more cases pending before the Supreme Court, I cannot speak with the Justice about issues which may come be-

fore the court. And alas, given the state of the recount in Florida, that no doubt pertains to the current Presidential indecision as well, so we can't talk about that either. But there is plenty that we can speak of. And while I certainly don't want to dwell on it, Justice Ginsburg, may I simply begin by expressing our collective good wishes for your health, and ask how you're doing these days?

RUTH BADER GINSBURG: I'm doing just fine, Lynn, and I want to share with all of you that just about a year ago at this time, when I had finished my surgery and was beginning on a prolonged course of chemotherapy and radiation, I met Lynn and she told me that she also had colon cancer. Tonight when she greeted me she said, "It's been three years and I'm okay."

LS: So perhaps I can be a role model for you in this one, as we all are for each other in so very many ways. Justice Ginsburg, like most of us, for me, the women's movement was a very personal time. I came to New York right out of college, just about the time you were teaching, and I went around like all my pals, looking for a job in journalism and I was told by every major newspaper in this city, and there were more in those days, "We don't hire girls." Later I was told by the news magazines, as all women were, "Oh yes, women can get a job on the clip desk, clipping out articles, sticking them in their folders, so some guy could then write the article." There was all this discrimination that it never occurred to us to question. It's just the way things were, we thought. You seemed to have had other ideas, and what I am taken by is the fact that so much of the work you have done seems to have been inspired by what you went through in your personal life. I wonder if you could go through a few of those things for us.

RBG: We can start with my first job. Kathleen Sullivan's collaborator can confirm this. I didn't really know the story until Gerry Gunther, who was my teacher at Columbia Law School, wrote about it in the pages of the Hawaii Law Review. He said that he had been in charge of getting clerkships for Columbia Law School students and there was a particular Judge in the Southern District who hired only Columbia clerks. The Judge was himself a Columbia graduate and had designated Gerry Gunther his clerk-picker. Gerry called the Judge and said, "I have selected Ruth Bader Ginsburg for you." The Judge responded, "Are you out of your mind? Not only is she a woman, but she has a four-year old child and I sometimes work late and

on Sundays...” Well, it worked this way. Gerry said, “If you don’t give her a try I will never refer another Columbia clerk to you. But as insurance, if you take her and she doesn’t work out, I have an agreement with a young man in her class. He will take leave from his Wall Street firm and fill in for Ruth.” That’s how I got my first job.

LS: So you had a back-up all lined up, just in case.

RBG: You can imagine how exhilarating it was for me when the women’s movement came alive in the late 60s and it became possible to do something about all that. Before then, you were talking to the wind. When you think of the truly great and brave ladies, Susan B. Anthony, Elizabeth Cady Stanton, those were women who didn’t have a wave to ride. We did. We came at a time when society finally was willing to listen.

LS: But what was it? I suppose one could look back and say, “Oh that’s easy. She was a lawyer. She knew she could change things with the law.” When did it occur to you that what was happening to you personally was something you could do something about professionally?

RBG: That realization came to me two ways. One was through my students. I was then teaching at Rutgers Law School and the students there wanted to have a course on women and the law. And the other way, I was a volunteer lawyer for the American Civil Liberties Union in New Jersey. New complaints came trickling into that office of a kind not seen before. For instance, a woman is a teacher and she is pregnant and begins to show. The school says it’s time for maternity leave, which was a euphemism for, “You go. You will not get paid. If we want you back, we’ll call.” Or the woman who says, “There’s a good health plan at my company but they won’t let me sign up for it on a family basis because I’m a woman, and my husband’s health plan isn’t nearly as advantageous for our family. Why can’t I be the person to get the health insurance?” Complaints like that. These were newly voiced grievances. And then there was law out there to press into service. There was the Equal Pay Act passed in 1963, there was Title VII of the Civil Rights Act of 1964, and there was the Equal Protection Clause of the Constitution. And as I said, for the first time in history, we were speaking to courts prepared to listen.

LS: You said back in 1988, “The Supreme Court needed basic education before it was equipped to turn away from the precedents in place...” and

then you named certain decisions. Your strategy seems to have been to go very slowly to give the Supreme Court that education. I assume this was a conscious decision on your part and not something that just sort of worked out that way; that you were doing little building blocks all the time.

RBG: We were starting from a different place, unlike the people who were arguing in court against odious racial discrimination. Most of the men in the courts at that time didn't associate discrimination in its unpleasant sense with the way women were treated. They thought of themselves as good husbands and good fathers. They genuinely believed that women had the best of all possible worlds. Women could work if they wanted to; they could stay home if they wanted to. They could avoid jury duty if they wanted to or serve on juries. The challenge was to educate the men on the bench, to help them to realize there was something wrong with that world. Justice Brennan eventually stated the essential point in a U. S. Supreme Court opinion after the California Supreme Court had said the same thing. There was something about that pedestal that resembled a cage. We tried to get across that idea in a way that would not be offensive. Wherever you are, whatever your audience is, you want to play to that audience and not turn it against you. The way to do this was to make the judges understand that, yes, even their own daughters could be disadvantaged by the way things were. And to do that you had to start with the basics.

LS: I have a friend who used to say, "The best feminists in the world were men with daughters." So you were always looking for things like that. I guess that the question that keeps coming back to me is, "Do you think someone who didn't have these experiences could have done it as well as you did?" Was it because you had lived through so many things personally that you were able to make your case?

RBG: I don't know that someone who hadn't lived through it at that time would have wanted to do it. There were all kinds of strains in the beginning. There were people who said, as they did at the time of the suffrage movement or in the post-Civil War era, there were more important things to be done. The women should wait. They should wait until racial injustice is eradicated. They should wait until there's peace in the world. Always, women should wait. These were the "your time has not yet come" group of people. Now I got carried away in that response. What was the question?

LS: The issue was simply, could someone without the personal experience have done it. You went through so much.

RBG: Yes, yes... I felt that I was speaking for the people in the cases we brought. The turning-point case was *Reed v. Reed*. The plaintiff was a woman who probably never heard the word “feminism.” She took care of elderly people in her home. That’s how she made her living. She had a child. He was a teenager. She and her husband were separated. She had custody of that child when he was in his “tender years”—that was the mother preference that then existed. But when the child was ready to be prepared for a man’s world, the father (at least the father of a boy) often got custody or enhanced visitation rights. It was a long story, but just to tell you the tragic end, one day when the boy was in his father’s care, he used his father’s rifle to commit suicide. Sally Reed wanted to be appointed administrator of her son’s estate. Her husband, perhaps out of spite, also applied to be administrator of an estate that had virtually nothing in it. Idaho had a law that settled such questions. It said, as between persons equally entitled to administer a decedent’s estate, males must be preferred to females. That was an ideal case. But Sally Reed was in fact the kind of plaintiff we came upon over and over again. Persons who said, “Something here is unjust.” And we had a system that could respond to complaints like that. So I was able, with my lawyer’s skill, to speak for people who were treated unfairly but hoped they could effect change because of our system of justice.

LS: Talk a little bit more about some of the things you went through. I know there’s the story about the Judge Learned Hand?

RBG: One of the greatest judges that ever sat, in the United States or in the world. It was late 50’s days. Judge Learned Hand would not engage women as law clerks and he didn’t try to be obscure about it. He said, in effect, “I will not entertain the idea of having a woman as a law clerk.” Well, he was a gentleman of a certain age. My Judge lived around the block from Learned Hand and, if I finished work on time, I sat in the back of the car while my Judge drove Judge Hand home. The great jurist would sing, booming at the top of his voice, he’d sing sea chanteys, or Gilbert & Sullivan. He had a rather colorful vocabulary, including some words that my mother never taught me. I said to him, “Judge Hand, you say anything and everything that comes into your head in this car, and yet you won’t consider me for your law clerk.” He responded, “Young

lady, I am not looking at you.” And that was it. He would have felt uncomfortable, he would have had to censor his speech dealing with a woman in that relationship.

LS: Tough time. We all went through it. Let me take you up to 1981. You were qualified. You’d been mentioned. How did you feel when Sandra Day O’Connor was nominated for the Supreme Court?

RBG: I thought it was terrific for the country. There was no chance that I was going to be nominated by President Reagan. But it was certainly time. I remember being in my car, turning on the radio, hearing the news, and thinking, “Isn’t this grand!” She has been to me very much like a big sister. We divide on some important questions, but I know if there’s ever a problem inside the court, or outside... Sandra was the first person to call me in the hospital after my colorectal cancer surgery. She had breast cancer some years back so she was able to prepare me for what to expect. I think we have an enormous affection and respect for each other, even though on some very important issues we are going to be on opposite sides.

LS: Give us a little sense, if you can, of what, if anything, goes on while you’re sitting there listening to arguments about something that we would consider a women’s issue or a sex discrimination issue. Do you shoot each other glances? Is there that kind of ‘knowing’ look?

RBG: It happened in the VMI case, when I was reading the summary of my opinion from the bench and I mentioned a case called “Mississippi University for Women against Hogan.” When I mentioned that case name I turned to Sandra, because she wrote that decision at the end of her first year on the court in 1982. She wrote a five-four decision. By the time of the VMI case some 15 or 16 years later, there was only one dissent, not four. And that to me was a sign of the education that had gone on. Another observation. The Supreme Court works by seniority. How did I get to write that decision when I was then number 8, and Sandra was number 3? That says something about the relationship we have.

LS: Is there, dare I say it, safety in numbers for women at the Supreme Court? Is it better for you that there are two of you, do you think?

RBG: In the most literal of ways. When I became a member of the court,

they rushed a renovation in the robing room and it was to create a women's bathroom equal in size to the men's. Another rule that got swiftly changed was that the public bathrooms opened for men when the building opened, but the women's bathroom on the floor where the courtroom is located didn't open until 9. When *Dear Abby* or *Ann Landers* told Sandra and wrote to us that this was the case, we couldn't believe it. Then we checked and sure enough, it was.

LS: These are what we call basic changes. Talk to us a little bit about the difference you think it makes to have women sitting on any bench, and particularly on the Supreme Court.

RBG: Well, it says to the world, "We're here not as one-at-a-time curiosities. We are here to stay, and in all our diversity." I went through the entire last term which was my, what, seventh year on the court, with no one calling me Justice O'Connor. It took six years, but that, to me, was a sign that we've really made it, that all know there are two women.

LS: Which reminds me. Would you tell the T-shirt story?

RBG: The National Association of Women Judges, with great foresight, had a little celebration at the court when I took my seat. They presented gifts to Sandra and to me, T-shirts made for the occasion. Hers reads, "I'm Sandra, not Ruth" and mine reports, "I'm Ruth, not Sandra."

LS: Which, of course, you did not have to wear tonight. Justice O'Connor has said, "I think the important fact about my appointment is not that I will decide cases as a woman, but that I am a woman who will get to decide cases." You've heard the question a million times, I'll ask it to you again. Do you think there's a difference between the way a woman decides a case versus a man?

RBG: Judge Jeanne Coyne, who was on the Supreme Court of Minnesota, which I think was the first state Supreme Court to have a majority of women, once said, "A wise old man and a wise old woman will reach the same judgment." I think that is true. But we also bring to the table our life's experience, which is different. A very important difference: Are you male? Are you female? Are you a girl from the golden west? Or are you a kid who grew up in Brooklyn? All of those differences, I think, make the Supreme Court bench, make all the benches in the country, ever so much

better than they were when only one kind of person sat in the seat of judgment.

LS: What kinds of things are you still hearing that reek of sex discrimination? What kinds of comments get made? What kinds of things still surprise you in the year 2000 that you're hearing having been through what you've been through and helped change so much of this legislation?

RBG: One day not too long ago, a reporter noted an argument during which I interrupted Justice O'Connor when she was asking a question. That item was picked up in many papers with the headline, "Rude Ruth Interrupts Justice O'Connor." Asked to comment, I said, "Well, the guys do it to each other all the time and no-one notices." Quite true, but looking at two women was more interesting. There were some amusing follow ups. One woman, a specialist in language (how people talk), explained that the reason this kind of thing occurred is that Sandra was a girl from a ranch in Arizona, very laid back, and Ruth was this fast-talking Jewish girl from Brooklyn, New York. People who know the two of us will confirm that Sandra says about two words to my every one.

LS: You have mentioned in some of your writing, one of your efforts was to get so-called humor out of the law books. The one that I love is the one where you quote the phrase, "Women, like land, is meant to be possessed." This was part of the law, right?

RBG: That familiar wisdom was in a law school casebook published around 1970.

LS: Right. Do some of these things still exist? Are they still there? What are the words that still have to come out of the text, as far as you're concerned? Or what's the attitude that's still missing? Or are we okay in that area now?

RBG: There's very little in the way of overt statement. It's more subtle. It's underground. Often, it's unconscious bias, which is more difficult to identify and to combat. It's a person interviewing someone for a job and somehow the person who is hired tends to resemble the one doing the hiring. That kind of unconscious bias. Now, some systems have rather strong medicine for it. At the panel this afternoon, there was a reference—I think by Judith Resnik—to the system of parity in France where party lists for

local elections will include an equal number of women and men. That idea was promoted strongly by the Minister of Justice, Elisabeth Guigou. Her idea was that women, once they get elected a first time, are a shoe-in after that because they do such a good job. But to get that first job is very difficult and needs something as radical as equal numbers on the party list to accomplish that result.

LS: Is that a matter for the law or is that a matter of policy?

RBG: Law expresses policy. What did the great Civil Rights legislation do other than express the policy of the nation that it was time to get rid of apartheid in America?

LS: What are the big issues that you see out there now for women? I feel as if I want to say, “what’s left” in the broader sense.

RBG: In some ways it’s the most familiar issue and the largest one. It’s, “Who will take the responsibility for bringing up the next generation?” That, I think, is the hardest problem. There can be incentives and encouragement, but women will have achieved true equality when men share with them the responsibility of bringing up the next generation.

LS: And speaking of the next generation, what is your sense of the young women who are out there in many cases holding 50% and sometimes more, of the jobs in certain areas? Do you think, “Well, how do we deal with this, ‘I hate the word, “feminism,” stuff?” How do we deal with the young women who are saying, “I’m not a feminist, *but...*” What do you make of all that?

RBG: There was always that. It’s like anyone else who doesn’t understand. You do your best to explain. In so many of these cases life’s experiences will be the teacher for young women who think there’s no problem anymore, so they don’t have to do anything... My generation was so differently situated. We knew what the people who had gone before had done. We knew how brave they were and we knew that we were standing on their shoulders. I don’t think there’s the same sense of that anymore. Many young women today might say, “Well, I never encountered discrimination, so what is this all about?”

LS: Does that trouble you or do you think that’s the way it ought to be

since they've grown up in a society that largely does not discriminate against women?

RBG: Well, I wish that that's the way it will be, but as I said, we're not there yet. It still takes persistence, in setting a good example, in gentle persuasion. At least for the rest of my life that's going to be necessary, and the rest of my daughter's life, perhaps not my granddaughters'.

LS: Do you think this country needs an equal rights amendment at this point?

RBG: The word "needs" is not the one I would use. Much that the amendment was designed to do has been accomplished in tangible results through legislation. Still, it's a tremendously important symbol. We were talking this afternoon about other human rights documents, modern charters, like Canada's or South Africa's. Margie Marshall mentioned that those documents are not so different from our Bill of Rights or the Massachusetts Bill of Rights. It's true that many of them express social and economic rights, while we concentrate on civil and political rights. But there's another thing they all do, almost every one of them. They have a statement that men and women are equal before the law. And to think that the U.S. Constitution doesn't make that basic statement, when almost every post-Second World War constitution does, says something about our society. U.S. children studying the Constitution in their civics class won't see that basic statement. Children elsewhere will. It is a basic statement for the century just beginning. It is certainly a fundamental human right that men and women should have the chance to pursue whatever is their God-given talent, and not be held back simply because they're male or female. The Equal Rights Amendment is an expression of that idea, and I think for that reason it belongs in the Constitution.

LS: Do you see any hope for its passage?

RBG: That depends on whether the young women care enough about it. If they don't, it won't pass. And if they decide that the United States should have this basic principle in its fundamental instrument of government as so many nations have in their constitutions, they will work for its passage.

LS: After you made the VMI ruling, Phyllis Schlafly wrote, and I don't

have the exact quote, but I believe it was something like, “It expressed Ruth Ginsburg’s radical feminist agenda” or something like that. Do you consider yourself a radical feminist?

RBG: She said, “Every senator who voted for her confirmation shares in the shame of this decision.” That’s exactly what she said.

LS: Does that trouble you when you read things like that?

RBG: Not when I know that there were six others who shared in the correctness of the decision.

LS: When you are up there making the kinds of decisions you’re making, you get a lot of praise, you get a lot of criticism. What hurts you?

RBG: Well, I’m dejected, but only momentarily, when I can’t get the fifth vote for something I think is very important. But then you go on to the next challenge and you give it your all. You know that these important issues are not going to go away. They are going to come back again and again. There’ll be another time, another day.

LS: Was there anything terrifying about the first time you actually opened your mouth when you were on a bench at the Supreme Court?

RBG: I had had a lot of practice: seventeen years teaching at a law school, thirteen years on the Court of Appeals for the D. C. Circuit, also about ten years pursuing cases that we hoped would end up before the Supreme Court, having as my colleagues three people before whom I argued in the 70s. So it wasn’t an unfamiliar venue for me.

LS: So much of obviously what we’re talking about and so much of your work has been dealing with the issues of men and women and your comment about what it’s about as raising the next generation. Do you think it’s all about men and women? Is it all about what used to be called, “The Battle of the Sexes”—and we’ve had so many names for it between now and then. Is that really what it comes down to or is there some other principle that you think is the major principle that we’re dealing with now?

RBG: It’s part of a human rights agenda that people should not be held back because they were born female, born male, born—what’s the line

from Gilbert & Sullivan—a Russian, Turk or Prussian, or whatever national origin, whatever religion. The core idea is that we should not be held back from pursuing our full talents, from contributing what we could contribute to the society, because we fit into a certain mold, because we belong to a group that historically has been the object of discrimination. So it's that idea of people being able to contribute what they can contribute to make this society better without being held back because of the group they come from.

LS: We have a room full of very distinguished people here. Many lawyers, as I said, and judges. What if someone wants your job? What should they do? I don't mean, by the way, to take it away from you. I mean to get a similar one.

RBG: Have not a little, but a lot of luck! There are only nine of us and who the nine will be at any particular point in time depends so much on chance. When people ask me, "Did you always want to be a judge?" I think back to the year I graduated from law school, 1959. There had been in the entire history of the United States only one woman ever on a Federal Court of Appeals. She was Florence Allen, appointed by President Roosevelt in 1934 to the United States Court of Appeals for the Sixth Circuit. After she left there were none until 1968 when President Johnson appointed Shirley Hufstедler to the United States Court of Appeals for the Ninth Circuit. Certainly none on the Supreme Court. The first woman appointed to a Federal trial court was Burnita Shelton Matthews, chosen by President Truman in 1949. Women and judges, until the 1970s, were two categories that didn't go together.

LS: Not in the same sentence anyway.

RBG: The person who made the big change in the United States was Jimmy Carter. He never had a Supreme Court appointment to make, but did, quite literally, change the face of the federal judiciary across the country. He set a pattern that no President since has ever departed from, a practice of including on the bench people who represent all of the United States and not just one segment of it.

LS: Do you think you have the best job in the world?

RBG: I think I have the best job in the world for a lawyer, yes.

LS: Answered as only a lawyer can answer. Wouldn't want to trade it for anything else right now?

RBG: It is constantly exhilarating and also exhausting.

LS: Justice Ginsburg, so much to discuss, so little time. I think we could probably go on forever, but I'm going to thank you at this moment for letting us enter your life and enter your mind for just a short period. I want to close with a nod to a woman that I know we both admire, Susan B. Anthony. Towards the end of her extraordinary life, which happened also to be the end of the 19th century, during which she had led the fight to get us the right to vote, a reporter asked her about the new century that was dawning. "I am filled with sadness at this passing of the 19th century," she said. "I feel as if I had just buried my dearest friend. But then this new century will be just as good." The reporter interrupted with the question, "Well, Miss Anthony," he said, "What message have you for the new century?" Anthony responded with eloquence (keep in mind she was approaching 80 years of age). She said, "We women must be up and doing. I can hardly sit still thinking of the great work waiting to be done. Above all, women must be in earnest, we must be thorough, and fit ourselves for every emergency. We must be trained and carefully prepare ourselves for the place we wish to hold in the world." Justice Ginsburg, you have helped make possible the place that so many of us hold in the world. With determination like yours, we should all be able to join in the words of Susan B. Anthony and say of our future, "Failure is impossible." Thank you very much.

EVAN A DAVIS: I want to thank Justice Ginsburg and Lynn Sherr. It takes two to have a great conversation and that was a great conversation.

Justice Ruth Bader Ginsburg
Distinguished Lecture on Women and the Law

Constitutionalizing Women's Equality

Kathleen M. Sullivan, Dean, Stanford Law School, delivered the Inaugural Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law at the Association, November 15, 2000.

Ours is the only major written Constitution with a bill of rights that lacks a provision explicitly declaring the equality of the sexes. The French Constitution since 1946 has provided that "The law guarantees to the woman, in all spheres, rights equal to those of the man." Article 3 of the German Basic Law provides that "Men and women shall have equal rights," and that "No one may be disadvantaged or favored because of his sex...." The Constitution of India provides that "the State shall not discriminate against any citizen on grounds of ...sex...." Among newer constitutions, Canada's provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ...sex...." And South Africa's provides that neither the state nor any person may "unfairly discriminate directly or indirectly against anyone on ... grounds including ...gender, sex, pregnancy, or marital status...."

In contrast, the United States Constitution, in its original text, never

referred to women at all. The only known use of the pronoun “she” in the framing deliberations concerned a later-rejected clause that would have referred to the rendition of fugitive slaves. Of course some clauses must have applied implicitly to women (e.g., habeas corpus, ex post facto, bills of attainder). But the Constitution provided no federal protection against laws that disenfranchised women, excluded them from juries, barred married women from owning property or suing in their own capacity, or the like.

The 14th Amendment of course added that “no state shall deprive any person of the equal protection of the law,” nor of the “privileges and immunities” of federal citizenship. But nothing in that provision or the circumstances of its framing contemplated equality for women. Indeed, section 2 of the 14th Amendment, to the horror of contemporary suffragists who had also fought for abolition, introduced the word “male” into the Constitution and linked it to the franchise, providing for the apportionment of representatives among states by population but penalizing states that limited the vote of non-criminal “male” inhabitants.

The Supreme Court soon confirmed that the majestic guarantees of section 1 of the 14th Amendment did not apply to women, even when challenging express formal discrimination against them. In 1873, the Court denied that federal privileges and immunities included right of Myra Bradwell to practice law in Illinois; even Justice Bradley, who had a day before dissented from the decision in the Slaughterhouse Cases, arguing, contra the Court, that federal privileges and immunities should include the right to pursue an occupation, wrote in *Bradwell* that such privileges would apply to men only: “it certainly cannot be affirmed, as an historical fact,” that “it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.” The next year, in *Minor v. Happersett*, the Court denied that federal privileges and immunities included the right to vote in state elections, suggesting that women may be persons within the meaning of the 14th Amendment, and even citizens, but that they were not thereby entitled to participate in a political or professional realm reserved to men.

The only provision of our Constitution that addresses women's equality specifically is the 19th Amendment, which provides that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.” The provision has been construed narrowly to apply only to the formal franchise; in the aftermath of its 1920 passage, the Court failed to find in it any implied right against sex discrimination in jury service; women could constitutionally

be excluded from jury service even if states chose jurors from the very election rolls that the 19th Amendment required the states to extend to both sexes. And as late as 1948, the Court upheld a Michigan law forbidding women to be licensed as bartenders unless they were the “wife or daughter of the male owner” of a bar.

Unlike the Reconstruction amendments, which separately enacted an equal protection guarantee in the 14th Amendment and a ban on race discrimination in voting in the 15th—suggesting that the content of racial equality was not limited to equal access to the voting booth—we have never enacted constitutional text that similarly extended equal protection on the basis of sex. To be sure, the Equal Rights Amendment, debated in successive Congresses since 1923 and proposed by both houses in 1971-2, would have provided that, “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” But it had the ignominy of being one of only six amendment proposals in our history to have passed Congress but failed ratification in the states, falling 3 states short of the 38 needed before its extended deadline lapsed in 1982.

The story of constitutionalizing women’s equality in our own system is therefore a story of creative interpretation of the equal protection clause, and in turn a story of advocates’ bravado. Led with inventiveness and strategic brilliance by now-Justice Ruth Bader Ginsburg, litigating as a founding director of the ACLU Women’s Rights project, women’s rights advocates persuaded the Court to read guarantees of sex equality into the equal protection clause by analogizing sex discrimination to race discrimination, and arguing that it ought similarly be presumed an invalid basis for law. The story is familiar but nonetheless still astonishing in retrospect. Out of thin blue air in 1971, *Reed v. Reed* held it irrational and hence unconstitutional under the equal protection clause for the state of Idaho to prefer “males to females” as estate administrators when the degree of relationship to the decedent was otherwise a tie. The decision enabled Sally Reed, as against her separated husband, to administer the estate of their teenage son, who had committed suicide with his father’s gun.

In 1973, in *Frontiero v. Richardson*, Ginsburg won a case on behalf of a servicewoman challenging a rule that presumed wives dependent on their military husbands for purposes of obtaining housing and medical benefits, but required husbands to prove dependency on their military wives. Ginsburg’s brief dryly called prior cases permitting states to exclude women from voting, jury service, and membership in either kind

of bar, "precedent in need of reevaluation." Urging the Court to adopt strict scrutiny, or a strong presumption against sex discrimination in the absence of a compelling justification, she won the votes of 4 justices, led by Justice Brennan, but not quite the 5 she was usually so gifted at counting to.

Challenging similar presumptions of female dependency in cases brought by men aggrieved by benefit hurdles, Ginsburg obtained similar results: *Weinberger v. Wiesenfeld* (1975) held that social security survivor benefits could not go automatically to widowed mothers but only to those widowed fathers able to prove dependency—in a case where the widower sought to raise the baby son his wife had left behind when she died in childbirth (he later went to law school). And *Califano v. Goldfarb* (1977) applied the same logic to social security spousal benefits. In the course of litigating *Wiesenfeld*, Ginsburg lowered her sights from strict scrutiny, which would operate as a strong presumption against sex discriminatory laws, to merely heightened or intermediate scrutiny, under which an important government interest might be balanced against and sufficient to sustain a discriminatory law. The Court did not adopt that standard in that case, but did so a year later in *Craig v. Boren* (1976), which held that 18 year old boys, like 18 year old girls, had an equal right to buy near-beer.

Imagine the satisfaction Ruth Ginsburg must have felt in 1996 when, now as a Justice, she announced the Court's 7-1 decision in *United States v. Virginia*, which held that Virginia had failed to provide the needed "exceedingly persuasive justification" for excluding women from the Virginia Military Institute and placing female would-be cadets in a separate and decidedly unequal girls' school that foreswore the adversative method of the rat line at VMI. Overbroad generalizations about talents and capacities based on sex were not just an unpersuasive justification but an impermissible one, ruled the Court, and an argument that Virginia was merely providing a diversity of educational opportunities might have been sufficient had it been the real reason for sexual segregation *ex ante*, but was not sufficient when concocted *ex post*.

Now note how difficult and tortuous this path was. And note how the cases constitutionalizing women's equality were largely brought on behalf of men. Why? Because the lack of constitutional text required a kind of path dependency in relation to precedent: the argument for invalidating sex discriminatory laws depended on analogizing them to race discrimination. Equal protection law was the creature of slavery and reconstruction, the central American equality issue. And the Court faced certain analogical crises in determining the relation of sex discrimination

to discrimination on the basis of race. On the one hand sex is like race: it is a visible and (generally, transgender transformations aside) immutable characteristic that had been used to typecast and classify without regard to individual merit in relation to public benefits and burdens. Sex is also like race in that women, like African-Americans, have been subject to social prejudice and stigma if they exceeded the boundaries of the roles laid down for them, as well as to formal legal disadvantage with respect to voting, jury service, occupational licenses, property ownership and the like.

On the other hand, sex importantly differs from race in some respects. If courts ought, in Justice Stone's famous words from *Carolene Products* footnote 4, to show special solicitude for discrete and insular minorities, it might well be objected that, like the Holy Roman Empire—which was neither holy, Roman, nor an empire—women are neither discrete, insular, nor a minority. Women are a numerical majority both demographically and, after the 19th Amendment, electorally, and can exercise majority voting power if they vote as a block. (For example, Gore received 54% of women's votes and 42% of men's; if only women had voted, Gore would have won 31 states and 370 electoral votes, *chad* or no *chad*). Women have not experienced entrenched residential segregation, as have racial minorities, but for the most part (lesbian households without male children aside) are integrated with men, household by household, as wives, lovers, sisters and daughters. The history of separate spheres for men and women differed from the history of separate but equal that characterized the era of American apartheid from *Plessy* to *Brown*—the division of labor it enforced was not rooted in fear or loathing so much as in “romantic paternalism.” And even if, as Justice Brennan famously wrote in *Frontiero*, the pedestal can become a cage, no one ever confused a pedestal with an auction block upon which human beings were literally bought and sold as chattel. Above all, while race has been deemed more a social than a biological construct, women alone can gestate and bear children (men uniquely suffer the disability of being unable alone to create new life), so there is an irreducible biological difference between men and women that has no analogue for race.

When faced with analogical crises, the Supreme Court often splits the difference (cf. campaign finance and commercial speech), and the qualified intermediate scrutiny it settled upon expresses that ambivalence in law. Where there are real differences between men and women, the Court accords no heightened scrutiny whatever: exclusion of pregnancy from publicly funded medical benefits was not sex discrimination but a

distinction between “pregnant and non-pregnant persons” (Geduldig); protecting underage girls but not boys under a statutory rape law merely reflected a natural asymmetry—the heavy burdens of possible pregnancy would deter girls from underage sex, but boys needed the added disincentive of the criminal law (Michael M.). Separate but equal might sometimes be permissible for sex though not for race—at a minimum for bathrooms and, as a tantalizing footnote in *VMI* suggested, even sometimes for all-girls’ public schools. And laws self-consciously and deliberately passed to compensate for past discrimination against women—allowing women more years for up or out in naval officer candidacy (Ballard), or fewer low-paying years in calculating social security retirement payouts (Webster)—might be upheld, even with fuzzier records of past official discrimination than the current Court requires to uphold ameliorative preferences on the basis of race.

So much for our own actual history of constitutionalizing women’s equality by vague text and imperfect racial analogy. Now imagine a thought experiment: what if we were in a position to constitutionalize women’s equality from scratch? What if a trio like Ginsburg-Anthony-Stanton were the framers instead of Hamilton-Madison-Jay, and the context was a society like our own, minus our racial history—an advanced industrial, democratic society with a history of legally and culturally enforced stereotyping of women into the home and family and out of the market and war, but unconstrained by the central legacy and metaphor of human bondage rooted in racism? What jurisprudential choices would face them in drafting a constitutional provision providing for women’s equality with men? There are five basic axes on which such drafting would turn:

First, the choice between generality and specificity. Should the provision advert specifically to sex, or to women, or merely to general principles of nondiscrimination or equality? This is an old debate, between rules and standards, between 65 mph and drive safely for the conditions on the road. Our federal constitution mostly consists of open-ended, vague, broad standards (e.g., freedom of speech, not freedom to burn flags/make political contributions/engage in erotic dancing in the nude; right to equal protection in the franchise, not right to count one’s dimpled, hanging or pregnant chad). State constitutions are often far more detailed and specific, and for that reason less constitution-like—picture the 10 commandments with a few alternate side parking regulations thrown in.

The key difference between the two choices—generality or specificity—is really about the jurisdictional or institutional allocation of discretion. A broad vague standard leaves much more discretion to future inter-

preters and decision makers to decide what facts are relevant to the policy expressed, and to expand the scope of application beyond initially contemplated fact scenarios. Specificity is more directive and restraining, tying future interpreters' and decision makers' hands. Our own equal protection clause interpretation illustrates the discretionary character of broad, vague, general standards: having pointedly excluded women suffragists at the outset, it has become the textual basis for enforcing women's equality today.

But note that the use of general standards defers to another day and decision maker questions about whether women count, and if they do, whether pregnancy discrimination is sex discrimination, and in respect of what women should count as equal—civil rights such as property ownership and the capacity to sue, political rights such as voting, jury service or the holding of public office, or rights against private actors by analogy to the 13th Amendment's ban on slavery.

In contrast, more specific provisions might particularize either the classifications or the classes covered, and/or the privileges and immunities to which the ban on discrimination applies. As an example of a highly specific provision, in contrast to the generality of our equal protection clause, consider Article I of the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which arises from the 1948 United Nations Universal Declaration of Human Rights. The Declaration, like our equal protection clause, is general: "All are equal before the law and are entitled without any discrimination to equal protection of the law." CEDAW, in contrast, is highly specific: it defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women in human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Note that specificity does not entail narrowness! General/specific is a different axis from narrow/broad.

Why might one specify classes (women) or classifications (sex) (more on that distinction in a moment)—as do many of our own antidiscrimination statutes, the constitutions of 21 states, and as mentioned earlier, constitutions of many other nations—rather than simply say, as a general matter, no irrational discrimination? After all, any individual may be the victim of irrational discrimination—here in California, for example, we might worry about discrimination against Scorpios, even though elsewhere in the country, signism might not seem alarming—and laws might

simply bar arbitrary adverse treatment, as, for example, common carrier statutes do. One answer is that specificity may function as an administrative shorthand, expressing the principle that all irrational discrimination is bad but that racial, sexual, religious etc. discrimination may be conclusively or nearly conclusively presumed to be irrational. This is a method of categorization familiar in other contexts; think of *per se* rules against price-fixing in antitrust.

The use of specific group-based criteria might also be understood to increase the efficiency of enforcement: all irrational discrimination is bad but sex etc. discrimination is atypically likely to be persistent and not self-correcting given the entrenchment of discriminatory social norms. Specificity helps isolate and focus legal resources upon those social groups that are likely to experience irrational discrimination more commonly than would be the case through the random exercise of idiosyncratic tastes. This may follow from animus toward members of such groups or mistake about their capabilities based on false stereotypes. The key is that such attitudes are socially systematic or widespread, and so not easily escaped through simple exit, as in the case of an individual faced with an adverse response from an isolated idiosyncratic actor (e.g. one adverse to Scorpios). While the Scorpio can go across the street to another store where the merchant will be less hostile, discrimination against women or like groups is likely to be particularly pervasive, persistent, entrenched, and unlikely to be self-correcting.

Another possible answer is that a generalist alternative depends upon a clear baseline for appropriately equal treatment. In the conventions of the market, for example, discrimination means treating workers differently despite their equal marginal product, or treating customers differently despite their prospects of equal net revenues to the seller. But it is far more difficult to specify an appropriate baseline for government in regulation or redistribution. What net marginal amount of safety does the government owe each additional citizen in a jurisdiction? Which entirely optional benefit out of a finite pool? Any attempt to surmount these problems leads to formulations that are hopelessly vague or circular, such as "no consideration not relevant to the purpose of the government program" or worse, "no irrational discrimination."

So much for generality and specificity; second would arise a choice between symmetry and asymmetry. Should the ban on discrimination apply to forbidden classifications (no discrimination on the basis of sex, no discrimination on the basis of race, no discrimination on the basis of sexual orientation) or to protected classes (no discrimination against women;

no discrimination against African-Americans, no discrimination against gay men and lesbians)? If you aim at classifications, men can sue as readily as women, and whites as readily as blacks. This too is an old debate, between formal and substantive notions of equality, between the view that the constitutional injury is treating people differently across an irrelevant criterion, and that the injury is subordinating one group to another. As the first Justice Harlan put the two alternatives adjacently in his dissent from the separate-but-equal holding of *Plessy v. Ferguson*: our Constitution is color-blind; and we have no system of caste. If you think only caste matters, asymmetry is acceptable; as the well-known radical feminist Justice Rehnquist said in objecting to heightened scrutiny of laws nominally advantaging females, he was not sure why men needed the special solicitude of the courts.

The ERA—which would have barred discrimination on the basis of sex—would have chosen classification not class, proceduralism over substantive distribution. For the most part, so does our judicially crafted gender discrimination law—male plaintiffs initiated 2/3 of the sex discrimination cases that have gone up to the Supreme Court, with the VMI case being the rare recent counterexample of a case initiated on behalf of excluded women. Contrast this with the approach of, say, the Ugandan Constitution, which provides that “women shall be accorded full and equal dignity of the person with men,” or CEDAW, which, by the terms of its title, is both specific and aimed at the protection of the class of women rather than the classification of sex. (Some laws split the difference; the recently invalidated civil damages provisions of the federal Violence Against Women Act created a cause of action against “gender-motivated violence.”)

Why choose classifications over classes? Is it merely to create an appearance of neutrality? A strategic necessity to enlist the participation or acquiescence of the dominant group in an antidiscrimination regime? Ruth Ginsburg’s answer, like Justice Brennan’s in his famous pedestal as cage metaphor, was not merely strategic but frankly substantive: dissolving sexual inequality, or empowering women, depends upon freeing both men and women from the gender roles in which historical socialization has immured them. Apparent preferences for women out of civic duties and hard jobs helped immure both women and men in separate spheres, impeding both men and women from pursuing opportunities that might make them exceptional to their gender. And women’s freedom from stereotypes of fragility and dependence necessitates men’s freedom from stereotypes of aggressor and paterfamilias. Equality functions in this view as a preference for fluid over fixed identity. In this view, a man challenging

sex discrimination is virtually representing women's best interests as well as his own.

Even assuming you choose a basically symmetrical approach to a sex equality guarantee, should there be a partial asymmetry that excepts affirmative or ameliorative action, or laws designed to advance substantive equality by preferring in some respect the traditionally disadvantaged group? Again, one might make such an exception more or less specific. Canada, for example, provides in its Constitution that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination, and, in particular, without discrimination based on ...sex," but then states expressly that this provision "does not preclude any law, program or activity that has as its object the amelioration of conditions of groups disadvantaged on the basis of...sex." Our own constitutional law, while containing nothing so formally specific, as a practical matter upholds some preferences as forms of well-justified inequality—recall the compensatory rationales by which *Califano v. Webster* allowed women retirees to calculate social security payouts so as to offset their receipt of lower wages than men during their working years; or *Schlesinger v. Ballard* gave women more time for promotion in the Navy, partially offsetting the effects of exclusion of women from combat-rated jobs.

The question remains what counts as acceptably ameliorative—a particular difficulty for our own constitutional law of sex discrimination, paved so significantly upon the elimination of preferences for biological females, often at the behest of men. The short answer our Supreme Court has arrived at is that affirmative action for women is OK; affirmative action for ladies is not. As Ruth Ginsburg put it in a 1988 lecture on "Women Becoming Part of the Constitution," habits or traditional ways of thinking that lead to laws "grossly drawn solely by reference to sex" are not acceptable—hence exceptional men have to be admitted to Old Miss nursing school and exceptional women to VMI—but a legislature that actually looks to the empirics of past economic discrimination against women still has "a corridor in which to move" by taking corrective or compensatory measures.

What counts as affirmative action for ladies may still be difficult to discern. As Ginsburg cautioned in a 1999 lecture on affirmative action and human rights, special pregnancy benefits or any other special care and assistance toward motherhood, raise "a troubling concern: Patriarchal rules long sequestered women at home.... It is not always easy to separate rules that genuinely assist mothers and children from those that

confine women to traditional subordinate status..." No need to remind those many women professionals who have found that taking time off from work to raise children continues to carry with it significant and often irreversible professional penalties. Hence the temptation to be sparing in departing from symmetry; for example, NOW LDF, the ACLU Women's Rights Project and other feminist groups filed briefs in the 1987 case of *California Federal Savings & Loan v. Guerra*, arguing that it was sex discrimination to grant paid pregnancy leaves but not disability leaves to other workers incapacitated for similar periods—an argument the Court rejected.

The third methodological choice facing the hypothetical feminist drafters would be whether to apply the ban on discrimination only to public or also to private action. The 13th Amendment is our only federal constitutional provision that by its own terms applies to private action, though the 14th Amendment's enforcement clause was meant to empower Congress to reach at least some private discrimination that was unlikely to be remedied by the states. Some other constitutions, in contrast, address private discrimination directly. Consider the South African Constitution, which provides that "the state may not unfairly discriminate directly or indirectly on ground of sex...", but also that "No person may unfairly discriminate directly or indirectly against anyone on such a ground."

Our own tradition of limiting constitutional constraints to government action is deeply rooted in policies of both privacy and federalism. Requiring the federal government and the states to treat women as the equals of men does not entail requiring husbands thus to treat wives, or employers thus to treat female employees. Constitutional immunity for a private sphere fosters normative pluralism; we do not impose upon all associations the constitutional norms we impose on government. While citizens enjoy robust rights against the state, this view holds, intimate or expressive groups ought not be conceived as miniature governments, microcosms of the democratic polity in which members are conceived as rightholders vis-a-vis their groups. The social institutions of liberal democracy need not be liberal or democratic all the way down; private associations ought not all be colonized as outposts of public virtue. Maintaining safe harbors for private inequality promotes a kind of liberty or check on the homogenizing power of the state. However equalized the public sphere, at home women may still choose to be ladies, even if it is a dying art.

Moreover, the state action requirement for federal constitutional claims preserves a default of decentralized government: it is principally the states,

with their plenary powers, not the federal government with its thinner delegated powers, that are assigned the task of regulating private life. This provides a geographical dimension to normative pluralism—some states will regulate differently from others.

Antidiscrimination norms thus have been extended against private actors in our system principally by statutory rather than constitutional prohibitions. Congress may require sex equality in employment, housing, public accommodations, education or other activities significantly affecting interstate commerce (even after *Lopez*), and states may require sex equality anywhere they want—subject only to independent constitutional constraints such as the freedom of private expressive association that, as currently understood, would allow the Boy Scouts or Male Supremacist Society to exclude women in the teeth of state law, but not the Rotary or Jaycees. Congress may also legislate to remedy state deprivations of equal protection, including selective omissions to protect members of some groups from private interpersonal violence. States need not have murder or battery laws at all, but if they have them, sheriffs may not look the other way when blacks are lynched or women battered, and if they do then Congress may correct the state's omission through federal remedies (at least against the sheriffs or those implicated in their public inaction). This principle was not rejected in *United States v. Morrison* last term; the Court simply did not find civil damage actions that Congress had provided against the private perpetrators of date rape appropriately tailored to correcting the state omission (nor did it find date rape regulable under the commerce power because not an economic event).

The argument for rejecting this approach and instead applying constitutional norms directly to private actors might take a general form and a form specific to the situation of women. In general form, it would hold that social equality is a necessary precondition to civic or political equality; it does no good to ride a segregated bus from a segregated neighborhood to an integrated voting booth to cast a ballot and then recede. The broader the private discrimination, the more enfeebled the exercise of civic participation on equal terms. Hence the need to contain private discrimination in order to make meaningful the bar on public discrimination. In a society in which women are beaten at home or hassled on streets, few may even bother to go to the polls. Equal rights to contract are not enough without equal rights to contact; on this view, contra last term's decision, Jim Dale should have been allowed to integrate and thus demonstrate gay competence to other Boy Scouts.

The argument for applying constitutional norms specifically to pri-

vate discrimination against women might add the additional concern that women's entrenchment in the private sphere and notions of real differences will make state omissions of enforcement particularly hard to prove, necessitating remedies that directly reach sexist private actors. Date rape at home does not fit the model of conspiracies to keep blacks from traveling public streets. Nor will a state's differential treatment of rape as compared with batteries committed typically against men necessarily appear a denial of equal protection in the first place.

While there is much to such arguments, some cautions are in order. First, it would be a mistake to see federal law as wholly abandoning women to the more "private" realm of the states; as Judge Patricia Wald has pointed out, federal law regulates family life considerably through a range of measures from tax and benefit schemes to the constitutionalization of rights of marriage, parenting, and family formation. Nor does protection of women's interests necessarily increase linearly with ever larger units of government. Recall that a strong view of state autonomy, which left the states free to prescribe substantive qualifications for voting, permitted western states to enfranchise women at a time, well before the 19th Amendment, when the national consensus would not have permitted it. Local experiment might mean civil unions for gay people in Vermont while nationalization means the Defense of Marriage Act. And the states today, despite the continuing gender bias that Congress considered in VAWA and the Court in *Morrison* accepted *arguendo*, are hardly the backwaters with respect to women's rights that the southern states were with respect to race relations in the 1950's and 1960's—rape laws have been widely reformed and sexual violence units instated. A second caution is that privacy can be good for women; among other things, it allows reproductive autonomy and Seven Sisters' colleges. Of course some might say such things would be protected anyway under a properly substantive view of equality, but in its absence, one might want to hesitate before constitutionalizing too much of the private realm.

The fourth choice for our drafters would be one between negative and positive rights: should women have only freedom from legal exclusion and discrimination, on the one hand, or also some guarantee of freedom to work, to minimal subsistence, to equal pay, to literacy, to reproductive control, to health care, to education—in short to the material preconditions of meaningful exercise of equal rights of citizenship? Here the concern is less that women will be battered at home than that they will be tethered to an endless cycle of meals, diapers and laundry there.

Our own constitutional tradition, in its typically proceduralist lib-

eral way, generally provides for negative rights only, and excludes positive rights (with limited exceptions, such as the effectively compelled subsidy of the public forum under the 1st Amendment). Our own judges tend to view positive rights as unenforceable; judges, after all, lack direct power of the fisc. And proclaiming unenforceable rights, it is feared, is likely to dilute popular respect for other constitutional provisions (e.g., the Soviet constitution at its downfall guaranteed a right to work).

But other traditions include positive rights in a conception of constitutionalism. European judges from social democratic traditions often express surprise that we furnish extravagant protection to civil liberties such as speech but not socioeconomic liberties such as provision of basic welfare. The United Nations Declaration of Human Rights sets forth social and economic rights as well as civil rights, and provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind such as ... sex...." The International Covenant on Economic, Social and Cultural Rights provides that signatories shall ensure "just and favourable conditions of work," including "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work." And CEDAW contains an extensive list of affirmative commitments to ensure the "full development and advancement of women...on a basis of equality with men," including in education, reproductive advice, employment, health care, and even recreation.

Our own tradition treats such economic liberation as a matter of statutory grace, not constitutional right. Legislatures might choose to subsidize prenatal care, aid to families with dependent children, or family planning advice, but need not do so. Negative freedom might be expected to generate economic advancement for women as a by-product. Freed from the legalized constraints of preassigned gender roles, women gain agency—fluid rather than entrenched or fixed identities—and may reshape their lives. They might become more like men rather than depending upon them, or alternatively, fashion new practices in a new world that cannot even be predicted from the vantage point of the old. But we do not as a constitutional matter set a threshold for the material preconditions for full exercise of that freedom.

Fifth, and finally, our drafters would face a choice between judicially enforceable and hortatory or aspirational standards. We have a strong culture of judicial review. Our Supreme Court justices report that when they meet with judges in other nations, their foreign counterparts admire

and envy their ability to get their decrees enforced. So our tradition favors preaching only what you can practice. This distinction interacts with several of the earlier distinctions: for example, specific rules may be more readily enforced than general standards, but not if they intrude too far into the private realm or go too far in the direction of compulsory subsidies or positive rights. The terse guarantees of our constitutional text are largely made operative through statutes that elaborate the constitutional norms, but depend upon political will rather than judicial enforcement.

Contrast our approach with other documents that would enter into fundamental law aspirations that would seem incapable of direct enforcement. Article 5 of CEDAW, for example, commits signatories to “take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” Such cultural liberation might be the anticipated end-state promoted by American equality norms, but not a likely candidate for a constitutional provision. (Not surprisingly, the U.S., which is not among the 165 nations that have ratified, has expressed reservations about this provision on privacy and free speech grounds.)

To summarize, American constitutional law operates under strong conventions of constraint to general norms, of formal equality, symmetrically interpreted, against state rather than private action, to promote negative not positive rights, that are capable of administrable judicial enforcement. Our hypothetical feminist drafters might be sorely tempted to adopt instead a constitution of women’s equality unconstrained by these traditions—one that was specific, asymmetric, extended to private action and positive rights, and culturally aspirational, or that, in short, looked more like CEDAW, which goes so far as to mandate equality child-rearing and combat (provisions that a number of nations besides the US draw the line at).

Which approach is better? Obviously this is not a question that may be answered in the abstract; the answer depends on cultural and historical circumstances. Introduction of a highly ambitious Constitution into a nation where women are at a low starting point of material well-being is unlikely to jump start overnight change (consider India). And even thin constitutional guarantees may be quite effective in changing social assumptions in a nation already primed for change by a period of political and cultural feminist activism (consider the United States).

Several observations about the American approach can now be made, though, in light of this extended comparison. First, it is striking to note

how far the litigation strategy of Ruth Bader Ginsburg and other feminist constitutional lawyers got based on so little in the way of constitutional materials. The series of equal protection results that began with *Reed v. Reed* are a little like a cookbook on what to cook when there's nothing in the kitchen.

Second, what we have gained in the way of women's equality rests on a patchwork of constitutional and statutory provisions, at both the federal and state levels (the United States has thus far been a reluctant participant in international conventions). Such legal initiatives have been stealthy, patient, optimistic in the face of adversity, unfussy (after all, Title VII began as an intended southern filibuster) and creative with limited ingredients—in short, have exhibited the very features women have long developed in adaptation to relegation to trying to wield power from the confined circumstances of the private sphere. There can be no conclusive confidence in either the judicial or the political branches, and women's rights will be the outcome of a complex interplay between them. And the inspiration of broad constitutional guarantees, like letters from heaven, can still matter to the work that's being done in grittier fashion on the ground.

Third, and most important, our approach of constitutionalizing women's equality out of a minimal text that is stupendously general, broad, vague and standard-like, allocates tremendous discretion to its interpreters, and it is accordingly vital to have women in the room doing the interpretation. To celebrate over an election in which we finally have five women governors, 13 women senators, and a record number of women in the House, is sobering; if federal elective office were assessable under Title VII it would be a *prima facie* case. The French (the French!) have adopted a constitutional principle of parity that actually requires that a certain proportion of women be placed on the ballot for public office ahead of otherwise available men. Imagine if we did the same. Do we have any doubt that the world would look different if half the seats of power had women sitting in them? In short, constitutionalizing women's equality can only go so far; the challenge is for those of us who have benefitted so greatly from the pioneers before us is to go out and do our best to constitute it. And that is the brilliant model of Ruth Bader Ginsburg's pioneering career.

The State of Truth: Judges Speak

The Committee on Criminal Advocacy

In the wake of the impeachment and acquittal of President Clinton, and the defense by many commentators of his evident lack of candor at a civil deposition, our committee decided to solicit the views of judges in the New York metropolitan area on the topic of perjury, its prevalence in criminal and civil cases, and the effectiveness of current remedies to deter and punish it.

To this end, our committee recently prepared and sent a detailed questionnaire to federal and state judges in the New York metropolitan area. The questionnaire asked the judges to limit their responses to their own first-hand experiences, and defined perjury as “testimony that you reasonably believed was intentionally false with respect to a material matter.” We offered the judges a continuum of responses to most of the questions that included “never,” “occasionally,” “commonly” and “frequently.” We also solicited the judges’ more detailed views in several optional open-ended questions.

Fifty-nine judges responded. Of these, 36 are federal judges, and 23 are state and city judges. The judges’ overall impressions, and specific comments by many individual judges, are thought provoking.

Background: The Common Law Approach to Perjury

Perjury is of course not a recent development in the law. Society has long recognized the occurrence of perjury, and attempted to tilt the judi-

cial battleground against false testimony. “It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule.”¹ This rule “rested on the unstated premises that the right to present witnesses was subordinate to the court’s interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.”²

For those permitted to testify, “one consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: “that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.”³ Accordingly, the offense of perjury was as punishable as misdemeanor.⁴

Nevertheless, during the common law era judicial perjury was pervasive:

One crime, as more universal and characteristic than others, may be particularly noticed. All writers agree in the prevalence of judicial perjury. It seems to have almost invariably escaped human punishment; and the barriers of superstition were in this, as in every other instance, too feeble to prevent the commission of crime. Many of the proofs by ordeal were applied to witnesses as well as those whom they accused; and undoubtedly trial by combat was preserved in a considerable degree, on account of the difficulty experienced in securing a just cause against the perjury of witnesses.⁵

The Modern Approach to Perjury

The common law approach, which so heavily relied upon the exclusion of witnesses with an obvious motive or penchant to prevaricate, was quickly rejected in the United States. Over a hundred years ago, the Supreme Court observed that “steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till

1. *United States v. Scheffer*, 523 U.S. 303, 328 n. 13 (1998) (citation omitted).

2. *Taylor v. Illinois*, 484 U.S. 400, 429 (1988) (internal quotes & citations omitted).

3. *United States v. Serafini*, 167 F.3d 812, 823 (3d Cir. 1999) (citation omitted).

4. *Nix v. Whiteside*, 475 U.S. 157, 169 (1986).

5. 2 Hallam, *Europe During the Middle Ages* 372 (8th ed. 1841), quoted in New York Law Revision Commission 1935 Recommendation and Report to the Legislature on Perjury, Legis. Doc. No. 60 at 9 n.5 (1935) (“IRC Report”).

now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.”⁶

In 1918, the Supreme Court, refusing to be bound by “the dead hand of the common-law rule of 1789,” permitted even the testimony of convicted felons, observing that “‘the conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ’”⁷

Thus stripped of the common law’s blunderbuss disqualification of interested witnesses and felons, our judicial system had need of a counterweight to replace these protections. Many reported decisions reflect the view that the threat of criminal prosecution serves as such a deterrent. “Perjury statutes operate to prevent false testimony in judicial proceedings. As such, they represent a more enlightened approach to obtaining the truth than the penalties of death or the pillory imposed for perjury during the nascent stages of European jurisprudence. . . . At the same time, we have adopted the common law rule of England that the punishment for perjury should not be so severe as to discourage witnesses from appearing and testifying.”⁸

“Our adversary system of justice has embraced the belief that the best mechanism to elicit the truth is to impress witnesses with the duty to testify truthfully and admonish them of the penalty for perjury.”⁹

Currently, both federal and New York law teem with criminal disincentives to falsehood,¹⁰ and the threat of imprisonment looms over viola-

6. *United States v. Benson*, 146 U.S. 325, 337 (1892).

7. *Rosen v. United States*, 245 U.S. 467, 471 (1918) (citation[s] omitted).

8. *United States v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986) (citations omitted).

9. *United States v. Armiijo*, 5 F.3d 1229, 1238 (9th Cir. 1993) (citations omitted); *United States v. Turner*, 558 F.2d 46, 50 (2d Cir.1977) (“[T]hose who have been impressed with the moral, religious or legal significance of formally undertaking to tell the truth are more likely to do so than those who have not made such an undertaking or been so impressed.”); *People v. Robinson*, 89 N.Y.2d 648, 657 n. 4, 657 N.Y.S.2d 575 (1997) (the solemnity of proceedings, coupled with the sanction of a perjury prosecution, promote the reliability of testimony).

10. Federal law contains numerous specific prohibitions against misrepresenting to particular agencies. It also contains general anti-perjury statutes, 18 U.S.C. §§ 1621, 1623, and a catch-all prohibition against lying to federal agencies and agents. 18 U.S.C. § 1001. New York State

tors.¹¹ Both federal and New York State procedural rules seek to deter perjury and false submissions.¹²

These approaches have not been entirely successful. As the New York Court of Appeals observed 15 years ago, “frivolous court proceedings present a growing problem which must be deterred. . . . Such practices not only injure and debilitate the honest litigant, but they also waste judicial resources. Existing remedies for such conduct, such as disciplinary proceedings for attorneys, contempt or possibly criminal proceedings if perjury is involved, or seeking redress in a separate action for damages on theories of malicious prosecution or abuse of process have not proved effective to

law similarly proscribes perjury and sworn false written statements. Eg., N.Y. Penal Law §§ 210.15; 210.40.

Congress has devoted considerable attention to the issue of perjury by seeking to refine the contours of the criminal offense in order to coerce truthful testimony. It facilitated perjury prosecutions in enacting 18 U.S.C. § 1623, by abandoning the two-witness rule, allowing prosecutions for irreconcilable statements without requiring prosecutors to prove which was false, and requiring only a knowing rather than willful state of mind. At the same time, Congress sought to foster the search for the truth by allowing witnesses to escape a perjury prosecution by a timely recantation of false testimony. See *United States v. Moore*, 613 F.2d 1029 (D.C. Cir.1979); *United States v. Lardieri*, 506 F.2d 319 (3d Cir.1974).

As the Senate Judiciary Committee explained:

A subpoena can compel the attendance of a witness ... But only the possibility of some sanction such as a perjury prosecution can provide any guarantee that his testimony will be truthful.

Today, however, the possibility of perjury prosecution is not likely, and if it materializes, the likelihood of a conviction is not high. * * *

(Section 1623) creates a new federal false declaration provision that will not be circumscribed by rigid common law rules of evidence.

United States v. Lardieri, *supra*, 506 F.2d at 322. (citing S.Rep. No. 91-617, at 57-59 (1969)).

11. Federal Sentencing Guidelines generally require imprisonment upon conviction for perjury, U.S.S.G. § 2J1.3; New York law authorizes imprisonment for up to seven years. See Penal Law § 210.15. And, of course, criminal defendants who commit perjury at trial are subject to enhanced sentences. *United States v. Dunnigan*, 507 U.S. 807 (1993); *People v. Harris*, 272 A.D.2d 225, 709 N.Y.S.2d 515 (1st Dept. 2000).

12. In civil cases, the Federal Rules of Civil Procedure provide sanctions against false submissions, see F.R.Civ.P. 11; 28 U.S.C. § 1927. New York State’s procedural rules are to similar effect. See 22 N.Y.C.R.R. 130-1.1(c)(3) (conduct is sanctionable if “it asserts material factual statements that are false.”). See also, CPLR § 8303-a.; 317 West 87th *Associates v. Dannenberg*, 170 A.D.2d 250, 566 N.Y.S.2d 2 (1st Dept.1991) (award of attorney’s fees and damages as punishment for contempt of court under Judiciary Law § 753 *et seq.* and CPLR § 3126 for, *inter alia*, perjury, submission of false document and false affidavit).

deter frivolous litigation in the past. Thus, the assessment of attorneys' fees and disbursements has become the single most important device suggested to deter such misconduct . . . " *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 4, 511 N.Y.S.2d 216, 217-18 (1986) (citations omitted).

The Judges' Overall Responses to Our Questionnaire

Turning to the questionnaire, common to the responses of virtually all of the responding judges was that they encountered perjury "occasionally" both with respect to pre-trial matters, such as depositions, affidavits and pre-trial hearings,¹³ and during trials, both civil and criminal.¹⁴

Overall, of the responding judges who had personally presided over both criminal and civil proceedings, 43% (16/37) responded that perjury was more prevalent in civil cases; 30% (11/37) reported that it was more prevalent in criminal cases; 27% (10/37) reported no difference.

The judges were also asked to differentiate the prevalence of perjury among different categories of participants in proceedings, *i.e.*, plaintiffs, defendants, plaintiffs' fact and expert witnesses, and defendants' fact and expert witnesses.

In commercial cases there was no appreciable difference at trial between plaintiffs and their fact witnesses, and defendants and their fact witnesses. 82% of judges (31/38) reported that they occasionally encountered perjury at trial by plaintiffs, while 80.5% (29/36) reported occasional perjury by defendants.¹⁵ An equal 82% of judges (27/33) reported occasional perjury at trial by plaintiffs' fact witnesses, while 83% (30/36) reported occasional perjury by defendants' fact witnesses.¹⁶ Notably, expert witnesses enjoy a far higher reputation for truthfulness than the parties

13. With respect to perjured testimony at pre-trial proceedings, the minority views broke down as follows: three judges reported that perjury occurred frequently, six judges noted that it occurred commonly, one judge said it was rare, and two judges said that it "never" occurred.

14. Four judges reported that trial perjury is "frequent"; five reported that trial perjury is common;" one judge volunteered that trial perjury is "rare," and two judges noted that they had never detected perjured testimony.

15. 10% (4/38) of the judges reported that plaintiffs commonly commit perjury, while 14% (5/36) reported that defendants commonly commit perjury. 8% (3/38) reported that plaintiffs never commit perjury, while 5.5% (2/36) reported that defendants never commit perjury.

16. 3% (1/33) of the judges reported that plaintiffs' witnesses commonly commit trial perjury, and a virtually equal 3% (1/36) reported that defendants' witnesses commonly commit perjury. 15% (5/33) reported that plaintiffs' fact witnesses never commit perjury, while 14% (5/36) reported that defendants' witnesses never commit perjury.

and their fact witnesses. The judges' perceptions were equal with respect to expert witnesses, regardless of their proponents: 50% (15/30) reported occasional perjury, while 43% (13/30) reported that they had either never or rarely encountered perjury by expert witnesses.¹⁷

The reported perceptions of *pre-trial* perjury in commercial cases were remarkably similar. 82% of judges (31/38) reported that they occasionally encountered pre-trial perjury by plaintiffs, while 83% (29/35) reported occasional perjury by defendants.¹⁸ 72% of the judges (23/32) reported occasional pre-trial perjury by plaintiffs' fact witnesses, while 71% (22/31) reported occasional perjury by defendants' fact witnesses.¹⁹ Here, again, expert witnesses are perceived more favorably. With respect to both plaintiffs' and defendants' expert witnesses, 52% (15/29) of the judges reported occasional perjury, while 38% (11/29) reported never encountering perjury by experts.²⁰

Criminal defendants on trial have an entirely different, and indeed unique, profile: 17.5% (7/40) of the judges reported that criminal defendants frequently commit perjury at trial, while 42.5% of the judges reported that defendants commonly commit perjury at trial. 40% of the judges reported that defendants occasionally commit perjury. By contrast, 81% (35/43) of the judges reported that law enforcement personnel occasionally commit perjury; 5% (2/43) reported that they frequently commit perjury; 7% (3/43) reported that they commonly commit perjury, and an equal 7% (3/43) reported that they never commit perjury.

Criminal defendants' fact witnesses similarly showed reduced credibility. 5% (2/37) of the judges reported that such witnesses frequently committed perjury, and 23% (8.5/37)²¹ of the judges reported that defendants' fact witnesses commonly committed perjury. 69% (25.5/37) of the judges reported that defendants' witnesses occasionally committed per-

17. A minority of judges, 7% (2/30), reported that perjury by experts was common.

18. 13% (5/38) of the judges reported that plaintiffs commonly commit perjury, while 14% (5/35) reported that defendants commonly commit perjury. 5% (2/38) reported that plaintiffs never commit perjury, while 3% (1/35) reported that defendants never commit perjury.

19. 12.5% (4/32) of the judges reported that plaintiffs' fact witnesses commonly commit pre-trial perjury, and a virtually equal 13% (4/31) reported that defendants' witnesses commonly commit pre-trial perjury. 16% (5/32) reported that plaintiffs' fact witnesses never commit perjury, while 16% (5/31) reported that defendants' witnesses never commit perjury.

20. 10% (3/29) of the judges reported that pre-trial perjury by experts was common.

21. One judge's response straddled "occasionally" and "commonly" and one-half of that judge's response was assigned to each category.

jury, and 3% (1/37) reported no encounter with such perjury. In contrast, 89% (34/38) of the judges reported that prosecution witnesses occasionally commit perjury, 3% (1/38) reported common perjury by prosecution witnesses, and 8% (3/38) reported no perjury by such witnesses.

With respect to prosecution expert witnesses, 56% (19/34) of the judges never encountered perjury, while 44% (15/34) reported that such perjury occurred occasionally. Defendants' expert witness enjoyed somewhat reduced credibility. 52% (17/33) reported no instances of perjury; 42% (14/33) reported that such perjury occurred occasionally; and 6% (2/33) found such perjury common.

The judges' perceptions of perjury with respect to *pre-trial* criminal proceedings mirrored the reduced credibility of defendants at trial. 11% (4/37) reported that defendants frequently committed perjury, and 32% (12/37) reported that they commonly committed perjury. 51% (19/37) reported that they occasionally committed perjury. 5% reported no encounters with pre-trial perjury by defendants. As for law enforcement witnesses' pre-trial perjury, 78% (32/41) of the judges reported occasional perjury and 15% (6/41) reported no instances of perjury. 5% (2/41) reported that it was frequent; 2% (1/41) reported that such perjury was common.

With respect to pre-trial proceedings, defendants' fact witnesses again had diminished credibility. 69% (24/35) of the judges reported occasional perjury; 20% (5/35) reported that perjury was common; 6% (2/35) percent reported frequent perjury; and 11% (4/35) reported no encounters with perjury. With respect to prosecution fact witnesses, 86% (30/35) of the judges reported occasional perjury; 3% (1/35) reported that perjury was common; and 11% (4/35) reported no encounters with perjury.

With respect to expert testimony offered by the prosecution, 65% (20/31) of the judges found no perjury; 32% (10/31) found occasional perjury; and 3% (1/31) found perjury to be common. With respect to defendants' experts, 61% (19/31) of the judges found no perjury; 35% (11/31) found occasional perjury; and 3% (1/31) found perjury to be common.

Asked whether attorneys who were the proponents of perjured testimony "knew or had reason to know of the perjurious nature of the evidence," thirty four judges (69%) reported that this happened occasionally; six (12%) reported that this occurred commonly; one (2%) reported that this occurred frequently; and eight (16%) reported that this never occurred.

Individual Judges' Comments

The judges were asked to respond to optional open-ended questions regarding their views as to the prevalence of perjury, whether or not they

believed that any action should be taken by legislation, court rule or decision, or modification of the Code of Professional Responsibility to address the issue of perjury” in both criminal and civil cases.

Snapshots of the judges’ responses are revealing both for the observations, and for their range. The following excerpted observations were each made by a different judge:

“This has not been a significant issue in my courtroom.” “I don’t see it as a problem. Of course, I don’t *know* if I’ve seen perjury at all.” (emphasis in original) “The real problem is that perjury is in the eye of the beholder.”

One must “distinguish puffing and elaboration from purposeful misstatement.” “The problem is *proving* that a witness has committed perjury. There are many times that you “know” that perjury is being committed but do not have enough to make the necessary referrals.” (emphasis in original) “While I believe I have heard perjured testimony, I have never been faced with a situation where I *knew* testimony was perjured.” (emphasis in original) “Perjury is hard to prove. . . . It’s expected that people must lie to avoid embarrassments, support family and friends, and protect their interests.”

“Perjury is widespread in matrimonial actions for reasons that are well known. Perjury or at least exaggerated claims are commonplace in motor vehicle personal injury cases, a direct if unintended consequence of the No Fault Insurance statute which requires a showing of serious injury before any recovery can be had for pain and suffering.”

“I believe that perjury in civil cases has become worse since President Clinton was allowed to get away with it, and commentators . . . stated that civil perjury is rarely prosecuted. . . . Perjury is widespread and getting worse since the Paula Jones case, and getting worse particularly [in] depositions.” Disparate treatment of Presidents Nixon and Clinton “are testament enough to the lack of uniformity in the administration of justice in this country . . .”²²

“Police perjury is widespread. The situation has worsened with the present administration . . .”

“This being a land of opportunity, if the chief law enforcement officer of the United States (as well as his wife) can commit perjury with impunity, and have his actions publicly justified and/or defended by promi-

22. This judge provided “[a] recent example [that] illustrates an outgrowth of the present standard. In conjunction with a summary judgment motion by a defendant in a trade secrets case, a defecting defendant in answer to an interrogatory as to whether he took anything from his former employer said ‘No one saw me take anything.’ (hence, issue of fact.)”

nent leaders of the bar, and attorneys serving in the U.S. Congress and Senate as the people's representatives, can one justify denying the same right to mere law enforcement minions?"

"In criminal cases, the most common offenders are not surprisingly defendants." "Criminal defendants who testify frequently lie. More able attorneys seem able to dissuade their defendants from testifying." "Other than police officer testimony describing the reason for stops on the street, the problem is not outright perjury, but rather [that] litigants testify in a way consistent with their interest[s]—most times there [is] agreement in basic facts, but it is the nuance that is different." "In the civil area perjurious actions are more subtle."

"Unfortunately, misleading statements and outright perjury in testifying is part of the game." "It's no more or less prevalent than in society at large."

The Judges' Reactions to Instances of Perjury, and Their Recommendations

The responding judges reported a liberal use of a mixture of self-help measures. Of the fifty nine responding judges, twenty (35%) have made referrals to prosecutors of instances of perjury; ten judges (17.5%) have made referrals to attorney disciplinary authorities; twenty (35%) have imposed harsher criminal sentences, while in civil cases eleven (19%) have resorted to dismissal of a cause of action or defense and nine (16%) have imposed monetary sanctions. Additionally, one judge suppressed evidence; one judge reported perjury to an agency supervisor, one judge reported it to an attorney's employer, and another made a report to a police officer's superior.

Finally, twenty judges (35%) have interrupted proceedings to admonish witnesses, while sixteen (28%) have admonished counsel. Fourteen of the judges (25%) had never taken any affirmative measure referable to perjury.

Forty three responding judges (90%) were satisfied that the judges in their court had available sufficient discretion, and a sufficient array of remedies to address perjury; twenty nine (69%) were satisfied that appellate courts supported the measures they had taken to acknowledge, punish and deter perjury.

The judges were asked whether action should be taken by "legislation, court rule or decision, or modification of the Code of Professional Responsibility to address the issue of perjury" in both civil and criminal cases: 65% (26/40) responded that no such action was warranted with

respect to civil cases; and 70% (30/43) responded that no action was warranted as to criminal cases.

The more detailed responses by responding judges are revealing:

“Attorneys have not sought relief in the rare instances I suspected a problem.” “Perjury in civil cases is much more frequent than in criminal cases, precisely because the judge has fewer weapons to combat it and also because so many such cases settle before the judge has any opportunity to take action Judges should be able to reduce or reverse jury verdict in civil cases if [they are] morally certain perjury has materially affected the outcome.”

“I think an additional problem . . . [is] ‘misrepresentations’ to the court by counsel—mostly in civil cases—which . . . you ‘know’ to be false but which cannot be proved.” “Attorneys need more instruction as to the meaning and importance of FRCP 11. More CLE programs on professional ethics [are needed].” “Some disciplinary action short of criminal prosecution would be appropriate.”

“Make attorneys more responsible for suborning perjury. Monetary sanctions should be Draconian. Criminal penalties should be mandatory and harsh.”

“Prosecutors should be urged to prosecute more cases of perjury in civil cases.” “Egregious cases should be prosecuted. Most judges believe prosecutor[s are] not particularly enthusiastic to receive references of perjury from judges. . . . The adversary system will suffer if we require counsel to investigate independently the truth of prospective testimony. Unless counsel knows it’s false, that’s the job of the trial jury. Prosecutors should [prosecute perjury in civil cases] to raise public awareness and for general deterrence. Our nation is undergoing a decline in basic morality. If our justice system is to continue to rely on sworn testimony which is not corroborated we will have to start punishing perjury in this world by prosecution and incarceration. The media should stop proclaiming as they did in the case of the President that ‘everybody does it and it is seldom prosecuted.’ That’s not true.”

“Among all instances in which I believed there was perjury, only two have been so blatant that I referred them to the U.S. Attorney . . . The U.S. Attorney took no action in either case It is my view that there is no ‘teeth’ in the perjury crime because it is *almost never* prosecuted, except in high profile, notorious cases. Perjury will *always* be a real problem unless and until prosecutors prosecute in the rare cases when conviction is a ‘slam dunk’ even if the case lacks notoriety.” (emphasis in original).

“No matter what the laws, prosecutors have very little interest in pursuing perjury cases. I do not think district attorneys have any commit-

ment to prosecuting perjury cases. If they did and it was publicized, I suspect there would be a lot less perjury.” “Judges do not refer cases to [the] D.A. for lack of confidence in [the] D.A.’s willingness to prosecute, notwithstanding legal difficulties.”

“The number of [perjury] cases that would require investigation and consume judicial time prevents a systematic response to every possible case. The result has been to ignore it! . . . I find a larger than expected number of victims in sex crime cases to have been untruthful concerning their past sexual relationship with the defendant. The prosecution often dismisses indictments for this reason but, to my knowledge, has never prosecuted the former ‘victim’ even when conceding that the victim’s perjury has caused the arrest and indictment of an innocent person. If perjury cases are not actively prosecuted, any other remedy diminishes the seriousness of the crime.” “When a case is sent to a prosecutor, the prosecutor should have to report back to the judge what has been done.”

“New laws are not needed, abolition of the ‘double standard’ is.”

“Police administrators should create a culture of truthfulness, letting the chips fall where they may. D.A.’s should be more skeptical when . . . case[s] come in. Senior D.A.’s should do the screening.” Action should be taken “particularly with reference to complainants whose later recantations are plausible and with police officers who routinely lie concerning the circumstances of arrest and questioning of defendants.”

“In an adversarial system, the best device for getting to the truth is vigorous cross-examination. Unfortunately, many attorneys are not sufficiently skilled in the art.”

The Committee’s Conclusions and Recommendations

Several overall impressions emerge from the judges’ responses. In the case of most categories of trial witnesses, (*i.e.*, the parties and their fact witnesses in commercial cases, and law enforcement personnel and prosecution witnesses in criminal cases) approximately 80% of the judges reported encountering “occasional” perjured testimony. Human experience teaches that it is not possible to deter all perjury.

Nevertheless, there are areas of particular concern. Significantly, 60% of the judges reported that criminal defendants either frequently or commonly commit perjury at trial. Additionally, while a somewhat reduced (from the 80% range) 69% of judges reported fact witnesses called at trial by criminal defendants “occasionally” commit perjury, it is troubling that 28% of the judges reported that such witnesses either frequently or commonly commit perjury.

From a broader perspective, it is noteworthy that 43% of the judges reported that perjury is more prevalent in civil cases, compared with only 30% of the judges who reported a greater prevalence in criminal cases. This overall differential seems important, particularly because one can reasonably surmise that absent instances of perjury by criminal defendants themselves, the disparity would be even greater. Indeed, the most salient of the judges' observations is the lament that prosecutors do not devote adequate attention to the crime of perjury, particularly that occurring in civil litigation.

The judges' observations seem borne out by the paucity of reported decisions respecting perjury prosecutions for such conduct. Recently, the Second Circuit had occasion to uphold such a prosecution against a due process challenge, noting somewhat defensively that:

although it is undoubtedly the case that a good many untruthful statements occur during the course of a civil trial, many such falsehoods essentially are resolved by adverse jury verdicts, leaving for criminal prosecution those few instances where a witness' lie is so material to the truth-seeking function of a trial that the prosecutor (sometimes, upon the referral of the trial judge) elects to seek an indictment. Such is the present case. Moreover, that this criminal conviction for perjury arose in a civil context is unremarkable. We and other Circuits have reviewed perjury convictions arising from civil proceedings. See, e.g., *United States v. Thompson*, 29 F.3d 62 (2d Cir.1994) (one count of perjury in connection with separate civil judicial proceeding); *United States v. Kross*, 14 F.3d 751 (2d Cir.1994) (false declarations in civil forfeiture deposition); *United States v. Wilkinson*, 137 F.3d 214 (4th Cir.1998) (false statement during deposition in civil case); *United States v. Clark*, 918 F.2d 843 (9th Cir.1990) (false testimony in civil rights suit against police department), overruled on other grounds by *United States v. Keys*, 133 F.3d 1282 (9th Cir.1998).

United States v. Cornielle, 171 F.3d 748, 751 (2d Cir. 1999).

Yet, *Cornielle* itself bears testimony to the rarity of prosecutions for perjury in civil proceedings, and to the dependence of such a prosecution on the government's own ox being gored. The *Cornielle* prosecution stemmed from false allegations in a federal civil rights action. The plaintiffs had falsely alleged that New York Drug Enforcement Task Force officers had beaten them during their arrest. The Second Circuit cited four illustrations of prosecutions for perjury in civil cases. However, each of these

cases implicated the prosecution's interest and attention in ways not common to ordinary civil cases.

In *United States v. Thompson*, 29 F.3d 62 (2d Cir. 1994), the perjury charge alleged that the defendant had lied in a bankruptcy proceeding in concealing funds that were the predicate for criminal charges of money laundering that were brought with the perjury count. In *United States v. Kross*, 14 F.3d 751 (2d Cir.1994), the defendant had committed perjury at a deposition held with respect to a civil forfeiture proceeding brought by the government to forfeit land that had been used to cultivate and distribute marijuana. In *United States v. Wilkinson*, 137 F.3d 214 (4th Cir.1998) the perjury was part of a broad scheme, charged in the indictment, to commit fraud and money laundering offenses. And, in *United States v. Clark*, 918 F.2d 843 (9th Cir.1990), the perjury was in connection with false claims made against a police department.²³

It is evident that many judges feel unable to rely upon prosecutorial action as a significant weapon against perjury. As Judge John Martin observed in dismissing a complaint because of pervasive perjury in *Miller v. Time-Warner Comm., Inc.* 1999 WL 739528 *3 (S.D.N.Y.), "the instances in which perjury in civil cases is prosecuted criminally are relatively rare and the Courts cannot rely solely on criminal prosecution to deter civil perjury."

Prosecutors in the 20th century have never paid much attention to perjury. The New York Law Revision Commission, in its 1935 Recommendation and Report to the Legislature on Perjury, Legis. Doc. No. 60 ("LRC Report"), canvassed court records and reported that in the 25 year period ending 1932, there had been a total of 101 perjury convictions in New York County. LRC Report at 60. The Commission noted that this experi-

23. It has been observed that "[a]lthough the popular impression that perjury arising in the criminal context is prosecuted more often [than perjury in civil cases] appears to be true, the reason for that increased prosecution does not appear to derive from a widely held view that perjury in criminal cases is more serious than in civil cases. Rather, the reason that perjury that occurs in criminal cases appears to be dealt with more frequently than perjury that occurs in civil cases seems to derive from the proximity of the prosecutors to the crime in criminal cases and their relative distance from the crime in civil cases." Report on Perjury in Civil Cases, Council on Judicial Administration of the Association of the Bar of the City of New York at 1 (May 6, 1998). This report further notes that "[t]here is no well-developed mechanism for bringing suspected perjury to the attention of a prosecutor. Unlike with some other types of criminal activity, there is no investigative agency to develop the facts of a suspected perjury case and present findings to a prosecutor. Instead, affected parties must 'cold call' the prosecutor's office to present their suspicions. If the referring party is an adversary in the midst of a heated litigation, the prosecutor's office may view the referral with some skepticism." *Id.* at 8-9 (footnote omitted).

ence was not unique to New York. During the 11 year period 1910-1920, there were 51 perjury indictments (resulting in 18 convictions) in Cleveland; during the 10 year period 1924-1933, there were 36 indictments (with 9 convictions, and 15 of the cases pending) in Baltimore. *Id.* at 62-64. More recently, the U.S. Sentencing Commission's statistics reflect that during its fiscal year 1999, the guideline applicable to perjury, subornation of perjury and bribery of witnesses, U.S.S.G. § 2J1.3, was employed as the primary sentencing guideline in 83 cases nationwide, representing 0.1% of federal prosecutions. (<http://www.ussc.gov/ANNRPT/1999/table17.pdf>)

Without doubt, perjury convictions are hard to obtain. Over a century before the LRC Report, in an 1828 debate in the English Parliament, it was remarked that "[t]he difficulty of convicting in cases of perjury is one of the great blots in the law, both civil and criminal."²⁴

In this vacuum of criminal enforcement, the responding judges have reported resort to a melange of remedial measures. It is not without irony that the welter of *ad hoc* judicial remedies reported by the judges parallels with greater civility—the sometimes unpredictable efforts of common law judges:

In one [case] a man was punished for a false oath, which was regarded as a contempt of court; in another case, 'Buckett being examined in open court upon a question asked him, and his oath being afterwards disproved, was sentenced to the pillory.' Moreover, all these cases were punished, not by the known law of the land, and according to a regular course of proceeding, as for a known offense, but by an arbitrary punishment imposed by the court, which was offended at the verdict or false oath.

3 Stephen, *History of Criminal Law of England* 244, quoted in LRC Report at 11.²⁵

The remedial measures currently employed are certainly important.

24. Remarks of Mr. G. Lamb, Feb. 29, 1828, Speech on the Courts of Common Law, Hans. Parl. Deb. 2d Series, XVIII, 867, quoted in LRC Report at 96 n. 139.

25. Colonial courts similarly resorted to an imaginative blend of remedies. The Colonial Laws of early New York "ffor the better prevent the crying sin of Perjury and that all due punishment may bee inflicted on such persons as willfully commit the same," variously authorized forfeiture of "the sune of fforty pounds Sterling," that offenders "suffer imprisonment by the space of one half yeare, without Baile . . . , and to stand upon the Pillory the space of one whole houre in some town next adjacent where the Offense was committed;" "thatt . . . [the offender] be branded with the letter P in ye foreheade, and from thence forth to bee discredited and disabled forever, to be swome in any of the Courts of record within this Province . . . ;" that he forfeit of "[t]he one Moyety of all which sums of money, goods & chattels . . . to his

Nevertheless, the LRC Report found it evident that the participation of prosecuting authorities was needed. The LRC Report noted that even an earlier provision of New York's Penal Law that authorized judges to summarily commit a witness who had likely committed perjury "for his appearing and answering to an indictment for perjury" had been ineffective.²⁶ LRC Report at 98.

The Commission, in the concluding paragraph of its report, observed the reluctance by individual judges to take upon themselves the *onus* of stigmatizing witnesses as perjurers:

A most plausible explanation has been given by a judge of why this section will probably never be effective. To commit a witness for perjury, he says, seems to judges to be tantamount to proclaiming their guilt. The stigma of guilt attaches even though in law the presumption of innocence still operates. Judges are unwilling that this consequence should flow from their individual impressions about the witness. They much prefer that an independent authority inquire *de novo* into the truth of what the witness has said. They are willing to turn over the testimony to prosecuting officials for the purpose of having such an independent investigation into its truth or falsity, and to let responsibility for proceeding further abide with those officials. The attitude of many, if not most lawyers toward the prospect of effective action by prosecutors upon the turning over of testimony to them for proper action, is one of contemptuous cynicism. If the attitude be justified, we at least have the consolation of knowing where to put responsibility for present unsatisfactory conditions, and lack of improvement in the future. If it be unjustified, then there is hope of improvement through amending Section 1628 by adding to it a direction that testimony reasonably suspected of being perjured be turned over to

Royall Highnesse . . . & the other Moyety to such person . . . as shall be grieved hindred or molested by reason of . . . the offence . . . before menconed . . . ;" and "in all Cases of life and Member, the person . . . so offending . . . shall suffer and undergoe such punishment . . . as the person . . . against whome hee . . . bore such false witness did or should have undergone." LRC Report at 30, 31. The effectiveness of these measures is not reported.

26. "Where it appears probable to a court of record that a person, who has testified before it in an action or proceeding in that court, has committed perjury in any testimony so given, the court may immediately commit him, by an order or process for that purpose, to prison, or take a recognizance, with sureties, for his appearing and answering to an indictment for perjury." Penal Law, § 1628. See *People v. Criscuoli*, 164 A.D. 119, 123, 149 N.Y.S. 819, 821-22 (2d Dept. 1914).

the district attorney for such investigation and action as to him shall appear necessary or proper in the premises.

*Id.*²⁷ See also, *Report on Perjury in Civil Cases* by the Council on Judicial Administration of the Association of the Bar of the City of New York at 10-11 (May 6, 1998) (notwithstanding the obligation of both judges and lawyers to report attorneys' involvement in perjury, "such reporting rarely occurs partly because lawyers and judges feel that it is distasteful to report another lawyer to the state bar." (footnote omitted)).

The committee has concluded that it is time for society to firmly plant its thumb on the scales of justice on the side of truth by asking its prosecuting authorities to assign a small number of assistant prosecutors to the task of following through on judicial referrals of perjury. New York State prosecutors in particular have available to them the Law Revision Commission inspired misdemeanor offense of swearing falsely, which does not require a showing of materiality. N.Y. Penal Law § 210.05.

Our law has always been solicitous, and properly so, of the pressures under which witnesses labor. "Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yield information reluctantly." *United States v. Bronston*, 409 U.S. 353, 359 (1973).

Moreover, historically, common law and American courts have taken great care to ensure "that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying." *Id.*, quoting LRC at 249.²⁸

27. The Commission made two specific findings and corresponding recommendations. It found that the existing penalty of up to 20 years' incarceration was "altogether too severe and that this circumstance also stands in the way of effective prosecution." It further found that the inherent ambiguity of the materiality requirement is a "serious impediment to effective prosecution for perjury, . . . that . . . discourages even the initiation of prosecutions. . . ." IRC Report at 3.

The Commission submitted a draft bill that incorporated these recommendations, and it was signed into law. L.1935, ch. 632. See generally, *United States v. Serafini*, *supra*, 167 F.3d at 824 n. 17.

28. The "way to effective deterrence lies through certainty and quickness of prosecution rather than making examples of the few convicted offenders by imposing heavy sentences on them." IRC Report at 93.

“English law ‘throws every fence round a person accused of perjury,’ for ‘the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure: and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission,—such as publicity, cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment, wherever the commission of the crime has been clearly proved.’” *Id.* at 359-60 (citations omitted). *See also, United States v. Cornielle, supra* (our system assumes that “many such falsehoods essentially are resolved by adverse jury verdicts . . .”)

As a result, it has been “the traditional Anglo-American judgment that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony.” *United States v. Bronston, supra*, 409 U.S. at 360. Nevertheless, the committee believes that the outcome of society’s extreme solicitude for witnesses is an undue burden upon its judicial resources and moral capital.

At least some appreciable number of prosecutions is warranted. It is common knowledge that the government makes a concerted effort to file and publicize criminal tax indictments each spring, as a warning to members the general public to take care before they sign their income tax returns. A similar deterrent effect may be realized from even a limited number of publicized perjury prosecutions, in instances in which the offense is clear and readily provable.

February 2001

The Committee on Criminal Advocacy

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Restructuring New York's Electric Power Industry: A Progress Report

The Committee on Energy

I. INTRODUCTION

Restructuring of the electric power industry is front page news as a result of the disruption of the California electric power market and the increase in the price of electricity in California, New York and elsewhere. Restructuring of New York's electric power industry has been underway for approximately five years. The move to deregulate this critical industry has the potential to affect the State's economy materially. It is thus timely to examine the progress of electric power industry restructuring in New York.

The companies that make up the electric power industry in New York State provide electric service to more than 8 million residential, commercial, governmental and industrial customers throughout the state.¹ Traditionally, public utilities, each of which was a regulated monopoly with a designated franchise territory, provided such service. In May 1996, however, the New York Public Service Commission ("PSC") initiated the restructuring of New York's electric utility industry with the issuance of Opinion No. 96-12.²

1. These companies include public utilities, state and municipal power authorities, companies that own and operate generating plants and retail and wholesale marketers.

2. In re Competitive Opportunities Regarding Electric Service, 168 P.U.R.4th 515(1996) ("Competitive Opportunities Opinion").

The Committee previously reported on the restructuring of the electric power industry in New York.³ This Report extends the Committee's earlier review by focusing on three topics essential to electric power industry restructuring: (1) the restructuring of the wholesale market for electricity and the commencement of operation of the New York Independent System Operator ("NYISO"); (2) the development of competition in the retail electricity market; and (3) the efforts to mitigate market participants' possession of market power.

In 1997 and 1998, the PSC commenced utility-specific restructuring proceedings which led to the issuance of the company-specific restructuring orders addressed in the Committee's Initial Report.⁴ By late-2000, many of the actions called for in those orders are complete. Thus, four utilities now provide access for all retail, end-use customers to the competitive market. The phase-in to retail competition for all utilities is expected to be completed by the end of 2001.⁵ A number of industrial and large commercial customers have switched from their traditional public utility supplier to a new load serving entity ("LSE").⁶ The level of retail competition in the residential and small commercial sectors of the market, however, remains low. Commonly-cited reasons for such slow development of a competitive retail market are the small to non-existent rate margins avail-

3. The Association of the Bar of the City of New York, Committee on Energy, A Status Report, Electric Utility Restructuring in New York ("Committee's Initial Report"), 53 The Record 352 (1998).

4. See, *id.* (discussing the orders). These orders provided for, among other matters, the phasing-in of retail competition, a rate plan for the transition period, changes in rate design, corporate restructuring, divestiture of generation plants by traditional public utilities and recovery of utility stranded costs. Thus, industry restructuring in New York has not resulted from legislative direction, but from administrative initiative. New York appears to be unique in this respect among states that are restructuring their electric power industries. The Legislature, however, has clarified siting responsibilities under Article X of the New York Public Service Law (major electric generating stations) (L. 1999, c. 636); and enacted a law that modified New York City's energy cost savings program to permit companies that receive benefits under that program to purchase their electric commodity from a competitive supplier (L. 2000, c. 472). A federal court determined the law barring Consolidated Edison Company of New York, Inc. ("Con Edison") from recovery of its nuclear plant outage costs to be unconstitutional. *Consolidated Edison Co. of N.Y. v. Pataki*, 117 F. Supp. 2d 257 (N.D.N.Y. 2000). The State and other appellants are appealing the decision to the Second Circuit Court of Appeals, and oral argument is expected in Spring 2001.

5. Other aspects of the PSC's restructuring orders, such as multi-year rate stabilization plans, will continue for several years.

6. The term "LSE" refers both to investor-owned utilities which have traditionally distributed electricity at retail and to competitive retail suppliers.

able to competitive suppliers to reduce prices to their new customers, the high cost of energy supplies, rate designs that produce frequent changes in rates to customers and utility business practices that vary from utility to utility which makes state-wide marketing by competitive suppliers more difficult.

In addition to opening the retail market to competition, electric utilities are divesting their electric generating facilities. Five electric utilities have commenced, and in most cases completed, the divestiture of their fossil-fueled and hydro power generation plants.⁷ A sixth public utility⁸ has not initiated divestiture. In addition, five New York utilities, have announced their intent, and in some cases their agreement, to sell their interests in nuclear power plants.⁹

These divestitures have transformed the traditional, vertically integrated electric public utility into a company whose prime utility function is the retail distribution of electricity.¹⁰ While customers are permitted to switch to a competitive supplier, the utility still remains responsible for those customers who either do not switch to a new supplier or return from a competitive supplier to utility service.¹¹

The rates each utility could charge were adjusted in the utility-spe-

7. Central Hudson Gas & Electric Corporation ("Central Hudson"); Con Edison; New York State Electric & Gas Corporation ("NYSEG"); Niagara Mohawk Power Corporation ("Niagara Mohawk"); and Orange and Rockland Utilities, Inc. ("O&R").

8. Rochester Gas and Electric Corporation ("RG&E"). The seventh New York utility, the Long Island Lighting Company, has undergone a corporate restructuring under which the non-nuclear generating assets and the gas distribution businesses were transferred to KeySpan Energy Corporation and the balance of the company (including the electric transmission and distribution businesses) was purchased by the Long Island Power Authority.

9. Niagara Mohawk, NYSEG, Central Hudson, RG&E and Con Edison. In addition, the New York Power Authority ("Power Authority"), which is not generally subject to the Public Service Law, has completed the divestiture of its two nuclear power plants.

10. In addition, these utilities continue to own high voltage transmission facilities and, in some cases, to distribute natural gas to retail customers. The merger and corporate restructuring of the Long Island Lighting Company reduced the number of traditional combination electric and gas utilities in New York from seven to six. In addition, O&R and Con Edison have merged. Notwithstanding the merger, O&R and Con Ed currently operate as distinct companies. As a result, this Report treats those utilities as separate entities.

11. Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities ("Provider of Last Resort Proceeding"), 2000 N.Y. FUC Lexis 261 (2000). The Provider of Last Resort Proceeding is Case 00-M-0504. The PSC initiated this case to examine, among other matters, potential alternatives to the traditional provider of last resort responsibility. In the short-term, it is expected that the majority of each utility's customers will not shift to a new supplier, but will remain with the utility. See *infra*, Section III(D) (discussing the proceeding).

cific restructuring orders such that each utility would be provided a reasonable opportunity to collect the costs, commonly-referred to as “stranded costs,”¹² that may become unrecoverable as a result of deregulation. The PSC’s orders provide for the traditional recovery of costs and return on investment. The orders, however, differ from traditional rate orders in that they contain an offset, or rate discount, to be provided to customers who elect to switch to a competitive supplier of electric energy. In such an instance, the customer pays the distributor utility its approved rate, less the amount of the discount. This rate offset (known as a “backout rate” or “shopping credit”) is intended to cover at least the commodity cost of electricity, which would be owed to the competitive supplier.

The company-specific restructuring orders require that all or a major portion of the net proceeds resulting from the divestiture of power plants be applied to benefit utilities’ customers.¹³ The plant divestitures have reduced utilities’ stranded costs substantially. Two companies, O&R and Central Hudson, have no stranded costs as a result of their divestitures and NYSEG’s stranded costs are expected to be substantially reduced, if not eliminated completely.

In Section II of this Report, the Committee describes the NYISO’s assumption of responsibility for the operation of wholesale markets for electricity. In Section III, the Committee reviews the development of competition in the retail electricity market. In Section IV, the Committee identifies how the PSC has attempted to address the mitigation of market power. Finally, in Section V, the Conclusion, the Committee addresses the significant policy question whether the electric power industry should be “re-regulated.”

II. THE WHOLESALE MARKET FOR ELECTRICITY AND THE COMMENCEMENT OF OPERATION OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR

A. Introduction

In January 1997, the Member Systems of the New York Power Pool (“Member Systems”) proposed to restructure the wholesale electric market in New York State by establishing the NYISO, the New York State Reliabil-

12. Stranded costs typically result from utilities’ investment in generation plants (e.g., the embedded cost of nuclear power plants) and entry into power purchase contracts that result in costs that are not recoverable in the competitive market-based environment.

13. One form of such benefit is the requirement that the net proceeds be used to amortize the utilities’ stranded costs.

ity Council (“NYSRC”) and a power exchange.¹⁴ The Member Systems’ proposal, as updated in December 1997, contained the following key elements: (1) energy prices, and the prices of certain other services, would be set through continuous day-ahead and real-time auction markets for energy and the other services (which two auction markets are referred to as “two settlements”); (2) the price of energy would be set on the basis of locational-based marginal pricing (“LBMP”) to reflect the varying costs of energy production throughout New York State; (3) the auctions would be based on the “single price” approach, in which the highest single bid price sufficient to clear the market sets the price for all accepted bids; (4) transmission customers would pay a congestion charge for use of the transmission system, to the extent that particular energy transactions involve congested transmission paths;¹⁵ (5) customers could also buy and sell energy through bilateral contractual transactions independent of the NYISO’s auction markets; (6) the NYISO would optimize unit commitment and dispatch based on the bids of market participants; and (7) the NYSRC would maintain reliability standards for the bulk power system.¹⁶

FERC reviewed the Member Systems’ filings in four comprehensive orders.¹⁷ Notably, in its January 27, 1999 order, FERC required the Member Systems to file a transmission tariff that is separate from the rate schedules that govern non-transmission functions. On April 30, 1999, the Member Systems filed an Open Access Transmission Tariff (“OATT”) (to cover transmission-related matters) and a Market Administration and Control Area Services Tariff (to cover market-oriented matters). These tariffs were approved by FERC on July 29, 1999.¹⁸ The NYISO commenced operation on

14. The eight utility companies that made up the New York Power Pool in 1997 are identified above in notes 7-9. The proposal was made in filings at the Federal Energy Regulatory Commission (“FERC”) in Docket No. ER97-1523-000. The NYISO now performs certain functions of a power exchange and there is no independent power exchange in New York. See *infra*, Section II(D) for discussion of NYSRC.

15. See *infra*, Section II(c).

16. See Supplemental Filing To Comprehensive Proposal To Restructure New York Wholesale Electric Market re: Central Hudson et al., ER97-1523-000 (filed Dec. 19, 1997). While the Member Systems’ December 1997 Filing did not eliminate references in the NYISO tariffs or agreements to a power exchange, neither the Member Systems nor the NYISO itself has established a power exchange and none is under consideration.

17. Central Hudson Gas & Electric Corp., 83 FERC ¶ 61,352 (1998); Central Hudson Gas & Electric Corp., 86 FERC ¶ 61,062 (1999); Central Hudson Gas & Electric Corp., 87 FERC ¶ 61,135 (1999); and Central Hudson Gas & Electric Corp., 88 FERC ¶ 61,138 (1999).

18. Central Hudson Gas & Electric Corp., 88 FERC ¶ 61,138 (1999).

November 18, 1999, and took formal control of the New York wholesale electric power system on December 1, 1999.

The NYISO's first year of operation has been turbulent, during which numerous market design and implementation flaws have been identified and, in many cases, addressed. Furthermore, significant elements of the NYISO's market structure remain under construction. For example, the rules governing auctions of installed capacity, the rules concerning price-responsive demand and the rules applicable to transmission expansion have not yet been written or are being rewritten. While the NYISO is unquestionably meeting its minimum goal of operating the New York electric system reliably, a number of substantial market design and implementation issues remain to be addressed. In the first parts of this section of the Report, the Committee describes the NYISO and then, in Section II(E), identifies five significant longer-term issues facing the NYISO, the participants in the electricity markets in New York and electric customers throughout the state.

B. NYISO Organizational Structure

The NYISO is composed of market participants, acting through committees, an independent board of directors ("Board") and the NYISO Staff. The NYISO's ultimate authority is the ten person Board, the members of which are unaffiliated with any market participant.¹⁹ Each director has a single vote; six votes are required to pass an item. The initial directors were chosen by a Selection Committee composed of interested parties and the Board is self-perpetuating. The Board has ultimate responsibility for the operation of the NYISO and the effective execution of its basic responsibilities. Further, the Board is charged with managing the financial affairs of the NYISO. The Board also reviews and determines appeals from the actions of the Management Committee, a membership body composed of market participants.²⁰ Finally, the Board can make tariff filings under Section 205 of the Federal Power Act with the agreement of the NYISO's Management Committee, and, when exigent circumstances exist, on its own without Management Committee approval. In the absence of exigent circumstances and Management Committee approval, the Board may make tariff filings under Section 206, which do not take effect until approved by FERC.

19. Independent System Operator Agreement ("ISO Agreement"), Articles 4 and 5, <http://www.nyiso.com/services/agreements.htm>.

20. *Id.*, at Section 5.07.

The Management Committee supervises and reviews the work of other NYISO committees. Unlike the Board, the Management Committee is a stakeholder-oriented body, comprising each party to the NYISO Agreement.²¹ The Management Committee is composed of five stakeholder sectors: Generator Owners, Other Suppliers, Transmission Owners, End-Use Consumers and Public Power/Environmental Parties. Each sector is assigned a share of the total votes of the Management Committee. Thus, the Generator Owners and Other Suppliers sectors each has 21.5 per cent of the total vote; the Transmission Owners and End-Use Consumer sectors each has 20 percent; and the Public Power/Environmental Parties sector has 17 percent. A measure requires at least 58 percent of the total vote in order to pass. Subject to review by the Board, the Management Committee and the two other market participant committees can make binding decisions.

The NYISO's two other standing committees, also composed of market participants, are the Business Issues and Operating Committees. These two Committees are organized, in terms of governance, similarly to the Management Committee. The Business Issues Committee is responsible for commercial and markets-oriented issues,²² while the Operating Committee is responsible for non-commercial aspects of the NYISO's operations.

C. NYISO Market Structure

The limited availability of transmission in certain areas of the State led to the development of a congestion management plan as part of the NYISO OATT which is based upon the long-standing division of the State into load zones separated by "transmission-interfaces."²³ The cost of producing power varies from one load zone to another because, among other reasons, of varying fuel costs. Because customers in more expensive load zones seek to be served from lower cost generation, there are continuing power flows from low cost zones to high cost zones. Such power flows sometimes reach the limits of the available transmission facilities. When this occurs, not enough lower-priced energy can be transmitted into the higher cost load zones from areas outside that zone. In other words, at

21. *Id.*, at Section 7.01. There are currently over 80 members.

22. *Id.*, at Section 9.01.

23. Transmission interfaces separate the state into load zones, each of which has relatively little intra-zone transmission congestion. The transmission facilities that define interfaces are owned by the transmission providers, that is, the traditional utilities, the Power Authority and LIPA.

times of high demand transmission constraints prevent power flows sufficient to equalize energy prices throughout the state.

The NYISO addresses this condition through adoption of a transmission pricing arrangement known as locational based marginal cost pricing, generally referred to as "LBMP." When energy price differences exist between load zones as a result of transmission constraints, the price difference represents the economic cost of being unable to use the constrained transmission facilities. These costs are referred to as congestion charges. Congestion charges constitute a market-based indication of where the most economically advantageous locations for generating plants and transmission upgrades exist. Purchasers may hedge congestion costs by purchasing transmission congestion contracts ("TCCs") or entering into other financial arrangements.²⁴

Additionally, the NYISO oversees markets for energy, operating reserves, and other ancillary services which enable market participants to buy, sell and schedule energy. Bids are submitted on a day-ahead and an hour-ahead basis at points located within load zones.²⁵ The amounts and prices specified in the suppliers' bids are matched, by load zone, to the electric requirements of LSEs (*i.e.*, utilities and competitive suppliers which are load serving entities) and are used to establish day-ahead and real-time market clearing prices. For this purpose, the market clearing price for each zone is the cost to supply the next increment of customer demand at that location (in theory, the short-run marginal cost), taking into account generation bid prices, physical constraints, congestion and transmission losses. The NYISO is responsible for ensuring that there are sufficient generating resources available to meet the projected electric requirements of the state.

Generators and wholesale marketers submitting bids that exceed the market clearing price typically do not participate in that hour's transactions. All suppliers which do participate in the LBMP market are paid the applicable LBMP for the energy produced at their generator. Buyers pay the applicable energy price LBMP for the load zone in which they take delivery.²⁶

24. The holder of a TCC is entitled to receive revenue associated with congestion that occurs between the points of withdrawal and injection for that TCC.

25. The NYISO acts for the market participants, but it is not a participant itself. It does not own generation or transmission facilities. It does not physically operate any such facilities, and although it is a conduit of transmission revenues as part of a financial settlement process, it does not set the transmission rates on which they are based.

26. Because of current limitations of metering equipment, generator prices are calculated at the particular generator, while customer demand prices are calculated for the applicable load zone.

A supplier of electricity may also enter into bilateral agreements directly with an LSE to sell electric output. These physical²⁷ bilateral transactions are not entitled to preferences or advantages relative to LBMP transactions²⁸ and they must be reported to the NYISO. In this way, the NYISO is able to include these transactions in its evaluation of generation resources from a reliability perspective.

Under the NYISO's OATT, the NYISO makes available transmission service and required ancillary services. The NYISO provides "one-stop shopping" for transmission services. Transmission customers wishing to schedule firm point-to-point transmission service must agree to pay any congestion charges associated therewith. By paying the congestion charges, such customers are assured that their transactions will not be curtailed for economic reasons, thereby providing a form of transaction that is financially analogous²⁹ to firm transmission. Non-firm point-to-point service is provided to those customers that do not wish to pay congestion charges.

When transmission interfaces are not constrained, the LBMP for electric energy acquired in the real-time and day-ahead markets consists of the incremental cost for supplying energy (that is, the bid of the marginal unit) and the marginal losses component. Additionally, the purchaser will pay for ancillary services, the applicable Transmission Service Charge ("TSC") and a transmission charge for the New York Power Authority ("NTAC").³⁰ Under the NYISO framework, with minor exceptions, the TSC is the "license plate" rate paid to the transmission provider owning the transmission facilities from which electric energy is withdrawn for distribution to customers.

The applicable congestion charge is equal to the difference between the congestion components of the LBMPs at the point of withdrawal and

27. Bilateral transactions may also be created purely as a matter of financial contract. Financial transactions do not involve transmission facilities and will not be reported to the NYISO because they are settled monetarily rather than by delivery. The existence of the option to use bilateral transactions is a major distinction between the New York market and the pre-December 2000 California market.

28. Bilateral transactions permit a buyer or a seller to lock in the price of electricity without being subject to the market clearing pricing mechanisms of the ISO-administered markets.

29. The term "financially analogous" is used because the services provided might not actually involve any transmission over a congested interface, but the purchaser of such services will be left in the same economic position as if there were.

30. Similarly, a bilateral transaction includes the contract price for energy, marginal losses, ancillary services, NTAC, and the TSC.

the point of injection.³¹ In some instances, customers may receive a congestion payment. For energy purchases from the LBMP market, the cost of congestion is included in the LBMP. For bilateral transactions, the congestion charges are separately stated. To the extent received by transmission owners, such congestion income partially offsets the transmission owner's revenue requirement and thus reduces the corresponding TSC.

Congestion charges are intended to provide market signals that lead to efficient siting of load and generation. The market structure anticipates that new generation will locate on the higher priced side of an interface thereby relieving congested interfaces. In some circumstances, the construction of new transmission facilities may also be economically justified. In the meantime, which may be for a period of years, congestion will occur and congestion charges will be paid.

D. New York State Reliability Council

The NYSRC is responsible for developing the Reliability Rules with which the NYISO must comply.³² The NYSRC additionally establishes state-wide annual installed capacity requirements for New York State consistent with national and regional reliability organization standards. In establishing the state-wide annual installed capacity requirements, consideration is to be given to the configuration of the system, generation outage rates, assistance from neighboring systems and Local Reliability Rules.³³ The NYSRC is governed by a thirteen-member Executive Committee, composed of seven representatives of transmission owners, one representative of large consumers, one representative of municipal and cooperative systems, one representative of wholesale sellers, and three unaffiliated persons. Transmission owners, thus, have a larger proportional share of control of the NYSRC than transmission owners have on the NYISO's three committees.

The NYSRC monitors and audits the NYISO's compliance with the Reliability Rules. If the NYSRC determines that the NYISO has failed to comply with or has improperly applied the Reliability Rules, the NYSRC is to raise the issue with the NYISO and, if no resolution is reached, the

31. If there were no congestion, there would be no low price/high price dichotomy. Instead, all transactions would seek less costly resources (wherever located) and more expensive generation (wherever located) would cease to operate.

32. New York State Reliability Council Agreement ("NYSRC Agreement"), § 3.01, <http://www.nyiso.com/services/agreements.htm>.

33. *Id.*, at § 3.03.

NYSRC can use the dispute resolution procedure provided in the agreement between the NYSRC and the NYISO. The NYSRC also represents New York State on regional and national reliability organizations.

E. Five Significant Issues That Will Shape the NYISO's Future

The NYISO recently completed its first year of operation. While it certainly has resolved a number of important issues concerning market structure during this period, a number of significant issues remain. The Committee considers that the five issues identified below are key to the shaping of the NYISO as well as the structure of the bulk power market:

- Price spikes and bid/price caps
- Continued development of the market
- Coordination with neighboring control areas
- Siting and construction of new generation
- Uniform price auctions.

Although these unresolved issues are technical in nature, the Committee is concerned that these five issues may not be susceptible to technical corrections, but rather reflect fundamental shortcomings in the current structure of New York's wholesale market.

The increase in wholesale electric prices during 2000, particularly in New York City, appears to have been caused by a number of factors, including increases in the cost of production,³⁴ market design and implementation flaws, load increases without a corresponding increase in generation and the outage of a major base load generating plant. While market design flaws can, in most cases, be addressed through redesign efforts or better enforcement of existing rules (*e.g.*, when market power abuses are detected), other market issues may not be so easily remedied. If temperatures during Summer 2001 are less moderate than those of Summer 2000, New York customers may be confronted with sharply rising energy prices. In other words, would energy prices in New York have followed those in California in the face of high temperatures? Market economics and the continued existence of market design flaws in the New York market suggest the answer may be "yes."³⁵ Significant structural differences between

34. For example, by December 2000, the price of natural gas had increased almost fourfold over 1999. Even with cooler than normal weather, electricity prices in New York City increased 30% over 1999 prices.

35. There are significant distinctions between the pre-December 2000 California electric

the two markets, however, suggest that economic outcomes may be more moderate in New York. Nevertheless, all other things being equal, continued supply constraint in the face of rising demand brought on by higher temperatures render wholesale price increases inevitable.

FERC recently released two significant market analyses: (1) a critique of the competitive market in California³⁶ and (2) a set of regional studies of the bulk power markets throughout the United States.³⁷ Although some of the issues in the California study are understandably "California-specific," the report raises a substantial question about the viability of a competitive market in electric energy, particularly when there is a shortage of generating capacity. FERC's study of bulk power markets in the northeast provides a valuable compendium of issues and concerns facing the three northeastern independent system operators.³⁸ The PSC's Staff also recently released a report on the NYISO.³⁹

Price Spikes and Bid Caps. Energy prices in New York are higher now than prior to the formation of the NYISO.⁴⁰ In part, this increase reflects the increase in the cost of oil and natural gas, the fuels used for much of New York's generation. The NYISO also has indicated its belief that the lengthy absence from service of one nuclear power plant affected the price

power markets and New York's markets. In California, all utility purchases must be made through the power exchange (a spot market), there is a lack of hedging available and there are dangerously low capacity reserves.

36. FERC Staff, Staff Report to the Federal Energy Regulatory Commission on Western Markets and the Causes of the Summer 2000 Price Abnormalities, (Nov. 1, 2000), <http://www.ferc.fed.us/electric/bulkpower.htm>.

37. The bulk power studies covering the United States include a study addressing northeastern United States electricity markets. FERC Staff, Investigation of Bulk Power Markets - Northeastern Region ("FERC Staff Study - Northeastern Region") (Nov. 1, 2000).

38. In addition to the NYISO, these include ISO New England, Inc. and PJM Interconnection, L.L.C.

39. Department of Public Service Pricing Team, State of New York, Interim Pricing Report on New York State's Independent System Operator, ("PSC Staff Pricing Report") (Dec. 14, 2000), <http://www.dps.state.ny.us>. The PSC Staff recommends that the NYISO seek FERC approval for a \$150/mWh "soft" price cap, with a \$1,000/mWh "hard" price cap. A "soft" price cap permits bidders to place bids that exceed the cap provided that they supply data to FERC on the transaction, including incremental generation costs. Such bids, however, would not set the market clearing price.

40. In particular, retail energy prices rose in New York City. While the immediate reasons for such increases were the increases in wholesale energy costs and the rise in fuel prices, New York City energy prices will remain high unless new generation is sited in-City or transmission upgrades increase the City's limited import capability.

of electricity. The increase in prices also reflects the volatility of an immature market. Such volatility is dampened in a regulated market and sometimes spread over periods spanning several years, while prices are free to move in a competitive market. It is also likely that the price increases reflect market design flaws and implementation flaws and, possibly, the exercise of market power by some market participants. The NYISO and market participants expended substantial efforts during the NYISO's first year of operation addressing market design and implementation flaws.⁴¹

Relatively brief price spikes can have a significant impact on general price levels. One such spike which occurred in June 2000 resulted in a thirty percent increase in the average wholesale price for electricity for the month in which it occurred.⁴²

In response to the fear of price spikes causing soaring wholesale energy prices, the NYISO placed bid caps on market participants' energy bids. These caps presently limit energy bids to \$1,000 per megawatt hour ("mWh").⁴³ While these caps originally were to have ended on October 30, 2000, the NYISO recently obtained permission from FERC to extend them until April 30, 2001. Concurrently, the NYISO is considering adoption of "circuit breaker" measures, similar in objective to trading curbs used on stock exchanges, to address market volatility.⁴⁴ They would be intended to identify transitory susceptibility to market power and to mitigate it before it is exercised. Circuit breakers could be substituted for or used in conjunction with bid caps.⁴⁵

The dynamics of the market can be affected by a bid cap, even those well above the cost of production. For example, generators with very high operating costs operate only during peak demand periods. If bid caps were lowered to a point that discourages the participation of such generators in the market during these peak demand periods, supply and reliabil-

41. See Compliance Filing of the NYISO to FERC Reserves Order (Docket No. ER00-3591-000) (Sept. 8, 2000) (cataloging the NYISO's work to resolve market design issues, and the responses of several market participants to the compliance filing, including Con Edison-O&R, NYSEG and Enron Power Marketing Inc).

42. The duration of the spike was less than one day.

43. Bid caps apply both to energy bids and bids to supply operating reserves.

44. One such circuit breaker currently being discussed would be triggered by objective criteria, such as a reference price exceeding bids in some prior period by more than a predetermined percentage. When the bids exceed this level, the NYISO would intercede and establish the price that the generator would be paid. Market participants and the NYISO are evaluating several circuit breaker proposals.

45. PSC Staff Pricing Report, *supra* note 39 at 14-16, 56-57.

ity may be adversely affected. In addition, imposition of such caps in one portion of a multi-state market may lead to suppliers selling to buyers in uncapped regions.⁴⁶

The adoption of a market-based approach to market restructuring was intended to replace prescriptive regulation and price controls. Continuing constraints on the markets will produce lower energy prices in the short-term, but they may also retard the long-term development of a robust, efficient market. The difficult issue during the transition from regulation to competition is how to balance properly the need to protect consumers from extraordinary price spikes while providing the proper price signals to encourage reduction of customer demand at the peak and stimulate the construction of new generation while market participants learn how to let competitive forces act as a self-regulator. The FERC, as respects California, and the PSC in its Staff Pricing Report addressing the New York market, have both suggested that a "soft" price cap of \$150/mWh will provide the proper interim protection.⁴⁷ The NYISO, however, has expressed reservations about this suggestion. The NYISO's economists conclude that imposition of such a "soft cap" would likely increase general price levels, significantly reduce incentives to invest in new electric generation capacity and create an administrative morass. The NYISO proposes introduction of a "circuit breaker."⁴⁸ In addition, the NYISO proposes introduction of measures to credit customers for responding to increasing prices

46. Such behavior has been reported to have recently happened with respect to the California market. Secretary Backs Cap on Western Power Prices, N.Y. Times, Dec. 21, 2000, at A27.

47. Under a "soft" price cap, a generator may be paid more than \$150/mWh if its bid above that amount is cost justified. However, the accepted bid above \$150 will not set the market clearing price. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 93 FERC ¶ 61,294, slip op. at 24 (2000). The severe problems being faced in California are causing FERC to grapple with issues like how to assure that rates meet the Federal Power Act's "just and reasonable" standard when they are market-based. In response to claims by a generator that FERC lacked the authority to step in to correct high electricity prices caused by scarcity, FERC stated:

We further agree that we need to distinguish scarcity rents from exercises of market power; however, we disagree that, absent exercise of market power, prices are necessarily just and reasonable. Our analysis must be, as discussed above, based on a determination of whether the rate falls within a zone of reasonableness.

Id., at 36. See PSC Staff Pricing Report, *supra* note 39 at 54-57.

48. Letter, dated January 11, 2001, from William J. Museler, President of the NYISO, to Maureen O. Helmer, Chairman of the PSC. "Circuit breakers" are discussed *supra* at 15.

by reducing demand.⁴⁹ The resolution of what bid caps and what other measures will be imposed, however, remains fluid at this time.

The NYISO's Board has indicated that it is not inclined to rely upon price caps and strict controls. Nonetheless, in the course of proposing such limitations on the market, neither the NYISO, FERC nor the PSC has presented a clear long-term strategy for a transition from regulation and price controls to a market-based approach.⁵⁰ The Committee suggests that the NYISO should exercise leadership in the transition to a market-based environment by developing and communicating to the public and regulators a strategy for such transition. This should be a key goal for the NYISO in 2001. The NYISO thus could provide a reasoned explanation for how consumer interests, and the public's interests generally, will be met at such time as the NYISO withdraws or modifies the bid caps. As a part of this explanation, the NYISO should further explain why it believes that the circuit breaker approach will provide satisfactory protection, both to market participants and the State's electric consumers. For instance, does the NYISO believe that the circuit breaker approach should be combined with continued reliance on bid caps? Explanation of its position on such key issues would assist the NYISO in providing leadership on key restructuring issues. Examination of market power issues may also increase public confidence in the integrity of the system and constrain abuses.

Key Market Design Issues. In addition to the issue of bid caps, the NYISO is confronted with the need to improve the structure and operation of the New York markets in other respects. FERC Staff criticized the NYISO for relying upon market rules that have required numerous and time consuming corrections.⁵¹ FERC Staff suggested that the NYISO consider limiting itself to administering one market, the energy market, until that market is functioning efficiently, at which time it could add other products.⁵² FERC further noted that while the New York market was evolving it was perhaps correcting itself too slowly.⁵³ The PSC Staff Pricing Re-

49. See *infra* at 17-18 (discussing price responsive load).

50. The PSC Staff Pricing Report offers numerous recommendations for the transition period. See PSC Staff Pricing Report, *supra* note 39 at 42-56. Outgoing FERC Chairman James J. Hoecker has counseled against reliance on price caps as a long-term measure. *San Diego Gas & Elect. Co. v. Sellers of Energy and Ancillary Services*, Slip. op. at 5 (concurring opinion, Chairman James J. Hoecker).

51. FERC Staff Study - Northeastern Region, *supra* note 37 at 1-75-1-76.

52. *Id.*

53. *Id.*, at 1-75. One example of a needed design change involves transactions which are

port also contains numerous recommended changes to market rules and operations including redressing market design flaws and flaws of implementation.⁵⁴

The NYISO needs to develop procedures to account for “price responsive load.” In classic economics, buyers are expected to respond to increased prices by reducing their demand. In electricity markets, however, customers have often not had adequate market signals, nor the technical means of monitoring their level of energy usage, to allow them to adjust demand. With rising energy prices, however, some customers may now become more sensitive to energy economics and may be more willing to take actions to reduce energy usage at times of high prices. At the same time, the existence of verifiable agreements by customers to reduce demand based on price level changes would be valuable to the NYISO in its management of the auction markets in energy. The Committee understands that the NYISO is working on means to introduce verifiable price-responsive demand.

The NYISO is considering how to incorporate such procedures into the New York markets prior to Summer 2001. One alternative is the installation of a certain number of real time meters that can track energy usage by date and time, although the NYISO is seeking a broad range of such mechanisms, particularly in light of the lack of new generation expected to come into service during the next several years.

In addition, the NYISO can play a significant role by facilitating price-capped load bids, which are not yet available to most wholesale market consumers. A price-capped load bid mechanism would allow purchasers to set a maximum price above which they will not purchase from the day-ahead market. The PSC found that this capability needs to be in place and functioning well by Summer 2001 so that it can be used as a tool for managing price risk in the day-ahead market and for reducing day-ahead load during extreme summer peak usage periods.⁵⁵

With the deregulation of the energy markets the normal channels of support for energy conservation have changed. If the NYISO were to join in funding such efforts, it could potentially violate its requirement of maintaining independence. The NYISO was formed to operate the state’s

“virtual,” that is, for which there is no firm, identified supply or demand. The NYISO, however, has sought to prioritize correcting design flaws and other more serious problems before engaging in this market enhancement. *Id.*

54. PSC Staff Pricing Report, *supra* note 39 at 15-17, 72-111.

55. *Id.*, at 15.

electric system, not to participate in the energy markets. The Committee suggests that the NYISO should guard zealously its stance as a non-participant in the markets that it administers, since active participation in energy conservation efforts could appear to some parties as market intervention.

A number of market participants complain about the balancing market evaluation ("BME"), a computer-produced assessment of the energy market which is made hourly, approximately 90 minutes prior to the beginning of the actual dispatch of energy. The NYISO, as noted, uses two continuous auctions—or two settlements—to operate the market, the "day-ahead" and "real-time" settlements. In addition, the NYISO operates the BME shortly prior to the real-time settlement. While the BME projects real-time clearing prices,⁵⁶ it has proven to be a poor predictor of real-time prices. Real-time prices are frequently much higher or much lower than hour-ahead prices. One result of such errors of prediction is that generators and suppliers whose schedules are determined by BME sometimes operate on an uneconomic basis. Inaccurate BME projections thus may lead to uneconomic curtailment of imports or the acceptance of generator bids or other transactions that prove to be uneconomic in real-time.⁵⁷ Numerous market participants have criticized the BME and called for changes in its method of operation. A revision of the BME is currently before a NYISO working group which is considering reform measures.

Another significant instance of needed improvements in the market concerns expansion of the transmission system.⁵⁸ FERC Order No. 2000⁵⁹ concerning regional transmission organizations ("RTOs") requires that RTOs be able to make arrangements to manage transmission expansion.⁶⁰

56. The BME also performs numerous other functions which are based upon the BME's often erroneous assessment of prices.

57. A catalogue of significant BME problems is set forth in the PSC Staff Pricing Report, *supra* note 39 at 92-96.

58. While a number of proposals to increase generating capacity have been made, very few proposals to increase transmission capacity have been made. Moreover, it is not presently clear whether the market will produce effective decision making that will substitute for integrated resource planning that existed under regulation.

59. 18 C.F.R. § 35.34(h) (2000). The NYISO, and other existing independent system operators ("ISOs") as well, have responded to Order No. 2000 with substantial compliance filings or requests for declaratory orders. While Order No. 2000 may provide FERC with a convenient opportunity to re-address deregulation, a detailed discussion of Order No. 2000 is outside the scope of this Report.

60. See *infra* at 21-24.

The Committee supports the NYISO's efforts to make its energy market more efficient and to adapt the market to participants' and consumers' needs.⁶¹ These efforts, however, have not led to prompt resolution of the major pending market design issues faced by the NYISO. That the NYISO's substantial effort is focused on market design issues underscores one of the FERC Staff's questions, whether the three northeastern ISOs should each be independently working to revise their own markets, or whether they should be working collectively and rapidly towards market integration and implementing market development on a coordinated, cross-ISO basis.⁶²

Coordination With Neighboring Control Areas. As noted above, the control area operated by the NYISO is bounded by other independent system operators, including ISO New England, Inc. and PJM Interconnection, L.L.C. Each of these three system operators has established its own market rules and operates its own energy auction market. The market in electric energy, however, is not limited by the boundaries of individual ISOs and numerous transactions cover multiple control areas. Not surprisingly, such independence has led to instances in which transactions across control area boundaries are not managed in a coordinated fashion by neighboring system operators.

While FERC has criticized the three northeastern ISOs for the slow integration of their systems,⁶³ all three northeastern ISOs are currently seeking to resolve critical differences pursuant to a memorandum of understanding ("MOU"). In addition, the Boards of the NYISO and ISO New England recently announced that they have agreed to establish a joint committee to speed the elimination of obstacles to transactions between the two ISOs.⁶⁴ The Committee strongly supports the ISOs' efforts, at the very least, to work cooperatively to resolve unnecessary differences

61. FERC held a technical conference on January 22 and January 23, 2001, at which many of the issues identified in this Report, as well as a number of other issues, were discussed, including the following: curtailments, system reliability, demand response, competitiveness of the operating reserves markets, self-supply of operating reserves, use of western New York generation to meet operating reserve requirements, market protection measures, "seams issues" with other ISOs, BME performance, virtual bidding, trading hubs and other proposals enhancing liquidity.

62. FERC Staff Study - Northeastern Region, *supra* note 37 at 1-89. See *infra*, discussing Neighboring Control Areas.

63. FERC Staff Study - Northeastern Region, *supra* note 37 at 1-89.

64. The agreement also envisions participation by the PJM ISO and the comparable organization being organized by the Province of Ontario.

in operations. The three ISOs' existence as separate entities reflects not inherent logic, but the dead hand of the past and numerous institutional investments in the status quo. Improved integration of the three northeastern ISOs is a minimum requirement for the success of the deregulated market. The relatively small size of the markets operated by the three ISOs may be one contributor to the instability in electricity prices.⁶⁵

Siting and Construction of New Generation. In the pre-NYISO period, the Member Systems calculated the amount of generation that needed to be installed based on the projected level of peak demand, plus a substantial margin for safety above the projected peak load.⁶⁶ Under deregulation, however, parties wishing to build new generation plants are free to construct such plants as they choose, subject to environmental and siting laws. In fact, because the market is premised on the availability of sufficient supply, there is no cap on how much generation may be built. Over 80 applications in connection with new generating plants have been filed with the NYISO, with a gross capacity in excess of 28,800 megawatts ("mW"). While some of these proposals will never be built, developers of 21 projects (totaling about 15,000 mW in capacity) have filed applications or preliminary scoping statements with the New York State Board on Electric Generation Siting and the Environment. Almost all of these new plants are combined cycle, natural gas fired plants, which are significantly more efficient than the plants currently operating. These plants use a technology that was largely unknown a decade ago. New plants will be less polluting of the environment. To the extent that energy from new plants displaces energy from older, more polluting plants, the new plants will actually have environmental benefits. In a market context, the added supply of energy produced by these plants will reduce prices in the classic application of supply and demand.⁶⁷

New generation is needed. Over the past few years there has been substantial growth in the demand for electric power. One estimate indi-

65. FERC supports enlarged markets and system operations that cover an area larger than the three northeastern ISOs currently do. In Order No. 2000, the RTO Order, FERC rejected the position of NYISO that it already qualified as an RTO and should be exempt from making any of the required RTO filings. Regional Transmission Organizations, Docket No. RM99-2-000 III FERC Stat. & Regs. ¶¶ 31,089, 31,225, 31,227 (Dec. 20, 1999).

66. As yet, there has been no parallel calculation of the reserve margin needed to create an adequately competitive market, but it is likely that the margin would exceed the one required for reliability.

67. In addition to these generation projects, one developer has proposed a merchant transmission facility across Long Island Sound.

cates that demand has increased by 12.2% since 1993, while generating capacity in New York has increased only by 2.6%.⁶⁸ In fact, the NYISO projects that only one major new generating plant will actually be added to the list of generators supplying the New York Control Area in the next three to four years.⁶⁹ Without augmented supply, as well as correcting market structure problems noted above, market imbalance may contribute to higher electric prices until sufficient new capacity is brought on line and the problems are corrected. Moreover, the majority of new generation is fueled by natural gas, raising the issue of lack of fuel diversity, attendant financial risk and higher costs.

Nevertheless, the NYISO has not established the rules for connecting the proposed new plants to the transmission grid. In particular, the NYISO has not established clear rules for allocation of the cost of system expansion and system upgrades needed to allow new generator interconnections. Utilities argue that they are currently subject to rate freezes (for state-regulated retail sales) and thus cannot undertake transmission upgrades without express authority to recover their costs. At the same time, some parties fear that the proponents of system expansion simply seek to adopt transmission solutions to problems that could be solved by additional generation. The NYISO addressed this matter in its filing on January 16, 2001 in compliance with Order No. 2000.

In addition, and potentially more serious, the current siting procedures under Article X of the New York Public Service Law, which were designed in part to expedite licensing, have yet to meet that goal.⁷⁰ This issue is crucial to the restructuring of the industry as New York requires the introduction of new, lower cost efficient and less polluting power plants to moderate demand-driven price increases. Demand-reduction and demand shifting will reduce but not eliminate the need for construction of new generating plants. If this issue cannot be resolved promptly, the markets will remain imperfect and unwanted price volatility will result, with higher prices as a likely result.

The Committee is separately addressing Article X of the Public Service

68. Floyd Norris, *To Fix the Electricity Mess, More Power Plants are Needed* New York Times, January 5, 2001, at C1.

69. The New York Power Authority, however, recently announced plans to install up to 11 44 mW gas turbines by June 1, 2001 at various sites in or near New York City.

70. While it is noteworthy that the Siting Board recently issued a certificate for an 800 MW facility on Lake Ontario three months ahead of the 12-month deadline, that case was essentially uncontested. *Heritage Power LLC, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need*, Case 99-F-0558 (issued January 19, 2001).

Law in another report to be issued later this year. For the purposes of this Report, it is sufficient to note several policy alternatives: first, the Legislature might simply repeal Article X and allow new generation plants to be licensed under the State Environmental Quality Review Act ("SEQRA"), as other industrial and commercial projects are licensed. Second, the Legislature might replace today's Article X with a new siting law that places rigorous time limits on review of project applications. Third, the Legislature might amend Article X to provide a higher minimum threshold exempting more projects from Article X licensing procedures. Today, projects that are smaller than 80 megawatts in capacity do not have to meet the requirements of Article X and are, instead, reviewed under SEQRA.⁷¹ Such an increased threshold would afford developers an expanded option to select relatively smaller project sizes while avoiding Article X requirements. Thus, developers would consider licensing strategy as a part of project development. Fourth, the Legislature might amend Article X by adding a "fast track" option for projects that complied with all environmental laws and regulations. Such an option would stipulate a time certain for completion of state-level licensing requirements. As a practical matter, this option would apply only for plants with very low levels of air emissions which consumed essentially no water for cooling purposes.

While the Committee does not recommend a particular option in this Report, the Committee does consider that there is a substantial need to review New York's siting process to determine if it appropriately meets the demands of the deregulated electric market. While the proponents of the deregulated market assumed that price increases would inexorably lead to increases in supply, the period of such response to increased prices appears to be measured in years. Thus, much higher prices are likely to be around for several years before new capacity is built. Although a slowing in the level of demand in response to changes in price may be typical for some markets, in the case of electricity, such response to increased prices may be unacceptable to consumers. Therefore, although the ultimate causes

71. The State's licensing authority for electric generating plants recently permitted the Power Authority to avoid Article X for its emergency turbine projects that exceed 80 MW in installed capacity because the Power Authority agreed to limit the output to 80 MW at each site. *Petition by Power Authority of the State of New York for a Declaratory Ruling That a Board Certificate is Not Required for Combinations at a Site of Generators That Shall be Operated at a Combined Wattage of Less Than Eighty Thousand Kilowatts*, 2000 N.Y. PUC Lexis 911 (2000). In this case, some environmental groups argued that the effect on the environment would be worse because the Power Authority was artificially limiting the output of the turbines. This could be an argument in favor of raising the cap.

of the inhospitable climate for development of new generation facilities are likely to involve issues not completely addressable by the Legislature, the Committee believes that the existing siting laws for large electric generation plants should be reviewed to assess their adequacy for the deregulated market.

Uniform Price Auctions. The NYISO energy market makes use of a uniform price for all successful bidders: the last (and highest) accepted supply bid sets the clearing price for all generators. Some economists have suggested alternative methods for developing a clearing price. For example, an alternative approach, known as "pay according to bid," would pay bidders the amount bid by that party. One analyst has recently suggested that the "pay according to bid" model may be a more appropriate approach to auctions in the electric utility industry.⁷² Other economists maintain that elimination of the single clearing price would result in bids well in excess of marginal costs. While the Committee does not endorse a substantial redesign of the markets, the appropriateness of the standard single clearing price is one of the many issues being raised about the New York wholesale market.⁷³ Does a uniform price auction increase the opportunity for the exercise of market power?

The Committee encourages the NYISO and the PSC, as well as other parties interested in promoting competition in New York, to undertake a review of alternative market clearing price determination methods. While some will argue that electricity is a commodity, which should be subject to traditional market forces, the Summer 2000 experiences in California and New York suggest that the electricity markets may be inherently more volatile and complex than had been expected. If the problems are not corrected, the economy and consumers may be harmed substantially by the excessive cost of electricity.

III. THE DEVELOPMENT OF COMPETITION IN THE RETAIL ELECTRICITY MARKET

A. Introduction

The PSC's vision for restructuring electric market provided for the

72. Randy Hudson, Referring Bulk Power Auction: Why Not Pay According to Bid? *Public Utilities Fortnightly*, October 1, 2000, at 46. This approach also received tentative endorsement from FERC Commissioner Curtis Hebert. See *San Diego Gas & Electric Co. v. Sellers of Energy*, Market Order Proposing Remedies For California Wholesale Electric Supply, 93 FERC ¶ 61,121 (2000).

73. FERC Staff has included the elimination of the single price auction as an option in its study of northeastern bulk power markets. FERC Staff Study-Northeastern Region, *supra* note 37 at 1-95.

development of competitive markets in the retail sale of electricity. As noted at the outset of this Report, the adoption of retail competition in New York reflects utility-specific collaborative processes, rather than comprehensive legislation. Thus, retail access programs vary among the utilities in terms of timing, availability, “shopping credit” calculations,⁷⁴ technical arrangements and other provisions. While this approach properly accounts for the unique characteristics of each utility’s service territory (such as the capacity requirements for Con Edison’s New York City customers), competitive suppliers seeking to serve customers in multiple service territories have found the different requirements daunting. As a result of the slow development of competition in the retail markets and competitive marketers’ complaints, beginning in 1996 the PSC commenced several proceedings to address specific aspects of the competitive retail market.

In this Section of the Report, the Committee discusses the PSC’s efforts to make utilities’ business practices uniform (Section III(B)), the licensing and qualification requirements applicable to competitive suppliers (Section III(C)), a number of other pending PSC proceedings addressing restructuring issues, including a proceeding examining the future of the competitive gas and electricity markets (Section III(D)), and the Committee’s assessment of the development of retail competition (Section III(E)).

B. Uniform Business Practices

On February 16, 1999, the PSC issued Opinion No. 99-3 (the “Uniform Business Practices Order”) to reconcile inconsistencies and provide some degree of standardization among the utilities’ business practices and procedures related to retail access.⁷⁵ Utility filings of key elements in compliance with the PSC’s Uniform Business Practices Order requirements became effective June 1, 1999. The requirements are as follows:

Competitive Supplier Creditworthiness. Utilities must use the major bond rating agencies instead of making creditworthiness determinations themselves. Competitive suppliers can satisfy the utility’s creditworthiness requirement (and avoid posting security) by having an acceptable bond

74. See *supra* at 4.

75. In the matter of Retail Access Business Rules, Opinion and Order Concerning Uniform Business Practices, 190 P.U.R.4th 369 (1999). The Business Practices proceeding also addresses concerns of competitive gas marketers seeking to serve gas consumers and establishes uniform business practices and procedures for the natural gas industry. See also, In the Matter of Retail Access Business Rules, Order Granting Portions of Petitions for Rehearing, 1999 N.Y. PUC Lexis 95 (1999).

rating from Standard and Poor's, Moody's or Fitch or by having a Dunn and Bradstreet rating, combined with a good credit history, to satisfy creditworthiness requirements.

Switching Requirements. The PSC determined that there was a possibility of customers gaming the system by, for example, using a competitive supplier for the portion of the year when commodity prices are low and then returning to bundled utility sales service when prices are high to take advantage of the utility's levelized annual pricing. The PSC required that customers voluntarily returning to utility bundled service may be required to remain with the utility for up to twelve months (unless the utility has in place other mechanisms, such as a pass through of the market price, designed to protect non-participating customers).

Customer Liability in Billing Agency Situations. A utility is not permitted to collect amounts due from a customer who has paid a billing agent if the billing agent fails to remit the customer's payment to the utility. On rehearing, the PSC determined that customers should not have to pay a bill twice because they have chosen to move to a competitor.⁷⁶ Utilities are allowed to petition for recovery of net incremental costs incurred after security deposits have been used, and after they have taken steps to mitigate losses.

Billing Agency. The Uniform Business Practices establish consumer safeguards for companies acting as billing agents and require that customer payments be applied to utility charges before competitive supplier charges (unless directed otherwise by the customer).

Separately, the PSC Staff had issued a single bill option proposal for comment that would obviate much of the controversy over billing agency arrangements. The Staff's proposal would require the utility to allow the competitive supplier to bill for both the commodity and delivery components of a customer's bill.⁷⁷ The PSC adopted the Staff's proposal, requiring major gas and electric corporations to allow their retail access customers to receive single combined bills from their utility or their competitive supplier. The PSC also required that the utilities' backout credits reflect long run avoided costs for the billing function and prescribed proxies if such costs were not readily available.⁷⁸ The PSC subsequently rejected util-

76. Retail Access Business Rules, Order Granting Portions of Petitions for Rehearing, 1999 N.Y. PUC Lexis 95 (1999).

77. The retail choice program underway in the service territory of RG&E is a "single retailer model," in which the ESCO purchases delivery services from the utility and bundles those services with the commodity in billing customers.

78. In the Matter of Customer Billing Arrangements, Order Providing for Customer Choice of Billing Entity, 200 P.U.R.4th 149 (2000).

ity claims that the backout credits were overstated, discriminatory and unconstitutional, and directed the utilities to file tariffs after collaboration with the parties.⁷⁹

C. Competitive Supplier Qualifications/Acceptance

The PSC established the qualifications and acceptance procedures applicable to competitive suppliers doing business in New York.⁸⁰ The PSC directed that the requirements be included in the transmission providers' tariffs. Competitive suppliers must provide proof of registration with the New York Department of State; a description of customers to be served, and how required consumer protections will be met; sample bills and complaint handling procedures; and a copy of its disclosure statement.

The PSC also stated that a competitive supplier might be suspended, on a case by case basis, after an opportunity for a hearing. Factors to be considered include failure to adhere to its disclosure statement; failure to comply with prescribed consumer protections; an unacceptably high volume of complaints; failure to comply with requirements of the NYISO; failure to submit required reports; and failure to apprise Staff of material changes from the competitive suppliers' initial filing.

Thus far, significant problems have not developed in the retail access programs being implemented. One competitive supplier serving approximately 14,000 customers filed for bankruptcy protection under Chapter 11 and has liquidated its business under Chapter 7 of the Bankruptcy Code. Some utilities suffered losses as a result of this bankruptcy.

D. Other PSC Regulatory Proceedings

The PSC has acted in a number of additional areas to address retail market concerns. The following pending proceedings provide an indication of the breadth of the PSC's activity: Competitive Metering Proceeding,⁸¹ Electronic Data Interchange Proceeding,⁸² Customer Billing Arrange-

79. In the Matter of Customer Billing Arrangements; Order Denying Petitions for Rehearing, 2000 N.Y. PUC Lexis 731 (2000).

80. Competitive Opportunity Proceeding, Regulatory Policy for the Provision of Retail Energy, 1997 N.Y. PUC Lexis 328 (1997).

81. Competitive Opportunities Proceeding, Order Providing for Competitive Metering, 194 P.U.R.4th 129 (1999); Order Denying Petitions for Rehearing and Clarifying Order, 1999 N.Y. PUC Lexis 609 (1999).

82. In the Matter of Electronic Data Interchange Proceeding, Opinion and Order on Implementation of Electronic Data Interchange, 200 P.U.R.4th 329 (2000).

ments;⁸³ System Benefits Charge Proceeding,⁸⁴ and Provider of Last Resort Proceeding.⁸⁵

In the Competitive Metering proceeding, the PSC adopted policies to implement competitive metering and meter data services and required utilities to file unbundled tariffs and provide a credit at embedded costs for those services. An eligibility threshold of 50 kW of demand was established. The utility tariffs are still under review, and there have been few applications of competitive metering/meter data services.

In the Electronic Data Interchange proceeding, the PSC established procedures and protocols for the electronic exchange of billing and other information between utilities and competitive suppliers.

In the Customer Billing Arrangements proceeding, the PSC recently ruled that customers may choose to receive combined (*i.e.*, electric commodity and delivery service) bills from either their utility or their competitive supplier. The PSC directed the utilities to unbundle the billing function on the basis of long run avoided costs, and if such estimates were unavailable, on an embedded cost basis as a temporary proxy. Aside from those participating in RG&E's single retailer model, few competitive suppliers are providing combined bills at this time. The utilities' tariffs are currently under review by the Commission.

In the System Benefits Charge ("SBC") proceeding, the PSC increased the annual funding from \$78.1 million to \$150 million, extended the program from June 30, 2001 through June 30, 2006, established uniform statewide rates among utilities, and added load reduction programs to be funded by the SBC.

The Provider of Last Resort case was initiated to address the future of competitive gas and electricity markets, including the role of a utility as provider of last resort and related issues. The case has been conducted on a collaborative basis and the parties are evaluating the following three models of an ultimate framework for competition at retail:

- Model 1—utilities, in competition with competitive suppliers, continue to offer fully bundled service.

83. In the Matter of Customer Billing Arrangements, Order Providing for Customer Choice of Billing Entity, 200 P.U.R.4th 149 In the Matter of Customer Billing Arrangements, Order Denying Petitions for Rehearing, 2000 N.Y. PUC Lexis 731 (2000).

84. Competitive Opportunity Proceeding, Opinion and Order Concerning System Benefits Charge Issues, 183 P.U.R.4th 373 (1998).

85. Provider of Last Resort Proceeding Order Instituting Proceeding, 2000 N.Y. PUC Lexis 261 (2000).

- Model 2—utilities exit the sale of commodity, but remain in the retail transmission and distribution business.
- Model 3—utilities exit the retail business entirely, and customers can obtain commodity energy and delivery services only through competitive suppliers.

A PSC decision is expected during Spring 2001.

E. Conclusion Concerning Retail Competition Issues

The PSC has put in place the basic infrastructure to encourage retail electric competition. The penetration rates, however, have been less than anticipated. Marketers and competitive suppliers generally contend that, despite the actions taken in the PSC's Uniform Business Practices proceeding, significant differences and complexities among the utilities' retail access programs thwart marketers, and competitive suppliers' marketing efforts. They also contend that the backout credits against which they compete are understated, and that further unbundling of services is required. Finally, they argue that an "end-state" has to be clearly articulated. Furthermore, it seems apparent that with the price spikes of Summer 2000, and continued reports of the significant and dramatic flaws in California's deregulation effort, customers are thinking twice about choosing a competitive supplier. The continued shortcomings in the wholesale electric markets will also undermine the development of retail competition.

Ultimately, the transition to a competitive electric retail marketplace may take much longer than its proponents anticipated. Specifically, the Committee believes that NYISO pricing reforms, market design and market power mitigation improvements, and software corrections, on the wholesale level, together with the PSC's review and consideration of the backout rate, approval of unbundling tariffs for metering and billing, further unbundling of services (*e.g.*, commodity procurement) and articulation of a PSC vision of an end-state, on the retail level, will stimulate development of competitive retail markets.

The Committee also observes that some industry observers expect that restructuring of the electric power industry will also lead to non-price changes in the supply of electricity, including the introduction of new products and services. For example, customers could receive flexible, time-dependent rate plans, access to on-site small generators, bills that cover combined multiple utility services and remote meter reading via telemetry. Deregulation of other industries has led to significant new products

and services. Such introduction of new service options could rank as one of the most significant results of the restructuring of the electric power industry. While these changes are expected in the electric industry by some observers, there has not yet been widespread introduction of new products and services. Other observers attribute the relatively slow development of the competition retail deregulation of the electricity market to the difficulty in the introduction of new products and services to customers in that market.

IV. THE MITIGATION OF MARKET PARTICIPANTS' POSSESSION OF MARKET POWER

A. Introduction

The electric utility industry has been an exception in the United States to the strong preference for open, competitive markets which provide choices for consumers and exert market pressure to control prices. In the early twentieth century, many states enacted statutes that substituted economic regulation of an industry regarded as a "natural monopoly"⁸⁶ for market competition. The end of such economic regulation has led to a need for regulators to address market power issues. In fact, the devising and enforcing of market rules that do not permit the exercise of market power are possibly the most important tasks facing the regulators who are restructuring of the electric industry.

The PSC envisioned competitive generators making electric sales through the NYISO in a robustly competitive generation market.⁸⁷ The PSC fa-

86. A "natural monopoly" is an industry that can achieve lower costs as a monopolist in a market, usually because of economies of scale and/or scope. Garfield and Lovejoy, *Public Utility Economics* 15-16 (1964). Electric utility monopolies enjoyed freedom from competition in their market, provided they served all applicants in their service territory on a non-discriminatory basis.

87. Two researchers, R. Crandall and J. Ellig, report in *Economic Deregulation and Customer Choice: Lessons for the Electric Industry* (at 2-3) that within ten years of deregulation, prices in five industries decreased between 20 and 50 percent while quality of service improved. In addition, the Federal Trade Commission ("FTC") recently released a report on deregulation of the electric power industry in which it stated: "Extensive research on the actual effects of regulatory reform has revealed a pattern of substantial benefits, including cost savings, and technologic services." United States FTC, Staff Report, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform*, (July 2000) at *8 ("FTC Staff Report"). Some observers, however, have questioned the notion that electricity industry is not sufficiently similar to other industries so as to justify the assumption that electricity deregulation will be as successful as in the case of other industries. As stated recently in one article,

vored the divestiture of utility-owned generation and the existence of multiple plant owners to enhance competition and to preclude the exercise of market power. By permitting additional sellers to enter the market previously dominated by utilities, there would be less likelihood that a single seller can gain by behaving strategically (*e.g.*, withholding supply) or that a small group of sellers could coordinate their efforts to affect the market. The PSC is responsible for determining whether the structural changes in the electric utility industry are consistent with prevention or, at least, the mitigation of the exercise of market power.

FERC has also reviewed the transactions covered in this section.⁸⁸ FERC evaluated the right to sell power at market-based rates on the basis of concentrations in the relevant markets, which depends on the relative size of the market participant and the ability of competing suppliers to serve customers. This is defined by the presence or absence of generating capacity and transaction capacity to deliver power to relevant markets, although the focus to date has been more on availability of generation and transmission than on price. Former FERC Chairman Hoecker said recently that “market power must, to some extent, be assumed as a feature of growing and changing electricity markets (W)e need to be much more hands-on in monitoring markets . . . and be willing to mitigate market power as it occurs.”⁸⁹ Mitigation measures put into place include imposition of hard and soft bid caps, divestiture of generating capacity to reduce market concentration, disgorgement of profits where preferential treatment was provided to affiliate producers, and prohibition on the ability to sell at market based rates for various periods of time, requiring the producer to sell at cost-based rates instead. The rules of the various ISOs which FERC has approved contain variants on these approaches as well.

In general, the non-storability of electricity, combined with very little demand elasticity and the need for real-time supply/demand balancing to keep the grid stable, has made restructuring of electricity markets a much greater challenge that was inferred from experience with natural gas, airlines, trucking, telecommunications, and a host of other industries.

Borenstein and Bushnell, *Electricity Restructuring: Deregulation or Reregulation*, Regulation, The Cato Review of Business and Government, Vol. 23, No. 2, (2000) at 46.

88. FERC’s determination of market power will be the relevant determination because it has jurisdiction over wholesale transactions.

89. Tina Davis, Massey: FERC Behind the Times on Market Power Analysis Tools, *Energy Daily* (Nov. 22, 2000).

The mitigation of market participants' possession of market power remains a significant issue in the restructuring of New York's electric power industry. While a detailed discussion of the economic, regulatory and legal issues raised by market power is beyond the scope of this Report, the Committee addresses the PSC's vertical and horizontal market power guidelines (Section IV(B)), mitigation of market power in connection with power plant divestitures (Section IV(C)), the issue of market power in utility mergers (Section IV(D)) and market power in affiliate transactions (Section IV(E)).

B. The PSC's Market Power Guidelines

In addition to encouraging utilities to divest generating plants, the PSC has adopted guidelines concerning both horizontal⁹⁰ and vertical market power.⁹¹ While there are potential efficiencies inherent in single ownership of multiple generation stations, the PSC has attempted to balance customer protection and obtaining the potential benefits which large-scale ownership may provide to ratepayers against undue market power concentration. The PSC's horizontal market guidelines track those contained in FERC's electric industry merger guidelines.⁹²

Utilities were required in the divestiture proceedings to certify that they believe the horizontal market power guidelines are satisfied, or they were required to propose appropriate mitigation measures. In addition, the winning bidders were required to maintain compliance with the guidelines until regulatory approvals are received and the transactions closed.

On July 17, 1998, the PSC issued a Policy Statement regarding vertical

90. Horizontal market power occurs if one generation-owning entity, or a small number of generation entities, owns a share of generation supply large enough to allow the exercise of control over prices independent of, and above, competitive market levels. Because competing generators set the price for energy production in an open market, "load pockets" raise horizontal market power issues. Load pockets are areas that, due to limits on available transmission, require generators within the areas to supply capacity, energy, ancillary services and related products. The PSC Staff has described "load pockets" as geographic areas that, because of transmission limitations, must have generation inside the area to ensure reliable service for that area's load. PSC Staff Pricing Report, *supra* note 39 at 44, n. 24.

91. Vertical market power occurs when an entity with market power in one stage of the production process leverages that power to gain advantage in a different stage of the production process. See generally, In the Matter of Orange & Rockland Utilities, Inc.'s Plans for Electric Rate/Restructuring Pursuant to Opinion No. 96-12, Order Approving Transfer of Generating Facilities and Making Other Findings, 1999 N.Y. PUC Lexis 306 at p. 14 (1999).

92. See New York State Electric & Gas Corp., Order Authorizing the Process for Auctioning of Generation Plant (1998) N.Y. PUC Lexis 192, Appendix A 1998. The same guidelines were appended to other utility auction orders.

market power.⁹³ The PSC noted that a transmission and distribution (“T&D”) utility whose affiliate owns generation may, in certain circumstances, be able to influence prices in that generator’s market to the advantage of the combined operation.⁹⁴ The PSC established a rebuttable presumption, applicable to its review of transfers of generation plants under PSL § 70, that ownership of generation by a T&D company affiliate would unacceptably exacerbate the potential for vertical market power. The T&D company and the new owner, therefore, would have to demonstrate that circumstances do not provide an opportunity for the combined T&D company and the affiliate to exercise market power or that reasonable means exist to mitigate market power. Alternatively, petitioners must demonstrate substantial ratepayer benefits, coupled with mitigation measures, that warrant overcoming the presumption.

C. The PSC’s Treatment of Market Power Issues in Plant Divestiture Proceedings

The PSC evaluated market power issues in connection with the divestiture by five utilities of their generation facilities.⁹⁵ These evaluations addressed the divestitures both in terms of the PSC’s market power guidelines and as respects “load pockets.”⁹⁶ Load pockets cause market power problems because the limited number, concentrated ownership and size of generators create opportunities to raise prices substantially above competitive market levels for significant periods of the year.⁹⁷ So long as there is insufficient transmission and insufficient generation, load pockets require regulatory intervention.

1. The Application of Market Power Guidelines To Divestitures

The PSC determined in the case of O&R’s divestitures that no hori-

93. See, e.g., *In the Matter of Orange and Rockland Utilities, Inc.’s Plans for Electric Rate/Restructuring Pursuant to Opinion No. 96-12, Generation Plant Auctions*, Statement of Policy Regarding Vertical Market Power, 187 P.U.R.4th 223 (1998).

94. *Id.*

95. The five utilities are Con Edison, O&R, NYSEG, Niagara Mohawk and Central Hudson. The PSC also reviewed the bidding process, the sales prices, transfer agreements, transitional power purchase agreements and environmental impacts.

96. See *supra* at note 90.

97. See Department of Public Service Staff, State of New York, *Analysis of Load Pockets and Market Power in New York State*, (“DPS Staff Report”) (Oct. 1, 1996) at 3. The DPS Staff Report identified a number of significant load pockets within New York State, particularly in the downstate region.

zontal or vertical market power concerns would arise. The purchaser's market share in the energy market is projected to be in the 2% to 5% range, depending on the market definition and the time of year. The purchaser's market share in the capacity market will range from 7% to 16%, depending on the market definition and assumptions used. No vertical market power concerns will arise as a result of the sale. The purchaser did not own any electric transmission or distribution facilities in New York State prior to the purchase of O&R's facilities. As a result of the sale, the only such facilities the purchaser will own are those that are incidental to the generating facilities. Ownership of these dedicated T&D facilities, according to the PSC, will not give the purchaser any opportunity to inhibit the ability of any other generator in the State to obtain access to the transmission grid.

In the case of NYSEG's transfer of its New York fossil-fueled facilities and its share of the Homer City, Pennsylvania plant,⁹⁸ the PSC's market share analysis yielded changes in market shares in the western New York market. NYSEG's 19% share dropped to 7% (which primarily reflects its 18% share of Nine Mile Point 2 nuclear power plant). The two purchasing generators' shares rose to about 7%, depending on various assumptions for Homer City.⁹⁹ Based on these findings, the PSC did not discern horizontal market power concerns. Vertical market power issues did not arise in the PSC's review because neither purchaser owns transmission in New York.

With respect to Niagara Mohawk's Oswego divestiture, Niagara Mohawk argued that the purchaser's near-term market share (between 10% and 21% depending upon the season and retail access penetration assumptions), fell within Herfindahl Hirschmann Index ("HHI") tolerances permissible under the horizontal market power guidelines. According to Niagara Mohawk, long term projections also satisfied the market power guidelines in all cases other than an assumption of 0% retail access. Given the market power mitigation measures imposed in the Huntley/Dunkirk order, the PSC determined that the potential horizontal market power problems had been satisfactorily ameliorated.¹⁰⁰

98. In the Matter of New York State Electric & Gas Corp., Plans For Electric Rate/Restructuring Pursuant to Opinion No. 96-12, Order Approving Transfer of Electric Generation Facilities, Approving Contracts Upon a Condition, and Making Other Findings, 1998 N.Y. PUC LEXIS 678 (1998).

99. *Id.*, at 10.

100. NRG Energy, Inc. and Oswego Harbor Power, LLC, Order Approving Transfer of the Oswego Generating Facility and Making Other Findings 1999 N.Y. PUC LEXIS 502 (1999). See, *infra* note 104 (discussing the Huntley and Dunkirk plants).

The PSC approved the transfer of Niagara Mohawk's hydroelectric generation facilities, crediting Niagara Mohawk's analysis which showed that the HHI would improve or remain unchanged as a result of the sale and that the transfer therefore fell within the market power guidelines.¹⁰¹ The fact that two of the purchaser's affiliates would provide various services to both the purchaser as well as to other competitors was thought to present too remote a possibility of anti-competitive behavior to justify a finding that the transfer was not in the public interest.¹⁰²

The purchaser of Niagara Mohawk's Albany Steam Station would have a market share of no more than 1% to 5% resulting from the sale and Niagara Mohawk maintained that the sale increased competition. The PSC determined that the sale posed no market power problems.¹⁰³ With respect to Niagara Mohawk's sale of its Huntley and Dunkirk coal-fired generating facilities, the PSC noted that a study projected that the HHI would increase between 135 and 225 points. It also noted that federal agencies rely upon a 100 point increase criterion as a trigger for increased scrutiny of market power impacts.¹⁰⁴ Nevertheless, the PSC determined that the purchase of the Huntley and Dunkirk plants, standing by itself, satisfied the horizontal market power guidelines, but that the purchaser's pending purchases of other plants as well as its affiliations needed to be considered.

The PSC found that two of the purchaser's other major acquisitions in New York (Con Edison's Arthur Kill generation bundle and the Oswego Steam Station) are located in separate capacity markets and that there is little interaction between the markets. It found that the acquisition of Arthur Kill would not give the buyer market power within the New York City market because of the established mitigation measures designed to prevent that outcome but that acquisition of Oswego could affect upstate electricity markets when its capacity is combined with the Huntley and Dunkirk capacity. Accordingly, the PSC directed the purchaser to enter into a capacity option contract in the Oswego transaction to mitigate the

101. *Id.*

102. *Id.*

103. Proceeding of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk power Corporation for Electric Service, Order Approving Transfer of the Albany Generating Facility and Making Other Findings, 2000 N.Y. PUC LEXIS 350 (2000).

104. Proceeding of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for electric Service, Order Approving Transfer of Coal-fired Generation Facilities and Making Other Findings, 1999 N.Y. PUC LEXIS 257 (1999).

potential for market power impacts that could otherwise arise with the acquisition of Oswego.¹⁰⁵

On September 21, 2000, Central Hudson, its co-tenants at the Roseton Station, as sellers, and the buyer sought PSC approval for the transfer of Central Hudson's two generating facilities. In its order authorizing the divestiture,¹⁰⁶ the PSC directed compliance with the horizontal and vertical market power guidelines, advised Central Hudson to address load pocket issues, authorized the utility to enter into transition power agreements and adjusted the divestiture incentive. Central Hudson and the buyer have entered into a transition power agreement and have also agreed to address load pocket issues. On December 20, 2000, the PSC approved the sale of Central Hudson's generating facilities, finding that the buyer's ownership raised no horizontal or vertical market power issues.¹⁰⁷ This transaction is expected to close in the near future.

2. The PSC's Response to Load Pocket Considerations

The PSC considered Con Edison's divestitures of most of its generating plants in light of the fact that these plants are all located within a load pocket defined by Con Edison's underground transmission system. The resulting transmission limits constrain the amount of electricity that can be imported into the City, and thus require that a certain percentage of the load be supplied from in-City generators. Both the PSC¹⁰⁸ and FERC¹⁰⁹ issued orders containing comparable mitigation measures concerning market power.

Energy bid price cap. Since the commencement of NYISO operation in November 1999, market-based bids for energy and transmission service have been managed through locational marginal cost pricing. In New

105. *Id.*

106. In the Matter of Central Hudson Gas & Electric Corp., Plans for Electric Rate/Restructuring Pursuant to Opinion No. 96-12 ("Matter of Central Hudson Restructuring"), Order Authorizing the Process for Auctioning of Generation Plant and Modifying Prior Orders 2000 N.Y. PUC LEXIS 1040 (2000).

107. Case 96-E-0909, In the Matter of Central Hudson Restructuring, Order Approving Transfer of the Danskammer and Roseton Generating Stations and Making Other Findings, 2000 N.Y. Lexis 931 (2000).

108. In the Matter of Consolidated Edison Company of New York, Inc., Order Authorizing the Process for Auctioning of Generation Plant, 188 P.U.R.4th 149 (1998), ("Con Edison Auction Order"); see also Matter of Central Hudson, Comprehensive Order Approving Transfer of Generating Facilities and Making Other Findings, 1999 N.Y. PUC LEXIS 286 (1999).

109. Consolidated Edison Company of New York, Inc., 84 FERC ¶ 61,287 (1998).

York City, if the combined bids for the day-ahead in-City market have a clearing price more than 5% greater than the price at the Indian Point 2 bus, which is outside of the New York City market, then either average bid prices during an unconstrained period or cost-based bids for the in-City market will be substituted. This mitigation method is intended to prohibit the exercise of market power during times of heavy demand. Con Edison has recently suggested that this mitigation measure should also be applied to the real-time market.

Installed capacity. Until the NYISO rules otherwise, load serving entities in New York City¹¹⁰ must arrange for 80% of their installed capacity to be located in the City. The cap for capacity sold by the new owners of generation formerly owned by Con Edison is \$105/kW/year, which is below Con Edison's average embedded cost of capacity and the level of the NYISO-established capacity deficiency charge. The figure, however, is above the projected cost of new generation. In order to encourage new entrants, the cap does not apply to newly constructed generation (those generators, however, can be paid no more than the NYISO capacity deficiency penalty, which is currently \$150/kW/year but is projected to rise to \$220/kW/year). Con Edison has suggested that the \$105/kW/year cap should be applied to all City generation.

Unit commitment. In the unit commitment market, if a unit is committed and proves to be the cheapest alternative, there would be no market power. However, if the unit is committed and is not dispatched the next day to deliver energy, its unit commitment payment would be capped at the variable cost of the unit. Other mitigation measures were adopted by the PSC¹¹¹ in ancillary services markets, such as spinning reserve and non-spinning reserve.¹¹²

The PSC also reviewed the O&R divestiture in the context of load pockets. The PSC approved O&R's proposal to enter into call contracts with the purchasers of the divested units to address the potential for market power in the load pockets in the O&R service territory.¹¹³ Under these con-

110. Traditionally, Con Edison was one of two load serving entities in New York City. Today, this term includes Con Edison and other retail suppliers that compete with Con Edison.

111. Con Edison Auction Order, 188 P.U.R.4th at 162-64.

112. *Id.*

113. In the Matter of Orange & Rockland Utilities, Inc.'s Plans for Electric Rate/Restructuring pursuant to Opinion No. 96-12, Final Divestiture Plan and Petition for Approval of Agreement with Consolidated Edison Company of New York, Inc., Order Authorizing the Process for Auctioning of Generation Plant and Rejecting Joint Agreement, 1998 N.Y. PUC LEXIS 374 (1998).

tracts, the new owner will supply capacity and variable energy at a fixed availability price. The contracts specify the amount of capacity which the new owner is required to make available as well as the price and will require the new owner to operate generation units and provide energy when load pocket circumstances exist, even if the unit would otherwise be scheduled to be off-line.¹¹⁴

Although the call contracts are a form of price control that could be inconsistent with a fully competitive marketplace, the PSC found O&R's proposal reasonable and noted that the contracts will terminate when the needed transmission reinforcement is complete.¹¹⁵

Similarly, the PSC approved NYSEG's divestitures based on transition contracts which provide for the purchase of capacity from the new owners and a separate agreement with one buyer concerning the operation of the Milliken units during high load periods. The operating agreement runs for seven years (five-year term plus a two-year renewal right for NYSEG). After that, the parties may enter into a new contract or NYSEG may pursue other means to ensure adequate voltage support.

The PSC also noted that one of Niagara Mohawk's coal-fueled facilities is located in a load pocket and that a call contract was needed to preclude the possibility that the purchaser of these plants would exercise market power during situations where transmission into or out of the pocket is constrained. The PSC determined that the Niagara Mohawk rate freeze and the call contract prevent the exercise of market power now, market power impacts may arise after their expiration. It required that Niagara Mohawk report on market power conditions within all its load pockets not later than one year before the expiration of its price freeze.¹¹⁶

Central Hudson and the purchaser of its plants have entered into a transition power agreement and have also agreed to address load pocket issues. The PSC accepted for filing the parties' Local Area Support Agree-

114. O&R also entered into two Load Pocket Option Agreements with the purchaser of its divested plants to further address the constraints imposed by load pockets, which allow O&R to call on specific plants and have them dispatched when it is not otherwise being dispatched, in order to insure the reliability of the load pocket. The PSC, finding that the agreements establish appropriate availability and energy payments, and that the penalties and legal provisions of the agreements are reasonable and appear to adequately protect system reliability, accepted them for filing. See also, *In the Matter of Orange & Rockland Utilities, Inc.'s Plans for Electric Rate/Restructuring Pursuant to Opinion No. 96-12, Order Approving Transfer of Generating Facilities and Making Other Findings*, 1999 N.Y. PUC Lexis 306 (1999).

115. *Id.*, at 14.

116. *Id.*, at 17.

ment, finding that it adequately protects ratepayers in the load pocket from the purchaser's possible exercise of market power.¹¹⁷

D. Utility Mergers and Market Power

The merger activity in New York reflects the national consolidation trend among electric utilities. Con Edison and O&R have completed their merger and a second Con Edison merger, with Northeast Utilities, is pending regulatory approval. Moreover, Niagara Mohawk has announced that National Grid Company has agreed to acquire Niagara Mohawk. Additionally, Energy East Corporation (NYSEG's parent) completed in 2000 its acquisition through merger of the following holding companies: CMP Group, Inc. (parent of Central Maine Power Company); Connecticut Energy Corporation (parent of The Southern Connecticut Gas Company); CTG Resources, Inc. (parent of Connecticut Natural Gas Corporation); and Berkshire Energy Resources (parent of The Berkshire Gas Company). For the purposes of this Report, however, the Committee will focus on the two Con Edison mergers which have received significant regulatory review.

1. Con Edison/O&R Merger

The PSC approved the merger of Con Edison and O&R subject to various terms and conditions.¹¹⁸ First, the corporate structure conditions, competitive conduct standards and affiliate relations, previously adopted in the two utilities' earlier rate/restructuring orders, were revised, preserving and strengthening the protections against cost subsidies or unfair competitive advantages being extended to unregulated affiliates. With respect to market power, the PSC briefly discussed¹¹⁹ and confirmed the interim market power mitigation measures agreed to by the parties and approved by FERC.¹²⁰ The PSC did not expect horizontal market power problems following the utilities' completion of their power plant divestitures. Although the PSC did not discuss vertical market power issues, PSC

117. Matter of Central Hudson Restructuring Order Approving Transfer of the Danskammer and Roseton Generating Stations and Making Other Findings, 2000 N.Y. PUC Lexis 1040 (2000).

118. In the Matter of Consolidated Edison, Inc., Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc., Order Authorizing Merger, 1999 N.Y. PUC Lexis 109.

119. *Id.*, at 15.

120. Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc., Order Approving Merger, 86 FERC ¶ 61,064 (1999).

Staff maintained that given the PSC's and FERC's continued oversight of distribution and transmission rates and services, the standards of conduct and affiliate rules, there would be no significant opportunities to exercise vertical market power in other markets, such as generation, transmission and distribution.

2. Con Edison/Northeast Utilities Merger

On November 28, 2000, the PSC approved a settlement agreement¹²¹ which, among other issues, addressed the Con Edison/Northeast Utilities merger.¹²² The PSC noted that while several parties raised market power and competitive market concerns in opposition to the merger, these parties did not demonstrate that these market power concerns existed.¹²³

Several parties¹²⁴ suggested that Con Edison may seek to charge customers for more expensive electricity while precluding low-cost electricity generators from making deliveries to New York City.¹²⁵ The PSC, however, noted that Con Edison had previously divested substantial amounts of its generation facilities, that both Con Edison and Northeast Utilities had publicly announced plans to sell their nuclear generation facilities, and that both utilities were continuing to divest their generation. Therefore, the PSC found the opponents' concerns to be unlikely to occur.¹²⁶

The PSC also noted that parties to the settlement agreement provided ample safeguards against the exercise of market power towards Con Edison's customers, and recommended that the PSC's policies pertaining to vertical market power be applicable to any generating facilities, other than distributed generation units, acquired or constructed in New York State by unregulated affiliates of Con Edison.¹²⁷ In addition, in order to address the parties concerns, Con Edison agreed to conduct a market power study within two years of the agreement.¹²⁸

121. In the Matter of Joint Petition of Consolidated Edison Inc. and Northeast Utilities Regarding Merger and Stock Acquisition, Settlement Agreement, Dated October 2, 2000.

122. Joint Petition of Consolidated Edison Inc. and Northeast Utilities for Approval of a Certificate of Merger, With All Assets Owned By a Single Holding Company, Opinion and Order Adopting Terms of Settlement, Subject to Modification, 2000 N.Y. PUC Lexis 958 2000.

123. *Id.*, at 46.

124. NYSEG, Westchester County, Pace Energy Project and the New York City Comptroller.

125. *Id.*

126. *Id.*, at 46-47.

127. *Id.*, at 47.

128. *Id.*

3. Market Power Issues Raised by Mergers

The mergers of New York utilities can provide benefits in a deregulated marketplace, such as cost reductions through consolidated purchasing and combined management and other economics of scale. For utilities that have downsized their business through divesting their generating plants, mergers may help avoid or defer rate increases.

Utility mergers also have potential detriments. For example, divestiture of generation in New York was intended to limit vertical market power. Should a New York utility merge with an out-of-state utility that has retained generation, the utility may acquire the ability to import such generation into New York and re-establish vertical market power.

In addition, the potential for exercises of market power may not be fully known to the PSC when it is faced with reviewing a merger plan. Although the PSC has required the adoption of affiliate transaction rules, it has yet to be fully tested how the rule will work in practice. Further, the actual impact of various mergers *inter alia* on ratepayer charges, wholesale markets, plant siting and market transmission projects in the changing market paradigm may be unclear.

E. Affiliate Transactions

While the PSC's treatment of market power issues has principally concerned divestitures, load pockets and utility mergers, the issue of market power also exists with respect to affiliate transactions. The traditional integrated utility is now, typically, organized in a holding company structure with a number of affiliated operating subsidiaries. Regulators and others have seen the potential risk for cross-subsidization or cost-shifting between affiliated subsidiaries, particularly to favor the unregulated affiliates over their competitors. Competitive suppliers raise a concern that the incumbent distribution utility has unequal access to customer consumption and load profile information. Competitive retail suppliers assert that such information is necessary to make price offers to retail customers under the distribution utility's control, and discriminatory release of such valuable customer information to its affiliate could lead to increases in costs for competitors. Such activities, if permitted, might displace more efficient and innovative competitors in favor of the subsidized utility affiliate. In New York, the PSC approached this problem by requiring each utility in its specific rate/restructuring plan to agree to competitive conduct standards.¹²⁹

129. See Committee's Initial Report, *supra* note 3, at 18-19, 26-27, 32, 37-38, 44, 50 and 55-57.

The PSC thus far has not addressed competitive complaints in the increasingly deregulated electric industry. The PSC Staff reviews the complaints, which have been generally resolved or not pursued by the complainants.

F. Market Power and Continued Development of the Market

While the current increase in energy prices undoubtedly results in part from the impact of increasing fuel costs and scarcity of supply, some market observers assign a portion of the cause to market participants' exercise of market power.¹³⁰ FERC's Staff identified a number of policy options in their report on northeastern ISOs that are available to FERC to prevent the exercise of market power in the short-term, including the following:¹³¹

- Allow the continuation of price or bid caps until market design flaws are corrected and market rules that contribute to market power are revised. Without specifying a date by which flaws and rules must be corrected, however, some market participants believe that ISOs will have less incentive to resolve market design flaws. Others believe FERC should establish criteria for price cap removal based on entry of sufficient additional generation or increased demand response.¹³²
- Require reporting of bids in excess of a defined threshold (that is, above or below the threshold depending on the nature of the bid) to FERC. Bids in excess of the threshold would be subject to review and possible refund.
- FERC has required the consideration of new methods of market power monitoring and mitigation that could improve the ISO's capability to address generators having potential market power. In New England, the ISO has been required to evaluate a

While the PSC established processes for prompt resolution of competitor complaints, the PSC has not had to directly resolve complaints by competitors against electric utilities alleging anti-competitive practices or violations of the standards.

130. A Department of Energy report on competitive markets in California and northeast reports evidence that certain market participants have the potential of exercising market power. *Horizontal Market Power in Restructured Electricity Markets*, Electric Power Daily, March 9, 2000.

131. The options set forth are taken from the FERC Staff Study-Northeastern Region, *supra* note 37, at 1-91 – 1-93.

132. See *Order Directing Remedies for California Wholesale Electric Markets* 93 FERC ¶ 61,294 (2000) at 52. FERC attempted to do this and imposed a \$150/mWh soft cap pending the "adoption of a permanent monitoring plan by May 1, 2001."

structural screen for market wide market power and the screen's possible uses in monitoring and mitigating market power. The implementation of such methods may eliminate the need for blanket price caps. However, this would represent a significant step toward increased market intervention.

- Direct market monitors to monitor the ISO and the markets to assure that operational procedures for dispatch are consistent and transparent.
- Encourage state regulatory agencies to implement policies to increase retail price-sensitive demand responsiveness and encourage load bidding.

Similarly, the PSC Staff Pricing Report found that the “potential exists for serious run-ups in prices caused by scarcity of resources, NYISO systems that do not yet work as intended, a marketplace that is not yet fully competitive, and market participants taking advantage of problems that have been identified but not fixed.”¹³³ That report urges a cap of market-clearing prices at \$150/mWh, with generators’ bids exceeding the cap not setting the clearing price and subject to the filing of cost information. It also urges development of a “circuit breaker” mitigation mechanism when market conditions are not workably competitive and retention of the current \$1,000/mWh “hard” bid cap.¹³⁴ The PSC Staff Pricing Report also recommends a three-step mitigation process to guard against market power (including imposition of penalties and public identification of offenders), and numerous NYISO rule changes and software improvement to improve market operations.

The Committee believes that the potential for market participants to exercise market power is, and will continue to be, a significant issue for the restructured markets. While the long-term goal should remain the creation of a robust, competitive market, short-term measures, such as those identified, may be necessary.

V. CONCLUSION: SHOULD THE ELECTRIC POWER INDUSTRY BE RE-REGULATED?

Despite the slower than anticipated pace of restructuring New York's

133. PSC Staff Pricing Report, *supra* note 39, at 1.

134. *Id.*, at 5

electric power industry, significant changes have occurred. New York electric utilities have almost entirely completed the divestiture of their generating plants and have realized substantially higher prices for the divested plants than anyone expected or considered possible at the outset. The divestiture of generating plants has allowed utilities to become more efficient and has reoriented the strategic architecture of utility companies from vertically integrated, completely regulated, natural monopolies to quasi-unregulated companies operating a number of businesses. While the new utility continues to operate transmission and distribution lines, and make end-use sales subject to regulation, it now purchases the power it sells from generating companies, wholesale marketers or the independent system operator. The rate setting incentive, in the case of many utilities, has shifted from investing large amounts of capital, upon which the rate of return is calculated, to incentive rates based on improving efficiency and reducing costs.

Independent generators, which once were small stand-alone operations, are now major corporations, frequently divisions of substantial national energy corporations. Moreover, there is competition among these generators. Such competition has produced cost savings through reductions in staffing and economies of scale. The transfer of operation of the state's high voltage transmission system to the NYISO has reduced utilities' control of the wholesale market.

While the restructuring of New York's electric power industry resulting from deregulation has allowed it to reflect the changes in technology and the changing role of electricity in the economy, the substantial increase in electric power prices downstate and in other parts of the United States has led certain political leaders to question the value of deregulation and the long-term role of competition. One popular assertion is that a "new" restructuring plan, designed by the Legislature, should be substituted for the current market-oriented system.

Calls for re-regulation can be expected to escalate if energy prices continue to rise during the next two years as a result of the increasing demand for, and insufficient supply of, electricity.¹³⁵ In California, for example, various political leaders have proposed substantial changes to

135. It should be noted that "re-regulation" can take different forms. While some free-market oriented observers denominate any price controls "re-regulation," others believe that price controls are necessary to combat the increase in wholesale market prices during the transition from regulation to competition. Deregulation of the natural gas commodity market was phased in from 1978 to 1993. Advocacy of such a transitional control does not necessitate a complete return to traditional cost-based regulation.

that state's system operator, including a return to cost-based rates. Just as California led the United States into the current era of deregulation, there is a possibility that high prices and an uncertain market design could permit California to lead the country into a new era of re-regulation.

At least some of the restructuring steps, however, are irreversible. Thus, no industry observers think that generating plant divestitures will be reversed, or that utilities will once again become vertically integrated. Moreover, the increasingly competitive wholesale market, with marketers, independent generators and various system operators will not easily be abolished.

Market participants are aware of the substantial differences between the market in California and the markets of the ISOs in Northeastern United States. The heavy reliance in California on the spot market and market participants' limited ability to hedge market risks through forward contracts distinguish California's market from New York's. In addition, because of developments in adjacent states, it is unlikely that New York can effectively revert to a model inconsistent with markets of adjacent states, in which deregulation has occurred.

Thus, while it is likely that the issue of re-regulation will remain squarely before regulators, the Legislature and the State's administration, re-regulation—at least in its most dramatic form—may not be a realistic option. In addition to the practical difficulties of reversing deregulation steps taken over the past five years, very real differences in market design between New York and California suggest that what is happening in California should be distinguished from restructuring elsewhere. Moreover, the growing integration of the nation's electric markets supports the continuation of the effort to deregulate the electric power market in New York.

January 2001

The Committee on Energy

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The Committee recognizes the substantial contributions to the Report by Edgar K. Byham and Robert G. Grassi.

Formal Opinion 2001-01

Obligations of Law Firm Receiving Unsolicited E-Mail Communications from Prospective Client

Committee on Professional and Judicial Ethics

TOPIC: Duty to Preserve Confidences of a Prospective Client (Pre-retention Communication); Conflict of Interest.

DIGEST: Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an internet web site maintained by the lawyer or law firm where such information is adverse to the interests of the prospective client generally would not disqualify the law firm from representing another present or future client in the same matter. Where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the commu-

nication and not disclosed to or used for the benefit of the other client even though the attorney declines to represent the potential client.

CODE: DR 4-101 [22 N.Y.C.R.R. § 1200.19]; EC 4-1; DR 5-105(A) [22 N.Y.C.R.R. § 1200.20]

QUESTIONS: May an attorney who receives an unsolicited communication from a prospective client represent another client in the same matter against the prospective client? May the lawyer disclose the unsolicited information to the existing client or use it against the prospective client?

OPINION

A law firm has received an unsolicited written communication from a potential client containing confidential information about a potential dispute with, or transaction relating to, another company which is an existing client of the law firm. Before learning that it concerns an existing client of the firm, the communication has been read by an attorney at the receiving law firm. It contains confidential information that would be of use to the existing client and harmful to the interest of the potential client if it were disclosed. We understand that the would-be client was acting in good faith in transmitting the information and was genuinely seeking to consult the law firm in response to the firm's web site listing.¹

The law firm receiving the unsolicited written communication poses the following inquiries: (1) whether the receipt and review by a lawyer at the law firm of the information unilaterally transmitted to it precludes the law firm from representing its existing client in the same matter; and (2) whether the law firm may disclose to its existing client or use for its benefit the information contained in the communication or disclose the fact that the communication had been reviewed.

1. Certainly, if the prospective client was aware, or had any reason to believe, that the law firm to which the information was transmitted was currently representing a client whose interests are in conflict in the same or another matter, it could not expect that its communication would be confidential. See ABA 90-358 (1990); Geoffrey C. Hazard, "Ethics, The Would-Be-Client," *Nat'l L.J.*, Jan. 15, 1996 at A19 ("taint shopping describes the behavior in which someone purporting to be seeking legal assistance interviews a lawyer or law firm for the purpose of disqualifying them from future adverse representation.").

DISCUSSION

It is apodictic that the Code of Professional Responsibility requires an attorney to preserve the confidences and secrets of a client. DR 4-101 [22 N.Y.C.R.R. 1200.19]. But, neither the Code of Professional Responsibility nor the Model Rules addresses the protection, if any, to be accorded information received from potential or would-be clients.² EC 4-1 states that both the “fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or *sought to employ* [the attorney].” *Leisman v. Leisman*, 617 N.Y.S. 2d 807 (App. Div. 2d Dep’t 1994) (quoting EC 4-1) (emphasis added). In this same vein, the scope section of the Model Rules provides that the duty of confidentiality embodied in Rule 1.6 may attach when the lawyer “*agrees to consider whether a client-lawyer relationship shall be established.*” *Model Rules of Professional Conduct*, Rule 1.6 (1983) (emphasis added).

The American Bar Association concluded in Formal Opinion 90-358 that an attorney is obligated “to protect information imparted by a would-be client seeking to engage the lawyer’s services even though no legal services are performed and the representation is declined.”³

Disqualification by the Firm is not Mandated by the Receipt and Review of an Unsolicited Communication

It does not follow, however, that the duty of confidentiality that may apply to a prospective client necessarily mandates that a law firm be disqualified from representing an existing client in the matter whose interests are adverse because a prospective client unilaterally transmits confidential information to the law firm. We agree with ABA Formal Opinion 90-358 that “in most circumstances, balancing the interest of the ex-

2. See Geoffrey C. Hazard, “Ethics, The Would-be-Client,” *Nat’l L.J.*, Jan. 15, 1996 at A19, Jan. 29, 1996 at A19 (cited hereinafter as “Hazard, Jan. __, 1996”).

3. Proposed Model Rule 1.18(b) of the ABA Ethics 2000 Commission states that “even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to the information of the former client.” The reporter states that the new rule is “in response to the Commission’s concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules [and the Code] do not address that pre-retention period.” *Model Rules of Professional Conduct of Ethics 2000 Commission*, Rule 1.18, *Reporter’s Explanation of Changes* (discussion draft 2000). Confidentiality is required under proposed Model Rule 1.18 according to the Explanation “no matter what right the lawyer or law firm may have to undertake later adverse representation.” *Id.*

isting client against those of the would-be client demands that the representation of the existing client continue as long as the lawyer believes that the representation would not be materially limited and this belief is reasonable.” We believe that this applies with special force where, as in this case, a prospective client unilaterally elects to transmit information to a law firm with which no prior attorney-client relationship exists.

The law firm in this case did not request or solicit the transmission to it of any confidential information by the prospective client. The fact that the law firm maintained a web site does not, standing alone, alter our view that the transmitted information was unsolicited. The fact that a law firm’s web site has a link to send an e-mail to the firm does not mean that the firm has solicited the transmission of confidential information from a prospective client. The Committee believes that there is a fundamental distinction between a specific request for, or a solicitation of, information about a client by a lawyer and advertising a law firm’s general availability to accept clients, which has been traditionally done through legal directories, such as *Martindale Hubbell*, and now is also routinely done through television, the print media and web sites on the internet. Indeed, Martindale Hubbell has put its directory on-line, with links to law firm web sites and e-mail addresses, facilitating unilateral communications from prospective clients.

To be sure, there are circumstances where information communicated even before an attorney-client relationship has been formed may preclude a law firm from accepting an engagement adverse to a prospective client, even on behalf of an existing client. Increasingly, clients are interviewing more than one lawyer or law firm before selecting counsel. Absent appropriate precautions by lawyers participating in these so-called “beauty contests,” the communication of confidential information by a prospective client may preclude the law firm from accepting an engagement from another present or future client adverse to the prospective client in the matter even though the lawyer is not retained. See e.g., *Bridge Chemicals Products, Inc. v. Quantum Chemical Corp.*, No. 88 C 10734, 1990 U.S. Dist. LEXIS 5019 (N.D. Ill. 1990); see also *Buys v. Theran*, 639 N.E.2d 720 (Mass. 1994); see generally, Report of the Committee on Professional Responsibility, Association of the Bar of the City of New York, “Ethical Issues in Beauty Contests,” 48 *The Record* 1003; B. Kirman & M. Ramey, “When A Beauty Contest Turns Ugly,” *Business Law Today*, March/April 1992.

We believe, however, that there is a vast difference between the unilateral, unsolicited communication at issue here by a prospective client to a law firm and a communication made by a potential client to a lawyer at

a meeting in which the lawyer has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential. Indeed, this basic distinction is recognized by the ABA Ethics 2000 Commission's Proposed Rule 1.18 addressing the duties to a prospective client. Significantly, a "prospective client" is defined to be "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter. . . ." As significantly, in explaining Proposed Rule 1.18, the Comments note that

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

Id., comment 2.

Similarly, the Restatement of the Law Governing Lawyers, which defines a lawyer's duties to prospective clients, limits those duties to situations in which "a person *discusses* with a lawyer the possibility of their forming a client-lawyer relationship." *Restatement (Third) of the Law Governing Lawyers*, § 15(1) (2000) (cited hereinafter as "Restatement §__"). Limiting the trigger to "discussions" between a lawyer and client provides the lawyer with the opportunity to avoid receiving disqualifying information, which is not the case when the information is unilaterally sent: "In order to avoid acquiring disqualification information, a lawyer deciding whether or not to undertake a matter may limit the initial information. . . ." *Id.*, comment c. In these limited circumstances, "as a result of the lawyer's duty to protect the information relating to the representation of the would-be client, the lawyer's representation of the existing client may be materially limited" in which event disqualification under DR 5-101(A) [22 N.Y.C.R.R. 1200.20] (and Model Rule 1.7(b)) could be warranted. *Id.*

In the case of a beauty contest, the lawyer is able to determine whether to converse with the prospective client, has at least acquiesced to a communication with the prospective client and has an opportunity to apprise the potential client of possible conflicts and specifically warn against disclosure of confidential information. In this context, if the lawyer fails adequately to take appropriate action to avoid the disclosure of confidential information, disqualification may be warranted.

In contrast, where, as here, a prospective client simply transmits information to a law firm providing no real opportunity to the law firm to avoid its receipt, the Committee concludes that the law firm is not precluded from representing a client adverse to the prospective client in the matter. In considering a lawyer's confidentiality obligation to a prospective client in the context of beauty contests, this Association concluded that "applying these rule to attorneys who participate unsuccessfully in a client-sponsored beauty contest stretches the confidentiality responsibility to the limits." 48 *The Record* at 1003. We agree, and conclude that to extend these rules still further to disqualify a lawyer who receives an unsolicited communication would transgress the boundaries of ethics or common sense. Where the potential conflict is thrust on a law firm by virtue of an unsolicited written communication, we agree with Professor Hazard:

A [prospective client] who tells a lawyer that he wants to sue XYZ . . . can properly be charged with knowledge that lawyers represent many different clients, and hence that there is a possibility that the immediate lawyer or her firm already represents XYZ Corp. It follows that the client cannot impose on the lawyer the risk that a preliminary discussion will later be the basis of a disqualification motion against the lawyer.

Hazard, January 29, 1996.

In other situations that precede the formation of an attorney-client relationship, in which the lawyer voluntarily participates, such as in preliminary meetings, including beauty contests, or telephone conversations, the lawyer can and should apprise the prospective client that no information the client considers confidential should be imparted, because it will not necessarily be treated as confidential, unless and until conflicts are cleared and the lawyer accepts the matter. In the event that no such warning is given and the lawyer does receive confidential information before an attorney-client relationship is formed that could be significantly harmful to the client, the lawyer will be precluded from representing a client whose interests are materially adverse to the prospective client in a substantially related matter *unless* the lawyer actually reviewing the information is screened or consent is obtained.⁴ Restatement § 15(2); *Cumming v. Cumming*. 695

4. The Code of Professional Responsibility and the Model Rules do not provide for screening. Hazard, January 29, 1996. Several jurisdictions and courts have adopted rules to screen lawyers who have received confidential information from disclosing that to other attorneys

N.Y.S.2d 346 (App. Div. 1st Dep't 1999); *see also* *McCook Metals L.L.C. v. ALCOA*, 99 C 3856, 2001 U.S. Dist. LEXIS 497 (N.D. Ill. Jan. 18, 2001) (allowing firm to continue to represent client in litigation against company which became firm client through new partners' joining firm where new partners were screened from those representing original client in litigation); *compare* *Leisman*, 617 N.Y.S.2d at 807, in which court disqualified plaintiff wife's attorney where the husband had a preliminary consultation with the wife's attorney regarding the prior action between the husband and the former wife which could bear a substantial relationship to the present litigation. Proposed Model Rule 1.18, ABA 2000 Ethics Commission, contains a screening provision which enables the "firm" to continue to represent the existing client, but not the personally disqualified lawyer who has received "significantly harmful" information. Proposed Model Rule 1.18(d) states that: "Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, *or*: (1) the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the prospective client." (emphasis added).

Unsolicited Information May Not Be Disclosed or Used Against the Interests of the Would-Be Client

Having determined that the law firm is not precluded by the receipt of an unsolicited communication from an engagement against the prospective client, we now address the issue of whether the lawyer may use the confidential information against the would-be client.

Any analysis of an attorney's duty to maintain confidential information imparted to him in the course of his professional duties must begin with DR 4-101, which states that a lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.

and as a means of not disqualifying the entire law firm. ABA Opinion 90-358 recommends that the recipient of the confidential information be screened: "In litigated matters where the information disclosed by the would-be client is not extensive or sensitive, this mechanism [screening] may avoid disqualification of other lawyers in the firm from representing another client in whose representation the information might prove useful." A New York case cautions, however, that if the attorney actively examined a file from the prospective client, the examining attorney would be disqualified from representing a client adverse to the prospective client. *Desbiens v. Ford Motor Co.*, 439 N.Y.S.2d 452, 453 (App. Div. 3d Dep't 1981) ("an attorney must avoid not only the fact but even the appearance of representing conflicting interests.").

2. Use a confidence or secret of a client to the disadvantage of the client.
3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

DR 4-101(B) [22 N.Y.C.R.R. § 1200.19]. A “confidence” is defined as “information protected by the attorney-client privilege under applicable law,” and “secrets” comprise “other information *gained in the professional relationship* that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.” DR 4-101(A) [22 N.Y.C.R.R. § 1200.19]. The information unilaterally transmitted to the law firm via e-mail in the instant situation can only be protected, if at all, as a confidence because no attorney-client—or professional—relationship had been formed between the law firm and the prospective client at the time the information was sent, and therefore it was not “imparted to him in the course of his professional duties.” Thus, the law firm’s duty to maintain as confidential any information disclosed to it by the prospective client is defined by the contours of the attorney-client privilege.

In New York, the attorney-client privilege has been codified at CPLR 4503, which defines an attorney-client privileged communication as “a confidential communication made between the attorney or his employee and the client in the course of professional employment.” CPLR 4503(a) (McKinney’s 2001). The privilege protects not only communications between a lawyer and client, but also communications between a lawyer and one who “sought to become a client.” *People v. Belge*, 59 A.D.2d 307, 308, 399 N.Y.S.2d 539 (4th Dep’t 1977) (quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950)). Accordingly, initial statements made when a prospective client in good faith intends to employ a lawyer are privileged even though the lawyer ultimately declines the engagement. *United States v. Dennis*, 843 F.2d 652, 656-57 (2d Cir. 1988); see also *United States v. Devery*, 93 Cr. 273 (LAP), 1995 WL 217529, at *5 (S.D.N.Y. Apr. 12, 1995); *Bennett Silvershein Assocs. v. Furman*, 776 F. Supp. 800, 803 (S.D.N.Y. 1991); McCormick, *Evidence* § 88 (5th Ed. 1999) (“communications in the course of preliminary discussions with a view to employing the lawyer are privileged even though in the upshot the employment is not accepted”). “Such information should be protected because frank disclosure is required before an intelligent decision on the retainer

can be made.” Weinstein, Korn and Miller, *New York Practice*, ¶ 4503.12 (Matthew Bender & Co. 2000) (citing 8 Wigmore, *Evidence* § 2304 (McNaughton rev. 1961)).

However, the landscape changes where the client could not reasonably have been seeking to employ the attorney because, for example, the attorney has already declined the representation in question or the prospective client knows the lawyer is representing an adverse party. In situations such as these, it is well-established that no privilege attaches to communications made to an attorney, because the prospective client cannot reasonably have believed that the communication was made in furtherance of seeking the advice of an attorney. *Dennis*, 843 F.2d at 657 (citing 8 Wigmore § 2304 (McNaughton rev. 1961)); *People v. O'Connor*, 85 A.D.2d 92, 96, 447 N.Y.S.2d 553, 557 (4th Dep’t 1982).

Thus, in the situation presented here, we believe that prospective clients who approach lawyers in good faith for the purpose of seeking legal advice should not suffer even if they labor under the misapprehension that information unilaterally sent will be kept confidential. Although such a belief may be ill-conceived or even careless, unless the prospective client is specifically and conspicuously warned not to send such information, the information should not be turned against her. Indeed, we see no reason that the other client should be benefitted by the fortuitous circumstances that the lawyer approached by the prospective client turned out to be the same lawyer retained by the adverse party. Nor do we believe that zealous advocacy compels a different result. After all, there are many circumstances where a lawyer comes into possession of an adverse party’s information and cannot use it. We recognize that this solution may not be a perfect one, and that there exists the possibility that the prospective client could still suffer at least some residual harm from the transmission of confidential information because the bell cannot be unrung and the lawyer cannot unlearn the information. However, the result is no different from other circumstances where an adversary lawyer gains inadvertent access to privileged information such as inadvertently produced privileged material. American Bar Association Formal Opinion 92-368 (1992) on the inadvertent disclosure of confidential materials instructs against the literalistic reading of the black letter Model Rules. ABA 92-368 states: “there are many limitations on the extent to which a lawyer may go ‘all out’ for the client.” The opinion also notes that “first, [inadvertent] disclosure to counsel does not have to result in disclosure to counsel’s client. Second, there is a significant difference between a lawyer’s knowing the contents of documents and the lawyer’s being able to use them, for ex-

ample, at trial either as a basis for questions or by presentation to them to a fact finder.” As Professor Hazard writes:

[T]he [prospective] client should not have to take the risk that the lawyer will convey the preliminary information to the lawyer’s existing clients. Accordingly, the position taken in the Restatement of Law Governing Lawyers, Sec. 27 (Tentative Draft No. 5) is that such preliminary information is confidential. This is the exception to the general rule that a lawyer must make use of all available information for the benefit of his clients. . . . The confidentiality accorded to preliminary conversations responds to a similar necessity, this being the integrity of protecting against conflicts of interest in the independent practice of law.

Hazard, Jan. 29, 1996.

We recognize that our conclusion conflicts with that which would be required by the ABA Ethics 2000 Commission’s Proposed Rule 1.18, which squarely addresses the duties owed to a “prospective client.” Significantly, Rule 1.18 specifically extends confidentiality protection to “prospective clients” by mandating that “a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation. . . .” Proposed Model Rule 1.18. On its face, however, Rule 1.18 limits this extended confidentiality protection only to a “prospective client who actually discusses with a lawyer the possibility of forming an attorney-client relationship. . . .” Rule 1.18(a)-(b). The stated purposes for defining a “prospective client” is to “limit[] circumstances to which the Rule applies”. *Id.*, explanation [1]. Any doubt that prospective clients who unilaterally communicate with a lawyer without any prior discussion are intended to be excluded is dispelled by comment 2:

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client” within the meaning of paragraph (a).

Application of Rule 1.18 here would lead us to conclude that the law firm receiving the disclosed information could use it against the prospective client. Indeed, it could be reasonably, if not forcefully, argued that the

prospective client's cavalier treatment of her own information undermines any *bona fide* claim that others should be required to afford it confidentiality protection, and the lawyer's obligation of zealous advocacy would suggest that a lawyer should be able to exploit the prospective client's mistake and make available to another client everything he learns.

In the final analysis, however, we believe that the strong policy of encouraging clients to seek legal advice, fortified by the New York rule generally protecting pre-retention communications, warrants protecting the information in this case—especially given the absence of any warning against the disclosure of confidential information posted on the web site.

Situations in which Confidential Information May Be Used

In other situations, however, the policy of encouraging clients freely to seek legal advice must yield to other considerations. As discussed above, in situations where it is apparent to the prospective client that she cannot retain the lawyer—either because of awareness that the lawyer already represents an adverse party or an admonition from the lawyer that she will not represent the prospective client—no attorney-client privilege attaches to the communication.

In this connection, in dealing with law firm web sites, we note that an adequate disclaimer—one that prominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check⁵—would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning.⁶ If such a disclaimer is employed, and a prospective client insists on sending confidential information to the firm through the web site, then no protec-

5. An optional web site disclaimer that the web site viewer may choose to read prior to sending an e-mail and which merely states that an attorney-client relationship cannot be established by e-mail is not as effective as a large print, prominently placed warning that e-mails with potential clients will not be treated as confidential. Such a disclaimer becomes even more effective if it appears in a "dialogue box" which materializes upon the website viewer's clicking the firm's link to its e-mail address and which requires that the viewer click "OK" before composing and sending an e-mail.

6. One way to minimize the risk that a firm will be disqualified by viewing such a haphazard confidential communication is to create a firm procedure that e-mail originating from the firm's web site should be reviewed with caution. Specifically, the reviewing lawyer should not read the entire e-mail if it becomes apparent that the message contains confidential information or if a conflict is revealed.

tion would apply to that information and the lawyer would be free to use it as she sees fit.⁷

CONCLUSION

Notwithstanding disclaimers, especially those whose warnings are insufficient, there can be instances where prospective clients have revealed confidential information involving potential disputes with an existing client. "You've got mail" can be a problem. If an e-mail intended as confidential is received and assuming it was sent in good faith, the Committee believes it should be treated for confidentiality purposes as if it were a pre-retention discussion with a potential client. Under those circumstances, as explained herein, the e-mail must be treated as confidential and must not be disclosed to the existing client.

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7. In this same vein, lawyers representing corporations, whether as inside or outside counsel, frequently encounter situations in which employees of the corporation communicate information to the attorneys expecting that information to be held in confidence. But communications to a corporation's lawyer by an employee of the corporation are not afforded the same protection as those made to independent, unrelated attorneys. The privilege with respect to communications to a corporation's attorneys generally belongs to the corporation. *United States v. Int'l Brotherhood of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997). Indeed, it is apparent that the attorneys represent the corporation, and not the individual employees. Nevertheless, courts have allowed employees to assert privilege with respect to conversations with the corporation's inside or outside counsel, but only in circumstances which make it clear that the employee is seeking advice on personal matters. *Teamsters*, 119 F.3d at 215. In order to invoke the attorney-client privilege for such communications, employees must demonstrate that "they approached counsel for the purpose of seeking legal advice, . . . when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities, . . . counsel saw fit to communicate with them in their individual capacities rather than in their representative capacities, . . . their discussions were confidential . . . [and] the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company." *Id.* (quotations omitted). We conclude that unless all these criteria are met, a unilateral communication from an employee to her employer corporation's counsel need not be maintained in confidence by the attorney in question.

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Seth D. Harris	New York Law School	New York NY	01/91
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Tayanita Hayes	Deloitte & Touche LLP	New York NY	12/97
Sean Hecker	Covington & Burling	New York NY	10/00

NEW MEMBERS

Elizabeth Hellmann	Skadden Arps Slate Meagher & Flom	New York NY	06/99
Erin Hennessy	Time Warner Inc.	New York NY	09/97
Brian A. Herman	Morgan Lewis & Bockius LLP	New York NY	02/99
Reinerio Hernandez	Internal Revenue Service	New York NY	07/00
Nicomedes S. Herrera	Torys	New York NY	11/98
William C. Heuer	Morgan Lewis & Bockius LLP	New York NY	03/98
Ian K. Hochman	Willkie Farr & Gallagher	New York NY	10/97
Howard S. Hogan	Debevoise & Plimpton	New York NY	01/00
Toby Holbreich	Collazo Carling & Mish LLP	New York NY	12/95
Anna J. Hong	Weil Gotshal & Manges LLP	New York NY	06/95
Mark Horowitz	I.Path	New York NY	04/97
Sharon Hoskins	Flemming Zulack & Williamson LLP	New York NY	05/00
Abraham B. Hsuan	IncuVest LLC	New York NY	01/91
Sheila Hurley	Epstein Becker & Green PC	New York NY	07/99
Philip C. Huynh	Sullivan & Cromwell	New York NY	05/00
Giuliano Iannaccone	Frank J. Cerza Law Offices	New York NY	12/00
Amy K. Impellizzeri	Skadden Arps Slate Meagher & Flom	New York NY	11/95
Eric Iversen	Morgan Lewis & Bockius LLP	New York NY	06/94
Seema Iyer	USA Broadcasting Inc.	New York NY	01/98
Guy Jacobson	FTI Consulting	New York NY	07/94
Sara I. Jacobson	Bronx District Attorney's Office	Bronx NY	08/97
David M. Jaffe	NASD Regulation Inc	New York NY	03/87
Scott Jaffee	Morgan Lewis & Bockius LLP	New York NY	07/00
Linda Joe	Wachtell Lipton Rosen & Katz	New York NY	11/00
Susan Joe	Proskauer Rose LLP	New York NY	09/00
Jaye Pershing Johnson	NYC Partnership & Chambers of Commerce	New York NY	07/88
Nadine C. Johnson	NYS Supreme Court	New York NY	01/99
Samuel K.F Jones	L.S. Inc.	New York NY	06/93
Sheila Joseph	The Association of the Bar	New York NY	06/99
Charles P. Juster	Thelen Reid & Priest LLP	New York NY	02/82
Beth R. Kallet	Arnold & Porter	New York NY	12/97
Juliet P. Kalib	Hartman & Craven LLP	New York NY	01/97
Howard S. Kaminsky	Law Offices of Howard Kaminsky	New York NY	08/93
William L. Kandel	Orrick Herrington & Sutcliffe LLP	New York NY	02/65
Jordan W. Kapchan	99 Park Ave.	New York NY	04/84
Wendy Lang Kaplowitz	Debevoise & Plimpton	New York NY	05/00
Randi L. Karmel	26 Court St.	Brooklyn NY	06/92
Eli Katz	Hunton & Williams	New York NY	08/00
Jonathan S. Katz	Richards & O'Neil LLP	New York NY	03/99
Elan P. Keller	Feingold & Alpert LLP	New York NY	01/99
David Kennedy	US Attorney's Office (SDNY)	New York NY	12/97
Paul Kenney	Fred D. Knapp & Associates	New York NY	12/97
Matthew K. Kerfoot	Shearman & Sterling	New York NY	12/00

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NEW MEMBERS

Kristopher Kerstetter	Morgan Lewis & Bockius LLP	New York NY	01/99
Kenneth Kettering	New York Law School	New York NY	12/80
John C. Kim	240 E 76th St	New York NY	05/99
Sang Y. Kim	Skadden Arps Slate Meagher & Flom	New York NY	06/98
Justine Kirby	Debevoise & Plimpton	New York NY	06/93
Jeffrey L. Kirchmeier	CUNY Law School	Flushing NY	12/89
Michael A. Klein	Simpson Thacher & Bartlett	New York NY	12/99
Robert Klein	Salomon Smith Barney, Inc.	New York NY	12/80
Mathew A. Kleiner	228 West 71st St	New York NY	10/97
Siu Yun Kong	Watson Farley & Williams	New York NY	01/97
Lynette P. Koppel	Shearman & Sterling	New York NY	02/87
Torsten M. Kracht	Walter Conston Alexander & Green PC	New York NY	05/98
Joshua Kraus	Bertelsmann Inc.	New York NY	01/97
Bradley G. Kulman	Stroock & Stroock & Lavan LLP	New York NY	02/88
Cheryl Lagay	Morgan Lewis & Bockius LLP	New York NY	03/00
Christopher D. Lang	Simpson Thacher & Bartlett	New York NY	07/00
Frank J. Langella	Milbank Tweed Hadley & McCloy	New York NY	09/00
Catherine LaTorre	Sokolow Dunaud Mercadier & Carreras	New York NY	12/98
Frank Laudadio	Kings County DA's Office	Brooklyn NY	10/93
Damian A. Laughner	Greenberg Traurig	New York NY	11/00
Mark Lebovitch	Skadden Arps Slate Meagher & Flom	New York NY	09/00
Jonathan B. Lefkowitz	Law Offices of Pamela A. Mann, LLC	New York NY	12/98
Kathleen Lennon	Beveridge & Diamond PC	New York NY	03/99
Joseph P. Leon	Morgan Lewis & Bockius LLP	New York NY	04/94
Emily Leong	Skadden Arps Slate Meagher & Flom	New York NY	02/97
Lori B. Leskin	Kaye Scholer Fierman Hays & Handler LLP	New York NY	12/92
Nathan P. Letts	Pennie & Edmonds LLP	New York NY	11/97
Arnold J. Levine	The Legal Aid Society	New York NY	10/94
Abigail R. Levy	Friedman & Levine	New York NY	03/98
Benjamin D. Levy	Morgan Lewis & Bockius LLP	New York NY	06/98
Yafang Li	Chhetry	New York NY	10/99
Steven Lichtman	Time Warner Inc.	New York NY	08/96
Joshua M. Lifshitz	Bull & Lifshitz LLP	New York NY	12/93
David M. Lindsey	Clifford Chance Rogers & Wells LLP	New York NY	12/88
Owens S. Littman	Morgan Lewis & Bockius LLP	New York NY	06/98
Peter J. Liuzzo	Siller & Wilk LLP	New York NY	12/98
Dorothea Lockhart	521 Fifth Ave.	New York NY	06/99
Sonia Lopez	Morgan Lewis & Bockius LLP	New York NY	11/99

NEW MEMBERS

Yvonne Look	Time Warner Inc.	New York NY	05/94
Stewart Louie	Bangser Klein Rocca & Blum LLP	New York NY	05/98
Jennifer Lupo	Dietsmart, Inc.	New York NY	02/96
Au H. Ly	41-45 49th Street	Sunnyside NY	07/00
Timothy D. Lynch	Paul Hastings Janofsky & Walker LLP	New York NY	02/00
Eulalia M. Mack	Covington & Burling	New York NY	02/91
Kara MacKenzie	Morgan Lewis & Bockius LLP	New York NY	05/00
Valencia N. Macon	Siemens Corporation	New York NY	10/96
Frank Maldari	Darby & Darby PC	New York NY	01/00
Eric M. Manganelli	Morgan Lewis & Bockius LLP	New York NY	04/00
Donald Manning	Ridgewood Bushwick Senior Citizen Council Inc.	Brooklyn NY	10/96
Barry G. Margolis	Margolis Bergson LLP	New York NY	03/90
Jordana H. Marinoff	Simpson Thacher & Bartlett	New York NY	05/00
Natalie S. Marjancik	Shearman & Sterling	New York NY	08/99
Chad A. Marlow	Orrick Herrington & Sutcliffe LLP	New York NY	05/00
Michael R. Marra	Proskauer Rose LLP	New York NY	06/96
Frank F. Martinez	Proskauer Rose LLP	New York NY	05/96
Scott Mason	NYC Dept of Buildings	New York NY	05/93
Amanda Masters	NY Lawyers for the Public Interest Inc.	New York NY	06/97
Michele C. Mayes	Colgate Palmolive Company	New York NY	06/75
Sandra Maxfield	Skadden Arps Slate Meagher & Flom	New York NY	08/96
Amy J. Mayer	NYS Attorney General's Office	New York NY	02/97
Robyn C. Mazur	Center for Court Innovation	New York NY	12/96
Timothy Joseph McCarthy	Rockefeller & Co. Inc.	New York NY	05/00
Victoria McCool	Dechert Price & Rhoads	New York NY	05/00
Theodore J. McEvoy	Simpson Thacher & Bartlett	New York NY	05/00
Mary Ann McGuire	Hunton & Williams	New York NY	07/00
Amy McManus	Cahill Gordon & Reindel	New York NY	06/99
Mary E. McNeill	CNNfn.Com	New York NY	02/91
Laura S. Mello	21-31 36th Street	LI City NY	05/96
John C. Meringolo	The DAR Group	New York NY	06/99
Patricia J. Meyer	Simpson Thacher & Bartlett	New York NY	10/00
Quinn W. Michael	Time Inc. Law Department	New York NY	06/94
Paul Sanford Miller	The Association of the Bar	New York NY	09/00
Sandra F. Miller	Morgan Lewis & Bockius LLP	New York NY	05/99
Sara Mogulescu	Morvillo Abramowitz Grand Iason & Silberberg PC	New York NY	03/99
Rebecca A. Monck	Morvillo Abramowitz Grand Iason & Silberberg PC	New York NY	02/00
John J. Montone	Orans Elsen & Lupert LLP	New York NY	12/96
Peter Montoni	Morgan Lewis & Bockius LLP	New York NY	10/97
C. Rochelle Moorehead	Prudential Securities Inc.	New York NY	12/90

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NEW MEMBERS

Joseph V. Moreno	Skadden Arps Slate Meagher & Flom	New York NY	03/00
Jonathan Morris	Morgan Lewis & Bockius LLP	New York NY	07/99
Michelle A. Morrison	380 Legion Street	Brooklyn NY	11/00
Jason F. Moser	Mayer Brown & Platt	New York NY	01/98
Satoru Murase	Bingham Dana Murase LLP	New York NY	02/84
John W. R. Murray	Paul Weiss Rifkind Wharton & Garrison	New York NY	05/00
Stephen J. Nahley	Carter Ledyard & Milburn	New York NY	09/98
Ancela R. Nastasi	666 Greenwich St.	New York NY	10/92
Genevieve Nelson	169 East 93rd St	Brooklyn NY	10/98
Frank P. Nervo	Lesbian & Gay	New York NY	02/88
Melissa Shari Norden	The American Society for the Prevention of Cruelty to Animals	New York NY	03/00
Leana Nussbaum	Morgan Lewis & Bockius LLP	New York NY	05/99
Christiana Ochoa	Clifford Chance Rogers & Wells LLP	New York NY	03/00
Emily B. O'Connor	Debevoise & Plimpton	New York NY	03/99
Margot F. O'Connor	Richards & O'Neil LLP	New York NY	07/00
Cindy O'Hagan	Time Warner Inc	New York NY	03/94
Ngozi Okaro	Brown Raysman Millstein Felder & Steiner LLP	New York NY	04/99
Nancy Ordoukhanian	Juris Placement International	New York NY	11/00
Christopher J. O'Rourke	Clifford Chance Rogers & Wells LLP	New York NY	07/94
Jamie T. Packer	John E. Osborn PC	New York NY	04/96
Jenifer DeWolf Paine	Proskauer Rose LLP	New York NY	12/94
Nilie Pajoochi	Pajoochi & Tooma LLP	New York NY	07/98
Elisabeth A. Palladino	40 Park Ave.	New York NY	04/86
Thomas S. Pardo	Rappaport Glass Greene & Levine	New York NY	10/93
Breon Peace	US Attorney's Office (EDNY)	Brooklyn NY	04/97
Allan R. Pearlman	Godosky & Gentile	New York NY	12/92
Louise W. Pennington	Harkins Cunningham	New York NY	12/95
Michael A. Petrizzo	Morgan Lewis & Bockius LLP	New York NY	05/96
Robert M. Petrucci	Attorney At Law	New York NY	03/89
Kirsa Phillips	Fried Frank Harris Shriver & Jacobson	New York NY	07/98
John A. Pistocchi	Morgan Lewis & Bockius LLP	New York NY	05/86
Joseph Polizzotto	Lehman Brothers Inc	New York NY	06/79
Claudia R. Pollack	Jacobson Mermelstein & Squire LLP	New York NY	10/99
Allen S. Popper	The Legal Aid Society	Kew Gardens NY	11/85
Jennifer R. Rackoff	Simpson Thacher & Bartlett	New York NY	04/00
James Ian Rapp	Kleinberg Kaplan Wolff & Cohen PC	New York NY	08/99
Michael J. Ramos	Zuckerman Spaeder Goldstein Taylor & Kolker	New York NY	03/99
Yasmine Rassam	Morgan Lewis & Bockius LLP	New York NY	12/94

NEW MEMBERS

J. Claire Razzolini	Nixon Peabody LLP	New York NY	09/99
Adam C. Reed	American International Group, Inc.	New York NY	04/00
Shawn P. Regan	Hunton & Williams	New York NY	06/97
Michael P. Reynolds	Lovell & Stewart LLP	New York NY	06/95
John C. Richardson	Emmet Marvin & Martin LLP	New York NY	04/00
Eric B. Ripper	465 Greenwich Street	New York NY	05/99
Rosemary Rivieccio	305 Broadway	New York NY	12/89
Diane L. Rose	Jones Day Reavis & Pogue	New York NY	08/84
Shira Y. Rosenfeld	Bartlett & Bartlett LLP	New York NY	01/00
Henry A. Rosenzweig	Sacks Montgomery PC	New York NY	12/89
Jeremy S. Rosof	Morgan Lewis & Bockius LLP	New York NY	01/00
Richard T. Ross	Skadden Arps Slate Meagher & Flom	New York NY	08/00
Jessica A. Roth	Gibbons Del Deo Dolan Griffinger & Vecchione	Newark NJ	09/98
Shira B. Rothschild	Emmet Marvin & Martin LLP	New York NY	03/98
Kevin M. Royer	Siemens Corporation	New York NY	12/93
Joshua P. Rubin	Ross & Hardies	New York NY	04/96
Leslie A. Rubin	US Magistrate Judge—US Courthouse	Brooklyn NY	12/91
Laurence M. Rubenstein	110-64 Queens Blvd	Forest Hills NY	06/99
Caroline Rule	Kostelanetz & Fink LLP	New York NY	12/89
Scott Ruskay-Kidd	Debevoise & Plimpton	New York NY	06/99
Dennis W. Russo	Patterson Belknap Webb & Tyler LLP	New York NY	03/87
Jeffrey P. Rust	Gibney Anthony & Flaherty	New York NY	12/99
David G. Sabel	Cleary Gottlieb Steen & Hamilton	New York NY	04/78
Noah M. Sachs	Carter Ledyard & Milburn	New York NY	06/00
Jacqueline E. Sacus	Morgan Lewis & Bockius LLP	New York NY	07/00
Edward Sadtler	Skadden Arps Slate Meagher & Flom	New York NY	05/00
Hiroshi Sarumida	Skadden Arps Slate Meagher & Flom	New York NY	06/95
Joseph H. Saunders	Human Rights Watch	New York NY	02/95
Larry S. Schachner	NYC Civil Court	New York NY	06/86
S. Scharfstein	445 East 14th Street	New York NY	08/87
Christine N. Schnarr	Morgan Lewis & Bockius LLP	New York NY	10/96
Edward L. Schnitzer	Securities & Exchange Comm.	New York NY	01/98
Einat Eliaz Schnitzer	Carter Ledyard & Milburn	New York NY	06/99
Howard Schragin	King, Pagano & Harrison	New York NY	07/98
Susan R. Schwaiger	Pomerantz Haudek Block Grossman & Gross LLP	New York NY	04/93
Jodi Schwartz	Morgan Lewis & Bockius LLP	New York NY	04/98
Joel M. Schwartz	130 West 57th St.	New York NY	05/75
Michael I. Schwartz	Sullivan & Cromwell	New York NY	01/00
Deborah E. Seidenberg	NYC Law Department	New York NY	01/83

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NEW MEMBERS

King M. Shani	Fried Frank Harris Shriver & Jacobson	New York NY	08/00
Daniel Shapiro	Tompkins & Davidson LLP	New York NY	05/00
Rachelle Shapiro	Morgan Lewis & Bockius LLP	New York NY	12/98
Jeremiah J. Sheehan	Jeremiah Sheehan-Attorney At Law	New York NY	02/91
Ting-Ting Shi	Simpson Thacher & Bartlett	New York NY	09/99
Alfred Siegel	Center for Court Innovation	New York NY	03/76
Jane M. Sigda	Arkin Kaplan & Cohen LLP	New York NY	04/00
Linda J. Silberman	New York University	New York NY	01/69
Karen P. Simmons	The Legal Aid Society	New York NY	06/95
Ventura A. Simmons	US Dept of Housing Urban & Development	New York NY	05/95
Harvey Simon	Proskauer Rose LLP	New York NY	01/00
James L. Simpson	Shack & Siegel PC	New York NY	02/00
Gerald R. Singer	American Museum of Natural History	New York NY	06/98
Kai B. Singer	Wachtell Lipton Rosen & Katz	New York NY	10/00
Anil C. Singh	Supreme Court	New York NY	06/88
Thomas A. Sipp	The Sipp Law Firm	Staten Is. NY	02/99
Shalom Sittner	Morgan Lewis & Bockius LLP	New York NY	09/00
Bryan C. Skarlatos	Kostelanetz & Fink	New York NY	12/86
Alexa J. Smith	Willkie Farr & Gallagher	New York NY	10/95
Janene Sohng	Dechert Price & Rhoads	New York NY	06/00
Laren E. Spirer	Probono Net	New York NY	01/98
Ellen M. Spodek	Spodek & Barrett LLP	New York NY	01/89
Lee Squitieri	Squitieri & Fearon LLP	New York NY	12/83
Michael P. Stanley	Pitney Hardin Kipp & Szuch LLP	New York NY	12/99
Ariadne Staples	Debevoise & Plimpton	New York NY	05/99
Linda Sue Stein	122 Spring Street	New York NY	08/86
Carol A. Stokinger	NYC Family Court	Bronx NY	07/78
Christian A. Struck	Simpson Thacher & Bartlett	New York NY	10/98
Jill H. Teitel	Siller & Wilk LLP	New York NY	06/96
Steven D. Thomas	Financial Security Assurance, Inc.	New York NY	06/85
Debra R. Thompson	Fogel & Wachs PC	New York NY	11/92
Kenneth P. Thompson	Morgan Lewis & Bockius LLP	New York NY	02/93
Fredrick S. Title	New York Presbyterian Hospital	New York NY	12/74
Farnoush H. Tooma	Pajoochi & Tooma LLP	New York NY	03/99
Damaris E. Torrent	Puerto Rican Bar Association	Bronx NY	04/93
Marc R. Tortora	Saviano & Tobias	New York NY	11/00
David B. Toscano	Davis Polk & Wardwell	New York NY	08/93
Mara E. Trager	Akin Gump Strauss Hauer & Feld LLP	New York NY	04/99
Terry L. Trantina	Blank Rome Tenzer Greenblatt LLP	New York NY	06/76
Gordon Travers	145 West Broadway	New York NY	01/78
Damon Treitler	110-56 71st Ave.	Forest Hills NY	03/00
Robert W. Trenchard	Paul Weiss Rifkind Wharton & Garrison	New York NY	12/94

NEW MEMBERS

Marc R. Trevino	Sullivan & Cromwell	New York NY	06/95
Calvin D. Trowbridge	551 Madison Ave.	New York NY	06/60
Jany Tsai	Dorsey & Whitney LLP	New York NY	06/00
Eileen A. Twigg	Thaumatargix Inc.	New York NY	03/98
Brian Ullman	Davidoff & Malito LLP	New York NY	06/91
Brian Urbano	Paul Weiss Rifkind Wharton & Garrison	New York NY	05/00
Mark S. Vecchio	Heller Ehrman White & McAuliffe LLP	New York NY	03/86
Howard S. Veisz	Kornstein Veisz & Wexler LLP	New York NY	02/75
Kenneth R. Vennera	Parker Duryee Rosoff & Haft PC	New York NY	11/94
William R. Veto	Olshan Grundman Frome Rosenzweig & Wolosky	New York NY	04/99
Chad Vignola	NYC Board of Education	Brooklyn NY	05/83
Gustavo L. Vila	248 Rose Ave.	Staten Isl. NY	01/99
Hans-Ueli Vogt	Sullivan & Cromwell	New York NY	01/98
Paul Vogt	Morgan Lewis & Bockius LLP	New York NY	12/92
Richard R. Volack	Peckar & Abramson PC	New York NY	10/98
Nora Von Stange	Morgan Lewis & Bockius LLP	New York NY	12/94
Howard M. Wagner	Trief & Olk	New York NY	04/98
Yitzchok D. Wagshul	Law Offices	Brooklyn NY	05/95
Eric Wals	Morgan Lewis & Bockius LLP	New York NY	06/99
Christine Walsh	Merrill Lynch & Co.	New York NY	10/85
Helen Wang	250 E 63rd St.	New York NY	07/00
Jeffrey I. Wasserman	Shaw Pittman Potts & Trowbridge	New York NY	04/00
Stuart Weichsel	Weichsel & Zarah	New York NY	06/94
Melvin Weinberger	67-50 Thornton Place	Forest Hills	12/58
Daniel Weir	Cipriani USA Inc.	New York NY	03/99
Frederic C. Weiss	424 Madison Ave.	New York NY	02/81
Jody L. Weiss	Brown & Wood LLP	New York NY	10/00
Justin Wertman	Morgan Lewis & Bockius LLP	New York NY	05/98
David J. Wexler	Morgan Lewis & Bockius LLP	New York NY	03/99
Cheryl A. Whitney	Morgan Lewis & Bockius LLP	New York NY	12/96
Elaine Williams	NY Life Insurance Co.	New York NY	07/82
Nicholas C. Dylan Willoughby	Simpson Thacher & Bartlett	New York NY	09/00
Andrew J. Wilson	Goodkind Labaton Rudoff & Sucharow LLP	New York NY	11/98
Erika L. Wood	Goodman & Zuchlewski LLP	New York NY	01/00
Gregorg H. Woods	Debevoise & Plimpton	New York NY	12/95
Victor Worms	Kazlow & Kazlow	New York NY	04/89
Faith F. Wu	Winston & Strawn	New York NY	05/00
Daniel A. Wuersch	Wuersch & Gering LLP	New York NY	06/90
Joan Xie	Law Offices of Joan Xie	New York NY	12/99
Ethan D. Yale	Wachtell Lipton Rosen & Katz	New York NY	10/99
Natasha Young	Squadron Ellenoff Plesent & Sheinfeld LLP	New York NY	05/00

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NEW MEMBERS

Stacie L. Young	Martin Clearwater & Bell	New York NY	04/88
Michelle E. Zierler	David M. Perlmutter & Associates	New York NY	07/00
Kenneth S. Ziman	Simpson Thacher & Bartlett	New York NY	12/90
John E. Zuccotti	Weil Gotshal & Manges LLP	New York NY	06/64

NONRESIDENT

Izumi Akai	Sullivan & Cromwell	Tokyo	100-0004	06/82
Robert N. Anthoine	Robert N. Anthoine, Counselor At Law	Waterford CT		12/88
Janine M. Brookner	3645 St. Mary's Place, NW	Washington DC	01/99	
Earl L. Croman	1100 N. E. Loop 410	San Antonio TX	10/55	
Paul R. Fisher	Fisher Mediation & Arbitration	Los Angeles CA	06/71	
Jerrold S. Krivitzky	6 Cedar Drive	Chester NJ	02/83	
Qi Adam Li	Fangda Partners	Shanghai		07/92
Klint J. McKay	McKay Meyer & Herbert PC	Los Angeles CA	06/83	
Virgil Melnic	Ursu Melnic & Partner	Timisoara	1900	06/69
Samuel Okoshken	51 Avenue Montaigne	Paris	75008	12/65
Adams S. Paris	Sullivan & Cromwell	Los Angeles CA		12/97
Matthieu Boissavy	45 Avenue Montaigne	75008 Paris NY		10/93
Alexander D. Phillips	A D Phillips .Com	London E12 6DX		10/99
Susan P. Read	NYS Court of Claims	Albany NY		02/74
Norma Strella	Estudio Strella	Buenos Aires		01/71
Scott E. Walker	Kelley Drye & Warren LLP	Washington DC	04/86	

SUBURBAN

Vincent Altieri	60 Laura Dr.	Monsey NY		03/94
Stephen M. Brecher	96 Taconic Rd	Greenwich CT		12/64
Theodore K. Cheng	US Courthouse	Newark NJ		05/98
Alicia Franqui	Law Offices of Richard M. Greenspan	Elmsford NY		01/00
Sharon H. Foster	One Woodland Gate	Syosset NY		06/80
Magdalen Gaynor	7 South Broadway	White Plains NY		03/79
Theresa V. Gorski	8 Old Lyme Rd	Purchase NY		06/91
Tracey C. Hammer	Levett Rockwood PC	Westport CT		10/98
Glenn F. Hardy	226 Seventh Ave	Garden City NY		12/94
Eileen Kaufman	Touro Law School	Huntington NY		02/76
Stephanie Sklar Kaufman	Village of Hewlett Bay Park	Hewlett Bay Park NY		12/84
Nile A. Kaya	36 Leroy Place	Ridgewood NJ		06/94
William J. Lewis	Lewis Johs Avallone Aviles & Kaufman LLP	Melville NY		12/72
Theresa M. Morgan	XL America	Stamford CT		07/88
Isaac I. Noy	51 Executive Drive	Manhasset NY		12/92
Kenneth Pelsinger	5 Cypress Lane	Plainview NY		07/82
Ronald J. Rabkin	Arthur Anderson & Company	Roseland NJ		06/86
Ralph M. Randazzo	Randazzo & Randazzo	Huntington NY		12/93
Vincent J. Torna	McDonough Marcus Cohn Tretter Heller & Kanca	New Rochelle NY		05/79

NEW MEMBERS

David R. Torres Community Health Law Project Bloomfield NJ 12/91

RECENT LAW GRADUATE

Matthew J. Aaronson	Parker Chapin LLP	New York NY
Anny M. Abreu	763 Jennings St.	Bronx NY
Aaron F. Adams	Cravath Swaine & Moore	New York NY
Aimee M. Adler	Proskauer Rose LLP	New York NY
Richard H. Agster	Brown & Wood LLP	New York NY
Joseph C. Albanese	419 101th Street	Brooklyn NY
Damaris Ally	1475 Hoe Avenue	Bronx NY
Jason Alper	Pillsbury Winthrop	New York NY
Daniel Altchek	Proskauer Rose LLP	New York NY
Dana W. Atchley	287 Communipaw Ave	Jersey City NJ
Patience E. Atkin	Stillman & Friedman PC	New York NY
Matthew E. Bales	Morgan Lewis & Bockius LLP	New York NY
Anne Bardin	11 Lake St.	White Plains NY
Adam Michael Becker	Skadden Arps Slate Meagher & Flom	New York NY
Gabrielle Benadi	Pillsbury Winthrop	New York NY
Michael Berg	Brown & Wood LLP	New York NY
Sarah E. Bergman	Morgan Lewis & Bockius LLP	New York NY
Wanda Y. Blackwell	Lockheed Martin	Yonkers NY
Julia R. Blue	Simpson Thacher & Bartlett	New York NY
Toby S. Bonini	100 Morningside Dr	New York NY
Paula A. Bosco	405 Fairmount Ave	Jersey City NJ
Anne Marie Bowler	Proskauer Rose LLP	New York NY
Brian C. Brennan	Paul Hastings Janofsky & Walker LLP	New York NY
Christopher S. Brennan	Cravath Swaine & Moore	New York NY
Tara Bruh	Proskauer Rose LLP	New York NY
Vanessa Buta	Hunton & Williams	New York NY
Valerie Bynoe-Kasden	Proskauer Rose LLP	New York NY
Jeff Cahlon	Morgan Lewis & Bockius LLP	New York NY
Eugene P. Caiola	Skadden Arps Slate Meagher & Flom	New York NY
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