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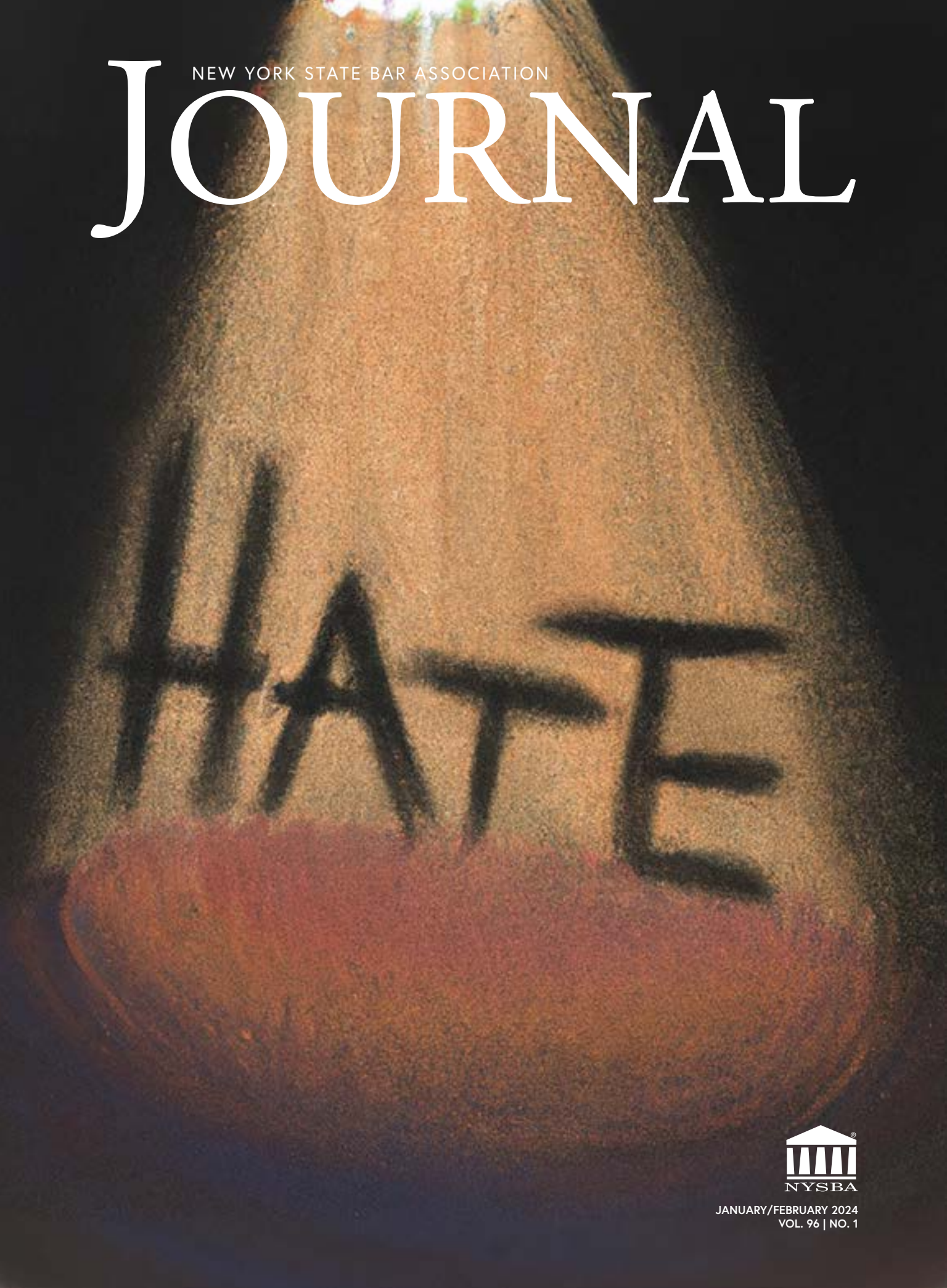

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NEW YORK STATE BAR ASSOCIATION
JOURNAL

JANUARY/FEBRUARY 2024
VOL. 96 | NO. 1

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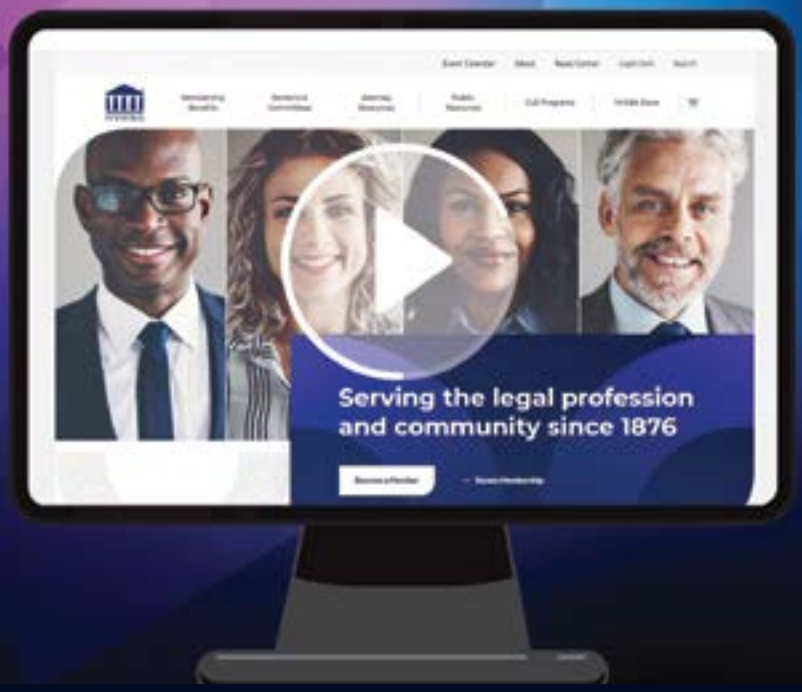

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RICHARD LEWIS

Our Condemnation of Hate Must Be Loud and Clear

Hate is taught, as Nelson Mandela reminded us. We are not born with animosity toward other human beings any more than we are born with the ability to take care of ourselves. Instead, prejudice is passed on from generation to generation and, if left unchecked, it is deadly. The stories throughout this edition remind us that the proliferation of hate knows no bounds and that nobody is immune to its destructive impact. It presents itself in many forms: through racism, antisemitism, anti-Asian hate, homophobia and Islamophobia to name but a few. However, it has a singular overarching goal: to instill fear by attacking our most basic human rights and robbing us of our dignity.

In this special issue of the Bar Journal, most of the articles include suggestions for lawyers about the roles they should play in combating hate. While the Bar Journal doesn't usually permit opinion, we have allowed it in this instance so that the edition can focus on ways to reverse this recent surge in discrimination, hate speech and hate crimes.

We set the tone with the first of numerous frank and insightful stories that span this timely matter.

Brian Cohen, co-chair of our Task Force on Combating Antisemitism and Anti-Asian Hate, offers a personal take through a conversation with one of his rabbis from his youth, Solomon Aidelson, an Auschwitz survivor. Aidelson's description of the genocide that took his family from him and threatened his existence resonates with Brian today. And the Oct. 7 attacks reinforce the idea that Jews in 2023 are as vulnerable to unimaginable violence as they were in the early 20th century.

Hate can carry an aura of invincibility unless good people speak up. This is illustrated by Vince Chang's article that reflects on the precipitous rise in violence against Asian Americans and Pacific Islanders. Vince, who co-chairs the Task Force on Combating Antisemitism and Anti-Asian Hate with Brian, discusses how a consortium of bar associations, Asian American lawmakers and other groups worked together to push Congress to pass the federal COVID-19 Hate Crimes Act. The act, which was signed into law by President Biden, targets the rising number of hate crimes directed at Asian Americans. However, it should not be lost on any of us that it took a catastrophic event, the Atlanta Spa murders in 2021, to provide the impetus for such a law to materialize.

I co-authored an essay with past president Hank Greenberg that speaks to the consequences of inaction by lawyers' organizations during the rise of the Third Reich. We, as the nation's largest and most prominent voluntary state bar association, must learn from the past and live up to our responsibility to act against all forms of prejudice. Our condemnation of hate must be loud and clear. We also need to understand that while we as U.S. citizens have a right to free speech under the First Amendment, that right does not extend to inciting violence.

We also must respond to the spike in anti-Muslim bias that has become more prevalent in the past few months and has only served to heighten an already hostile climate of fear and intimidation. Since 9/11 over 20 years ago, the Muslim American population has grown, but hate crimes against these citizens have not abated. In the first 48 hours after the Oct. 7 attacks, hate speech targeting Muslims rose 422% on X, formerly known as Twit-

ter, according to the Institute for Strategic Dialogue in London. Muslims, like all groups, should have the right to enjoy the liberty of a free society without the fear of oppression.

Brian Cohen's contention that we must be ever vigilant against antisemitism is also a theme in the interview with New York lawyer Michael Bloch, who was on the legal team that successfully sued white nationalist leaders and organizations on behalf of nine plaintiffs injured in the "Unite the Right" rally in Charlottesville, Va., in August 2017. The case was the subject of a 2023 HBO Max documentary, "No Accident." Bloch, a Jewish attorney whose grandparents escaped Nazi Germany, discusses how profoundly meaningful it was to bring white supremacists to justice.

LGBTQ+ rights continue to be infringed upon as well. Kaila Clark and Warren Seay, Jr., who co-authored an article in the Journal, along with several of their ArentFox Schiff colleagues, detail how this community continues to be repressed throughout the world, most notoriously in Uganda, and even here in the U.S., where gay sex is still outlawed in 12 states.

And while justice has been served with the passage of the COVID-19 Hate Crimes Act and a record-high jury verdict in the "Unite the Right" rally lawsuit, we must keep at it. As Vivian Wesson points out in her article on police use of force against Black people during the past 30 years, we are driven to action when hatred is brought into the forefront of our consciousness, but the public outcry dissipates, and we lose the gains we have made.

We must be persistent because we have witnessed firsthand in New York how hate speech can trigger violence. The gunman who killed 10 people at a supermarket in a predominantly Black neighborhood in Buffalo last year had been influenced by online hate tirades. More recently, a Cornell University student was charged with an online threat to shoot up the school's Center for Jewish Living. And three 20-year-old college students of Palestinian descent were shot near the University of Vermont campus during a visit to one of the victim's relatives.

Unfortunately, these incidents resemble other dark moments in our nation's history. Our most prevalent attribute as American citizens is our differences, and so it is imperative that we are allowed to live freely without fear of attack due to our background and beliefs.

As attorneys, we are charged with protecting our fellow citizens from oppression. NYSBA has taken the lead, forcefully denouncing such venomous actions. We have continuously condemned racism in our state, our country and the world. We have stood up to antisemitism, Islamophobia, anti-Asian hate and prejudice against LGBTQ+ individuals.

We have been in communication with the Israel Bar Association and are in the process of launching a pro bono portal that would allow Israeli refugees and victims of the Hamas attacks to find legal assistance.

I have said this before, but it warrants repeating. The future of our profession, and democracy itself, is dependent upon the willingness of attorneys to step forward when the rule of law is under attack. We need to listen to each other and respect our differences of opinion through constructive dialogue.

Never has that been more needed than now. I implore you to speak out and, more importantly, to respect, listen and love each other, especially with a new year upon us and, with it, an opportunity to make a new commitment to greater tolerance and understanding.

RICHARD LEWIS can be reached at rlewis@nysba.org.

Just Because We Are Jewish: The Disturbing and Historic Rise in Antisemitism and What We Can Do About It

By Brian S. Cohen

Shortly after my bar mitzvah, I interviewed one of my beloved spiritual leaders, Rabbi Solomon Aidelson, a survivor of Auschwitz, for a class project about the Holocaust. To prepare, I studied a great deal about the topic, beginning with Hitler's rise to power, which unleashed a surge of antisemitism throughout Nazi Germany, including the boycotting of Jewish businesses, the public burning of Jewish-authored books and Kristallnacht (the "Night of Broken Glass"), one of the largest pogroms in Jewish history, resulting in the destruction of 200 synagogues and 7,500 Jewish shops.

It also shocked me to learn that Jewish children were prohibited from returning to school, that all Jewish businesses had to be handed over to the German government and that Jews were required to wear armbands or Jewish stars for identification. But I was most horrified when I watched films about Hitler's deportation of millions of Jews to concentration camps. The disturbing images of emaciated Jews in striped uniforms, and piles of corpses in mass graves, have been seared in my mind since and will be forever.

With this knowledge, I felt ready for the discussion, but boy, was I wrong. Listening to Rabbi Aidelson speak in detail about the genocide that threatened his existence and robbed him of his family, with his thick Eastern European accent and his shirtsleeve rolled up to reveal his forearm bearing the number branded on him by the Nazis, made everything in the textbooks and documentaries real.

"My entire life, and my entire being, has been affected by the Holocaust," he said. "Anyone who has been in Auschwitz has been marked for life, not only by the physical mark of the number tattooed on his arm, but mentally, it will always remain with those that have ever seen and were unfortunate to be in that camp called Auschwitz."

The interview was at once heartbreaking and infuriating. I could not believe that my people were subjected to such an unthinkable level of hate and persecution just because

we were Jewish. At the same time, I had a naïve sense of comfort that an event like the Holocaust could not and would never happen again, that such extreme antisemitism had been an issue for older generations, but it would never be in mine. I was wrong. The missions of the Nazis in the early 20th century and the terrorist group Hamas today are the same: extinguish all Jews. In 2019, Fathi Hamad, a senior member of Hamas, encouraged Palestinians across the world to kill Jews: "Seven million Palestinians outside, enough warming up, you have Jews with you in every place. You should attack every Jew possible in all the world and kill them."[1]

On Oct. 7, Hamas terrorists heeded that call when they slaughtered as many as 1,200 Jews, the deadliest day for our people since the Holocaust, and kidnapped more than 200 women and children, including the elderly and Holocaust survivors. On that dark day, among other inhumane acts:

- Hamas raped women and young girls, just because they were Jewish.[2]
- Hamas burned people of all ages alive, just because they were Jewish.[3]
- Hamas murdered over 300 people attending a concert for peace and love, just because they were Jewish.[4]

That day, a Hamas terrorist boasted to his parents about killing 10 Jews as he spoke to them on one of his victims' phones: "Look how many I killed with my own hands! Your son killed Jews!" He also crowed that he was using a phone stolen from a Jewish woman he had killed. "I killed her and I killed her husband," he said. "I killed 10 with my own hands! Dad, 10 with my own hands!" The father responded: "Oh my son, God bless you."[5]

Making matters much worse, these barbaric and unthinkable acts of evil and depravity are being celebrated worldwide, right here in New York, which has the largest Jewish population outside of Israel, and throughout America, including by certain antisemitic members of Congress. According to data released by the Anti-Defamation League, in the month following Hamas' terror attack on Israel, antisemitic incidents in the U.S. increased by 316% compared with the same time period last year. In addition, in the one-month period between Oct. 7 and Nov. 7, 2023, ADL documented 832 antisemitic incidents of assault, vandalism and harassment across the U.S., an average of nearly 28 incidents a day.[6]

This is a very frightening time to be Jewish. Religious or not, we are all on edge. It is even more frightening to be, as my wife and I are, parents of Jewish children in college. At NYU, for example, a student held up a sign that read "Keep the world clean" of Jews.[7] A recent study found that 73% of Jewish college students and 44% of non-Jewish students have experienced or witnessed antisemitism since the start of the 2023–2024 school year.[8] The dark cloud of antisemitism that has hovered over us consistently throughout history is surging and combating it must be prioritized as a fundamental human rights issue. We must fight back with a sense of urgency.

Although I was not alive at the time, I believe that this is what the eve of the Holocaust must have felt like.

The Jewish People and Antisemitism: A Very Brief History

> As a Jew I carry with me the tears and sufferings of my grandparents and theirs through the generations. The story of my people is a narrative of centuries of exiles and expulsions, persecutions and pogroms . . . . Jews knew that they or their children risked being murdered simply because they were Jews. Those tears are written into the very fabric of Jewish memory, which is to say, Jewish identity. – Rabbi Jonathan Sacks, "The Dignity of Difference"

The Jewish people have always lived in the land of Israel, but over many years, they dispersed throughout the Middle East and beyond. In Rome and Greece, their loyalty was questioned because they rejected polytheism, which engendered antisemitic rhetoric. Later, a genocide in Alexandria wiped out the Jewish population of Egypt.[9] Jews were also blamed for the crucifixion of Jesus Christ, despite the fact that the Romans were responsible.[10]

During the Middle Ages, antisemitism and the persecution of Jews continued. Jews were blamed for the Black Death and accused of killing Christian children and using their blood for Passover rituals. Several countries created Jewish ghettos to separate Jews from society, and Jews were expelled from many countries, including England (1290), France (1306) and Spain (1492).[11] More recently, in 1894, a serious injustice known as the Dreyfus Affair led to an irreversible wave of antisemitism in France, with people calling for the death of Jews.[12]

Jews are still scapegoated for problems throughout the world and, since the Holocaust, many of the same hateful antisemitic narratives persist, such as that Jews are greedy and deceive others to get ahead, but today, they are much easier to promote on social media by influencers with hundreds of thousands, if not millions, of followers. Notably, certain conspiracy theories, like "the Jews control Hollywood," came about after Jews immigrated to the U.S. and were forced to become entrepreneurial and create opportunities for themselves in certain industries, like entertainment, and professions, like law and medicine, in which they were denied employment.[13] A classic no-win scenario: Jews are denied opportunities simply for being Jewish and then stereotyped and hated for working hard to overcome such bigotry and achieving success.

The Work of the Task Force

Last year, NYSBA President Richard Lewis convened the Task Force on Combating Antisemitism and Anti-Asian Hate. The task force, conceived in the fall of 2022, launched in the spring of 2023 in response to the alarming levels of hate toward Jews and Asians, But since Oct. 7, we have been confronted with even more antisemitic hate crimes (at levels that we have not experienced since the Holocaust), following years when anti-Asian hate crimes have dominated the news.

In 2021, 746 anti-Asian hate crimes and 817 antisemitic hate crimes were reported to the FBI by law enforcement agencies. From 2020 to 2021, reports of anti-Asian hate crimes increased by 167%. Antisemitic hate crimes increased by 20%, according to the same data.

Sadly, while Jews account for only 2.4% of the U.S. population, we are the victims of at least 63% of reported religiously motivated hate crimes. And recent polling conducted by the Louis D. Brandeis Center for Human Rights Under Law found that 65% of college students active in Jewish organizations felt unsafe on campus because of physical or verbal attacks, and half felt the need to conceal their Jewish identity or support for Israel for the sake of their safety.

To date, bar associations have not systematically studied the problem of hate crimes. This task force seeks to close that gap. As President Lewis has said: "Antisemitic and anti-Asian bias in America is overt and disturbing, and it is increasing exponentially. . . . We have launched this task force because we are at a crossroads, and left unchecked, we can only expect that crimes against these two vulnerable groups will continue to spiral out of control." The task force has been grappling with the scourge of hate crimes, which present a clear and present danger to many, but most strikingly to New Yorkers.

The task force is hard at work on a report that will go before the Executive Committee and the House of Delegates in January. If the report is approved by the bar association's governing body, the association will begin lobbying for changes in the law. For example, we explained to the Executive Committee in an informational report at its November meeting that we are proposing that all offenses, if motivated by bias, should count as hate crimes. The current law provides a lengthy list, but leaves out certain offenses like graffiti, criminal obstruction of breathing and rape in the third degree, and only provides "negative guidance" by defining what is not a hate crime. We are examining the possibility of changing the law, or issuing model jury instructions, to permit jurors to consider the totality of the circumstances or to provide more examples in the statute of what constitutes a hate crime, including the actions of a defendant before and during an attack.

We are also examining the Stop Hiding Hate Act (S895/A06789), legislation that has passed the New York Senate and is pending in the Assembly. This bill would require large social media companies to disclose their policies and moderation practices for online hate speech. The legislation is modeled after a similar law in California.

In line with our mandate, the task force is also examining how to stop hate before it begins through education, especially in schools. While anti-bias, anti-bullying and diversity programming has been shown to be effective, we are exploring how to make such programming consistent in schools throughout the state. In addition, we are examining measures to increase compliance with New York State's Dignity for All Students Act, which aspires to provide the state's public elementary and secondary school students with a safe and supportive environment free from discrimination, intimidation, taunting, harassment, and bullying on school property, a school bus and/or at a school function.

In the letter to the Executive Committee, the task force said it is also reviewing measures to improve the reporting of hate crimes. The current situation is a patchwork of inconsistent laws that result in severe underreporting of hate crime in some states. New York's reporting system has made substantial strides, but we are examining the reporting laws of Oregon, New Jersey and Massachusetts to help us further. Oregon's law, for example, requires all police agencies to document reports of alleged hate crimes – whether or not they result in arrest – and share information with the state criminal justice division. District attorneys must track their hate crime caseloads and report on outcomes, sentences and recidivism.

To be sure, I have no illusions that our task force alone will reverse antisemitism, which has persisted for thousands of years. In this larger war against bigotry, all hands must be on deck, and as a bar association, this is the role that we can and must play. I hope that we are not alone and that all stakeholders will come together and take a stand to combat all forms of hate.

Brian S. Cohen is a partner and co-founder of Lachtman Cohen & Belowich in White Plains, where his practice focuses on complex commercial, employment, and civil rights litigation. He is the co-chair of the NYSBA Task Force on Combating Antisemitism and Anti-Asian Hate, a member of NYSBA's House of Delegates, and a vice president of the Westchester County Bar Association.

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The Working Definition of Antisemitism

An Important and Useful Tool for Guidance and Education

By Brian S. Cohen

The International Holocaust Remembrance Alliance is the only intergovernmental organization mandated to focus solely on Holocaust-related issues. The alliance's Committee on Antisemitism and Holocaust Denial built international consensus around the following non-legally binding working definition of antisemitism, which many institutions and organizations worldwide have endorsed and adopted:

> Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.[1]

Per the alliance, "antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for 'why things go wrong.'" In addition, antisemitism "is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits."[2]

The alliance also provides 11 examples of contemporary antisemitism "in public life, the media, schools, the workplace, and in the religious sphere" including, among others: calling for, aiding or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion; making mendacious, dehumanizing, demonizing or stereotypical allegations about the power of Jews as a collective, such as the Jews controlling the media, economy, government or other societal institutions; accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews; denying the Holocaust; or holding Jews collectively responsible for the actions of the state of Israel.[3]

As explained by the Anti-Defamation League, the world's leading organization fighting antisemitism and hate in all forms, "these examples are important, because while certain longstanding myths animating antisemitism have stood the test of millennia, manifestations of antisemitism do change, sometimes significantly, over time and place. It is important to provide guidance built on the knowledge of experts in the field, as well as the lived experience of large segments of the Jewish population."

In addition, the alliance's definition is intended to be utilized by various government and non-government agencies and institutions, such as college administrators, law enforcement and others, as an important tool for education and guidance on antisemitism. As the ADL further explained: "As antisemitic incidents have increased worldwide, governments and civil society have sought ways to speak out against antisemitism and ensure that there is awareness of its real-life manifestations and impact. The definition should not be viewed as a substitute or replacement for existing laws and it is not a 'charging authority,' but [n]onetheless, it is critical as guidance. . . … to better enable [institutions and organizations] to identify antisemitism and gather and analyze relevant data."[4]

Finally, according to the alliance, "antisemitic acts are criminal when they are so defined by law . . . " and "criminal acts are antisemitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews."[5]

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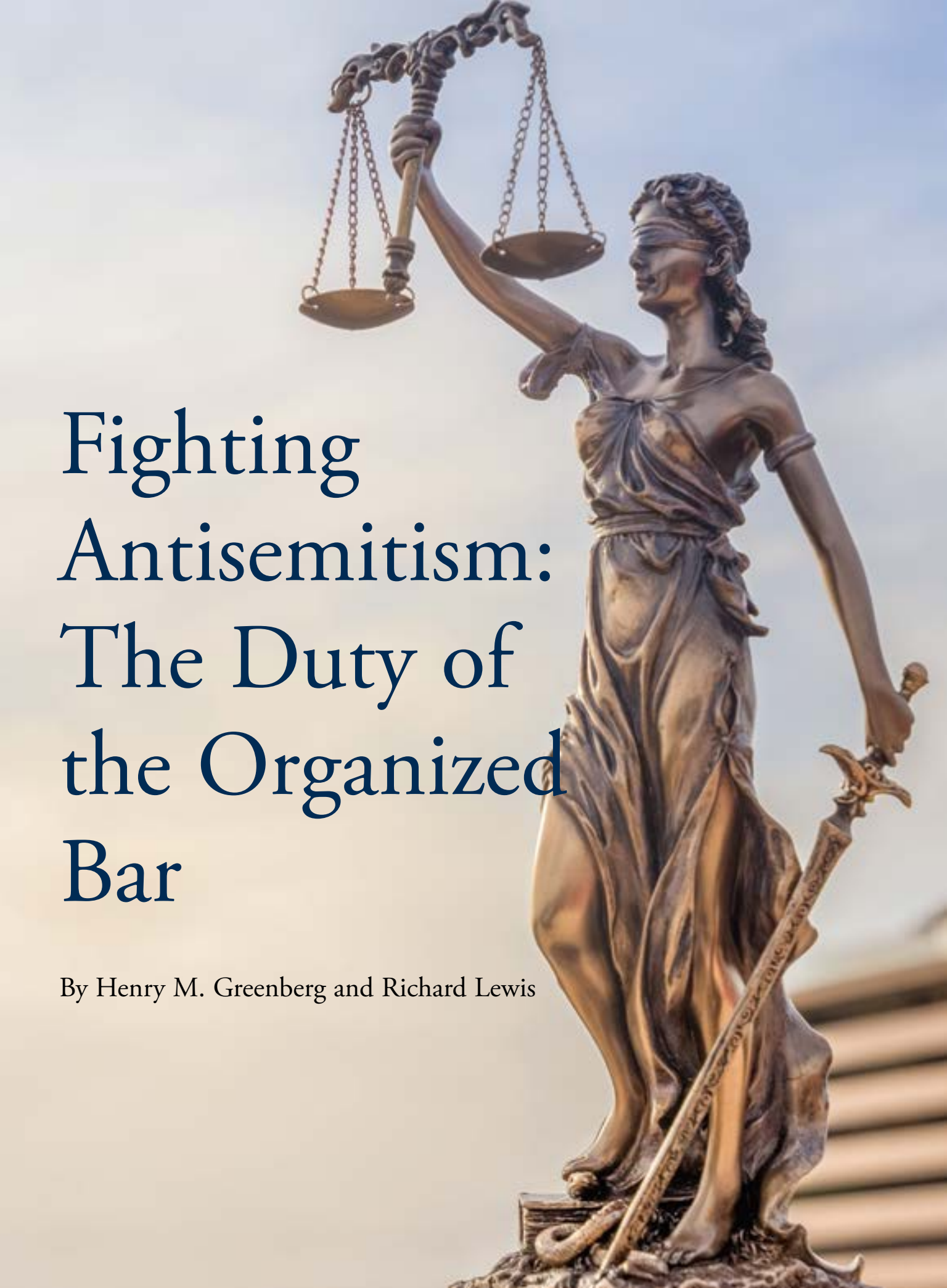

Fighting Antisemitism: The Duty of the Organized Bar

By Henry M. Greenberg and Richard Lewis

In the wake of Hamas' horrific Oct. 7 attack against Israel, there has been an unprecedented number of antisemitic incidents in the U.S. This alarming spike comes amid already historic levels of anti-Jewish harassment and assault. Antisemitism is rapidly mutating into a societal cancer, especially in New York State – the home to the largest population of Jews anywhere in the world outside Israel.

How should lawyers respond to this lethal threat? History provides a cautionary tale of what can happen when lawyers turn a blind eye to antisemitism and lawyer organizations are not just passive but on the wrong side of this perpetual evil.

Consider, for example, the plight of Jewish lawyers in Germany during the rise of the Third Reich. Although Jews were less than 1% of the population of Weimar, Germany, they made up 25% to 30% of the legal profession. On Jan. 1, 1933, in Berlin, the capital city, 43% of the 3,400 lawyers were Jews or of Jewish origin. But the fate of German Jewry was sealed later that month when the Nazi Party assumed control of the German state with Adolph Hitler's appointment as chancellor.

On April 7, 1933, the Nazi-run government took one of its first steps to destroy the rule of law, by promulgating the Law for the Restoration of the Professional Civil Service. It expelled all Jewish judges and "non-Aryan" attorneys, save a few exceptions that were subsequently eliminated. Ultimately, in 1938, the Nazis banned Jews from practicing law.

Shamefully, most non-Jewish German lawyers offered no resistance and made no effort to help their colleagues. Lawyer organizations did nothing, too, except expel Jews from their ranks. Half of the members of the Berlin Bar Association in 1933 who were Jewish, including those who converted to Christianity, emigrated from Germany and a fifth were murdered.

Fast forward to the present. Hamas is a U.S. State Department-designated Foreign Terrorist Organization under Section 219 of the Immigration and Nationality Act. Notwithstanding that it is a crime to provide material support to such an organization, all too many lawyers, organizations that represent lawyers, and law students have defended Hamas' attack against Israel.

For example, on Oct.7, as Hamas slaughtered and kidnapped Israeli civilians, an Albany Law School professor appeared to celebrate what happened on social media. In a post on X, formerly known as Twitter, accompanied by a photo of a breached border fence, the professor wrote: "Long live the Palestinian resistance & people of Gaza, tearing down the walls of colonialism and apartheid." She added, "As the Biden admin builds more walls at US borders, the people of the world are rising up and tearing walls down. The Palestinians are a beacon to us all."

In a similar vein, the day after the Oct. 7 massacres, the National Lawyers Guild praised Hamas' conduct as entirely justified "military actions." And on Oct. 10, a Student Bar Association president at NYU Law School blamed Israel for the Hamas attacks in an online student newsletter, stating that "Israel bears full responsibility" for Hamas' deadly attack. Some five weeks later, 60% of the school's students voted to remove the president from office.

On Dec. 5, University of Pennsylvania President Liz Magill, along with the presidents of Harvard University and the Massachusetts Institute of Technology, appeared before a congressional committee to answer questions about the rise of antisemitism on their respective campuses. Magill, a former law school dean, was asked whether the call for genocide of Jewish people on campus constituted bullying or harassment violative of Penn's rules or code of conduct. She declined to give a definitive answer, saying that a call for Jewish genocide could be harassment if it turned into conduct. This response was immediately and widely condemned. Pennsylvania's governor described it as "shameful," and a White House spokesperson observed that "[a]ny statements that advocate for the systematic murder of Jews are dangerous and revolting[.]" Magill resigned from her position as president four days later following an outpouring of criticism regarding her testimony.

Manifestly, lawyers (and aspiring lawyers) should not glorify, condone, or rationalize genocidal mass murder fueled by hatred of Jews. Of course, lawyers have a right under the First Amendment to criticize Israel's policies – past, present, and future. But lawyers can be disciplined to the extent they counsel or assist others in illegal and criminal conduct. So, too, lawyers are not free to advocate hate crimes or incite violence against others.

America's foundational principles abhor intolerance. Equal justice under law is a core principle of the rule of law. Pluralism and diversity are our national heritage: the source of our strength. The promise of our country lies in government's ability to protect citizens of all religions, races and ethnicities.

Antisemitism threatens the nation's bedrock principles of equality and freedom from persecution. It also undermines the government's obligation to safeguard its residents from bigotry and violence.

Thus, lawyers and the organized bar have a special responsibility to fight injustice caused by all forms of prejudice, including antisemitism, the oldest prejudice of them all. Just as they have long condemned racism, their response to antisemitism, Islamophobia and anti-Asian hate must be equally vigorous and emphatic. Law schools must also recognize their mission is to produce graduates that understand a lawyer's duty is to the rule of law – not the law of tooth and claw.

Thankfully, most of the New York bar is meeting the moment. On Oct. 9, NYSBA issued a statement strongly condemning Hamas' "premeditated invasion of Israel and its brutal murders of hundreds of Israeli and Arab citizens in their homes and communities. The attacks are abhorrent and unforgivable and flagrantly violate the United Nations Charter, Helsinki Accords, and established norms and principles of international law."

On Nov.1, more than two dozen of the state and nation's leading law firms sent a letter to more than 100 law school deans, threatening not to hire their students if they failed to take antisemitism more seriously. The law firms wrote that, "[o]ver the last several weeks, we have been alarmed at reports of antisemitic harassment, vandalism and assaults on college campuses, including rallies calling for the death of Jews and the elimination of the State of Israel. Such antisemitic activities would not be tolerated at any of our firms."

The law firms made clear that they would not "tolerate outside groups engaging in acts of harassment and threats of violence, as has also been occurring on many of your campuses." Accordingly, the letter continued, "[a]s employers who recruit from each of your law schools, we look to you to ensure your students who hope to join our firms after graduation are prepared to be an active part of workplace communities that have zero tolerance policies for any form of discrimination or harassment, much less the kind that has been taking place on some law school campuses."

On Nov. 4, NYSBA's governing body, the House of Delegates, condemned Hamas' vicious and unprovoked attack on Israel, defended Israel's right to defend itself and called for all hostages to be released. A few weeks later, NYSBA issued another statement, decrying the chants and slogans of the supporters of Hamas as "no different from the words of the Ku Klux Klan or the Nazis," explaining that "[t]hey are a deviation from our American values, and protecting our citizens is part of preserving our democracy." In addition, after the Hamas attacks, the mission of NYSBA's Task Force on Combating Antisemitism and Anti-Asian Hate, which was launched in June to deal with a rise in hate incidents, took on more urgency as incidents of antisemitism skyrocketed.

Such actions are in keeping with NYSBA's tradition of responding aggressively to antisemitic incidents. In January 2020, NYSBA formed an emergency task force to study 14 antisemitic attacks in New York that occurred the preceding month. The task force rapidly completed its work and produced a comprehensive set of recommendations for the governor and Legislature to help rid the state of the scourge of hate crimes.

From the early days of the war, NYSBA has been in continuous communication with the Israel Bar Association. Over the course of several Zoom meetings with the Israel Bar Association's leadership, NYSBA has freely shared expertise it acquired standing-up an emergency statewide pro bono network during the COVID-19 pandemic. In partnership with the justice tech company Paladin, NYSBA and the Israel Bar Association launched a pro bono portal that allows Israeli lawyers and law firms to expeditiously find pro bono work with war victims. This technology is facilitating the provision of free legal assistance to the survivors of the Oct. 7 attack, the families of hostages and evacuees from the southern and northern borders of Israel.

In short, no state bar association in the nation has been more proactive or forceful than NYSBA in denouncing antisemitism and supporting Israel in its time of agony and need.

* * *

At the end of Albert Camus's novel, "The Plague," an allegory of the Nazi occupation of France, the narrator, Dr. Rieux, explains why he told his story:

> It is because the *bacillus de la peste,* the plague germ, never dies; it never entirely disappears; it simply goes into remission, perhaps for decades, but all the while lurking: in the furniture, in linen cupboards, in bedrooms, in cellars, in trunks, in handkerchiefs, in file folders, perhaps one day to reawaken its rats, and then, to the misfortune or for the education, of mankind, to send them forth once again to die in some once-happy city.

Antisemitism, like the plague germ, has reawakened. While lawyers alone cannot eradicate such hatred and evil, the organized bar must be unrelenting in the fight against it. The concerted action of the most impactful, consequential and influential profession in the history of the world can make a difference. All of us together must do everything in our power to make sure that New York's Jewish community feels and is safe. This is a basic human right, and the legal profession has a duty to defend it.

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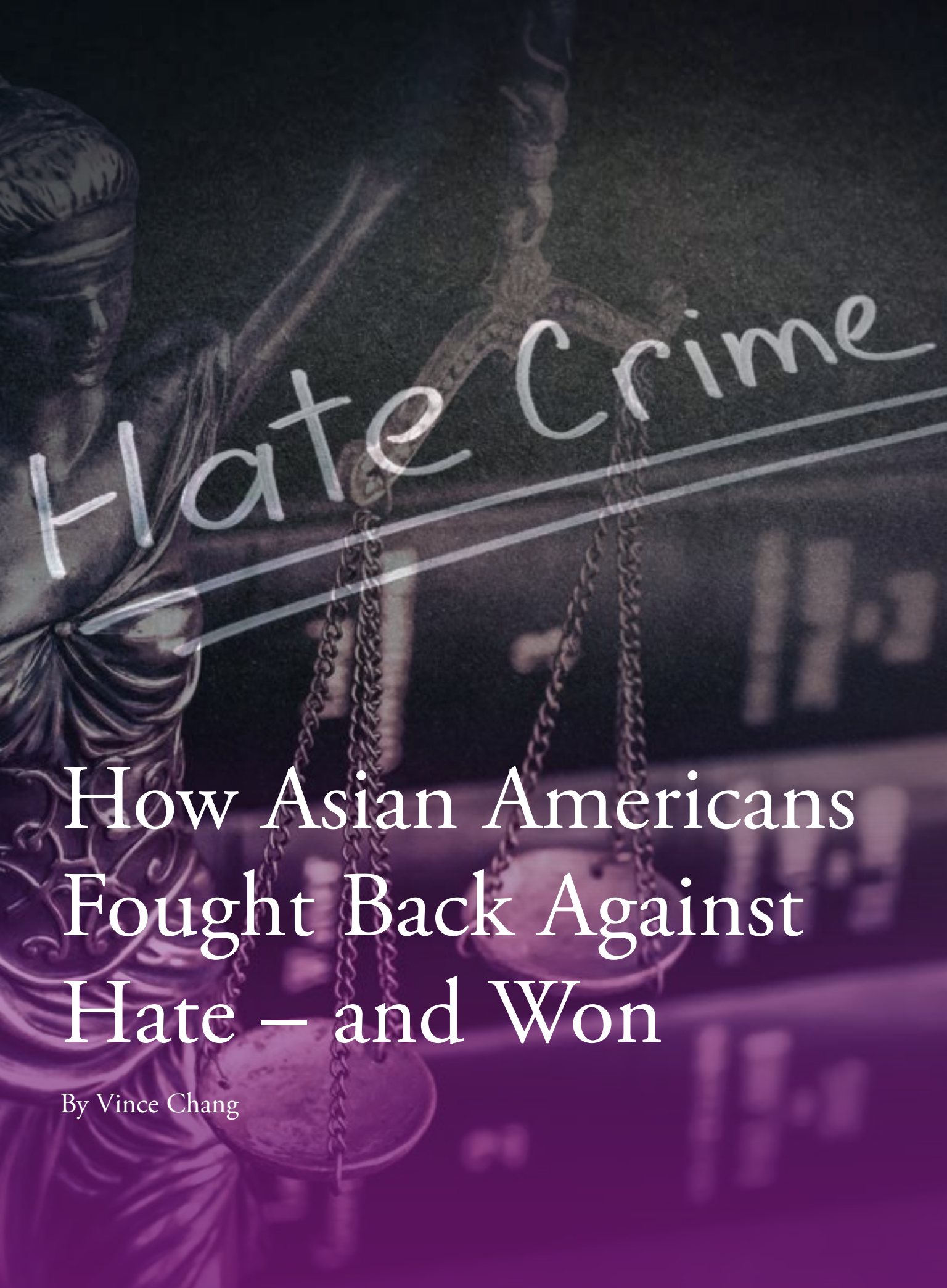

How Asian Americans Fought Back Against Hate – and Won

By Vince Chang

> Congress determined that hate crimes have reverberating effects, not only for the targeted community but also for the nation. The Supreme Court has held that the widespread, systemic effects of hate crimes are significant enough to justify the use of enhanced sentences. . . . Additionally, these enhanced sentences for hate crimes are often seen as symbolically important because these laws have a signaling effect in sending a "message to society that criminal acts based upon hatred will not be tolerated."
>
> U.S. Commission on Civil Rights, *The Federal Response to Anti-Asian Racism in the United States* (Sept. 2023).[1]

I am proud to serve with Brian Cohen as co-chairs of the NYSBA Task Force on Antisemitism and Anti-Asian Hate. We are grateful to NYSBA President Richard Lewis for convening this task force of talented and dedicated individuals and for shining a spotlight on this pressing problem.

For decades the dominant narrative about Asian Americans has been that they are a "model minority," not subject to the same discrimination and other tribulations to which other diverse groups are subject.[2] This oversimplified stereotype was shattered during the pandemic when hate crimes against Asian Americans soared by 800% in the first year of the pandemic.[3] As a result, as the U.S. Congress stated: "Following the spread of COVID-19 in 2020, there has been a dramatic increase in hate crimes and violence against Asian Americans and Pacific Islander . . . [An] alarming surge in anti-Asian hate."[4]

The Response to Anti-Asian Hate Crimes

The Atlanta spa murders in March 2021, in which six Asian spa workers were murdered, catalyzed the nation's attention on the problem of anti-Asian hate crimes.[5]

On March 18, 2021, for the first time in more than 30 years, a congressional hearing on discrimination against Asians was conducted.[6] On May 20, 2021, approximately two months after the Atlanta spa murders, President Biden signed the COVID-19 Hate Crimes Act in recognition of the dramatic increase in hate crimes and violence against AAPI victims. The legislation, introduced by U.S. Rep. Grace Meng and Sen. Mazie Hirono, improved reporting of hate crimes, expedited the review of hate crimes related to COVID-19 and authorized grants to state and local governments to conduct hate crime-reduction programs.[7]

This hate crime legislation was passed on a fast track on an overwhelmingly bipartisan basis with majorities of 94-1 in the Senate and 364-62 in the House during a period when bipartisanship was rare. As President Biden remarked, the legislation represented "a significant break" in an otherwise hyper-partisan political climate.[8]

The COVID-19 Hate Crimes Act has been described as "the single most significant piece of legislation to improve federal hate crime data since the Hate Crimes Statistics Act of 1990," according to Michael Lieberman, Southern Poverty Law Center senior policy counsel for hate and extremism.[9]

How was such a bipartisan result possible, and what are the lessons for future hate crimes legislation?

First, the crisis atmosphere surrounding the Atlanta spa murders undoubtedly played a decisive role.[10] As the Asian American Bar Association of New York chronicled, President Biden, Attorney General Merrick Garland and U.S. Representatives Grace Meng, Judy Chu, Young Kim and Ted Lieu issued statements supporting the Asian American community.[11] In New York City, the issue of anti-Asian hate incidents became a campaign topic in the mayoral and the Manhattan district attorney races, with all candidates pledging to invest resources and attention to combating hate.

Notably before the spa murders, in 2020, there was significant opposition to even non-binding resolutions condemning anti-Asian hate crimes.[12] The Atlanta murders provided an impetus for hate crimes legislation that did not previously exist.

Second, Asian American lawmakers played a pivotal role in securing the passage of the act. Asian American Representatives, most notably Rep. Grace Meng, spearheaded the historic March 2020 congressional hearing, the first hearing held on Asian hate crimes in 30 years. Congresswoman Meng focused on the Atlanta murders, noting "we saw the terrible news about the six Asian women who were shot and killed in the Atlanta area. Our community is bleeding, we are in pain, and for the last year, we've been screaming out for help."[13]

Third, a broad coalition of Asian and non-Asian groups supported the act. The legislation was endorsed by Asian Americans Advancing Justice, National Council of Asian Pacific Americans, National Asian Pacific American Bar Association, Asian and Pacific Islander American Health Forum, National Asian Pacific American Women's Forum, Association of Asian Pacific Community Health Organizations, Oxfam America and Muslim Advocates.[14]

Among the non-Asian groups supporting the act were the Anti-Defamation League, the American Civil Liberties Union,[15] the American Medical Association,[16] the National Education Association[17] and Amnesty USA.[18] ADL in particular "advocated tirelessly for these bills, including by organizing petitions in support, which have garnered thousands of signatures."[19]

Fourth, bar associations added their voices in support of the Asian American community. Before the passage of the 2021 legislation, the National Asian Pacific Bar Association and the Asian American Bar Association of

New York, the American Bar Association[20] and the New York County Lawyers Association,[21] as well as a coalition of diverse bar associations,[22] condemned the rise of anti-Asian hate crimes. Notably, the National Asian Bar sponsored a historic resolution in the ABA House of Delegates urging action on Asian hate crimes.[23]

The New York State Bar Association convened this task force partially in response to the rise in anti-Asian hate crimes.

In short, the combination of a crisis atmosphere and strong leadership from a broad coalition of elected officials and Asian and non-Asian groups, including bar associations, helped produce the historic 2021 hate crimes legislation.

The History of Anti-Asian Hate Crimes

The 2021 legislation followed centuries of inattention to hate crimes against Asian Americans.

As Second Circuit Senior Judge Denny Chin and Kathy Hirata Chin emphasized: "This is nothing new, for there is a long history of hostility and violence against Asian Americans in this country, a history that is not well known."[24] As U.S. Rep. Jimmy Gonzalez noted: "From the LA Chinese massacre of 1871 to the murder of Vincent Chin, anti-Asian hate has been a stain on our nation's history."[25] Harvard's Courtney Saito explained that Asians have often been scapegoated during times of national distress: "This is really not an exceptional moment by any means . . . But it's really part of a much longer genealogy of anti-Asian violence that reaches as far back as the 19th century."[26] As Judge Chin and Kathy Chin documented,[27] anti-Asian hate crimes took such forms as:

- The October 24, 1871 lynching of at least 18 Chinese Americans (10% of the Chinese American population of Los Angeles at the time) by a mob of hundreds.
- The murders of 28 Chinese coal miners on September 2, 1885, in Rock Springs, in what was then the Wyoming territory.
- The massacre in 1887 in Hells Canyon, Oregon, in which at least 31 Chinese miners were murdered, their gold stolen, their camps burned, and their bodies thrown into the Snake River.
- The attacks on Vietnamese fishermen in 1981 by the Ku Klux Klan in Galveston.
- The brutal murder of Vincent Chin in 1982 in Detroit at a time when American auto companies in Detroit were threatened by competition from Asian companies.

Specific Instances of Recent Anti-Asian Hate Crimes

The foregoing instances of anti-Asian hate are not often taught in our nation's classrooms. Before the pandemic, hate crimes against Asian Americans were generally underreported and under-recognized. However, recent hate crimes perpetrated against Asian Americans have been so widespread and so brutal that they have been impossible to ignore. From New York to San Francisco, hate crimes against Asians erupted nationwide, accompanied by denunciations of Asians as responsible for the COVID-19 pandemic.[28] And anti-Asian hate crimes did not stop when the pandemic did. The following is a small sampling of some of the most brutal, and/or most recent, anti-Asian hate crimes in New York City alone over roughly the last two years. (Over 40% of the anti-Asian hate crimes in large cities nationwide took place in New York City in one recent time period.[29])

- On Oct. 19, 2023, Jasmer Singh, an Indian American Sikh man, was beaten to death in a New York road rage attack. His family seeks hate crime charges against the killer.[30]
- On Sept. 2, 2023, a crime suspect caught on camera in Prospect Park, Brooklyn, yelled anti-Asian remarks at a man, then hit him with a stick repeatedly before running off.[31]
- On Aug. 7, 2023, an Asian woman from Nevada was punched repeatedly as "anti-ethnic remarks" were directed toward her on a Manhattan subway train.[32]
- On May 23, 2023, an indictment was handed down for an Asian hate crime in Koreatown in which an Asian man was pulled out of his car and assaulted. The man sustained bruising, pain in his elbow, a cut on his knee and a laceration on his forehead.[33]
- On March 2, 2023, an 18-year-old woman grabbed Cecile Lai, pulled her to the ground and punched and kicked her, according to the district attorney's office. A 44-year-old male bystander tried to pull her off the victim and then was himself attacked by two men who were with her. Before leaving the scene, the assailants' SUV swerved and came within inches of the female victim.[34]
- On Feb. 27, 2022, during a three-hour period, seven Asian American Pacific Islander women were attacked in seven separate incidents in midtown Manhattan.[35]
- On Feb. 22, 2022, GuiYing Ma died from her injuries after she was smashed in the head with a rock in Queens.[36]

- In February 2022, Christina Yuna Lee was followed and then stabbed more than 40 times in her apartment in Manhattan's Chinatown.[37]
- On Jan. 15, 2022, Michelle Go died when she was shoved to her death in front of a moving subway train.[38]
- In July 2021, Than Than Htwe died from head injuries after an attempted robbery caused her to fall down subway stairs.[39]
- On April 23, 2021, Yao Pan Ma was stomped on the head and killed in Harlem.[40]
- In May 2021, a video showed a stranger attacking an Asian woman with a hammer in Manhattan. The victim was hospitalized with head lacerations.[41]

The foregoing list is, unfortunately, far from exhaustive. Scores of other hate crimes took place before, during and after the roughly two-year time period covered above. This list is confined to New York City and thus does not cover crimes such as the 2022 Atlanta spa murders.[42]

Statistical Analysis of Recent Anti-Asian Hate Crimes

The evidence of hate crimes and hate incidents directed against Asian Americans is not merely anecdotal. While hate crimes and hate incidents are notoriously underreported, particularly when they were committed against Asian Americans,[43] statistical evidence further demonstrates the magnitude of the problem.

One group studied internet activity and reported a rise of 1,662% in anti-Asian hate speech in 2020 compared with 2019. This peaked with the announcement of the COVID-19 pandemic.[44]

At the most basic level, public opinion poll data sheds light on the statistical scope of the hate crime problem, showing that 1 out of 4 Asians has experienced a hate incident.[45] And these statistics carry over into 2023. About 2 in 10 Asian Americans and Pacific Islanders (23%) say they have experienced being verbally harassed or abused in the last year, and 22% have been called a racial or ethnic slur.[46]

Earlier surveys showed that fully one-third of Asian Americans feared threats and physical attacks and most said violence against them was rising.[47] A joint report by Columbia University and Committee of 100 found that about 3 out of 10 of the nearly 6,500 Chinese Americans it surveyed in 2022 were verbally or physically harassed.[48] Stop AAPI Hate reported about 11,500 acts of hate between March 2020 and 2022.[49] More than half of Asian respondents report that they know someone who has been victimized.[50]

The foregoing data relates to hate incidents, which are not necessarily hate crimes, but the statistics on hate crimes are equally alarming. In 2021, 746 anti-Asian hate crimes were reported to the FBI by law enforcement agencies. Reports of hate crimes against Asian Americans jumped 342% from 2020 to 2021, continuing a pattern from the previous year: Anti-Asian crimes increased 124% between 2019 and 2020.[51] The Bureau of Justice Assistance reported that the first quarter increases in 2021 followed a "historic surge" in anti-Asian hate crimes that started in 2020, with anti-Asian hate crimes increasing 149% in 16 of the largest cities.[52]

The Asian American Bar Association of New York, including our task force members, Professor Elaine Chiu and Chris Kwok, performed perhaps the most extensive statistical analysis of anti-Asian hate crimes, thoroughly reviewing over 200 New York City cases. Notably, the study found that assault was the most common offense – 58% of all incidents – indicating that hate crimes are generally serious violent crimes. But the study found that prosecution of hate crimes remains difficult. Out of the 64 criminal prosecutions the database studied, only seven resulted in hate crime convictions. At the time, 20 other prosecutions were still pending.[53]

The Profound Effect of Hate Crimes on Asian American Communities

The surge in hate crimes has resulted in fear and isolation in Asian American communities:

> "For the Asian American communities that are experiencing this, it just feels like an all-out assault," said William Ming Liu, PhD, a counseling psychologist and chair of the Department of Counseling, Higher Education, and Special Education at the University of Maryland.
>
> Early research has linked the uptick in anti-Asian discrimination to increases in anxiety, depressive symptoms, and sleep problems among those who are targeted.[54]

A recent study showed that "having experienced or witnessed a hate crime incident was associated with higher levels of serious psychological distress . . . [and] having had to forgo necessary care . . ." [55] Another study that surveyed over 5000 people, including 575 Asians, found that more than 72% of AAPIs who experienced a hate incident believed that anti-Asian discrimination is the greatest source of stress[56] and 70% of AANHPIs believed that discrimination against Asians became more common during the pandemic,[57]

As a result of the fear and stress arising from anti-Asian hate, many AAPI persons changed their behavior in response to bias-motivated attacks and harassment, including closing shops early, avoiding community events or public transportation. Some opted not to report incidents to the police because they feel that their concerns would not be adequately addressed.[58] Stop AAPI

Hate commissioned a nationally representative survey of Asian Americans and Pacific Islanders and found that 45% indicated discrimination negatively changed their sense of belonging, and 31% stated that discrimination impacted their behavior, such as causing them to switch schools, jobs or where they shop.[59]

Conclusion

Our task force is studying further ways to address hate crime and will report to the NYSBA House of Delegates in 2024. Although the hate crime epidemic of 2020–22 against Asian Americans has subsided somewhat, hate crimes persist, and we should continue to push for measures to address the scourge of hate crimes. As President Biden has stated:

> For centuries, Asian Americans, Native Hawaiians, Pacific Islanders . . . have helped build this nation only to be often stepped over, forgotten, or ignored . . . [they have] lived here for generations, but still considered, by some, the "other" . . . It's wrong . . . it's simply un-American.

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How a New York Law Can Help Stop Hate Speech on the Internet

By Vince Chang

Much of the world now communicates on social media, with nearly a third of the world's population active on Facebook alone.[1] However, as The New York Times reported, "Antisemitic and Islamophobic hate speech has surged across the internet since the conflict between Israel and Hamas broke out. The increases have been at far greater levels than what academics and researchers who monitor social media say they have seen before, with millions of often explicitly violent posts on X, Facebook, Instagram and TikTok."[2]

As a Washington Post article quoting the ADL showed, since Oct. 7, antisemitic content has increased 900% on X, and there have been more than 1,000 incidents of real-world antisemitic attacks, vandalism and harassment in America.[3] Memetica, a digital investigations firm, has documented 46,000 uses of the #Hitlerwasright hashtag on X since Oct. 7, up from fewer than 5,000 uses per month.[4]

Both before and after this recent surge, internet platforms and political leaders have urged steps to address internet hate speech. The measures taken thus far have not proven entirely effective, but now there are new proposals in the New York State Legislature, including the Stop Hiding Hate Act, that would require internet platforms to disclose the steps, if any, that they take to address hate speech. While opponents argue that attempts to regulate internet hate speech run afoul of the First Amendment's guarantee of free speech, the Stop the Hate Act seems to pass constitutional muster.

The Effect of Internet Hate Speech

Adi Cohen, the chief operating officer of Memetic, stated that the rise in antisemitic posts reflected a convergence of goals by far-right and far-left activists.[5] "Some of them explicitly say this is an opportunity to gloat and celebrate the killing of Jews online . . . They are trying to lure an audience to their content, and this is a huge growth moment for them."[6]

As the popularity of internet platforms has increased, so has the hate speech on those platforms. The ADL recently reported in a survey across all population groups that:

- 33% of survey respondents reported identity-based harassment this year, not a statistically significant change from 35% last year.
- 28% of survey respondents reported race-based harassment, comparable to 25% recorded a year ago.[7]

Over the last decade, research has shown that social media can increase actual hate crimes.[8] Researchers have shown that social media can lead to discriminatory attitudes and actual hate crimes against people in marginalized groups.[9] Cities with a higher incidence of a certain kind of racist tweets reported more actual hate crimes related to race, ethnicity and national origin.[10] Both online vicarious and individual discrimination were significantly associated with worse psychological well-being among adults of racial/ethnic minorities (e.g., Black Americans, Latinx Americans, Asian Americans).[11]

Internet Platform Regulation of Hate Speech

Under pressure from the ADL and other groups, internet platforms have voluntarily adopted measures to regulate hate speech. The ADL described some of the measures that have been taken:

> Facebook prohibited Holocaust denial content, hired a vice president of civil rights, changed parts of its advertising platform to prohibit various forms of discrimination; expanded policies against content that undermined the legitimacy of the election; and built a team to study and eliminate bias in artificial intelligence. Due to pressure from ADL and other civil rights organizations, Twitter banned linked content, URL links to content outside the platform that promotes violence and hateful conduct. Reddit added its first global hate policy, providing for the removal of subreddits and users that "promote hate based on identity or vulnerability."[12]

Despite these efforts, one analysis showed that major social media platforms fail to take down more than 80% of antisemitic posts on their platforms. The Center for Countering Digital Hatred reported that 80% of 700 posts containing "anti-Jewish hatred," which had collectively been viewed 7.3 million times, were not removed. The research covered Facebook, Instagram, TikTok, Twitter and YouTube. Facebook was said to have failed to act on 89% of posts.[13]

The Constitutionality of New York State Bills Calling for Transparency

In an attempt to respond to internet hate speech, New York legislators have introduced the Stop Hiding Hate Act, legislation that has passed the New York Senate and is pending in the Assembly. This bill would require large social media companies to disclose their policies and moderation practices for online hate speech. The legislation is modeled after a similar law in effect in California.

The Stop Hiding Hate Act presents difficult issues relating to the First Amendment. For reasons set out below, we believe that the act does not violate First Amendment principles as set out in the preponderance of case law. Legislation that establishes disclosure standards rather than content-based regulation generally survives First Amendment standards.

As set out above, internet platforms have adopted a variety of different measures to address the hate speech problem. Their approaches are divergent and often not

transparent. Their sufficiency and effectiveness cannot be gauged by the public or by platform users in the absence of transparency-enhancing measures such as the Stop Hiding Hate Act.

As set out more fully below, disclosure regulations are not generally considered content-based and will likely survive First Amendment scrutiny. In a recent decision, discussed more fully below, the Eleventh Circuit has upheld the constitutionality of disclosure requirements directed at internet platforms.[14] And while it took a different approach to most forms of internet platform regulation, the Fifth Circuit also upheld the constitutionality of disclosure standards.[15] The issue may be headed to the U.S. Supreme Court in that certiorari could be granted in one or both of the *NetChoice* cases. In that event, regardless of the outcome regarding other components of the laws at issue in the *NetChoice* cases, we are confident that the disclosure requirements at issue should survive First Amendment scrutiny.

It is settled that hate speech receives First Amendment protection.[16] And the Supreme Court has held that entities arguably analogous to internet platforms receive First Amendment protection. In *Smith v. California*, for example, the court said that booksellers could not be strictly liable for obscene content in books they sell, because cautious booksellers would over-enforce, removing both legal and illegal books from the shelves. The resulting "censorship affecting the whole public" would be "hardly less virulent for being privately administered."[17]

However, legislation like the Stop Hiding Hate Act would likely survive First Amendment scrutiny. The Stop Hiding Hate Act is not content-based but merely requires disclosure. The Supreme Court has opined that there are "material differences between disclosure requirements and outright prohibitions on speech."[18]

A disclosure requirement like the Stop Hiding Hate Act does not prevent speech; it requires only that regulated parties "provide somewhat more information than they might otherwise be inclined to present."[19] Thus, *Zauderer* has been applied to uphold disclosure requirements against First Amendment challenges in a variety of contexts.[20]

And apart from the *Zauderer* line of cases, in the election context, where First Amendment projections are at the highest level, disclosure requirements have been upheld against First Amendment attack.[21]

Against this backdrop the courts have recently considered disclosure requirements analogous to the Stop Hiding Hate Act imposed on internet platforms and in two recent decisions have upheld those requirements.[22] As the *NetChoice* court wrote:

> The State's interest here is in ensuring that users – consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum – are fully informed about the terms of that transaction and aren't misled about platforms' content-moderation policies . . . So, these provisions aren't substantially likely to be unconstitutional.

The Fifth Circuit decided a similar case. While the court applied a dramatically different analysis from the Eleventh Circuit with respect to much of the statute in question, its analysis of the disclosure requirements of the statute was similar to that of the Eleventh Circuit. The Fifth Circuit held that the disclosure requirement in question "easily passes muster under *Zauderer*."[23] The court further explained:

> Here, the Platforms do not explain how the one-and-done disclosure requirements – or even the prospect of litigation to enforce those requirements – could or would burden the Platforms' protected speech . . .
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> * * *
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> . . . the Platforms have not explained how tracking the other purportedly more difficult statistics would unduly burden their protected speech, as opposed to imposing technical, economic, or operational burdens. So the Platforms are not entitled to facial pre-enforcement relief.

Conclusion

The rise of internet hate speech sets up a potential clash between our country's cherished values of free speech and the need to address the hate speech that has such a corrosive effect on our society. The legislation enacted in California and proposed as the Stop Hiding Hate Act in New York would require internet platforms to disclose the measures they take to address hate speech. Under existing precedent, the Stop Hating Hate Act is fully consistent with First Amendment principles.

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The Inverted 'V' Problem – After the Outrage Over Police Brutality Against Black Victims, Where Are the Reforms?

By Vivian D. Wesson

Rodney King. Amadou Diallo. Michael Brown. Eric Garner. Breonna Taylor. Over the past 30 years, instances of police use of force against Black people have sparked public outrage and triggered discussions about racial discrimination, justice and police reform. Following each incident, an immediacy to act, to change and to redress was featured prominently in the daily news cycle. Until it wasn't. Before any true reform, reckoning or rectification could occur, the front page found other issues to report. Support for fledgling initiatives diminished[1] and hope for equity faded.[2] America suffers from an inverted "V" problem – we are propelled to react in the heat of the moment, igniting conversation and spiking interest in justice, only to see the fervor drop off precipitously a few months after each event.

That's what happened in the Rodney King case. After the nation watched his savage beating on television, the exoneration of the officers involved and the burning of Los Angeles, the Department of Justice finally took action, filing charges against the officers for violating King's civil rights[3] and negotiating a consent decree[4] with the Los Angeles Police Department that addressed issues of excessive force, racial bias and police misconduct. There were changes in police training, use-of-force policies and use of video evidence in documenting police interactions.

And then what? All too soon the nation learned of another outrage, another victim of police overreaction. In 1999, Amadou Diallo,[5] an unarmed West African immigrant, was shot and killed by four New York City police officers, who mistakenly thought Diallo was reaching for a weapon. This incident again sparked widespread protest with activists calling for the end of racial profiling and the use of excessive force. But once again, all the officers were tried and acquitted of all charges,[6] fueling public outrage and frustration. The Department of Justice again stepped in to levy federal charges, but no officer was convicted. The Diallo killing did draw attention to the need for criminal justice reform, police accountability, racial profiling and excessive use of force, but his tragic death did not sustain long-term reform.

The list of outrages continued to grow: Sean Bell[7] fatally shot by New York City police officers on the morning of his wedding day; Oscar Grant[8] fatally shot by a Bay Area Rapid Transit police officer in Oakland, California, while he was lying face down on a train platform; Michael Brown,[9] an unarmed Black teenager, shot and killed by a police officer in Ferguson, Missouri; Eric Garner,[10] dead from a chokehold by a New York City police officer during an arrest for selling loose cigarettes. Garner's dying words, "I can't breathe,"[11] became a national mantra during protests against police brutality. A year later, Freddie Gray[12] died in Baltimore, Maryland, while in police custody. A year after that, Philando Castile[13] was shot and killed by a police officer during a traffic stop in Falcon Heights, Minnesota. In 2020, during the execution of a "no-knock" search warrant, Breonna Taylor,[14] a Black woman, was fatally shot by police in her apartment in Louisville, Kentucky. None of the officers involved in the Garner,[15] Gray,[16] Castile[17] or Taylor[18] incidents were held criminally liable for their actions. Once again, these tragedies prompted conversations about police accountability, racial policing and the use of deadly force. But systemic issues of racism, bias, inequity and injustice could not hold national attention longer than the press coverage following each tragic event.

And then there was George Floyd.[19] Occurring during the height of the COVID-19 pandemic, George Floyd was murdered by Minneapolis police officer Derek Chauvin, who knelt on Floyd's neck for over nine minutes during an arrest, which was captured on video.[20] Despite a global health emergency, people took to the streets in protest in cities around the globe.[21] We were captivated in our homes daily by the visceral outcry for equity[22] and the pleas for humanity reported in the news.[23]

CEOs[24] of Fortune 500 companies denounced the violence against Black Americans and signed declarations in support of diversity, equity and inclusion. Financial service juggernauts[25] established multimillion-dollar funds dedicated to supporting Black-owned businesses. Organizations arranged their investment strategies to be inclusive of environmental, social and governance issues,[26] which involved a DEI lens. States considered proposals that might remodel their law enforcement practices.[27] Companies deployed DEI-related training and created "safe" spaces[28] for their colleagues to engage in open dialogue. "How to Be an Antiracist"[29] by Ibram X. Kendi sold nearly 2 million copies. We had reached the top of the inverted "V."

Now, companies that bravely issued DEI statements face litigation[30] and public scrutiny.[31] Institutions that hired DEI executives are letting them go.[32] State attorneys general are proposing regulations against ESG considerations in investing.[33] Most attempts at police reform have been roundly rejected.[34] The news cycle has moved on to the next hot topic. The precipitous slide down the other side of the "V" has begun.

But should it? Can the legal profession help effect sustainability in the social justice movement? Lawyers are uniquely suited to this task because they are trained advocates for justice and can influence the legal system. Specifically, lawyers can engage in impact litigation, advance criminal justice reform, encourage efforts to increase diversity in judicial appointments, engage and defend impacted communities, promote legislation aimed at addressing systemic racism and incorporate diversity and inclusion in legal education.

Impact litigation challenges discriminatory laws, policies and practices. By bringing high-profile cases on systemic issues to court, attorneys can spearhead legal precedents that promote racial equity. For example, in a 2021 complaint[35] filed by the New York City Legal Aid Society, attorneys challenged the New York Police Department's practice of arresting people for lower-level offenses that, under state law, are non-arrestable offenses subject only to the issuance of an appearance ticket. In *Davis v. City of New York*,[36] the Legal Aid Society successfully ended a longstanding practice of unconstitutional stops, searches and false arrests of New York City public housing residents and their guests.

"We should not wait for history to tragically repeat itself. Through our legal profession, we can reform, defend, influence and educate to achieve enduring social change now."

Regarding criminal justice reform, attorneys recognize that many people, particularly those of color, who have not been convicted of crimes remain in jail because they cannot afford bail. Further, their trials are often delayed while they remain behind bars. Lawyers with the New York Civil Liberties Union advocate against these practices by promoting bail reform,[37] proposing legislation aimed at curtailing inequities[38] and addressing police reform.[39]

In 2020, a presiding justice of the New York Appellate Division, First Department, examined the state of diversity[40] among the state's judiciary. Justice Acosta noted that "diversity on the bench lends credibility to a justice system that underrepresented groups, such as women and people of color, have historically viewed with suspicion and distrust."[41] Lawyers, as well as judges and legal scholars, should continue to advance judicial diversity and promote educational opportunities to increase judicial awareness about implicit bias to ensure fairness and impartiality in the justice system.

Lawyers are also particularly adept at defending impacted communities. Whether acting pro bono or through a legal aid group, lawyers can build trust and partnerships with affected communities by providing representation and addressing issues of police misconduct, racial profiling, housing discrimination and unequal access to education.

The Civil Rights Act of 1964 represented sweeping legislation that banned labor discrimination based on race, color, religion, sex or national origin, and ended segregation. Following the passage of this law, the U.S. signed the International Convention on the Elimination of All Forms of Racial Discrimination. Although more than 50 years have passed since signing the international convention, the U.S. struggles with reparative justice, discrimination in the criminal legal system, use of force by law enforcement officials, discrimination in the regulation and enforcement of migration control and stark disparities in economic opportunity and healthcare. As recommended by Human Rights Watch, lawyers should continue to support legislation that addresses these issues, including the Commission to Study and Develop Reparation Proposals for African Americans Act[42] and federal legislation aimed at standards for teaching Black history and racial discrimination in schools.[43]

Lastly, our law school curriculum should incorporate discussions of racial justice, critical race theory, and diversity, equity and inclusion. We recognize that DEI is critical to the legal profession, our judicial system and the rule of law. In fact, in 2022, the American Bar Association[44] stated that it will require law schools to educate students about bias, racism and cross-cultural competency. While there are those who see a detriment to DEI training[45] for law students, legal administrators[46] continue to embrace such training that they believe fosters an environment and culture of inclusion and equality and nurtures and strengthens a sense of community and belonging for faculty, staff and students.

The precarious slide down the other side of the "V" is not inevitable. Our society has equipped lawyers to drive sustainability in social justice initiatives and to advocate for equity and fairness. We should not wait for history to tragically repeat itself. Through our legal profession, we can reform, defend, influence and educate to achieve enduring social change now.

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Perilous Prejudice: LGBTQ+ Rights in Uganda and Beyond

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Lesbian, gay, bisexual, trans and queer rights have a complex history worldwide. Of the numerous countries that have restricted LGBTQ+ rights (see sidebar), Uganda is arguably the most repressive.[1] Although Uganda's laws have remained largely unenforced for many years, there has been increasing momentum among anti-LGBTQ+ proponents leading to the recent enactment of Uganda's Anti-Homosexuality Act, which includes punishments ranging from life imprisonment to the death penalty. Unfortunately, Uganda has earned a spotlight among other countries due to its persistent subjugation of LGBTQ+ Ugandans and the active enforcement of its anti-LGBTQ+ legislation, including the Anti-Homosexuality Act. New York attorneys – though miles away – can play a vital role in the struggle for reform.

LGBTQ+ Rights in Uganda

Since gaining independence in 1962, Uganda has grappled with archaic laws that punish "unnatural offenses" with life imprisonment and are often interpreted to criminalize same-sex relationships.[2] The Ugandan parliament restricted LGBTQ+ rights by amending the Uganda constitution in 2005 to exclusively recognize heterosexual marriages.[3] This move was accompanied by increased state-sponsored policing of LGBTQ+ individuals, fostering a climate of fear and discrimination.[4] In 2014, Uganda's President Yoweri Museveni signed the notorious Anti-Homosexuality Act, exacerbating anti-LGBTQ+ sentiment in Uganda.[5] Although the 2014 act was later overturned on procedural grounds, homosexuality remains illegal in Uganda, carrying the threat of imprisonment.[6] However, the overturning of the 2014 act brought some positive change, such as the lifting of the obligation to denounce LGBTQ+ individuals to authorities.[7] Nonetheless, anti-LGBTQ+ sentiment remained strong and motivated the passing of the Sexual Offenses Bill in 2021, which sought to criminalize same-sex sexual acts and discriminate based on HIV status.[8] This bill did not become law; Museveni vetoed the bill on the grounds that its contents were already covered by other laws.[9]

Violence against LGBTQ+ individuals continues to be common in Uganda, and it is often perpetrated by state officials.[10] Police routinely target, abuse and arrest individuals based on their presumed sexual orientation or gender identity.[11] LGBTQ+ organizations have also faced significant challenges. For example, Uganda's main LGBTQ+ rights organization, Sexual Minorities Uganda, was forced to shut down in 2022.[12] The consequences of state-sanctioned oppression are evident, as demonstrated by the publication of the names, photographs and addresses of LGBTQ+ individuals in a Ugandan newspaper in 2010, which led to the murder of a prominent LGBTQ+ activist.[13]

The Act

The passage of the highly controversial Anti-Homosexuality Act by the Ugandan Parliament in March 2023 marked a significant turning point in the recognition of LGBTQ+ rights.[14] The act introduced severe punishments, including death and long prison sentences for same-sex acts, while also criminalizing the "promotion" of homosexuality with imprisonment of up to 20 years.[15] Legal entities found guilty under the act face consequences such as license suspension or cancellation.[16] Unlike in the past, Ugandan officials are actively enforcing the act, evidenced by a recent case in which a 20-year-old man was charged with "aggravated homosexuality" under the act.[17] The charging sheet states that the defendant "performed unlawful sexual intercourse" with a 41-year-old man but does not provide further details on the "aggravated" nature of the charge or whether the other individual was also charged.[18] The act signals a dramatic shift in the status quo, imposing up to the death penalty for consensual same-sex relations under certain conditions, which has been widely condemned by international organizations, local nonprofits and foreign countries.

The act has faced criticism from human rights advocates who argue that it could have adverse public health consequences, particularly for individuals living with HIV. The act institutionalizes discrimination against LGBTQ+ individuals, creating a punitive barrier to accessing HIV prevention, testing and treatment services. The act's provisions of life imprisonment for "homosexual relations" and the death penalty for "aggravated homosexuality" (which includes sex when the person involved is HIV positive) instill fear in LGBTQ+ individuals seeking essential health care services. As a result, HIV clinics have reported a decline in patients accessing their services since the act went into effect, with some patients even requesting the removal of their identifying information from clinic systems.[19] Critics argue that the act not only diminishes the human rights of people living with HIV but also obstructs access to HIV prevention, testing and treatment services for vulnerable groups, including the LGBTQ+ community. Research shows that criminalizing homosexuality in sub-Saharan Africa leads to increased HIV rates among LGBTQ+ individuals, marginalized populations and young adults, who are at the highest risk for HIV and are the least likely to seek testing or treatment.[20] The act may further ostracize these populations, discouraging them from seeking necessary health care services. Furthermore, the act threatens vital funding, such as the U.S. President's Emergency Plan for AIDS Relief, which supports health care services combating HIV/AIDS in the region.[21] The act also reintroduces the requirement to report "homosexual relations" and imposes severe penalties for failure to report or for "promoting or abetting homosexuality."

Consequently, some health care providers have left their jobs out of fear for their safety, families and careers.[22] The act not only reduces access to healthcare services for LGBTQ+ individuals but also criminalizes LGBTQ+-inclusive healthcare, obstructing health care providers from performing their jobs and undermining Uganda's efforts to end AIDS by 2030.[23]

It is important to note that Uganda, as a signatory to the International Covenant on Civil and Political Rights, is barred from passing or enforcing laws that discriminate based on sexual orientation.[24] However, it is unclear how the International Covenant on Civil and Political Rights may be used to prevent the passing or enforcement of such laws. Human rights activists argue that the act represents a significant violation of LGBTQ+ rights, leading to international condemnation and legal challenges. The act has had consequences beyond the courtroom, empowering homophobic social attitudes with credibility. For example, since the act's passage, the Human Rights Awareness and Promotion Forum has recorded 149 cases of violence against LGBTQ+ people in June and July of 2023 alone, highlighting an alarming increase in violence.[25] The concerning trend of anti-LGBTQ+ legislation in east African countries is a concern of activists who observe neighboring countries expressing interest in adopting similar legislation, making the current situation even more precarious for LGBTQ+ individuals in the region.

What Can Legal Professionals Do?

U.S.-based attorneys may ask themselves what pursuing justice looks like with respect to Uganda and its subjugation of LGBTQ+ individuals. We suggest a variety of ways that U.S. law firms can play a role in protecting this vulnerable population.

Be a Friend of the Court

Legal allies in the U.S. and abroad may support local advocates working to overturn the act. Challenges to Uganda's anti-LGBTQ+ legislation are especially important as neighboring countries, like Kenya and Tanzania, may seek to enact similar laws.[26] George Kaluma, a Kenyan parliamentarian, recently praised Uganda's government for passing the act on social media by saying, "What a leader we've in Africa!"[27] He continued by asserting, "Kenya is following you in this endeavour to save humanity."[28] Unfortunately, Kaluma's words likely represent a growing sentiment among lawmakers in the region aiming to limit the rights of, and persecute, LGBTQ+ Africans. Therefore, the efforts of Ugandan attorneys to overturn the act on constitutional grounds are vitally important to deter the passage of similar laws.

Ugandan activists and attorneys have begun to formulate a blueprint to attack and overturn the act on constitutional grounds. After the act was passed, prominent activists and attorneys in Uganda questioned its constitutionality. Human rights lawyer Adrian Jjuuko claimed the act violated multiple articles of Uganda's constitution, including the rights to equality, non-discrimination, and dignity.[29] Jjuuko stated, "[The criminalizing of] consensual same-sex activity among adults basically goes against key provisions of the constitution including violating the rights to equality and non-discrimination under article 20 and 21 of the constitution. It also violates the right to dignity which is under article 24 of the constitution."[30] A simple reading of the constitutional provisions Jjuuko refers to supports his argument that the act flagrantly violates the fundamental rights of LGBTQ+ Ugandans.

One key constitutional provision that Jjuuko highlighted is Article 20 of the Ugandan constitution, which guarantees basic human rights and autonomy to every citizen, stating, "Fundamental rights and freedoms of the individual are inherent and not granted by the State."[31] By ensuring that individual rights are inherent to every individual, the Ugandan constitution guarantees its citizens the right to conduct their private lives autonomously and without interference from their government. Article 20 goes on to say that the fundamental rights of Ugandans shall be "upheld and promoted by all . . . agencies of Government and all persons."[32] As attorneys like Jjuuko assert, the act violates the fundamental rights of LGBTQ+ Ugandans.

Article 21 of the Ugandan constitution protects citizens from discrimination based on various qualities, including sex, race and religion.[33] The provision states, "All persons are equal . . . under the law in all spheres [life] . . . and shall enjoy equal protection of the law." Like the U.S. Constitution, the Ugandan constitution was written to ensure that all citizens enjoy equal rights under the law. The act is a clear violation of this guarantee, treating LGBTQ+ Ugandans as lesser citizens and targeting them because of their sexual orientation. Article 21 explicitly states that such treatment is unconstitutional discrimination. The Constitution specifically defines "discriminate" as treating people differently "only or mainly" because of "their respective descriptions by sex, race, [etc.]."

Additionally, Article 24 of the Ugandan constitution protects against "inhuman treatment."[34] It requires "[r]espect for human dignity" and prohibits any form of "inhuman or degrading treatment or punishment."[35] By criminalizing "homosexuality" and imposing severe penalties, including life imprisonment and the death penalty, the act subjects LGBTQ+ Ugandans to inhuman and degrading treatment, violating their constitutional rights.[36]

Furthermore, the lack of LGBTQ+ representation in the legislative process also called into question the constitutional legitimacy of the act.[37] The exclusion of LGBTQ+

citizens from the decision-making process undermines their right to have their views heard on a law that directly affects them. Provided the non-inclusion of LGBTQ+ citizens in the passage of the act, and the many contradictions between the act's provisions and the Ugandan constitution, there are clear grounds for attorneys to challenge the constitutionality of the act.

Provide Direct Representation

Attorneys can also help by directly representing LGBTQ+ Ugandans who require legal assistance. This can be done through partnerships with organizations like the Human Rights Awareness and Promotion Forum, which defends those prosecuted under the act and provides vital legal support. Attorneys can also support asylum matters and help qualified individuals relocate to safe countries, such as the U.S. or other viable options.

The passage of the act has led to a significant number of Ugandans fleeing the country due to persecution and overall anti-LGBTQ+ sentiment.[38] Under U.S. law, asylum is a form of protection granted to foreign nationals who can demonstrate a well-founded fear of persecution based on numerous factors including membership in a particular social group, such as the LGBTQ+ community.[39] In the U.S., those granted asylum are allowed to remain in the country to work, travel and apply for permanent residency and eventually citizenship.[40] Asylum seekers must be on U.S. territory or at a port of entry to apply for asylum.[41] In recent years, the process of seeking asylum at the U.S. border has been impacted by the Migrant Protection Protocols, also known as the Remain in Mexico program, whereby certain foreign individuals entering or seeking admission to the U.S. may be returned to Mexico and required to wait outside of the U.S. for the duration of their immigration proceedings.[42] These policies make it more challenging for asylum-seekers to enter the U.S. and apply for protection. Between 2002 and 2020, 1,278 Ugandans were granted asylum in the U.S.[43] However, receiving asylum is an arduous task, including lengthy waiting at a border while an application is processed.[44] While embassies and consulates can assist with immigration matters, such as visa applications, they cannot grant asylum applications.[45]

Another option for entry into the U.S. is humanitarian parole, which allows foreign nationals who are otherwise inadmissible to temporarily enter the country due to emergency, urgent humanitarian reasons or significant public benefit.[46] The authority to grant humanitarian parole lies with the Secretary of Homeland Security and may be granted by U.S. Citizenship and Immigration Services or, at the discretion of the port director, by U.S. Customs and Border Protection at a U.S. port of entry.[47] The president may influence the Secretary of Homeland Security's decision-making by issuing executive orders or directives.[48] However, humanitarian parole is not a direct route to asylum and is granted on a case-by-case basis, with no guarantee of entry.

U.S. Citizenship and Immigration Services has discretion to authorize humanitarian parole based on "urgent humanitarian reasons" or "significant public benefit."[49] Whether the applicant merits a favorable exercise of discretion is considered. Another important factor considered in granting parole is the applicant's means of support while in the U.S. Applicants may use persons who agree to financially support them in the U.S., who may be natural persons, nonprofit organizations or, in some circumstances, medical institutions. Applications are considered on a case-by-case basis and the burden is on the applicant to prove entitlement to parole.

While there is no statutory or regulatory definition of "urgent humanitarian reasons," several factors are considered in holistic fashion, including but not limited to:

- whether the circumstances are pressing;
- the effect of the circumstances on the applicant's welfare and well-being; and
- the degree of suffering that may result if parole is not granted.

There is likewise no statutory or regulatory definition of "significant public benefit." According to U.S. Citizenship and Immigration, "significant public benefit" may include, but is not limited to, law enforcement and national security benefit(s) or certain foreign or domestic policy considerations.

Notably, parole is not intended to bypass normal visa processing procedures or established refugee processing channels. Humanitarian parole is typically granted for no more than one year, although it may be granted for a longer period depending on the reason(s) for the parole. In the past, humanitarian parole has been used for groups such as "Ugandan Asians," who faced persecution and were stripped of their nationality by the Ugandan government.[50] In response, the U.S. attorney general "announced that he would exercise the authority granted to him under the INA to parole up to 1,000 Ugandan Asians into the United States" and later paroled hundreds more based upon a "direct foreign policy interest."

In *Nantume v. Barr,*[51] the First Circuit stated:

> We have no illusions about what is happening in Uganda with respect to LGBT individuals. . . . We regard the views of the Ugandan government toward members of the LGBT community as benighted, and we know that the petitioner's life in her homeland may prove trying. But the conditions that confront LGBT individuals in Uganda, though disturbing, are not new. . . . The Executive Branch has the power to assist aliens trapped in this sort of cultural snare. [citing Humanitarian Parole] (granting Attorney General discretion to "parole into the United States

> . . . on a case-by-case basis for urgent humanitarian reasons . . . any alien applying for admission to the United States"). But courts are bound by a more rigid framework of legal rules and cannot reconstruct those rules to achieve particular results.[52]

By assisting with asylum or humanitarian parole matters, legal professionals can provide direct support to LGBTQ+ Ugandans in need.

Contact Your Elected Officials

Consider contacting your representatives in office to discuss what the U.S. can do to assist Ugandans affected by the Act. Advocating for diplomatic efforts and international pressure can help protect the rights and safety of LGBTQ+ individuals in Uganda. The international community has raised concerns since the enactment of the act. The United Nations High Commissioner for Human Rights has criticized Uganda for jeopardizing progress made in combating AIDS and has called for the repeal of the act.[53] The World Bank has halted new financing to Uganda, stating that the act endangers people's access to vital medical care and is inconsistent with the values of non-discrimination and inclusion.[54] Additionally, the Archbishop of Canterbury called on the Anglican Church of Uganda and global Anglican organizations to renounce their support for the act.[55]

Various countries, including the U.S., have also expressed concern and condemned the act.[56] President Biden issued a statement condemning the act as a violation of human rights and directed a review of U.S.-Uganda relations including aid, trade eligibility and sanctions for human rights abuses or corruption.[57] The U.S. has imposed visa restrictions and terminated Uganda's beneficiary status under the African Growth and Opportunity Act due to human rights violations.[58] The U.S. also issued a business advisory warning of risks for U.S. companies in Uganda.[59] However, the U.S. has not imposed direct sanctions on Uganda in response to the act, raising concerns among activists who advocate for a stronger stance against violence and discrimination.[60] Though, a bill has been introduced in the U.S. House of Representatives that would ban U.S. foreign aid to countries that criminalize LGBTQ+ activity.[61] It is crucial for the international community to continue applying pressure and advocating for the rights of LGBTQ+ individuals not only in Uganda but also in the wider region. By contacting your elected officials and raising their awareness, the international community can help combat the negative impact of such legislation on the lives of countless individuals.

Reconsider Business Affiliations With or in Uganda

It is not unprecedented for firms or other businesses to pause a fixation on their bottom lines in the face of human rights violations. As recently as March 2022, firms began pulling out of Russia in numbers unseen before.[62] This response came in the wake of Russia's invasion of Ukraine and the subsequent international condemnation. Even if firms did not have offices on the ground, many reconsidered representing clients that were associated with the Russian regime at all.[63] In cases such as this, moral reputation matters. It matters to clients, and it should matter to firms. Firms should take account of their commitments in and around Uganda to see if they are helping or hurting the cause and act accordingly.

Spread Awareness

Author legal articles or blogs for existing publications or your law firm or share articles (such as this article) with your network to raise awareness about the act and its implications. Consider hosting speakers or leading panel discussions with attorneys and advocates who have worked with the LGBTQ+ community in Uganda. Topics for discussion may include the legal and cultural history leading to the act's enactment, experiences of attorneys navigating the act, and personal stories highlighting the impact of the law on LGBTQ+ Ugandans.

Donate Time and/or Money to Ugandan Attorneys and Advocates

Partner with organizations and attorneys leading efforts to assist LGBTQ+ Ugandans, such as Human Rights Awareness and Promotion Forum, which is currently representing two Ugandan men indicted under the act. The organization is funded mostly by donations from the U.S. and Europe. Support can include financial contributions and pro bono services, specifically in asylum matters or criminal defense cases.

Conclusion

The struggle for LGBTQ+ rights in Uganda has been long and arduous. Oppressive laws, societal prejudice and state-sanctioned violence continue to undermine the rights and well-being of LGBTQ+ individuals. However, there are glimmers of hope as regional progress is made towards equality. It is crucial for the international community to raise awareness, provide legal support and exert diplomatic pressure to address the grave human rights violations faced by the LGBTQ+ community in Uganda and beyond.

The countries where LGBTQ+ rights are restricted include:

- **Russia**, where laws against "propaganda of nontraditional sexual relationships among minors" have been used to suppress public discussion of LGBTQ+ issues. The law sometimes leads to arrests and fines.
- **Saudi Arabia,** where homosexuality is illegal and can be punishable by death, corporal punishment or imprisonment. Reported cases of enforcement include arrests and public lashings.
- **Brunei,** where there are laws that could potentially enforce death by stoning for homosexuality, though international outcry has led to a moratorium on the death penalty.
- **Nigeria**, where in 12 northern states that have adopted Sharia law, homosexuality is punishable by death. In other states, it can be punished with imprisonment.
- **Sudan**, **Tanzania** and **Zambia**, where life imprisonment is prescribed for same-sex sexual relations.
- **Gambia**, **Kenya** and **Malawi**, where maximum prison sentences of 14 years are imposed.
- **United Arab Emirates**, where homosexuality is illegal and penalties can range from a minimum of six months imprisonment with no set maximum. Same-sex relationships are not recognized, and adoption by same-sex couples is prohibited. The law provides no protections against discrimination based on sexual orientation or gender identity, and LGBTQ+ individuals are not allowed to serve openly in the military or donate blood.
- The **United States** has 12 states (Florida, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina and Texas) where gay sex is outlawed. Though these "sodomy laws" have been invalidated by the Supreme Court, they remain on the books. These laws are unenforced regarding consensual same-sex conduct.

This article is a collaboration among the legal professionals (listed here) at ArentFox Schiff, led by Warren Seay, Jr, a real estate finance partner at the firm and a member of the firm's Pro Bono Committee, and Kaila D. Clark, the co-chair of the firm's LGBTQ+ affinity group. Their shared goal is to contribute to the ongoing conversation surrounding LGBTQ+ rights and to advocate for the urgent need to safeguard and advance these rights on an international level.

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Islamophobia Surges in the U.S. Due to Global and National Tensions

By Rebecca Melnitsky

It is half a world away, but the conflict in the Middle East has led to a dramatic increase in hate crimes against Muslims in the United States, and state and national leaders are calling for swift action to reverse the surge.

Two of the attacks – which are being investigated as hate crimes – have led to worldwide condemnation.

In a Chicago suburb, landlord Joseph Czuba stabbed 6-year-old Wadea Al-Fayoume 26 times, killing him. His mother, 32-year-old Hanaan Shaheen, said Czuba was angry at her for the Oct. 7 Hamas attack that killed 1,200 people in Israel.

Weeks later, 48-year-old Jason James Eaton allegedly shot three Palestinian-American college students – Hisham Awartani, Kinnan Abdel Hamid and Tahseen Ahmed – in Burlington, Vermont. The students were speaking English and Arabic and two of them were wearing the kaffiyeh, a traditional Middle Eastern headdress often associated with Palestine. Awartani's family says he is now paralyzed from the chest down.

A Historical Perspective on Islamophobia

The terrorist attacks of 9/11 led to a serious increase in Islamophobic and anti-Muslim hate crimes, as well as anti-Arab and anti-Sikh hate crimes. Women who wore the hijab were especially at risk because they were so easily identified as Muslims.

Less than a week after the attacks, then-President George W. Bush visited the Washington Islamic Center and famously said, "Islam is peace," in an attempt to defuse tensions. However, the Patriot Act and the War on Terror that followed framed Muslims as the enemy, which increased Islamophobic attitudes and associated hate crimes.

Sikh men were – and often still are – mistaken for Muslims due to their beards and turbans, especially in the aftermath of the 9/11 attacks. Most infamously, gas station owner Balbir Singh Sodhi was murdered four days after 9/11. His murderer, Frank Silva Roque, targeted Sodhi, a Sikh man who wore a turban.

"According to data tracked by the New York State Division of Homeland Security and Emergency Services, there has been a 417% increase in online hate speech against Muslim communities since the war started last month."

These are just two of the tragedies that authorities believe are part of a major surge in Islamophobic and anti-Arab hate since the Hamas terrorist attack on Israel and the subsequent war. Between Oct. 7 and Nov. 4, the Council on American-Islamic Relations received 1,283 requests for help and reports of bias – while in an average 29-day period in 2022, the organization received only 406 complaints.

"American Muslims are facing the largest wave of Islamophobic bias that we have documented since then-candidate Donald Trump's Muslim Ban announcement in December 2015. Political leaders, corporations, media outlets, civic organizations and others all have a role to play in ending this surge in bigotry," CAIR Research and Advocacy Director Corey Saylor said in a statement.

This surge in anti-Arab and Islamophobic hate reverses what had been a decline in the number of reported incidents. According to FBI data, anti-Muslim hate crimes had decreased overall from a peak of 310 incidents in 2016, falling to 129 in 2020, but increased again for a total of 158 in 2022.

In 2013, former Executive Director of the Gallup Center for Muslim Studies Dalia Mogahed wrote, "As horrific as the attacks of Sept. 11, 2001, were, the rise and fall (mostly rise) of negative sentiment toward Muslims and Islam in America does not coincide with this or any other Al-Qaeda act of violence. Instead, levels of anti-Muslim sentiment follow trends in domestic U.S. politics, not international terrorism."

Although Muslims are a quarter of the global population, they are a minority in the United States. They make up 1.3% of the population, or 4.45 million people, according to the 2020 U.S. Religion Census report. While Muslim people have lived in the United States since the American Revolution, the population increased dramatically after the Immigration and Nationality Act of 1965 expanded immigration opportunities.

More than 700,000 Muslims make New York State their home, the largest Muslim population of any state in the country. New York City is particularly notable for being the home of the most ethnically diverse Muslim population of any city in the world, and the city has seen its share of hate crimes recently.

The New York Police Department has noted this increase, including an incident in which a man pulled off the hijab of a 16-year-old girl riding the subway. The NYPD logged seven anti-Muslim motivated complaints for the first nine months of 2023, and then five in the three weeks immediately following the Hamas attacks on Oct. 7.

On a national level, 152 anti-Muslim, 105 anti-Arab and 185 anti-Sikh hate crimes were reported to the FBI by law enforcement agencies in 2021. This marks an increase of 38%, 48% and 108% respectively over the previous year.

Even these numbers do not paint an accurate picture of hate crimes because the FBI did not receive data from 6,929 of 18,812 law enforcement agencies. Underreporting to law enforcement is also an issue because many victims are hesitant to come forward or fear that police departments will not take them seriously.

Governments Act Against Hate

According to data tracked by the New York State Division of Homeland Security and Emergency Services, there has been a 417% increase in online hate speech against Muslim communities since the war started last month.

Citing that statistic and a similar increase in antisemitism, Gov. Kathy Hochul sent a letter in November to four social media companies – Meta (which owns Facebook and Instagram), Google (which owns YouTube), TikTok, and X, formerly known as Twitter – demanding that the social media platforms improve their moderation policies, add more staff and resources for content moderation, and be more transparent about how hate speech spreads on their platforms.

"Users across your platforms have reported being flooded with hateful and threatening messages and comments, and content promoting explicit calls for violence against Jewish, Muslim, and Arab people have proliferated – in some cases being shared tens of thousands of times," the letter reads. "And while the most brazen messages have in many cases been removed, less overt content and coded messages that nonetheless carry violent and threatening meanings persist. This is not simply a concern about the quality of our online discourse. Studies have shown that online hate speech contributes to real-world violence."

On that same day, Hochul also announced that $3 million would be allocated to expand terrorism threat assessments for colleges and universities in New York State, and that a media literacy toolkit would be distributed to educators and students to combat misinformation.

On the national level, President Biden announced on Nov. 1 that his administration is working on a national strategy to counter Islamophobia.

"We look forward to continuing our work with community leaders, advocates, members of Congress, and more to develop the strategy – which will be a joint effort led by the Domestic Policy Council and the National Security Council – and counter the scourge of Islamophobia and hate in all its forms," White House Press Secretary Karine Jean-Pierre said in a statement. "For too long, Muslims in America, and those perceived to be Muslim, such as Arabs and Sikhs, have endured a disproportionate number of hate-fueled attacks and other discriminatory incidents."

On Nov. 14, Biden's administration released a list of actions and best practices it is taking to address the rise of Islamophobia and antisemitism, including releasing resources for schools and updated resources for law enforcement to respond to hate crimes.

On a societal level, measures to fight Islamophobic attitudes are similar to those needed to fight other forms of prejudice – outreach, education and anti-bias training.

Islamophobia endangers not only Muslims, but society at large. Research from the Institute for Social Policy and Understanding has found that people who believe anti-Muslim tropes are more likely to be racist against other groups as well. The research also found that people embracing Islamophobia are likely to endorse authoritarian governments and be willing to accept fewer democratic freedoms in an attempt to protect against perceived terrorist threats.

"In short," Mogahed wrote, "the propagation of Islamophobia undermines the very foundation of a free society: a dissenting and well-informed citizenry."

Member Profile: Michael Bloch – A Passion To Defend Victims of Persecution

By Jennifer Andrus

After hearing about the deadly "Unite the Right" rally in Charlottesville, Va., New York attorney Roberta "Robbie" Kaplan's first instinct was that lawyers had to stand up to the white nationalists who intimidated and attacked counter protesters. One protester, Heather Heyer, was killed when a self-proclaimed white nationalist rammed his car into a crowd of counter protesters. Kaplan and her legal team filed a lawsuit against 17 white nationalist leaders and organizations on behalf of nine plaintiffs.

The lawsuit alleged that the event was not a spontaneous gathering but rather a well-planned and coordinated conspiracy to incite racially motivated violence and to advance an antisemitic race war. In a verdict that could set a precedent, the jury awarded the plaintiffs millions in compensatory and punitive damages. We recently interviewed Michael Bloch, a founding partner of boutique litigation firm Bloch & White, who worked alongside Kaplan. We spoke about his work following the release of the HBO Max documentary "No Accident."

Was the Charlottesville case different for you from other civil rights cases you have tried in your career? Did this one weigh heavily on you?

As a Jewish attorney whose grandparents escaped Nazi Germany before the Holocaust, it had a profound meaning for me to be a part of this effort. The rise of extremism and white supremacy is one of the most important issues of our time. The opportunity to use my experience as a litigator to hold white supremacists accountable for what they did in Charlottesville was incredibly meaningful.

How was the rally and violence in Charlottesville different from other white supremacist events, and how did that impact your case?

I think Charlottesville felt different because the defendants were so emboldened by the political climate to come out, openly march and plan violence in an American city. Their views are not just hateful and racist, but so explicitly violent, which was a key factor in our case. It was not a freak accident, but a conspiracy to commit racially motivated violence, and the evidence was overwhelming. One challenge in the case was to pull together all the evidence and present it in a succinct and compelling way for the jury.

How did you work with your clients without retraumatizing them during the process?

We were mindful that we were working with victims of real trauma, and we focused on telling their story in a way that didn't traumatize them further. This case had the added challenge in that the plaintiffs were cross-examined by the actual pro se defendants who had victimized them in Charlottesville. I was so inspired watching our clients testify so powerfully against the defendants that victimized them. I was heartened to see the filmmakers were similarly thoughtful of not retraumatizing them but amplified their story.

What is your critique of "No Accident" and how the crew at HBO Max handled your story?

I think that the filmmakers did a brilliant job. Kristi Jacobson and her team really captured the essence of what happened at Charlottesville. I think they captured a lot of the nuances of litigation. They made lawyers' work seem exciting! They did an incredible job pulling together four years' worth of film and presenting it in a way that authentically captured what went on both in Charlottesville as well as in our case.

What drives you? Why do you take on this kind of litigation work?

I was a public defender in the Bronx for seven years. I have a great passion for representing people who are victims of bullying and to use the law to effect social change. In the Charlottesville case, we were representing individuals that had been bullied by some of the biggest, most prominent bullies in this country and were able to use litigation to hold them accountable. Charlottesville gave me the ability to use a lot of what I love about the law. It was one of the most rewarding professional experiences of my career.

What advice would you give a young lawyer or a new lawyer about the work you do?

I really think it's incredibly rewarding to be able to use the law to fight for people and to effect social change. It's hard work, but it really matters to real people. There are so many different ways you can use your law degree. I find it rewarding and exciting to fight for people who need help, and whether that's because they've been arrested or because they've been victimized, it's really rewarding to use the legal system to fight for people in need in that way.

Why should someone join the New York State Bar Association. What value have you found in being a member?

It gives you an opportunity to connect with and work with other like-minded passionate, wonderful attorneys. Every conference I have attended, I have left both having learned something and met someone that I stayed in contact with. I have made so many friends and am able to work with those people in the future. It's a great organization where you can make wonderful, sometimes lifelong connections with people who enjoy the work that I do.

The Roots of Abuse: Expanding Vicarious Liability for Sexual Abuse in Women's Sports

By Ashlyn Stone

Ninety-three percent of athletes experience sexual harassment, sexual assault or unwanted contact during their times in sport.[1] The majority of those sexually harassed or assaulted within their sport identify as women.[2] While this news could be stunning to some, fewer are more familiar with the pervasiveness of abuse within women's athletics than the players of the National Women's Soccer League.[3] On Oct. 3, 2022, a report detailing the offenses of multiple coaches against many players, and the lack of real action by the National Women's Soccer League and owners alike, was released to the public.[4] The report stirred conversations regarding abuse in women's sports, pushing many into action who called for accountability for all involved actors.[5] It remains unclear as to what fundamental changes could best ensure that girls and women are safe to play sports without fear of abuse or sexual coercion.[6] This article will provide a framework for addressing these issues of abuse, pointing to the standards in New York and beyond as a guideline for handing sexual harassment and claims throughout the league.

Part I: The Protections (or Lack Thereof) Afforded by Federal Employment Law

Sexual Harassment Claims and Title Structures

Under Title VII of the Civil Rights Act of 1964, it is prohibited for any employer to allow anyone to be sexually harassed at work by anyone else, regardless of sex, gender or sexual orientation.[7] A plaintiff may establish a violation of Title VII by proving that discrimination based on sex by a supervisor, who is one that is "empowered by the employer to take tangible actions against the victim" and does not include other individuals in positions of power who are not directly managing or supervising that specific employee.[8]

Employers can be held vicariously liable for sexual harassment unless they can prove the elements of the *Ellerth* defense, that is: (1) that they exercised reasonable care to prevent and correct promptly any sexually harassing behavior, such as through publishing policies and hosting regular trainings for employees, and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm.[9] Considering that 95% of sexual harassers go unpunished in the workplace,[10] this defense is often viewed as a type of loophole to allow employers to avoid liability for the acts of sexual harassment by their supervisors.[11]

New York's Standard for Sexual Harassment

New York has provided for more expanded liability for sexual harassment in the workplace.[12] For example, in New York, employers hold the burden of proving that the harassing conduct does not rise "above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty or trivial inconveniences," rather than the plaintiff under Title VII.[13] Further, under New York law, the *Ellerth* defense is essentially eliminated through the addition of a clause that an employer's liability will not be based on whether or not the individual made a complaint about the harasser.[14] Under New York City law, vicarious liability is imposed on an employer for harassment committed by an employee when (1) the employee or agent exercised supervisory or managerial responsibility; (2) the employer knew of the conduct, and acquiesced or failed to take immediate and appropriate corrective action, where actual knowledge is shown on the part of any other supervisory or managerial employee; or (3) the employer should have known and failed to exercise reasonable due diligence to prevent discriminatory conduct.[15]

Therefore, in New York City, any supervisor who was aware of the conduct and did not act, or any employer who failed to exercise reasonable care to prevent this conduct, can be held liable, expanding vicarious liability in such a way that captures many more complicit actors.[16] This new standard has proved to encourage more victims to come forward regarding sexual harassment, considering New York's expansive language in defining harassment and the ridding of the harmless intent defense.[17] One example of the expansive nature of New York's sexual harassment law is the expanded statute of limitations, which allowed victims to bring cases dating back 20 years.[18] The broadened New York laws have allowed for a greater number of sexual harassment investigations, leading to more offenders receiving consequences for their abuse in the workplace.[19]

Part II: A Pattern of Systemic Abuse in Women's Soccer

The History of the National Women's Soccer League and Abuse and Misogyny as a Central Theme

The National Women's Soccer League is a professional women's soccer league, founded under the management of the United States Soccer Federation and now operating as its own entity.[20] Under the initial regime, players who were members of their country's national teams were paid by their respective federations, and the rest of the club's players were paid by the club under a salary cap bargained for by the league's Player's Association.[21] Since then, the federation-supported allocation system has been dissolved, meaning that there is no substantial difference between players who come from the United States Women's National Team and players operating drafted directly into the league.[22]

The National Women's Soccer League has had many recent successes, including setting a record for its attendance of 32,000[23] and an aired championship with multiple networks.[24] Those victories, although massive for women's sports, have been overshadowed by the abuse within the league.[25]

The Sally Yates Report on Abuse Scandals

On Oct. 3, 2022, former United States Deputy Attorney General Sally Yates released a report that exposed massive abuse, sexual coercion and underlying sexism in the league, reporting failures of administration at multiple levels.[26] The report states, "Some of the misconduct dates to predecessor leagues and some to youth soccer. The roots of abuse in women's soccer run deep and will not be eliminated through reform in the NWSL alone."[27] Yates emphasizes that while the report focuses in on the abuse by three coaches, this is simply to "illustrate the gravity and breadth of the misconduct at issue and the institutional failures that perpetuated it," and that in the 2021 season, half of the league's 10 teams had to separate from coaches due to player allegations of misconduct.[28] Speaking on one particular charge of abuse concerning former North Carolina Courage Head Coach Paul Riley, his problematic behaviors were seen as an "open secret" that never prompted an institutional response, even though there was knowledge by the league's executive director, the federation's president, the league's general counsel and the Women's National Team head coach.[29]

More so, the lack of official "jurisdiction" over player safety (though logically flowing, would likely come from the league itself) enabled each organization to label the mass abuse as "local" problems that individual teams had to address, rather than a sport-wide issue that called for collaboration of the fedearation and the league, as their single-entity employer, discussed below.[30] Yates asserted that, "In general, teams, the NWSL, and USSF appear to have prioritized concerns of legal exposure to litigation by coaches – and the risk of drawing negative attention to the team or league – over player safety and well-being."[31] She reiterated that teams and leagues alike "cloaked" information about the coaches' misconduct, claiming inappropriately attorney-client privilege, non-disclosure protections and non-disparagement as reasons for not informing other teams or the press about the real reasons for releasing coaches.[32]

Part III: Resolutions and Solutions in Preventing Future Harm in Women's Sports

Employer Structures Under the National Women's Soccer League

Like other sports leagues, the National Women's Soccer League operates under a unique structure; that of a single-entity employer.[33] A single entity refers to when "those leagues in which there is a centralized entity which substantially owns or controls the league's operations and which contracts with the players" in which individual teams are shareholders in the central entity.[34] In these scenarios, players execute employment contracts with the league and not with their individual teams.[35] Courts have found that the league and teams in these single-entity relationships act as "concurrent employers," where the individual teams are controlling the day-to-day operations of the players and contributing to the overall success of their ultimate employer – the league.[36] Therefore, when considering any sexual harassment case, the league is operating under a standard where it is the employer of each individual player, regardless of its claims that it is not technically in the standing for liability as an employer. Additionally, each team is considered the employer. Finally, this could implicate the involvement of the United States Soccer Federation as another technical employer, at least for the time when federation was managing the league.

Expanding Vicarious Liability to Complicit Actors in Sexual Harassment and Assault Claims Under the New York Model for Vicarious Liability

The New York model for sexual harassment essentially allows the plaintiffs to avoid the murky waters of the *Ellerth* defense, instead stating that an employee is not required to make a complaint and follow company procedures to bring a sexual harassment claim against their employer.[37] Further, under New York City law, a supervisor includes any individual that has managerial responsibility, and the burden is on the employer, rather than the traditional employee, to show that the employer did not know of the conduct.[38]

The New York standards, both the state and city combined, should be adopted under a Title VII amendment and applied correctly in the case of women's soccer and women's sports. The state of the league is not unique from other women's sports fields.[39] Women are subjected to tremendous amounts of abuse in the sports arena,[40] forcing the professional players into choosing between coming out about their abuse or staying on the field and generating more income.[41] Furthermore, the current structures of Title VII are not functioning as they are intended to, specifically in the realm of women's sports.

The purpose of Title VII is to "improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace."[42] In women's sports, this purpose is plainly not being reached, in that women are unable to operate in the same conditions as the male athletes due to the enormous burden the women carry of overcoming sexual violence and abuse while maintaining their athletic performance.[43] Therefore, the adoption of the combined New York stan-

dards would give these athletes the most equitable means to address their grievances against consistently violent leagues and institutions. In the case of the National Women's Soccer League, utilizing the New York combined standards would shift the burden from the players to the league and the clubs as a joint employer.[44] The employer would have to prove that they were unaware of the abuse, or that the harassment was merely a petty slight, which would almost definitely fail due to the multiple individuals either being directly involved or at least substantially aware of the abuse within the teams, the league and the federation.[45] Each guilty supervisor, whether a coach or athletic trainer (a standard more flexible under New York Law), should be held liable, and the National Women's Soccer League and the United States Soccer Federation, as the employer at the given time, should be held vicariously liable as well.

Ashlyn Stone, a former collegiate soccer player, is a law clerk at Alston & Bird. She recently graduated from St. John's University School of Law, where she focused on a combination of employment and intellectual property law, with a particular interest in their relation to sports. This article first appeared in the EASL Journal, the publication of the Entertainment, Arts & Sports Law Section. For more information, go to NYSBA.ORG/EASL.

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37. N.Y.S. HRL § 296(h).

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40. Scandals of abuse in women's sports carry an "awful sameness: allegations of systemic sexual, physical and psychological abuse of young athletes, many of them teenage women, by the officials and coaches who are supposed to nurture and protect them." *Women in Sports: The Good, The Bad, The Sexist*, Nat'l Women's L. Center, Mar. 10, 2022, https://nwlc.org/women-in-sports-the-good-the-bad-the-sexist/. Some examples of this repetitive abuse include the abuse of over 200 young female basketball players in Mali, the sexual assault of United States' gymnasts by their doctor, Larry Nassar, and the harassment by a professional water polo team in California that led to over $14 million in settlements, though this list is hardly exhaustive. *Id.*

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Scratching the Surface of IP Rights: Data Scraping and Artificial Intelligence

By Jonathan E. Barbee

Earlier this year, X, formerly known as Twitter, sent Meta a cease-and-desist letter accusing it of hiring former X employees and using those employees to learn the trade secrets behind X's platform.[1] Meta was developing its new Threads platform, which would compete directly with X. The focus of the accusations was Meta's alleged misappropriation of X's trade secrets through those former employees, but the letter also accused Meta of scraping data about X followers. While the letter did not classify the X follower data as trade secrets or indicate that Meta's alleged data scraping would rise to the level of misappropriation of trade secrets, it showed that data scraping and the misappropriation of trade secrets can have a common nexus and arise from similar scenarios.

"Data scraping" or "web scraping" is a process where a computer program – such as an artificial intelligence (AI) program – collects data from the web or another source. AI tools, such as ChatGPT, are designed around the concept of data scraping in many ways because the "intelligence" in a tool like ChatGPT derives from collecting information and data from outside sources, especially information available on the internet. The data being scraped can reside in the recesses of the internet or deep in a document repository, which is why data scraping can provide access to large volumes of information that humans would not be able to mine manually.

In some ways, it is not surprising that X did not allege that the scraping of its follower data misappropriated its trade secrets. After all, for data to be considered a trade secret, it must be kept confidential, and X follower data appears to be publicly available. But, with slightly different facts, where permission was needed to access the X follower data, or the data was not completely available to the public, then scraping X follower data could have stronger implications for misappropriation.

Back in 2020, before ChatGPT caught the world's attention, the 11th Circuit grappled with the issue of data scraping and trade secrets. Specifically, the 11th Circuit faced the question of whether scraping publicly available data on the internet could lead to the misappropriation of trade secrets. In that case, *Compulife Software Inc. v. Newman*,[2] Compulife, a company that produced a database of life insurance quotes, sued a competitor for misappropriating trade secrets and violating a state anti-hacking statute, among other things. While Compulife's database was available to the public, individual users were only able to retrieve individual quotes from the database – with the database structured that way, it would simply take too long for a person to retrieve every quote in the database.[3] In that sense, the public did not have access to the entire database; the public only had access to the individual set of quotes requested. Even though the database was technically available to the public, it could not practically be recreated or copied in its entirety by any single person.

The twist in the *Compulife* case arose because the defendant used a data scraping computer program – known as a "bot" and similar to an AI tool – to request over 40 million quotes from Compulife's database.[4] The 11th Circuit explained, "Although Compulife has plainly given the world implicit permission to access as many quotes as is humanly possible, a robot can collect more quotes than any human practicably could."[5] "So," the 11th Circuit continued, "while *manually* accessing quotes from Compulife's database is unlikely ever to constitute improper means, *using a bot to collect an otherwise infeasible amount of data may well be*."[6] Based on that reasoning, the 11th Circuit concluded that a data scraping program could misappropriate trade secrets by copying an entire database of information, even when that database is technically available to the public.[7] It is far from clear whether other courts will follow the same rationale, but the 11th

Circuit established one principle that other courts may consider: even if an AI tool can access data, that does not mean that the AI tool should access that data.

As AI tools continue to evolve and become widely adopted, data scraping is bound to become more prevalent, which is likely to lead to an increase in data scraping litigation. In order to prepare for this heightened scrutiny of data scraping, in-house counsel should consider the following practical tips when using AI tools in their organizations.

1. Exercise Caution With Internal AI Tools

By virtue of having their own intelligence, AI tools have a "mind of their own." When using internal AI tools, such as AI programs that are directly connected through a company's network to internal databases and work product created by employees, it is possible that internal AI tools will have access to confidential and proprietary information. Some of that internal information may be considered a company's trade secrets. As part of their data scraping routines, internal AI tools could potentially scrape a company's own trade secrets and then use those trade secrets in a way that compromises the protection of those trade secrets. For that reason, in-house counsel should take precautions to ensure that AI tools are not inadvertently scraping trade secrets from internal company sources. This could arise, for example, if an internal AI tool was asked to collect information from a company's databases for a client alert and, in doing so, included some of the company's trade secrets in its collection.

2. Know How AI Tools Are Trained

AI tools are trained by humans and can also be programmed to train themselves. When using AI tools, in-house counsel should be aware of whether those AI tools are being trained to scrape data and, if so, which sources are being scraped for information, including sources that may contain trade secrets. For example, in-house counsel should understand whether AI tools will scrape employees' personal computers and devices for data when connected to a company's network and whether any scraped data will be shared by AI tools with third parties outside of a company. Controlling how AI tools are trained can help in-house counsel prevent AI tools from scraping data that could lead to issues, such as the inadvertent disclosure of trade secrets.

3. Review Licenses Carefully

In-house counsel should review the licenses for any databases and repositories that may be accessed by AI tools to ensure that licenses will not be violated by data scraping. In the same vein, in-house counsel should check that AI tools have the proper permissions and consent to collect data from sources being targeted by the AI tools.

4. Track the Activities of AI Tools

In-house counsel should monitor the activities of AI tools so that they can intervene if an AI tool starts collecting data that could be problematic. Even conducting audits of AI tools could be helpful in preventing AI tools from gathering data from sources that may contain trade secrets or other confidential and proprietary information. In-house counsel should work with their IT departments to install programs and systems that can monitor the activities of AI tools, such as forensics software that can track AI tools. Having a record of what AI tools have done, and where AI tools have scraped data, can be useful in the event of an incident, especially if the incident leads to an investigation.

5. Be Mindful of the Computer Fraud and Abuse Act and Other Hacking Statutes

AI tools, if left unchecked, can potentially engage in activities that could violate hacking statutes. For example, the Computer Fraud and Abuse Act is a federal statute that imposes civil and criminal liability for improperly accessing another person's computer without authorization.[8] AI tools that scrape data could potentially run afoul of the law by collecting data from third-party computers and networks without the proper permissions. When data scraping flirts with hacking, in the sense that the scraping involves some sort of improper access to a third party's computer or network, then the law may be implicated.

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This article previously appeared in Inside, the publication of the Corporate Counsel Section. NYSBA.ORG/CORPORATE-COUNSEL-SECTION.

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A Lesson for Notaries: Never Take Shortcuts

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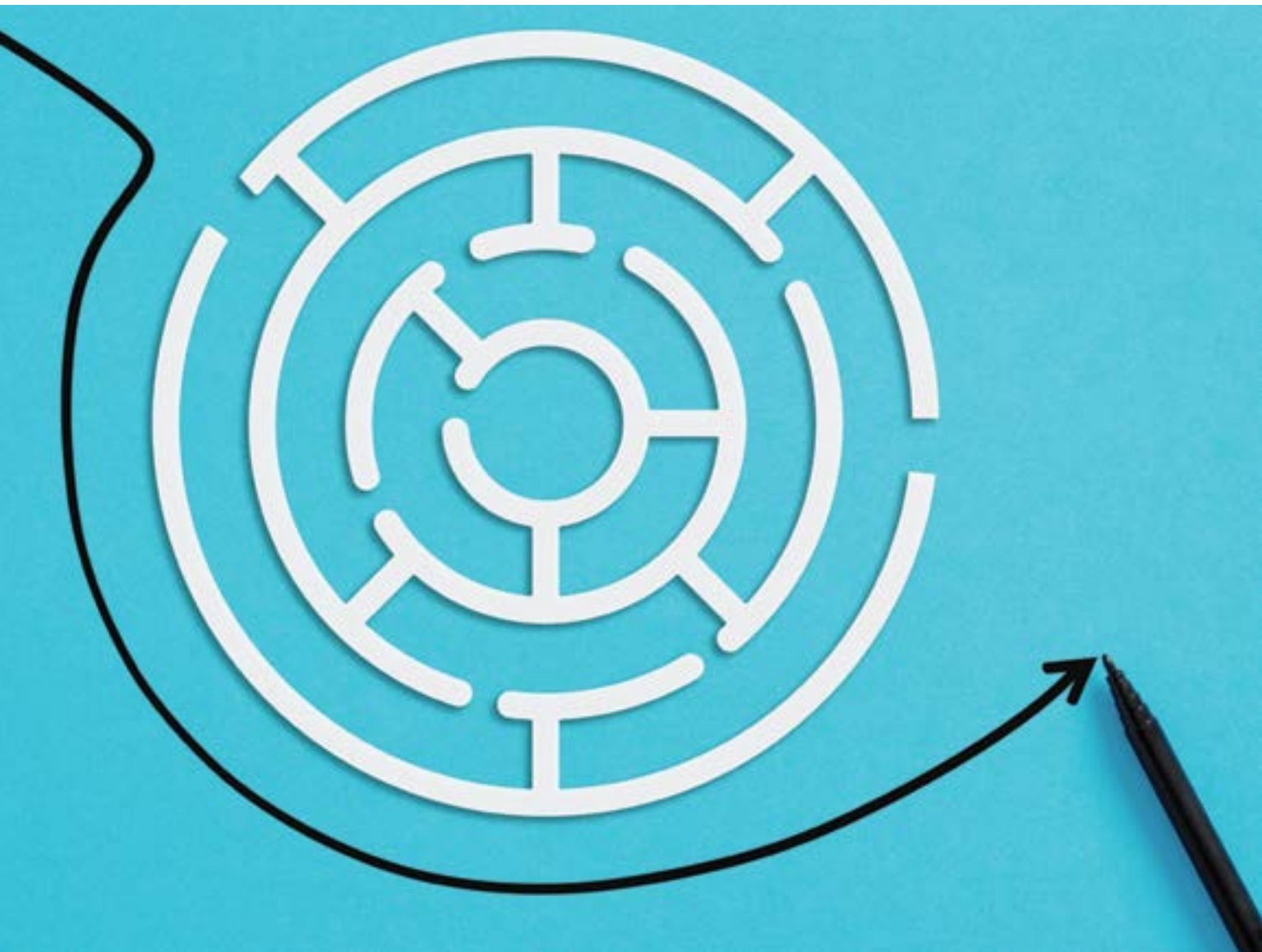

To the Forum:

I am a young attorney named Iam Abel. I opened Abel Law in 2020. I hired my twin sibling, Sheis Cane, as my paralegal. Sheis Cane also took the bar but failed.

One of the first cases that I signed up was Maybie Tomorrow's personal injury case in March 2020. Cane conducted the intake interview. Although I was out of the office that day, I spoke with Maybie by telephone during the interview to obtain information about her accident, injuries, and employment status.

I instructed Cane to "work up" the file – get police reports, medical reports, etc. Once we obtained the necessary information (it took years due to COVID-19 pandemic delays), I reviewed the file and drafted the summons and complaint in November 2022.

On Dec. 1, 2022, I met virtually with Maybie via Zoom to review everything, including documents I previously sent her to review. On Dec. 30, 2022, we had a second Zoom meeting, during which she signed a verification to the summons and complaint, which I notarized after she showed me her driver's license. We also discussed what Maybie thought would be a good settlement offer. Maybie stated she would accept "nothing less than $500,000" as she was still in pain, undergoing medical treatment and out of work. My firm then served and filed the summation and complaint.

A few months later, on March 10, 2023, the defendants made an offer of $600,000, so I gladly accepted on behalf of Maybie, reasoning that she would be happy because it was $100,000 more than she wanted (and because I was behind on my bills). I asked Cane to call her to tell her the good news and to obtain releases, etc. However, Cane could not reach Maybie. So, unbeknownst to me, on April 1, 2023, Cane and our secretary cut and pasted Maybie's signature from another document, then used my notary stamp and signature stamp on the documents. My office sent the documents to the defense counsel, and we are awaiting the settlement proceeds.

I received a call from Maybie's daughter stating that Maybie passed away on March 1, 2023, one month before she allegedly signed the settlement documents. Needless to say, I was unaware of Maybie's death, so I confronted Cane and our secretary. They both admitted what they did. I fired them both.

HELP!! What am I professionally obligated to do? How do I handle this situation?

Sincerely,
Iam Abel

Dear Mr. Abel,

As a licensed lawyer and notary public, you are responsible for your conduct as well as that of your employees, so you must act ethically and professionally to ensure that your clients' legal interests are protected. Lawyers, as officers of the court, are granted the privilege to practice law, and are held to a higher standard and must comply with all laws and regulations, including the New York Rules of Professional Conduct (RPC) as well as the statutory and regulatory procedures for a notary public. It is important to understand the mistakes you made, as well as those of your employees, while handling Maybie Tomorrow's case. Although Maybie died, the personal injury case remains viable, so you must take corrective measures to ensure that Maybie's family members (now her beneficiaries[1]) do not suffer harm because of your conduct, including the lack of supervision of your employees.

Notarization is often thought of as a routine or ministerial act, but it is an official task relied upon by others, so it should be treated seriously. Understanding how to properly notarize documents is vital for the lawyer/notary or, for that matter, any notary, because a court, other official agencies and the public rely on the veracity of the notarized documents as well as the fact that the person signing (the signor) the documents signed voluntarily.[2]

As a result, a notary/lawyer should understand New York's notary laws as well as the RPC to avoid penalties because they risk more than the loss of their notary license.

Notarization of Documents

There are two ways to be "commissioned" or licensed as a notary in New York by the Department of State. Anyone can take the examination administered by the Department of State, but a lawyer admitted to practice is exempt from the examination (they need only pay fees and complete an application). The notary signs an oath of office, sworn before a notary public that they "swear (or affirm)" to "support the Constitution of the United States, and the Constitution of the State of New York" and "faithfully discharge the duties of the office of Notary Public to the best of [their] ability."[3] They are required to pay licensing fees, including a $60 initiation fee and a $60 fee upon renewal of the oath of office every four years. According to the Secretary of State's website, a notary must be familiar with other statutory and regulatory obligations, including:[4]

- New York's Executive Law Sections 130-142.
- Public Officers Law Sections 3, 10, 67 & 69.
- County Law Sections 534.
- Real Property Law Sections 290–333.
- Banking Law Section 335.

- CPLR 3113.
- Domestic Relations Law Sections 11.
- Judiciary Law Sections 484-485 & 750.
- Penal Law Sections 70.00, 70.15, 170.10; 175.40 & 195.00.

Although lawyer/notaries may obtain a notary license without taking the examination, they should read the notary public rules prior to doing so, and again upon their license renewal when they again swear an oath. Among the business transactions that a notary may conduct are:

- administering oaths and affirmations;
- taking affidavits and depositions;
- receiving and certifying acknowledgments or proof of such written instruments as deeds, mortgages and powers of attorney; and
- demanding acceptance or payment of foreign and inland bills of exchange, promissory notes and obligations in writing, and protesting the same for nonpayment.

As to the notarization process itself, even if it only takes a mere few minutes to notarize a document, it is a multistep and solemn process. We recommend the implementation of a custom and best practice for a notary to ensure that the signor personally appears before the notary with a photo identification card; swears the oath (if necessary), and signs the document they want notarized. In turn, the notary signs their own name in black ink, dates and affixes their notary stamp and gives the document to the signor.

Notably, effective Jan. 25, 2023,[5] Executive Law Section 135-c(3) was amended to include extra steps for in-person notarization and also permitted virtual notarization. Executive Law Section 135-c(3), requires a notary to keep a logbook or journal with a list and copies of all documents they notarized and to record the information about the document and the signor. And, the new law requires, *inter alia*, that the notary follow the best practices outlined above and additional requirements such as:

- the notary must be physically located within the New York State at the time of the notarization;
- the notary must identify the remote signor (also known as the principal) of the document through any of three methods:
- the notary's personal knowledge of the signor,
- by communication technology that facilitates remote presentation by the signor of an official, acceptable form of identification, credential analysis, and identity proofing, or
- through oath or affirmation of a credible witness who personally knows the signor, and who is either personally known to the notary or identified by the previously referenced means of communication technology;
- the notarization must take place via real time audio visual interaction; and
- the notary must make and maintain a record of the notarization for 10 years, and the jurat needs to include the following language: "This remote notarial act involved the use of communication technology."

Thus, Abel, if you seek to virtually notarize documents due to the flexibility it affords to your practice, you must comply with the additional requirements to ensure the validity of the signor's notarized document(s).

Maybie's Case

Although New York has provided an additional process to accommodate today's virtual world, there are pitfalls that come with this responsibility. A failure to adhere to these regulations can subject a lawyer/notary to serious penalties that include civil and criminal sanctions, fines and the potential revocation of the notary and law licenses. However, there are ways to avoid these mistakes, some of which we address as we examine your query.

You state that you had three meetings with Maybie, in March 2020, Dec. 1, 2022 and Dec. 30, 2022, respectively, and that between March 2020 and Dec. 1, 2022, your firm worked on the file obtaining the necessary documents to allow you to draft the summons and complaint. In turn, you sent and discussed the draft during your Dec. 1 virtual meeting. On Dec. 30, 2022, you and Maybie again met virtually to discuss and notarize her verified affidavit to the summons and complaint. Notably, at the time you notarized Maybie's verified affidavit, the former governor's Executive Order 135-c(3) had expired and the current Executive Law Section 135-c(3) had yet to take effect, so you are in an odd situation. However, in your letter, you state that Maybie showed you her driver's license. Hopefully, a review of your file notes will determine whether you followed any of the best practices as set forth above. Thus, it is questionable as to whether the notarization was valid, but we cannot advise you as to this issue.

Although you do not state whether you communicated with Maybie between March 2020 and December 2021, presumably you communicated with her during that time period. It appears that up to this point, you followed most of your ethical obligations to diligently work on her file; to provide her with informed consent as you provided her information adequate for her to make an

informed decision about the lawsuit as well as potential settlement offers; and that she understood what she was signing as well as the issues relating to material aspects of the case.[6]

Thus, the major issues to be examined arise from your April 1, 2023 acceptance of the settlement offer and delegation to Cane and your secretary regarding the settlement documents to Maybie to finalize the agreed-upon settlement.

First, we note that your reason for accepting the offer is an issue here. You attest to accepting the settlement offer from the defense counsel because you were "behind on your bills." Even if you had discussed the parameters of the settlement amounts with Maybie, you may have engaged in a conflict of interest because you did not exercise your duty of loyalty and judgment to protect Maybie's interests by considering your own financial interests ahead of those of your client, and thereby you may have violated RPC Rules 1.0(f) and 1.7(a)(2). And doing so may also have violated the RPC Rules cited above concerning informed consent, settlement offers and communication of material aspects of the case at Rules 1.0 (j), 1.2(a) and 1.4, respectively. In fact, if Maybie was alive at the time of the offer (she died one month before), any additional conversations relating to this issue during the negotiation process may have resulted in you learning that she had different views toward settlement. Needless to say, accepting an offer based on your own financial situation is never right. You should always check with your client, as you are obligated to make these decisions based on your client's best directives and interests.

Second, the fraudulent notarization by your staff is also problematic, even if you were unaware your employee's acts included cutting and pasting Maybie's signature from another document; inserting your signature and notary stamps on the documents; and sending the fraudulent documents to defense counsel. As the licensed lawyer/notary who took the oath, you alone are allowed to notarize any document, but the signor must be present and actually sign it, and you must supervise your staff.

While it is true that you fired Cane, you must also understand the steps you must now take regarding the underlying pending Supreme Court civil action. Pursuant to RPC Rule 3.3, you are obligated to ensure that you do not use "false evidence" or engage in "fraudulent conduct" before "a tribunal." Specifically, RPC Rule 3.3(b) provides that a "lawyer shall take reasonable remedial measures, including if necessary disclosure to the Court" so that the court, counsel and other interested third parties do not rely on the fraudulent conduct by a "person" (in this case two persons: Cane and your secretary). Thus, as you know that the settlement documents are improper, you must remediate the matter by notifying the court, Maybie's daughter and the defense counsel, as they have an interest in the case and continue to rely on false documents. We recommend that you review NYSBA Ethics Opinions 1123 (May 15, 2017) and 837 (Feb. 5, 2010) as well as NYCLA Ethics Opinion 741 (March 10, 2010) as to the steps to take to remediate the false notarization issue.

"Simply stated, the cover-up often results in more dire consequences because it will result in your having to defend against allegations that you may have engaged in intentionally dishonest conduct and/or that you may have engaged in criminal conduct."

While providing notice may implicate your failure to supervise the conduct of your non-lawyer employees as required by RPC Rule 5.3, the worst thing to do is to wait to see whether others realize the documents are not valid and report you to the court. We recommend that you promptly take corrective measures by volunteering the information and that you did not participate in the fraudulent conduct. Doing so will likely avoid the severe wrath of the court, should it learn about what happened from others. Simply stated, "the cover-up" often results in more dire consequences because it will result in your having to defend against allegations that you may have engaged in intentionally dishonest conduct and/or that you may have engaged in criminal conduct.[7]

Even so, confessing to your employees' false notarization of Maybie's signature on the settlement documents will likely result in some action by the court. Pursuant to the New York Rules of Judicial Conduct at 22 N.Y.C.R.R. 100, Rule 100.3(D)(2), a judge who "receives information indicating a substantial violation of the Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200) *shall take appropriate action*" (emphasis added). The New York State Judicial Advisory Committee[8] has repeatedly advised that "appropriate action" may be some lesser action than reporting the lawyer to a disciplinary authority.[9] Thus, the judge has full discretion when handling

any issue relating to the false notarization. The judge can choose to either simply let you fix the mistake, sanction you or may refer you to the disciplinary authorities.[10]

If you find yourself subject to a disciplinary complaint, depending on the number of falsely notarized documents and the harm caused, the sanction ranges from a private unpublished admonition issued by the committee to public discipline via hearing with formal charges that results in sanctions ranging from censure to lengthy suspension and, in some cases, disbarment due to the lawyer's additional unrelated egregious conduct.[11]

One case that you should review, *In re Roosa*,[12] is particularly instructive because the facts are strikingly similar. In *Roosa,* the lawyer/notary was censured due to the mitigation offered despite misconduct that arose in an uncontested divorce where he falsely notarized the signatures of his client on documents he submitted six days after the client died but did not advise the court (or others) that his client died. The court held:

> Although we find the submission of falsely notarized documents to the courts serious professional misconduct, we conclude that, in view of the circumstances presented, especially respondent's apparent lack of venal motive and his relative inexperience as an attorney, censure is the appropriate discipline. We also direct respondent, within one year from the date of this decision, to complete six credit hours of accredited continuing legal education in ethics and professionalism in addition to the accredited continuing legal education required of all attorneys.[13,14] (emphasis added)

There is no sure way to predict what the judge may do, but it is important that you move quickly to take corrective action on Maybie's case. You must advise and assure the court that this was an isolated incident; that you did not act with venal intent; that you want to resolve the issue; and that you fired Cane to prevent any recurrence of this issue. Until the court has determined the right path for handling the falsely notarized document, the best approach is transparency because it will be among the mitigating factors considered.

Needless to say, Abel, this incident should serve as a wake-up call: it is never a good idea to take shortcuts. In addition to the remedial measures outlined above, we recommend implementing changes to your own individual and office processes. This will help in your day-to-day practice as well as in a defense should you have to appear before the disciplinary authorities, as it will provide mitigation. Indeed, you must understand the RPCs and how to manage your own time and tasks as well as tasks you delegate to your staff.

In addition to the best practices outlined above, familiarizing yourself with the notary public laws is a must. We also recommend the following:

1. Do not leave your notary stamp, journals and/or recordings where others have access to them; rather keep them locked away or in a place where others cannot locate or use them.
2. Pay for a staff member to take a course and the notary public examination, so that once they are licensed, they too can notarize documents.
3. Train all staff members about the proper notarization practices.
4. Travel to the signor's location to notarize the documents in person.
5. Provide virtual notarization services (but be mindful and adhere to the extra requirements cited above).
6. If you do not provide virtual notarization services, and the signor is unable to come to the office, you must advise them to seek out a local notary. If they are out of country, they must go to the local American Embassy. However, in the case of an affidavit for litigation, CPLR Section R2106, was amended, effective Jan. 1, 2024, and permits an "affirmation of truth of statement" to be filed in lieu of an notarized affidavit as long as it includes the following: "I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law."

Conclusion

Abel, you sought help because you understood that falsifying a person's signature and then notarizing a document in a pending matter is wrong. We hope that you now understand your ethical obligations as to your own conduct, including the proper supervision of your non-lawyer employees, which is crucial to protecting your clients' interests. More than that, the use of the best practices and adherence to notary laws will not only help you to protect your client's interests but will make you a better lawyer/notary and well-rounded lawyer, allowing you avoid the consequences for not properly doing what a lawyer/notary is entrusted to do.

Sincerely,
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QUESTION FOR THE NEXT FORUM

To the Forum:

I am an attorney defending my client in a bench trial against allegations of fraud. My client is a well-known public figure, so the case has been closely monitored by the media. My client has been very vocal about his concerns that the judge and his staff are biased against him. And I have to say, I agree with him.

Given my client's status, everyone in the courtroom knew who he was before he ever stepped foot before the judiciary, including the judge's clerk. Throughout the trial, the clerk could be seen shaking his head in disapproval. During my client's testimony, the clerk glanced at the judge numerous times with the same disapproving look and furiously took notes that he passed along to the judge. The judge passed notes back to the clerk as well.

This behavior unnerved my client and made our whole defense team suspicious that the clerk may have been biased against my client. After an eventful day of trial, my client posted on his social media page to his millions of followers questioning the clerk's and judge's impartiality and that he felt he was not receiving a fair trial. One of the defense attorneys on my team reposted my client's post to his own social media page. This instantly made news headlines.

When we appeared in court the next day, my team argued to the judge that his and the clerk's conduct was improper, as the judge appeared to be consulting with the clerk during the proceedings by passing notes.

By the end of the day, the judge issued a gag order preventing my client and the rest of our team of defense attorneys from publicly commenting on the judge and his staff. The judge reasoned that the order is being issued to protect his office and staff from further threats of violence that have resulted from, in his words, "the public bashing of the judiciary" on my client's social media account.

My question is, does this impede on my client's and fellow defense attorneys' First Amendment rights? Can a judge prohibit litigants and attorneys from criticizing the judiciary outside of the courtroom?

Sincerely,
Sy Lenced

Endnotes

1. We limit this column to the ethical issues raised herein, but note that you will need to determine if Maybie has a will and who she designated as executor, or whether she died intestate. In either case, you will have to seek relief from the Surrogate's Court so that her estate is substituted for Maybie in the personal injury case and allow the case to proceed.

2. *See, e.g., Ambulatory Surgery Center of Brooklyn v. Helpers of God's Precious Infants, Inc.*, 283 A.D.2d 528, 529–30 (2d Dep't 2001) (Court relied on but later vacated part of its prior decision when the lawyer admitted to repeated false representations that affidavits were signed in his presence before he notarized because they were improper; the lawyer was also sanctioned and fined $10,000).

3. When a lawyer is admitted to practice, they take a similar oath.

4. *See* https://dos.ny.gov/system/files/documents/2022/04/notary.pdf.

5. Revisions to Section 135-c(3) came three years after the start of the COVID-19 pandemic during which notarization of documents was done virtually after March 19, 2020, when Governor Andrew Cuomo issued Executive Order 202.7, temporarily allowing documents to be notarized "utilizing audio-visual means" via an internet video conference. It required that the signor send the document and photo ID to the notary; affidavits be executed by the signor; and that the signor present their photo ID on the screen. In short, recognizing that business and legal matters had to proceed, Executive Order 202.7 provided a simpler process for virtual notarization. However, once the COVID pandemic restrictions were lifted, Executive Order 202.7 expired on July 5, 2021.

6. *See* the RPC at 22 N.Y.C.R.R. § 1200, Rules 1.0(j), 1.2(a) and 1.4, respectively.

7. *See* RPC 8.4 and Penal Law §§ 70.00, 70.15, 170.10, 175.40 and 195.00.

8. The Advisory Committee on Judicial Ethics provides ethics advice to judges, justices and quasi-judicial officials of the New York State Unified Court System about their own conduct.

9. *See, e.g.,* JAC Advisory Opinion 10-85 (If the alleged misconduct is not so egregious as to implicate the lawyer's honesty, trustworthiness or fitness to practice law, the judge need not necessarily report the lawyer to the appropriate disciplinary authority) and JAC Advisory Opinion 91-36 (Vol. VII) (where no improper motivation, the judge has the discretion to take less severe, appropriate measures, including but not limited to, counseling and/or warning a lawyer, reporting a lawyer to his/her employer, and/or sanctioning a lawyer).

10. *See* Federal Rule 11 or 22 N.Y.C.R..R § 130-1.

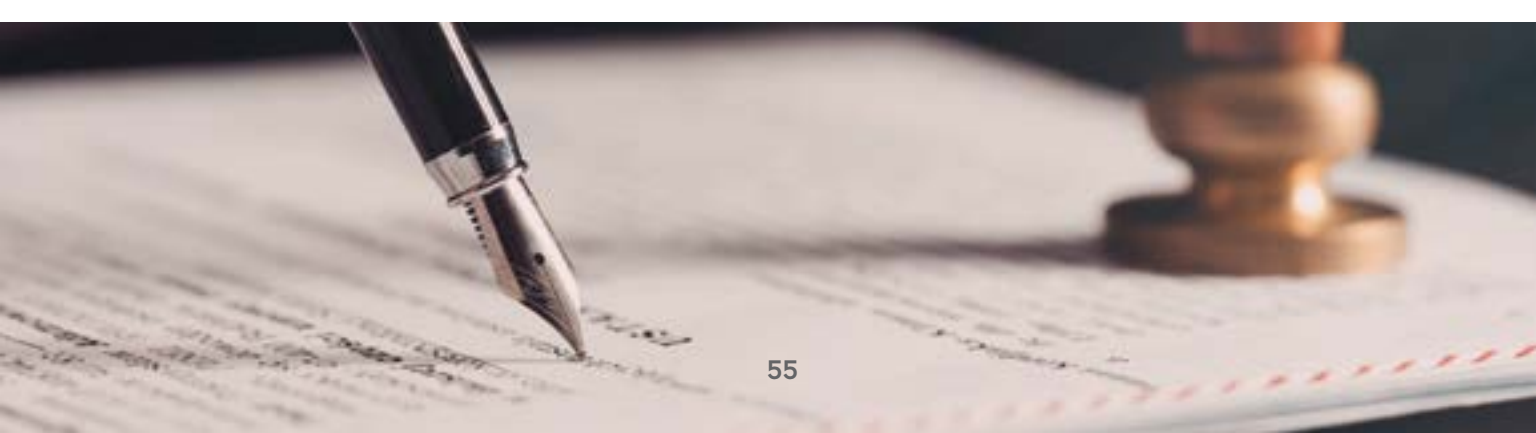
11. For the procedures see the Rules for Attorney Disciplinary Matters you should review 22 N.Y.C.R.R. Part 1240. *See, e.g., Matter of Ciaravino*, 204 A.D.3d 138 (2d Dep't 2021) (law firm associate censured via discipline by consent because she notarized 11 affidavits purportedly, but the client had never signed the affidavits. The lawyer electronically signed them outside of the client's presence and then falsely notarized the affidavits that were filed with the court); *Matter of Gitler,* 184 A.D.3d 105 (2d Dep't 2020) (lawyer reciprocally suspended for six months because he forged his assistant's name and notarized the forged signature on two letters in support of an application for an exten-sion); *Matter of Micho*, 169 A.D.3d 15 (4th Dep't 2019) (lawyer suspended for one year for signing client's husband's name on an affidavit, notarizing it, filing it with the court and representing that it had been signed by the husband to other attorneys; failing to appear and neglect of unrelated legal matter that caused substantial harm to the client, resulting in excessively high valuation of a marital residence against client's interests); and *Matter of Toback*, 199 A.D.3d 99 (1st Dep't 2021) (lawyer disbarred in Florida reciprocally disbarred in New York because she falsely notarized an agreement, executed a certification in litigation related to the agreement that included false statements, and repeatedly gave false testimony at a deposition).

12. *In re Roosa*, 273 A.D.2d 535 (3d Dep't 2000).

13. See 22 N.Y.C.R.R. Part 1500; *cf., Matter of Davis*, 269 A.D.2d 732 (3d Dep't 2000). Respondent shall report said completion to petitioner.

14. *Roosa*, 273 A.D.2d at 537.

15. Mr. Seminara worked as a summer intern at Scalise & Hamilton, P.C. He is in his second year at the Elizabeth Haub School of Law at Pace University and a member of the law school's International Law Journal. He will graduate in May of 2025.



To Forgive Is Divine

By David Paul Horowitz and Katryna L. Kristoferson

With the holiday season over, most of us can count the days until we break one or more New Year's resolutions. Adding to the ubiquitous "I will lose 10 pounds" or "I will give up bacon," we resolve each year to make fewer mistakes in the practice of law. And yes, we make mistakes, less often with the passage of time and (fortunately) not with devastating impact, but we make them, and it rankles.

Sometimes mistakes are minor and fly under the radar, undetected, with no one the wiser. More often than not they surface, and the impact on the mistake-making lawyer can range anywhere from embarrassment to chastisement all the way to disciplinary action and/or a legal malpractice suit. That lawyer should make every effort to ensure that if there is going to be an impact from a lawyer's mistake that any penalty will fall on the attorney and not the client. Better the attorney pay a $5,000.00 sanction than the court grant an adverse inference against the client.

And once we realize we have made a mistake, we know enough to know we must take prompt corrective action (so far our mistakes have been correctible). In our most recent round of CLPR Update CLEs we have a section titled "Mistakes," and we thought we would share what we have learned from the experiences of other lawyers who have made mistakes.

And in case it isn't obvious, never, ever, cover up or ignore a mistake. Time is not your friend, and the repercussions when the mistake is ultimately discovered (and it almost always will be) will be far worse than if prompt disclosure had been made.

Forgive and Forget

> Plaintiffs established a reasonable excuse for his default in failing to timely file his cross motion and opposition to defendants' motion for summary judgment. Plaintiff's counsel stated that he mistakenly believed that the papers could be filed at any time on the return date of December 15, 2021, and that the e-filing at 10:58 p.m. on that date was timely, despite the fact that the papers were, in fact, due to be filed two days before the return date. Thus, the default resulted from law office failure, which a court may excuse in its discretion.[1]
>
> Supreme Court improvidently exercised its discretion in denying plaintiffs" motion to vacate the underlying default. Although we share the court's concern regarding the extended delay and the inattentiveness of plaintiffs' former counsel, counsel's neglect in pursuing his clients' action should not be permitted to redound to the clients' detriment.[2]
>
> The court improvidently exercised its discretion in denying plaintiffs' cross motion solely on the technical basis that the proposed amended complaint was not redlined (*see* CPLR 3025 [b]), since the proposed amendments to add the third-party defendants as direct defendants were sufficiently described in the moving papers and easily discerned on review of the proposed amended summons and complaint.[3]

Reprimand and Rebuke

> [E]electronic signatures "have the same validity and effect as the use of a signature affixed by hand" (State Technology Law §304 [2]). . . . The presumption of genuineness is rebuttable, however. While "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature," an expert opinion is not required. Here, plaintiff's affidavit, which highlights the irregularities in decedent's purported signatures, together with an exemplar of a known signature, raises issues of fact as to the authenticity of the signatures on the admission agreements. . . . Here, [Defendant] could have sought to establish the genuineness of decedent's electronic signature by the affidavit of someone with knowledge of the Docusign protocols and indicia of reliability, both generally and as applied to decedent's proffered signatures. [Defendant] did not do this.[4]
>
> The initial email and the subsequent correspondence also fail to establish that the parties reached an agreement. Following the initial email, the wife's counsel responded, asking the daughter's counsel to "[l]eave the timing of payment open" in the draft settlement, and he suggested additional terms for the draft. Following the long-standing principle that "where the recipient of an offer is under no duty to speak, silence, when not misleading, may not be translated into acceptance merely because the offer purports

> to attach that effect to it," such response did not constitute assent. . . . Although the daughter argues that this Court should find an enforceable agreement because the parties cancelled certain depositions, this is not the type of detrimental reliance that excuses compliance with CPLR 2104, and the parties are free to reschedule such depositions upon remittal, if they so choose. For these reasons, we reverse the order on appeal, deny the daughter's motion and restore the proceedings and actions for further proceedings.[5]

Avoiding Mistakes

While there have been many recent beneficial changes to the practice of law, many as a result of COVID-19, some of those changes bring challenges of their own. From a firm management standpoint, remote work has required changes in how legal assignments are made, how work is monitored, and how the final collaboration on a project is accomplished.

Some practices (should) remain unchanged, double diary entries with multiple ticklers, tracking cases on NYSEF and PACER, and staying current with the law. But many changed.

"Fall on your sword. Ask the court to excuse the mistake. Ask the court to fashion relief (suggesting the relief is a good idea) that mitigates any prejudice to your adversary and their client. Ask that you, as the attorney, be penalized, instead of the client."

When David started practicing his firm had regular Wednesday calendar meetings, attended by all attorneys in the firm, where the next week's calendar assignments were given out, and issues on cases could be discussed by the assemblage. Fast forward to when Katryna started practicing, weekly paper calendars were distributed giving assignments (and yes, the calendar did eventually go electronic) and issues would be discussed between two or three attorneys at most.

We have (re-)instituted weekly, in-person calendar meetings to allow for a systematic monitoring of deadlines, review of individual case issues, and routine discussion of changes and challenges impacting our practice. It is not a bad idea to periodically re-think our practice routines to try and better them.

When You Realize You Have Made a Mistake

On the exceedingly rare occasion when you realize you have made a mistake, worry, don't panic. Take the time to think through the error and consider potential fixes. After that, consult a trusted colleague. Formulate a plan to include disclosing the error (where necessary) and taking ameliorative action, discussed below.

Acknowledge the mistake. Consider contacting your adversary and requesting relief from the mistake. Our practice is to grant these requests (with the exception of one or two adversaries unworthy of any consideration) so long as granting the request does not compromise a right of our client. And we are not only beneficent, we have both benefited from attorneys relieving us from our mistakes, often with grace.

Tools for Correcting Mistakes

Recognizing that lawyers (and judges) make mistakes, the drafters of the CPLR devoted an entire article, Article 20, to the subject, titled "Mistakes, Defects, Irregularities[6] and Extensions of Time."

The most oft-used tool in our CPLR toolbox for correcting errors is CPLR 2001, which parrots the article title with one change:[7]

> §2001. Mistakes, omissions, defects and irregularities.
>
> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

When All Else Fails

It is a fundamental concept of New York civil practice that our court system is designed for, and has the goal of, deciding cases on their merits. This is an argument always worth making in the situation where we need to seek leave of court to fix something. "[I]t is the strong policy of our courts to permit actions to be decided on the merits."[8]

Fall on your sword. Ask the court to excuse the mistake. Ask the court to fashion relief (suggesting the relief is a good idea) that mitigates any prejudice to your adversary and their client. Ask that you, as the attorney, be penalized, instead of the client.

Conclusion

We all strive to do better, and a good way to do that in the New Year is to work (and yes, it involves work) to avoid making mistakes in the practice of law. And when (not if) we make them, promptly do everything possible to correct them.

We hope your 2024 is off to a good start and look forward to continuing this collaboration.

Endnotes

1. *Giordano v. Giordano*, 2023 N.Y. Slip Op. 02381 (1st Dep't 2023).
2. *Rosario v. General Behr Corp.*, 2023 N.Y. Slip Op. 03560 (2d Dep't 2023).
3. *Herrera v. Highgate Hotels, L.P.*, 213 A.D.3d 455 (1st Dep't 2023).
4. *Knight v. New York & Presbyt. Hosp.*, 2023 N.Y. Slip Op. 04258 (1st Dep't 2023) (internal citations omitted).
5. *Matter of Eckert*, 2023 N.Y. Slip Op. 03270 (3d Dep't 2023)(internal citations omitted).
6. A word Katryna cannot ever seem to pronounce.
7. The remaining sections are: § 2002. Error in ruling of court, § 2003. Irregularity in judicial sale, § 2004. Extensions of time generally, and § 2005. Excusable delay or default.
8. *Schupak, Rosenfeld & Fischbein v. Campanelli Indus., Inc.,* 51 A.D.2d 699 (1st Dep't 1976); *see also Dahlem v. Universal Sch. Bus Leasing, Inc.*, 35 A.D.2d 992 (2d Dep't 1970); *Leale v. NY City Health & Hosps. Corp.,* 69 A.D.2d 832 (2d Dep't 1979).

David Paul Horowitz of the Law Offices of David Paul Horowitz has represented parties in personal injury, professional negligence, and commercial litigation for over 30 years. He also acts as a private arbitrator and mediator and a discovery referee overseeing pre-trial proceedings and has been a member of the Eastern District of New York's mediation panel since its inception. He drafts legal ethics opinions, represents judges in proceedings before the New York State Commission on Judicial Conduct and attorneys in disciplinary matters, and serves as a private law practice mentor. He teaches New York Practice, Professional Responsibility, and Electronic Evidence & Discovery at Columbia Law School.

Katryna L. Kristoferson is a partner at the Law Offices of David Paul Horowitz and has litigation experience across many practice areas. She has lectured at CPLR Update, Motion Practice, and Implicit Bias CLEs, and will be teaching "Bias and the Law" at Pace Law School next year.

New York State Bar Association President Calls Removal of Notary Requirement in Civil Cases a Big Step Forward for Access to Justice

By Susan DeSantis

A new law allowing litigants in a civil case to file affidavits and other sworn documents without getting them notarized will eliminate unnecessary delays and needless costs in civil lawsuits.

"This law is a big step forward for access to justice," said Richard Lewis, president of the New York State Bar Association. "The notarization requirement was a big impediment in civil litigation, particularly for unrepresented parties in rural areas of the state where finding a notary is difficult. We commend Gov. Kathy Hochul for signing the bill."

In a letter of support for the bill, S5162 (Hoylman-Sigal)/A5772 (Lavine), sent to Gov. Hochul on July 31, Lewis told the governor that: "An undue burden falls on unrepresented parties when they need to file a sworn document, such as an affidavit or a verified pleading that requires notarization, in New York State court civil actions and proceedings." He noted that finding a notary became even more difficult during the pandemic.

In addition to its success on this law, the New York State Bar Association and its Government Relations Department reached many of its major legislative objectives during the 2023 session. Several priorities and key initiatives were passed by the Senate and Assembly and await review by the governor. These include removing a requirement that out-of-state attorneys practicing in New York have an office in the state. Other successes include legislative passage of the Equal Rights Amendment to the New York State Constitution that will now go to the voters. And the enactment of a law sealing the conviction records of some New Yorkers who have served sentences for certain felonies.

The association also saw success in its effort to raise the pay rates of Attorneys for Children and 18b attorneys to $158 per hour after 20 years without an increase in pay. In November 2022, the association sued New York State, seeking to compel an increase in the rates of compensation for assigned counsel equal to what lawyers receive in federal court and to provide a mechanism for continued increases. That lawsuit continues in New York State Supreme Court.

Daughter of March on Washington Organizers Discusses 60 Years of Civil Rights

By Rebecca Melnitsky

Left to Right: Clotelle Drakeford, Past President T. Andrew Brown, Hasna Muhammad and Chief Judge Rowan Wilson.

The March on Washington for Jobs and Freedom, the famous civil rights demonstration of August 1963, still echoes to this day. Organizers Bayard Rustin and A. Phillip Randolph gathered the factions of the civil rights movement and 200,000 participants to fight for jobs, housing, the right to vote, a minimum wage, comprehensive civil rights legislation and integrated education.

At an event cohosted by the New York State Bar Association and the Government Law Center at Albany Law School in November, participants discussed the legacy of the March on Washington and the continued fight for equality.

"In theory, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 addressed most of those demands," New York's Chief Judge Rowan Wilson said at the beginning of the event. However, he pointed out that there are still gaps in education, income and employment for African Americans. For example, in 1963, the Black unemployment rate was double the white unemployment rate, and that ratio has remained virtually unchanged to the present day.

"I draw two basic points," said Wilson. "First, the March represents a fundamental turning point in our history – when citizens demanded that the federal government commit itself to end racial segregation and its vestiges, to which the government agreed with comprehensive legislation. Second, while the legal and social gains are tangible, the fundamental economic gains are not."

The March's Living Legacy

Artist, educator and activist Hasna Muhammad, daughter of actors and activists Ruby Dee and Ossie Davis, spoke about her parents' involvement at the March and the wider civil rights movement at an event commemorating the 60 years since.

Muhammad was six years old at the time of the March. Her parents did not bring her, although they often brought her and her siblings to other demonstrations. "They didn't take us because they couldn't protect us," she said. "We went with them to work and on picket lines whenever they could take us, but this was a time where they didn't think that they could."

Dee and Davis acted as emcees of the March on Washington. Davis introduced entertainers at the March, alerted people when meetings changed from one room to another and told the crowd that W.E.B. Du Bois had died the day before. He also helped direct crowds from the Washington Monument to the Lincoln Memorial. "Dad volunteered in the national headquarters," Muhammad said. "He answered phones, and he probably did anything that Bayard Rustin asked him to do. And he was there often."

Muhammad said there was not as much of a record of what her mother did at the March, but there is at least one photo of her speaking at a podium.

Muhammad noted that the women were not as prominent in the March and received much less speaking time than the men. Daisy Bates of the Little Rock Nine said fewer than 200 words. Lena Horne said one word: "Freedom."

"Their comments were used to fill the time they were fixing the speech for John Lewis," she said. "They had to change and revise John Lewis's speech because it was a little bit too much. So, they had the women fill in that space. But after the March . . . they decided that that would be the last time that they, as women, would be marginalized in these types of efforts."

T. Andrew Brown, past president of the New York State Bar Association, also spoke about the legacy of the March on Washington. "Much of what was said about the March and what happened 60 years ago is just as important today," he said. "[The list of demands] was written 60 years ago. If I asked you to write a list of demands today, how different would it look?"

He added: "Those involved in the movement that led to the March on Washington – I am their beneficiary. As a black man, to have risen to the presidency of arguably the greatest bar association in the United States and the world . . . that would not have happened if it were not for others who came before me."

Space Law: Expanding To Cover the Moon, the Stars and Beyond

By Rebecca Melnitsky

As humans race to explore the cosmos, the law has some catching up to do. While treaties provide guidance, a lot of legal issues in space exploration remain unaddressed and untested.

A recent Continuing Legal Education course, hosted by the New York State Bar Association, discussed developments in space law and how they might apply to future travel and commercialization of assets in outer space, especially as private companies like SpaceX launch missions.

Alexandra Dolce, senior legal consultant in the Procurement Department of the New York City Housing Authority, was the speaker. She recently earned an LL.M in Space Law from the University of Mississippi and is a fellow at For All Moonkind's Institute on Space Law and Ethics.

Dolce explained that between 1967 and 1984, the United Nations enacted five treaties on space to emphasize cooperation and collaboration among nations. Notably, the Moon Agreement of 1984 says that nations should share the moon – and other celestial bodies – with "due regard" to the benefit of all nations.

"'Due regard' means be nice, but what does that mean?" said Dolce. "Especially when you're dealing with commercialization of space and trying to procure space resources, what does 'due regard' mean? It's a major contention, and that's one of the reasons I believe a lot of signatories have left the Moon Agreement, because they don't want to deal with the concept of 'due regard,' nor do they want to deal with that expansive nature of including other planets until norms are established."

In many cases, there are no norms. Consider the following scenarios, for instance:

- If an accident happens in space, who is liable?
- How should insurance for space workers be determined? Who pays?
- If there are not enough resources for people in space, who decides the distribution?
- If a worker from the United States kills a worker from Poland in space, what is the criminal jurisdiction? Was it a crime?
- Does a space tourist legally qualify as an astronaut?
- Should alternative fuel options be required for launches to cut down on noise and pollution?

Other U.N. principles and documents emphasize the need to protect the environment in space and the use of satellites for broadcasting.

Remote sensing, in which satellites collect data about the earth, is also an issue. Remote sensing can be used to track weather, conduct espionage, measure growth in cities and more. U.N. principles encourage nations to share the information gained from remote sensing with other countries, especially if data finds a problem in a country without remote sensing capabilities.

However, Dolce emphasized that U.N. principles are "soft law" – it acts as a guide for space exploration, but it is not enforceable. "If it's done on a regular basis, it becomes custom," she said. "And once it becomes custom, it becomes law."

Plus, the few existing laws contradict these treaties. In the United States, the Commercial Space Launch Act of 1984 allows private citizens to keep and sell space resources – like water on the moon – obtained through exploration. Luxembourg and the United Arab Emirates enacted similar laws in the last few years. "If you get it, you can transport it, it's yours," said Dolce. "You can do whatever you want with it. The concept of 'let's all work together; if you find something that's helpful to mankind, share it' is currently out of the window right now."

The Commercial Space Launch Act was enacted partially because it is cheaper for private companies to do space launches. SpaceX's Falcon Heavy Missions can cost under $100 million while NASA's Space Launch System will cost $2 billion per launch for similar missions.

"That's where the conflict is arising right now," said Dolce. "A lot of people say that the five initial treaties are basically expired. They're no longer relevant because of commercial activity that's taking place in space right now or that is intended to take place in space in the future."

The CLE was sponsored by the International Section.

World-Renowned Experts Among Prominent Panelists Who Will Be Discussing the Evolutionary Impact of Artificial Intelligence at the 2024 Presidential Summit

By David Alexander

ChatGPT failed the Unified Bar Exam in December of 2022, and less than four months later its descendant, GPT-4, scored in the top 10th percentile and completed the test in less than six minutes.

That news has stirred excitement and worry while provoking debate surrounding what the accelerating growth of Artificial Intelligence means for the legal profession.

That discourse will be at the heart of the Presidential Summit, the marquee event of the New York State Bar Association's Annual Meeting, on Wednesday, Jan. 17, from 1 p.m. to 4 p.m. in the Grand Ballroom West of the Hilton Midtown in New York City.

The summit, entitled "AI and the Legal Landscape: Navigating the Ethical, Regulatory and Practical Challenges," will focus on harnessing the technology that is transforming the practice of law and bringing ethical and regulatory challenges to the forefront of its deployment.

"Artificial Intelligence is having and will continue to have an enormous impact on the legal profession. It is rapidly growing, and we need to address how to implement it into our daily practices while at the same time developing appropriate regulation mechanisms to prevent it from being misused," said New York State Bar Association President Richard Lewis.

The first of two 90-minute panels will touch upon issues surrounding generative AI and will feature a pair of world-renowned experts: Bridget McCormack, president and CEO of the American Arbitration Association and the former Chief Justice of the Michigan Supreme Court, and Katherine Forrest, partner in the Litigation Department and co-chair of the Digital Technology Group and a member of the Antitrust Practice Group at Paul, Weiss.

McCormack and Forrest both said the precipitous learning curve illustrated in the transition of ChatGPT into GPT-4 on the bar exam is merely a glance into the technology's ability to quickly assimilate and adapt itself to a task put before it.

"This is going to have more of an impact on the business of law and the way we practice than any other technology we have seen in our lifetime. Anyone who is familiar with it is taken aback on how fast it has improved and how powerful it is," said McCormack.

"There is going to be a velocity of change that is unmatched. The absolute transformative reality of AI is reshaping every industry and the way we are practicing law. The transformation is coming, and the only question is: are we ready?" said Forrest.

McCormack and Forrest will offer an overview of the potential and regulatory issues surrounding generative AI, while the second panel will concentrate on how to leverage the

technology as a 21st century lawyer. Discussion will center on how it can assist in legal research, document drafting and client interactions while adhering to ethical guidelines and maintaining the highest practice standards.

The panelists will include:

Vivian D. Wesson, Executive Vice President, Corporate Secretary, and General Counsel for the Board of Pensions of the Presbyterian Church (U.S.A.) and chair of the NYSBA Task Force on AI;

Ignatius Grande, Director at Berkeley Research Group and a member of the association's Task Force on AI and Immediate Past Chair of its Commercial & Federal Litigation Section;

Marissa Moran, Professor in the law and paralegal studies department at New York City College of Technology, CUNY; and

Ronald Hedges, Principal of Ronald L. Hedges and a member of the NYSBA Task Force on AI.

The Presidential Summit is just one of NYSBA's premier events during the 147th Annual Meeting that takes place from Jan. 16 to 20.

Other highlights include the Presidential Gala, where former Homeland Security Secretary Jeh Johnson will be honored with the association's most prestigious award, the Gold Medal. The gala is Thursday Jan. 18, from 7:30 p.m. to 11:30 p.m., at the Museum of Modern Art. Chief Judge Rowan Wilson will deliver the keynote address at the Justice for All Luncheon earlier that day, while the Constance Baker Motley Symposium and Diversity Awards Program takes place Wednesday, Jan. 17, from 4:15 p.m. to 6:15 p.m. The President's Reception will immediately follow.

Honoring attorneys who render extraordinary service to the public and the profession is part of NYSBA's Annual Meeting tradition. This year's edition promises to be a dynamic and informative event, featuring a wide range of sessions and activities tailored to the diverse interests and needs of lawyers practicing in New York.

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