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The *Forum* was founded in 2010 to provide a specific and neutral forum for students, scholars, practitioners, and organizations to explore the complex developments of the law governing the workplace. It serves as a medium that highlights emerging developments in labor and employment law and explores the legal issues that arise under this area of law.

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Employment Discrimination: 45 Years of Enforcement of Title VII of the Civil Rights Act of 1964

Note

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EMPLOYMENT DISCRIMINATION:

45 YEARS OF ENFORCEMENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

INTRODUCTORY NOTE

RICHARD S. UGELOW

On February 19, 2010, the American University, Washington College of Law hosted an event of historic dimensions. *Employment Discrimination: 45 Years of Enforcement of Title VII of the Civil Rights Act of 1964* is unique for two main reasons. The symposium reflected upon the first forty-five years of enforcement of Title VII of the 1964 Civil Rights Act by the U.S. Department of Justice ("DOJ"). Title VII became effective in July 1965. As originally enacted, Title VII applied only to private sector employers with judicial enforcement authority residing in the DOJ. DOJ used this authority to bring, among others, groundbreaking litigation against the steel industry;[1] the trucking industry;[2] and the movie industry.[3]

In 1972, Title VII was amended to cover state, local and federal government employees. The 1972 amendments transferred private sector enforcement authority to the Equal Employment Opportunity Commission ("EEOC") and conferred public sector enforcement authority in the DOJ. DOJ used its authority to bring pattern or practice lawsuits against state and local governments to challenge discriminatory recruitment, hiring and promotion practices. Many of these lawsuits focused on the employment practices of police and fire departments.

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* The *American University Labor & Employment Law Forum* would like to thank Richard Ugleow for providing us the opportunity to publish this transcript

1. *E.g.*, United States v. Allegheny Ludlum, 517 F.2d 826 (5th Cir. 1975).

2. *E.g.*, United States v. Trucking Mgmt. Inc., 384 F. Supp. 614 (D.D.C. 1975).

3. *E.g.*, Int'l Alliance of Theatrical Stage Emps. v. Ass'n of Motion Picture & Television Producers, Inc., C.A. No. 71-2630 (C.D. Cal.).

2010 marked the forty-fifth anniversary of the enforcement of Title VII of the Civil Rights Act of 1964 by the DOJ. For the vast majority of the last forty-five years, enforcement responsibility has rested with the Employment Litigation Section. The panelists who graciously contributed their time and wealth of experience to the symposium make this transcript unique for another, important reason. The transcript of this event serves as a history and testament to the work of the Employment Litigation Section over the past forty-five years. The transcript vividly demonstrates the challenges—personal and legal—faced by the dedicated staff and attorneys and how overcoming those challenges changed employment patterns in the American workforce forever and gave meaning to the promise and spirit of Title VII. A reading of the transcript of the final panel reveals that Title VII enforcement faces new legal and political challenges and that the DOJ will need to adapt its enforcement mechanisms to the times.

I am not only grateful to the panelists who made this program so meaningful, but also to Tom Perez, the Assistant Attorney General for Civil Rights. Tom fully supported this program and many Civil Rights Division employees were panelists or attended. In addition, Tom graciously agreed to be the keynote speaker at lunch. While a transcript of Tom's remarks are unavailable, he reiterated the DOJ's commitment to vigorous and fair enforcement of the nation's civil rights laws. I am pleased to say that Tom has backed up his words with deeds. Today, the Employment Litigation Section possesses a new sense of mission and is effectively enforcing Title VII.

Employment Discrimination:

45 Years of Enforcement of Title VII of the Civil Rights Act of 1964

Panelist Biographies

Richard Ugelow is on the faculty of American University's Washington College of Law, where he teaches clinical legal education. He also teaches a course on employment discrimination.

Prior to joining the law school faculty in 2002, Professor Ugelow was a Deputy Section Chief of the Employment Litigation Section ("ELS"), Civil Rights Division, United States Department of Justice ("DOJ"). There, he supervised investigations and litigation to enforce Title VII of the Civil Rights Act of 1964. During the course of his twenty-nine year career at the DOJ, he litigated complex pattern or practice cases of employment discrimination filed against public sector and private employers pursuant to Title VII. He was also the government's lead trial attorney in defending challenges to the constitutionality of federally-sponsored affirmative action programs, particularly statutes and programs designed to provide contracting opportunities to minority, disadvantaged, and women-owned businesses.

While at the DOJ, Professor Ugelow frequently spoke at conferences concerning the development of lawful and nondiscriminatory selection and promotional procedures for police officers and fire fighters. He has published on the subjects of discrimination encountered by women seeking employment in physically demanding jobs and the role of expert witnesses in employment discrimination litigation.

From 1969–1973, Professor Ugelow was a Captain in the Army's Judge Advocate General's Corps.

WELCOME REMARKS: OVERVIEW OF TITLE VII

Susan Carle is a Professor of Law at American University's Washington College of Law. Her teaching and research interests lie primarily in the areas of legal ethics, the history and sociology of the legal profession, employment discrimination, labor and employment law, and torts. She is currently at work on a project examining the many ideas about economic justice and strategies for advancing the cause of economic justice held by the generation of race leaders who constituted the forerunners of the National Association for the Advancement of Colored People ("NAACP"). She is the author of numerous scholarly works examining the transmission and transformation of ideas about public interest law practice, as well as other ethics topics, for which she has won several awards. In Spring of 2006, she served as Visiting Professor of Law at Harvard Law School. Among other professional service commitments, she serves on the D.C. Bar Rules of Professional Conduct Review Committee and the Legal Ethics Advisory Committee of the National Disability Rights Network. She also served as the First Associate Dean for Scholarship at the law school from 2005 to 2008.

David L. Rose has been engaged in the private practice of law since December 2, 1987 specializing in litigation, particularly in equal employment opportunity and other employment, environmental, and appellate law. Rose & Rose, P.C. ("The Firm") was established in 1995, and has engaged in a national practice of equal employment opportunity law, primarily for employees and applicants for employment and organizations representing them.

The Firm's clients have included many individuals; the NAACP; the City of Detroit; the National Wildlife Association; the Neuse River Foundation; a Washington, D.C. law firm; the Braxton Citizens for a Better Environment; and the National Consumers League. Reported decisions in the Firm's cases include *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), affirming the ruling for Plaintiffs in *Holowecki v. Federal Express Corp.*, 440 F.3d 558 (2d Cir. 2006) both cases briefed and argued by the Firm; *Schuler v. Price Waterhouse Coopers, LLP*, 514 F.3d. 1365 (D.C. Cir. 2008); *Thomas v. National Football League Players Ass'n*, 273 F.3d 1124 (D.C. Cir. 2001); *NAACP v. City of Parma*, 263 F.3d 513 (6th Cir. 2001); *NAACP v. Town of East Haven*, 259 F.3d 113 (2d Cir. 2001); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000); *Thomas v. National Football League Players Ass'n*, 131 F.3d 198 (D.C. Cir. 1997); *NAACP v. Town of East Haven*, 70 F.3d 219 (2d Cir. 1995); *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994); *City of Houston v. Department of Housing & Urban Development*, 24 F.3d 1421 (D.C. Cir. 1994); *NAACP v. Town of Harrison*, 940 F.2d 792 (3d Cir. 1991); *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988); *Taylor v. Social Security Administration*, 2006 WL 1310233 (EEOC May 5, 2006); *NAACP v. New Jersey Department of Law & Public Safety*, 711 A.2d 1355 (N.J. Super. Ct. App. Div. 1998); *Payton v. City of Detroit*, 551 N.W.2d 187 (Mich. 1996); *Payton v. City of Detroit*, 536 N.W.2d 233 (Mich. Ct. App. 1995); *Detroit v. Qualls*, 454 N.W.2d 374 (Mich. 1990).

Mr. Rose has been a Fellow of the College of Labor and Employment Lawyers since 1996. He served as a member of the Committee on Assessment

and Teacher Quality of the National Resources Council of the National Academies from mid-1999 until 2001. The Report of that Committee is published as: Karen Mitchell et al., *Testing Teacher Candidates, The Role of Licensure Tests in Improving Teacher Quality* (2001).

From October 6, 1969 through December 1, 1987, Mr. Rose was the Chief of the ELS of the Civil Rights Division of the DOJ. As such, he was responsible, subject to the direction of the Assistant Attorney General, Civil Rights, for developing and implementing the Department's litigation program to secure enforcement of Title VII of the Civil Rights Act of 1964, and other provisions of federal law requiring non-discrimination in employment and equal employment opportunity; and he directed the litigation activities of twenty-five to thirty-five lawyers in federal courts throughout the United States. He participated personally in a number of landmark cases in equal employment opportunity law, including: *Bazemore v. Friday*, 478 U.S. 385 (1986); *Moody v. Albemarle Paper Co.*, 417 U.S. 622 (1974); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Contractors Ass'n. of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971); *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969); and *EEOC v. AT&T*, 556 F.2d 167 (3d Cir. 1977). He participated personally in major consent orders for the United States, including *AT&T* and those with the trucking and steel industries.

From 1972 through 1980, he was the DOJ's representative and chairman of the interagency staff committee that developed the "Uniform Guidelines on Employee Selection Procedures," adopted by the DOJ, Department of Labor, Department of the Treasury, the Equal Employment Opportunity Commission ("EEOC"), and the Civil Service Commission in 1978; and the interpretive "Questions and Answers" adopted by those agencies in 1979 and 1980. The Uniform Guidelines are still in force, at 29 C.F.R. § 1607 (2010).

From April 4, 1967 through October 6, 1969, Mr. Rose served as Special Assistant to the Attorney General for Title VI of the Civil Rights Act of 1964. As such, he was responsible to the Attorney General for coordinating the efforts of federal fund-granting agencies to enforce the provisions of that Title, which prohibit discrimination in federally assisted programs and activities.

Mr. Rose received his A.B. with honors from Harvard College in 1953, and his LL.B. with honors from Harvard Law School in 1956. Mr. Rose served as a lawyer in the Civil Division of the DOJ from September 1956 to April 4, 1967, and, from 1967 through December 1, 1987, was an attorney and Section Chief in the Civil Rights Division. With the exception of a six month tour of active duty in the United States Army Reserve, he spent the first three years handling litigation at the trial level. Thereafter, he was in the Appellate Section of the Civil Division, representing the United States and its agencies in the federal courts of appeals, some state appellate courts, and the Supreme Court. He became an Assistant Section Chief in 1965. He argued approximately eighty-five appellate cases while in that section, including three cases in the Supreme Court. His most recent argument in the Supreme Court was on November 6, 2007 in *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008).

Mr. Rose received a number of awards while in government service, including the Senior Executive Meritorious Awards, the Attorney General's Distinguished Service Award in 1978, and the Younger Federal Lawyer Award

of the Federal Bar Association.

From 1977–1981, Mr. Rose was a member of the Adjunct Faculty of the Georgetown University Law Center, where he taught "Federal Courts and the Federal System." He rejoined the Adjunct Faculty at Georgetown in 1991, where he shared the teaching of an Equal Employment Opportunity Law course with Douglas Huron through the 1993–94 school year.

Mr. Rose is the author of *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 *Vanderbilt Law Review* 1121 (1989); and *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 *San Diego Law Review* 63 (1988). He is also the editor of a chapter of *Employment Discrimination Law* (3d ed. 1996) for the ABA Section of Labor and Employment Law. He testified before committees of the House of Representatives in 1990, 1991, and 1994.

Mr. Rose resides in Chevy Chase, Maryland, with his wife Ann. They are the parents of four adults and have ten grandchildren.

Vicki Shultz is the Ford Foundation Professor of Law at Yale Law School. Her areas of focus include employment discrimination law, civil procedure, feminism and law, and gender and work. Her publications include Vicki Shultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States* (Yale Law School, Public Law Working Paper No. 91, 2004) and Vicki Shutlz, *The Sanitized Workplace*, 112 *Yale Law Journal* 2061 (2002). Professor Schultz earned a B.A. from the University of Texas and a J.D. from Harvard University.

ELS ENFORCEMENT 1965–1974

Joel Contreras earned a B.A. from the University of Oklahoma in 1965 and a J.D. from the University of Texas in 1969. In 1969, Mr. Contreras was employed at the EEOC in Austin, Texas. From January 1971 to December 1973, Mr. Contreras worked at DOJ, Civil Rights Division, ELS in Washington, D.C. and in 1974 he worked for the Lawyer's Committee for Civil Rights, also in Washington, D.C. From 1975 until 1980, Mr. Contreras worked for the Mexican American Legal Defense & Educational Fund as a Director Employment Litigation in San Francisco, California. Mr. Contreras also served as Chief Counsel from 1980 until 1982 at the California Employment Development Department in Sacramento, California. Since 1982, Mr. Contreras has worked for the California Unemployment Insurance Appeals Board. He first served as an Administrative Law Judge (ALJ), then as a Chief ALJ, then as an ALJ I, and since July 2005 as an ALJ II.

Squire Padgett started at the DOJ in June of 1970. Late on the afternoon of the first day of employment Mr. Padgett was sent to Birmingham, Alabama to investigate what became *United States v. U.S. Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975) and later the nationwide steel consent decree; *United States v. Allegheny-Ludlum Corp.*, 366 F.3d 164 (3d Cir. 2004). Mr. Padgett was also responsible for compliance in *United States v. Roadway Express, Inc.*, 457 F.2d 854 (1972); a case that integrated job sequences.

In 1974–1975, Mr. Padgett investigated, and was lead attorney for the United States in, a suit filed against the City of Miami, Florida, *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981). In that case, he argued before an en banc Fifth Circuit Court of Appeals. That consent decree is still in place today.

Finally, Mr. Padgett was the lead attorney in *Bazemore v. Friday*, 478 U.S. 385 (1986) before the Supreme Court. The case, among other issues, determined the standard for the use of regression analysis in employment discrimination cases. Mr. Padgett left the Department in July of 1982.

Robert Marshall became an Assistant U. S. Attorney in Colorado. Since then he has worked in civil litigation with various firms. Mr. Marshall is presently a civil litigator with the law firm of Carpenter & Klatskin in Denver, Colorado.

Mr. Marshall worked in the ELS starting in January 1970. He transferred to the Criminal Section of Civil Rights near the end of 1971. Mr. Marshall stayed with the Criminal Section until March of 1973. His first case was to write a brief opposing Certiorari to the U.S. Supreme Court. *United States v. Electrical Workers Local No. 38*, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970). At the same time Mr. Marshall was working with Bill Fenton on the St. Louis-San Francisco Railway Case for the train porters; *Howard v. St. Louis-San Francisco Railway Co.*, 361 F.2d 905 (8th Cir. 1966). That case was tried in St. Louis, Missouri and ultimately was won on appeal to the 8th Circuit. Judge Roy Harper did everything he could to make it difficult to try the case but Mr. Marshall and the team persevered. The Train Porters received seniority and were allowed to transfer to freight trains. Mr. Marshall also handled the Electrical Union case in New Orleans; *United States v. Electrical Workers Local No. 38*, 428 F.2d 144 (6th Cir. 1970). In the deposition of the President of the union, when asked why there were no blacks in the union, the union President testified that blacks were afraid of electricity. As a result of that comment Joel Selig was able to put together the New Orleans plan. The plan joined all the trade unions together in New Orleans in an affirmative action program, and they built the Superdome. Mr. Marshall also worked on the D.C. Trucking case in which relief was provided to long haul truckers; *Teamsters v. United States*, 431 U.S. 324 (1977). Mr. Marshall also assisted Mr. Squire Padgett in the East St. Louis trade unions; *United States v. Sheet Metal Workers Local 36*, 280 F. Supp. 719 (E.D. Mo. 1968). In the Criminal Section, Mr. Marshall obtained guilty pleas on involuntary servitude cases and won a jury trial in Tulsa, Oklahoma on an 18 U.S.C. § 242 case of a police officer abusing his office by beating an arrestee. Mr. Marshall also lost a jury trial in Lexington, Kentucky, against a deputy sheriff who shot and killed a high school basketball coach. Mr. Marshall considers that portion of his career as the most rewarding legal work he has ever done.

Frank Petramalo, Jr., is a 1969 graduate of the Georgetown University Law Center. After graduation he joined the DOJ as a trial attorney in the ELS where he served until 1973. In that four year period, he handled Title VII litigation involving building trades unions in Cincinnati, Columbus, Indianapolis, St.

Louis, Las Vegas, Seattle, San Francisco, and Los Angeles. Mr. Petramalo was also involved in litigation with city fire departments in Chicago, Los Angeles, and Boston.

From 1973–74, Mr. Petramalo worked as a staff attorney with the District of Columbia Public Defender Service representing indigent criminal defendants.

From 1974 through 2004, he practiced labor and employment law with the Washington, D.C. firms of Bredhoff & Kaiser and Gordon & Barnett. His practice centered on representing employees, employee organizations, and labor unions.

After retiring from practice in Washington, D.C., Mr. Petramalo became the Executive Director and General Counsel for the Virginia Horsemen's Benevolent & Protective Association ("VHBPA") in Warrenton, Virginia. The VHBPA represents approximately 1,800 thoroughbred horse owners and trainers who race at Colonial Downs in New Kent, Virginia.

Doug Huron has been practicing employment law for forty years, beginning in 1970 at the Civil Rights Division of the DOJ with the only break being a four-year stint in the White House Counsel's office during the Carter administration. While at the DOJ, he was the lead lawyer for the government in a trial before Judge Frank Johnson that resulted in the desegregation of the Alabama State Troopers; *Paradise v. Shoemaker*, 470 F. Supp. 439 (M.D. Ala. 1979). Since entering private practice in 1981, his highest profile case has been *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Mr. Huron has written several amicus curiae briefs for the Supreme Court, and he wrote the brief for the appellee in another Supreme Court case in 2007; *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511 (2007). He has also published articles on employment law in the *Washington Post* and other journals. Doug is currently with the D.C. firm of Heller, Huron, Chertkof, Lerner, Simon & Salzman and is married to Amy Wind, the Chief Mediator for the D.C. Circuit.

ENFORCEMENT AGAINST STATE AND LOCAL GOVERNMENTS

Terence G. Connor serves as the Co-Head of the Labor and Employment practice of the Miami office of Hunton & Williams. Mr. Connor's practice focuses on all aspects of labor and employment law, including complex employment and employee benefits litigation, labor-management relations and labor disputes, railway labor act, and wage and hour laws. Mr. Connor has extensive experience in trying employment and employment discrimination cases in federal and state courts, and the counseling of employers on compliance with state and federal employment laws. Mr. Connor has extensive labor and employment law experience in several industries, including the airline and transportation industries and the biotechnology and pharmaceutical industries. He also has substantial litigation experience in employment, employee benefit, and labor relations matters in state and federal courts.

Mr. Connor worked as a trial attorney with the DOJ Civil Rights Division where he prosecuted pattern and practice cases under Title VII. At the DOJ Civil Rights Division between 1973 and 1976, Mr. Connor developed and litigated cases desegregating the state police forces of Maryland, Michigan,

and New Jersey, each of which was ultimately resolved through Consent Decrees he negotiated with the states and that were entered by the courts. Prior to leaving government service, he had initiated similar actions in New York and North Carolina that were later successful.

Additionally, Mr. Connor was a member of the litigation team in *EEOC v. AT&T*, 556 F.2d 167 (3d Cir. 1977), an early nationwide gender discrimination case, and in the department's desegregation cases against Jefferson County, Alabama. He has also negotiated a system-wide Conciliation Agreement on behalf of National Airlines with the Washington Headquarters Office of the Equal Employment Opportunity Commission and tried, to a defense judgment, the cases of those who opted out of the Conciliation Agreement in *Leonard v. National Airlines, Inc.*, 434 F. Supp. 269 (S.D. Fla. 1977).

Mr. Connor has published numerous works and has been recognized as the Winner of *The American Lawyer's* 2006 Litigation Department of the Year—Labor and Employment Law, Member of Group award and was listed in *The Best Lawyers in America* (2006 & 2007), in *Who's Who Legal* (2005, 2006 & 2007); *Chambers USA: America's Leading Lawyers for Business* (2003, 2004, 2005, 2006 & 2007); and was named among the top lawyers in Florida by *Florida Super Lawyers Magazine*, a listing of the state's "lawyers held in the highest regard" by their peers, for Employment and Labor, June 2007.

Mr. Connor earned his LL.M. from Georgetown University Law Center in 1975, his J.D. from Seton Hall University School of Law in 1967, and his A.B. from Georgetown University in 1964.

Michael Middleton joined the law faculty of the University of Missouri in 1985 after working for the federal government in Washington D.C. He served as a trial attorney in the Civil Rights Division of the DOJ and in 1977 was appointed Assistant Deputy Director of the Office for Civil Rights at the Department of Health, Education, and Welfare.

After serving as Director of the Office of Systemic Programs for the EEOC and as Principal Deputy Assistant Secretary for Civil Rights at the Department of Education, he was appointed Associate General Counsel of the EEOC's trial division. Mr. Middleton returned to St. Louis, where he served as director of the St. Louis district office of the EEOC.

Beginning in 1997, he served as the Interim Vice Provost for Minority Affairs and Faculty Development for the University of Missouri. In 1998, he accepted the position of Deputy Chancellor.

Marybeth Martin served in the ELS of the Civil Rights Division for twenty-eight years as a research analyst, line attorney, and deputy section chief.

Ms. Martin graduated from Randolph-Macon Woman's College in Lynchburg, Virginia, in 1966, with a B.A. in Philosophy. After working briefly on Capitol Hill and for federal contractors, she began working as a research analyst in the Employment Section (now ELS) in 1970, where she served on a variety of Title VII pattern or practice investigations of private employers and unions, and assisted Section attorneys in litigation for over three years. Her assignments included assisting with trials under Title VII against U.S. Steel's Fairfield (Alabama) Works, and the Texas and Baltimore locals of the

International Longshoremen's Association. Through her work in the Section, she became interested in becoming an attorney, and earned a J.D. degree from Antioch School of Law, Washington, D.C., in 1976. For nearly two years, she served as a law clerk to Judge James A. Belson, then of the D.C. Superior Court.

Ms. Martin began working as a line attorney in ELS in 1978. Her Title VII work included referrals of individual charges from the Equal Employment Commission and pattern or practice matters against state and local governments. In addition, her assignments included representing federal agencies in challenges to the constitutionality of various disadvantaged business enterprise programs. Under Title VII cases against the State of Georgia, she worked with ELS paralegals and attorneys in developing a model for the Section to use in proposing remedial monetary and job relief for individual victims in large pattern or practice cases. She also worked on cases the Section brought against the City of Milwaukee, the City of Montgomery, the State of Alabama and other government entities in which issues arose in the enforcement of Tile VII consent decrees.

After serving for fifteen years as a trial attorney, she became a Deputy Section Chief in ELS, and, in that position, served as a reviewer of Title VII matters and cases assigned to Section attorneys and paralegals. She also worked with ELS, Division, and federal agency attorneys in coordinating the government's response to challenges to the constitutionality of disadvantaged business and federal contractor programs. In addition, she coordinated Title VI (nondiscrimination provisions of federal funding programs) with other branches of the Division and Department. Beginning in 1995, she served as a representative on the Section's hiring committee for experienced attorneys.

Since her retirement at the end of 2003, Ms. Martin has served as a volunteer on local high school and library projects, and has taught English as a second language to adults at the Dulin Methodist Church and the Literacy Council of Northern Virginia in Falls Church.

Gerald F. George was an attorney in the ELS of the Civil Rights Division from 1969–88. While in the Civil Rights Division, he was lead counsel on a number of state and local government "pattern and practice" suits, including suits addressing hiring and promotion practices in the police and fire departments of Los Angeles and San Francisco, fire departments in St. Louis and the twelve largest cities in New Jersey, state-wide police and fire employment in Louisiana, all city employment in the City of Memphis, and the State Police in Virginia and North Carolina. In 1988, he transferred to the Environment and Natural Resources Division and managed the Environmental Enforcement Section field office in San Francisco. He has been in private practice since 1995 and has specialized in environmental law.

Vivian B. Toler served in the ELS from 1971 until her retirement in 2007. For the vast majority of that time, she was the supervisor of a staff of paralegal specialists, formerly called Research Analysts. Ms. Toler either personally worked or supervised the work of her staff on every investigation or case handled by the Employment Section. The matters she worked on include the Las Vegas

gaming industry (which had no African American dealers), the motion picture industry (discrimination against African Americans in "behind the camera" jobs), and several cases against nationwide trucking companies (discrimination against African American applicants for desirable "over the road" jobs). She also provided important research support to the government's defense of federal affirmative action programs. Her responsibilities included analyzing applicant files; identifying the race of job applicants; interviewing witnesses; preparing statistical analysis to include standard deviations and correlation coefficients; preparing back pay calculations, which were used for settlement discussions or court proceedings; preparing trial exhibits; and testifying.

ENFORCEMENT AND THE FUTURE

William Yeomans joined the American University, Washington College of Law faculty in 2009. From 2006 until 2009, he served as Senator Edward M. Kennedy's Chief Counsel on the Senate Judiciary Committee. He has also been Legal Director of the Alliance for Justice and the first Director of Programs for the American Constitution Society, where he spearheaded the launch of its two publications: the *Harvard Law and Policy Review* and *Advance*. Prior to that, he spent twenty-six years at the DOJ where he litigated and supervised civil rights cases in the federal courts involving voting rights, school desegregation, employment discrimination, housing discrimination, hate crimes, police misconduct, abortion clinic violence, and human trafficking. He served as Deputy Assistant Attorney General, Chief of Staff, and acting Assistant Attorney General for Civil Rights.

Robert Libman was born and raised in Chicago. He obtained his undergraduate degree from Stanford University in 1985, where he graduated with distinction and was a member of Phi Beta Kappa and Omicron Delta Epsilon (Economics) honor societies. He obtained his law degree from Stanford Law School in 1988, where he graduated Order of the Coif (top ten percent of his class).

From 1988 to 1990, Mr. Libman served as law clerk to the Honorable Joyce Hens Green of the United States District Court for the District of Columbia. Mr. Libman began his career in civil rights litigation as a plaintiff, bringing a constitutional challenge to the United States DOJ's policy of suspicionless drug-testing of applicants for trial attorney positions in the Department's Civil Rights Division in *Libman v. Thornburg*.

From 1991 until 2004, Mr. Libman held a variety of positions in the ELS of the Civil Rights Division of the DOJ where he litigated a wide variety of cases under Title VII of the Civil Rights Act of 1964, including claims of employment discrimination on the basis of sex, race, national origin, and religion under both disparate treatment and disparate impact theories. Mr. Libman successfully tried a sex discrimination "failure to promote" case in *United States v. Hancock Count Board of Education*, No. 91-0149-W(S), 1993 WL 436490 (N.D. W. Va. Sept. 1, 1993); litigated and obtained a consent decree in the Civil Rights Division's first lawsuit alleging a pattern or practice of sexual harassment by a public employer in *United States v. McHenry County*, 1994 WL 447419 (N.D.

Ill. 1994); litigated and obtained a consent decree resolving claims of systemic racial and sexual harassment in *United States v. New Jersey Department of Corrections*, 246 F.3d 267 (3d Cir. 2001); and successfully argued the appeal in *United States v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478 (3d Cir. 1999), a case of first impression interpreting the "consistent with business necessity" standard under the disparate impact provisions of the Civil Rights Act of 1991. Mr. Libman trained trial attorneys in the Civil Rights Division and the U.S. EEOC on trial advocacy and case management and spoke frequently on behalf of the DOJ at national conferences of employer, employee, and stakeholder organizations regarding Title VII. In 2002, he was selected by the Civil Rights Division to be its sole representative to the DOJ's newly formed Employment Discrimination Task Force. Mr. Libman received numerous awards and commendations from the DOJ for his work as a Trial Attorney, Senior Trial Attorney, and Special Litigation Counsel in the ELS.

In 2004, Mr. Libman returned to Chicago to join the law firm of Miner, Barnhill & Galland, where he has been a partner since 2005 and has represented individual and class plaintiffs in a variety of civil rights and other public interest cases. He also represents and counsels individuals in negotiations over employment-related matters including employment contracts and severance agreements. Mr. Libman has served as co-counsel with the Mexican American Legal Defense & Education Fund's ("MALDEF") Chicago office in *Vergara v. City of Waukegan*, 590 F. Supp. 2d 1024 (N.D. Ill. 2008) representing a group of Latino and African-American residents in their First Amendment claims against the City of Waukegan and its Mayor and Chief of Police by alleging interference with their rights to protest what they believe to be the Police Department's racial profiling and discriminatory enforcement of various City ordinances. Mr. Libman has spent a large portion of his time at Miner, Barnhill & Galland representing several States in civil enforcement actions against dozens of pharmaceutical manufacturers alleging pricing fraud in violation of state consumer protection, Medicaid fraud, and false claims statutes. He recently tried two such cases on behalf of the Commonwealth of Kentucky and secured judgments for damages and civil penalties in excess of $46 million.

Aaron D. Schuham serves as Legislative Director for Americans United for Separation of Church and State, where he supervises legislative and policy activities with Congress and the Administration, and in all fifty states. From 1997 through 2003, Mr. Schuham served as a Trial Attorney, and later a Senior Trial Attorney, in the ELS of the Civil Rights Division. Mr. Schuham received his Sc.B. in Mathematics from Brown University and his J.D. from Stanford Law School. He served as a judicial law clerk to the Honorable Judith W. Rogers on the United States Court of Appeals for the District of Columbia Circuit.

John M. Gadzichowski currently serves as the Chief of the ELS of the DOJ's Civil Rights Division. Mr. Gadzichowski entered duty with the Department in July 1971 as an Attorney General's Honors Program trial attorney appointee assigned to ELS, and he has been continuously assigned to ELS since then. Mr. Gadzichowski has extensive experience in the development and prosecution

of Title VII cases. Throughout his career in ELS, he has personally developed, tried, and supervised numerous Title VII pattern or practice cases. Mr. Gadzichowski received his J.D. from Marquette University School of Law in May 1971.

Jocelyn Samuels has served as a Senior Counselor to the Assistant Attorney General for Civil Rights at the DOJ. In that capacity, she oversees the work of the Employment Litigation and Educational Opportunities Sections of the Civil Rights Division and spearheads interagency policy projects related to combating discrimination and promoting equality of opportunity in education and employment.

Prior to her tenure at the DOJ, Ms. Samuels was the Vice President for Education and Employment at the National Women's Law Center in Washington, D.C., where she oversaw an active litigation docket and engaged in legislative and policy advocacy to promote enforcement of Title VII and Title IX. Her prior experience also includes work as a Labor Counsel to Senator Edward M. Kennedy, then Ranking Member and subsequently Chair of the Senate Committee on Health, Education, Labor and Pensions, and as a senior policy attorney at the EEOC. Ms. Samuels has additional experience in the private sector and as a law clerk to a federal judge on the U.S. Court of Appeals for the Ninth Circuit.

Ms. Samuels received her law degree from Columbia University, where she was a Notes Editor of the *Columbia Law Review*, and her bachelor's degree from Middlebury College, where she graduated *magna cum laude* and was elected to *Phi Beta Kappa*.

Michael Selmi joined the George Washington University Law School faculty in 1996, after teaching at the University of North Carolina for two years. Previously, he litigated employment discrimination cases at the Lawyers' Committee for Civil Rights Under Law and the DOJ Civil Rights Division. He also served as a law clerk to Judge James R. Browning, then Chief Judge of the Ninth Circuit Court of Appeals. Professor Selmi teaches courses on employment law, employment discrimination, contracts, and civil rights legislation, and has also taught constitutional law. Professor Selmi has written extensively in the areas of employment discrimination, employment law, and constitutional law; his work often includes empirical analyses of litigation. He has co-authored casebooks involving employment law and civil rights. Professor Selmi worked on a number of Supreme Court cases, including the affirmative action cases involving the University of Michigan. Professor Selmi recently served as a visiting professor at Harvard Law School and has been a commentator for the *New York Times*, *Washington Post*, *Wall Street Journal*, NPR, and MSNBC.

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Employment Discrimination:

45 Years of Enforcement of Title VII of the Civil Rights Act of 1964

Welcome Remarks:

Overview of Title VII

BEGIN TRANSCRIPT

RICHARD UGELOW: My name is Richard Ugelow. I teach in the clinical program at the [Washington College of Law] ("WCL"). In my prior life, I was an attorney in the Employment Litigation Section ("ELS") of the Civil Rights Division [at the Department of Justice ("DOJ")]. Let me thank you all for coming today to celebrate and review forty-five years of enforcement of Title VII of the 1964 Civil Rights Act by the Department of Justice ("DOJ").[1] A special thank you to the Dean of the Law School, [Claudio] Grossman, who will be here later and to the [Program on Law & Government] who kindly sponsored today's program.

Title VII of the 1964 Civil Rights Act prohibits discrimination in employment on the basis of race, sex, religion, and national origin.[2] As originally enacted by Congress, judicial enforcement authority was the exclusive responsibility of the [DOJ]. Within the [DOJ], that authority was given to the Civil Rights Division and ultimately what became the Employment Section, the Federal Enforcement Section, and now today the [ELS].

Following the 1972 amendments to Title VII, which expanded the scope and coverage of Title VII, enforcement authority was divided between the Equal Employment Opportunity Commission ("EEOC") and the [DOJ].[3] The

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

2. 42 U.S.C. §§ 2000e–2000e-15 (2006).

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2006)).

EEOC was given enforcement authority against private sector employers and the [DOJ] responsibility against public sector employers. Today's program is devoted to the [DOJ]'s enforcement of Title VII.

In his recent State of the Union address, President Obama recognized the Civil Rights Division, and, in particular, he recognized the important work [performed by] the [ELS]. That work is indeed important and that's what makes today's program important as well.

The [ELS] litigated seminal employment discrimination cases and has a distinguished record of achievement. Several of those cases will be discussed today by the people who worked on them. The work of the Section, unfortunately, [has become] controversial in recent years—and not just in the last eight years. Politically charged terms such as: "affirmative action," "hiring goals," "hiring quotas," "lowering qualifications for employment," "racial preferences," and the like became public and part of the public discourse. The speakers today will discuss those terms. And if they don't, I hope the audience will ask questions about them.

Let me give you an overview of today's program. The first speaker will be my colleague, Susan Carle, who will provide an overview of Title VII. Professor Carle is also an alumnus of the Appellate Section of the Civil Rights Division. Following Professor Carle, Professor Vicki Schultz of Yale [Law School], and an alumna of the [ELS] will interview Dave Rose. Dave was the first chief of the [ELS] and a mentor and teacher to many of us. Dave will discuss the origins of the [ELS] and the creation of a litigation strategy to the development of Title VII law.

Following Professor Schultz's interview of [Mr. Rose], the first panel consisting of employment litigation attorneys that litigated the early Title VII cases will discuss those cases and their impact of desegregating jobs, industries, and unions in the United States. This panel will also discuss the Supreme Court's decision in *Griggs v. Duke Power Co*., which recognized the disparate impact theory of Title VII liability.[4] As we will see today, disparate impact litigation brought by the [DOJ] was the major vehicle for effecting workforce change.

The second panel will discuss the uniform guidelines on employee selection procedures which were developed following the *Griggs* decision and the cases brought to enforce Title VII against state and local governments, particularly police and fire departments. This panel includes former [ELS attorneys] and non-attorneys who were critical to the enforcement effort.

Finally, the last panel led by WCL Professor Bill Yeomans, also a Civil Rights Division alumnus and . . . my colleague here, will discuss the future of Title VII. This distinguished panel consists of former ELS attorneys including Aaron Schuham, Bob Liven, Professor Mike Selmi of George Washington University [Law School], and current ELS Chief John Gadzichowski. We are honored that Tom Perez, the current Assistant Attorney General for the Civil Rights Division will be our lunch time speaker.

I also want to note the presence of Jim Turner. Jim was the career Deputy Assistant Attorney General for the Civil Rights Division for more than thirty

4. 401 U.S. 424 (1971).

years. He served as the acting Assistant Attorney General for the Civil Rights Division when the position of the Assistant Attorney General was vacant. [I] believe, in that capacity [he] served as the longest Assistant Attorney General in the Civil Rights Division.

Finally, I want to recognize Loretta King, a WCL graduate, who succeeded Jim Turner as the career Deputy Assistant Attorney General for Civil Rights. If she's not here, she will be here later. I would like to mention two other [ELS] alumni, Ray Lohier, a recent alumnus of the Section, last week was recommended by Senator Schumer of New York to be nominated as a Judge on the United States Court of Appeals for the Second Circuit. Ray left ELS for the U.S. Attorney's Office in the Southern District of New York. And I might add that his wife is a clinical law professor at the City University of New York Law School.

The second person is David Lopez. David is awaiting Senate confirmation as General Counsel to the [EEOC]. He would've been here today had he been confirmed. He promised me a future visit to the law school.

I am going to try to be a good moderator, just [and] fair as Dave Rose taught me. One of my goals is to leave time for questions at the end of each segment. Since I know everyone on the panels and I know that they are never at a loss for words, I face a stiff challenge, but I will do my best. So let's begin with the history of Title VII with Professor Carle. Thank you very much.

SUSAN CARLE: Thank you, Richard. Before I start I just wanted to take the opportunity today to say how lucky I feel we are at Washington College of Law that Richard has joined us here. I first met him when I was a brand new lawyer in the Civil Rights Division longer ago than either of us wants to admit. And he was the Deputy Section Chief of the ELS and just a terrific person. He served as an informal mentor to a lot of junior people. Mike Selmi who will be here a little later was another contemporary of mine, and I think he would agree with me that Richard was a really inspiring role model in his fairness, and the care and precision that he put into his work. And so it's just wonderful that we have him here now.

So Richard asked me to discuss the legislative history of Title VII, I think particularly for the [benefit of the] students in the audience. Some of this is not for people who are the old timers here. You would have a lot to teach me so I am really pitching this to students. And he wanted me to keep it brief and he gave me a very long list of questions he thought it was essential that I cover. So I will try to do both things.

Title VII is, of course, part of a very important statute of the Civil Rights Act of 1964, which had a number of titles addressing discrimination in a number of areas including public accommodations, education, federally funded programs, and employment. And as I was putting together my thoughts here I just could not help but [think] about the parallels between 1964 and the situation we face now with healthcare reform, which also, of course, is about a human rights issue and involves issues of race, class, gender, equality, and equity. So at the end of my remarks, I want to just very briefly allude to those parallels.

But first, to take up Richard's list of long questions, his first question was: what led to the enactment of the 1964 Civil Rights Act? And of course, the

Civil Rights Act—from my perspective—was very clearly the product of a social movement. A social movement that was very visible in the 1950's leading to and then responding to the U.S. Supreme Court's decision in *Brown v. Board of Education* and the outburst of direct action including nonviolent civil disobedience that came as a response to the lack of progress after *Brown* in dismantling Jim Crow's segregation in all its forms.[5] [T]hose facts are really imbedded in our national consciousness. But what's not so deeply imbedded in historical memory is the fact that the Civil Rights movement has much, much longer roots, and since I write about that, I always want to focus on that.

Title VII is really the result of activity and activism pushing for civil rights laws that extended all the way back into the nineteenth century. The first statute to prohibit discrimination on the basis of race and religion in private employment was the Ives-Quinn Act of 1945 in New York State.[6] There were also efforts at the federal level in the '40s and '50s to use the President's executive order power to enforce prohibitions on discrimination in businesses receiving federal contracts. And the first of those executive orders was brought about in World War II as a result of the great labor leader A. Philip Randolph's threat to President Roosevelt to call a massive march on Washington to protest discrimination in the defense industry while black soldiers were going off to fight and lose their lives in the war.

In 1957, the Eisenhower administration attempted to pass a very weak, mild civil rights measure—but that attempt was defeated by the opposition of a coalition of southern conservative Democrats along with conservative Republicans. Then, of course, in the 1960 presidential race between Kennedy and Nixon, civil rights became an important campaign issue. Kennedy campaigned very hard for the African American vote by professing a strong commitment to passing civil rights legislation, but once in office, he was criticized for seeming not to be in a particular hurry to prioritize civil rights legislation over the other reform legislation that he was pushing. And historians say that Kennedy was afraid that the coalition of southern Democrats and conservative Republicans would defeat this measure and jeopardize the rest of his legislative agenda. But when the civil rights crisis in Birmingham, Alabama arose in the spring of 1963 where black demonstrators, including many high school students and even some elementary school children, were marching for civil rights in defiance of a city ban and members of the police and fire departments attacked the marchers with dogs and fire hoses knocking people over, tearing off their clothes, and the TV images were broadcast around the country and around the world, Kennedy at that point realized that he really did need to go to Congress and get working on legislative action.

[T]he legislative history of Title VII, which I take here mostly from a book called *The Longest Debate* by Charles and Barbara Whalen—which is a wonderful book; so my account may conflict with others including people in this room who know more than I do about all of this.[7] So the administration first supported a bill that was introduced in the House by the chair of the Judiciary

5. 347 U.S. 483 (1955).

6. N.Y. Exec. Law § 290 (McKinney 2002).

7. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE (1985).

Committee, Manny Celler, a liberal Jewish Democrat from New York City along with Bill McCulloch, a moderate Republican from a rural district in Ohio with a very small African American population but a strong abolitionist tradition. McCulloch believed in civil rights as a matter of principle. The administration had promised McCulloch and the moderate Republicans to support a very moderate bill. But Manny Celler's strategy on the Judiciary Committee was to load the bill up with as many strengthening amendments as possible so that when the Republicans eventually extracted compromises to the bill on the floor it would still be a strong bill.

So his proposal copied the structure of the Ives-Quinn Act in New York State, and it created the EEOC as an agency like the National Labor Relations Board. It would have a prosecutorial arm and an adjudicatory arm with authority to issue cease and desist orders. So by the time the bill was reported out of committee, McCulloch and the moderate Republicans no longer supported it and Celler had put the Kennedy administration in the embarrassing position of being against the bill the civil rights community supported and trying in the background to broker an agreement that would keep the Republicans on board. But eventually the bill that was reported out and sent to the House Rules Committee was stronger than the initial administration bill. And, in the Rules Committee, it was promptly blocked by the conservative Republican, and former Judge, Howard Ward Smith of Virginia, who was the leader of the Conservative Coalition, an avid segregationist, and a powerhouse in Congress notorious for his ability to block all kinds of progressive legislation, so things did not look good at that point.

Then, in late 1963, the tragedy of President Kennedy's assassination changed the dynamics in Congress, and Lyndon Johnson, [upon] assuming the presidency, used the memory of Kennedy and constructed an image of his legacy as a strong supporter of civil rights and began to call for moving the bill in honor of Kennedy's memory and legacy. And Johnson, of course, had voted against the Civil Rights Bill in 1957 and was a segregationist himself at one point, but he had become convinced of the need for the bill. And being a brilliant legislative strategist, he put his authority behind [it and] push[ed] for it. [T]hrough procedural maneuvering the bill got to the House floor and at this point, Judge Smith, who was still seeking to defeat the bill, decided to offer an amendment including sex as one of the prohibited bases for discrimination. [W]hen he made this amendment he was literally met with laughter and guffaw from the floor as if this was a ridiculous idea. So you often hear people referring to the inclusion of sex in Title VII as a legislative accident.

But [from another perspective] the idea was not so ridiculous. The Equal Pay Act[8] had passed just the year before, and there was also a social movement perspective or story underlying the inclusion of sex in Title VII. It was supported by the five congresswomen in the House; at that time both Republicans and Democrats, strongly supported by the National Women's Party. And ironically enough, Manny Celler opposed the amendment because he was afraid it would lead to the defeat of his legislation.

8. 29 U.S.C. § 206(d)(3) (2006). The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act.

So there are two ways of looking at this. One is the inside story, the cynical attempt to defeat the bill. And another is a social movement story—which is thinking about how the women's rights movement seized on the opportunity to piggyback on the wave of support for civil rights to add their issue to the civil rights agenda as well. [I]n the end the bill passed the House overwhelmingly by a vote of 280 to 130 in a very strong bipartisan effort. But everyone knew the Senate was going to be a very different story and there, and this will sound familiar, the Democrats did not have a cloture proof supermajority—[at the] time that required sixty-seven votes. It's been changed since then. And in the case of the Civil Rights Act, much more so than even the healthcare issue today, not all Democrats supported the bill.

So the Senate Judiciary Committee had the bill for a long time, was ignoring it, and the Senate Majority Leader Mike Mansfield from Montana assigned the bill handling to the Democratic whip who was Hubert Humphrey, the Senator from Minnesota who had been fighting for strong civil rights legislation since 1948 and had big political ambitions to stake himself out as a liberal Democrat who could get things done, and, of course, became Johnson's vice president in 1965. And Humphrey was opposed by the Democratic opposition led by Senator Richard Russell of Georgia who directed the southern voting block. But Humphrey worked assiduously to get the votes and worked on cultivating the ego of the moderate Republican minority leader Everett Dirksen from Illinois and telling Dirksen that his help on this bill would be the source of his historical legacy.

So together they avoided the bill going to the Judiciary Committee where it would have been sunk. And Dirksen, at the same time, was using his strategic position to negotiate for compromises to the bill. Then, of course, the Senate filibuster began—and this was the longest filibuster in the Senate's history—[and] it lasted two and a half months [w]ith proceedings [that] continued well into the night. Our own alum Senator Robert Byrd of West Virginia was one of the more notorious participants in the filibuster, though I believe he later said he regretted his role in this. He gave fourteen hours of speeches on the Senate floor. [A]t the same time, Dirksen was trying to maneuver behind the scenes to change the bill, but Johnson was resisting him. And the public perception of what was going on in the Senate began to become more and more negative. So that public perception, the pressure from the public on the Senators engaging in the filibuster, and the legislative handling skills by the bill supporters in the Senate eventually led to the votes for closure being there–seventy-one votes–four more than needed, and, of course, this just got the bill up for discussion on the merits in the Senate.

And at this point, two sets of compromises called the Dirksen-Mansfield Compromises in the form of a substitute bill modified some aspects of the bill. And one of the things that the substitute amendments did was to give state and local governments more authority to enforce the bill to placate the Republican's federalism concerns. But the most significant compromise in the bill was to strip enforcement authority from the agency that was created under the statute, the EEOC, taking away its adjudicatory power, its power to issue cease and desist orders so that the EEOC only had authority to investigate and attempt to conciliate complaints, but had no litigation authority in the

courts, so that after the EEOC was done with its efforts the complainants were essentially on their own in terms of trying to seek enforcement of the bill's provisions in court. [T]he only government litigation authority, of course, was granted to the Department of Justice in Section 707 of the Act and that power was limited to cases in which Justice detected a pattern or practice of discrimination.[9] And as I've discussed in my course with my students, that's why you see the early government-litigated cases against private employers as pattern or practice cases.

[S]upporters [of the bill] also got some important things and one of them, I think, was the attorneys' fees provision which allowed private litigants to get their attorney's fees if they prevailed against a defendant in a case. So the passage of Title VII was a huge victory, but there were obviously significant weaknesses in the legislation and the passage was by a very large margin, seventy-three to twenty-seven with forty-six Democrats in favor, twenty-one against, and twenty-seven Republicans in favor of the bill. Richard [has] already talked a little bit about the 1972 amendments. There were efforts to fix some of the weaknesses in the bill that went on for some years unsuccessfully, and then in 1972 Congress was able to fix Title VII. First of all by authorizing the EEOC, as well as individuals, to litigate in federal court and extending coverage of Title VII to the state and local employees and strengthening the coverage of federal employees. And, of course, as Richard has already mentioned, the 1972 Act gave the DOJ the power to sue state and local employers for employment discrimination and it did a few other things as well that I won't go into.

But it occurs to me that when we look back on this [and compare it] to our situation today, we see how long it really took, and how inadequate or imperfect attempts and successes were, and how some of them, at least, were fixed later—which I think are comforting thoughts when we think about our next big super statute initiative of today. But also there [are] really some significant differences and those include the strong bipartisanship that was necessary to enact Title VII and the Civil Rights Act, the coalition building across the aisle, the idea of voting your conscience or voting on principle, and also the huge role of a President with enormous legislative experience and really tough, wily, hardball political skills.

So when we look back at passage of Title VII forty-five years ago from our current perspective and our concern about today's legislative log jams, I think we can even better appreciate the importance, and the enormous accomplishment of the 1964 Civil Rights Act, and also the key need for having a working political system that allows us, as a country, to take . . . and make progress on pressing human rights issues. Thank you.

RICHARD UGELOW: Thank you so much Susan. I wish I could take your course. It's really a pleasure to welcome back Vicki Shultz to the law school. She was here about . . . two years ago, and [she] spoke at a faculty lunch on Friday and it was just wonderful. And she also, the next day, spoke at the fiftieth anniversary of the Civil Rights Division event held at another law school in town. Vicki is the Ford Foundation Professor of Law

9. 42 U.S.C. § 2000e-6 (2006).

at Yale University Law School. Her areas of expertise include employment discrimination, civil procedure, feminism in the law, and gender and work. I'm not going to read her list of publications because we'll be here until tomorrow. Sitting next to her is Dave Rose. I mentioned Dave earlier in my remarks. Dave started in the Department of Justice in what year?

DAVE ROSE: 1956.

RICHARD UGELOW: 1956 in the Civil Division of the Civil Rights Division. From 1969 to 1987 he was Chief of the ELS, and he'll tell you how he got to that position. And at various points he was the Special Assistant to the Attorney General for Civil Rights. Some of the cases that Dave worked on include *Griggs v. Duke Power* which I mentioned and we'll hear about, *Local 189, United Papermakers v. [United States]*,[10] *Contractors Ass'n [of] Eastern Pennsylvania*,[11] which involved the Philadelphia Plan,[12]—which I hope we'll be able to touch upon—*Albemarle Paper v. Moody*,[13] *[EEOC] v. AT&T*,[14] and *Bazemore v. Friday*;[15] and that's only the beginning of the list for Dave. I'm going to turn this over to Vicki because you don't want to hear me talk about Dave when Dave can talk about Dave much better than any of us can. So thank you very much.

VICKI SCHULTZ: Thank you so much, Richard. I can't tell you how honored I feel to be here. It's one of the great honors of my life to be able to interview Dave Rose today—one of my greatest mentors and someone whose belief in me as a young person has really stuck with me and empowered me throughout my life. So with that, let's start with your transition over from the Civil Division. You were recruited to work in the Civil Rights Division in 1967 by John Doar, and hired as the Special Assistant to the Attorney General, then Ramsey Clark, and charged with coordinating the efforts of the federal agencies under Title VI. You did a lot of really important employment cases during that period, and I would just love to hear you talk about one or more of them.

DAVE ROSE: I [was initially recruited] by Bob Bowen who [was] a contemporary of mine but died a number of years ago. [He was] a very

10. 416 F.2d 980 (5th Cir. 1969).

11. Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 163 (3d Cir. 1971).

12. *See* Exec. Order No. 11246, § 202(1), 30 Fed. Reg. 12,319 (1965), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967), 3 C.F.R. 406 (1969), *reprinted as amended in* 42 U.S.C. § 2000e note (2006) ("[Government] contractor[s] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."); *see also Contractors Ass'n of E. Pa.*, 442 F.2d at 163 (observing that the "Philadelphia Plan" was the Secretary of Labor's implementation of Executive Order No. 11246 & 11375 as to the five-county Philadelphia area).

13. 422 U.S. 405 (1975).

14. 36 F. Supp. 2d 994 (S.D. Ohio 1998).

15. 478 U.S. 385 (1986).

important person in the Civil Rights Division and the person who recommended to John Doar that I be selected for some position. He tried once a couple of years before [1967], maybe in [1966], I'm not sure, the second time there was a position and it was a super grade. I had been a GS-15 at the advanced age of 34 or something like that. I had been in the Appellate Section for several years and argued a number of cases and those cases led to a case involving *mandamus* and that led to the Labor Department coming to Justice and asking us to represent them in contractor cases involving [the Office of Federal Contract Compliance Programs]— the executive order program.

In any event, I got selected. I was told my job description was Title VI, which most of you know does not involve employment matters and expressly disclaims coverage of employment matters although the ultimate interpretation [of the] law sort of contradicts that. But whatever it was, Title VI was not employment. But there were two agendas for the Civil Rights Division. The stated objective was the coordination provision, but John Doar had told me that what he really wanted to do was to bring some employment cases. So I did both, even though that wasn't the job description, and I had a very small group of two lawyers working for me when I was a coordinator—and Dave Martin was [t]here. He is here and was one of the two. In any event, I did a lot of different things, and I did do a number of Title VI [cases] but I also got involved with the *Papermakers* case because that involved the threatened strike by the white union against Crown Zellerbach in Bogalusa, Louisiana. And I had worked defending the decision of the Labor Department which Crown Zellerbach had tried to overturn so I was the logical person to deal with the threatened strike. And the long and short of it was one of the most exciting days I had in my career.

There was a threatened strike. We talked about filing before the first day of business in January because that was when the threatened strike was. I drafted the complaint. I showed it to John Doar. I brought it upstairs, and I forget who signed it, but I brought it upstairs and got Ramsey Clark to sign it, got on the airplane and flew to New Orleans. [W]e had called and told the Judge we were coming, and he said he wanted to see us [and] we notified the Papermakers' lawyer who was also from Washington. We met with him that evening and talked about the case. We had the argument the next day. Judge Heebe was not known for making quick decisions, but he was confronted with it and as he was about to sign the order, the [Temporary Restraining Order] ("TRO"), he said, "I've never enjoined the union before," and I said something like, "Well you've never had a strike that was based on preservation of segregation in violation of Title VII before either" and he said, "I guess that's right." He signed it and we got it entered. Getting the TRO was the whole thing. We had a formal trial, I think, a couple of months later that lasted a day or two. We got a preliminary injunction and ultimately a permanent injunction and that case advocated the disparate impact theory partly because the employer wanted to do the right thing and partly because it was the logical thing to do. And no I didn't invent the disparate impact theory. It was the [*Harvard*] *Law Review* article by Cooper and Sobol, I believe, a year or two before,

that laid it out, and we lawyers heard at least about the law review articles.[16]

VICKI SCHULTZ: [That's] comforting.

DAVE ROSE: And I had figured out what the theory was by the time I got the job. So anyhow, that one worked very well, [and it was] very exciting, . . . because I was doing the Executive Order stuff [and] it was a bridge to Title VII, but it was a case that did both a Title VI-like contract and the purposes of Title VII, but we filed it under Title VII.

VICKI SCHULTZ: Okay, so Mr. Doar wanted you to focus on employment and [then] the Division files six employment suits in 1967, twenty-six more in 1968, and establishes very important precedents like *Local 189 of the United Paper Workers* and *Local 53 v. Vogler*[17] and there are a couple of other really important cases that establish the disparate impact principle. And you say in your *Vanderbilt Law Review* article[18]— which I recommend if you haven't read it—these cases are very important in establishing this principle by the time *Griggs v. Duke Power* goes up to the Supreme Court. So I wanted you to talk a little bit about that and talk about your involvement and the Division's involvement in *Griggs v. Duke Power*.

DAVE ROSE: What I remember about the *Griggs* case was that Dennis Gordon and Frank Petramalo—Frank is here, I don't know if Dennis is here or not—had written a memo to me when the Court of Appeals decision came down, or they visited me and said the government ought to be supporting the petition. And I said, "[w]ell write something" and that was my normal reaction. So they did, and I liked it, and it made sense, and so I talked to Jerry Leonard, and I gave him the memo. Jerry Leonard, the Assistant Attorney General, was, on the whole, a very good boss because he tended to look at your work and try to make a decision on it and do it promptly in contrast to a number of other Assistant Attorney Generals that we've had. So I gave him the paper and I didn't hear anything. I may have asked him about it once or twice, but he didn't tell me anything.

So, it sat there on his desk or some place and nothing happened until April, or something like that, [and] the Supreme Court issued an order requesting participation of the government. And so we had the petition ready, Jerry took it out, looked at it, we talked about it for a few minutes, he signed it, brought it up to the Solicitor General's Office, and we sued.

VICKI SCHULZ: I'm going to switch to affirmative action now. So affirmative action has a long history and it begins with a series of federal

16. George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

17. Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

18. David Rose, *Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121 (1989).

executive orders which leads to President Kennedy's 1961 Executive Order 10,925, the precursor to 11,246, commanding federal contractors to take affirmative action to ensure equal employment opportunities. [19]

So the executive order is given teeth and tested by the Philadelphia Plan. So, I think you were still Special Assistant [to the Attorney General] then. Could you tell us about your involvement?

DAVE ROSE: I'm not sure. No, I think I was the Chief of the Section although if you read the case you can't [tell]; I've re-read it recently and I had a title that was not Section Chief, although I'm sure I was. I became Section Chief in September [1969] when Jerry Leonard and Dave Norman decided that we should have functional sections rather than geographical ones. So I was clearly the Section Chief. I'm not sure how that title got appended to the decision, but I did argue it.

In any event, we had some fans in the Labor Department by then because of the *Papermakers* case, and I believe the Solicitor of Labor invited us to defend them again, and we did. It wasn't a particularly difficult case to win. I believe that Judge Higginbotham in the District Court was the only African American judge and a very smart man. And drawing him was either very great good fortune or somebody was pulling some wires, but I believe it was just luck. In any event we had him. I was delighted to see him. He had us in chambers and he had no problems with the plan and the contractors appealed of course. That was not a difficult piece of litigation but was important because there was a series of other regional affirmative actions plans like the Philadelphia Plan that helped a little bit to desegregate those unions. They remained very strong, and very resistant, and primarily white. And I really have not looked at any demographics for those unions in recent years so I don't really know how much good we did but we tried and got some good law in.

VICKI SCHULTZ: And was the Third Circuit precedent that upheld the Philadelphia Plan important to the Section in later being able to incorporate goals and time tables into the relief?

DAVE ROSE: Yes. It gave me enough intestinal fortitude to use goals and it made it hard for anybody to say no because we'd publicly taken that position. Thank you, that's a very important transition. I had been very, very careful about pushing that envelope too far, and maybe I was overly conservative in that regard.

VICKI SCHULTZ: So in [1969] you become Chief of the Section, which is now reorganized into the functional reorganization. And the next five or six years [after this reorganization] are an extraordinarily productive time in which the Section successfully prosecutes path-breaking pattern or practice cases against several major industries including trucking and the steel industries. Could you tell us a little bit about the trucking lawsuits and how this early industry-wide litigation influenced the climate of enforcement for Title VII?

19. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961).

DAVE ROSE: The first trucking case I had was *Roadway Express*,[20] and I learned there that there were city drivers and over-the-road drivers and, in some parts of the south, the city drivers were black and the over-the-road drivers were white. But in some parts of the south, where the pay was very good, the whites had both jobs. Places like Memphis had a number of black drivers but almost all of them had been hired before '57 or '58; so they were sort of merged into seniority lists. In any event, *Roadway* was a suit we tried to get—and did get—a preliminary injunction in Cleveland. We prevailed in the lawsuit. The numbers were thousands and thousands of white drivers and zero or, almost zero, black over-the-road drivers. One didn't have to be a whiz at math to figure out what was going on. And it was somewhat akin to the voting cases. I mean it was an unspoken rule, but it was almost universally followed by the interstate carriers. So we had one trucking case. We could've had as many trucking cases as we did, and we brought several, and then we decided to [go] amass [the] rest of the major companies in one suit.

Bob Moore, who is not here, was doing the steel industry and had the case against U.S. Steel,[21] and he had, I think, proposed doing it, and that was a much smaller number of employers, a handful of steel makers—the national case—and I think I took his idea, but I'm not positive of that. So those are the only national cases that we had. The law had been changed and we retained authority to bring new suits through '74 under the '72 Act, but we were being put out of the private sector business. And that was disappointing for me; and Vicky and I think that was at least, in part, a mistake. But I do think it would've been a bit much to have [DOJ] do all of the pattern [or] practice cases, but I don't think it was necessarily bad that EEOC could do it, but I think it was a mistake to put us, the Justice Department, out of business in that area.

Clarence Mitchell was the long-time sponsor of the Civil Rights Act and a very great man, but he had worked for the War Labor Relations Board during World War II, I believe, and therefore, his model [was] the NLRB and [a policy of] administrative review. So what we got in Title VII, [as] previously explained, was a dual system—a sort of mixture.

VICKI SCHULTZ: So I'm going to skip over some really important cases against police and fire departments and state agencies because I know that's going to be the subject of a panel later this afternoon. And I would like to skip to, I think, the late '70s. Now, when I joined the Section, which was in 1983, I would hear Section lawyers say that at some point prior to that time, Section lawyers had "rolled like Sherman through the suburbs." So, I was just wondering if you could tell us about how the emphasis on suing suburban government employers such as the Chicago and Detroit suburbs or even the St. Louis or Houston suburban school districts developed, and whether you think the Section's suburban initiative was successful?

20. United States v. Roadway Exp., Inc. 457 F.2d. 854 (6th Cir. 1972).

21. United States v. U.S. Steel Corp., 520 F.2d 1043 (5th Cir. 1975).

DAVE ROSE: Well, let's start with the word Cicero, and not the person, but the town that is adjacent to Chicago and you have the answer.[22] Cicero had a resident requirement and Cicero kept out black residents. So you had to be a resident to be a municipal worker and no black residents allowed means no black employees. Anyhow, I was asked about the *Cicero* case by somebody who brought the housing case, Sandy Ross, and I saw him in the hall one day and he said, "Dave, I got a question for you" and I sa[id], "What?" He said, "What do you think about having a Title VII count against Cicero?" And I said, "I think that's a good idea." Bill Yeomans is here. I think he worked on the *Cicero* case, and he argued once, I remember once to my annoyance, (laughter) not because it was you but because I wasn't given the assignment in the Court of Appeals.

BILL YEOMANS: As I recall, you came along.

DAVE ROSE: I did. (chuckles) I felt much better after you spoke than I did before.

VICKI SCHULTZ: Tell us what those cases were about for people who may not know?

DAVE ROSE: Cicero is the exemplar [because] you've got one side of the street [that] is Cicero and the other side of the street [that] is Chicago. And the side that's Chicago is black and everything, I guess, [that's] to the east is white. So we learned quickly after the *Cicero* case that there were a heck of a lot of other towns that had adopted residency requirements in the '50s or the early '60s and they were all around Chicago. All of Cicero's neighbors had—all of them is a little bit strong, but most of them had—adopted the same rule and the closest thing to Cicero in the Cleveland area is Parma, Ohio, also a city in Sicily.[23] So we went there and we found them springing up all over the place so we had a whole group of cases in Illinois, not as many in Ohio, and one in East Haven—near New Haven, I believe.[24] So, those cases were almost cookie cutters; they didn't involve a lot of intellectual resources but persistence, because the mayors were willing to settle those cases because they did not want to lose the next election.

So when I left the Justice Department, there were a whole bunch of cities that hadn't been sued by [the DOJ] and so the Rose Law Firm and ultimately Rose & Rose brought a bunch of those. And I have one going right now. There's [a case] called *NAACP v. North Hudson Regional Fire & Rescue* which has hired one black fire fighter out of about 300, and that person was hired because we had brought a suit against North Bergen and he was hired as part of the settlement of the suit against North Bergen.[25] And I think the legal [counsel] was the Justice Department.

22. United States v. Town of Cicero, 786 F.2d 331 (1986).
23. NAACP v. City of Parma, 616 F.2d 513 (6th Cir. 1981).
24. NAACP v. Town of East Haven, 998 F. Supp. 176 (D. Conn. 1998).
25. 707 F. Supp. 2d 520 (D.N.J. 2010).

VICKI SCHULTZ: Wow. Okay. There's so much I'd love to ask you but we don't have all day so I'll try to skip ahead here, sadly. [S]o skipping to the early 1980s, Assistant Attorney General Brad Reynolds argues for and seizes on passage of dictum in the *Stotts*[26] case to support the idea that Section 706(g) of Title VII prohibits the award of any race-conscious relief to anyone who's not proven to be an individual victim of discrimination.[27] [T]hen relying on this misreading of *Stotts*, the Section takes the position—or Mr. Reynolds does—that the government's fifty-one consent decrees are contrary to Title VII. So, looking back on it in hindsight, did the Reagan administration represent a turning point in the Division's history, one that set it on a road to a future, which is now our present, in which time honored understandings of civil rights have been undermined in your view?

DAVE ROSE: Well, I think it was an effort in that direction. I don't think it had that result. We remember Chuck Cooper, and Mike Carten, and Brad Reynolds had no notions of that kind when he came in and for the first couple of years w[ere] bringing the same kinds of suits that we always brought. But in the later part of the Reagan years—I call them zealots but that's a little derogatory—but people who had very strong views on that began to become important people in [DOJ], and Cooper was Brad's first assistant and then became an Assistant Attorney General himself. A very smart guy, a very ambitious guy, but his views and mine were not the same.

So the late '80s was when I left and the two or three years before that the job had become very uncomfortable for me. I'd had thirty years of service. I stayed about a year and a half longer to see some of the suburban litigation programs through. That reading of Title [VII] is not correct and was not; I don't think it has become law.

VICKI SCHULTZ: No, it's repudiated by the Supreme Court in the [*Local 28*] case.[28]

DAVE ROSE: Right. Doug Heron [is] here, and I'm very happy to see him. And we talk from time to time, and I believe you're going to be hearing from him in the near future and I've got to talk about the case with Frank Johnson against the State of Alabama. I did that case before the '72 amendments became effective.[29] And we had a unique theory which I think was mine but I'm not sure. Anyhow there was a provision attached to the receipt of federal funds from [the Committee on Health, Education, and Welfare] which required all the government programs to be nondiscriminatory. And, of course, Alabama had not signed that contract, or they may have signed it but they didn't enforce it. So we brought a case based on that theory. The passage of the '72 Act was imminent, so it wasn't a secret to Frank Johnson, but he took our complaint

26. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

27. 42 U.S.C. § 1981a(b)(2) (2006).

28. Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

29. Civil Rights Act of 1964, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000(e)-(e-17)).

and acted on it before the enactment of the '72 Act and that was another sort of exciting day to fly down to Montgomery and file a case. But he was delighted to see a representative of [DOJ] there.

VICKI SCHULTZ: Wonderful. Okay, so I'm going to turn to a few sort of broader questions about the work of the Section now. One thing that I read in Brian Landsberg's excellent book *Enforcing Civil Rights*[30] is that John Doar began training Civil Rights Division lawyers in what he called the immersion method, in which lawyers were expected to know everything there is to know about federal law, all the precedents, all the local customs, and especially all the facts digging very deep as we conducted our own investigations. And it seemed to me that you were training lawyers in this same method when I joined the Section many, many years ago. So I wanted to ask if you self-consciously set out to train lawyers in the Section in that way?

DAVE ROSE: Well, I did because what John Doar was doing and what the Civil Rights Division was doing was really almost unheard of for lawyers. We, John first, but I figured out what the Division did, and I thought it was exactly the right thing to do. So yes, we tried to train because there's no better way to find the facts than to talk to the people who are harmed, many of whom were afraid to act by themselves, and talk to the employer also if you can to get both sides and get the information you need to decide whether you've got a lawsuit. That's very extraordinary. That's a lesson, I believe, that our friends at EEOC had not learned. I'm not saying none of them had learned it, but that, I think, is one of the strengths of the Division and certainly it was one of the strengths of the Employment Section. Richard's getting very uncomfortable.

RICHARD UGELOW: Okay, Vicki has one more question.

VICKI SCHULTZ: All right, since I only have one more it's hard to choose, but as a workplace the Section was, for me, hands down the best place I've ever worked. Things weren't always perfect all the time, but we were reasonably well integrated along race, sex, age lines. We had wonderful leadership in which lawyers got the help they needed but also had some autonomy, and we had an amazing esprit de corps where everyone worked hard but also played hard together. So, I guess, it seems to me that the Section was a model of the kind of equality that we wanted other employers to create. And I think probably everyone here would be interested in knowing how you created such a wonderful, welcoming, and model workplace?

DAVE ROSE: Well, I don't think I created it. I think the people who came to work for us were an exceptional group. We had an embarrassment of riches in terms of able people willing to work hard and doing something important. And probably the easiest time was the first five or ten years; easiest not physically or mentally, but easiest to do. But once the attitude was established,

30. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE (1997).

I think it is somewhat self-perpetuating because when a new lawyer came in I'd typically send him or her off with an experienced lawyer to work on an investigation, or something of that kind, and to see and experience what we were doing. And so I didn't create it. We were fortunate to have a time when a lot of intelligent people wanted some change made. The change is slow—very, very slow; embarrassing[ly] slow; was and is. There was dramatic change and things are [continuing to change]—I never thought I'd see a black president in my lifetime. I've got to say, not due to us, that the fact that we've had it shows that a lot of progress has been made, but some of the traditions are very, very firmly in place and very hard to detect and overcome. So I don't think the battle's won by any means, but I think that what the Section did was something we all can be very proud of.

END TRANSCRIPT

Employment Discrimination:

45 Years of Enforcement of Title VII of the Civil Rights Act of 1964

ELS Enforcement 1965–1974

BEGIN TRANSCRIPT

RICHARD UGELOW: We have a great panel to discuss the early cases brought by the Section, and Dave's interview is a nice segue to this panel. I will introduce the moderator, who is Joel Contreras, [w]ho will then introduce the panel. And I would like two things: one, everybody should use the microphone; and two, we will try to leave a few minutes for questions at the end, okay?

[Joel] has a distinguished record in employment discrimination litigation, and today he is an administrative law judge with the State of California, so Joel?

JOEL CONTRERAS: I would like to begin by pointing out that when President Lyndon Baines Johnson signed the Civil Rights Act of 1964,[1] he had present with him people that had worked long years and he gave out pens: Clarence Mitchell; Whitney Young; Roy Wilkins; Ed Randolph, who headed the Porters—Pullman Porters—for many, many years; and Martin Luther King, Jr.

In his remarks, [President Johnson] specifically stated, "It provides for the national authority to step in when others cannot or will not do the job. . . . [W]e have come now for a time of testing. We must not fail. Let us close the springs of racial poison."[2]

He did not know—and we did not know at that time—how long this time of testing would endure. That time of testing during these early years, litigation of Title VII, continues. What we realize now is that there is an ebb and a flow to it. When the opportunity presents itself, you have to seize that opportunity and make [the] most use of the resources and the time afforded; that time came to us in the early years—1965 to 1974. In one other

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

2. Radio and Television Remarks Upon Signing the Civil Rights Bill, 1 Pub. Papers 843–44 (Jul. 2, 1964).

footnote I would like to mention, since I am from California, at this point was in the vote on cloture, there was a first-term Senator from California, Clair Engle. Unfortunately, Senator Engle had suffered brain cancer

and had surgery in April of 1964. He was unable to speak, but he was present in the Senate chamber for the vote on cloture. When his name was called, he made a gesture which was recorded as "aye," and his "aye" vote was part of historic vote for cloture. So we remember him, among others, who are able to step forward and provide these opportunities.

Starting our panel discussion this morning is Frank Petramalo, Jr., a 1969 graduate of Georgetown University Law Center. He now represents approximately 1,800 thoroughbred horse owners and trainers who race at Colonial Downs in New Kent, Virginia. Should you need that assistance to recoup your retirement losses, Frank is available for consultation.

FRANK PETRAMALO: Let me start by saying I have several horses that are for sale if anybody would like to see afterwards. But I would like to talk about the first five years' worth of litigation by the Employment Section; probably from [19]65 to 1970. It was not technically the Employment Section until the later part of [19]69.

But in the first five years, the [Department of Justice] ("DOJ") brought a number of lawsuits against building trades unions.[3] And by building trades unions I mean the electrical workers, plumbers, sheet metal workers, ironworkers, et cetera, who work on large commercial structures, not homes. [F]or example, building a law school like this would include operating engineers, ironworkers putting up the structural steel, the plumbers and sheet metal people putting in the air conditioning and the water, and of course the electricians.

Now, the government looked at those unions as targets for a couple reasons; one, in those days, [19]65 to [19]70, the urban areas in the country were highly organized by unions and had large minority populations, and the jobs in the unionized construction sector were very high paying.

Now, the other factor is the inexorable zero. Those construction unions were virtually all white. Dave mentioned the Philadelphia Plan.[4] In the City of Philadelphia, and the area around it, about thirty percent of that population was black. Only one percent of the membership in about five or six unions that did all the work on construction were black, so that was what it looked like in the period from [19]65 to [19]70.

So the [DOJ] brought suits against isolated local unions in various cities like New York and in the Midwest—Indianapolis, Cincinnati, St. Louis, East St.

3. *See* United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36, 280 F. Supp. 719 (E.D. Mo. 1968), *rev'd*, 416 F.2d 123 (8th Cir. 1969); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

4. *See* Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 163–64 (3d Cir. 1971) (explaining that the Philadelphia plan was introduced to force the ironworkers, plumbers, pipefitters, steamfitters, sheet metal workers, electrical workers, and elevator construction workers to abide by the Department of Labor's affirmative action mandate).

Louis—and even in places that you would not expect, like Las Vegas, which had a small minority population.[5] But it soon evolved into taking a more broad-based approach rather than suing an odd union here or there.

So what we did was [to] start moving city by city to attack all of the building trades in a particular city; one of the first ones that we undertook was in Seattle. Seattle at that time had a population [that was] about seven or eight percent black, and this kind of explains a little also as to how the [DOJ] often got into suits. In Seattle, there were a number of large public projects underway, including a hospital and a community college, and I think maybe even the predecessor of the current football stadium out there, the Kingdome, or whatever it was called.

Anyway, a number of community organizations picketed those jobsites because there were no minorities working on the jobsites, and it got rather heated and there were arrests and injunctions and things of that sort. So the chief federal judge out there, William Lindberg, called up the Attorney General and said, "Do something about this." Well, the doing something about it was five lawyers from the Employment Section going out to Seattle to file suit.[6] And we eventually sued five local unions out there: [the] ironworkers, sheet metal workers, plumbers, electricians, and operating engineers, who among them had 6,000 members. [A]nd of that 6,000 membership there were only three black members.

We then went on to replicate that same pattern in other cities like New Orleans and East St. Louis.[7] [L]ater on, we even spread out statewide. We brought suit against all of the ironworker locals in the state of California.[8] And then we brought suit against an operating engineers' union that cut across three states: California, Nevada, and Utah.

And it is important to understand why we were suing the unions. Normally you think what has a union got to do with anything? All they do is sit there and negotiate on behalf of the employees for wages and terms of conditions. Well, that is not really the limit that unions have in the building trades industry, because, in the building trades industries, the unions really functioned more as an employer in the following respect: employment in the industry is transitory; workers go from job to job. [After] they build American University [Washington College] of Law, then they go downtown and put up a government building, et cetera, and you have the workforce constantly changing and you have probably dozens and dozens of contractors involved in the process. Well, to simplify things, what happened in the industry is all of the contractors got together in an association and they bargained with a union; for example, let us take the electrical workers. And they set up a collective bargaining agreement

5. *See, e.g.*, United States v. Local Union No. 212, Int'l Bhd. Of Elec. Workers, Local 212, 472 F.2d 634 (6th Cir. 1973); Unites States v. Int'l Union of Operating Eng'rs, Local Union No. 520, 476 F.2d 1201 (7th Cir. 1973).

6. United States v. Local No. 86, Int'l Ass'n of Ironworkers, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd sub nom.* United States v. Ironworkers Local 86, 443 F.2d 554 (9th Cir. 1971).

7. United States v. Sheet Metal Workers Int'l Union, Local Union No. 36, 280 F. Supp. 719 (E.D. Mo. 1968), *rev'd*, 416 F.2d 123 (8th Cir. 1969); *Local 53*, 407 F.2d 1047.

8. United States v. Ironworkers Local 86, 443 F.2d 544 (1971).

that provides that the union will supply the workers; it is called an exclusive hiring hall. So if you need an electrician, you do not go and advertise in the newspaper if you are an electrical contractor, you call the union, and the union sends out its members.

So our reason for attacking the unions initially was because they really control the employment. And probably, through the years, the pattern has been lessened somewhat because there is more and more competition from non-union segments. So where you had a city like Washington, D.C., which probably in the [19]60's and [19]70's was ninety percent union, at least in terms of construction, today it is probably forty percent union, but at that time it was very important.

Now, we had to go about proving discrimination under Title VII. We had to prove a pattern or practice, and we always ran up against the initial argument from the defendant unions that this was not a pattern or practice. So we had some interesting cases early on that defined what a pattern and practice was; that it is something that was usual, pervasive, and not an isolated incident.

Now, in proving the pattern and practice, we kind of followed the [theory of] we win with our witnesses and the defendants' records, and this is part of what Dave had alluded to earlier. From early on in the Division, it was drummed into us that it was important to know all of the facts, and that meant if you had a thousand pages of union records you read the thousand pages and knew what was in them. But our proof really broke up into probably about four different areas; the first thing was the statistics. I mean it did not take a rocket scientist to convince a court that it was meaningful to look at a minority population of thirty percent and compare it to building industry unions that had zero percent minorities in it. But again, we had to litigate this issue in terms of whether or not statistics had any probative value, and, of course, they did.

But the next thing that we did in putting together a case was look for witnesses. Now, this was not always easy for a number of reasons. These unions were well known in the communities, and they had discriminatory reputations, so it was not unusual to run into very few minority electricians or plumbers who [didn't have] anything to do with any of these unions because they knew it was a waste of time to go there.

But we always did manage to find individuals who themselves had experienced discrimination, and we went about doing this in a number of . . . interesting ways. First of all, we of course had complaints, either through organizations like the NAACP or the Urban League; even [the] EEOC would refer complaints of individuals to us, but that was just the starting point. We would [also] comb through [the] unions' records to look for indications that blacks or Hispanics had sought union membership, and it was not always easy identifying who was a minority.

I remember taking a deposition of the business agent in Seattle and I asked him whether Joe Albertosi was black because the businessman claimed he was. And he said, "Well, you know, he is either black or Italian; I can't tell the difference." Yes, that is true. That is true. Turns out he was one of my tribesmen; he was Italian.

But in any event, we also used to look for other ways to define people who had contacts with these unions. For example, in Los Angeles, when we sued

ironworker locals there, ironworker locals used certified welders. In order to be certified, you have to be licensed by the city. So we went down to city hall, pulled all the licenses, and lo and behold they have a picture on them. So you go through a thousand licenses, you come up with 100 black applicants or black licensees. And then we had the luxury of sending out the FBI to talk to these 100 people to see whether or not they had ever had any contact with the ironworkers local and then we would follow up.

But the bottom line is we were always looking for live victims of discrimination to give some context to the all-white statistics. And then we would couple that with the records of the union, which were absolutely invaluable and gave all trial lawyers their thrill. Because [when] we have always put on a black witness, he would say, "Well, I went down to the union and ask to be referred out to work and they told me there was no work," and we put on a string of people like that. "Or they told me the membership rolls were closed and I could not join." And lo and behold, the business agent from the union would take the stands and, "Yup, we did not have any work, the books were closed." But, by gosh, you pull out their records, and the fun of being a trial lawyer is when you catch somebody in a lie. And you pull out their records, and bingo, when they were not taking any applicants, just turns out there w[ere] twenty-five whites who were accepted into membership.

There was one case I [will] never forget. The business agent was swearing up and down that there was no work in Seattle and he could not find new jobs for electricians. At the same time, we had him telling his local union, which was reflected in the minutes, that they were in tough shape because they did not have enough workers to supply the employers' needs for electricians, so I mean, that is what we went through in terms of proving a case.

And the last thing that we always threw in there was the evidence about the reputation of the unions in the community, and you say, "Hmm, what's that?" That and a dollar will get you a cup of coffee at Starbucks. Well, it was very helpful, because there were times when we had few live witnesses, and we would have to explain why it was not unusual for minorities to have nothing to do with these unions, and that was because it was well known that you were wasting your time. So we would bring in community people and they would testify that this was what the reputation was.

But during the course of all this litigation, this initial stuff in the first five years, we had a number of interesting legal issues: Whether or not evidence of pre-Act discrimination—that is discrimination occurring before July of 1965—was admissible, and also what types of statistics were admissible, and I had said before what constitutes a pattern or practice. All very interesting, not particularly difficult to win; but the other side would always argue vigorously that all we had here was perhaps an isolated incident of discrimination.

But the real challenge in the litigation came not so much from proving discrimination, but rather from remedying discrimination. It was quite easy when you had individual victims who were denied work referral or denied membership. Fine, the court orders that they be given membership or be given work referral, and in some cases even be given back pay—although that was another legal issue as to whether or not the Attorney General was authorized to seek back pay.

But the real problem with the relief went to systemic relief. Once you get beyond the specific discriminates, the issue is what do you do going forward with respect to the operations of these building trades unions? Early on, some of the early cases that were decided simply said, "Well, do not discriminate, and publicize that you do not discriminate, and make efforts to recruit minority members or minority individuals who want to take part in training programs." But not surprisingly, that did not yield much of a change; you still had all white unions.

So what we did was seize upon the notion set forth in the Philadelphia Plan; that is, in the Philadelphia Plan, because it was federally-assisted contracting, under the Executive Order at 11,246.[9] The Executive Order already said not only should you not discriminate, but you have to take affirmative steps to bring minorities into the work force. And what they did was set goals so that over a five-year period those contractors had to have twenty-five percent minority in their work force.

And what we did was seize upon that notion of goals and put that into our request for relief in these building trades cases. And we were successful—ultimately the courts did conclude, in the face of arguments, that this violated Section 703(j) of the Act, which says no preferential treatment because of a racial imbalance.[10] The courts concluded that that did not limit the remedial authority of the court once there was discrimination found. So that was fairly interesting and that kind of got us through into the mid [19]70's and really was the precursor to the forty-year-old debate now still going on about affirmative action and racial[ly]-conscious relief.

Now, there are a bunch of other issues involving unions, but most of those the other panelists are going to deal with, because those are the industrial unions. They don't really play any role in hiring, but their role has to do with seniority systems and whether or not the seniority systems that the unions have negotiated had to give way in light of past Act discrimination, pre-Act discrimination. That [was] my hook; I ha[d] to keep going.

JOEL CONTRERAS: Our second panelist, Bob Marshall, joined the ELS in January of 1970, and he transferred to the criminal section of [the] Civil Rights [Division of the DOJ] at the end of 1971 and left in 1973. After leaving Washington, D.C., he became an Assistant U.S. Attorney in Colorado and since then has been in civil litigation with various firms and is presently a civil litigator with the law firm of Carpenter & Klatskin in Denver, Colorado. Bob?

BOB MARSHALL: Thanks, Joel. I would like to start out by saying a couple years ago I came back [for] the anniversary of the Civil Rights [Division] reunion and I got to see a lot of my compatriots and talk to them, and every one of them, without exception, had become very successful in whatever field they [were] in. And I talked to several of them and asked them what they attribute that to, and they said, "To being here, [in] the Civil Rights Division."

9. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), *superseded in part by* Exec. Order No. 11,478, 34 Fed. Reg. 12985 (1969), *reprinted as amended in* 42 U.S.C.A. § 2000e note (2006).

10. 42 U.S.C. §2000e-2 (2006).

They learned how to prepare, how to investigate, and how to try a case. They learned how to work hard and that taught them how to become successful. And so working here I think was the core attribute to get us all started in our legal careers.

When I started here, we had . . . much latitude to go anywhere in the United States and take on any industry, because, you know, discriminatory practices were rampant everywhere. And my first case was actually a case that already had been brought, and Bill Finton and I took over and it was against the St. Louis-San Francisco Railroad.[11] And with railroads, there was a position called train porter. If a white man or black man came in [and] applied for a job, they took a physical, they took a written exam, and the white man would be hired as a brakeman and the black man would be hired as a train porter.

Now, the train porters are often confused with chair car porters. Chair car porters were the guys that rode in the passenger trains and sold pillows or rented pillows to the passengers. The train porter, while the train was moving, assisted the chair car porter, [but] whenever it stopped he had to run to the front of the train and brake the train and throw the switches, and he did all of the same work as a brakeman did, but the brakeman rode in the caboose while the train was moving.

Well, the case had already been brought, and you've already been told we were taught to prepare everything we possibly c[ould]—look at every record.

I [heard] a rumor that there existed a document that actually put [the discriminatory practices of the railroad union] in writing. I went over to the National Archives and went down in the basement, and found in a box an old charter of the National Brotherhood of Trainmen which said that coloreds can only be hired as porters. It was actually in writing, and we used that in the trial. It was no longer in effect, it started in the early 1900's, but it remained in effect for [twenty] or [thirty] years. And they officially changed the charter, but they still follow[ed] the same practices.

Well, we had a trial coming up just a few months after I started, and so under Dave Rose's instructions we had to meet our witnesses; we had to talk to them, we had to find out what they are going to say.

So I went out, up and down the railroad line from Birmingham, Alabama to Tupelo, Mississippi to Springfield, Missouri to Kansas City to St. Louis to Tulsa . . . and interviewed these train porters. Because what had happened is the passenger trains had slowly gone out of existence and there were not jobs for train porters anymore, and brakemen were just switched to a freight train. Well, the train porters were laid off; they did not have jobs anymore, because even though they had done all the jobs of brakemen, they could not go over to the freight trains. And they loved the railroad; they loved everything about it. And I would go and interview them in their homes and talk to them, and I would have to ask them to come and testify. And this was asking [them] to do a fairly dangerous thing, because they love[d] the railroad and they did not want whatever happened to them to happen to the next generation. So they took on the dangerous task, in this case the testifying, and also it had economic impact, too, because it meant they were not going to be offered any other jobs.

11. United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972).

But we had a strategy, because we knew from prior hearings with this judge, Roy Harper in St. Louis, Missouri, who was the Chief Judge, that he was a racist—[he] just told it to us; used words that left no doubt about it. So we knew that we were going to lose. It was a matter of putting a case or a record in that we knew could win on appeal.

So we took like [thirty] depositions, and we made a decision that we would only call four or five of the train porters to testify, and we put the rest of them in under preservation of testimony and put their deposition testimony in where the railroad lawyers could not do anything about it.

We went into a three week trial in St. Louis, Missouri [with] Judge Harper—the defense lawyers did not have to do anything. Every time we had a witness on that was making any point, he would start screaming at us. And I finally said, "Well, are you ruling that I cannot ask this question?" And he would yell at me some more, and so I would ask the question again, because he never said I could not ask it. And so we just kept going and it became a real struggle, but we got the entire record in, we got the evidence in, everything we needed.

Their big defense was that train porters did not really do all the work as written and that they only did thirty or forty percent of it, where my own witnesses were saying, well, they did like ninety percent of it. And they could not do anything about the written testimony, but they did put on some witnesses that were train porters [who] were afraid. And so they said, "Well, now, maybe I only did thirty or forty percent of the job of the brakeman. But I had a rebuttal witness that I put on that came in and testified that, yes, he did ninety or 100 percent of the job of the brakeman, and Judge Roy Harper almost came out of his seat, but it still got in.

And at the end of the trial we waited for months, and he finally issued a long opinion, ruling against us, and we appealed it to the Eighth Circuit Court of Appeals, and the appeal was affirmed. And so we took it in a petition for a hearing en banc, and—Bob Moore, I see is coming in—argued the case, and the entire Court of Appeals of the Eighth Circuit reversed and gave the judgment to the United States and ordered that these train porters could have jobs on the freight trains and they would have their seniority. And we could not get them back pay in those days, but we did get them the seniority and any jobs that came open, and in fact, they were great jobs for some of them, and we finally did get that relief, and that was the . . . railroad story.

I was going tell one additional story because I had a little extra time, as Frank was talking about trade unions. You could pick any trade union in the country; [they] had to be almost all white. And I went down and selected the electrical union in New Orleans, and it was an all-white union; there were no blacks in it.

And when we brought a case, the case was prepared to the point where we should win it as soon as we got it, because we had all the documents together, we had all the statistics together. We found witnesses who had applied for the union and had not gotten in, and so then all we had to do was bring it and try it.

In this particular case, as part of the preparation after I brought the case, we took the deposition of the president of the electrical union. And I was asking him: "You know, sir, I understand that you have had black applicants that have passed the physical, they have passed the written test. When they come in for

the interview, the subjective part of the application, they never score as well. Why is that?" And this president of the electrical union looked at me and he said, "You know, I have thought about that a lot, and to tell you the honest truth, it is because I believe that blacks are afraid of electricity." His attorney's head hit the table and the deposition was over and the case was over. They signed a consent decree the next week which provided for affirmative action for the program. Another attorney in our session, Joel Selig, then brought together all the trade unions in New Orleans and they all signed consent decrees.

And right after that, and within a few months is when they signed the contract to build the Superdome, and all these unions all had jobs and they are all required to only hire black workers in order to go on the jobs, so that was a pretty good turnout. And I guess you will see in the summary they said about my time there, I value my time at the [DOJ] probably as the most productive time—the best time—I have [had] in my legal career. I have made a lot of valuable friends and I have learned how to try cases, and it has been something that has helped me through the rest of my career and I appreciate it.

JOEL CONTRERAS: Thank you, Bob. Our next panelist, Squire Padgett, who is in private practice in the District [of Columbia], has cards available. He began his work with the Employment Litigation Section in June of 1970, and he served there until July of 1982. So he covers this initial time of testing and then some. Squire?

SQUIRE PADGETT: Thank you. I want to start off by following up on something that Vicki Schultz said about immersion. I came there June 1st, and subsequently you learn if Dave Rose shows up at your door [at] about five o'clock in the evening, [it is] either real good news or real bad news.

The first day I was there, and that afternoon, he told me that I was going to go down to Birmingham, Alabama with three other lawyers: one was named Jack Razeko, the other named Mike Thrasher, and . . . another lawyer named Susan Reeves. Razeko and Thrasher—you did not work with [them], you worked for [them]. Their egos did not allow you to do [work with them]. Susan Reeves [and I] had to go home and tell our family from the first day of work that we are going out of town and we d[id] not know [for] how long. At that point in time, we went out for weeks at a time.

Well, those two guys wanted to investigate and make the litigation. They wanted to do it by Monday. We got down there on a Wednesday. We came back Friday night. They wanted us, Susan and I, to be in the office by 8:30 on Saturday morning to put the evidence together, write the justification memo, and they turned the justification memo in on Monday, and that became *U.S. Steel—United States v. United States Steel*[12]—which was the first of those steel cases that subsequently became the nationwide steel litigation. That was my very first immersion.

I ended up in June of 1982 with—I was the lead lawyer in *Bazemore v. Friday*,[13] which went to the Supreme Court and established the precedent as it

12. United States v. U.S. Steel Corp., 520 F.2d 1043 (5th Cir. 1975).

13. Bazemore v. Friday, 478 U.S. 385 (1986).

related to use of regression analysis in establishing employment discrimination. The case was turned over to me by one of those meetings with Dave saying, "Squire, I think you ought to look at—you may want to take [a] look at this litigation." And it was something that had been started three or four years ago, and as everybody knows, you do not want a case that three or four lawyers have had, because no matter what it is there are some traps there.

But we started the trial on December 7th, 1981, and the judge was a Judge Dupree, down in Raleigh, North Carolina, who I won't say he was like Judge Harper, but he was close. And he kept saying, "if you do not like what I am doing, take it up Route [One]," which meant throw it up to the Fourth Circuit, which was no picnic either.

We tried that case from December 7th with a day and a half off for Christmas, a day-and-a-half off for New Year's, until February 28th. We lost in the trial court, and then I decided it was time to leave, and it was appealed to the Fourth Circuit through the good work of David Marblestone, who is here today. Then it was a rehearing involved, it went up to the Supreme Court, and they reversed a [nine to zero] morality opinion. And one of the things they said about the evidence [was that] it was very persuasive in a number of ways.

But the case was litigated on the way back down to the Fourth Circuit and all the way back down to the trial court. And I can remember very distinctly at the Court of Appeals argument on the way back down, the lawyer was arguing, and he kept making the same argument he made before. And Judge Russell, who if you know anything about the Fourth Circuit, was not a friend of ours, but he at least said he was with Howard Manning, Jr. He said, "Mr. Manning, we heard you say that and gave you that on the way up, but the Supreme Court told us that [would not be] acceptable, "so I think you ought to tell us something a little different with this argument, all right?"

But that was the way I ended it; that was the twelve years. It was really very, very intense, and not only in terms of the litigation, but the people you travel with. I was fortunate enough to travel with both of these guys on either side of it. But if you have ever traveled with Joel Contreras—Joel does not ship his luggage. He does not check his luggage; he carries everything, so I started carrying it. And if you want to see security appear very quickly, you have Joel carrying everything and me carrying everything walking through the airport. Yes, we knew what the [Transportation Security Administration ("TSA")] was before the TSA knew what it was.

But to start off, very briefly, [with] a [discussion of a] couple of the other cases. Other than [the] railroad cases, I was able to try and be lead lawyer in literally [almost] every kind of case they had including trucking cases [and] trade union cases. And I can remember very distinctly a case—that Bob developed before he left—against the sheet metal workers in Cleveland [in] the Northern District of Ohio; where we fully litigated the case and it was before a Judge Kopanski who became a very good judge on the Sixth Circuit. And we won, and he was giving us relief, as Frank was talking about the remedies, like two for every three referrals—two of them were going to have to be African-American. [A]t the time, [we had] some other issue; we thought that wasn't good relief and we appealed to the Sixth Circuit. How we would like to have that now, right?

And then I went from there to a number of other kinds of cases, including a case in the state and local governmental area against the City of Miami in Dade County, and I will tell you about development of [that] litigation in just a second.

But we ended up negotiating a consent decree, *United States v. the City of Miami*,[14] that I am very pleased to say is still in force and effect right now; went up to the Fifth Circui[t]—and then we ended up having to argue it en banc, and I think that is probably the highlight of my legal career. It was just before the Fifth Circuit split up into the Fifth and Eleventh Circuit, and there was an en banc argument that I had. And if you ever had an en banc argument, first of all, you know how stressful that could be. But it was twenty-three judges, and Dave Rose had the argument right behind me in another case. But they were sitting in rows, and you hear a question, and you would look over there, and everybody is just kind of looking at you.

But it ended up they preserved the consent decree and [it] went back down. And it went back up again to the Eleventh Circuit and it was still preserved, but I still view that in terms of the legal argument. I am one of the few lawyers who probably ever argued before that many judges and consider that to be very, very fortunate.

And one other kind of case that involved the state and local governments which we subsequently took over; we had a case against the State of Texas which Lorna Renadeer was very, very helpful [on] as a paralegal. And as everybody who was in the Employment Section knows, it was better to have a good paralegal than a second lawyer; they did all of the work that for a long time I did not know. That was probably the biggest settlement ever reached involving a state government for a long time and had about eleven state agencies; and . . . we were able to settle that. It was very, very taxing—it was kind of like herding cats; you did not quite know who you were going to be dealing with from time to time—but it was incredibly intense and fun.

And what we would do—and the part that I want to kind of emphasize—here in terms of developing the litigation; we heard some of the things Frank said and you heard some of the things that Bob said. [I] don't know how many of you have ever heard of [standard metropolitan statistical abstracts ("SMSAs")], but it is put out by the Department of Commerce and the Bureau of the Census, every ten years, and it is going to happen again; the viewer of the census will put out these—the SMSA . . . is a breakdown of these metropolitan areas. For example, and [the] D.C. metropolitan area at one time included D.C., Prince George's County, and Montgomery County. I believe now it is expanded to include Baltimore [and] Howard County and whatever Baltimore is.

But they do a breakdown, and it gives very, very detailed information about the ethnic and sexual makeup, the economic income, whatever-have-you. [W]ith the state and local governments and these county governments and police, fire, and all these, it is very important to look at that because you get a real clear idea if there is [let] us say . . . a police department. Let's say the Prince George's County Police Department, which includes at one time I remember, twenty-five to thirty percent African-Americans. And if you look at the fire and

14. United States v. City of Miami, 664 F.2d 435 (Former 5th Cir. 1981) (per curiam).

police department and school board and whatever-have-you and it comes out to be like a great statistical difference, it is at least an initial targeted instrument.

And you would also use such things as Frank was talking about, union contracts and other indicia to develop a theory, or at least to target who you were going after. Once you targeted them, then you would have to do what Frank was talking about and Dave always wanted. He was very nice about it, but they always said they wanted warm and bloody bodies, and so we would have to go and get these victims. And I have one delightful story about trying to get a victim related to *East St. Louis*.[15] We were looking for an applicant—any applicant we could find—to the electrical union. And I learned from someone that they said that they knew a guy who was an applicant, and this is one of the things all of us know. Half of the people in the neighborhood of the community do not know people's real names; could be men, women. And they said that, "This guy"—I said, "Well, what is his name?" They said, "I do not know." I said, "What do they call him?" They said, "light bulb." I said, "Well, how can I find him?" He said, "You know, he always hangs out at a bar right there at St. Claire and 26th Street" or wherever it was. And I said, "What time?" He said, "He will be there about five." I said, "Well, how will I recognize him?" He says, "You will know."

And so you were hooked to have some fun. I walked in this bar and sat there, you know, trying to look—and looking in that government suit, with the Ford Fairlane parked out front. And in walks this guy with a head that you would not believe.

And then my next problem was how to introduce myself and what to call him, you know, and I just started in the middle of a conversation. I said, "Hey, I understand that you may have tried to get a job with the electrical union and I am kind of look[ing] at the electrical union." I mean that turned out to be an incredibly bright guy who had been a good app[licant] and with the whole thing, but that was one of the kind of little ways that you did it. And if you showed up on the east side of Cleveland with Bob and me in some of these housing projects, trying to find applicants, and you say [you're] from the [DOJ], that just did not work. But it was intense, it was fun, and I do think we made a difference, and I still think it has made a difference.

JOEL CONTRERAS: Thanks, Squire. Our next panelist is Doug Huron. He has been practicing employment law for [forty] years. He began in 1970 with the [ELS]. He is currently with [the] D.C. firm of Heller, Huron, Chertkof, Lerner, Simon & Salzman. [He] is married to Amy Wind, the Chief Mediator for the D.C. Circuit. Doug.

DOUG HURON: This is a true story. About five or six years ago, this neurological disease really set in and I started using this machine to talk. I would tell people who had not seen me in a while that I am not as bad as I look or sound, but I gave that up after I said [that] to an old friend whom I had not

15. United States v. Int'l Union of Operating Eng'rs, Local Union No. 520, 476 F.2d 1201 (7th Cir. 1973).

seen in several years. He replied without missing a beat: "You were never as bad as you looked."

More than anything else, today is a tribute to Dave Rose. That is appropriate for many reasons. Not only for his unparalleled leadership [in] advancing [the concept of] fair employment, but also for his work [in] training young lawyers to emulate him and to be diligent, doubtful, and unflappable. I am personally indebted to Dave in a host of ways.

I am speaking last on this panel because this is a segue to the panel after lunch, which deals with police and fire cases and the testing guidelines, [and] among other things, of course, the trade bar for the guidelines was the Supreme Court's decision in *Griggs v. Duke Power*.[16] And my first assignment from Dave after I started in July 1970 was to write the legislative history of Section 703(h) of Title VII for the Solicitor General's read in *Griggs*.[17] And to do that, I had to read a legislative history of the Senate debate on what became the Civil Rights Act of 1964. Today the debate is probably easily searchable, but we did not have computers back then, so I had to read all the debate to make sure that I was not missing something.

Congress stood tall back then, and no one stood taller than Hubert Humphrey of Minnesota, the born leader for the civil rights bill for the Democratic majority in the Senate. Humphrey was everywhere, answering questions about the bill's provisions, responding to quorum calls, scheduling the Republican leader, Everett Dirksen, and finally bringing him around.

And in the end, Humphrey orchestrated the book breaking the southern filibuster. That was harder in those days, because back then it took two-thirds of the Senate; sixty-seven votes, not sixty.

Humphrey was masterful as the winter of [19]64 turned to spring and finally to summer, when the Civil Rights Act of 1964 passed and was signed. He was at the peak of his powers. That came through the normally dry legislative history, but something else came through, too. The seeds of Humphrey's downfall four years later in 1968. Two lonely senators repeatedly interrupted the debate. Wayne Morse [of] Oregon and Ernest Gruening of Alaska, addressing the chair, would ask, "Mr. President, what about the war in Vietnam?"

The day after New Year's Day, in 1972, January 2nd, the Alabama NAACP filed suit against the Alabama State Troopers in Montgomery, the seat of the [big old] history [of] Alabama, which had only one judge, Frank Johnson.[18] The troopers had never had a black officer and were the instruments used by governors such as George Wallace to enforce segregation.

Judge Johnson, in contrast, had been desegregating Alabama institutions ever since he was first appointed by President Eisenhower. In 1956, he had the Fifth Circuit Judge, Richard Reeves, form the majority on a three-judge district court that struck down the Montgomery arguments requiring segregation on buses, against which Rosa Parks and a young pastor, Martin Luther King, Jr., had led a boycott. And in [e]arly 1972, Title VII did not yet cover state and local agencies, so the trooper suit was brought under Section 1983 and the

16. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

17. 42 U.S.C. § 2000e-2(h) (2006).

18. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

Fourteenth Amendment, and there was no law allowing the Attorney General to enforce the Amendment sequel, "protection guarantee."[19]

But I am convinced that Judge Johnson knew what he wanted to do with the state troopers, and to do it he needed a solid record. So he appointed the United States as amicus curiae, with all the rights of a party. It turned out that the United States [meant] me. I had done some enforcement work upon the *Frankier* case against the Alabama merit system, which Dave talked upon and which he tried before Judge Johnson. And Dave sent me to Montgomery along with a research analyst, Helen Long. Like the other research analysts in this Section, Helen was extraordinary. The private plaintiffs were represented by Morris Dees, a self-made millionaire in the direct mail business and the founder of the Southern Poverty Law Center in Montgomery, [Alabama].

Four years later, in 1976, Morris was the chief fundraiser for an obscure ex-governor of Georgia who was running for president, and he prevailed on me to leave the Division and join the Carter campaign, but that is another story.

The troopers were about to hire a class in January 1972, and Morris moved for a preliminary injunction. Judge Johnson set it down for early February, which meant that Helen and I had about three weeks to prepare, including finding an expert in police testing.

The hearing itself went fairly smoothly, the only glitch coming when I momentarily could not find an exhibit Judge Johnson wanted to see. He bellowed, "I want that exhibit, and I want it now." Needless to say, he got it.

At the end of the hearing, Judge Johnson said he would issue a ruling soon. At that point, Walter Allen, the head of the trooper force, spoke up. He said that the State desperately needed to hire more troopers and he pleaded with the judge to rule quickly. "Well," replied Judge Johnson, "I can tell you what I am going to do," and he hit the State between the eyes. "Alabama had unconstitutionally excluded blacks from the position of state trooper," he said, "and from now on the state would be required to hire one black trooper for every white hire until the trooper force was twenty-five percent black." That was exactly the relief requested by the United States. But as I said, Judge Johnson was way ahead of us.

In the [ELS], when I was there, there was one word that we were forbidden to use; that word was "quota." We never asked for quotas; maybe goals, or if we were feeling especially daring, affirmative hiring ratios, but not quotas. You know the old saying, "if it looks like a duck and quacks like a duck, then it is probably a duck." Well, what Frank Johnson did to the Alabama state troopers sure as hell quacked like a quota. We used to say that quotas were rigid and inflexible, and like goals, which were always subject to the availability of qualified applicants, but can you imagine what Judge Johnson would have done if somebody told him there were not enough qualified African Americans to meet his order? "Qualified blacks are out there," he told Walter Allen, when he ruled from the bench. "I want you to find them."

The old Fifth Circuit certainly understood that Judge Johnson had imposed a quota on state trooper hiring. The court sustained, and I am quoting, the conclusion of the District Judge. That quota relief was essential to make

19. 42 U.S.C. § 1983 (2006).

meaningful progress towards eliminating the unconstitutional practices and to overcome the patrol's thirty-seven year reputation as an all-white organization.

I argued the appeal at New Orleans, and Dave went down with me, probably to make sure that the word "quota" never [appeared] and it never did. But today, I am proud that I had a small role in supporting Judge Johnson's imposition of the quota. Within a decade, the Alabama troopers had more African-American officers than many highways patrolling the country.

Now, I have talked about two monumental figures in civil rights history: Senator Hubert Humphrey and Judge Frank Johnson, but I would be remiss if I did not mention another person, one who is known mainly to the people gathered here: my dear friend, Jack Davis. I got to know Jack working on the new Art Building Trades case in the early [19]70s. I saw him bluff the business manager of an Ironworkers local in a deposition, making the guy believe Jack had incriminating documents; then he utterly destroyed him. I had many friends in the Division, but Jack was the closest.

Let me say thank you to Senator Humphrey and to Judge Johnson, and a special thanks to Jack Davis, who was the best of what we had in the Division. Thank you for your attention.

JOEL CONTRERAS: Thank you, Doug. [A]t this point, I know we are going to have a few questions, but I would [be] remiss if I did not mention that in this laborious process of examining documents, often the documents would be provided. And one of the cases that we had, the attorneys for the defense brought [them] to the front. They provided tables very similar to this, much like a classroom setting. As we poured through the documents and found something that we would like copied, we had to take it up to the front, they would examine it, make their notes, then we would return [and] go back through more documents.

I gained an insight into the classroom process followed by Squire Padgett. As he sauntered up to the front with his document and handed it to the defense attorney who had clerked for Chief Justice Warren Burger, and as he took the document back, said, "Well, you know, when we have equal employment opportunity implemented in the United States, you can tell your grandchildren you opposed it," and returned and sat down. And I reflect that often, when we had the opportunity to build this foundation, we were able to do that. This afternoon you will hear how others have built upon this foundation. The work continues. The time of testing remains. Now I will take any questions that you might have.

MALE SPEAKER: The term "seniority" has been used. I thought perhaps some people in the audience might not understand the importance of seniority and the different types of seniority.

FRANK PETRAMALO: Sure, sure. I love seniority. Seniority is important in the industrial sector, because what it does is give an employee an objective basis on which to have his career judged. Generally speaking, the employer runs the operation, he owns the operation, decides who gets hired, who gets fired, who gets promoted.

The union comes in and tries to somewhat lessen that management authority by, among other things, negotiating a seniority system, which pretty much will set forth the objective standard on which people get promoted or laid off, things of that sort. I say objective because seniority just starts when you are hired and continues to accrue.

Now, the problem in Title VII litigation is there are various types of seniority. Some of the early cases they refer to [is] the *Local 189 Paperworkers*.[20] The problem with the seniority system there is it was not a plant-wide seniority system. There were blacks in the plant, but they were relegated to one department—the least desirable, lowest-paying—and their seniority was pretty much limited to that department. And if they wanted to transfer ultimately to the white department when they had the opportunity, they would lose all their seniority and start at the bottom.

So one of the early legal issues was whether a seniority system like that could survive, and of course it [was] concluded no; that the blacks coming over had to be credited with their total seniority with the company and not just the seniority in a particular job or a particular department.

In the building trades industry, it really was not an issue, because as I said before, the employment was really transitory; you were not building up seniority with a particular contractor. So it really, I think, culminated in the Supreme Court's decision in a teamster case sometime in 1977, where the Court went in, and for the last time decided what was lawful and what was not lawful in the way of a seniority system that might have a discriminatory impact.[21]

SQUIRE PADGETT: Well, let me just add, if you look at Title 703(h),[22] which says—and that was negotiated on behalf of the unions into the Title—[that] neutral seniority systems are not to be considered discriminatory. So we were dealing with those issues, and in the *Bazemore* case[23] a seniority system was one of the issues. We were talking about state agricultural extension workers, African-Americans and whites and women; they were all doing the same thing. So when they integrated the system, instead of doing it this way, just on the basis of who started earliest and who started later, they did it this way. And so we—which is great and the way it almost always happened—ended up having to litigate that. And one of the very first—some of the very first—trade union cases and some of the writings talk about how and which way to use seniority; Richard Sovell and several others you are talking about; concepts such as Freedom Now, which means everybody knows where the seniority takes them. Or if you do it by jobs like they [were] talking about with city drivers—who may have more company seniority, but may not have as much road-driving experience—and how you deal with it. That is what most of the litigation was about.

20. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

21. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

22. 42 U.S.C.§ 2000e-2 (2006).

23. Bazemore v. Friday, 478 U.S. 385 (1986).

FEMALE SPEAKER: My question is a little forward-thinking. First, I want to say thank you to all for your wonderful years of service, having literally been a child who was born in the midst of this struggle. What would you say to those forty-five years from now who are mounting some of the same arguments opposing current legislation, such as the Employment Non-Discrimination Act?[24] What would you say to them in terms of their fight against it, and would you look at it and say, "Forty-five years from now you can tell your grandchildren that you opposed this?"

FRANK PETRAMALO: Gee, you are asking us to tell you what is going to happen in forty-five years. I can't even pick the winner of the next race. You know—I think Dave mentioned—it is incremental progress. I mean, when you are young, you expect things to change overnight. But I think as a young lawyer what you have to realize is that it is going to take a long time, a step at a time, to get to a goal, and, hopefully, you will get there. Now, it is not going to be all a straight line; it is going to go up and down, up and down. But I think ultimately if you look back over our history, we usually wind up in the right place.

SQUIRE PADGETT: I would add one thing. I guess I will say it this way as a trial lawyer. I have had several situations where I had tried cases and then appellate lawyers were looking at the transcript and were asking me why didn't I ask this question, that I could have made a better record, and I said it this way: while I was standing there I was trying to save what I had as much as I was trying to move the ball forward. And I think that with the last—since Ronald Reagan—much of what we have been doing is trying to save what we had as opposed to moving forward, and I think that is still [the] issue. I think there are forces out here who still believe that people of color and women and others who fight for these things [are] inappropriate—these are not the real Americans. And I view it very, very differently. I [think that] we are the real Americans. It is those who oppose the dreams and hopes of all of us that are not the real Americans.

BOB MARSHALL: I guess I would respond that I think our whole life we were fighting to do the right thing. We are trying to fight for right to prevail over wrong, and we were here; when we were doing our work, I felt that is what I was doing. I was trying to right past and present wrongs, and that battle will always be here. Through your whole life you will be doing that, and forty-five years from now they will be doing it, too, and I think it is a moral battle that you always will be fighting.

JOEL CONTRERAS: I also think part of the challenge is that we have not seen an effective communication [on] the value of the progress. The South would not have been as industrialized as it has been without access to a labor force that was better educated, that could compete for jobs—that is part of what happened through the Civil Rights Act of 1964.

24. Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1548, 111th Cong. (2009).

The unfair advantages that people enjoyed came at a cost, and part of our challenge is to do a much better job of letting people know that when discriminatory testing fails, then, normally, everyone benefited. There was inside information on those tests. Many of them had been memorized, so people had an unfair advantage, because when they went in to take those tests they knew what they were taking. So when those tests were thrown out, everyone benefited. Everyone competing for those jobs had a better opportunity than those who were on the inside. If you had a tile-workers' union, as they did in New Jersey, that said you had to be related in order to become a member, there were not just minorities and women who were excluded, there were a lot of people in the general community that could not compete for those jobs.

We have not done the kind of job that needs to be done to let the people of America know how important it was for this country to be able to compete on the basis of merit, not only in jobs, education, housing, et cetera, and this country is stronger—it has avoided a lot of violence that has occurred in other countries—because of the fact that we stepped forward at that time.

Additional efforts will have to be formulated. There will always be a reaction anytime there is significant change. And this has been one of the greatest social changes that [has] occurred in the history of the United States. Remember, it was over one hundred years after the Civil Rights Acts of 1866, 1873, and [the] Fourteenth Amendment were rendered ineffective by the courts.

Part of the challenges that we were looking at was [whether] the federal government and the people of America [would] support these important changes in 1964? Fortunately, many of those changes have been implemented. They have not been implemented without a reaction, but they have been implemented.

END TRANSCRIPT

Employment Discrimination:

45 Years of Enforcement of Title VII of the Civil Rights Act of 1964

Enforcement Against State and Local Governments

BEGIN TRANSCRIPT

RICHARD UGELOW: Let me introduce Terry Connors who's leading the next panel, and he too will introduce the distinguished panelists. Terry and I share something in common; we started in the [ELS] on the same day. The only problem was that Terry came from Air Force JAG, which is an inferior branch of the military, and I came from the Army JAG and it was [superior.] Terry had a really distinguished career at the [ELS]. He prosecuted cases against . . . Maryland, Michigan, and [the] New Jersey State Police for race and sex discrimination; and worked on the *AT&T* case.[1] After he left the Section in 1976, he went into private practice in Florida. He's now co-head of a labor and employment practice, the Miami office of Hunton & Williams. He's worked extensively in employment throughout his professional career and he's written extensively on employment discrimination and [he] participates in many professional organizations dealing with employment discrimination issues. Terry?

TERRY CONNORS: Thank you, Richard. The truth is that the reason I was invited was because on my first day at the Civil Rights Division I reported late for work to Mr. Rose, as I knew him at the time, and he wanted to know why. I'd just settled on my first house purchase, so I didn't need to get fired, but he said "well, we don't—we haven't hired many people before that have already tried cases, so here's a file involving the City of Albuquerque, and why don't you take a look at it and why don't you go out and handle it?" So having nothing to say, I said, "well, what happens if I lose?" and he said, "we don't." But I did. Actually, I think Brian Landsberg lost it, because he touched it last.

1. EEOC v. AT&T, 556 F.2d 167 (3d 1977).

But in any event, that was the religious discrimination case, and—and I think maybe the only one ever brought [there].[2]

On the State Police, and building on the very good work you heard described this morning, by the time [I] got [to] the State Police agencies, the heavy lifting had largely been done on the *Griggs*[3] issues and so forth; and I recall that I discovered something that we didn't have in [the] Judge Advocate's court, which is request to admit. And so I prepared this extensive request to admit that essentially meant that we won the case. And to my great surprise, Michigan signed it.

So I didn't know quite what to do next, except I went out and November 11th happens to be Veteran's Day and that year my wife's 30th birthday. And we got to a point in the discussions—Gerald Ford was newly in the White House—where the Attorney General of Michigan and the Chief of the State Police yelled at me across the room that "Jerry Ford would never require us to do what you're asking us to do in this settlement, and we're just not going to discuss it with you; we're going to talk to him." So it was November 10th, and I was supposed to be taking somebody to dinner in Washington the next night, but I said, "well, I actually don't know the President, but why don't we do this: let's adjourn for today and you call Jerry and . . . one of two things will happen. Either I will go home and have birthday dinner with my wife, or we'll be back here tomorrow morning talking about this, depending on what he says." And we came back and talked about it the next day, so we did resolve the case, so thank you for the heavy lifting everybody.

Our group is—I want to introduce them all at once because I think we'll bounce back and forth a little bit . . . and I'll start to my immediate right: Marybeth Martin, who has held Section responsibilities, having started in 1970 as a research analyst—and worked on numerous cases—then moved on [to] another career, became a lawyer later, returned as a lawyer in the Section and prosecuted numerous cases before she retired there in . . .

MARYBETH MARTIN: 2003.

TERRY CONNORS: Next to her, Jerry George, [who was with the Civil Rights Division of the DOJ from] 1969 through . . .

JERRY GEORGE: 1988.

TERRY CONNORS: 1988, and then [he went] to the Environmental and Natural Resources Division and off to private practice in San Francisco after that, handling many cases involving police and fire departments in Los Angeles, San Francisco, St. Louis, and others. Vivian Toler, next to Jerry, was a research analyst and worked through the entirety of her career I think until [her] retirement . . .

2. United States v. City of Albuquerque, 423 F. Supp. 591 (D.N.M. 1975), *aff'd*, 545 F.2d 110 (10th Cir. 1976).

3. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

VIVIAN TOLER: [in] 2007.

TERRY CONNORS: In 2007, when at the end of her career she was responsible for all the research assistants—by then called paralegals—working on many cases including the gaming industry, the film industry, and putting together the analysis models for the various remedial relief programs that the [ELS] sought. And to her right, Mike Middleton, [who was] in the [ELS] from 1971 to [19]78, currently on [the] faculty at the University of Missouri, and we'll focus, among his many accomplishments, on the *City of Jackson*[4] case, if you will. And if I may, Mike, could you start off to talk about that one?

MIKE MIDDLETON: Sure. Thanks, Terry. I'm really happy to be here. I was at a gathering of the Civil Rights Division a few years ago in Washington and I was impressed with that gathering and I'm equally impressed with this one and I am very grateful for the experience. What people have said about Dave Rose and the folks who taught us all what we were doing; it's hard to express how influential they were on us and as I look around the room and see all my former colleagues and see all the success they've had—I think all can be attributed to Dave. His work ethic. His nurturing attitude towards folks. And his deep, deep intelligence. And deep, deep commitment to these issues.

Like Terry said, by the time we started working, most of the heavy lifting was done. The law had been pretty much established, the seniority systems had been—at least the framework for analyzing [the] seniority systems—had been worked out. Adverse impact theory had been worked out.[5] And it was simply a matter of finding the right targets and going after them. I had some experience in several different areas, and I'll briefly describe some of those cases. But what I think I really want to say is the pictures that were on the screen at the beginning of this session the white/colored bathrooms, the colored only movie theater. You may think that that was long, long ago, but the fact of the matter is the cases that I worked on, the discrimination was so clear and so in-your-face, that it made the cases not only easy to do, but a lot of fun to really challenge that kind of stuff.

My first trial I tried with Bob Gallegher and Dave Allen; and Kathy Green was our research analyst on that case. It was in Detroit, *Detroit Edison*.[6] [This is from when] we began going to the public utility companies. Detroit Edison was a major electricity provider in the Detroit area. We also did the *Philadelphia Electric Company*,[7] [which was the] same kind of case. The fundamental issue there was [that] obviously the good jobs went to whites and the menial jobs, if [any] at all, went to blacks. I will never forget the *Detroit-Edison* trial. We managed to find a star witness, a gentleman named Leroy Bell. And by the

4. United States v. City of Jackson, 519 F.2d 1147 (5th Cir. 1975).

5. *See, e.g.*, *Griggs*, 401 U.S. at 424.

6. Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 310 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977) (remanding for further consideration in light of Supreme Court's decision in *International Brotherhood of Teamsters v. United States* (citation omitted)).

7. United States v. Phila. Electric Co., 351 F. Supp. 1394 (E.D. La. 1972).

way, the way we found witnesses, I think someone mentioned. You had to develop a really good relationship with the local NAACP and some of the local organizations because they knew where the people were.

So whenever you would go into a city, you would contact the NAACP or [Congress of Racial Equality] or some community organization that was involved in civil rights, explain what you were doing, [and] explain what you were looking for. [We would] try to develop a trusting relationship with those groups because we were the federal government, and of course we're here to help you. They didn't always buy that. But, they put us in touch with a gentleman named Leroy Bell [in Detroit].

Leroy Bell had been in World War I; he was trained as an electrician in the war. He came out of the war and went to his home[town] of Detroit, and applied for a job at the electric company. He was told [that] he was black. He was told that there was one job at the Detroit Edison Company that a black man could have. But they already had a shoeshine boy. And if he were to wait around; if this gentleman ever left, they would consider him for the job. Well obviously he was our star witness, I mean. But that's how simple the case was. Their policy was you didn't get to be a lineman if you were black, no matter what your qualifications. The other interesting thing about that case was [that] Damon Keith was our judge. A very distinguished African-American judge, and when I saw him I immediately got very relaxed. But somewhere during Mr. Bell's testimony, the question was raised, well, how about black women? And he mentioned well, black women could work there, but the job[s] for black women [were as] elevator operator[s]. And they had two elevators in the building, and there were women in those jobs. Well the defense counsel was trying to challenge him and ask [confusing questions]. Judge Keith interrupted. And he said, "Well I know something about that; my sister was an elevator operator at Detroit Edison." So it was a good case, and it was a lot of fun. Needless to say we won that case.

Some of the other things—someone mentioned the airline cases. I worked on three airline cases: *TWA*,[8] *Delta*,[9] and *United*,[10] with Susan Reeves, and eventually Doug Huron . . . got on those cases. I don't want to tell the story of how I was second chair on *United* and Susan left. Dave Rose turned to Doug, who had just completed some major case and asked Doug to take first chair. I was of course quite outraged, because I thought I was ready for that. And I went in and talked to Dave about it, and I was railing about how he was mistreating me. It turned out that he was absolutely right. Doug was eminently more qualified to do that than I was. The only advice Dave gave me as we were arguing in his office was, "Mike, don't do anything precipitous." I had to go back to my office and find out what he was trying to tell me. I didn't do anything precipitous, and it all worked out. [B]ut Doug, I have always admired you and appreciate the leadership you gave on that case, and I confess even today that you were eminently more qualified than I to take the lead on that.

But the airline cases are pretty easy too. [B]asically blacks were redcaps or

8. Zipes v. Trans World Airlines Inc., 455 U.S. 385 (1982).

9. Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781 (E.D. Pa. 1967).

10. Lansdale v. United Airlines, 437 F.2d 454 (5th Cir. 1971).

baggage handlers, and the big jobs were ramp servicemen. [Ramp servicemen were] much more highly paid [and the jobs were] much more attractive. But the policies were that, you know, African-Americans simply need not apply for those jobs. And there was that inexorable zero in terms of black participation in those jobs.

The other aspect of the [airline] case[s] we were beginning to get into enforcing was the gender discrimination portions of Title VII. Women were always . . . stewardesses—not flight attendants, stewardesses. They had stewards and stewardesses and reservations agents. And again, the patterns were clear. Women were not in any jobs other than those two. Those were the lowest paying jobs. And there were some side issues about appearance, height, and weight requirements for stewardesses that were not related to one's ability to get down the aisle and serve passengers but more related to the physical attractiveness of the woman. There were age, height, and weight requirements for the flight attendants. It was fun challenging those because there was really no justification other than discriminatory attitude on the parts of people. And we—I think—settled all those cases. The other thing about what we did at the Division was we really prepared our cases well. And once you had the evidence together, a defendant really had to be crazy to go to trial. Because it was quite clear what the outcome would be if the judge was going to analyze the case properly.

And I've got to give credit to Marybeth and Vivian and other research analysts that we had in the Division then, because they did all that legwork to put the statistical cases together and kept the cases organized. But the case[s] I had [the] most fun with [were] the police cases. I think I had one of the first local government police cases in the City of Jackson, Mississippi, which was my hometown, so I knew something about it. I had two friends, Frank Parker, who was the head of the lawyer's committee in Jackson. He had sued the police department, and Mel Leventhal, who was the counsel for the NAACP Legal Defense Fund, had sued the fire department.[11] [Both were] race discrimination cases. I wanted to go home and do something in my hometown. Dave authorized me to go down and investigate but he told me that if I were able to do it by myself with, I think, one research analyst, I could try it.

So I went to Jackson and, on my way to the city attorney's office to introduce myself, I went by the employment office on a whim. I had a big afro and I was about twenty-five years old, maybe. And I asked the lady, I said "I'd like to apply for a job with the City of Jackson. May I have an application, please?" She said, "Boy, that's not the way you get jobs in Jackson. If you want a job, you have to go stand under the viaduct on Highway Forty-Nine before seven o'clock on any morning, and there's a truck that'll come by. And if there's work, you hop on the truck. And if there's not, you come back the next day." I dutifully took my notes, and said "Okay." I then went over to the City Attorney's Office and announced myself and told him what we were doing. Ultimately we settled that case. We focused on the fire and police departments, because there were two private suits in existence at the time. And

11. Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982); Corley v. Jackson Police Dep't, 755 F.2d 1207 (5th Cir. Unit A Mar. 1981); United States v. City of Jackson, 519 F.2d 1147 (5th Cir. 1975).

it's amusing, we talk about quotas and goals and timetables; we pretty quickly got an agreement out of the City of Jackson to hire—all future hires in the police department had to be on a one for one basis—Black/White. And in the fire department, two for one—two blacks for every white. We got that signed. Fortunately we didn't have Judge Cox [on] that. I don't know if any of you know Judge Cox, but I had some dealings with him several years later where I had to move to recuse him from some cases because of his racism. And finally [we] won that [case] in the Fifth Circuit.

But those were the days. The discrimination was obvious. The legal theories had been pretty much ironed out by our predecessors on the prior panel and others, and it was a great deal of fun to do those cases. Another little anecdote, I think I talked about the NAACP, and the research analysts. I have to tell you, the FBI was very, very, very helpful during those days. You can imagine a young black attorney running around Jackson, Mississippi or Birmingham, Alabama and Mobile, Alabama; trying to interview witnesses can be difficult. It was always very nice to be able to write a memo to J. Edgar Hoover and ask him to have his people go do the interviews. And the FBI did a very, very good job of following the script and getting vital information from basically anyone who was involved in any of these cases. White policemen, black applicants, black deterred applicants . . . the FBI had a way of walking around a community and getting people to talk, so their expertise was extremely useful.

Someone mentioned that we should talk about expert witnesses. I don't know that I have much to say about that except that it was often very difficult to find experts who could do what needed to be done. But I think it was more difficult for the defendants. In the Philadelphia Police Department case[12]—which was a sex discrimination case—[they] had about eight women on the police force. They were all assigned to the juvenile unit and they were all denied the ability to be patrolmen. The juvenile unit obviously paid less. To show you how blatant it was, on the way up to Philadelphia, when we got there in fact, Mayor Rizzo was on television saying that women would patrol the streets of Philadelphia over his dead body. That kind of motivated us on that one, too. But the point is that the City of Philadelphia hired an expert who did a study that pretty much confirmed the stereotype on some trumped-up psychological basis that women just were not cut out for police work. And that was their expert witness, and that was amazing to me that they thought that they could convince anybody with that kind of testimony. And indeed, they didn't. I didn't stay on there—Richard Ugelow, you took that case on when I left, didn't you? We won it, didn't we? Alright. Alright.

So those are some of the stories, and I will leave it at that and hopefully if there are questions, I will try to help answer them. Thank you.

TERRY CONNORS: I think that's a perfect segue to Vivian, and I wonder if you, Vivian, could explain to this group how you became the expert for the City of Cincinnati.[13]

12. United States v. City of Philadelphia, 573 F.2d 802 (3d Cir. 1978).

13. Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992).

VIVIAN TOLER: I'm not sure how that happened myself.

TERRY CONNORS: But perhaps beyond that, [could you] talk about the work of your team over the years, which was obviously extremely critical to this effort?

VIVIAN TOLER: Yes. Paralegal specialists or research analysts—there are numerous things in preparation for trial for the attorneys. A lot of our work involved xerox. That was a majority of it in the beginning. We xeroxed our hearts out, going to various cities, going through personnel files and applicant folders. Trying to identify—this was before people were identified by race and sex—people by looking at their high school or their college, to see if they went to a predominantly black school, and then we would make the identification that way. And [then compared] their qualifications with the white majority.

Paralegals summarize[d] depositions and went out and searched for witnesses; I guess that was after the FBI stopped doing it for us. We used to go out there to find witnesses for . . . particular cases. We had one case against the Florida Department of Corrections, [w]e had about [sex discrimination] and we had paralegals, research analysts [a]t that time, going all over the state to the different correction facilities trying to locate witnesses, and we'd do the preliminary interview and come back to the attorneys with people we thought would make good witnesses and give them that information.

We've had a paralegal . . . go out to a fire department and take the agility test to see how difficult that was. A female had to go out and take that test. We had one in which a male paralegal had to go into the shower at a Department of Corrections, because they said they weren't letting women be correctional officers because it would interfere with the privacy of the male prisoners. So he had to go out there to show that the guards wouldn't see the males' private parts while they were taking showers, and it was just a variety of different things.

And in the Chicago police case, I—along with other paralegals in the Section—had to go through the disciplinary actions to compare the discipline given to white officers compared to that given to black officers, and that was also before we had everything on computer, so we had to go through by hand and compare information and jot down our findings. And testifying at trial when necessary—I had to testify at that trial in Chicago.[14] I think I spent almost a year off and on in Chicago and I believe the entire summer of 1975 I was in Chicago. And I think that about covers it for right now. I think I worked on the Cincinnati case with Marybeth, so she knows[.]

MARYBETH MARTIN: Right. I know the strain.

TERRY CONNORS: Then go ahead.

14. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).

MARYBETH MARTIN: Oh, I'll do it. Vivian Toler was the paralegal assigned by the [DOJ] to work on the case. She never was an employee of the City of Cincinnati. However, the concentration that we wanted to enter there was something that the City had agreed that they needed to do some work on and that was basically hiring—hiring black females and Hispanic police officers. So what we needed to do—and this was even before . . . *Adarand*[15] and other decisions that talked about having the factual predicate or the findings—[was] we put together findings that would show how badly the City needed to have goals and timetables; so this was entered into the record. The City took about four years to hire anybody. They went into a layoff status. It was not for purposes of avoiding the decree as other places had done, but this was simply because they were in an economic downturn. So when the City started hiring again, that brought on a rush of reverse discrimination cases. One of them was the *Vogel* case.[16] We wanted to intervene, but Mr. Turner had some reason that we weren't allowed to intervene. I can't remember the specifics.

So this was a private case against the City, [and they were] saying these goals and timetables needed to be off the books. Vivian's affidavit was all of her standard deviation analysis. This was the bread and butter of a paralegal or research analyst's day, [which] was to sit and do—without a computer, remember, this is another time that we did not have computers. So she did her analysis, put it into an affidavit, and the Court of Appeals decision came out and lo and behold there was Vivian Toler, expert witness for the City of Cincinnati.

So Jim Turner was the first to read this, I believe, and came to my office or called me up and said, "We've got to object to this. Vivian Toler is an employee of the [ELS]." So I called the Court of Appeals clerk's office, and said, "There's a mistake on this opinion that just came out." And they said, "Are you a party?" And we were—[but] I couldn't convince the City to say that they didn't hire you as an expert witness. And she had made the case. Her affidavit had helped bolster our argument that these goals and timetables were indeed needed, so.

TERRY CONNORS: How much did you charge for that, Vivian?

MARYBETH MARTIN: I want to know if Vivian is going to get any referrals. Have you gotten any calls to serve as an expert witness? Because it was an excellent example. Now Vivian is the quintessential research analyst, I will say that. She worked—when she did the City of Chicago facts, she was up all night. The judge I believe commented—Bob Moore can confirm this—on what excellent work she had done, and ever so quickly. Now my point is that there's a theme underlying all of the discussions this morning and up to right now; thank you, Mike, for acknowledging us, and, Doug, you also.

Paralegals were also on the scene. Secretaries were on the scene. We had a big support staff in the Section and nobody knew exactly what research analysts did. I think I had an interview with an administrative officer in the

15. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

16. *City of Cincinnati*, 959 F.2d 594.

Division, and the only question I can remember when I was being hired was: are you available to travel? Well, little did I know how job related that was. I think I was kind of a hazy figure to people around the Section, because I spent most of my three and a half years as a research analyst in Birmingham, Alabama. Or Inslie, Fairfield, or Pratt City. One of those towns in which the U.S. Steel's Fairfield worked. Nine mills were located [there]. And I had to learn the difference between all the nine mills and the lines of progression in each of the mills. They had all been totally segregated up until the time at which . . . U.S. Steel thought it would solve its problems by creating a pool down at the bottom. So you lost your line of promotion seniority so that you'd have the opportunity to hopefully get into another line. Well there weren't any jobs. Or not enough jobs for this to happen smoothly. So that's one reason we got involved.

Now another thing I will say, because we had paralegals and research analysts, and I understand the word just—the title—changed. I'm not sure there was any use of something called a research analyst before it was used in our Section. I keep hearing that we were the innovators there in the Section, and I hope that's the case, because I think that it was a wonderful job category to do anything that was needed to get ready for a case.

Now what this meant was, yes, we did a lot of interviews. We did the interviews that the FBI basically didn't want to do or the lawyers didn't want the FBI to do for some reason. We also went . . . without our government suits on—because at that time all the research analysts were female and we would be a little bit less intimidating sometimes than some of the lawyers. So we had some of our interviewees tell us that they preferred talking to us. And [this] worked out well when we got ready for trial. We also had a number of records to look at almost every case. This goes to the factual development of the case that we've talked about being so important, and it was critical; it really was critical. [W]ell Kate Green, for instance, in the late [19]70s, I believe had a responsibility in a case [called] *United States vs. County of Fairfax*[17]—one of the wealthiest counties in the nation. The records for applications I believe were stored in shoeboxes that were pushed under a table in the personnel office, and they were in no order. That's what we had to deal with.

A lot of records were in any number of different places; they had different codes. Charlotte and Logan, I believe in *Detroit Edison*,[18] found a dot curiously behind certain names and learned that oh, that means this is the internal code for "that's a black applicant." I had to deal with a case in which I was seeing the word peachy written by some names. That was a little bit more evident, I suppose. But anyway we had to learn these records inside out. [Let's go] back to *U.S. Steel*, [19] where I spent a lot of my time.

17. 629 F.2d 932 (4th Cir. 1980).

18. Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 310 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977) (remanding for further consideration in light of Supreme Court's decision in *International Brotherhood of Teamsters v. United States* (citation omitted)).

19. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

We had not only interviewed all the black steel workers; we knew all the lines of promotion, who was where, and we had a curious delay in the trial. There were fifty-five trial days over—Lou and Bob could tell me precisely—[t]wo years, I believe. Well, there was a delay for the defendants after we'd put on our case; they were working on some big project over at the law firm, and it turns out that they brought in an expert witness. We didn't have any experts up until that time on this case. The expert witness had something called a regression analysis. We had never heard of a regression analysis at this point, so we were curious to see this. Well it was a big printout and it showed that while we were saying race made the difference—ah-ha—you need to look further. There are other factors at work. One of those factors was education. Now it wouldn't surprise anybody to know that black steelworkers typically did not have the same level of education as white steel workers, but these are steel working jobs. And education is not necessarily something that is translatable into most of the work in the steel mills.

But we had interviewed—the paralegals had interviewed—all of the black steelworkers. We knew when we looked at this closely, their education levels aren't even right. Some were too high, some were too low–they [were] just [in]correct. What did we do? We brought in about fifty steelworkers to testify to the inaccuracy of the data they were using for their regression analysis, and the judge, who was very much attuned to mathematical analysis, Judge Pointer, tossed out the exhibit. That was their major work, I'd have to say—I don't think they put up any resistance after that, but it was just a good example for me of how facts are important.

TERRY CONNORS: The Department actually paid you for all that time in Alabama?

MARYBETH MARTIN: No. I got per diem; it was twenty-five dollars a day.

TERRY CONNORS: Actually—

MARYBETH MARTIN: And overtime.

MIKE MIDDLETON: [You received] overtime?

TERRY CONNORS: In 19—

MARYBETH MARTIN: We did get overtime.

MIKE MIDDLETON: We didn't.

JERRY GEORGE: We didn't.

TERRY CONNORS: [That's a] good point, because someone brought us up to 1974, I believe, in the initial phase, and there was a group of us that went over to the EEOC on detail, when the transfer occurred, and were asked to put cases together in ninety days in the style we had done at the Justice

Department and I recall going to tak[e] a team to Cincinnati to investigate a major consumer products company that will remain unnamed. And my plan was that we would go on Tuesday and we would return when we were finished. And, of course, that we would be finding people at home at night and over the weekend and so on and so forth, and the team said "wait a minute." The point of this is young lawyers and law students, when you are dedicated [to] something like this, [will] work as much as it takes to get this done and I think this is the theme throughout all of our lives at the [ELS]. And Jerry, tell us about fire departments and police departments and your experience.

JERRY GEORGE: Well, police and fire departments, they're sort of like construction unions; they're kind of my people. I'm from Indiana; I was working class. [I went] to Catholic schools. As I say, the guys in the police and fire departments were my people; I knew them. Before I get into that, one of the themes I think that's coming out of this is that in the [ELS], I think in the Civil Rights Division generally, [it] wasn't lawyers; it was a team. It was lawyers; it was research analysts and secretaries. We traveled together; we worked together; we partied together. We made very effective teams, and it's because we didn't have any artificial barriers between job classifications. This wasn't even a consideration. People did. Everybody worked on everything. And Dave Rose was key to that. And he always had our back. I always felt he had my back and I got one story on that which I would like to tell.

In the mid [19]80s, when I was suing—and had been suing for several years, off and on—the San Francisco Police Department,[20] there was [a] promotional exam coming up and it was no different than the promotional exam that I had stopped two years earlier, and [so I] informed the Chief Deputy City Attorney and I said, you know, under our consent decree, you guys [can't] go—I'm objecting; I'm writing you a letter telling you to stop the exam. Unfortunately there [was] some turmoil in the City Attorney's office at the time and that the person I had spoken with departed without ever telling anybody he was supposed to stop the examination. And we came up around in 1986, Thanksgiving week. I sent off my letter; I stopped the examination and the then mayor, now a Senator, called a friend of hers, George Bush, who was Vice President, at his home in Kennebunkport for the holidays; who then called Ed Meese; who then called Brad Reynolds. Who then called Dave Rose. And then the day after Thanksgiving, when I was at my mother's house, he called me; asked me what was going on, [and] I explained what had happened, and you know, nothing ever happened out of that. I understand that the mayor spoke to Brad, and Brad—she started yelling at Brad, Brad started yelling at her, they hung up on each other and nothing further happened. But I never had to worry about political interference as long as Dave was my Section chief, and it made a huge difference given the particular dealing[s] with police and fire litigation, which [were] extremely politically sensitive.

20. *See, e.g.*, United States v. City of San Francisco, Nos. C-84-7089-MHP & C-84-7694-MHP, 1986 WL 68546, at *1 (N.D. Cal. Feb. 12, 1986).

Police and fire—why did we do so many police and fire cases? Well, police and fire departments in this country historically were all white and all male. There were in some cities [where] you might have had a few blacks, a few Hispanics, but often they would have segregated assignments, segregated facilities. And these are really well paid jobs that have low entry requirements. They hire eighteen year-old kids and they train them to be firefighters; they train them to be police officers. You don't need to be an electrician; you don't need to be a sheet metal worker. You start out with no skills at all; they train you and it's a very good living.

Now, if you're also wondering why the fire department [i]n New York might have a lot fewer minorities than the police department. Firefighters in most big cities work eight days a month. They're twenty-four hour shifts, but they're sleeping in the firehouse during most of those shifts. I often thought I missed my calling; I went into the wrong profession. It is a fabulous job, and most of these guys have two jobs. And they'll work through their firefighting career and then retire and go to their second job full-time. But they'll have two full-time jobs. They can easily work two full-time jobs depending on what kind of job it was. There were firefighters in Chicago; there'd be four of them that would have a union—they would have a union job, a construction job, [which] they would work among the four of them. Whoever had a day off would work that day—they are terrific jobs. They have terrific . . . salaries, good benefits, and very good retirement.

Another element that made these this kind of litigation a little different than dealing with the industrial and union cases that I dealt with [was] the fact that you have the civil service "merit" system. (I would put quotes around merit.) It's a different kind of process. At a company you can go in any time and apply for the job. When you're talking about police and fire entry level jobs, they all accept applications maybe—they might be doing it once every five years. They'll go out, they'll rig, they'll run a selection process, and they accept applications, [and] they go take the multiple choice test, the physical agility test, they'll interview, create an eligibility list, that eligibility list will rank maybe 500 people, and that will be in place for several years. And they either run out of people on the list, [or] it expires. And then they go through the process again. So you have to be motivated to get those jobs. And they are politically sensitive. I mean, these are the people that are responsible for the protection of the community: your homes, your families, [and] your businesses. So people are very concerned about the quality of their fire and police departments. But it's also very important that those fire and police departments be representative of the communities they're serving, and that they be perceived as actually serving that community and not [be]—as many police departments were, and maybe still are—occupying forces.

They also were politically sensitive because they have extremely strong unions that are very politically savvy. They have a lot of time, they have a lot of money, and they have a lot at stake in preserving the status quo. So when we filed these cases, we're dealing with the cities—and maybe the politics in the city might be to resolve this matter, but the politicians in the city had to take into account the political threat from the police and fire unions. So that made them a little harder to deal with.

Now I talk about the myth of "merit" selection. You know, [a] lot of these departments were just historically all white. If they had any blacks, they just [would]—even [in] some of the northern and western cities [they] would have a few blacks, Hispanics—[have] segregated assignments. The city of Los Angeles—[the] liberal left coast—had two black fire houses. And the area of all the other fire houses were whites; all of these departments would have male only policies. They would not—just would not—even allow a woman to apply for a firefighter job or a police officer's job. On police officers—police departments—there were no street cops. You might have a policewoman category or a matron category to deal with prisoners; maybe to serve undercover on vice squad or something, but they were not considered police officers.

A story I heard [a]bout the Philadelphia Police Department was that when the Director was deposed, he was explaining that there were two badges for the Philadelphia Police Department. You had the badge for the police officers, and then the badge for the dogs, horses, and policewomen. In the L.A. Police Department, at a dinner for the policewoman's organization, there were about a hundred policewomen I think at the time on the L.A.P.D. The police chief at the time said he thought there was room for about twenty policewomen. And I don't know why he thought that was a good audience to say that to, but that was the situation that existed at the time we got authority to start suing these employers.

In addition to these policies there [was] a lot of what you would call "institutional head-winks." The standard they were all using—standards unrelat[ed] to job performance—[such as] multiple choice tests [that] would consistently have adverse impact on blacks and Hispanics. Blacks and Hispanics would always score, or not always, well—always—pretty much, one standard deviation below the white mean. If you're using it as pass/fail, that's bad enough, but if you're using the written test as a ranking device, forget it. You're not going to be hiring any blacks or Hispanics. Physical strength and agility tests—they would use those to screen out female candidates once formal sex requirements were eliminated. There were minimum height requirements, usually in the five-foot-six to five-foot-nine range, which would eliminate at least ninety percent of the women, and eliminate Asians and Hispanics at twice the rate of white males. And then [there were] background checks; use of factors, such as arrest records without convictions that had disproportionate impact on minorities, and often they were just subjectively applied. If your dad's a cop they may not even bother to check your background, particularly, you know, if he had a bad patch when he was a teenager but he's fine now. If you were a minority and you had an arrest record, you're out of there.

And then the last thing was just the process itself. Like I said, they might have an eligibility list that would exist for five years, [so] then you wouldn't know if you missed that start date; you're just going to have to wait around. And who waits around—unless you're really motivated to be a police officer or a firefighter? In addition you have this multiple step process where you first apply, then they'll send you a notice of the written test. Come in and take the written test. [We'll] send you the results of the written test. Then later they'll schedule the physical agility test. They'll send you another notice. You come in for the physical agility test. Then, after that, same thing for the oral

interview. And then maybe, then they'll have the eligibility list, and then if you've got 500 names on it, they probably won't run the background [checks until] they're getting ready to hire somebody, so they're going to hire twenty people, maybe they'll take [the] first sixty names on the list and send them a notice to come in and fill out the forms for the background check. So if you're in the second sixty names, you might not hear anything for two years after you've got yourself on the list.

So none of this is a problem if your dad's a police officer [and] your six cousins are all [in] the department. You know, when things are ready to happen, they'll let you know. You need to move, you change your address, you know; they make sure civil service knows about it. But if you're not in that game, then it can be a real problem. And people move; they forget to tell somebody about the change of address, they don't get notice, and they're off the list. Or it's been three, four years, they forgot they even applied for the job. So if you wonder why, if you have a merit system, you still end up with situations where the bulk of the people on the police or the fire department are all related to each other, that's how it happens. It's a merit system. It's a transparent system, but it's set up in such a way that unless you've got a comparable organizational effort for the minority communities, they're going to fall to the wayside. In terms of litigating stuff, what we really did [wasn't]—most of what we actually actively litigated—the height requirements and that sort of thing [because those] just went. You know, people understood they couldn't defend them. I only had one that ever got litigated.[21] They brought in an expert to talk about why the North Carolina Highway Patrol [used that type of requirement], and we had a case that only went two days, because the judge had gone to the University of North Carolina and he wanted to go to the basketball game that night. He let the trial go over to the next day. It took a couple more hours of testimony, and then [he] ruled from the bench. But they put their expert on the stand, and the most amazingly bad thing about it was that this guy gets on with his report talking about why this five-foot nine-inch height requirement was absolutely required to be a good, successful State Trooper. And you know, I knew that five years earlier, he had a one page report, and I had in my hands this transcript from the case five years earlier in California where he had testified for a plaintiff against a height requirement, and had gone on at great length about just how you could never defend a minimum height requirement for a trooper position.

So it was fun, I [have] got to admit. But it was not difficult. In terms of challenging written tests—and I think this is still an issue, because we're still doing it, and they're still giving the same kinds of exams. As I said, they'll always have adverse impact. The evidence of job relation in those early days often was not much more than well, of course, it's a good test; I mean it says this is a test for a police officer. That's what it says on the first page. So that's what it does; it tests for a police officer. And it didn't get a lot more sophisticated than that. [I]f they did try to validate test performance against job performance, they would typically use training academy performance because they had no good measures of actual job performance. Everybody was satisfactory. And if

21. United States v. North Carolina, No. 75-0328-CIV-5, 1981 WL 232 (E.D.N.C. Feb. 17, 1981).

you're correlating against a written test against another written test, you would expect probably to get about a point three correlation; and that was about the best any of the cases I saw ever did, was to get about a point three correlation between written test performance and academy performance.

On promotional exams, they didn't even have that, because they didn't have any job performance data at all. So they would say that they built these tests using a "doing a good job" analysis and the content of the test matched the content of the job. [That's what's] called content validation. And our response to these was to first tear apart their job analyses, because these are typically very superficial job analyses done by inexperienced analysts; nobody had ever questioned them before in terms of their ability to do these jobs, and if you cross-examined them, you could trip them up fairly easily.

TERRY CONNORS: Jerry, isn't that true in the *Ricci* case,[22] as well, but it never got to the record, I think?

JERRY GEORGE: I suspect it's true. I doubt that the test was any better than any of the stuff I saw. And test [content], typically would be irrelevant to job content, even on the promotional exams. I mean they looked like they were relevant, but if you started asking people about [it]—"So what would you do with this information on the job?"—[they] typically had no idea. It made no difference. And these are highly physical jobs—in terms of firefighter[s and] even police officer[s]—and on the promotion[s], the difference between the guys who were successfully performing at the entry level and their officers is leadership potential and there's nothing on those written tests that's going to measure any of those leadership traits.

TERRY CONNORS: Jerry, in the interest of time, [would you] run down the results on the San Francisco [and] L.A. cases?[23]

JERRY CONNORS: Well, all right. Well, L.A., as I said, had historically segregated firehouses [until] 1956. Then the department—the fire chief—said the watchword within the department was integrate and eliminate. And so they had internal segregation within those firehouses. What all of us had some experience with [was] the black bed. If you're at a fire house, you've got four, five people on the crew [that] live in [the] fire house. [I] f there was a black on the crew, there was a bed he was supposed to sleep in, and then when the next crew came in, the black on that crew would have to sleep in that same bed. They were not allowed to eat in the supper clubs. They all fixed meals together and [would] eat together in the fire houses, but the blacks were not allowed to eat with the whites [and] were not allowed to socialize with the whites. They could only [be] with the whites at the

22. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

23. United States v. City of Los Angeles, 595 F.2d 1386 (9th Cir. 1979); United States v. City of San Francisco, Nos. C-84-7089-MHP & C-84-7694-MHP, 1986 WL 68546, at *1 (N.D. Cal. Feb. 12, 1986); Officers for Justice v. Civil Serv. Comm'n of San Francisco, 473 F. Supp. 801 (N.D. Cal. 1979).

fire scene. And the whites were told that they could not talk to the black firefighters, because, the Chief said, "If people talk, they'll argue. People argue, they'll fight, and I'm not going to have any interracial fights."

TERRY CONNORS: And that's the last word.

JERRY GEORGE: And the witness who was going to say all this was a black firefighter who went to law school while he was on the fire department, and by the time we were ready to go to trial his chief was the head of the Los Angeles Civil Service Commission.

TERRY CONNORS: [J]ust as a wrap, because I want to do it publicly, I endorse completely what a great thing it was, what a great example Dave Rose was to all of us and what a great man and a great lawyer he is.

RICHARD UGELOW: Before we take a break for the next panel, you've heard a lot about Dave Rose today and the culture he created and established in the [ELS], and I say in the entire Civil Rights Division, particularly in the [ELS]. We were trained by Dave. [Since] Dave left, our successors have continued that—that same work ethic and culture [w]ill carry on. And as you've heard Tom Perez say, [the] Civil Rights Division is open for business again, and I'm sure the [ELS] is open for business, but hopefully, in the same tradition that Dave created, and that will carry on in [the] future, we have as a token of our appreciation to you. And I want to give credit to Lorna Grenevere who, as you know, was always the heart and soul of the set.

END TRANSCRIPT

Employment Discrimination:

45 Years of Enforcement of Title VII of the Civil Rights Act of 1964

Enforcement and the Future

BEGIN TRANSCRIPT

RICHARD UGELOW: [T]he next panel [will be led] by my colleague, Bill Yeomans, who teaches in the Law and Government Program at [Washington College of Law], which [Dean Grossman] mentioned at lunch, and [who] is a former Chief of Staff, Civil Rights Division, Acting Assistant Attorney General. We have three Acting Assistant Attorney Generals, people who have acted in the room, and [Bill Yeomans] was in the Appellate Section for many years. And were you in the Trial Section?

BILL YEOMANS: Criminal Section.

RICHARD UGELOW: And Criminal Section, Deputy Chief in the Criminal Section. [He] is going to lead [and] facilitate this panel and [talk] about the future, where we are now, and where the future will be. And if somebody asked about the next forty-five years of the Civil Rights Division, well maybe this panel has some answers or can point us in the right direction

BILL YEOMANS: Okay, thank you, Richard. I want to say a special word about Richard for putting all of this together. He is an exceptional colleague, and we interact on a regular basis here, and he really is a driving force in this law school; it's amazing. But he has done us all—and done the legal community here—an enormous service by bringing us all together today and I think we ought to give him a round of applause.

(Applause)

BILL YEOMANS: All right, enough with the nice stuff; let's get on [with it]. No, actually we are going to talk about current enforcement and future enforcement. And we are building on a day of very wise words and so our

burden is heavy because we have some tough acts to follow and, also, we're all that stands between you all and a reception; so bear with us, but we have the people here who can keep it interesting. And I'm not going to do extensive introductions, but I will do quick ones.

I think most of you probably know everybody. Everybody here, with the exception of Jocelyn and I, served in the [ELS] as a trial attorney, right Jocelyn?

JOCELYN SAMUELS: I did not.

BILL YEOMANS: And served with great distinction. They all fall into that category of people, like many of you who came to the Section, who were enormously talented, incredibly dedicated, terrifically productive, and who made an enormous contribution to the country. And so I won't go through their Section histories, and I'm sure they'll talk about some of their experiences, but they have all gone on to do extraordinary things after leaving the Section and the Department.

And so just going down [the] line: Bob Libman, who came in from Chicago for the tropical weather, and is a partner [at] Miner, Barnhill & Galland in Chicago and has been practicing there for a number of years after leaving the Department in 2004, I believe, so he's pretty fresh.

And next to him is Aaron Schuham, who serves as the Legislative Director of an organization that I love dearly, but its name always gives me a headache. It's the Americans United for Separation of Church and State; it's a difficult concept to be united for separation.

(Laughter)

BILL YEOMANS: And then next to him is John Gadzichowski, who, of course, [is]—we might want to talk about changing that—[the] current Chief of the Section, and we're looking to him, for the inside view on what's going on inside the building right now.

And next to him is Jocelyn Samuels, who serves as Counselor to the Assistant Attorney General, and has responsibility for both the Employment Section and the Education Section. And next to her is Michael Selmi, who is a Professor of Law at George Washington University Law School, and is one of the country's leading scholars on employment law.

So we are delighted to have all of you here today. And I'm not going to say a whole lot. I did want to just get my chance to talk about Dave Rose very quickly. And what I want to say is: Dave, I'm sorry to hear that you're still bitter about the *Cicero* argument.[1] I thought we had gotten over that.

(Laughter)

DAVE ROSE: Respectively.

BILL YEOMANS: We won; it's time to move on.

1. United States v. Town of Cicero, 786 F.2d 331 (7th Cir. 1986).

(Laughter)

BILL YEOMANS: But, no, that was a wonderful experience, because I was, at that point, a relatively young attorney in the Appellate Section. And when I came to the Civil Rights Division, there were a few people who were sort of gods at that point because they had been there from the creation and had had just a real fundamental impact on the development of civil rights law and—of course, Dave was one of those; Brian Landsberg was another—[I] looked up to these people enormously.

And so Brian told me I was going to argue this case; [it] seemed like a good idea to me, and, of course, I had to write a brief—and by the way, I don't remember Dave volunteering to write the brief.

(Laughter)

BILL YEOMANS: And so I wrote the brief and I was going to go to the argument. And I knew there was some buzz about Dave being a little unhappy, and lo and behold there I am out in Chicago before the Seventh Circuit, and he shows up. And it was bad enough that I was going to face Judge Posner on my panel, [I] wasn't really looking forward to that, but there I had the added pressure of having Dave in the courtroom, and it turned out really well.

I think in the twenty minutes, or a total of forty minutes in that oral argument, we bonded because, as Dave said, he didn't feel that good about it before I started [talking] but, by the time I finished, he felt better.

(Laughter)

BILL YEOMANS: And I can vouch for that because at the very end of the argument—Judge Posner turned out to be very helpful during the argument, after sort of the light bulb went on halfway through, and so he was just eating the City Attorney alive—[I] wrote sort of a little note to Dave: "No rebuttal, right?" And Dave wrote back: "No!" So we had come together.

(Laughter)

BILL YEOMANS: Anyway, we're going to talk about current enforcement and future enforcement. Just to set the stage, I mean you've heard a lot about the Section's troubles, shall we call them, during the last number of years, and those troubles, we're all quick to say, came from the political level, certainly not from the career level, but it was a difficult time. It was a time when, from outward appearances, the Section really failed to perform its traditional mission.

It pretty much stopped filing cases on behalf of African-American victims for a while. In fact, there was a long stretch where it filed more cases on behalf of white victims than African-American victims. And I kept standing up and saying, "My people don't need that kind of help," but I think toward the end of the last administration there was some moderation of that. And I think, as we all heard at lunch today, it is an exciting new time.

And Tom Perez [the Assistant Attorney General for the Civil Rights Division] frequently says, "The Division and the Section are open for business again," which is nice—it makes me a little nervous because it makes me think they're taking bribes.

(Laughter)

BILL YEOMANS: But I think it is true—that it really is the dawning of a new age—it's an occasion! It's an occasion for all of us to think about where we should be headed, because the Section is an enormous resource; as you heard, it's getting more resources.

We are living in an ever evolving society. We are going to be dealing with a new economy emerging from this economy's recent near-death experience and we are facing new living patterns. We are facing non-traditional ways of living and we need to think hard about how we can use some of the tools that we traditionally use, not only to do the work that the Section has been so important in doing, but [to think about] how we can expand the reach and the impact of the Section.

So I hope we'll deal with some of those issues today. And I hope we'll talk, obviously, about some of the legal challenges that Title VII faces. There has been mention of the *Ricci* decision;[2] there is some disagreement about how serious a blow that is to Title VII, and maybe we'll talk about some of that. And we'll talk about whether there are changes in the law that should be thought about.

So I'm going to stop talking and we're going to turn first to our government witnesses, and we're going to start with . . .

JOCELYN SAMUELS: Witnesses?

BILL YEOMANS: Yeah.

(Laughter)

BILL YEOMANS: And we're going to start—that's all right—back in congressional hearing mode. One thing I didn't say about Jocelyn, of course, is that she worked for Senator Kennedy too, and so she is a part of that incredible group of uniquely and unvaryingly talented people who are also very good looking.

(Laughter and applause)

BILL YEOMANS: So I would like to start with Jocelyn and let her tell us a little bit about the current thinking in the Division about the Section.

2. Ricci v. DeStafano, 129 S. Ct. 2658 (2009).

JOCELYN SAMUELS: Well thanks, Bill, and I'm delighted to be here, although I sort of think Bill has now set me up in many ways (Samuels and audience chuckling). He started by, after congratulating Richard for putting together this great day, which I am delighted to be a part of, saying "okay, that's enough with the nice guy," follow[ed] by calling me a witness, and pointing out that I was not a trial attorney in the [ELS].

BILL YEOMANS: Nor was I.

JOCELYN SAMUELS: I'm prepared for some tough cross examination here.

(Laughter)

JOCELYN SAMUELS: But let me make clear at the outset, we are not open for business by taking bribes. We don't take bribes, lest anybody have any doubt about that.

What I think Tom does mean by "open for business," though, is that he and the rest of the Division are now firmly committed to really aggressive enforcement of Title VII and of all of the other laws under our jurisdiction, [as well as] ensuring that the Section is restored to its original mission and role as a promoter of real social change and [to being] an entity that really does combat employment discrimination against those disadvantaged in . . . society.

Tom often uses the terms "reformation" and "transformation," and I think that's sort of consistent with what Bill was talking about, because certainly reformation plays a part in what we want to do over the course of the next three years. Because, as Bill pointed out, we lost a lot of experienced attorneys during the last administration; we brought minimal numbers of cases. I think Tom referenced in his remarks the GAO report that showed that the pattern or practice caseload of the Section diminished significantly; and there were, I think, significant issues about morale and direction in the Section.

So, by "reformation," I think he really wants to look toward restoring the Section to the role that it has played over the course of the last forty-five years in promoting social change. But in order to do that, I think, we also—and he recognizes—[n]eed to transform; it's not simply enough to go back to 1999 or 2000 or 1982. That [is] because the nature of civil rights challenges are different than what they have been over time, because the nature of the tools that we have available has expanded exponentially, and because the complexity of some of the issues that we confront is really enhanced, [so] we need to think about new ways of doing business and using all of the tools at our disposal to make sure that we can be the most effective employment litigation law firm in the country. That takes people.

And I just want to reiterate something that Tom said at lunch, which is that we were extremely fortunate to receive a significant increase in our budget. We have many different job openings, including five in the [ELS]. So I urge you to consult our website to look at the job postings there [or] to refer them to your friends. We have—and I want to make [this] clear because this is part of the restoration component of our effort—[a] transparent and nonpartisan hiring

process in place, and we are really looking for the best and brightest candidates from all across the country and all different kinds of experiences, so please do spread the word. We need help, and this is an extraordinary opportunity for us to really make a difference.

But let me talk a little bit—and I know Bill had suggested that we each talk for between five and seven minutes, and I'm incapable of restraining myself, but I'll be quick—[about] some of the changes in processes that we have started to put into motion and that we are planning to expand on.

One is that we're determined to make better use of the federal government's enforcement resources writ large, because there are numerous agencies, the EEOC and [the Office of Federal Contract Compliance Programs ("OFCCP")] being the most significant of them, that also have responsibilities for combating employment discrimination across the country. We want to make sure that we leverage the—albeit growing—still limited resources that each of our agencies has and make [the] best use of them to ensure that we're operating at maximum efficiency and helping each other out where we can.

So, we've begun conversations with each of those agencies about ways that we can better collaborate. And that could potentially include joint training [and] joint investigations. As Tom said at lunch, it may mean getting involved earlier in certain cases to make sure that, as the investigations are conducted, they're set up well for ultimate litigation. We are absolutely open to expanding those relationships to the extent useful to ensure that we're making [the] best use of our enforcement dollars and resources.

We're not exclusively restricting that [to] EEOC and OFCCP [though]—Tom recently convened a meeting of all of the federal agencies that have civil rights enforcement responsibilities—because I think one of the things to recognize, in terms of understanding the complexity of issues that we face, is that there is overlap, potentially, between different forms of discrimination that previously have been too siloed.

So it may well be that housing discrimination is a significant component of education discrimination, and that disability discrimination, as we all know, permeates every aspect of whatever is going on—be it public accommodations, housing, education, or employment. So we want to make sure that we are coordinating in the most effective way, broadly, so that we can use our enforcement resources, not simply under Title VII and the ADA, but also under the Rehabilitation Act and Title VI and Title IX, so that we can, again, make the most effective judgments about how to promote equality of opportunity.

We also are looking to state fair employment practices agencies and trying to figure out whether there are ways that we can better collaborate with them to ensure that, again, we are using resources in the best way possible. So getting our own house in order is something that we are really attempting to do and put new energy into. But that's only the beginning.

Another thing that we really, really want to do is ensure that we have open lines of communication with all stakeholder communities. And I include everyone in this room in that. [W]e know that people who are on the ground have information about cases of discrimination; about situations that they think may be unfair or unlawful; about policy priorities that we ought to

pursue; about opportunities for us to come and do public education, technical assistance, or other kinds of work in local communities to ensure that we're getting the word out that we're in business and we intend to protect people's rights. So we welcome getting input from all of you, and from the coalitions and groups and communities of which you are a part, so that you can be our eyes and ears on the ground.

We're also trying to work with U.S. Attorneys, and particularly in the area of [Uniformed Services Employment and Reemployment Rights Act] cases, trying to promote enhanced partnerships so that we can, again, more effectively deploy our resources.

We also are interested in making use of new tools, and our website doesn't yet reflect that, but hopefully over the reasonably short term we will have a website that is more user-friendly and has lots of valuable information. But I think that as more social media tools have become available, as there continues to be a need for public education and technical assistance, we want to add those kinds of activities to the work that we do and to the core litigation that will always remain a key priority of the Section.

I guess the other category of things that I would say are about emerging issues. To the extent that there are discrimination issues that are presented in a new way, or issues as to new communities, or new legal questions that are emerging, on which you think the Justice Department could play a helpful role, we'd love to hear from you about that.

As Tom mentioned at lunch, he's very concerned about re-segregation of older work forces as people retire. There may well be issues related to immigrants that are things that we need to take a look at. There are obviously going to be all kinds of new issues under the ADA Amendments Act, and although that's not in the ELS bailiwick, it is something that the Division is quite committed to enforcing in a proactive way.

If there are new legal issues, we hope that you will look to us and ask us to weigh in as appropriate. We have begun to file more amicus briefs. As many of you know, the *Lewis* case[3] is going to be argued in the Supreme Court on Monday; that is potentially [the] son or daughter of *Ledbetter*[4] and it concerns the statute of limitations that applies to disparate impact lawsuits. I think that's a very significant case, and it's one [in] which the Solicitor General filed a brief and will be arguing on behalf of the government that the statute of limitations runs from every occasion on which an employer uses a test that has disparate impact.

Those kinds of issues are obviously ones that pack a big wallop, and I think that one of the clear things that Tom means by "open for business" is that we intend to play a significant role in shaping interpretations of the law and [we] hope you'll engage in the continuing dialogue with us about how we can do that.

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3. Lewis v. City of Chicago, 130 S. Ct. 2191 (2010).

4. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2006) (codified at 42 U.S.C. § 2000e-5).

So I think I'll stop, turn it over to John for discussion of some of the specific cases that we're involved in, and then I know that people on the panel have a lot of suggestions and are prepared to take me up on this invitation immediately for suggestions about ways we can proceed.

BILL YEOMANS: Thank you, Jocelyn. Go ahead, John.

JOHN GADZICHOWSKI: Thank you, Bill. Good afternoon folks. This past year, the first year of this administration, has been a banner year for the [ELS]. We filed a total of twenty-nine lawsuits, which is the largest number of lawsuits ever filed by ELS during any single year; ten of these suits were brought under Title VII, and nineteen were brought under USERRA.[5] As to the ten Title VII lawsuits, four were pattern or practice suits, and the remainder were brought under Section 706.[6]

I know that Tom ha[s] shared with you some of the work we had done, referencing a couple of cases, *Fire Department of New York*[7] and *Massachusetts Department of Corrections*.[8] I'm not going to repeat what he had said, but rather turn to areas of priorities that we may want to address and in that context, [I will] discuss the recent lawsuits that we have filed.

Probably one of the significant priorities that we ought to be addressing is, obviously, increasing the number of pattern or practice suits, especially those which are large and complex. There are several reasons for this. [O]ne is to have . . . impact and impact cases. And I don't mean impact verses treatment; I'm talking about the large cases that have a lot of relief; in other words, a lot of impact on communities and on employers. They can be found only in large suits. Second of all, it's those types of suits, especially where you have complex testing cases, where I think the Section can lend its expertise, as well as its deeper pocket, to members of the plaintiffs' bar who otherwise wouldn't be able to take and fund cases of that type.

A case in point is Fire Department of New York, [*United States*] *v. Fire Department of New York*. There, we, the United States has—and plaintiff intervenors have—alleged that the city had used two written examinations for entry-level firefighter[s], which resulted in disparate impact and which were not job-related or consistent with business necessity. By definition, since it's a testing case, [the case] requires experts in the area of the first prong, disparate impact, as well as the second prong, which is job relatedness. These are very labor and cost intensive cases, and I think we've had a very good working relationship and a true partnership with the Vulcan Society, which is the plaintiff intervenor there.

5. Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4335 (2006 & Supp. II 2008).

6. 42 U.S.C. § 2000e-5 (2006 & Supp. III 2009).

7. United States v. City of New York, 683 F. Supp. 2d 225 (E.D.N.Y. 2010).

8. Complaint, United States v. Massachusetts, No. 1:09-cv-11623 (D. Mass. Sept. 28, 2009), *available at* http://www.justice.gov/crt/about/emp/documents/massachusettscomplaint.pdf.

Just last month Judge Garaufis entered an order on relief in which the court . . . determined that the City is responsible [for] provid[ing] 293 priority job offers to black and Hispanic victims of the two tests, as well as to award those folks retroactive seniority for all purposes. We heard from Frank Petramalo and Jerry George earlier today with regard to the real importance of retroactive seniority, and, obviously, the Supreme Court also thought so in *Franks v. Bowman Transportation*,[9] where it held that (or instructed that) retroactive seniority is an integral part of remedial relief.

Another case that is large and complex is a current case that we're working on, *United States v. State of Massachusetts*. This case involves our challenge to the State's use of a physical abilities test for the entry-level position of corrections officer[s] statewide. The examination, or the test, that the State administers is not gender norm[alized], so, therefore, it has tremendous disparate impact on the basis of gender against women.

Jerry talked a little bit about police jobs, and I'm asked all the time, why do we concentrate on public safety jobs, and is that all we do? That is, and remains, a priority. Jerry had mentioned several reasons for it; let me add another one: and that is [that] especially in the economy that we find ourselves in, the employers on the state and local level are not only not hiring but, indeed, cutting back and letting folks go.

One thing we know about public safety positions . . . is that they're almost always going to be hiring cops and firefighters. So it's a very good job that's got great benefits, great pension benefits, and a lot of employment decisions, which—from a plaintiff's point of view—are crucial [in order] to make, for example, a statistical showing.

The type of job that we're looking at currently involves a police promotion exam. We want to focus; we want to continue our efforts in the area of public safety, but we want to expand those efforts in public safety to go after promotional practices. Heretofore, the Section has concentrated mostly on entry-level positions in public safety positions.

One of the reasons for having done that was because there weren't blacks or there weren't women or Latinos in even the entry-level jobs, much less the promotional positions. Now we're seeing more and more . . . integration of our police and fire departments but only at the entry-level, and we want to take the next step to look at discrimination in promotions in both police and fire.

An example of this is our State of New Jersey suit,[10] which was filed just last month. In this suit, we challenged the State's use of a written examination for promotion to the position of police sergeant. [That] examination is used by all local jurisdictions throughout the State that are part of the State's civil service system; so that's, I would say, about three-quarters of the local jurisdictions throughout the State utilizing this exam. We're in the early stages of discovery at this juncture.

9. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

10. Complaint, United States v. New Jersey, No. 2:33-av-00001 (D.N.J. Jan. 7, 2010), *available at* http://www.justice.gov/crt/about/emp/documents/newjerseycomp.pdf.

Jocelyn raised the point, and it's my third point in terms of priorities.

JOCELYN SAMUELS: I didn't mean to steal your talking point.

JOHN GADZICHOWSKI: Not a problem, no—[on] suits to address re-segregation: we actually have two suits already that are on point here, one is *Fire Department of New York*. Remember, I think Tom had mentioned at luncheon that blacks made up approximately only three-and-a-half percent of the firefighters in the Fire Department of New York. There was a time, folks, when blacks made up about seven or eight percent of firefighters, so we've actually had a retrenchment with respect to the Fire Department of New York.

Second of all, in our Massachusetts suit, we're challenging this physical abilities test, which is used without gender norms. But I've got to tell you something; at one point and up to 2004, the State actually used a physical abilities test that was gender norm[alized]. So I don't know how one defines the term "re-segregation," but certainly we have employers that are, shall we say, regressing. I think those are the types of employers that need special attention, because we certainly don't want to sacrifice and give up the gains that we've made. A fourth point is that we want to look very hard at employment discrimination in our schools and universities. Fifth, we expect that there is going to be a very substantial increase in the amount of defensive litigation.

As most of you know—I know Mary Beth in particular, because she worked [with] Ann Richard, because they worked on so many of these set-aside cases—they're under attack, and we have the [Associated General Contractors] ("AGC") and other plaintiffs looking to knock out the programs state by state, one by one. We're not going to let that happen. We are going to actively defend the set-aside programs that are in place.

Lastly, I see that there is going to be an increase in pregnancy discrimination suits. Two of our pattern or practice suits this past year have dealt with pregnancy discrimination; one in terms of assignment restriction, and the other one in terms of a termination. We've also seen it in one of our Section 706[11] suits, *United States v. City of Chicago Board of Education*[12] I think this is an issue that we thought some time ago was going to be taken care of and we weren't going to be seeing again, but it seems like we're revisiting this very issue that we thought we had settled and resolved some years ago.

Those are the bold-letter priorities. I'm sure that there are going to be suggestions from my colleagues with regard to more. But in working on these priorities, we're going to keep, as a process matter, [doing] three things.

First, as Jocelyn has indicated, we're going to develop and maintain a very close and constructive relationship with the EEOC with the respect to the enforcement of Title VII, and with the OFCCP with respect to the enforcement of the executive order. [Second], we're going to develop and maintain effective, constructive working relationships with stakeholder organizations and their

11. 42 U.S.C. § 2000e-5 (2006 & Supp. III 2009).

12. Complaint, United States v. Bd. of Educ. of City of Chicago, No. 09-cv-1092 (N.D. Ill. 2009), *available at* http://www.justice.gov/crt/about/emp/documents/chicagoboecomp.pdf.

counsel, as we've already started doing in the fire department case[s]. And [third], we're going to be putting more reliance upon the U.S. Attorney offices for litigating our USERRA suits, thereby freeing up valuable resources, both personnel and money resources, to further our enforcement program under Title VII. Thank you.

BILL YEOMANS: Thank you, John. That's a very heartening agenda, and I think . . . the part about bringing more complex pattern or practice cases . . . raises . . . one of the Section's biggest challenges. As most of us know, the Section has lost some of its most senior [and] most experienced attorneys in the last few years; it's lost an enormous amount of intellectual capital. So it's going to be a challenge, and at some point we'd like to hear what your plans are for restocking that capital. I know you're hiring.

But, our next speaker, Bob Libman, is a classic example of the kind of resource that the Section lost, and really tragically, and I want to ask him to speak next. Bob?

BOB LIBMAN: Thank you. And as the only member of the panel who lives outside the beltway, I think I have perhaps a different perspective; also, [I am] the only panel member currently in private practice. But I wanted to start first by also thanking Richard. Whether by design or otherwise, I think what Richard has done here is really develop and lay out the first oral history of the [ELS], and that, in and of itself, is quite an accomplishment, so thank you, Richard, for that. [W]e could applaud Richard for that.

(Applause)

BOB LIBMAN: And I can tell you that I've learned many things here today that I didn't know before. I was in the Section from 1991 until 2004—actually about 2002, [when] I was sent elsewhere, but that's another story. And I do also want to just publicly acknowledge and thank those who came before me and built the foundation upon which I hopefully did something during my thirteen years in the Section.

I did want to reiterate what John said about the importance—maybe the why—why the [ELS] and its work in Title VII enforcement is so important. Again, given my perspective in the private sector, at least for the last six years now—I'm in a small, primarily plaintiffs' public interest law firm, where we can brag that Barack Obama used to be in our office, actually, he worked there—and it is very difficult for the private sector to bring the kinds of cases that the [ELS] has historically brought and is uniquely qualified to bring because of the expertise. Historically, the Section has had the resources, as John mentioned, both intellectual and dollars wise; and the horizon, if you will, the time horizon for resolution of these cases, which can take decades, as many people know.

The *Lewis* case[13] is a perfect example. Our firm actually filed the EEOC charge that is at issue in the *Lewis* appeal, and that charge, I believe, was filed

13. Lewis v. City of Chicago, 130 S. Ct. 2191 (2010).

in [1997], so that's thirteen years ago. Along the way, the resources necessary to litigate that case were tremendous; it's not only our firm working on that case. But the [ELS], from my time there, served the critical role of bringing the large pattern or practice cases against the public employers in a way that the private bar can't do.

The private bar has other challenges as well in bringing these cases, including class certification under Rule 23,[14] which the [ELS] thankfully doesn't have to worry about. So the point there simply [that] is there is a real need for aggressive enforcement of Title VII from the [ELS]. I'm very encouraged and have reason for great optimism in light of what we've heard already.

I do also want to just, for those law students here or Section attorneys who are of the more junior in terms of experience, [give] you a few words to have hope as well, even [regarding], what somebody called, the "dark days" that [preceded] us. And it really touches on a case I worked on while I was there, the *SEPTA* case,[15] [during] which I was fortunate to have Richard Ugelow as my supervisor; I was lead attorney.

The brief background—this is the case against the Southeastern Pennsylvania Transportation Authority, essentially the Transit Police in Philadelphia, [h]ad a physical examination [used to screen] transit cop[s]; you had to run a mile and a half, I think it was in twelve minutes; never mind the fact that incumbent police officers were failing this repeatedly and being promoted and commended and doing heroic things. The test was developed by a test developer, Paul Davis, who was the expert for the *Virginia Military Institute* [case].[16] [H]is testimony in that case, which we tried to offer—I think we did in the *SEPTA* trial, trial number one—[t]hat the only area of physical performance in which women outperform men was in having babies and making milk. He did a validation study to justify the need to run fast as a transit cop by conducting a study at the University of Maryland.[17]

[I] believe Aaron went out there actually and talked to folks at the track where he had folks running to show how fast you needed to run to be a cop, and he put together a class of folks he called the perpetrator class, simulating the perpetrators that had to be tracked down by the police.

And I think Aaron talked to the Maryland track coach, [who] just happened to be on the track that day, and Aaron asked them if they knew anything about this study that had been done. He said, "Sure. In fact, some of my track team members were in that study." And it turned out that all the track team members were the perpetrators . . .

(Laughter)

BOB LIBMAN: . . . who ran as fast as the typical criminal in the Philadelphia transit system, I'm sure.

14. FED. R. CIV. P. 23.

15. Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478 (3d Cir. 1999).

16. *See* United States v. Virginia, 518 U.S. 515 (1996).

17. *See Se. Pa. Transp. Auth.*, 181 F.3d at 491–92 n.18 (describing Dr. Davis's Maryland study).

(Laughter)

BOB LIBMAN: The trial judge did not like our case, and said to me on the first day of trial with three attorneys and our counsel, "Who is running the country today now that you've left Washington?" We lost that case at trial. We appealed and established a very important principle about the use of a cutoff, or actually the meaning of the "consistent with business" assessing language of the Civil Rights Act of [19]91 in the context of a cutoff score; it was a tremendous victory in the Third Circuit.

The case went down for a second trial and eventually it became a casualty of the last administration; we were asked to withdraw from the case, strangely enough without any consultation of any person who worked on the trial team. And the case actually was—eventually—the test was found to be not unlawful, so it persisted.

That's a long intro, but the coda to it—which is the reason I started the story—is that just last year, within the last six months, SEPTA abandoned the test—the very same test that we challenged—and replaced it.

(Applause and laughter)

BOB LIBMAN: And [SEPTA] replaced it with essentially what we had been arguing should've been done all along. So the theme of incremental change and waiting to see the results, I think, certainly rang true for me there.

I want to speak just briefly also on this issue of the resource—the new attorneys that will be hired. The challenge I see for the [ELS] is not just bringing in new attorneys, but training them. As I viewed the work in the [ELS] when I was there, the day-to-day work of the line attorneys, with whom I have particular affection, is about gathering facts. That's what it's about; it's about gathering facts and presenting the facts.

We're not typically, on a day-to-day basis, making new law. We know what the legal standard is; we need facts that can meet that standard; and so the new attorneys coming in need to be trained. They need to be trained by senior people who have experience, who know how to develop Title VII cases, know how to take depositions. It's not enough just to get them in the door; they have to be trained.

One story I'd like to share with you, and it also recognizes Bill Fenton, who is here today, who is, again, one of my mentors, a Deputy Chief who retired last year, quietly, as we expected, but who[m] I think should be publicly recognized. He was one of my mentors and [a] mentor [to] many people I think who are here today.

(Applause)

BOB LIBMAN: And on the question of training—and on the theme of immersion—I wanted to share a story which I believe is true, Bill, and if not, it should be. The first case I was handed to work on, when I got to the Section

in 1991, was against Hancock County Board of Education;[18] and I was on the road within a few weeks doing an investigation, and found myself suing them and taking depositions within a few months.

I went in and talked to Bill about my first deposition, and as I recall it, Bill said, "Well you haven't taken depositions before?" And I said, "No." And he said, "Have you attended any depositions?" "Uh, no." "Have you read deposition transcripts?" "No." "Have you read any of the practice guides on how to take depositions?" I said, "No." He said, "Have you ordered the court reporter?" I said, "Yes." He said, "You're going to be just fine!"

(Applause and l aughter)

BOB LIBMAN: And in closing, I want to say that I do think the line attorneys are the real treasure of the [ELS], certainly during my time there, and for that reason I just want to reiterate that getting new folks in the door is not going to be enough; they have to be trained. And there's been a real loss of, as Bill says, intellectual capital. I think the challenge against this, facing the Section, is very large; not one that's insurmountable, but I do believe that it's going to take time to get the line attorneys to a place where they can effectively and vigorously enforce the law as the political appointees and the Section management want them to do. Thank you.

BILL YEOMANS: Thank you, Bob. Aaron, time to put your track shoes on.

AARON SCHUHAM: Okay. Well, thank you, Bill; I mean it's a really great honor to be on this panel. And this has been bothering me all day; can I actually ask, who are the current line attorneys in the Section? We want to know who you are, can you tell us?

BILL YEOMANS: Current.

AARON SCHUHAM: Thank you, current, yeah. I want to spend my time advancing a few ideas and raise actually a few questions about how ELS, I think, could help to sharpen its focus in the months and the years to come.

When I worked at ELS, some of my friends in the civil rights community would often kind of chide us and tell us that we were sort of DOJ's Title VII shop or the government's Title VII shop, and that always really irritated me. I don't think that ELS is just another Title VII shop or even just another Title VII shop with a lot of resources. That really, as we have learned today, is not what ELS has been in the past and I don't think—and my guess is that many of you don't think—that that's what it should be in the future either.

The Section has vast power as an arm of the federal government; it has vast prestige, credibility, and resources. And I think that it should be using these resources and these assets strategically to provide the most vigorous and aggressive Title VII coverage as possible.

18. United States v. Hancock Cnty. Bd. of Educ., No. 91-0149-W(S), 1993 WL 436490 (N.D.W. Va. Sept. 1, 1993).

And basically what I think this means is that ELS should really continue its past practice, to develop its past practice about being self-critical about what it uniquely brings to the civil rights table when it's deciding how to set priorities and deploy its resources. The mission really should not just center around investigations or cases that have merit, rather I really think that ELS should think carefully about putting in additional screens on top of these pipelines in order to prioritize work in a way so as to maximize its future impact.

And I want to note that in my view, there is no doubt that disparate impact cases are incredibly important for all the reasons that have already been described. But I am someone that really believes that the [Section] 706 docket—the individual discrimination docket that Bill used to manage—is part of this whole thing; that the development of that docket strategically would allow the [ELS] to develop its impact even more. [I]'ll try to describe a few ways very quickly.

So the first kind of broad point that I wanted to make, in raising some considerations for you all to think about who are in the Section for the future, is basically that ELS should address important enforcement gaps where the private bar may lack resources; as Bob and I guess John noted earlier, [w]here resources basically aren't available. So let me ask some questions.

Will ELS continue to deploy major resources towards Title VII investigations and cases that are simply too complex or expensive for private attorneys to develop? We really have already talked about that, and I think it's wonderful to hear about all the great work that you're leading the Section in doing on that. Private civil rights law firms—many of them, most of them—don't have the resources or even the organizational resources, or even, frankly, the sheer attorney power that ELS has to investigate these cases, carry them on for a long time, as Bob said, and move them forward.

Second, how can ELS work to eradicate forms of discrimination that seem most important now in this time of severe unemployment, which we all know has had even a greater impact on minority communities? Let me give you a couple of ideas. Can the Section expand its past work? And I think it's really amazing work that the Section did in the past to protect women's rights to full equal employment opportunity after pregnancy, or even adoptive parents, when they return to work.

A lot has been written—go and Google some Law Review articles—[a]bout whether Title VII could ever be used, [t]hrough the antidiscrimination principle, to get at childcare; to get at the fact that many people, in order to walk into a place of employment [in] the first place, must have childcare. It's a really interesting area of law; DOJ could look at that.

Third, will ELS then continue to make an impact in geographic areas, where access to private attorneys is very limited, even including . . . cases that seem to be very routine, straight-out violations of existing Title VII law? Here, the Section could continue what I really view to be a past critical role in: (a) providing relief for victims of discrimination in these areas who can't access local representation, and (b) in educating the public and employees and employers in specific geographic areas about their obligations [under] Title VII.

Let me give you one super-quick example right here; and I think someone in an earlier panel, and I apologize if I'm duplicating them, talked about the first set of firefighter cases. I worked on a firefighter case in southern Georgia; you remember that we pluralized and found multiple victims.

Well, I never realized, when I worked on this in the early [19]90s, that the origin of this whole thing really was 1972. Do you know that before 1972, when Title VII was amended to apply to public employers, in 1972 there was not a single woman paid firefighter in the United States?[19] I truly think that's a remarkable fact; that's an amazing fact. And it really was through the first iterations of disparate impact litigation then, that you all then carried out, that those kinds of barriers were broken down. ELS should do that in the future; looking at these geographic areas where people are totally disenfranchised from work, and especially for government jobs, which, as John said, are very high paid jobs and often come with very good benefits.

Second, then I will move it along, ELS really should not just fill gaps. I mean, that's sort of what I've talked about thus far, at least in my mind. I think that ELS really should continue to make a very conscious, focused, deliberate decision to lead in the development of Title VII law, as Jocelyn referenced, in a way that would really provide for the most robust protection of American civil rights in employment as possible.

I know there are institutional impediments in this process. I experienced them and I think many people in this room, at different times, did. It is hard sometimes to cleanly work with EEOC and OFCCP. I think what you all talked about today and what Tom talked about earlier, about improving your relationships with these agencies, is amazingly hopeful and amazing[ly] important.

Private attorneys may not take up cases that really result in the development of the law. They're risky cases to bring, they require tremendous investment, even in individual discriminations, to develop that kind of law, and I think that ELS is very capable of doing that. So here is, very quickly, by no means a comprehensive list of objectives, but some good examples.

First, we've talked about the disparate impact theory all day today and cases and *Ricci*;[20] can DOJ look not only at its own docket, but at private litigation involving disparate impact and get involved there, even at the District Court level, to weigh in on the constitutionality of disparate impact for the future? The [DOJ] has a role in defending the constitutionality of all federal statutes, we all know this; this is a very good example of where ELS, even at the District Court level, could do that.

Second, working to strengthen Title VII's sex discrimination and sexual harassment protections; if DOJ wants stronger protections in this area, and it certainly should and I'm sure it does, then the Section should look at developing some areas of Title VII law that really would do that. Here are three quick examples.

Pushing back on sex stereotyping and gender rules in the workplace;

19. Equal Employment Opportunity Act of 1972, Pub.L. 92–261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2006)).

20. Ricci v. DeStafano, 129 S. Ct. 2658 (2009).

could ELS work with the EEOC to look at specific potential cases, potential investigations, that involve sex stereotyping under the *Price Waterhouse*[21] theory? Or even, aside from the *Price Waterhouse* theory, could ELS work to address other minority communities that the Section could impact through Title VII straight-out sex discrimination provisions?

Here's a great example. Do people here know about the recent *Schroer* case?[22] This involved a transgender employee, a colonel, in fact, who used to brief Vice President Cheney on national security issues, and then applied as a male to the Library of Congress for employment for a [Statistical Reporting Service] job—a congressional research service job—obtained employment and then, after telling the supervisor at issue that this person was going to change genders, that offer of employment was then retracted.

And I would assume that the Civil Division of DOJ played a role in defending that litigation, the case, ultimately before a District Court Judge here in D.C. [T]hat the court there determined that, even though Title VII doesn't cover transgender people—there's a specific exclusion for it—that there was nevertheless a straight-out sex discrimination violation; not even a *Price Waterhouse* sex stereotyping violation there, but the fact of the change of gender was a literal violation of the statute.

You all could go and look at those kinds of cases. You could look at cases, of course, that don't involve sexual minorities but that get to traditional gender roles, just as *Price Waterhouse* did. You could look at cases that were really under-enforced on same-sex harassment, which was established as totally viable in the *Oncale* decision;[23] that's something that we did in the past.

A couple of more quick points, or do you want me to stop? Do you want one more?

BILL YEOMANS: One more.

AARON SCHUHAM: One more, okay. Can I mention something about the amicus [brief] role that Jocelyn brought up? Some of you who were involved in the Section back in the [19]90s and early in 2000 know that we got involved in a case there that looked at, really for the first time, having the Justice Department weigh in on the constitutionality of state and local anti-discrimination laws.

When Congress passed Title VII [in 1964] and extend[ed] that in 1972, Congress explicitly recognized that Title VII, as important as it is, really is meant to set a floor and not a ceiling to employment anti-discrimination principles; that it expected, specifically, that States and localities would provide for more expansive employment protection than Title VII itself does.[24]

21. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

22. Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).

23. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

24. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974) ("Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes . . . . Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." (footnote omitted)).

A lot of those provisions have been under attack in recent years. There are people raising free exercise claims and other First Amendment claims to the constitutionality of these kinds of laws. And I think that DOJ could play a very specific role—in its broader role of protecting the civil rights régime of providing equal employment opportunity—[c]oming in and weighing in on the constitutionality of those kinds of laws, just as we did in a very specific context in Kentucky and in Louisville back in 2000.

So I will stop with my ideas. But I really think what it comes down to is the fact that ELS has a very unique role. It may not feel like that to you every day. You have tremendous power and resources. You have access to other lawyers in the [DOJ], in other discipline areas, that allow you to really solve problems holistically, in a way that I truly don't think any other private attorney could, and so I hope you use it.

BILL YEOMANS: Thank you, Aaron, for a lot to chew on. Michael, you get the last word.

MICHAEL SELMI: Thank you, and I am, I guess, literally the last thing between you and your drinks at this point.

(Laughter)

MICHAEL SELMI: And I have to start by saying that it is just an absolute pleasure to be here and I really appreciate Richard having invited me. I was only at the Department for two years, from 1989 to 1991, and it was a great experience that, in some ways, has never left me, because I still use my anecdotes from those two years in class all the time. And as many of you probably know, whenever a professor starts off by saying, "I had a case once," they usually mean, "I had one case."

(Laughter)

MICHAEL SELMI: I actually had lots of cases at the [DOJ], and I had just a fabulous experience. And I later went to the Lawyers' Committee [for Civil Rights Under Law] and I never really felt like I had changed much; it did feel a little bit different in terms of the side that we were on.

There was one case that I was doing when I was at the [DOJ], with the City of Birmingham,[25] [where] I went to do a hearing and because of the past history of the [DOJ], having switched sides a couple of times, it wasn't at all clear where I was supposed to sit; and I ended up sitting behind everyone in the middle. And then when I went to the Lawyers Committee, it was different in that respect; we always did know what side we were on, but the work was the same for the most part. And I think that it's an important aspect to emphasize; that the work in the Civil Rights Department is important and it needs to be civil rights work again, I think.

25. McWhorter v. City of Birmingham, 906 F.2d 674 (11th Cir. 1990).

And I did want to just share one quick anecdote, sort of everybody else who has had, and one of the things that being here reminded me of was, just the wonderful experience I had at the [DOJ]. And the very first case I'd got when I arrived there was *Bazemore v. Friday*,[26] on remand from the Supreme Court, and within two weeks I was down in North Carolina arguing a summary judgment motion about the regression analyses that were present in that case.

And my favorite experience in that is, when I was making an argument in that case, one of the defense counsel tried to cut me off, and the judge stopped him and said, "Wait, wait, wait! Mr. Selmi,"—I was going to say professor—"he's the expert on this." And I was just thrilled. I'd been there all of two weeks and I was already the expert. I never quite knew whether the judge was being sarcastic or not and I didn't bother to ask him. And I've kept that transcript, highlighted, to this day; in large part, because it was the last time anyone referred to me as an expert on anything.

(Laughter)

MICHAEL SELMI: But it really was a terrific experience, and I hope that comes back to you. I'm not going to have too many comments, because a lot of what the [DOJ] can do has already been discussed, but I'm going to have a few suggestions. One of my very first articles that I wrote suggested that we ought to abolish the EEOC, and I'm not going to go that far with respect to the [DOJ], and I actually don't think the EEOC should be abolished, but I do think it's important for the [DOJ] and the EEOC to have a plan and to make sure that they're doing something distinctive and different.

From what I've heard—I wasn't here this morning—but from what I've heard this afternoon, it seems that there's a lot of emphasis on how the last eight years changed the [ELS] dramatically. My sense was this began before that, from the outside at least, and from my watching and writing about the [DOJ] and the enforcement of these statutes. During the Clinton administration, enforcement also declined—not nearly like it did with the Bush administration—but it didn't seem to be the priority that it should have been [f]or a variety of political reasons; and I hope that doesn't happen this go [a]round.

The rhetoric was very much the same at the beginning, although I think that the experience with Lani Guinier may have changed things significantly. And it is wonderful to have an Assistant Attorney General who has civil rights experience and knows that Title VII is an anti-discrimination statute and not a tax statute or something, and I think that should make a difference. But the rhetoric won't carry you through; we've heard the rhetoric before and we need to see, not just a budget, but I think we need to see actual results.

And that's one thing I want to say . . . the work of the [ELS] needs to be publicized. There are no longer annual reports. It is very hard to find out what the [DOJ] is doing. You do list complaints, but it needs to be public, and I think that's true for the EEOC too; so that we can, those of us on the outside, [h]ave better oversight of what the [DOJ] is doing. And we should be able to see the kinds of cases you're bringing.

26. Bazemore v. Friday, 478 U.S. 385 (1986).

And I think the other thing, in terms of a plan for the [DOJ] to be doing something distinctive, I think it should think about how it can contribute to the law. There is very little case law on the business necessity test after the Civil Rights Act of 1999; the *SEPTA* case is really it, and that's just one case and we could use more case law.

Now that doesn't mean you don't settle cases in order to develop law, but it does mean more amicus briefs; it means you want to look for cases that could have an impact. The fire department case in New York seems like a perfect example of what the [DOJ] ought to be doing, and it's getting publicity. And the fact that it occurred—it's actually not a post *Ricci* case, it was filed before—and the first decision, if I remember, came just on the heels of *Ricci* and is being pushed forward; that is a great example of what the [DOJ] should be doing. But it's still that old testing case, police and fire department[s], which has been going on since the 1970s, and that correctional officers case that you mentioned, with the physical agility test—the same thing—and it seems that there should be something different.

When I was at the [DOJ,] one of the initiatives was the suburbs cases. So that you had done the police and fire department cases before in the cities, and then we moved out to the suburbs and started doing all the Los Angeles suburbs, the Detroit suburbs, Chicago [suburbs] . . . and that made sense. That was a good plan, I think, and a lot of good work was done on those cases. And they were easy cases, for the most part, because so little had been done in them; they were really just a second generation of those initial cases.

The ones today are less easy; [t]here were the prison cases, too, and those turned out—you know when we were doing the prison cases with respect to women, some of which are still going on, it sounds like; with the women, some of us thought these were sort of silly cases because we were just suing about prison jobs—and they didn't sound like very good cases until we went out and did them. And I did a number of those cases involving women correctional officers in prisons, and you realize pretty fast, those are the best jobs around; they're not glamorous jobs, but they were the best jobs in those rural areas, and it made sense to be trying to get women access to those jobs; and . . . I think something along those lines.

And you've had lots of suggestions today . . . [o]ne of the things that's different from academia and practice [is that] in academia we focus on how much discrimination has changed, how it's more subtle, harder to prove, implicit, and these structural components; but the cases that people are bringing really don't involve those issues. And I think one area where you might be able to find them is in the schools; schools are still overwhelming[ly] female in terms of teachers [and] overwhelming[ly] male at the principal levels. Those might sound like individual cases, but you might be able to do them structurally and think about going out and searching for cases and trying to make a difference in some of these.

When you look at areas that are growing—and it's hard to [know] what areas are growing, where there is job growth today—[w]e used to look at North Carolina. You know, we would go and look at the data where it was a growing area and see if African-Americans—and now Latinos—were getting the jobs in those growth areas, too. Trying to find the big cities, sometimes some of the

rural areas might make sense, too, but really trying to look, with all the data the [DOJ] has, going out and trying to find cases to integrate the Latinos in the areas or African-Americans, trying to get them into the higher-level jobs; as opposed to doing the cases that come forward, and making it more like sort of a branch office of the U.S. Attorney's Office in some ways, which it doesn't sound like they're doing anymore; it sounds like [they]'re starting to go out and do those pattern or practice cases.

I don't think the [DOJ] should be doing individual cases or should be putting resources into them, and I've written about that, but that's also just a statutory issue; but I think the pattern or practice should be the focus. I think the publicity—and I think the other thing, and this I'm saying to the two people to my left, and then I'll stop—[and] the leadership has to support the attorneys. The attorneys want to do the civil rights work, but Bob's experience, when you have a case that's taken out from under you, you know you don't want to spend four or five years working on a case and then find out you're on the other side

BOB LIBMAN: Yeah.

MICHAEL SELMI: And you won't have the incentive to do those cases if that might happen, and the only way you're not going to have that is if you have support from the front office, which I always had. Jim Magnus hasn't been mentioned—from when I was here, he was my chief. He supported me, and Richard did, too, and Bill, and it made huge difference to the work that we did. [I] think that it's easy to forget the importance of that, because the attorneys want to do the work and hopefully they will be able to do so. And I think we're all looking forward to a new day, but we'll be watching, too.

(Applause)

END TRANSCRIPT

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NOTE

$0.77 Does Not Equal $1.00: A Perspective on the Ledbetter Fair Pay Act in a *Dukes v. Wal-Mart* World

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This Note builds upon a lecture of the same title that Fatima Goss Graves, Vice President for Education and Employment at the National Women's Law Center, delivered at Washington College of Law on October 28, 2010. The Labor & Employment Law Forum and the Women's Law Association co-sponsored the lecture.

I. INTRODUCTION

November 17, 2010 started and ended like a normal day for most people. For working women across the United States, it was another slap in the face. The defeat of the Paycheck Fairness Act ("PFA" or "Act")[1] in the U.S. Senate delivered a strong blow to the pay equality movement and women across the country.[2] Among other objectives, the Act sought to provide for punitive damages for sex-based pay discrimination and to limit the ability of employers to assert that a factor other than sex prompted a difference in pay.[3] Ultimately, the Act sought to rectify pay discrepancies between the sexes; on average, women in the United States make seventy-seven cents for every dollar earned by a man.[4]

In today's world, fair and equal pay for equal work should be the norm, but, sadly, that is not the case for most American women.[5] Although the wage gap between men and women has decreased, there is still work to be done to bridge that difference.[6] The death of the Paycheck Fairness Act should not, and cannot, be the end of the fight for wage equality.[7] This Note will contextualize the Paycheck Fairness Act's importance in the

1. Paycheck Fairness Act, S. 182, 111th Cong. (2009). The Act was reported to committee in January of 2009 and then had no movement until it was reintroduced in 2010 as S. 3772, 111th Cong. (2010) by Senator Reid. Ultimately, despite being approved by the House of Representatives, the Senate voted down the bill in November 2010. *Pay Equity Information*, NAT'L COMM. ON PAY EQUITY, http://www.pay-equity.org/info-leg.html (last visited Apr. 8, 2011) [hereinafter *Pay Equity Information*]..

2. *See* Mark Gruenberg, *Senate Kills Paycheck Fairness Act*, INT'L LABOR COMMC'NS ASS'N (Nov. 19, 2010), http://ilcaonline.org/content/senate-kills-paycheck-fairness-act (stating how the Act was defeated along party lines, with the two female Republican senators from Maine voting against the Act).

3. *See* NAT'L WOMEN'S LAW CTR., HOW THE PAYCHECK FAIRNESS ACT WILL STRENGTHEN THE EQUAL PAY ACT 1–2 (2010) [hereinafter NWLC, STRENGTHEN EQUAL PAY ACT], *available at* http://www.nwlc.org/sites/default/files/pdfs/Broad_Paycheck_Fairness_Fact_Sheet.pdf (noting that the Paycheck Fairness Act would strengthen the remedies available under the Equal Pay Act by allowing for liquidated damages and back pay awards, in addition to limiting the "factor other than sex" affirmative defense only to situations where the employer can show that the pay differential is related to job performance and consistent with a business necessity—and not merely caused by the gender of the employee).

4. *Id*.

5. *See generally* NAT'L WOMEN'S LAW CTR., WOMEN'S LOWER WAGES WORSEN THEIR CIRCUMSTANCES IN A DIFFICULT ECONOMY 1 (2010) [hereinafter NWLC, WOMEN'S LOWER WAGES], *available at* http://www.nwlc.org/sites/default/files/pdfs/lowerwageshurtwomen.pdf (observing that while other civil rights laws have helped narrow the wage gap, issues still exist in the enforcement of wage equality between sexes).

6. *See Closing the Loophole: The Paycheck Fairness Act and Eliminating Caps on Damages*, NAT'L WOMEN'S LAW CTR. (Oct. 1, 2010), http://www.nwlc.org/resource/closing-loophole-paycheck-fairness-act-and-eliminating-caps-damages [hereinafter *Closing the Loophole*] (stating that "[u]nlike most anti-discrimination statutes, the [Equal Pay Act] does not currently allow the award of compensatory or punitive damages" and limits lesser paid women to "unpaid minimum wages, or their unpaid overtime compensation" and "an additional equal amount as liquidated damages" (internal quotation marks and citations omitted)).

7. *See* Gruenberg, *supra* note 2 (announcing that the leading women's rights organizations would be meeting to discuss future strategy after the defeat of the PFA).

pay equality movement and for all working women in the United States. To that end, Part II of this Note will discuss the background of the pay equality movement. Part III will analyze why the Paycheck Fairness Act should be enacted and why a remedy is necessary to rectify the current issues in wage inequality.

II. Background

A. What Wage Inequality Really Looks Like

Wage inequality exists not only between the sexes but also across racial and national origin lines, state lines, and even among members of white-collar professions.[8] Census data from 2009 shows, on average, American women earn seventy-seven cents for every dollar their male counterparts receive.[9] African-American women make sixty-one cents for each dollar earned by white, non-Hispanic men, and Latina women make fifty-two cents for each dollar earned by white, non-Hispanic men.[10] The District of Columbia shows the smallest wage gap between men and women; with women earning 88.2% of what men earn.[11] The largest wage gap is seen in Wyoming, where women make 65.5% of what men make.[12]

In October 2010, the National Association of Women Lawyers ("NAWL") and the NAWL Foundation released a national report on the retention and promotion of women in law firms.[13] In this report, the NAWL found that women, while representing approximately 50% of all law school graduates, still do not earn as much as their male colleagues.[14] Women equity partners

8. *See, e.g.*, Kevin Clark & Patrick Maggitti, *How Women Can Reduce Their Wage Gap*, Forbes (Mar. 19, 2010, 12:02 PM), http://www.forbes.com/2010/03/19/women-compensation-pay-leadership-careers-ceiling.html (discussing a study among white-collar professionals enrolled in MBA programs that looked at, among other factors, compensation among men and women).

9. NWLC, Women's Lower Wages, *supra* note 5, at 1 & n.2 (utilizing U.S. Census Bureau income data for persons aged fifteen and older of Hispanic origin).

10. *See id.*; Nat'l Women's Law Ctr., The Lilly Ledbetter Fair Pay Act of 2009, at 1 (2009) [hereinafter NWLC, Fair Pay Act], *available at* http://www.nwlc.org/sites/default/files/pdfs/Ledbetter%20Fair%20Pay%20Act%20of%202009%20-%20Summary%20of%20case%20and%20Bill.pdf.

11. *See Wage Gap Persists in All 50 States Fact Sheet*, Nat'l Women's Law Ctr. (Oct. 20, 2010), http://www.nwlc.org/resource/wage-gap-persists-all-50-states (citing U.S. Census Bureau, Men's and Women's Earnings by State: 2009 American Community Survey (2010), *available at* http://www.census.gov/prod/2010pubs/acsbr09-3.pdf).

12. *Id.*

13. *See* Stephanie A. Scharf & Barbara M. Flom, The Nat'l Ass'n of Women Lawyers & The NAWL Foundation, Report of the Fifth Annual National Survey on Retention and Promotion of Women in Law Firms 3–4 (2010), http://nawl.timberlakepublishing.com/files/NAWL%202010%20Final(1).pdf (finding that women are underrepresented in law firm leadership, as they only account for 15% of the equity partners, are not listed as major rainmakers, and earn less than their male counterparts).

14. *See id.* at 2, 3–4 (observing that, despite the fact that women make up fifty percent of the law school graduates, women only account for fifteen percent of equity partnership in law firms and earn less than their male counterparts).

make 85% of what their male counterparts make.[15] Moreover, although associate pay is generally "on a par" for both men and women, wage gaps begin to appear as women move higher up in the law firm hierarchy.[16]

B. Legislative Background

The Civil Rights era saw the passage of two important pieces of legislation related to sex-based discrimination: the Equal Pay Act of 1963[17] and the Civil Rights Act of 1964,[18] signed into law by Presidents Kennedy and Johnson (respectively).[19] The Equal Pay Act was an amendment to the Fair Labor Standards Act (FLSA);[20] among other requirements, the Equal Pay Act established a minimum wage for employees.[21] The primary aim of the Equal Pay Act was to prohibit the payment of unequal wages between men and women for equal work.[22] At that time, women were earning fifty-nine cents to every dollar earned by men.[23] President Johnson signed the Civil Rights Act in 1964 in an effort to continue President Kennedy's civil rights legislation after President Kennedy was assassinated in 1963.[24] Title VII of the Civil Rights Act covers employment-based discrimination of protected classes, one of which is sex.[25]

The Equal Pay Act mandates the payment of equal wages to men and women in the same establishment when they perform equal work; provided that their

15. *Id.* at 4.

16. *See id.* at 21–22 (emphasizing that even though the survey found that the associate compensation appears to be equal, differentials begin to appear at the counsel, non-equity, and equity partner levels, with female counsel earning eighty-eight percent, non-equity partners earning ninety-four percent, and equity partners earning eighty-five percent of what their male counterparts earn).

17. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2006)).

18. Pub. L. No. 88-325, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e (2006)).

19. *See Overview of the Equal Pay Act*, AM. ASS'N OF UNIV. WOMEN http://www.aauw.org/act/laf/library/payequity_epa.cfm (last visited Apr. 8, 2011) (stating the Equal Pay Act extended wage protection to women, while Title VII broadened protections to all employment actions based on protected classes—including sex).

20. Fair Labor Standards Act, 29 U.S.C. § 201–19 (2006).

21. *See* § 206(d) (prohibiting discrimination based on sex in the payment of wages).

22. *See Closing the Loophole*, *supra* note 6 (noting that President Kennedy signed the Equal Pay Act into law, making the payment of unequal wages illegal because he thought of the Equal Pay Act as an essential component of the civil rights movement).

23. *Id.; see* Albert H. Ross & Frank V. McDermott, Jr., *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. INDUS. & COM. L. REV. 1, 4 (1974) (claiming that the Equal Pay Act was a result of the call of the War Labor Board for adjustments to equalize the wage and salary rates of men and women that was later adopted by the Commission on the Status of Women, created by President Kennedy).

24. *See* RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES 14 (2001) (recalling President Lyndon B. Johnson's comments to Congress that "no 'memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long.'").

25. *See* 42 U.S.C. § 2000e-2(a) (2006) (providing that it is "unlawful . . . to apply different standards of compensation, or different terms, conditions, or privileges of employment [on the basis] of race, color, religion, sex, or national origin").

jobs "require[] equal skill, effort, and responsibility;" and they work under similar working conditions.[26] However, the Act allows differences in wages if an employer bases the wage differential on "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[27]

Nevertheless, despite the passage of both of these important pieces of legislation, women still receive less pay than their male counterparts for doing equal work.[28] Loopholes in both laws allow employers to justify paying different wages to male and female employees doing equal work.[29]

C. Ledbetter v. Goodyear

Lilly Ledbetter was a female manager at Goodyear Tire and Rubber Company's plant in Gadsden, Alabama.[30] She worked for the company from 1979 until 1998.[31] By the time Ledbetter retired in 1998, she had attained the position of Area Manager.[32] She was one of a few female supervisors at the Gadsden plant and she faced many instances of sexual harassment while working there.[33] At one point, her male supervisor allegedly told her that "'women didn't belong in the company.'"[34] This supervisor consistently rated her near the bottom of all Area Managers each performance year.[35] Another supervisor offered her a better evaluation in exchange for sexual favors.[36]

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26. 29 U.S.C. § 206(d)(1) (2006).

27. *Id.*

28. *See Closing the Loophole*, *supra* note 6 (highlighting the fact that although the wage gap has narrowed there is a substantial need to change the current law to ensure that the wage gap between sexes ceases to exist).

29. *See* NAT'L WOMEN'S LAW CTR, PAYCHECK FAIRNESS: CLOSING THE "FACTOR OTHER THAN SEX" GAP IN THE EQUAL PAY ACT 1 (2009) [hereinafter NWLC, PAYCHECK FAIRNESS], *available at* http://www.nwlc.org/sites/default/files/pdfs/FactorOtherThanSex.pdf (noting evidence of employers using the loopholes provided under § 206(d)(1) to justify otherwise illegal practices and stating the need to readdress the gaps of the law).

30. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007) (observing that during Ledbetter's nineteen-year tenure at Goodyear, salaried managers received—or were denied—"raises based on their supervisors' evaluation of their performance").

31. *Id.*

32. *See* Bindu George, Note, Ledbetter v. Goodyear*: A Court Out of Touch With the Realities of the American Workplace*, 18 TEMP. POL. & CIV. RTS. L. REV. 253, 256 (2008) (stating that although Ledbetter was an Area Manager, in 1997, on the advice of her male supervisor, Ledbetter applied for and received the non-supervisory position of Technology Engineer, but she still functioned as an Area Manager).

33. NWLC, FAIR PAY ACT, *supra* note 10, at 1.

34. Paula A. Monopoli, *In A Different Voice: Lessons from* Ledbetter, 34 J.C. & U.L. 555, 560 (2008) (indicating that the supervisor that made this comment reflected his opinion of women not belonging at Goodyear by making sure that she received lower pay increases than her male counterparts over the years).

35. *See* George, *supra* note 32, at 255 (noting that Ledbetter was ranked twenty-third out of twenty-four salaried employees).

36. Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 508 (2010) (detailing the sexual harassment that Ledbetter faced from several male employees at her time at Goodyear, when she complained to management no action was taken, and when she finally complained to EEOC, after which she faced retribution from her coworkers).

During her employment, Ledbetter was unaware that she was being paid less than her male counterparts.[37] While some of her male co-workers bragged about how much they made working overtime, the company had a policy that did not allow employees to discuss their pay among themselves.[38] Ledbetter had received raises throughout the years but had no idea that the difference in pay was significant.[39] It was not until Ledbetter received an anonymous note informing her that she was being paid less than her male colleagues that she suspected pay discrepancy.[40] At the conclusion of 1997, Ledbetter was earning $3,727 per month, in contrast with the lowest paid male area manager who made $4,286 a month, and the highest paid male area manager who made $5,236 a month.[41] Consequently, Ledbetter filed a formal charge alleging sex-based discrimination with the EEOC in July 1998.[42] In November 1998, she filed suit in federal district court and alleged violations of Title VII and the Equal Pay Act.[43]

The district court allowed Ledbetter's Title VII claim to proceed to trial but granted summary judgment in favor of Goodyear for the Equal Pay Act claim and several other of her claims.[44] A jury found for Ledbetter on her Title VII discrimination claim and awarded her back pay plus damages.[45]

37. NWLC, FAIR PAY ACT, *supra* note 10, at 1.

38. Sullivan, *supra* note 36, at 508 (describing how, when Ledbetter first began working for Goodyear, all of the supervisors were paid the same but as time passed, Goodyear adopted a subjective performance-based system in which employees were told that the amount that they were paid was strictly confidential). For more on the illegality under Title VII of employer pay scale schemes which allow management to base promotion and wages on characteristics other than on their performance, see, for example, *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 613, 633 (5th Cir. 1983), which held that a pay plan that arbitrarily assigned predominantly blacks and women to lower paying job classifications would be illegal under Title VII and affected employees would be entitled to back pay.

39. *See* Sullivan, *supra* note 36, at 508 (recounting that some of Ledbetter's pay raises were "pretty good, percentage-wise," which led her to believe that there was not a substantial disparity between her pay and the pay of male employees doing the same job (internal quotation marks omitted)).

40. *See id.* (observing that after Ledbetter found out she was paid substantially less than her male counterparts, that discovery provoked her to quickly go to the EEOC and file a formal claim against Goodyear).

41. *See* Monopoli, *supra* note 34, at 563 (citing Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting)).

42. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621–22 & n.1 (2007) (majority opinion), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

43. *Id.* at 621–22.

44. *Id*. at 622.

45. *Id.; see* Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137-E, 2003 WL 25507253, at *1–2 (N.D. Ala. Sept. 24, 2003) (stating that Ledbetter was awarded approximately $3.3 million in compensatory and punitive damages in addition to the back pay award), *rev'd*, 421 F.3d 1169 (11th Cir. 2005), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *see also* Sullivan, *supra* note 36, at 508–09 (stating that the jury awarded Ledbetter three million dollars in compensatory and punitive damages, but "the trial judge reduced the damage award to $300,000" due to the Title VII statutory damages award cap).

Goodyear appealed to the Eleventh Circuit and contended that Ledbetter's pay discrimination claims were time-barred before her EEOC contact.[46] The Eleventh Circuit reversed the district court's decision and held that a plaintiff "can state a timely [Title VII pay discrimination claim] for disparate pay only to the extent that the 'discrete acts of discrimination' of which she complains, occurred within the limitations period created by her EEOC questionnaire. Any acts of discrimination affecting her salary occurring before then are time-barred."[47]

On appeal to the Supreme Court, Ledbetter sought review of the following question:

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.[48]

The Supreme Court granted certiorari and heard oral arguments on November 27, 2006.[49] Then, on May 29, 2007—nearly ten years after Ledbetter first contacted the EEOC—the Supreme Court, in a five to four decision, affirmed the Eleventh Circuit's holding that the discriminatory acts claimed by Ledbetter were untimely and that her claim was time-barred.[50]

D. Lilly Ledbetter Fair Pay Act

In 2009, in one of his first acts as President, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009—which superseded the Court's decision in *Ledbetter v. Goodyear*.[51] The Ledbetter Fair Pay Act restored the rights taken away by the Court's decision in *Ledbetter* and established that "pay discrimination claims on the basis of sex, race, national origin, age,

46. *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 2006) (holding that under *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), Ledbetter's claims of discrimination were time-barred under the statute of limitations created by her EEOC questionnaire), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

47. *Id.* at 1180.

48. Petition for Writ of Certiorari at i, Ledbetter v. Goodyear Tire & Rubber Co., 548 U.S. 903 (2006) (No. 05–1074).

49. *Ledbetter*, 550 U.S. at 618.

50. The majority of the court, in an opinion authored by Justice Alito, upheld the decision of the Eleventh Circuit and held that because a pay decision is an act that is made at a particular point in time, an EEOC statutory period begins when the act occurs. *Id.* at 621. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, authored a dissenting opinion that claims that the majority is incorrect and that the 180-day statutory period should be combined for each offense, rather than run for each offense individually, because pay disparities accumulate over time. *Id.* at 646–47 (Ginsburg, J., dissenting).

51. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending 42 U.S.C. §2000e-5 (2006)); *see* Carolyn E. Sorock, Note, *Closing the Gap Legislatively: Consequences of the Lilly Ledbetter Fair Pay Act*, 85 Chi.-Kent L. Rev. 1199, 1209 (2010) (noting that several Republican Senators feared that, without deadlines for filing, suits over pay discrimination would be unduly burdensome for businesses).

religion, and/or disability 'accrue'" with each discriminatory act.[52] Qualifying discriminatory acts include the receipt of a discriminatory paycheck, the adoption of or an employee's subjection to a "discriminatory pay decision or practice."[53] Whenever such an act occurs, a pay discrimination claim can move forward under the Ledbetter Fair Pay Act.[54] Moreover, the Act is effective as of the day prior to the Supreme Court's *Ledbetter* decision.[55]

Since the enactment of the Ledbetter Fair Pay Act, several cases have applied the expanded statutory time limitations period.[56] Courts have confirmed the Ledbetter Fair Pay Act's greater statutory timeframe by allowing each discriminatory paycheck to renew the limitations period for pay discrimination claims.[57] As such, each time an employee receives a paycheck based on a discriminatory pay decision, the time period in which an employee mayt file an EEOC complaint starts anew.

Despite the passage of the Ledbetter Fair Pay Act, other issues still exist in the fight for equal pay. One issue concerns the meaning of the clause: "when an individual becomes subject to a discriminatory compensation decision or other practice."[58] Courts have interpreted this phrase in different ways and have reached different outcomes.[59] Additionally, what qualifies as a "compensation

52. NAT'L WOMEN'S LAW CTR., THE LILLY LEDBETTER FAIR PAY ACT OF 2009: ONE YEAR LATER 1 (2010) [hereinafter NWLC, ONE YEAR LATER], *available at* http://www.nwlc.org/sites/default/files/pdfs/Ledbetter_FPA_One_Year_Later.pdf.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See, e.g.*, Mikula v. Alleghany Cnty. (*Mikula I*), 583 F.3d 181, 186 (3d Cir. 2009) (holding that each discriminatory paycheck renewed the time for filing a pay discrimination claim under the Ledbetter Fair Pay Act), *rev'd*, 583 F.3d 181 (3d Cir. 2009); Hester v. N. Ala. Ctr. for Educ. Excellence, 353 F. App'x 242, 243–44 (11th Cir. 2009) (finding that the plaintiff's claim was timely under the Ledbetter Fair Pay Act); Johnson v. District of Columbia, 632 F. Supp. 2d 20, 22–23 (D.D.C. 2009) (reinstating the plaintiff's claims after the passage of the Ledbetter Fair Pay Act and stating "there can be no dispute that, under the Fair Pay Act, plaintiff may seek relief under" the relevant federal laws); Goodlett v. Delaware, No. 08-298-LPS, 2009 WL 585451, at *6 (D. Del. Mar. 6, 2009) (holding that the plaintiff's pay disparity claim survived after the passage of the Ledbetter Fair Pay Act and "the 300-day clock for filing a Title VII pay disparity claim starts anew with each discriminatory pay period").

57. *See* NWLC, ONE YEAR LATER, *supra* note 52, at 1.

58. 42 U.S.C. §2000e-5(e)(3)(A) (2006 & Supp. 2009).

59. *Compare Mikula I*, 320 F. App'x at 136 (holding under *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), that plaintiff's claims were untimely, due to the fact that they were not filed within 180 days of the occurrence with the EEOC), *with* Mikula v. Allegheny Cnty. (*Mikula II*), 583 F.3d 181, 186 (3d Cir. 2009) (recognizing that the Ledbetter Fair Pay Act effectively overruled the Supreme Court's decision in Ledbetter and holding that the plaintiff's claim was timely). *See, e.g.*, Schengrund v. Pa. State Univ., 705 F. Supp. 2d 425, 432–33 (M.D. Pa. 2009) (articulating that plaintiffs "may recover for each and every paycheck received from the present dating back to 300 days prior to their filing with the EEOC"). *But cf.* AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1973 (2009) (holding that the Ledbetter Fair Pay Act does not apply in the calculation of pension benefits calculated, in part, under an accrual rule). *See generally* Sorock, *supra* note 51, at 1212–13 (discussing, in detail, the various judicial responses to the Lilly Ledbetter Fair Pay Act).

decision" under the Act varies from jurisdiction to jurisdiction.[60]

E. Paycheck Fairness Act

Senator Hillary Clinton (D-NY) and Representative Rosa DeLauro (D-CT) introduced the Paycheck Fairness Act in January 2009 to remedy some of the shortcomings of the Fair Pay Act.[61] One aim of the bill was to strengthen the amount of damages a prevailing plaintiff could recover; another goal was to close a loophole in one of the four affirmative defenses available to employers under the Equal Pay Act.[62] Nevertheless, despite approval by the House of Representatives, the Senate rejected the Paycheck Fairness Act on November 10, 2010.[63]

III. Discussion

A. Congress Should Reintroduce the Paycheck Fairness Act or Otherwise Remedy the Issues the PFA Sought to Address

While the Fair Pay Act restored the rights the *Ledbetter* decision removed, there are still problems that persist with the enforcement of equal pay for equal work.[64] First, the Equal Pay Act provides an employer with an affirmative defense when the employer can show that it based the allegedly discriminatory pay differential on a factor other than sex.[65] Many employers use this defense to defeat plaintiffs' Equal Pay Act claims by asserting the reason for differences between two employees' pay is not sex.[66] The Paycheck Fairness Act would have closed this loophole by requiring the employer to show the following: that it used a "bona fide factor . . . not based upon or derived from a sex-based

60. *See* Nat'l Women's Law Ctr., The Lilly Ledbetter Fair Pay Act of 2009: Current Status and Emerging Issues 2–3 (2009) [hereinafter NWLC, Emerging Issues], *available at* http://www.nwlc.org/sites/default/files/pdfs/Ledbetter_Act_Current_Status_and_Emerging_Issues.pdf (showing different types of claims that have been raised under the Ledbetter Fair Pay Act and how different jurisdictions have ruled).

61. *Pay Equity Information*, *supra* note 1.

62. *See* NWLC, Strengthen Equal Pay Act, *supra* note 3, at 1–2 (stating that other aims include: improving the remedies available; facilitating class action claims; prohibiting employer retaliation, modifying the "establishment" requirement; improving the collection of pay information by the EEOC; and reinstating pay equity programs and enforcement at the Department of Labor).

63. *See* Paycheck Fairness Act, S. 182, 111th Cong. (2009); *see also Pay Equity Information*, *supra* note 1 (stating the vote was 58–41, mostly along party lines).

64. *See* NWLC, Emerging Issues, *supra* note 60, at 2–3 (discussing problems of interpretation that have come before the courts, including problems with retroactivity and problems with the actual reach of the Act).

65. *See* 29 U.S.C. § 206(d) (2006) (providing four exemptions to the general prohibition of pay disparity); *see also* NWLC, Paycheck Fairness, *supra* note 24, at 2–3 (noting that a number of courts have allowed "factors other than sex" exemptions in their decisions, resulting in employers' being allowed to pay male employees more than female employees).

66. *See* NWLC, Paycheck Fairness, *supra* note 29, at 2 (asserting that judicial misinterpretation of the "factors other than sex" defense would be remedied with the Paycheck Fairness Act).

differential;" that the "factor other than sex" was "job-related to the position in question;" and that use of a "factor other than sex" to distinguish pay was "consistent with business necessity."[67] Under the Paycheck Fairness Act, if the employee could show that "an alternative employment practice" could have served "the same business purpose without producing a pay differential and the employer refused to adopt" the practice, then the employer would not have prevailed on the "factor other than sex" defense.[68]

A second aim of the PFA was to increase the amount of damages awarded to a prevailing plaintiff.[69] Unlike awards under Title VII or the Age Discrimination in Employment Act, awards under the Equal Pay Act do not include compensatory or punitive damages.[70] The prevailing plaintiff in an Equal Pay Act claim is entitled to back pay during the relevant limitations period and an additional, equal, amount as liquidated damages.[71] Usually, the award of back pay and liquidated damages is not very large.[72] By not being allowed to receive compensatory or punitive damages, victims of sex-based wage discrimination receive different treatment than other workplace discrimination victims.[73]

B. Application: Dukes v. Wal-Mart

An example of how wage inequality has emerged in a non-white-collar professional setting is *Dukes v. Wal-Mart*.[74] Here, a female employee, Betty Dukes, who initially had received an excellent ninety-day review and a promotion, alleged that she later experienced discrimination and retaliation

67. *Id.* at 4.

68. *Id.*

69. *See Closing the Loophole*, *supra* note 6 (detailing that the Paycheck Fairness Act would allow for both compensatory and punitive damages and would eliminate the cap on damages).

70. *See also* NWLC, STRENGTHEN EQUAL PAY ACT, *supra* note 3, at 1 (explaining that the Equal Pay Act does not permit the award of compensatory or punitive damages); *cf.* 42 U.S.C. § 2000e-5(g) (2006) (providing for back pay and reinstatement but no other damages).

71. *See* NWLC, STRENGTHEN EQUAL PAY ACT, *supra* note 3, at 1 (comparing the remedies of the Equal Pay Act with those of the Paycheck Fairness Act and finding the Paycheck Fairness Act remedies of compensatory and punitive damages superior).

72. *See id.* (noting that damage awards under the Equal Pay Act are insubstantial on the whole).

73. *See Closing the Loophole*, *supra* note 6 (observing that the Equal Pay Act remedies are not as far-reaching as those in other anti-discrimination statutes).

74. 603 F.3d 571 (9th Cir. 2010), *cert. granted sub nom.* Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. argued Mar. 29, 2011).

for complaining to her District Manager.[75] Dukes claimed that her supervisors never gave her the opportunity to train for higher-level and higher-paying positions and reprimanded her more harshly for mistakes than her male counterparts.[76] Dukes, along with six other female employees, filed a class action suit on June 8, 2001.[77] The plaintiffs allege that Wal-Mart pays women less than men in comparable positions, even when the lower-paid women have higher performance ratings and greater seniority than their male counterparts, and that women "receive fewer—and wait longer for—promotions to in-store management positions."[78] In addition, they allege that Wal-Mart's corporate culture encourages "gender stereotyping and discrimination" and that this treatment "is common to all women who work or have worked in Wal-Mart stores."[79]

One issue is whether it was appropriate for the district court to grant class certification under the Federal Rules of Civil Procedure.[80] On December 6, 2010, the Supreme Court granted Wal-Mart's petition for certiorari and heard oral argument on March 29, 2011.[81]

This case is important because of its potential social ramifications.[82] Wal-Mart, a large corporation, is one of the largest employers in the United States.[83] A favorable outcome for Dukes and the other plaintiffs would send a strong message not only to Wal-Mart, but to other employers as well; discriminatory promotion and compensation policies toward female employees are

75. *See* WAL-MART WATCH, BETTY V. GOLIATH: A HISTORY OF *DUKES V. WAL-MART* 5 (2006), *available at* http://walmartwatch.com/img/blog/dukes_backgrounder.pdf (recounting allegations that Ms. Dukes experienced retaliation through "1) discipline for procedures regularly used by male employees without being reprimanded; 2) not allowing her to train for a department manager position; 3) demotion to cashier and being falsely accused of violating company policy while performing a transaction that had been performed many times by Ms. Dukes and other employees in the past without incident; 4) a reduction in hours and hourly wage; 5) not being informed of at least four un-posted promotional opportunities (department and/or support manager positions) for which she would have been eligible but were each filled by males; and, 6) being discouraged from applying for future department manager positions").

76. *Id.* at 5.

77. 603 F.3d 571, 577–78 (noting plaintiffs' class alleged rampant Title VII violations).

78. *Id.* at 577.

79. *Id.* at 577–78.

80. *See* FED. R. CIV. P. 23(a) (requiring commonality of facts for all members of the representative class in order to permit certification); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010) (mem.) (granting certiorari to the question of "[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)").

81. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010).

82. *See* WAL-MART WATCH, *supra* note 75, at 4–5 (discussing the potential important implications of *Dukes* for consumers, investors, and employees alike, such as, risk to the "Wal-Mart 'brand' in the public eye").

83. *See* WALMART, CORPORATE FACT SHEET 1 (2010), *available at* http://www.walmartstores.com/download/2230.pdf (stating that Wal-Mart is one of the largest private employers in the United States).

intolerable.[84] As one attorney, who represents the *Dukes* class, explained the crux of the issue, "People keep shopping at Wal-Mart because they don't connect the fact that the low price they're paying is effectively subsidized by the woman at the checkout counter."[85]

IV. CONCLUSION

Despite the existing laws protecting wage equality, wage inequality remains. Savvy employers are able to defeat many legitimate EPA claims simply by asserting that a factor other than sex prompted a difference in pay.[86] When employees do prevail, the damages they obtain are generally a drop in the bucket for their employers.[87] Given the tough financial times that most Americans have been facing during this recession, women suffer harder hits to their wallet than men do as a result of the pay disparity.[88]

However, the political makeup of the 112th Congress makes it unclear whether any member of Congress will reintroduce the Paycheck Fairness Act and put it up for another vote before 2013. Regardless, the fight for equal pay for equal work must continue. Forty-eight years out from the passage of the Equal Pay Act, significant wage gaps between men and women are unacceptable.

84. *See* WAL-MART WATCH, *supra* note 75, at 4, 9 (stating that this litigation is being watched closely by competitors while law firms are releasing reports to their clients on how to avoid similar class-action employment litigation).

85. *Id*. at 4 (internal quotation marks and citation omitted).

86. NWLC, PAYCHECK FAIRNESS, *supra* note 29, at 1.

87. *See Closing the Loophole*, *supra* note 6 ("Employers would gamble that it costs less to pay damages than to create workplaces free of discrimination.").

88. *See* NWLC, WOMEN'S LOWER WAGES, *supra* note 5, at 1–2. At least one reason that wage gaps continue—and are exacerbated—in a bad economy are cultural perceptions that women are only secondary contributors to household income. *See e.g.* Steger v. Gen. Electric Co., 318 F.3d 1066, 1079 (11th Cir. 2003) (detailing that one of the reasons that management told Steger that she could not have a wage increase was because she did not "need" one since she could rely on her husband's salary).

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