NEW YORK STATE SENATE

THE STENOGRAPHIC RECORD

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11:13 a.m.

REGULAR SESSION

LT. GOVERNOR MARY O. DONOHUE, President

STEVEN M. BOGGESS, Secretary

P R O C E E D I N G S

THE PRESIDENT: The Senate will come to order.

I ask everyone present to please rise and repeat with me the Pledge of Allegiance.

(Whereupon, the assemblage recited the Pledge of Allegiance to the Flag.)

THE PRESIDENT: The Reverend Peter G. Young is with us once again this morning, from Blessed Sacrament Church in Bolton Landing, to give us the invocation.

REVEREND YOUNG: Let us pray.

Dear God, we thank You for this beautiful spring day with its sunshine, and with the hope of warmer weather and our Senate recess.

May we pray for our airmen being held in China, and that they resolve peacefully their return.

We pray for the Senators and their strength, who commit themselves to the demands of public service, resulting too frequently in a loss of their family time of togetherness. With the intensity of their legislative

duties, the Senators sacrifice for the State's priorities their personal family time. May You keep them strong and blessed in their dedication to both their personal and public responsibilities. We pray for their strength now and forever.

Amen.

THE PRESIDENT: Reading of the Journal.

THE SECRETARY: In Senate, Monday, April 2nd, the Senate met pursuant to adjournment. The Journal of Friday, March 30th, was read and approved. On motion, Senate adjourned.

THE PRESIDENT: Without objection, the Journal stands approved as read.

Senator Skelos.

SENATOR SKELOS: Madam President, there will be an immediate meeting of the Transportation Committee in the Majority Conference Room.

THE PRESIDENT: There will be an immediate meeting of the Transportation Committee in the Majority Conference Room.

Presentation of petitions.

Messages from the Assembly.

Messages from the Governor.

Reports of standing committees.

Reports of select committees.

Communications and reports from state officers.

Motions and resolutions.

Senator Skelos.

SENATOR SKELOS: If we're on motions and resolutions -

THE PRESIDENT: Yes, we are, Senator Skelos.

SENATOR SKELOS: -- if we could adopt the Resolution Calendar in its entirety.

THE PRESIDENT: All those in favor of adopting the Resolution Calendar in its entirety please say aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: The Resolution Calendar is adopted in its entirety.

SENATOR SKELOS: Madam President, I believe there's a resolution by Senator

Morahan, 1175. If we could open that up to sponsorship.

Anybody who does not wish to sponsor it should notify the desk.

THE PRESIDENT: Any member not wishing to response this resolution, please notify the desk.

SENATOR SKELOS: I believe there is a substitution at the desk, if we could make it at this time.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: On page 20, Senator Trunzo moves to discharge, from the Committee on Transportation, Assembly Bill Number 5831 and substitute it for the identical Senate Bill Number 3527, Third Reading Calendar 288.

THE PRESIDENT: Senator Skelos, the substitution is ordered.

SENATOR SKELOS: Thank you, Madam President.

If we could return to reports of standing committees, I believe there's a report of the Judiciary Committee at the desk.

I ask that it be read.

THE PRESIDENT: Reports of standing committees.

The Secretary will read.

THE SECRETARY: Senator Lack, from the Committee on Judiciary, reports the following nominations.

As a judge of the Family Court for the County of Broome, Robert J. Madigan, Jr., of Binghamton.

THE PRESIDENT: Senator Lack.

SENATOR LACK: Thank you, Madam President. I rise to move the nomination of Robert J. Madigan, Jr., of Binghamton, as a judge of the Family Court for the County of Broome.

We received Mr. Madigan's credentials from the Governor. The staff of the committee has examined his credentials. He was presented to the committee this morning, and on a unanimous vote of the committee has been moved for consideration to the floor at this time. And it is with great pleasure that I yield for purposes of a second to Senator Libous.

THE PRESIDENT: Senator Libous.

SENATOR LIBOUS: Thank you, Madam President. And thank you, Senator Lack.

It is indeed an honor and privilege for me to stand before this body to second the confirmation of Robert J. Madigan, Jr., to the Family Court of Broome County.

Madam President, I have known Bob Madigan for a number of years and have had the pleasure of knowing his family, his brothers and sisters, mother and father. And certainly Bob has possessed from them the unique qualities that it takes to aspire to lead this type of court position.

Bobby's background is a background of sound legal experience. Mr. Madigan spent 22 years as a lawyer. He worked as a litigator in state and federal courts. He also served the City of Binghamton as a commissioner for the Civil Service Commission and later, Madam President, served as the chairman of that body, as he possesses great leadership skills.

He currently is a member of the Workers' Compensation Board. He has served on

that board for the last four years. He was confirmed by this body four years ago. He has shown the compassion that it takes to work on a day-to-day basis as you deal with injured workers and claims that come before the workers' compensation system. And it is that sort of compassion, Madam President, that he will take to the Family Court of Broome County.

I can tell you that the screening committee was wise in their decision. The Governor has sent us a sound nominee. And I know that, as I said early on, that knowing him for as long as I have that both his mom and dad, if they were with us today, would be extremely proud of his accomplishments. His father was a friend of my uncle, who was the mayor of Binghamton and a fishing buddy and legal advisor. And many of the fine qualities that Mr. Madigan possessed are in Robert Madigan, Jr.

Madam President, it is an honor for me to second this nomination that has gone through the Judiciary Committee.

THE PRESIDENT: The question is

on the nomination of Robert J. Madigan, Jr., of Binghamton, as a judge of the Family Court for the County of Broome, for a term ending December 31, 2001. All in favor signify by saying aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: The nominee is hereby confirmed.

We congratulate Judge Madigan and his wife, Jill, and his son, Grant, who are with us this morning.

(Applause.)

THE PRESIDENT: The Secretary will read.

THE SECRETARY: As a judge of the County Court for the County of Madison, Dennis K. McDermott, of Oneida.

THE PRESIDENT: Senator Lack.

SENATOR LACK: Thank you, Madam President.

I rise once again to move the nomination of Dennis K. McDermott, of Oneida, as a judge of the County Court of the County

of Madison. Mr. McDermott's credentials also have been examined by the staff of the committee, they have been found to be eminently satisfactory. He appeared before the committee this morning, received a unanimous vote from the floor for consideration at this time.

And before yielding to Senator Hoffmann, for my colleagues, this once again is one of the rare examples we have these days of the confirmation of -- for those downstaters, as a person who is known upstate as a triple-hatter, serves as the county court judge, as required under the Constitution for every county in the State of New York outside of the City of New York to have a County Court judge that also performs the duties of a Family Court judge and a Surrogate for that county, which happens in the small counties.

And an excellent example of a general practitioner in law who is able, upon taking the bench, to exercise a multidisciplined approach to the ability to be a very fair and good jurist, acting in several fields at one time.

And another example of reasons why the 11 different trial courts in this state should be combined and put together into two trial courts, and the Constitution be amended to allow this to happen in not only the small counties, where it's a necessity, but in our large jurisdictions as well, so there can be more commingling and fungibility of jurists across multidisciplinary fields.

That having been said, it is with great pleasure for purposes of a second that I yield to Senator Hoffmann.

THE PRESIDENT: Senator Hoffmann.

SENATOR HOFFMANN: Thank you, Madam President. Thank you, Senator Lack.

The esteemed chairman of the Judiciary Committee has just given us a wonderful civics lesson, and explaining, in far better language than I could come up with -- and I'm not even sure about the word "fungibility" myself. But its application in this process is something that we can review later.

The key point here that we need to make is that we are really right on target

with a very, very well qualified individual who has, by his community and legal activities, demonstrated that wide range of experience that Senator Lack pointed out is so important when somebody is required to wear multiple hats in the performance of his job as County Court judge in Madison County.

Dennis K. McDermott, who is here with us today, is joined by his wife, Barbara, and his daughter Maria, and he has several friends with him as well -- Rani Blakeney, Donald and Sara Dew, good friends, and William and Kristine Agan.

And in confirming Dennis McDermott to this position today, it's nice to reflect on some of the activities that he has undertaken as a good citizen of beautiful Madison County that has led him to this great distinction.

He's a graduate of St. Bonaventure University, where he was a member of the honor society Phi alpha Theta, a graduate of Albany Law School and Union University. He was admitted to practice in the Northern District. He's been engaged in general practice in

Oneida since 1976. He's focused in the areas of matrimonial and family law, real estate, estates, municipal law, business law, criminal law, personal injury claims, and trial and appellate practice.

He was appointed by the Appellate Division of the New York State Supreme Court, Third Department, to its committee on professional standards, where he served as vice chairman in 1999 and 2000.

He's the president of the Federation of Bar Associations of the 6th Judicial District, which covers Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, and Tioga, as well as Tompkins and Schuyler counties.

He's a member of the Bar Association of the State, the Madison County Bar, and served as the Madison County Bar Association treasurer.

He served as city attorney in Sherrill, New York, member of the board of directors of the Madison County Legal Defense Bureau, 1996 to the present, and he negotiated the 1996 to 2001 contracts with the Madison

County Board of Supervisors, so we have left out labor law. But again, another one of those many hats that Judge McDermott has demonstrated he's suited to wear.

He's been appointed on numerous occasions as a law guardian, a guardian ad litem, referee, court evaluator, he's been a panel member on the Surrogate Decision Making Committee for the New York State Commission on Quality Care for the Mentally Disabled.

He's also been an adjunct professor at Onondaga Community College, teaching law and banking principles, a lecturer on a wide range of topics.

And in his civic capacity, he has been a member of the St. Patrick's Church in Oneida, where he's served as parish trustee, a member of Oneida Rotary Club, a member of Rotary Districts Youth Exchange Committee, and director of International Service for Rotary as well.

I could go on, because there are many, many more remarkable civic activities. It's hard to believe that one person can have done as many things as Judge McDermott has

done. And I'm delighted to be able to second the nomination of Dennis K. McDermott to the great position of Madison County Court judge.

THE PRESIDENT: Senator Meier.

SENATOR MEIER: Thank you, Madam President. Just very briefly, as someone who practices in the neighboring county of Oneida, I've had a number of occasions to see what a great lawyer Dennis McDermott is.

In fact, unfortunately for me, the Appellate Division, Fourth Department, also agrees with that by a five to nothing vote. And nonetheless, I second the nomination of Dennis McDermott, who will be a great judge.

THE PRESIDENT: All in favor of the confirmation of Dennis K. McDermott, of Oneida, as a judge of the Court for the County of Madison, please signify by saying aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: Dennis K. McDermott is hereby confirmed.

Congratulations, Judge McDermott, and best wishes.

(Applause.)

THE PRESIDENT: The Secretary will read.

THE SECRETARY: As a judge of the Family Court for the County of Schenectady, Eli I. Taub, of Schenectady.

THE PRESIDENT: Senator Lack.

SENATOR LACK: Thank you. Once again, Madam President, I rise to move the nomination of Eli Taub, of Schenectady, as a judge of the Family Court for the County of Schenectady.

We received the nomination from the Governor, the staff of the committee examined the credentials of Mr. Taub, found them eminently satisfactory. He appeared in person before the committee this morning, received a unanimous vote for consideration on the floor. And at this time it is with great pleasure that I yield to my esteemed colleague Senator Farley, from Schenectady.

THE PRESIDENT: Senator Farley.

SENATOR FARLEY: Thank you, Madam President.

It is with enthusiasm and pride

that I help move the nomination and second the nomination of Eli Taub, a dear friend of mine for a quarter of century or more.

Eli Taub is one of the most renowned attorneys, practicing attorneys in this entire area, the Capital District area, not just Schenectady. He has served in every area of the law, in every court. But more important, I think he has the judicial temperament to be a superb Family Court judge.

He has been outstanding in his volunteerism. He has served for 25 years, I believe, or longer, maybe, on the Northeast Parent and Child Group, the Alcohol Substance Abuse Council, the State Street Arts Council, the Capital District Planning Commission, the Schenectady Community College, he was a paralegal advisor. He's been involved with the Schenectady Light Opera. He's a past president of B'nai B'rith. He was voted the Volunteer of the Year -- he should be the Volunteer of the Decade.

But Eli Taub has really been a large part of this community. As I say, he will make an outstanding Family Court judge.

He is here today with quite an entourage, and of course being led by his most valuable asset, Nancy Bell, his wife and mother of their daughter, Dr. Jennifer Taub, who is a clinical psychologist serving a fellowship in Boston.

Eli Taub will be an asset to the bench, and one that I'm confident that will make this house and the State of New York proud of the appointment. It is with enthusiasm and pride that I nominate Eli Taub for Family Court judge.

THE PRESIDENT: Senator Breslin.

SENATOR BRESLIN: Thank you, Madam President.

I will echo Senator Farley's remarks about Eli Taub. As a practicing attorney here in the Capital District, Eli Taub is one of the most highly respected members of our bar.

And, more importantly, when you - each of these three judges that have been presented by the Governor have the academic credentials, they're involved in their community. But speaking on behalf of the

Democrats on the Judiciary Committee, we were all impressed with their ability to communicate a caring, a wanting to be on the bench, particularly in Family Court, because of the need today in our society to treat many dysfunctional situations.

And each of these gentlemen - Judge Madigan, Judge McDermott, and Eli Taub -- presented to us that ability, that ability to reach out and touch families and touch children who are in need. And in years past, that wasn't always the situation in our Family Courts.

And I commend the Governor, and I commend each of these individuals for wanting to go to Family Court, and in some situations to sacrifice a great deal of money that they might have been making. And I look forward to each of them performing in a very responsible and caring way in their roles as judges.

Thank you, Madam President.

THE PRESIDENT: The question is on the confirmation of Eli Taub, of Schenectady, as a judge of the Family Court for the County of Schenectady. All in favor

signify by saying aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: The nominee is hereby confirmed.

Congratulations and best wishes.

Judge Taub is here with his wife, Nancy Bell, and her parents, Rita and Lou Bell, as well as other family members and friends. Congratulations.

(Applause.)

THE PRESIDENT: Senator Skelos.

SENATOR SKELOS: Madam President, if we could take up the noncontroversial calendar.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 5, by Senator Maltese, Senate Print 95, an act to amend the Penal Law.

SENATOR PATERSON: Lay it aside.

THE PRESIDENT: The bill is laid aside, Senator Paterson.

THE SECRETARY: Calendar Number

105, by Senator Balboni, Senate Print 862, an act to amend the Civil Practice Law and Rules.

SENATOR PATERSON: Lay it aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 252, by Senator Skelos, Senate Print 399, an act to amend the Family Court Act and the Criminal Procedure Law.

SENATOR PATERSON: Lay it aside.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 259, by Senator Farley, Senate Print 2839, an act to amend the Banking Law.

SENATOR PATERSON: Lay it aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 260, by Senator Farley, Senate Print 2964, an act to amend the Banking Law and others.

SENATOR PATERSON: Lay it aside.

THE PRESIDENT: The bill is laid

aside.

THE SECRETARY: Calendar Number 286, by Senator Kuhl, Senate Print 3071, an act to amend the Vehicle and Traffic Law.

SENATOR PATERSON: Lay it aside.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 299, by Senator Marcellino, Senate Print 2384, an act to amend the General Municipal Law.

SENATOR PATERSON: Lay it aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 302, by Senator Padavan, Senate Print 2774, an act to amend the General Municipal Law.

SENATOR MONTGOMERY: Lay it aside.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 305, by Senator LaValle, Senate Print 1208, an act to amend the Education Law.

SENATOR PATERSON: Lay it aside,

please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 329, by Senator Goodman, Senate Print 3948, an act to amend the Tax Law.

SENATOR PATERSON: Lay it aside, please.

THE PRESIDENT: The bill is laid aside.

Senator Skelos, that completes the reading of the noncontroversial calendar.

SENATOR SKELOS: Madam President, if we could take up Calendar Number 329, by Senator Goodman, I believe Senator Goodman is on his way in.

THE PRESIDENT: The Secretary will read Calendar Number 329.

THE SECRETARY: Calendar Number 329, by Senator Goodman, Senate Print 3948, an act to amend the Tax Law, in relation to creating.

SENATOR DUANE: Explanation, please.

THE PRESIDENT: Senator Goodman,

Senator Duane has requested an explanation.

SENATOR GOODMAN: Madam President, this bill seeks to create an office of taxpayer advocate for the purpose of providing a means with which taxpayers can have an opportunity to fight the bureaucracy in an orderly fashion.

Unfortunately, on occasion the Tax Department is perceived is a monster which presses down its bureaucratic impositions on people without adequate justification. This bill attempts to create a device whereby that type of procedure can be rebutted and handled in an orderly fashion.

Specifically, the taxpayer advocate is an individual who is appointed by the Department of Taxation and Finance and reports to the Governor. The purpose of the taxpayer advocate is to assist taxpayers in resolving problems with the Tax Department, to identify areas in which taxpayers have problems dealing with the department, to propose administrative changes to departmental practices and procedures, to recommend legislative action, and to prepare an annual report by December

31st of every year which identifies initiatives taken, which summarizes the most serious taxpayer problems, describes actions taken and not taken, recommends administrative and legislative action to mitigate taxpayer problems, and includes any other pertinent information.

It seems to me that this is a very useful potential device which will assure taxpayers the opportunity to be heard, not necessarily with regard to specific complaints that they're being overcharged by the Tax Department, but rather, when they object to policies and procedures of the department, this provides them with a vital means of defending themselves and of seeking redress of their grievances.

THE PRESIDENT: Senator Duane.

SENATOR DUANE: Thank you, Madam President. Would the sponsor yield, please?

THE PRESIDENT: Senator Goodman, will you yield?

SENATOR GOODMAN: Yes, I will, Madam President.

THE PRESIDENT: You may proceed,

Senator Duane.

SENATOR DUANE: An identical bill was introduced by the sponsor in January. It was Senate Number 698. But the enactment clause was stricken, and a new bill was just introduced as S3948. Why is that?

SENATOR GOODMAN: Senator, the bill that was originally introduced was a bill that I initiated. This is a Governor's program bill. And that's why we defanged the first bill and substituted this one.

SENATOR DUANE: And through you, Madam President, if the sponsor would continue to yield.

THE PRESIDENT: Senator, will you yield?

SENATOR GOODMAN: Yes, I will, Senator, to a reasonable number of questions.

THE PRESIDENT: You may proceed with a reasonable number of questions, Senator Duane.

SENATOR DUANE: So there was no -- so I'm to understand that -- I didn't see any change, so there is no change, the bills are identical?

SENATOR GOODMAN: No, there have been changes, Senator, of different varieties. If you're interested, I can detail those for you.

SENATOR DUANE: Through you, Madam President, would the sponsor continue to yield for a clarification?

SENATOR GOODMAN: Yes, I will.

THE PRESIDENT: You may proceed, Senator Duane.

SENATOR DUANE: I didn't - perhaps I didn't -- there is a difference or there is no difference?

SENATOR GOODMAN: Madam President, could we close the chamber door so the audibility is improved?

THE PRESIDENT: Would the sergeant-at-arms please close the chamber door to reduce the noise level.

SENATOR GOODMAN: Would you repeat your question, please, Senator?

SENATOR DUANE: At first I thought that there was no change, but then I thought I heard the sponsor say that there was a change, but I couldn't hear that well. So

I'm just trying to clarify that.

SENATOR GOODMAN: There were no changes in the bill put in earlier this year, Senator, I misspoke. The changes related to a bill that was previously introduced last year.

SENATOR DUANE: Thank you for the clarification.

I'm wondering if the sponsor is concerned that we are -- if this bill were to pass, that we're giving the Governor a new appointment without the advice and consent of the Senate and whether institutionally that's a good idea.

SENATOR GOODMAN: You were wondering or do you wish to ask me a question, Senator?

SENATOR DUANE: Through you, Madam President, it's my polite way of asking a question.

But is the Senator concerned about giving the -- as I am, about giving the Governor an appointment without the advice and consent of the Senate and is he concerned, as I am, institutionally about that impact on the Senate?

SENATOR GOODMAN: Senator, in this specific case the Governor is on our side of this. We seek to find a means of bureaucratic redress, which this would provide.

And since our objectives are identical, I see no reason for us to have to go through the process of advice and consent on this particular appointment.

SENATOR DUANE: Through you, Madam President, if the sponsor would continue to yield.

THE PRESIDENT: You may proceed, Senator Duane.

SENATOR DUANE: I note that the Senator said "our." However, I notice that there are no Minority sponsors of the legislation. Were Minority Senators asked to go on the legislation? And if not, why not?

SENATOR GOODMAN: Senator, I begin to detect a pattern. I think every time you rise to ask a question, you raise the same question. And I'll give you the same answer, to the best of my ability. This is a Majority initiative in which no Minority Senator was

asked to participate.

SENATOR DUANE: Through you, Madam President, if the sponsor would continue to yield.

THE PRESIDENT: You may proceed if you have a new question, Senator Duane.

SENATOR DUANE: Yes, more questions, Madam President.

Was that your question, Madam President?

THE PRESIDENT: You may proceed if you have a new question, Senator Duane. I'll repeat my clarification for you.

SENATOR DUANE: Thank you.

Speaking of joint sponsorships - well, I'll go to that later.

Is the sponsor concerned that this proposal will create another layer of bureaucracy within the Tax Department?

SENATOR GOODMAN: No, I'm not, Senator.

SENATOR DUANE: Through you, Madam President, if the sponsor would continue to yield.

THE PRESIDENT: Senator Goodman,

do you continue to yield?

SENATOR GOODMAN: You've had four questions, Senator. Suppose I plan to yield to four more and we'll call that a limit. May we do that by agreement?

THE PRESIDENT: You may proceed with a maximum of four questions, Senator Duane.

SENATOR SKELOS: Madam President.

SENATOR DUANE: Through you, Madam -

THE PRESIDENT: Senator Skelos.

SENATOR SKELOS: If I could just interrupt for a moment, Senator Duane.

There will be an immediate meeting of the Tourism Committee in the Majority Conference Room.

THE PRESIDENT: There will be an immediate meeting of the Tourism Committee in the Majority Conference Room.

Senator Duane, you may proceed.

SENATOR DUANE: Thank you.

Is it not the Tax Commissioner's job to do pretty much what the advocate's job is supposed to be? For instance, assisting

taxpayers in resolving problems with the department, identifying areas in which taxpayers have problems dealing with the department, proposing changes in the administration and practices and procedures of the department, recommending legislation?

Aren't there already employees and in fact a commissioner -- is the commissioner not responsible for exactly those things? And if he's not doing a good job or she's not doing a good job, can't the Governor replace that commissioner?

SENATOR GOODMAN: Not in my opinion, Senator.

SENATOR DUANE: Through you, Madam President, if the sponsor would continue to yield.

THE PRESIDENT: Senator Duane, you have authorization now for three more questions, maximum.

SENATOR DUANE: Thank you, Madam President. I'm pleased that since we're on a tax, there's so much counting going on here.

THE PRESIDENT: Senator, if you have a question, you may ask it. That's what

you're authorized to do, not the gratuitous comments.

SENATOR DUANE: Exactly, Madam President.

THE PRESIDENT: Thank you. I'm glad we agree. Please proceed with a question.

SENATOR DUANE: Is there an Assembly sponsor for this bill, or is this a one-house bill at this point?

SENATOR GOODMAN: There is not an Assembly sponsor at this time, Senator. Assemblyman Espaillat sponsored this legislation last year. We presume he may wish to do it this year. We don't know that yet.

SENATOR DUANE: Madam President, I couldn't hear the second half of the answer.

SENATOR GOODMAN: Assemblyman Espaillat was the sponsor last years. I don't know whether he'll wish to sponsor it again. He'll be given that opportunity.

SENATOR DUANE: And through you, Madam President, if the sponsor would yield.

SENATOR GOODMAN: Senator, I already indicated I would yield.

THE PRESIDENT: Senator, you're delaying this process. I've now said twice, as clarification, that you have authorization now for a maximum of two more questions.

SENATOR DUANE: Thank you, Madam President.

THE PRESIDENT: Is this a countdown of some sort, Senator?

Senator Paterson.

SENATOR PATERSON: Madam President, point of order.

Senator Goodman has the right to answer as many questions as he would like. However, Senator Duane also has the right to state his opinion about whether or not he should be granted that number of questions. I don't know that that's a point to chastise Senator Duane, since we're acting in civility.

The Senator then asked Senator Goodman to yield; there was no answer. And then, if I'm not correct, you accused Senator Duane of delaying the proceedings. He was waiting for an answer.

THE PRESIDENT: And we are still delaying the proceedings. Senator Goodman

authorized Senator Duane to ask a maximum of four questions well over four minutes ago. And I'd like to proceed with that now, without further delay.

SENATOR PATERSON: Well, Madam President, point of order. It's fine with me whichever way that you would like to proceed. But I'm just saying that Senator Duane has a right to his opinion. There is no rule here about the questions and the answers.

Senator Goodman set what he thought was an approximate number of questions that he could answer. Senator Duane does not have to agree with that. And his statement in opposition to it is something he's entitled to. There's nothing under the rules that prohibits him from doing that. I don't see any reason, if we're acting in civility, to chastise him at that point.

THE PRESIDENT: First of all, Senator Paterson, your point is not well taken.

Second of all, if Senator Duane chooses to ask fewer than four questions, we would certainly welcome that decision.

Let us proceed. Senator Duane, do you have another question, sir?

SENATOR DUANE: Actually, Madam President, I'm going to speak on the bill.

THE PRESIDENT: You may proceed on the bill.

SENATOR HEVESI: Madam President.

THE PRESIDENT: Senator Hevesi.

SENATOR HEVESI: Would Senator Duane yield for a question?

THE PRESIDENT: Senator Duane, will you yield?

SENATOR DUANE: With pleasure, Madam President.

THE PRESIDENT: You may proceed, Senator Hevesi.

SENATOR HEVESI: Thank you.

Through you, Madam President. I'm curious in terms of this legislation as to why it's necessary that this legislation be enacted, as opposed to the Tax Department on its own, seemingly in accordance with its own purpose, doing everything that this legislation would enable it to do.

My question to you, Senator Duane,

is why do you believe that the Tax Department needs the legislative requisite that this legislation creates in order to advocate on behalf of taxpayers?

SENATOR DUANE: Thank you, Senator. That's an excellent, excellent question. In fact, the sponsor noted before that he believes that the Governor is on our side, although it must mean that side of the aisle, since there are no Minority sponsors of this legislation. Nor do I remember the bill being circulated to us -- to me, anyway, to sign onto.

But it seems to me that the duties of the Tax Commissioner include to assist taxpayers of the State of New York in resolving problems with the Tax and Finance Department, to identify areas in which taxpayers have problems in dealing with the department. I believe that the department and the commissioner should work together with the Legislature to propose changes that may be needed legislatively, and also within the agency to propose changes in the administrative practices and procedures of the

department to mitigate problems.

And I also believe that the Governor, since the Governor appoints the Commissioner of Taxation and Finance, I don't understand why the Governor needs another appointment at high level in that department to do exactly what his original appointment should be doing.

So I'm as perplexed as you are, Senator, as to why this is necessary. And apparently at this point, though we seem to be coming up to tax season -- and I wonder whether or not this bill has anything to do with April 15th looming. But even at this late date, there is no Assembly sponsor for this legislation, so it won't even pass, as I can see it, in time for April 15th. Although I could see it going out in newsletters saying that it was passed in this body by April 15th.

But again, why would the Governor support creating another layer of bureaucracy within a department that he really, you know, controls the highest echelons of? So I am, frankly, as perplexed as you are, Senator.

I might also note that this bill

has taken on an air of urgency. In fact, interestingly, we were called to a special meeting of the committee, even though this bill had been introduced originally by the sponsor in January, did not get a hearing in the committee which the sponsor of the bill actually chairs until the Governor made it one of his bills, and then it came to the committee. So that's fascinating.

Now, interestingly, the week before, in that very same committee, the Sexual Orientation Nondiscrimination Act was passed by the committee, and yet that hasn't come to the floor. So here we have a bill that was introduced a week later that's here on the floor today, and yet the Sexual Orientation Nondiscrimination Act, which has been around the Legislature for 30 years, has not made it onto the floor here.

So here we have, weeks ago, SONDA coming out of committee and not coming to the floor, and just last week this bill, in an emergency session of the committee, at the urging of the Governor, comes to the committee and gets passed and all of a sudden it's here

on the floor. It's like magic the way this bill came to the floor. But SONDA -- did I mention 30 years it's been around this Legislature? -- even though it's been passed out of committee here, has never made it the floor.

It's all very perplexing, Senator. Thank you for the question.

SENATOR HEVESI: Madam President, would Senator Duane continue to yield?

THE PRESIDENT: Senator, do you continue to yield?

SENATOR DUANE: Yes, Madam President.

THE PRESIDENT: You may proceed.

SENATOR HEVESI: Thank you.

Senator, I very much appreciate your informative answer because I was unaware that this legislation had been fast-tracked, as it were. And that in and of itself raises some serious concerns with me, because I'd like to know -- and if you can enlighten us, that would be wonderful. Or perhaps I'll put this question to the sponsor if you're not familiar with where I'm going with this.

In light of the fact that the Governor believes and Senator Goodman believes that this legislation is absolutely urgent, do you know the extent to which, in the time since we passed this bill last year till now, the Tax Department has done anything of the sort of the remedies that are included in this legislation?

In other words, it's so essential that we fast-track this legislation now, I believe that the Tax Department could undertake almost all of the actions that this legislation calls for. Is it your understanding that the Tax Department has done nothing in the realm of taxpayer advocacy in the last year?

SENATOR DUANE: That's an excellent question, Senator.

I would have to regrettably answer yes, that they have done nothing. Because if they had done something, perhaps this bill wouldn't be coming before us.

Now, if I were more cynical, which I am not, but if I were more cynical, I would say that this bill isn't really much more than

a feel-good bill to make taxpayers feel as if certain legislators who may be sponsors of the legislation on the other side of the aisle are trying to help taxpayers while others are not.

But as I say, I am not a cynical person, and so that's not what I think. And I hope, hope that no one else thinks that either.

However, I do think that this points to the inaction -- and it sounds as if the Governor may not be able to have much influence over what the Tax Commissioner is doing if the Governor is unable to get the Tax Commissioner to assist taxpayers in resolving problems and to identify areas in which taxpayers have problems in dealing with the department. Or perhaps the Tax Commissioner and his department are unable to propose administrative practices and procedures that might mitigate problems which have come up.

And so -

THE PRESIDENT: Senator Skelos.

SENATOR SKELOS: Yes, if I could interrupt, there's a meeting of the Local Governments Committee in the Majority

Conference Room. Immediate.

THE PRESIDENT: There's a meeting of the Local Governments Committee in the Majority Conference Room.

SENATOR DUANE: So sadly and regrettably, because I am not a cynical person, I must come to the conclusion that the Governor has lost control of the Tax Department and that's why we need to appoint this person.

Although I'm not sure I'm going to vote for this, because hope springs eternal that we may be able to rein in that agency and really make it be on the side of the taxpayers as well as to collect much-needed revenue to provide programs for the state.

SENATOR HEVESI: Thank you, Madam President. Would Senator Duane yield to another question?

THE PRESIDENT: Senator, would you yield to one or more questions, sir?

SENATOR DUANE: As many as he wants, Madam President.

THE PRESIDENT: You may proceed with a reasonable number of questions, Senator

Hevesi.

SENATOR DUANE: Or unreasonable. I don't care.

THE PRESIDENT: Well, I'll make that decision.

SENATOR HEVESI: Madam President, just a procedural clarification.

THE PRESIDENT: Yes, Senator Hevesi.

SENATOR HEVESI: Since Senator Duane has indicated that he will yield to an unlimited number of questions, am I then required to ask through the chair each time if Senator Duane will yield to a question?

THE PRESIDENT: No. And thank you for asking me that question.

You may proceed -- Senator Paterson.

SENATOR PATERSON: Madam President, point of order.

That has been the custom of this chamber which you have enforced, Madam President. The questions are supposed to go through the chair. This is the point that I tried to explain to you a few moments ago.

When Senator Duane asked Senator Goodman to yield, even though there was a prerogative on Senator Goodman's part to cut off the questioning at four questions or at any time, even if he changed his mind and wanted to cut off the number at three questions, he was entitled to do that under the rules. But the questions still have to go through the chair.

That is my understanding of the rule, Madam President.

THE PRESIDENT: Senator Paterson, we've had a multitude of instances here in recent weeks where Senators have authorized and yielded for a series of questions. I have accepted that yielding, and the Senate has proceeded smoothly. I'd like to continue that right now.

SENATOR PATERSON: Madam President, point of order.

THE PRESIDENT: Senator Paterson.

SENATOR PATERSON: Are you waiving your duty as the chair to have the questions go through the chair once there is a series of questions that the two Senators have

agreed to?

THE PRESIDENT: Certainly not. And I just clarified that with Senator Duane, saying I'll make that determination, sir.

SENATOR PATERSON: Well, then, Madam President -

THE PRESIDENT: Let us proceed now.

SENATOR PATERSON: Madam President, point of order.

THE PRESIDENT: Yes, Senator.

SENATOR PATERSON: This is a point of order. We're trying to maintain order in this chamber, and we're trying to maintain civility at the same time.

THE PRESIDENT: Absolutely, Senator.

SENATOR PATERSON: Could you please tell us what is the rule so that the Senators know when you would like the questions to go through the chair and when you would like the questions to continue without going through the chair if there is a series of questions.

THE PRESIDENT: Senator Paterson,

your point is not well taken.

Senator Hevesi, please proceed.

SENATOR PATERSON: Madam President.

THE PRESIDENT: Do you have another -

SENATOR PATERSON: What does your "point is not well taken" mean?

THE PRESIDENT: Do you have another point of order, Senator Paterson, that you'd like to raise with me?

SENATOR PATERSON: Madam President.

THE PRESIDENT: Yes or no, Senator?

SENATOR PATERSON: Madam President, my point of inquiry is you haven't ruled on the -

THE PRESIDENT: Is this a point of order that you're raising, sir?

SENATOR PATERSON: Yes, it is. You have not -

THE PRESIDENT: You may proceed, then.

SENATOR PATERSON: You have not

ruled on my last point of order, which is that I'm trying to get clarification of which of two ways which you've been conducting this chamber you prefer. Is it the value of having all the questions go through the chair, or that when there's a series of questions that the Senators will then continue with the questioning and not go through the chair?

We've done both here. I'm simply asking for you to make this clear to all of us who are trying to follow the rules here - that's what we are trying to do -- whether or not you would prefer, when there's a series of questions, that after each question the question go through the chair, which a minute ago you said that was the way you wanted to do it, or whether the question should just go directly to the other Senator, which is what you said five minutes ago to Senator Duane.

Which of the two do you prefer?

THE PRESIDENT: I did not make that latter statement to Senator Duane, Senator Paterson. All questions should go through me as President of the Senate.

Secondly, when the sponsor yields

to three questions, four questions, I will make a determination as to whether the Senator asking the question may proceed with three questions, four questions. I have been making those determinations in each case. I will continue to do that.

Your point -- your original point I already ruled on. It was not well taken. And I have now clarified your second point of order.

I'd like to proceed now, Senator Paterson.

SENATOR PATERSON: Madam President, point of order. And I'm going to tell you, if you would like, we can get the stenographer to read the record. Senator Duane -

THE PRESIDENT: That won't be necessary.

SENATOR PATERSON: -- asked Senator Goodman to yield for a question. There was no response, and you then ruled Senator Duane out of order for delaying the proceedings. He did not. He asked the question through the chair, which is exactly

what you just said the members should do.

That's my point of order.

THE PRESIDENT: Senator Paterson, out of respect for you, I will give one more clarification.

Senator Goodman very graciously yielded to a maximum of four questions. I authorized Senator Duane to proceed with a maximum of four questions. I would allow a Senator to proceed then with four questions, directed through me as President of the Senate, in that type of a situation.

I think that's an adequate clarification. I'm now going to acknowledge Senator Goodman, who again has been very graciously standing, waiting to have the floor.

Senator Goodman, you may proceed.

SENATOR GOODMAN: Madam President, merely to clarify the point of order which I believe is under discussion. May I just say that first of all, the matter relating to Senator Duane involved not four questions. After he asked the first four questions, I suggested that I be willing to

yield for four more questions, with the clear understanding that that yield would be through you for each of those four.

Under the circumstances, it seems to me there's total consistency in the ruling which you made that if a Senator does wish to yield to a series of questions rather than subject you and the whole chamber to the delay inherent in asking time whether it should be done through you, it's done seriatim, through you by mutual consent.

Therefore, if I may say so, I think this matter can now resume its normal course of discussion. In 32 years, I have never rationed questions. But in this case involving Senator Duane, it appears that it becomes necessary simply to permit the session to end sometime between now and next Christmas. Thank you.

(Laughter.)

THE PRESIDENT: I think we can all concur in your latter statement. That would be my hope and belief, anyway.

Senator Hevesi.

SENATOR HEVESI: Madam President,

one final clarification, since it was my inquiry that sparked this exchange.

If a Senator has given his agreement to answer or to yield to several different questions and you have subsequently given your permission for that Senator to be questioned without going through the chair, if I choose to go through the chair, am I entitled to do that for each question that I choose to ask?

THE PRESIDENT: Absolutely, Senator, as you did just now, for a clarification. And all statements should be directed through me, as President of the Senate.

You may proceed, Senator Hevesi.

SENATOR HEVESI: Thank you, Madam President, will Senator Duane yield to another question?

THE PRESIDENT: Senator Duane, would you yield to another question?

SENATOR DUANE: With great graciousness, yes.

THE PRESIDENT: You may proceed, Senator Hevesi.

SENATOR HEVESI: Thank you.

Through you, Madam President. Where we last left off, we were discussing gubernatorial appointment of the tax advocate and the ramifications and implications of that appointment -

THE PRESIDENT: Senator Skelos.

SENATOR SKELOS: Excuse the interruption again.

There will be an immediate meeting of the Codes Committee in Room 124 of the Capitol.

THE PRESIDENT: There will be an immediate meeting of the Codes Committee in Room 124 of the Capitol.

Senator Hevesi, you may proceed with your question.

SENATOR HEVESI: Thank you, Madam President. My question is the following.

It's my understanding that the tax advocate, as proposed under Senator Goodman's legislation, would be a position within the Tax Department. So I have a question in terms of jurisdiction and authority and whom is subordinate to whom.

Is it your understanding, Senator Duane, that the tax advocate would report to the Tax Commissioner?

SENATOR DUANE: Through you, Madam President, yes, that is my understanding, that the tax advocate would be reporting to the very same commissioner, who because apparently the Governor and the sponsor of the bill believe he's not doing or she's not doing their job appropriately - report to that person that they've been appointed to show that they're not doing a good job. It's bizarre.

SENATOR HEVESI: Thank you.

Madam President, would Senator Duane continue to yield?

SENATOR DUANE: Yes.

THE PRESIDENT: Senator Duane, do you yield?

You may proceed, Senator Hevesi.

SENATOR HEVESI: Thank you.

Senator Duane, in addition to this being a bizarre scenario in terms of why this is necessary, I have an additional concern. And the concern is notwithstanding the fact

that we -

SENATOR DUANE: Madam President, I'm sorry, I can't hear.

THE PRESIDENT: Senator Hevesi, could you clarify and speak up, please.

SENATOR HEVESI: Thank you.

Notwithstanding the fact that we may have questions as to whether or not it is necessary to have a tax advocate, I think most of us would agree that if we do have a tax advocate, that that individual should be able to perform his or her job effectively. So my question is, is a tax advocate -- that is, an individual who operates within the Tax Department and, it seems to me, under the authority of the Tax Commissioner -- is that tax advocate independent?

In other words, can that individual truly perform his or her duties as an advocate for the public under a Tax Commissioner who it seems to me by definition was unable to perform or unwilling to perform those same duties, thus the need for this bill?

SENATOR DUANE: Through you, Madam President, the answer to that is I don't

know. And it's really sort of a conundrum. In fact, one would hope that a person appointed to such a position would have the integrity to be able to be forthright and honest to the commissioner who happens to be their boss. But it is a difficult situation.

But we find it in other parts of government as well. For instance, someone who is overlooking contracts, are they able to stand up to a commissioner who appoints them to that job even if they have a disagreement about that contract? Or there are quasi-judicial appointments which are made by governors and mayors and managers across the state, and the same question could be asked of any of them: Are they willing and able to be truthful and forthright and honest to the people who actually control whether or not they keep that job?

So it's a very, very difficult and interesting question, and one which frankly people in government have wrestled with for a very long time.

Now in this case, I think that citizens get -- what's the word I'm grasping

for? I would say agitated, but that's not quite right. But when it comes to taxes, there's a very high level of interest, anxiety, anger, support, understanding. I mean, paying taxes really is a big test of citizenship. Because you have to trust when you're paying taxes that it's fair and that the money is going to appropriate programs and things that are good for the state and everyone who lives in the state.

That said, one would hope that a person who takes the job as Tax and Finance Commissioner takes that job with the sensitivity of how important it is to the people of the State of New York and the businesses of the State of New York. And so to a certain extent, who that person is needs to have the highest possible scrutiny.

What I'm concerned about is - okay, so we put that aside. Now, here we're appointing someone whose job it really is to critique the department being run by that commissioner. And yet they have to report to that commissioner. It's a difficult, difficult situation.

And, you know, I know it was a long answer to a short question, but I don't think there could be a short answer to that question, because it's a very complicated system that we've set up. And although I think while it's not a great system, it's certainly better than any other system that anyone has ever thought of. But it does call into question things like independence and integrity.

And the other thing is that the Governor would make this appointment of this person, but we would never really have a chance to look at that person's qualifications or frankly where their heart is. They would never come before any committee in this body or the body as a whole for their appointment. So that's also of concern as well, because I think that we need to maintain, as much as we possibly can, advice and consent over high-level appointments, particularly when it impacts everyone in the State of New York; that is, the taxpayers and the businesspeople of the State of New York.

SENATOR HEVESI: Thank you.

Mr. President, would Senator Duane continue to yield?

ACTING PRESIDENT KUHL: Senator Duane, do you continue to yield to a question from Senator Hevesi?

SENATOR DUANE: Yes.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR HEVESI: Thank you.

Through you, Mr. President. Following up on this theme, I'm very troubled by this. And I didn't have an opportunity to have a part of the process that led to the drafting of this legislation, so I'm concerned about additional ways in which this legislation could have been drafted.

In fact, Mr. President, if I may request -- put my request for Senator Duane on hold and ask the sponsor to yield for a question.

ACTING PRESIDENT KUHL: Well, Senator Hevesi, that would be rather abnormal, because Senator Duane has the floor, as I understand it. And I may be wrong there, but Senator Duane had the floor in which you're

entitled to ask him the question, he has the floor. You would then be asking the chair here to give you the floor, and that wouldn't be normal procedure.

So after Senator Duane is finished, if you'd like the floor, then perhaps the sponsor would yield to a question.

SENATOR HEVESI: Okay. I will yield the floor back to Senator Duane.

ACTING PRESIDENT KUHL: Okay. Senator Duane, why do you rise?

SENATOR DUANE: Thank you. On the bill, Mr. President.

ACTING PRESIDENT KUHL: Senator Duane, on the bill.

SENATOR DUANE: It's interesting, the terrific questions that I was just given really have opened up for me a whole new area which I don't think has been explored here. And I would like to use my time on the bill to speak about some of those things.

It seems to me that if a taxpayer wanted to use this hardship provision, as I read the bill, first they would have to exhaust all of the administrative

possibilities within the department before they could go to the advocate. So there are many, many things in place in the department already which the taxpayer would have to go before, advocate before, before they went to this taxpayer advocate.

Now, chances are -- and I would recommend that if a person were to go before the State Department of Taxation and Finance, that they bring in professional help with them. Because it's very hard for an average citizen who may not have as great a knowledge of the state's tax codes as the people working in the department, and so they would be at a disadvantage as they went through all of the different processes in the Tax Department.

So chances are they would have to hire someone to help them out. Now, that would be a very expensive proposition. So the taxpayer would have to decide whether or not it was worth the investment in hiring someone to help them before they made the decision on how far they wanted to go in the appeal. Because maybe they would win the appeal, but would have paid out everything that they were

appealing in hiring someone to help them. Well, that's not a very good situation for the taxpayer.

And so what's of concern is here we have yet another layer that's been added on, the advocate. And so then you would have to hire someone perhaps to go before the advocate. So here's another expense. And even if he won before the advocate, as I understand it, the commissioner can overturn what the advocate says. So your investment in hiring someone, your investment in time might all be for naught. And so that's of great concern to me.

Here we're making it potentially possible for a taxpayer who's an amateur in tax matters to spend an awful lot of money, maybe win before the advocate but not really get any money back because they've spent all of it, or win before the advocate, pay their expert, and then have the decision overturned by the governor. So almost like double indemnity. So that's a big concern of mine about this.

Now, as I understand it, there

already is a conciliation bureau within the Tax and Finance Department. I personally have not had to go before them, but I'm sure that people have gone before them. And I understand what the difference is between the advocate and the conciliation bureau. But it seems to me for some of the things you would go to the conciliation bureau for, you would go to the tax bureau for, and other things you would go to other people within the tax department. So it seems to be sort of, you know, a duplication of duties all over the place.

I'm wondering, you know, for instance, what happens if you go to the taxpayer advocate and the taxpayer advocate says, You know what? I don't think this is a very good case. I don't think I should bother hearing this. Well, that's not really advocating, is it? And yet the advocate is allowed to say, I don't think your case has merits.

Now, there is no -- or I'm not sure about this, and maybe someone could ask this of the sponsor, because I couldn't fit it in

in my four questions. But I'm wondering about the time limit. And is it possible that while you're going through all these processes that the statute of limitations might run out? Interesting. And of course that would defeat the whole purpose of having the taxpayer advocate there as well.

Now because, with the exception of what the advocate may say -- the only exception is that the commissioner can overturn that -- I think that raises constitutional issues. And I think that those constitutional issues about due process need to be explored before we rush into that legislation.

So, you see, there are a lot of things here that really need to be explored. Which is one of the reasons why I said, why are we rushing with this bill? What is the rush? Why don't we have a hearing? Why don't we bring in taxpayers who have actually suffered at the hands of the Tax and Finance Department. Let's bring the Commissioner in. Let's find out what the problems are. Maybe we could even get a report. Maybe a report,

that might be a good idea. We could get a report on what's happening.

And I'm also wondering, you know, that we're putting -- potentially we're putting this advocate in a difficult position. Here they are, they're a member of a department that they're critiquing. I mean, I would think that that would be almost a hostile work environment.

Many of us have experienced hostility in our public lives. I mean, it happens to the best of us. But could you imagine every day going to work in a department and your job is to critique that department and point out what people are doing wrong? That's an impossible situation. I personally would not want to do that. Very, very difficult.

If they were totally independent - you know, we have independent prosecutors. There are certain things put in for these people to sort of shield them from that. But could you imagine sitting at your little desk in the middle of a big department where everyone is concerned that you're going to go

after them? That would be completely untenable. I don't know how anyone could live with that.

So again, we need to look at why has the Governor lost control of this agency and why does the Governor then need to put in a tax advocate. Why is it that no one in the Assembly this year thinks that this is important enough to get it done by April 15th? Or maybe they agree with us and believe that this issue should be explored more fully and more of these questions should be put on the table.

I mean, it would be very difficult for anyone to vote against this, because it seems to be a pro-taxpayer piece of legislation. But we in government, we're not just supposed to vote to pander to our constituents. We are here to do things that I would hope are going to be helpful towards all of the people of the State of New York and, if you will, the right thing to do. And this seems like the right thing to do for taxpayers, but is it really? Is it really? Or does it really say that we're failing in

many ways?

And we have a Constitution which protects all of the people of the State of New York on the state level, and of course on the federal level we have a Constitution which protects all of the citizens of the United States. Well, shouldn't we make sure before we all vote on this legislation that it will pass both state and federal muster? I mean, isn't that part of our responsibility? I don't think that we should shirk our responsibilities just in order to pump a bill out from one house by April 15th.

And I would be remiss if I didn't say -- I mean, I'd like, you know, maybe if my name were on the bill -- no, you know, that's not true. Even if my name were on this bill -- although it was not offered to me to put my name on this bill -- but even if my name were on this bill, I would like to think that I would be raising these very same issues.

But what I would have liked is for these issues to have come up in committee. I would have liked to have asked the taxpayers

what they thought about this. I would have liked to have talked to the Tax Commissioner. I would like to have heard from the Governor's representatives why the Governor thought this bill was so very important. I'm not saying it's not important. It's just a lot of questions about why this bill has taken on such an air of urgency.

I mean, to me, if you look at a bill like SONDA, 30 years the Sexual Orientation Non-Discrimination Act has been before this Legislature. 30 years. In fact, maybe for longer than you're alive, some of my colleagues, it's been here. But there's no urgency about that. It came out of committee before this legislation, yet this legislation has hit the floor beforehand. You know, some things are beyond me here.

Now, the other thing is if there were Minority sponsors of this bill, I would like to think that we would be able to bring some expertise to this legislation. I read time and time again about how bipartisanship is really the way to go. President Bush prides himself on bipartisanship. I think of

myself as a bipartisan kind of guy. I think that maybe that's how we need to go in this house.

You know, a good example of bipartisanship -- which this bill is not - but look at McCain-Feingold. Minority, majority. Although now they're all equal in the Senate, they're both majority parties, which is really, if you think about it, just the perfect example of bipartisanship. But tragically -- or regrettably, maybe not tragically, maybe regrettably, this bill is not bipartisan. And I think that the more voices you bring to the table, the more voices you bring to the bill -- you know what, Majority party people, Minority party people, we all represent taxpayers. All of us together represent taxpayers. And I think all of us need to have our voices heard on this bill.

Same is true of SONDA, which has been around for 30 years. Majority party members could avoid discrimination because of SONDA, Minority party members also could profit by passing SONDA. It would make for a

much more equal state.

The same is true with this. I think in a bipartisan spirit we would be able to make for a much better bill, and a bill which would pass constitutional muster both on the state and the federal level, in addition to really finding out what the Governor's motives were in advancing this bill so quickly before our house.

ACTING PRESIDENT KUHL: Senator Lachman, why do you rise?

SENATOR LACHMAN: Mr. President, through you, I would like to ask the Senator a question.

ACTING PRESIDENT KUHL: Senator Lachman, I did have Senator Hevesi wishing to speak next. I have a list running here.

So, Senator Hevesi, do you desire still -

SENATOR HEVESI: Thank you, Mr. President. Would the sponsor yield?

ACTING PRESIDENT KUHL: Senator Goodman, do you yield to a question from Senator Hevesi?

SENATOR GOODMAN: Yes, I will,

Senator. Gladly.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR HEVESI: Thank you.

Through you, Mr. President, the discussion that we've been having here has been a good and thorough discussion. I voted for this bill last year, but I have a lot of questions now. They're sincere and genuine questions about whether or not I'm going to vote for this bill again.

My question to you is, as I peruse the legislation, the purpose of the office of taxpayer advocate will be to assist taxpayers in resolving problems with the department and to identify areas in which taxpayers have problems dealing with the department and to recommend administrative changes and propose legislative remedies to mitigate against those problems.

My question for Senator Goodman, Mr. President, is, aren't those all responsibilities that the Tax Department is currently charged with and should be engaging in?

SENATOR GOODMAN: My answer is that those are responsibilities which ought to be fulfilled by the Tax Department, but it's clear that in the perception of the government, and in my perception after some years of examining the function of the department, that it's not adequately carried out.

It's my belief that this additional individual will be helpful in discussing policy and procedural matters -- not individual complaints that they're being soaked with a specific tax, but rather the ways in which things that are being done do not make sense.

I'll give you one specific example, if I may. There's an interesting continuing discussion as to the concept of who and who are not residents of the State of New York for tax purposes. I've had people come to me and complain that they're being charged -- being asked to pay resident taxes when in fact they're nonresidents. The reason for this is that every time they come in and out of La Guardia or Kennedy Airport on a business trip

and that's reported in the log of their corporation, that they're then charged with a day of residence in New York even though they don't reside in New York, simply went to the airport and passed it on their way home.

Therefore, this raises an intriguing question as to what constitutes actual residency and permissible charging of a day of residence in New York. And that's the type of question which this sort of an individual would hopefully be able to review and give a ruling on.

Let me point out that once the ruling is made, that ruling is binding unless specifically overridden. It would require a positive act on the part of the commissioner to override the ruling; otherwise, it stands. And this is a helpful way of combatting bureaucratic excesses.

SENATOR HEVESI: Mr. President, would the sponsor continue to yield.

SENATOR GOODMAN: Yes, I will.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR HEVESI: I thank Senator

Goodman for enlightening us with that primary example of why or how the Tax Department is currently failing. And so I very much appreciate the candor with which, Senator Goodman, you have answered that question, that this is necessary because the Tax Department isn't doing its job and therefore we need an additional entity to come in and do a job that the Tax Department should be performing.

However, in light of that -- and I accept that. I don't like it, and I would explore it. As Senator Duane has called for, I think there should be hearings and a fuller discussion in committee and discussion from both sides of the aisle on this.

But in light of that situation, why would you have a taxpayer advocate report directly to the Commissioner of the Tax Department, putting those two entities in fundamental conflict? They are and probably should be in an adversarial relationship, but we haven't taken steps to ensure the independence of the taxpayer advocate. Aren't we cutting off our nose to spite our face, Senator?

SENATOR GOODMAN: I presume in drafting this the Governor has studied the examples of twenty other states who have this type of apparatus in effect.

It's been proven very effective in such states as Massachusetts and Pennsylvania and has worked well for them, and it's his belief it would work well in New York.

SENATOR HEVESI: Thank you.

Mr. President, on the bill.

ACTING PRESIDENT KUHL: Senator Hevesi, on the bill.

SENATOR HEVESI: I don't know how I'm going to vote on this bill. I honestly don't know how I'm going to vote on this bill.

And I supported it last year, and it passed unanimously. But in the time that we passed that bill last year, and in this time, almost by definition, the Tax Department -- and I'm assuming that this Governor's program bill came at the request of or through consultations and discussions with the Tax Department where they are acknowledging that they have been deficient in the performance of their duties.

And let's be perfectly honest here. The purpose of the Tax Department is not just to collect taxes. The purpose of the Tax Department is to collect taxes in a just and fair way and to establish procedures and remedies for individuals who have been shortchanged, who need additional information -- such as the case when Senator Goodman outlined that example -- and to provide a structure or remedies or measures to meet problems that it will encounter as a government agency.

And it can't do it, for some reason. I don't know why it can't do it.

And perhaps we should have had a discussion about the extent to which this agency is being funded appropriately. And maybe it's not being funded appropriately. Maybe that's the problem. But a hearing certainly would have indicated whether or not the Tax Department has sufficient resources to be able to in and of itself perform effectively as a state agency.

I mean, this is a real problem here. Forgetting first the merits of

legislation, what's wrong with the Tax Department? And if this bill is so essential and we need it done so expeditiously - although, to be honest, I doubt that. We're seeing this bill now, in April. The tax date is coming up in a few weeks. Why didn't we see this bill in January? I have no idea. Why is there no Assembly sponsor this year?

But it's so absolutely essential that we pass this legislation, but the Tax Department has done nothing, nothing in the past year to remedy the problems that I believe -- and I defy anybody else in here to get up and discuss with me the reasons why the Tax Department cannot and should not do exactly what is called for under this legislation. We're empowering a different entity to do a job that the Tax Department should be doing.

Okay, that's problem number one.

Problem number two is if you are going to acquiesce, if you are going to say, We quit, we can't as the Tax Department do our job, so we need another entity to come in and do that job -- and there may be merits to

having an adversarial relationship here, just as we have in our judicial system. There may be merits to it.

But why would you then take that entity, which is in some ways in conflict with the Tax Department because they're moving in different directions, because one is empowered to advocate on behalf of the taxpayer, the other one has not been doing that, so there's the need for this legislation -- why would you then take the taxpayer advocate and put that individual under the direct supervision of the Commissioner of the Tax Department? I mean, it really doesn't make sense.

And now we have a process and procedure set up here for taxpayer orders, assistance orders and what have you. But what if the Tax Commissioner decides that the system is becoming too much of an advocate on behalf of the taxpayer or the process is taking too long so it's costing more money and they can't get additional revenue out of the Executive or the Legislature to facilitate such a process in a timely fashion, so it's a drain on their resources, so the Tax

Commissioner turns around to the taxpayer advocate and says: No, curtail your process, cut it short. Why wouldn't he do that? He very well might do that.

You have a system that you are setting up here, if this passes -- and the more I discuss this, the less likely I am to vote for this legislation -- where you have a need for an -- if you believe that you need this legislation, you have the need for an independent entity that you are then putting under the constraints of not being independent by making that individual report to somebody who's not doing the job he should be doing right now.

We have a State Comptroller that audits agencies of the State of New York. That individual is elected independently. He operates independently. That's a good idea. Because you don't do auditing from within your agency. You can do it, but you lose your objectivity and you lose the credibility as to whether or not the audit which has been performed has truly been done on the merits. That's why you have a State Comptroller.

That's why you have, as Senator Duane points out, special prosecutors in some cases.

In New York City, the New York City Board of Education has an independent investigator that has -- we're talking about the other extreme now. This individual has no checks and balances, almost. So strong was the need to prevent the organization from influencing the ability of the independent investigator, Ed Stancik, to do his job that they didn't even do any checks and balances, any oversight, which incidentally is problematic.

But in New York City you have that special investigator on the New York City Board of Education. You have the New York City Comptroller, who audits all the city agencies and reviews the contracts and is in fundamental conflict in many different areas with the mayor, and he is independent.

And most tellingly in New York City, because we're talking about a taxpayer advocate here, we have a public advocate in New York City. Now, some suggest that the public advocate's office shouldn't exist. And

that's a debate for another time. But if the office is going to exist, of course it has to be independent of the entity which it is fundamentally opposing on behalf of somebody else.

I mean, this is just silly. I'm not going to vote for this bill. I'm not going to vote for this bill. I regret my vote on this last year. This is a bad idea.

Because the real danger here -- and you may say, Well, Senator Hevesi, why don't you go ahead and vote for this anyway, because is this going to be worse if we pass it than if we don't pass it. And I suggest to you now as I'm going through this, Yeah, it will be worse.

And here's how. And I'll take some of the political burden. Because a lot of times we're asked to vote on things here that seem like they're going to be costly to us politically, because a no vote makes the burden on us, that we now have to explain why we voted against the taxpayer advocate.

Well, here's my explanation and here will be the explanation that I provide to

any of my constituents who question my vote on this. Number one, this takes the heat off the Tax Department right now. It says we're okay with the Tax Department not doing its job. We're okay with that. Go ahead, Tax Department, continue not to do what you should be doing. Okay? I reject that. I repudiate it on its face. That's flat-out wrong.

And, number two, it will give the impression -- and Senator Duane alluded to this. It will give the impression that if this office has been created, the taxpayer advocate's office has been created, that there is true advocacy, there is a true remedy, there is a true mechanism for taxpayers to go to get relief. But we know that that's not true, because that taxpayer advocate doesn't operate independently, and he may have his processes curtailed, he may have his wings clipped if he's doing his job effectively, he may be under budgetary constraints, he is not probably going to be under any oversight.

There wasn't any oversight or any hearings that led us to this legislation. And so therefore, we may be in a situation where

we've said to taxpayers, we've shifted the burden, we've said, You know what, we created this office of taxpayer advocate for you. That's it, end of story. When in fact it really is a guise and what it's doing is creating the impression that we have provided a remedy that we actually have not provided. And that, I submit to everyone in this chamber, is more dangerous than taking no action in and of itself.

And I hope my colleagues vote no on this bill. Because the Tax Department has failed. I'd like to see a hearing of the Tax Commissioner right now. I want to hear complaints from taxpayers. Because this legislation is the proof that there are major problems within the Tax Department. You cannot deny the existence of these problems and at the same time say we need a taxpayer advocate. Those two things are fundamentally in conflict with each other. This is not a good piece of legislation.

And this is, Mr. President, one of those examples where the debate, discussion, and deliberations that we engage in on the

floor of this house -- which we don't do enough of in committee, which we hardly ever do in hearings, which are almost nonexistent, or the hearings are only one-sided in terms of having Majority-only task forces or what have you, where its credibility is by definition called into question -- but where we deliberate and we have discussions and now we realize, as I have realized today on the floor of this house, this bill is a bad bill. I made a mistake by voting in favor of this bill last year, and I'm not going to make that mistake again. And I urge all my colleagues to vote no on this bill.

Thank you, Mr. President.

ACTING PRESIDENT KUHL: Senator Lachman.

SENATOR LACHMAN: Mr. President, will the sponsor yield for a question?

ACTING PRESIDENT KUHL: Senator Goodman, do you yield to a question from Senator Lachman?

SENATOR GOODMAN: Yes, I do.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR LACHMAN: Last year, Senator Goodman, I believe that you cosponsored a similar bill with Assemblyman Adriano Espaillat in the Assembly; is that accurate?

SENATOR GOODMAN: That's correct. I mentioned that earlier, Senator.

SENATOR LACHMAN: Right. Now, why was this bill not passed in the Assembly? Were there procedural reasons, logistical reasons, policy reasons, or you don't know?

SENATOR GOODMAN: I don't know why it was not passed in the Assembly.

SENATOR LACHMAN: Through you, Mr. President, will the Senator continue to yield?

ACTING PRESIDENT KUHL: Senator Goodman, do you continue to yield?

SENATOR GOODMAN: Yes, I will.

ACTING PRESIDENT KUHL: The Senator continues to yield.

SENATOR LACHMAN: Has Assemblyman Espaillat offered a comparable bill in this area this year?

SENATOR GOODMAN: Let me see if I

can respond in this fashion. This bill has undergone change since last year. The changes reflect gubernatorial suggestions. And as I explained earlier, although at the start of the year being a straight Goodman bill, it's now been modified, it's a gubernatorial program bill. This reflects the imprint of the Governor on the bill.

SENATOR LACHMAN: Mr. President.

ACTING PRESIDENT KUHL: Senator Lachman.

SENATOR LACHMAN: Through you, will the Senator continue to yield?

ACTING PRESIDENT KUHL: Senator Goodman, do you continue to yield?

SENATOR GOODMAN: Yes, of course.

ACTING PRESIDENT KUHL: The Senator continues to yield.

SENATOR LACHMAN: Has your office and the office of Assemblyman Espaillat been in negotiations in regard this bill?

SENATOR GOODMAN: No, we have not, because the Assemblyman has not yet indicated his willingness to be on the bill.

SENATOR LACHMAN: Okay. On the

bill, Mr. President.

ACTING PRESIDENT KUHL: Senator Lachman, on the bill.

SENATOR LACHMAN: I view this bill as a consumer bill rather than a bill within the Department of Finance and Taxation. But I think it is a good bill in general. It needs some fine-tuning. And I would be hopeful that your office and the office of Assemblyman Adriano Espaillat will reach out to each other to get the type of language that is necessary to secure the passage in both houses of a pro-consumer bill.

I would also like to thank your office, Senator Goodman. I was somewhat pleasantly surprised when I arrived in my office last night to see a 15-page decision of Gibbons versus Ogden, authored by Chief Justice Marshall in the year 1824, dealing with interstate commerce. I thank you and, through you, David Lewis, who wrote a little note attached to it.

ACTING PRESIDENT KUHL: Senator Hassell-Thompson, did you wish to be recognized?

SENATOR HASSELL-THOMPSON: Yes, thank you, Mr. President. Just on the bill.

ACTING PRESIDENT KUHL: Senator Hassell-Thompson, on the bill.

SENATOR HASSELL-THOMPSON: Senator Goodman, I think that you have proposed something that has a great possibility of being an excellent advocacy bill. But if we're going to pass this bill that you propose, I think we need to consider the possibility that there truly can be some conflict of interest.

The conflict at least for me exists because the question that it raises is who does the tax advocate answer to. And the answer should be to the public, but not the way it's structured.

The other question it raises is, who does the tax advocate represent? Again, the answer should be the public. But the way it's structured, it's probably not possible.

Possible remedy. I never like to raise an issue without giving a suggested remedy. And whether it's accepted or not, I think that it's worth merit. And that is that

while this is an excellent bill, we have some other possibilities. And because I'm the ranking member on Consumer Protection, I always think of that as a possible remedy for many things. So that this department could in fact be folded over into consumer protection. There's also the possibility of the AG's office. Or it can be a freestanding office.

But as it is proposed, as good as it is, I believe that we would be perceived as creating a conflict that never is going to get resolved. I think that we have identified very clearly that the Tax and Finance Department has some serious issues that they're not able to resolve. Therefore, this is a possible remedy.

By putting, however, this within that department, you will not only not remedy that situation, but we will be expending taxpayers' money in a tailspin.

And so those are the recommendations that I would like to offer, and I would hope that we would lay the bill aside and continue to work on it. And certainly I would be willing to offer at least

my voice, if not any serious expertise, to participate in coming up with something that would make this a really excellent bill that I know will pass here with unanimous support and perhaps would even pass in the Assembly.

Thank you. Thank you, Mr. President.

ACTING PRESIDENT KUHL: Senator Paterson, why do you rise?

SENATOR PATERSON: Madam President, if the sponsor would yield for a question.

ACTING PRESIDENT KUHL: Senator Paterson, perhaps the voice will be a better indication of the salutation to which you should use. It should be "Mr. President."

Senator Goodman, do you yield to a question?

SENATOR PATERSON: Did I say Madam President?

ACTING PRESIDENT KUHL: I'm sorry, sir, you did.

(Laughter.)

SENATOR PATERSON: Mr. President, that was anxiety.

Would the sponsor yield for a question?

ACTING PRESIDENT KUHL: Senator Goodman, do you yield to a question?

SENATOR GOODMAN: Yes, I do, gladly.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR PATERSON: Senator, two previous members talked to you about this substitution of the bill. And I understand that. It's a modification, really, to be more exact.

What I'm just interested in is something that you alluded to earlier and expressed a willingness to discuss a little, and that was just some of the changes that you made in the legislation from last year to this year.

SENATOR GOODMAN: Senator, let me preface this by saying that I happened to, in my earlier days as a public servant, been the Tax Commissioner of the City of New York. And as such, I presided over one of the largest jurisdictions in terms of tax collection in

the United States of America. It was under my administration that we introduced, unfortunately had to introduce the income tax in the City of New York.

Therefore, I would like to suggest to you the basic motivation of this, which will apply to your question as well.

The fundamental motivation of this bill is to try to provide a device whereby the Tax Commissioner can see himself more clearly as others see him and can understand any areas in which excessive bureaucratic zeal may have led to abuse or might lead to abuse in the future.

Another example I'd like to give is the occasion on which the Tax Department sent its agents into the state of New Jersey, with cameras, to large shopping centers, photograph the license plates of shoppers, and subsequently trace the owners of the cars bearing those license plates and sought to collect from them sales tax on purchases made in New Jersey.

That was a very egregious, in my opinion, excessive zeal on the part of the

department, and this was ultimately brought to their attention by my office and discontinued upon the public exposure of that.

Had this particular device been in place at that time, I suspect that it would not have been necessary to go through senatorial review have that procedure. But that's just an example of the type of behavior which I think this type of a bureaucratic instrument can preclude.

The idea here is not to have an appeal mechanism as such, but rather to provide a lens through which the commissioner can understand the extent to which his own department may be failing to fulfill its mission adequately. And I think for the most part most tax administrators seek to be fair and even-handed, but unfortunately, as they become overwhelmed with work, they may overlook various aspects of their work which require review and a clear understanding on their part of their impact.

So that's the fundamental point. As a result, the bill was modified last year to the extent of making this a device which

was subject to the review of the commissioner himself rather than some external force. It's arguable whether that's an improvement or not, and I would be open to various views on that. But let me just say that in view of the fundamental notion that I just propounded to you of the basic purpose of the bill, it seems to me it's consistent with it.

ACTING PRESIDENT KUHL: Senator Paterson.

SENATOR PATERSON: Mr. President, if the sponsor would yield for another question.

ACTING PRESIDENT KUHL: Senator Goodman, do you continue to yield?

SENATOR GOODMAN: Yes, I will.

ACTING PRESIDENT KUHL: The Senator continues to yield.

SENATOR PATERSON: This came to mind, Mr. President, as Senator Goodman was speaking. I grew up in New York City, so I am aware that he was the Tax Commissioner for the City of New York. I don't know if everybody here is. And so this is an opportunity perhaps to ask a question of the Senator that

I might not ask the normal sponsor of a bill, because it's general to policy itself.

When you were talking about the situation where someone comes to an airport and whether or not the corporation should be considered in residency in the city or the state for that particular day, it comes to mind, what about baseball teams that come to play in New York, like one did yesterday - and they lost -- and do we charge them a tax as a resident for the day?

The question is, where do you draw the line between what would be administrative review on the part of the Department of Taxation and Finance and what we might consider law that would come under the jurisdiction of those lawmakers in the Legislature?

SENATOR GOODMAN: That's a hard thing to generalize about, Senator. But if I may just point out, your perception is just a little bit unclear as to the point about the example I gave.

The issue here is whether you spend more than half your time in New York, whether

there's evidence that you resided in New York for more than half of a 365-day year. If there is evidence of any kind that you were in New York or even touched base in New York, under the old arrangements that would -- for more than 185 days, you'd be charged with residence status and thus asked to pay a higher tax.

The point that I'm making, however, is that the importance of setting criteria for this purpose rather than specifically dealing with an overcharge is the purpose of this individual who we've described in this bill. And I think this is a useful purpose, one which serves both the interest of the public and the commissioner, helping him to do a better job.

Let me remind you, as I said before, that this has been tried successfully in other states, include Florida, California, Minnesota, Massachusetts, Pennsylvania, New Hampshire, Arkansas, Alabama, Indiana, Michigan, Nebraska, Hawaii, and South Carolina. So we're not treading on totally unfamiliar ground here. This has been tried

and it's been found to be a very useful administrative adjunct to the functioning of the department.

SENATOR PATERSON: Mr. President, I can't help but share with you my feelings about the eruditeness with respect to Senator Goodman's consultation. He did not slip by me the use of the term "touching base" in the City yesterday.

If the Senator would continue to yield.

ACTING PRESIDENT KUHL: Senator Goodman, do you yield to another question?

SENATOR GOODMAN: Yes.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR PATERSON: Senator, under Section 173-A of the law as it stands right now, we have a bureau of conciliation in the Tax Department. How will the legislation you're proposing today interact or vary from what seemed to be an institutional remedy that the Tax Department had set up that apparently is -- in our judgment has not really been as much help as we would have preferred?

Where will your legislation improve upon this and how will it interface with what we've previously put in place in the Tax Department to this point?

SENATOR GOODMAN: That's a good question, one which I'm glad to try to clarify.

The fact is that the administrator we're speaking of here deals with policy questions and broad-gauge procedural matters rather than individual claims. The specific bureaucratic instrument to which you refer relates to specific claims.

If the department claims you owe them $10,000 and you say you only owe them $5,000, that's the type of thing which can go do conciliation based upon the facts. But if the factual basis of that claim relates to a concept which is being misapplied by the department or a perceived misinterpretation of the law in broad-gauge terms, that's where this particular bill comes into play.

I think it's a valid distinction, and one worth keeping in mind.

ACTING PRESIDENT KUHL: Senator

Paterson.

SENATOR PATERSON: Mr. President, I'm properly informed and would like to ask another question if Senator Goodman is willing to yield.

SENATOR GOODMAN: Yes, I would be glad to yield.

ACTING PRESIDENT KUHL: The Senator continues to yield.

SENATOR PATERSON: Mr. President, I want to present an example and get Senator Goodman's response. Let's say someone files a claim with the office of the tax advocate and at a certain point the tax advocate has determined that they cannot take any action on this, they're not going to rule in favor of the claimant; in fact, they're not going to address the issue at all. The statute of limitations that would run on the penalty phase of failure to pay or some enforcement that is due onto the taxpayer at that point in time vested in the Tax Department, is there a tolling of the statute of limitations during this period that the taxpayer seeks relief from the office of the tax advocate?

SENATOR GOODMAN: I'm told that there is a tolling based upon the date of the application of the taxpayer.

ACTING PRESIDENT KUHL: Senator Paterson.

SENATOR GOODMAN: Until the decision is reached.

SENATOR PATERSON: Until the decision is actually reached?

SENATOR GOODMAN: Yeah, right.

SENATOR PATERSON: Thank you, Mr. President.

Then if the office of tax advocate makes a decision and the taxpayer is not pleased with the decision, there is no recourse at that point, because from -- I understand the concept of your bill is that you can't go to the office of tax advocate until you've exhausted your administrative remedies in all other areas of the Tax Department; is that correct?

SENATOR GOODMAN: That's correct, Senator.

SENATOR PATERSON: Okay, Mr. President, if Senator Goodman would yield to I

believe two last questions.

ACTING PRESIDENT KUHL: Senator Goodman, do you yield?

SENATOR GOODMAN: Yes, I do.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR PATERSON: Then, Senator Goodman, there is -- I guess there are layers of responsibility here. And this is somewhat situational. But since the last contact with the Tax Department would then have been with the office of the tax advocate, then my question to you is, are there some constitutional problems -- if the office of tax advocate rules against the taxpayer and then at that point the taxpayer does not have any remedy, would that in a sense violate the constitutional right to due process, not because the Tax Department set up an appeal in the first place but because the Tax Department had a second institution within it that did not grant an appeal?

SENATOR GOODMAN: The answer is no, Senator.

SENATOR PATERSON: I worked hard

on that question, Mr. President. All I can get is a no?

If the Senator would continue to yield.

ACTING PRESIDENT KUHL: Senator Goodman?

SENATOR GOODMAN: The answer is yes, I will continue to yield.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR GOODMAN: And that's my final decision.

(Laughter.)

SENATOR PATERSON: I have always protested when the Senator is referred to as euphemistic, Mr. President. I'm happy to see that we've brought him down to the basic answers here.

But my last question just involves that interaction between the office of tax advocate within the realm of the jurisdiction of the commissioner, something that is concerning Senator Hevesi to a great degree and is also concerning myself.

If the tax advocate does find a

problem with the department -- in other words, the tax advocate wants to rule on behalf of the taxpayer, the grievant, is there at that point -- what is -- what duties and responsibilities does the Department of Taxation and Finance and specifically the commissioner have? Can the tax advocate be overruled? Can the tax advocate force upon the department perhaps vanquishing a lien on property? Or to what extent does the tax advocate have final jurisdiction, or is there now another jurisdictional process that goes on within the department itself?

SENATOR GOODMAN: The procedure would be in the event that there's merit found in the matter brought before the tax advocate, that he issues a decision. That decision is one which normally would carry the weight of finality. But in instances in which the commissioner wished to override it, he would have the ultimate power to do so in writing.

It would then become a very public matter, and obviously there would be a reluctance on the part of the commissioner to override that individual. There's a certain

amount of moral suasion in the position of the tax advocate which I think would command a fair degree of respect.

ACTING PRESIDENT KUHL: Senator Paterson.

SENATOR PATERSON: Mr. President, I wish to risk my friendship with Senator Goodman. I promised that that would be it, but his answer actually elicited another question.

SENATOR GOODMAN: Go right ahead, Senator. Our friendship is not at stake, I'm happy to respond.

SENATOR PATERSON: Thank you, Mr. President.

My question is, have we outlined in the legislation -- and I know this is difficult because we can't imagine every opportunity or instance that can actually come up. But to what degree of specificity have we delineated in the legislation what points that the commissioner, using the broad supervisory powers that are implicit with his or her appointment, can overrule the taxpayer advocate and restore the original judgment of

the department?

SENATOR GOODMAN: I'm sorry, would you -- I didn't quite catch the thrust of this. You say at what point does what happen?

SENATOR PATERSON: I guess all I'm saying is I'm trying to figure out whether the office of the tax advocate really has strength and validity or if, let's say, some commissioner that doesn't like being told no, someone in a supervisory position that does not feel particularly admonished by the ruling of some kind of ombudsman built into the agency, might just always overrule what the tax advocate proposes.

In other words, the legislation as it stands is very apt. But appointed officials, administrators, have on occasion probably been very overbroad with their authority and have not been willing to listen even to different types of institutions that are put in under their jurisdiction that are put there for the purpose of advice or counsel or perhaps suggesting that there needs to be a change in policy on the part of the

department.

So what I'm just trying to understand is how often was it in your contemplation, having written the legislation, would the right of the commissioner to overrule the advocate be utilized? Would it be seldom or would it be something that we might find happens all too often?

SENATOR GOODMAN: If the Tax Commissioner had a cavalier attitude toward the findings of his advocate, I think that would bring down a degree of public opprobrium which would be an embarrassment to the department and probably cause public outcry.

To the extent that public opinion would weigh in heavily and be reflected possibly in other disciplinary action to be brought through a legislative body and the like, I think that would be a powerful influence on making certain that adequate respect is shown to the advocate in this type of situation.

ACTING PRESIDENT KUHL: Senator Paterson.

SENATOR PATERSON: Thank you, Mr.

President. I want to thank Senator Goodman for his gracious responses.

SENATOR GOODMAN: I just want to say thanks to you, Senator. May I just make one brief observation, with your permission?

There are various ways of posing questions on this floor, Mr. President, and something that comes to my attention is the fact that certain questions come with a degree of optimism and goodwill about the motivation of the sponsors. Others seem to imply that the sponsor is attempting to unhatch a plot on the unsuspecting public and is therefore guilty of a dirty trick.

I think in this body we've come over the years to respect one another's integrity to the point where it is not assumed that bringing a piece of legislation of this type is intended to be an underhanded effort to subvert the processes of our free society. And I'm grateful to you and several of your colleagues for the way in which you pose your questions, which are not dripping with suspicion or with negative implication.

Thank you.

ACTING PRESIDENT KUHL: Senator Paterson.

SENATOR PATERSON: I'm very happy, Mr. President.

No, in all seriousness, we all here have the utmost respect for the dedication of Senator Goodman and his integrity. Sometimes it might appear that the questions might - I'm speaking on the bill, Mr. President. Sometimes it might appear that the questions have a degree of suspicion or negative motivation, and I just wanted to assure Senator Goodman that it is not as much the case with respect to the individuals, sometimes it's just the case about the process.

I think there were three of us that asked questions about the modification of the legislation. We just didn't understand what it was actually about. And although there haven't been many plots that were hatched that would inure to public detriment from Senator Goodman, it's certainly our opinion that at times there could be greater notification or greater understanding.

And unfortunately, as Senator Goodman pointed out, when there is a breakdown in that communication, there can be perceptions and fears and anxieties that all of us feel. But I want to thank the Senator for reassuring us and talk about the legislation.

And to that end, I'm a little torn between the notable objective and sincerity that Senator Goodman presents but also the very steadfast discipline, criticism, and honesty that I think that Senator Duane and Senator Hevesi elicited in their discussion about how effective this actually can be in the Tax Department where, since we already have -- and it is a section that's not applied to the specific policy or application of policy as Senator Goodman's bill -- but we already have a bureau of conciliation under Section 173-A that was at least an institution that was designed to provide some relief for taxpayers.

And I think that there certainly is -- not in any way connected to Senator Goodman's bill -- some dissatisfaction on the

part of the public. We've seen nationally a complete mistrust of our Internal Revenue Service. And there is a feeling that these organizations have implementary power, they have at times harassed and bullied individuals over what were honest mistakes or just miscalculations on the part of public citizens.

And so Senator Goodman probably was speaking to that notion when he put this legislation together and wants to set up what would really be a second tier of relief, a second examination of an issue. Not a finding but necessarily an issue that's being raised that has not worked well for the particular taxpayer or entity that's paying taxes in a specific situation.

And what Senator Hevesi is saying is that that may be true, but still the inevitable power rests with the commissioner, and it would be very hard without some independence or independent nature to an entity to really be assured that there would be an apt change in policy, because too often when agencies rely to their detriment for a

long period of time on the application of a policy, some succeeding determination that is designed to actually supersede that notion is met with a great deal of resistance.

And so what Senator Hevesi is saying is things are not always as they seem. It would appear to be a viable entity that would shed some additional opportunity on the part of the taxpayer, but may inevitably just be a further exercise in bureaucracy, that not only inures to the detriment of the taxpayer but provides no review as the original Department of Taxation did in the first place.

I think I'm inclined to vote for the bill, because I can't really think of an option that would provide some independence other than to set up a board that would be the same tax advocacy process and let the board rule. In other words, just let them rule in favor of the taxpayer and force the agency to make the appropriate change in policy.

Because the issue is specific, as Senator Goodman pointed out, to the issue and not to the specifics of a case -- did you owe $5,000 or did you owe $10,000, I believe that

was Senator Goodman's example -- I don't know how we could set up a board that would be independent, because that would then become the de jure Tax Department itself.

So I think that we're going to have to rely on the ability of individuals to heed the call when in a number of instances the office of the taxpayer advocate tries to change policy on the part of the department, and just make sure that we as a Legislature read those reports that the office of tax advocate will send to us each year and take a look at those reports and see whether or not their admonishments are being considered by the department.

This is the reason again why when Senator Duane raised the issue of the Department of Taxation as it relates to the appointment of this agency, and that it not involve the advice and consent of the Senate, that that's somewhat important, because here is a second opportunity that we're not encouraging a legislative position.

In spite of that, I think I'll vote for the bill. But I am going to be somewhat

haunted if we find down the road that Senator Duane and Senator Hevesi are proven correct, because they really have left us with some valuable thoughts today that I think we really need to consider very carefully. And those thoughts relate to not necessarily the scope or the spirit of the legislation itself, but really the application.

You know, sometimes there's too much discussion about conspiracy. You know, nobody may have sat in the room and actually decided to do this. But if the results are the same as if they had, there really isn't much of a difference.

So leaving aside -- and I think we can all agree that this is a valid idea, which perhaps might need a little adjustment, but it's certainly a valid idea. But the point is whether or not this agency within an agency is going to have the kind of broad power that we would like it to have so that people have some type of redress.

What I'm encouraged by is that last year's legislation was to some degree not totally satisfactory with all the parties

involved, and Senator Goodman did, rather than just bring it back here for another exercise in futility, took the legislation and made some adjustments. Maybe not enough for all, but it demonstrates his willingness to work with us and try to craft what appears to be needed legislation that will change the opportunity for people who are thrust into these situations to seek the relief that they deserve.

Thank you, Mr. President.

ACTING PRESIDENT KUHL: Senator Onorato, why do you rise?

SENATOR ONORATO: Mr. President, will the sponsor yield to a question?

ACTING PRESIDENT KUHL: Senator Onorato, before that happens, Senator Rath, why do you rise?

SENATOR RATH: Mr. President, there will be an immediate meeting of the Veterans Committee at 1 o'clock, Room 328. Also an immediate meeting of the Energy and Telecommunications Committee in the Majority Conference Room.

SENATOR GOODMAN: Mr. President,

I will yield.

SENATOR ONORATO: I only have one question, Senator.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR ONORATO: You have in the bill there that the advocate would be required to report to the Legislature annually. Which raises a serious problem, because we've had some discussions here recently with some other agencies that were supposed to have made reports to this body and haven't done so, some of them two years, some of them as much as six years.

Is there anything in here that would actually put some teeth into it to require, other than simply stating that they should give the -- what happens if they don't give us the report on an annual basis? What can we do to bring it forth?

SENATOR GOODMAN: Senator, this report is a very serious one, and let me just outline its contents to you, if I may.

The annual report will be a full and substantive analysis of the activities,

and the report is made directly to the Governor, Temporary President of the Senate, Speaker of the Assembly, and the Commissioner by December 31st, 2002, and every year thereafter, without prior review by the Commissioner.

The report must contain statistical information and shall identify initiatives the taxpayer advocate has taken, summarize and describe the most serious problems encountered by taxpayers, contain an inventory of items for which action has been taken and their result, identify any taxpayer assistance order which was not honored by the department in a timely manner, and contain recommendations for administrative and legislative action to resolve problems encountered by taxpayers, and include such other information as the advocate deems advisable.

In short, he is required by law to give a comprehensive and specific report to this triple-report-receiving group.

SENATOR ONORATO: Mr. President.

ACTING PRESIDENT KUHL: Senator Onorato.

SENATOR ONORATO: If he will continue to yield.

ACTING PRESIDENT KUHL: Senator Goodman, do you continue to yield?

SENATOR GOODMAN: Yes, I will.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR ONORATO: I understand what he's supposed to do, or he or she, whoever it may be. What happens in the event that they don't do it?

SENATOR GOODMAN: Then he goes to the electric chair or something like that.

No, I think that the answer is that he would again be subject to serious criticism or oversight by the Legislature, which would certainly be aware of this failure, because the Legislature is one of those receiving the report, not to mention the Governor himself.

There's no specific penalty in the law for failure to do this, but I don't think that's a realistic possibility.

SENATOR ONORATO: Thank you, Senator.

ACTING PRESIDENT KUHL: Any other

Senator wishing to speak on the bill?

Senator Stachowski.

SENATOR STACHOWSKI: Just on the bill.

ACTING PRESIDENT KUHL: Senator Stachowski, on the bill.

SENATOR STACHOWSKI: I don't really have any questions for Senator Goodman, because he's answered quite a few questions. And I'm still not exactly sure which part in particular the Governor had to get in there, but -- and I know he answered Senator Paterson on that, and I might have just missed it when I was listening.

But anyway, regardless of that fact, I think that Senator Hevesi and Senator Duane brought up some good questions on the bill. I find it hard to oppose a taxpayer advocate proposition. Although it is kind of funny that he reports to the commissioner, he questions the commissioner, and how hard will somebody question the person they work for?

It's a difficult situation that you're going to put this person in. And quite frankly, after sitting through budget hearings

the last couple of years, if the Governor is okay with this bill, that tells me that the advocate is just going to support the policies of the Governor, basically the same as the commissioners do at the budget hearings.

So I really don't know what we're accomplishing here, except that we're going to be able to say that we've established the office of taxpayer advocate within the Department of Taxation. Maybe, if an Assemblyperson will decide to sponsor this bill, now that the Governor got whatever changes it is that he got -- which I got to believe have something to do with that he works for the commissioner, he questions the commissioner, and he reports to the commissioner.

Other than that, I think it's not a bad idea. I thought it was a better idea last year, because it was sponsored by an Assemblyperson. And whatever reason it didn't get through there, I still will continue to support it.

I again thank Senator Goodman for his graciousness to all my colleagues in

patiently answering their questions. I also kind of enjoy when there's a little excitement in here, so at least it started out with a big flurry. Maybe everybody didn't find that enjoyable, but it woke everybody up, got everybody in the right frame of mind to be sitting here and discussing various pieces of legislation.

But I will still support Senator Goodman's bill, even though I do have some series questions about the point that I mentioned, that the person questions the commissioner, he works for the commissioner, and he reports to the commissioner.

Thank you, Mr. President.

ACTING PRESIDENT KUHL: Any other Senator wishing to speak on the bill?

Hearing none, the Secretary will read the last section.

THE SECRETARY: Section 4. This act shall take effect in 60 days.

ACTING PRESIDENT KUHL: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT KUHL: Senator

Montgomery, why do you rise?

SENATOR MONTGOMERY: Mr. President, I just want to explain my vote.

ACTING PRESIDENT KUHL: Senator Montgomery, to explain her vote.

SENATOR MONTGOMERY: Yes, thank you. Just very briefly.

I have listened very intently to the debate on this legislation, and the thought occurs to me that I really have had a very positive response over the years when I have approached the Department of Taxation on behalf of my constituents. And one of the reasons that I assume that there's a positive response is that I can communicate with the commissioner, the commissioner then directs his or her staff to take care of issues, and usually it's very, very efficient and they do it very quickly and promptly.

So I really don't see the need for an entirely new bureaucracy within the bureaucracy to whom, as several of my colleagues have pointed out, that person - it's not clear who that person is ultimately accountable to, whether or not it's actually

in fact the public or whether or not it's just another arm of the Governor or -- i.e., through the commissioner to buffer direct access to the commissioner.

So I'm going to vote no. I'm not opposed to an advocate, but I find and I trust that the commissioner really is truly the ultimate advocate and has the ultimate authority to make decisions within the Taxation Department.

Thank you.

ACTING PRESIDENT KUHL: Senator Montgomery will be recorded in the negative.

Senator Duane, why do you rise?

SENATOR DUANE: Thank you, Mr. President. To explain my vote.

ACTING PRESIDENT KUHL: Senator Duane, to explain his vote.

SENATOR DUANE: Thank you.

Maybe 30 years ago there was a way of doing things and a way of not doing things. I hope that 30 years ago, debate wasn't cut off after four questions. And I hope that questions that were asked appropriately were answered appropriately.

I'm going to vote no on this bill. A lot of it has to do with the debate and discussion that occurred on the floor today. I think it would have been tragic if the debate on the bill had been limited to four questions, but I'm pleased that that didn't happen and we had a chance to have a complete and thorough discussion on the bill.

But it's based on the things that were brought out during that discussion that made me decide to vote no on the bill.

Thank you, Mr. President.

ACTING PRESIDENT KUHL: Senator Duane will be recorded in the negative.

Record the negatives and announce the results.

THE SECRETARY: Ayes, 54. Nays, 2. Senators Duane and Montgomery recorded in the negative.

ACTING PRESIDENT KUHL: The bill is passed.

Senator Marcellino.

SENATOR MARCELLINO: Mr. President, would you please call up at this time Calendar 105.

ACTING PRESIDENT KUHL: The Secretary will read.

THE SECRETARY: Calendar Number 105, by Senator Balboni, Senate Print 862, an act to amend the Civil Practice Law and Rules, in relation to prohibiting.

SENATOR PATERSON: Explanation.

ACTING PRESIDENT KUHL: Senator Balboni, an explanation has been requested by the Acting Minority Leader, Senator Paterson.

SENATOR BALBONI: Thank you, Mr. President.

This bill would amend Section 1411-A of the Civil Practice Law and Rules in relation to codifying common sense. That is a very simple proposition: If you commit a felony in this state, the last thing that you should be able to do is to bring a lawsuit against the person that you tried to either rob, assault, run over, steal from, or break into their home.

And as we've discussed before, three separate years now, there are a legion of cases, a legion of articles, and a legion of newspaper examples that underscore the

utter ridiculousness of the ability of a convicted felon of bringing these types of lawsuits.

This bill would change around what some legal commentaries have described as a misstep in 1975, when this Legislature adopted 1411-A but did not carve out an exception for felonious conduct.

Thank you, Mr. President.

ACTING PRESIDENT KUHL: Senator Paterson, why do you rise?

SENATOR PATERSON: Mr. President, there was a tragedy a couple of weeks ago in China when a number of children were playing with explosives and firearms. And there was an accident, and 20 to 30 people were killed. And there will be no lawsuits there, because China doesn't have lawsuits.

And one of the frustrating and at times tiring aspects of living in a democracy is the fact that we try to keep our courts open as often as possible. Now, Senator Balboni's point is well taken. And it's actually difficult for me to get up and debate Senator Balboni on this issue, because the

individuals who have often tried to sue people after they were committing a crime -- they broke into someone's house and at some point, maybe leaving the scene, they fell and hurt themselves and now they want to sue the property owner. That's how ridiculous it actually gets. And because of it, our first reaction is to shut it down, to stop it, not to allow anyone to sue.

And Senator Balboni's sentiment is my sentiment. I'm not trying to let anyone off or give anybody a break who is a felon, who is a robber, a burglar, a murderer, a rapist.

Yet at the same time, what distinguishes living in this country is that we do extend to our democracy the jurisdiction in our courts to make those actual determinations.

And I think that this is too rigid a rule. I think that there are situations that I could describe for Senator Balboni, and I will in a moment, where it would be really creating an open season on individuals who are breaking the law who, believe it or not, even

at that point have rights as well.

Now, if Senator Balboni would yield for a question.

ACTING PRESIDENT KUHL: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, I would, Mr. President.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR PATERSON: Senator Balboni, when -- Mr. President, when Senator Balboni first came to the Senate, which I believe was in 1996 -

SENATOR BALBONI: 1997.

SENATOR PATERSON: 1997. It just seemed longer.

But when he came here, I remember a particular debate between Senator Balboni and Senator Leichter and Senator Gold where he regaled this chamber and totally overwhelmed his colleagues with the reciting of case law of courts involving Barker versus Kallash and even a case that went back to 1894, for which I had to go and read the case just to try to understand. I think it's the Bailey case?

SENATOR BALBONI: Riggs versus Palmer.

ACTING PRESIDENT KUHL: Riggs versus Palmer, I'm sorry.

My question, Mr. President, relates to the issue of police who are arresting individuals, arresting them for what would later be convicted felonies. Are you saying by this that the only administrative relief for police brutality would then be administrative within the police department, that there would be no civil action that could be taken against the police officer as, there was in the Louima case?

Because remember, in the Louima case, because of the resisting arrest, Louima could have been charged with a felony, could have theoretically been convicted, and therefore this case we're reading about where the victim is suing the police officer who injured him right now, who is later convicted of a felony himself, couldn't do it civilly because he committed a felony.

SENATOR BALBONI: Senator Paterson, for purposes of making sure that the

record is complete, the incident that you began your comments with regarding the explosion at the school, with fireworks, in China -- I believe it happened 2½ weeks ago, is the approximate time -- if you followed the news, you would see that at this point in time, they have a man in custody who actually went into the school with the intent to set off explosives. So there was no accident associated with that particular incident.

The reason why I just state that is because I believe that that is something that -- we should just make sure that we understand that that was a felonious act in and of itself. And this bill would relate to that individual. He had a problem with the school itself. So I'm not sure that that necessarily applies in this particular situation.

But as to your discussion about police brutality, that has been -- if there's any emotion that attaches itself to this particular issue, that is the emotional element. Are we going to deny particularly minorities the right to bring a lawsuit -

because as you know better than anybody else, in the minority community there's a great concern about the relations with police officers. And the last thing I would want to do would be to advance a measure that would take away the ability of any individual who has suffered brutality to effectuate their rights.

This proposal does nothing of the kind, and I'll tell you why. The proposal we could have chosen to do that we could have passed in this house would have been the adoption of a strict assumption of risk proposal. That would mean that if you committed a felony, then anything you would have done from then on, you would have been liable for without recompense.

That is not the proposal that's before us, that is not the bill we have passed. We are passing a bill that sets up a standard that would be utilized by the court in determining whether or not dismissal of this case would be appropriate in the given case. Not wholesale, not by class, but rather at the specific case. And that word that

should be focused on is the word "culpable."

The court is to determine whether or not the actions that resulted in the conviction were the culpable cause of the injury that's being sued upon. That is the safeguard against any denial of a civil remedy in the course of a police brutality action.

But there's another argument that I've advanced that I would wish that this house would consider, and this comes from years of experience in the trial bar on my own behalf as an attorney trying cases involving not so much police brutality but cases involving lawsuits against police officers.

It is a proposition I've stated before. I will state it again. The practitioner who seeks to bring a cause of action for police brutality in the state court does so as akin to malpractice. And I'll tell you why. Because under the federal rules, you can get attorneys fees, the cases are much more expeditiously handled, and normally you can get more favorable forums, particularly in this state, if you do the federal route than if you do the state route. I've seen that

firsthand, particularly downstate.

And you have a 1983 civil rights cause of action that this bill does nothing to. So the statement that my legislation before this house would abrogate any and all civil remedy in a police brutality case is wrong on two counts. The first is, it's wrong because of the word "culpable." And secondly, it is wrong because the federal forum is still available.

And the third is that as a public policy matter in this state we want to deter police brutality in every instance against any community, against any individual. The way we do that -- this is not by anecdote, this is not by supposition, this is by testimony of police officers -- is by attaching to that incredibly severe and serious act a penal remedy, a criminal sanction. You put a police officer in prison. That is the way you stop police brutality.

Another practical matter, and I would refer you to 50-L of the Civil Practice Laws and Rules -- I'm sorry, the General Municipal Law, Senator Paterson. Many

municipalities have adopted immunity statutes for police brutality as a civil remedy. So in that regard, you don't have that available either.

So I hope that that gives you kind of a lay of the land as to why this particular measure does nothing to change the law or the effectiveness of a civil suit for police brutality.

ACTING PRESIDENT KUHL: Senator Paterson, why do you rise?

SENATOR PATERSON: Mr. President, if Senator Balboni would further yield for a question.

ACTING PRESIDENT KUHL: Senator Balboni, do you yield to another question from Senator Paterson?

SENATOR BALBONI: Yes, I do, Mr. President.

ACTING PRESIDENT KUHL: The Senator yields.

SENATOR PATERSON: Mr. President, I'm a little unsure of what Senator Balboni is proposing. Perhaps he's thinking about a balance in terms of jurisdiction.

Senator, you gave a remedy that I didn't think that you'd be willing to admit. In other words, if you're saying that we're going to knock out the state remedy, you can't go to state court, but you can go to federal court, I just thought that this would be a precursor to federal legislation also not allowing the perpetrator who was convicted of a crime to sue. I mean, certainly they could sue under a civil rights statute.

But I'm saying civilly, the civil case, which is one for damages, are you saying that you're leaving the remedy of the use of the federal courts? Or are you saying that you don't believe that we should allow this at all? Which is what I thought the intent of the legislation was.

SENATOR BALBONI: Mr. President, through you.

SENATOR PATERSON: Was that clear enough?

SENATOR BALBONI: Yes, it was.

ACTING PRESIDENT KUHL: Senator Balboni, why do you rise?

SENATOR BALBONI: In order to

respond to the gentleman's question, Mr. President.

ACTING PRESIDENT KUHL: Still answering the question from Senator Paterson? Fine, proceed.

SENATOR BALBONI: Thank you, Mr. President.

The federal remedy in the 1983 cause of action sounds in conspiracy, sounds in municipal neglect and negligence -- same thing -- sounds in a different cause of action than straight assault, which is what the state cause of action for negligence, at least, would sound in.

As you know, we in this Legislature cannot bind the hands of the federal government, and in this instance nor would we want to. What we want to do here is bring common sense from a jurisprudential perspective to the state courts. See, the people who are listening to this debate up here, I'm sure that if you laid out the example of a robber coming into your home at night, sticking a knife to your throat and taking your money, and then on the way out

tripping over one of your children's toys and breaking his leg, and then suing the homeowner, that is literally adding insult to injury.

And it says to all the God-fearing taxpayers and people who are upstanding citizens that there's something wrong with our system. Our law is replete with examples of how we have disenfranchised the felon, because a felony is a very serious criminal act. We are being consistent with the concepts of pari delicto, with the concepts of insurance fraud, with the concepts of civil debt under the Civil Rights Law, that you're not able to vote, hold a state or federal job if you're convicted of a felony.

You and I, God forbid, if we were ever to be convicted of a felony, would lose our seat immediately. But yet we want to maintain for that same individual who commits a felony, commits an act against society, the ability to use the very system that he or she flaunted? Is that the message that we send to our constituency, that we are not all the same, that if we break the rules that we

shouldn't lose the rights to participate in a society?

That's what this bill is about. That's all it has ever been about. I hope that answers your question.

SENATOR PATERSON: Mr. President, I want to thank Senator Balboni for the answer and ask him another question.

THE PRESIDENT: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, I do, Madam President.

THE PRESIDENT: You may proceed, Senator Paterson.

SENATOR PATERSON: Sorry, Madam President.

Senator, we have a case that is included in your memorandum, the McCummings case. And this of course was a case of a perpetrator who actually sued and won a couple of million dollars, in fact. And I think it's even more egregious than your example of the person slipping on the toy, because here this was a large recovery. But I want to make sure that we're not legislating the exception,

legislating that unique case sometimes that makes us scratch our heads and wonder who it was that was presiding over that particular case and what jury brought back that verdict.

I want to talk about a number of situations that could occur should we pass this bill. First of all, I was quite interested to hear your point of view about the relief in the federal courts. We've I think discussed this case on the floor about five years now, and it's at least the first time I remember hearing that you felt that way, and I'm really a little more drawn to the general concept because of that explanation.

But what I want to ask you is, what about the situation now where the family of a deceased perpetrator -- let's say someone who was committing a felony at the time of an offense -- might be barred from suing under a wrongful death statute because the individual, when they had completely subdued the perpetrator, continued to brutalize them, resulting in their death. Isn't that the other side of what we're possibly legislating?

SENATOR BALBONI: Madam

President, through you, if you are again talking about the wrongful death having resulted from police brutality while the individual was in custody?

SENATOR PATERSON: Well, I'm sorry, Madam President, just to clarify for Senator Balboni, you know, the overwhelming number of our police officers discharge their duties with complete professionalism, and it's certainly as high in if not a higher percentage than any other profession. So I'm not trying to turn this into some kind of an assault on our law enforcement officials, who work very hard. It could be anybody who was resisting the advances of a perpetrator.

But the police get cited because they are highly trained and because incidents such as this really tug at the heartstrings of people who recognize that the role of the police is to protect citizens, so when there is -- the same with us as elected officials, when there's wrongdoing on our part, it's an even more frightening concept for the public to swallow.

But I'm really, for purposes of

this question, just talking about anyone who is resisting the advances of a perpetrator who then goes over the top and becomes oppressive in their actions and overly aggressive in their physical resistance, perhaps resulting in the death of someone who was committing a felony.

SENATOR BALBONI: Madam President, through you. I'd like to answer your question in two regards.

The first is in regard to the sympathy that you would have for the family of a convicted felon who dies during the commission of a felony and whose family is unable to bring a wrongful death suit. That is a harsh outcome. It is the same outcome, however, Senator, for that same family should the perpetrator live and be sentenced to jail for a minimum of a year. They have no ability to perhaps earn an income, they've now lost the breadwinner. That is what our system of justice has decided is the appropriate response and deterrent to someone committing a felony in our society.

So with that scenario and the added

sympathies, the person who is at fault there is the perpetrator, not society. The person who should be the one who should answer to their family is the perpetrator, not society.

But in regard to somebody who perhaps sets up a spring gun -- and we talk about that example -- in order to protect a remote premises in a rural jurisdiction, they set up a spring gun. And they set it so it's a shotgun, and when you open up the door it goes off, killing somebody or maiming them or injuring them. In that case, the individual property owner would be brought to trial and would become in fact a felon and perhaps tried for murder or assault first degree. That is our response as a society to that particular situation.

The fact that the individual is a felon and should not be in the premises, that does take away the ability to bring a civil suit. But I assure you, the penalty and the deterrent, which is what we are here to try to promote, is the deterrence factor, is what we should be focusing on. There is going to be a harsh result in certain cases.

But the initial examination should begin with the conduct of the perpetrator. They stepped outside the bounds of society to commit the crime. Nobody told them to do it, nobody forced them to do it. They should take responsibility for it. The way that I ensure that justice is done, to the extent we can in an imperfect Legislature, is to include an analysis by the court of whether or not the conduct for which they are suing was culpable in nature to the felonious act.

SENATOR PATERSON: Mr. President, if Senator Balboni would be willing to yield for another question.

THE PRESIDENT: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, Madam President.

THE PRESIDENT: You may proceed.

SENATOR PATERSON: Madam President.

THE PRESIDENT: Senator Paterson, that's all right. As long as you refer to me as President.

SENATOR PATERSON: Thank you.

THE PRESIDENT: You may proceed.

And that was a joke.

(Laughter.)

SENATOR PATERSON: My question relates to the issue of deterrence, Senator. There are different aspects of punishment for a crime. There's deterrence, there's detainment, there's retribution. But you define this as deterrence. And I'm just going to ask you, let's say you and I completely agree about this bill. I just want to ask you about the nature of the bill itself.

I can understand that this would be retribution. I mean, that's what I'd feel if someone breaks into my house, puts a gun to my head, takes all my money, and then falls down the stairs and sues me because the stairs were too slippery and they hurt themselves. I would see that as more retribution.

If the person already risks incarceration in the criminal justice system, do you think the fact that they contemplated, well, you know, I'm not going to break into that house because just in case I get hurt, I can't sue -- do you really think that's a

deterrent, Senator?

SENATOR BALBONI: In certain actions, I do. But more importantly, this is not so much retribution as it is again consistency.

Let me take you back to the year 1975. This Legislature enacted a law which changed the way we pursued civil trials. The law prior to 1975 was that if you were contributory in your actions as a plaintiff, you were not able to sue. That was the law. So this harsh result that you were talking about occurred all the time to people who did not perpetrate felonious conduct to you and I if we brought a lawsuit.

We changed that standard in 1975. And if you go back and you read the bill jackets, if you read the commentators' remarks on the section, you will see that a lot of people felt at the time that there should have been an exception made for felonious conduct. But there wasn't. Because, as you know, we went from contributory negligence and assumption of risk to a comparative negligence scheme.

But in the rush to do justice to the civil justice system as a whole, we neglected to carve out and continue the public policy, which has been enunciated in a legion of cases in this state, that if you commit a crime you can't use the courts to effect a civil remedy. And those cases, as you've alluded to beforehand, begin in 1894 with Riggs versus Palmer case, which was the case about the guy who decided he wanted to get his inheritance faster and therefore killed his father, and the court said we are not going to give you your remedy, to the case of Barker versus Kallash, which I believe was Judge Wachtler's finest opinion, where he said that two children making a pipe bomb could not then sue each other when it went off accidentally, because that was against the whole notion of fairness and justice in our system.

Now, what is so amazing to me, Senator, is that -- and by the way, the cases continue. There was a case two years ago which I cited last year in debate -- 1997, that held the same exact position. In fact, we've never had a case in the last hundred or

so years in this state which has held the opposite, that comparative negligence did apply. It's only in the statutory enactment and the failure to continue this thought process and this jurisprudential concern and policy that we've not acted, because we have not adopted this statute.

SENATOR PATERSON: Madam President, I hope you're enjoying this discussion. It's really one of the ones that brings me back here every year because of the -- well, in spite of the feeling that his colleagues have, I enjoy the discussion with Senator Balboni, because he's very well-informed on the issue and in fact I believe has written a law review article on these types of issues.

But if the Senator would continue to yield.

THE PRESIDENT: Senator?

SENATOR BALBONI: Madam President, I yield.

THE PRESIDENT: You may proceed, Senator Paterson.

SENATOR PATERSON: I could not

fail to notice the haste in which we got off of the subject of deterrence, which was the basis for the last question, Senator. You said you had some instances where you actually thought that it was in the contemplation of the perpetrator to be deterred by the fact that they couldn't sue civilly if anything happened to them -- I doubt if half of them knew they could sue anyway -- based on the results of what would be the commission of a felony.

And my question is, were you really going back and thinking about the Riggs case, Riggs v. Palmer, where what you're saying is when you kill your father because he didn't give the inheritance you figured, well, even if he died, I can get the inheritance anyway?

SENATOR BALBONI: Madam President, through you, your characterization of my discussion as being haste to avoid a topic I refer to as emphasis. I chose to emphasize other aspects, other beneficial aspects of the adoption of the statute rather than deciding that one aspect is not in fact credible.

They are all credible aspects of this.

SENATOR PATERSON: Madam President, if the Senator is willing to yield.

THE PRESIDENT: Senator, do you yield?

SENATOR BALBONI: I am, Madam President.

THE PRESIDENT: You may proceed.

SENATOR PATERSON: Can the Senator cite for us instances where he believes that it was in the contemplation of the perpetrator that it would be better not to commit the felony because they might not be able to sue after the fact, what would be termed the deterrence?

SENATOR BALBONI: Madam President, it's difficult to cite common sense. It is difficult to stand here and to tell you what is in the operation of the mind of a particular individual.

But what I will tell you is that in my own personal history and experience, if you said to the plaintiff's bar, You will not be able to recover any judgment on behalf of an

individual who commits a felony if that act was in any way culpable in the injuries sustained, I assure you from my experience and my conversations that they would not bring the cases.

That is my only citation.

SENATOR PATERSON: Madam President, if the Senator will continue to yield.

THE PRESIDENT: Senator?

SENATOR BALBONI: Yes, Madam President.

THE PRESIDENT: You may proceed.

SENATOR PATERSON: I didn't bring this subject up, Madam President. Senator Balboni brought this subject up. He said that he could cite some instances. So I'm trying to help him.

In the case Riggs v. Palmer, from the 1890s, in this case someone killed their father because they didn't get the inheritance. I thought that perhaps the perpetrator might have thought that at the time of the commission of the act, even if they were convicted and went to jail for a

while, they would -- hopefully it would just be a manslaughter, they could do ten years and come out and take the inheritance.

Wouldn't be that different if the person knew that they couldn't sue and therefore might have eschewed the thought about committing the crime? I'm only trying to cite an example, Senator, because you haven't given me an example. Do you have an example?

SENATOR BALBONI: Madam President, I appreciate the gentleman's concern for my argument and my ability to advance it in a cogent fashion.

Let me just say this. Two aspects of your discussion need clarification. First of all, there was -- the Riggs versus Palmer fact pattern was not about an individual who disappointed at the fact that they did not get an inheritance, it was in the fact that they were anxious about trying to receive an inheritance and therefore tried to hurry up the demise so they could get the estate, because they figured the estate would go to them.

The second aspect, what you talk about as being the deterrence, there wasn't actually a civil suit; rather, a petition to Surrogate's Court as an heir. So again, that does not lend itself on all fours to this particular argument.

What is of relevance is the court's analysis and declaration of policy that this court will not lend its assistance to those who commit a felony. That is the reason why I cite Riggs Versus Palmer. And I do not know what effect, if any, the inability to bring such a petition would have had on the individual -- again, other than common sense.

SENATOR PATERSON: Madam President, if the Senator will continue to yield.

THE PRESIDENT: Senator, do you yield?

SENATOR BALBONI: Yes, I do.

THE PRESIDENT: You may proceed.

SENATOR PATERSON: I'm going to move to another subject, Madam President, because Senator Balboni told me that he could give me an example of a case that would be a

deterrent.

My point is that if you're facing all of the thrust of the criminal law and the punishment, who would be deterred from committing a felony by the further understanding that you now can't sue the victim that you perpetrated the felony against? My common sense tells me that no one would even think or factor it out to that degree before committing a crime, that the actual -- that the actual punishment or the definition of the punishment that we would be establishing would be more retribution, which we might want to do.

There is retribution that's built into our punishment. It's written into the M'Naghten rules, along with deterrence and detainment and other issues related to how we penalize people for their actions.

I was just saying that I didn't agree with Senator Balboni that deterrence is an issue here, because my common sense tells me that I don't know who thinks before they're going to rob a bank that, you know, just in case I fall down on my way out of the bank,

maybe I can sue the bank. I just don't think people about that. They think about going to jail and whether or not they can get away with robbing the bank. That was my point.

But let's move to 1975. It's a year that's ingrained in Senator Balboni's mind. And I want to know about the change from the contributory negligence statute under our civil law to the comparative negligence statute. And I want to ask Senator Balboni, why did we make that change?

Wasn't it true that at that time we were unable to actually give the individuals who were injured, even when they were committing a felony, any other option when there was excessive force used against them? So a person that perhaps was robbing a house, committed a felony but hadn't actually hurt anyone, was then hit over the head several times with a baseball bat and now needed medical assistance for the rest of their life, couldn't get anything out of the deep pockets of the victim of the crime, but the perpetrator of this offense, who may have actually been a person that knew better, was

wealthy enough to have helped the individual and, even though this was a crime, there was an excessive response to the crime -- isn't that one of the reasons that contributed to the change in the contributory negligence standard to the comparative negligence standard that we use today?

SENATOR BALBONI: Madam President, I was not around in this chamber in 1975, so I don't recall what the actual reasons were. However, I can point you to a law review article in the Fordham Urban Law Journal which talks, at Footnote 23, that during the adoption in 1975 of the companion sections of the New York Civil Practice Law and Rules, Sections 1401 and 1402, enacted around the same time as Section 1411, also abolished the common-law rules of contribution and permitted codefendants to seek contribution from one another based upon the degree to which each of them had contributed to the plaintiff's injury.

These sections essentially codified the decision of the Court of Appeals that had rejected the common-law rules of contribution

on the ground that they depended upon outmoded notions that served as arbitrary or artificial obstacles to the fair distribution of liability.

In other words, the Legislature saw as a whole the need to change a variety of different statutes so that you could have a comparative analysis and that you could take the negligence of one defendant, the negligence of another codefendant, and then the negligence of a plaintiff and say, all right, who is responsible? What degree can be apportioned to each of them?

We do this in workers' compensation, pursuant to case law. We should do so also in straight negligence. I have no problem with that analysis and the change. And in fact, I think that it makes sense and it's a fair result for law-abiding citizens.

My problem is that in the adoption of Section 1411, we failed to continue contributory negligence as it applies to the felonious plaintiff. But I'll say this. I believe that, at the risk of sounding self-congratulatory, the language that is on

our desks at this moment is superior to the old contributory negligence language, in that it adds the element of culpability, which prior to that had really been in common law and not statutory law.

SENATOR PATERSON: Madam President.

THE PRESIDENT: Senator Paterson.

SENATOR PATERSON: If the Senator would be willing to yield again.

THE PRESIDENT: Senator Balboni?

SENATOR BALBONI: Madam President, I yield.

THE PRESIDENT: You may proceed, Senator Paterson.

SENATOR PATERSON: Madam President, I'm interested in this law review article from the Fordham Law Review. Who was the author of that article?

SENATOR BALBONI: I don't recall at this time.

SENATOR PATERSON: Madam President, I don't think that Senator Balboni is being particularly responsive. I think Senator Balboni was the author of that

article, but he would rather that I enlighten his colleagues -

THE PRESIDENT: I plead the Fifth, Senator.

SENATOR PATERSON: Yeah, I think that's the case. And quite frankly, in all seriousness, he's done a tremendous amount of work in this area, and it's actually my honor to question him on some of these issues.

Senator, I want to know since 1975, have there been a plethora of cases? I mean, I mean the McCummings case which we described earlier really aggravates all of us to read about it. But has this been a tried and true remedy for the perpetrator of felonies? Or is this something that -- in other words, can you approximate for me, other than our willingness to perhaps address the law in this particular incident, how many times this has actually occurred that forces us today as lawmakers to take an action?

SENATOR BALBONI: Madam President, since 1975, by my count, there have been nine cases, many of them at the Appellate Division or Court of Appeals level, including

McCummings, that have specifically addressed this issue.

Does this happen every day? No. But not including that nine was the case that I tried, which was case of Key versus the County of Nassau. And I also know, through anecdotes from other colleagues, cases that are not reported where this has also been an issue.

Is this something that happens every single day in our courtrooms? No. But I would argue, and do so with the proposal of this particular piece of legislation, that this is something that needs to be done not because there is a huge number of cases that are out there that do this, but rather because this sends a clear and consistent message that people are going to be treated the same in this state.

And as I said before, this is a codification of common sense. So in that regard, I think that we've had sufficient enough fact patterns and liabilities that make this an issue.

But let me just comment on

McCummings. Though the fact pattern in McCummings -- that is, that Sean Dunphy, standing on the IRT subway platform, assaulted by Bernard McCummings, had his head bounced off the concrete several times, hospitalized, and then upon the arrival of transit police flees and is shot and then sues the City of New York and recovers, after it goes to the Appellate Division, $4.3 million, when the victim, Sean Dunphy, got nothing, that fact pattern always makes us angry. But the difficulty with trying to utilize that fact pattern alone is because if you take a look at the trial transcript, there was differing testimony as to whether or not McCummings was fleeing and had his back turned or whether or not he was trying to advance on the officers.

So there's a separate issue there that muddies the waters, as it were, to make this a crystal-clear-case fact pattern that promotes this idea. The much better fact pattern is Barker versus Kallash.

SENATOR PATERSON: Just as a follow-up, Madam President, if the Senator would yield.

SENATOR BALBONI: I do, Madam President.

SENATOR PATERSON: Senator, the victim of the original crime, Dunphy, had the option of suing McCummings, didn't he?

SENATOR BALBONI: Yes, he did.

SENATOR PATERSON: If the Senator would continue to yield.

THE PRESIDENT: Senator, do you yield?

SENATOR BALBONI: Yes, I do, Madam President.

SENATOR PATERSON: Just a point I wanted to clear up. I was talking to Senator Connor about this.

This scenario that we discussed about the wrongful death action, actually that wouldn't really come up, would it, because once the -- the decedent would never been convicted, so therefore the bill you're proposing is not -

SENATOR BALBONI: That's correct. That's correct.

SENATOR PATERSON: Okay, good. Then one final question, if the -

SENATOR BALBONI: But we didn't talk about a timetable as to when the death would occur.

SENATOR PATERSON: Right. Right. But it would be more likely that it would have been before it was time to convict the -

SENATOR BALBONI: Depending upon the fact pattern in the -- or the hypothetical.

SENATOR PATERSON: Right. Madam President, one final question for Senator Balboni.

THE PRESIDENT: Senator, do you yield?

SENATOR BALBONI: I yield.

THE PRESIDENT: You may proceed, Senator Paterson.

SENATOR PATERSON: Senator, I'm just still uneasy -- and you certainly enlightened me with that federal court option. That's something that we hadn't talked about in our past discussions on this.

But I'm still uneasy about what I consider to be an open season on perpetrators, when sometimes those crimes that meet the

threshold test for a felony -- and we're in here every day finding new ones. Yesterday we were talking about different elements of identity theft which would be a felony.

So someone acting under someone's else's identity, you realize someone is impersonating you, they're at a bank, and you harm them in some way -- it just makes me uneasy with how far this could actually go.

And I just want you to try to assure me, and perhaps relieve some of my colleagues, that there are some institutional protections from that excessive reaction to a felony being utilized.

SENATOR BALBONI: Madam President, your answer is contained within the concerns you've expressed today. That is that jail is a much greater deterrent than civil remedy. So the fact that there would be an open season on individuals acting in a manner that would be injurious to felonious plaintiffs, that will not occur because, again, people are afraid of going to jail themselves.

But likewise, the concern is

answered in the analysis by the court as to the felony and as to the culpable nature of the action. That will allow a court to decide upon a motion for summary judgment at the outset of the case, whether or not this case is suitable for dismissal. That will be the protection against any, quote, open season.

Madam President, thank you.

THE PRESIDENT: Senator Connor.

SENATOR CONNOR: Thank you, Madam President, on the bill.

I intend to oppose this, because I think we have a misplaced focus here. I heard Senator Balboni discuss deterrence, deterrence to crime. And indeed, much of the Penal Law is intended and its punishments thereunder is intended not only to punish but to deter people from such conduct.

And I think in the modern emphasis in personal injury law, that it's all about money and compensating victims, that we've forgotten that in the great common-law tradition of torts, certain doctrines evolved that were not only designed to compensate victims or the injured but were designed to

deter certain dangerous conduct by the tortfeasors.

That's why in various circumstances there is imposed on the defendant an absolute liability for certain inherently dangerous conditions. It's not just about the injury that gets inflicted in that case. The absolutely liability is imposed because there's a recognition that that tortfeasor maintain an inherently dangerous condition so recklessly dangerous that absolute liability is imposed.

And it's not just to compensate the victim. It's a warning to all who would maintain such conditions that present a danger to the public at large, to virtually anyone who should come upon those conditions that there's an absolute liability principle.

So deterrence of bad conduct, deterrence of inherently dangerous conduct or the failure to correct it by those responsible for such conditions imposes an absolute liability to deter that, because we don't want the public at large at risk.

And a classic example, Madam

President, a classic example of that is the spring gun or booby trap doctrine. Yes, a homeowner has a right to defend his or her home from a trespasser, from an egressor, from a burglar. But the law has always said if you employ such an automatic device -- a booby trap, a spring trigger on a shotgun pointed at the door -- that you're absolutely liable, no matter who should walk in there. And the law has compensated, traditionally, burglars who are injured by that.

Why? Not because, not because there was any great sympathy for the burglar but because there was a desire to deter all homeowners from planting such traps. Not to protect burglars. Oh, the press talks about the time the burglar gets caught in the booby trap. But the doctrine of law that imposes absolutely liability was designed to deter people from putting those booby traps in there because innocent people may just indiscriminately be injured.

Well, one may say, Well, innocent people? If you didn't go into the house. Well, children who are unaware, venturesome,

really don't have the capacity or aren't trying to burglarize might feel an apparently abandoned house is an attractive nuisance, let's peek in, let's look in there. People in danger may take flight and attempt to take refuge in such a house.

THE PRESIDENT: Senator Balboni, why do you rise, sir?

SENATOR BALBONI: Would Senator Connor yield for a question, please?

SENATOR CONNOR: Absolutely.

THE PRESIDENT: You may proceed, Senator.

SENATOR BALBONI: Senator Connor, are you aware of the mens rea requirement for the prosecution and conviction of an individual for a criminal act?

SENATOR CONNOR: Yes, I am.

SENATOR BALBONI: Madam President, through you, would the Senator yield to another question, please?

THE PRESIDENT: Senator, do you yield?

SENATOR CONNOR: Yes, Madam President.

THE PRESIDENT: You may proceed, Senator.

SENATOR BALBONI: Senator Connor, in the analogy that you are making about children trespassing upon land, would it be your opinion that those children would have the sufficient mens rea in order to be convicted under a trespass statute?

SENATOR CONNOR: No, Madam President, it's not.

And, Senator, this demonstrates, Madam President, that Senator Balboni, fine personal injury lawyer and expert though I know he is, is missing my point.

The point is not that children who stumble in there and don't have the mens rea to commit a crime and get shot by the spring gun shouldn't be compensated.

The point is you don't want anybody shot automatically. You don't want anybody to open a door -- a firefighter, a person taking refuge, perhaps from an attacker chasing him or her, to suddenly take the nearest refuge, open the door, and get a shotgun blast in their face.

You don't want anybody to -- it's not about compensating them after they're shot. It's about deterring the homeowners from setting such traps. And one way you do it is you deliver the message that you'll never benefit by this, because no matter who gets shot by it, that trap gun, that spring gun didn't know it was a burglar. You're setting up an inherently dangerous, deadly condition that will inflict its damage on anyone who enters upon that premises.

And we don't want you to do that. We don't want homeowners to do that, because we don't want to have to worry about compensating the parents of dead children who wander in there, and we don't want to have to worry about compensating the family of a firefighter who goes in there when there's a fire. We don't want those people to be injured.

The way we want to prevent it is we want to deliver the message, a deterrent -- a deterrent. And tort law is not only to compensate victims and spread risk, it is to deter bad conduct.

And we do that by saying if you set that kind of trap, it doesn't matter who falls into it. They get automatically compensated. You're automatically liable. Not based on their mens rea, based on the fact that you set this condition that would indiscriminately shoot anyone who walked in there.

And that's the very point. It's not whether Senator Balboni's law would prevent the parents of a child who wandered in there and got shot by the spring gun -- the point is, we don't want the spring gun to be there. And there are similar examples throughout tort law where absolute liability is imposed.

And the reason isn't just to compensate, it's to deter people from setting or maintaining those inherently unsafe conditions where the public at large, where it's mere accident, saint or sinner, wanders into that situation, they're going to get injured by that condition.

And it's not about whether the person who got injured is a saint or a sinner. It's about deterring the people who are

responsible for that condition from doing that.

THE PRESIDENT: Senator Marcellino.

SENATOR MARCELLINO: Madam President, just to interrupt for a moment, there will be an immediate meeting of the Civil Service and Pensions Committee in the Majority Conference Room.

THE PRESIDENT: There will be an immediate meeting of the Civil Service and Pensions Committee in the Majority Conference Room.

Senator Brown.

SENATOR BROWN: Was Senator Connor finished, Madam President? Okay.

Madam President, thank you. Through you, would Senator Balboni yield for several questions?

THE PRESIDENT: Senator Balboni, will you yield for a question?

SENATOR BALBONI: Yes, I do, Madam President.

THE PRESIDENT: You may proceed with a question, Senator.

SENATOR BROWN: Thank you, Madam President.

For me, this debate really has been quite fascinating, and I've tried to listen to it intently.

But I'm trying to understand, Senator Balboni, are you saying that through this legislation you can legislate common sense in the case of a convicted felon getting injured during the commission of a crime and then trying to sue and this preventing that convicted felon from being able to do so?

SENATOR BALBONI: Yes, Madam President.

SENATOR BROWN: Through you, Madam President, if Senator Balboni would continue to yield.

THE PRESIDENT: Senator, do you yield?

SENATOR BALBONI: I yield.

THE PRESIDENT: You may proceed, Senator Brown.

SENATOR BROWN: And not being a lawyer, and listening to this debate being carried by lawyers, and listening to the

common-sense portion of this, it seems to me that it kind of removes the common sense.

Because, like Senator Balboni, I certainly don't want to see a felon, someone convicted of a crime, being able to sue an innocent citizen and get some benefit during their commission of a crime.

But Senator Balboni, take a situation where someone breaks into my house, which I can tell you will piss me off. And I am able to overpower this person, and I tie this person up. And then in my anger, I decide, well, I'm not going to turn this person over to the police. They broke into my house. And if I turn them over to the police, they might get a slap on the wrist, and they might be let out. So what I'm going to do, I am so angry, and I never want to run the risk of this person ever breaking into my house again, I'm going to kill them. I'm going to kill them and untie them and, when the police show up, I'm going to say that there was a struggle, they broke into my house, and the only thing that I could do to protect myself and my property is kill this person.

Doesn't that felon, that convicted felon, even though they broke into my house, shouldn't they be protected against me just killing them for no reason?

SENATOR BALBONI: Madam President, in response to the gentleman's question, I would respectfully refer to you Black's Law Dictionary and a discussion of culpability. It is an analysis that is helpful in this argument.

Because in the fact pattern that you describe, there would be a break in responsibility. As the Lieutenant Governor knows, having sat on the Supreme Court, the court is in a position to decide what is culpable conduct and what is not culpable conduct.

It would be my argument and my experience that should you be in court and should you be faced with the fact pattern that you describe, the point at which you had the individual tied up is the point at which the culpability of the trespasser and the robber would cease.

And that is the very argument about

police brutality that must be focused on that Senator Paterson mentioned before. Once you are in custody, the culpability -- in other words, the responsibility for your own actions as a perpetrator ceases. You are now in the control of someone else. The law now puts a division between one set of conduct and the other.

That's what the word "culpable" means. That's how it would be used in this analysis.

SENATOR BROWN: Through you, Madam President, if Senator Balboni would yield for another question.

THE PRESIDENT: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, Madam President.

THE PRESIDENT: You may proceed, Senator Brown.

SENATOR BROWN: And I appreciate Senator Balboni explaining that and explaining how culpability would work.

But in that case, the person has still been killed. They cease to be culpable

after I tie them up, but I still go ahead and kill them. Would their family then not have the option of suing me under this legislation?

SENATOR BALBONI: No, they would have the ability to bring a lawsuit.

SENATOR BROWN: In this particular -

SENATOR BALBONI: Yes. The law would not be changed. They would be innocent in that regard, because there would be a break in the culpability.

SENATOR BROWN: Through you, Mr. President, if Senator Balboni would yield for a question.

ACTING PRESIDENT MEIER: Senator Balboni, do you yield for a question?

SENATOR BALBONI: Yes, I do, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR BROWN: Senator, if you would also, could you explain to me the defense that was available to a civil action for assumption of risk, that has been changed? That no longer exists?

SENATOR BALBONI: Yes, that no longer exists.

SENATOR BROWN: What was that, Senator, if you could explain it to me, as a layperson?

SENATOR BALBONI: Assumption of risk is defined as containing four elements. The plaintiff has the knowledge of facts constituting a dangerous condition. He knows the condition is dangerous, he appreciates the nature and extent of the danger, and nonetheless he voluntarily exposes himself to that danger.

That is the common-law concept of assumption of risk. That was contained in Section 1411 prior to the 1975 enactment.

That was changed when we adopted a comparative negligence scheme; that is, that you wouldn't be barred by your own conduct of the plaintiff. Rather, your actions would be taken into account and compared to the actions of the defendant to see whether or not you had any responsibility in your own activities.

SENATOR BROWN: Through you, Mr. President, if Senator Balboni would yield for

another question.

ACTING PRESIDENT MEIER: Senator, do you yield?

SENATOR BALBONI: Yes, I do, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR BROWN: So then, Senator, you're saying that the assumption of risk provision was preferable to the comparative negligence provision that presently exists?

SENATOR BALBONI: No, Senator, I do not. I say that it is appropriate in the analysis of conduct as between innocent individuals, innocent litigants. It is not appropriate in a discussion of a plaintiff who is in fact a felon.

SENATOR BROWN: Through you, Mr. President, if Senator Balboni would continue to yield.

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: Mr. President, I yield.

ACTING PRESIDENT MEIER: The

sponsor yields.

SENATOR BROWN: I understand your response, Senator, and I appreciate that.

So previously we had assumption of risk. That was changed to comparative negligence.

SENATOR BALBONI: Actually, Senator, if I may stop you, it was really contributory negligence is the more operative phrase.

SENATOR BROWN: Contributory?

SENATOR BALBONI: Yes.

SENATOR BROWN: Okay, so it's -

SENATOR BALBONI: Contributory negligence was changed to comparative negligence under the 1975 amendment.

SENATOR BROWN: And contributory negligence, contributory negligence was preferable to comparative negligence?

SENATOR BALBONI: As it relates to the felonious plaintiff.

SENATOR BROWN: As it relates to the felonious plaintiff.

But you don't think that contributory negligence should apply to the

felonious plaintiff?

SENATOR BALBONI: No, I do. I do.

SENATOR BROWN: Okay. That - through you, Mr. President, if Senator Balboni would yield.

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, Mr. President.

ACTING PRESIDENT MEIER: The Senator yields.

SENATOR BROWN: Then if you do, Senator Balboni, why does not the law as it presently exists, providing for contributory negligence, suffice in cases such as this?

SENATOR BALBONI: The law -- Mr. President, through you, the law of contributory negligence is no longer in statute. It was done away with in 1975.

SENATOR BROWN: Okay. Thank you, Senator. Thank you, Mr. President.

ACTING PRESIDENT MEIER: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Thank you,

Mr. President. Through you, if the sponsor would yield.

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: Mr. President, I yield.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: Isn't this really a statute that simply prevents a court from doing what I take it you support in most contexts, which is weighing the comparative fault of the two parties involved?

SENATOR BALBONI: Yes.

SENATOR SCHNEIDERMAN: And isn't it the case that if this statute were passed, someone committing even the lowest level of felony who was then apprehended and perhaps, as Senator Brown posited, murdered by the person who captured him -- with no break in the action, let's assume -- that person would be unable to get their claim even heard in court if this bill were passed, isn't that true?

SENATOR BALBONI: I have no

information to that effect. I don't know the fact pattern. And that's the problem with these discussions. They're hypothetical in nature.

And that's why this statute would work, because it would take the hypothetical fact situations when they became real, and would allow the court the ability to perform the analysis on a case-by-case basis and determine what is in fact dismissible and what is not.

See, that's why I was so surprised by Senator Connor's analysis that this bill does what it does. See, Senator Connor's analysis would have it that we recognize businessmen and place upon them absolute liability for transporting gasoline. That's what we do in this state. We say if you transport gasoline and the tanker explodes, you are absolutely liable for any injuries you have.

But at the same time, though comfortable with that imposition of strict liability, absolute liability, Senator Connor would not have that same liability attach to a

felon. That surprises me.

And what also surprises me is that Senator Connor's argument was undercut by Senator Paterson when he talked about the spring gun and the deterrence issue. Because Senator Paterson recognized, as I'm sure most of us do, that the deterrence factor is not in being sued, it is, rather, in going to jail.

Because the typical trial lawyer - and I mean this as an advocate, the typical trial lawyer perspective is that the ability to bring a lawsuit is sacrosanct.

Senator Schneiderman, I submit to you it is not. Because you can initiate all the lawsuits you want, you may never recover. The defendant could be in fact judgment-proof, without assets. So where -- what deterrence factor would there be in suing an individual with no money?

But that is exactly what's wrong with Senator Connor's analysis, that he does not appreciate the fact that the lawsuit, the ability to bring a lawsuit, is not the Holy Grail when it comes to deterrence or in making an individual whole.

And that's why this case and this bill really allows our jurisprudence, when it refers to our civil liability system, to bring back common sense.

SENATOR SCHNEIDERMAN: Thank you.

Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: Mr. President, I do.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: Thank you.

I was not present for the discourse of Senator -- between yourself and Senator Connor or Senator Paterson. But I think that the question I was asking, which I don't think you've answered yet, is fairly straightforward.

This bill puts a proviso in essentially removing your right to bring a civil action, providing for attorney's fees to punish if you attempt it, if any culpable conduct of the claimant or decedent resulting

in a felony conviction shall -- it's a complete bar.

Now, if someone is a burglar or someone is committing some other action, let's posit burglary, breaks in through the window -- now, when I working in a prison, there were several individuals who were actually in prison for breaking into people's homes while the people were actually there. This was a very dumb set of prisoners, I will admit, but they're entitled to rights without regard to their intelligence.

Say someone breaks into a home - and this happened in one case where the resident of the house was a police officer and had the other police officers in town in his backyard for a barbecue.

Someone breaks into a house or opens a door and goes in, trespassing - felony possibility. Maybe even there's someone who's just sitting in the car waiting for the person to come out who could be involved as a -- be convicted of a felony as a coparticipant, even though he doesn't do anything in connection with the house or the

residents.

The person in the house, having not studied adequately the Eddie Eagle classes, takes out a gun, shoots the guy who broke into the house, runs out into the street, shoots the guy who's in the car.

Now, this would bar the person who was in the car, to the extent there was a felony conviction for his participation in this burglary, from bringing any action, or his family from bringing any action; is that not correct?

SENATOR BALBONI: That is wrong.

SENATOR SCHNEIDERMAN: That is wrong.

SENATOR BALBONI: Absolutely wrong.

SENATOR SCHNEIDERMAN: Well, I agree it's wrong. But would that be what your bill provides?

SENATOR BALBONI: With your fact patterns and your analysis, absolutely inaccurate. And let me tell him why.

ACTING PRESIDENT MEIER: Just one moment, Senator.

Senator Marcellino.

SENATOR MARCELLINO: I hate to interrupt this law school discourse, but we have some business to attend to.

There will be an immediate meeting of the Education Committee in the Majority Conference Room.

ACTING PRESIDENT MEIER: Immediate meeting of the Education Committee in the Majority Conference Room.

Senator Balboni.

SENATOR SCHNEIDERMAN: Thank you. Through you, Mr. President -

SENATOR BALBONI: Mr. President, by way of an answer. I'd like to make an answer.

Here is why your analysis is incorrect. Again, it goes to the term "culpable." The person sitting in the car, that their actions of sitting in the car, though they may in fact be charged with a felony, are not culpable in their injuries.

And might I also remind you, Senator, that in this state it is the right of every New Yorker to defend their home. Did

you know that? Are you aware of that? That the family sitting and watching this debate, that, God forbid, someone were to enter into their homes at night, there is no duty to flee. Are you aware of that?

SENATOR SCHNEIDERMAN: Yes, through you, Mr. President, I am aware of that.

SENATOR BALBONI: Okay. Now, that's important in your fact pattern, because the law recognizes no civil or criminal liability if someone in fact defends their family in the middle of the night when a robber breaks into the house.

And that's exactly the kind of egregious actions we're talking about. Now, I know that it is a trial lawyer's attempt - and I mean that in the best way -- to try and find a fact pattern that would make this law not apply in the same -- with the same equity.

But I'll tell you what the intent of the law is, and that's important. The intent of the law is to address the most serious of activities that are criminal in nature and take away the right to sue. That

is the intent of this law.

Now, the fact that there may be individual situations and examples that you and I, with your greatest imagination, cannot contemplate, that's why we give to the courts. You and I cannot legislate every fact pattern, and we're not supposed to. What we're supposed to do is establish policy.

And, Senator Schneiderman, I put it to you, I doubt very much that you'd be against taking away the right to sue from someone who is a convicted felon or take away their right to vote or take away their right to enter into a contract and have those contract rights enforced, or any of the other statutes that are already in place. I doubt very much that you, as an upstanding citizen and Senator and public representative, find those rights should be preserved for the felon.

SENATOR SCHNEIDERMAN: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: I certainly don't accept the notion that you in your wildest imagination could not come up with all of the relevant fact patterns here.

My question simply is this, and it's the same question I've asked originally, and I will just rephrase it, because I believe I'm having trouble getting an answer. Any culpable conduct is an extremely low standard. Any. Not culpable conduct, any culpable conduct.

Now, in the fact pattern that we were positing before, if someone is the getaway man, that's culpable conduct. You're waiting for your friend the burglar to come out of the house.

It's an -- I see gesticulation, head shaking. Mr. President, could I get a response to that orally?

SENATOR BALBONI: You're wrong.

SENATOR SCHNEIDERMAN: Through

you, Mr. President, why am I wrong?

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: You're wrong because your analysis of any culpable conduct is not necessarily what the court's analysis would be. You're trying to take a statutory view of that phrase. That's not appropriate.

It is done on a case-by-case basis, Senator Schneiderman. There's no other way for us to legislate. We place with the judges the ability to make that determination on fact patterns that are not hypothetical but that are real and before them. That's the only way we can mete out justice.

And in your case, the wheelman, what culpable conduct would he have done in terms of someone coming out and shooting him in a car? That's absurd.

SENATOR SCHNEIDERMAN: Through you, Mr. President, I think the difficulty here, and the reason I'm concerned about this, is that this statute actually takes away judicial discretion to make these determinations.

You're saying any culpable conduct. Judges have differing views on what constitutes any culpable conduct. But for many people, pulling up in the car and being the getaway man for a burglar -- let's look at the language used. Any culpable -- not just any culpable conduct, in your bill. It says any culpable conduct resulting in a felony conviction.

So if there is a felony conviction involved, as I believe -- correct me if I'm wrong, I think if you're the getaway man in a burglary and you drive up and you're ready to take the burglar away, that could be a felony conviction. How in the world, under your statute, would a judge have the opportunity to review the facts and weigh the relative merits, because you're taking that ability away from the court?

SENATOR BALBONI: Mr. President, through you, I would recommend to the distinguished Senator that he review the case law as it relates to the definition and application of the term "culpable." I assure you, you will find a plethora of case law that

limits the discussion of culpable.

And I apologize, I don't have the cites in front of me, but I can get them for you.

SENATOR SCHNEIDERMAN: I'm prepared to wait, Mr. President, if you want to go to the library.

SENATOR BALBONI: No, the two hours will come and go. I apologize, Senator, as much as I adore this debate.

And that is really the crux of your issue as to what is culpable, what is relevant. But really, the case law has specifically spelled out in many instances what is culpable conduct. The first case I would turn you to is Palsgraf versus Long Island Railroad. See, I do have a cite. That has a wonderful discussion of the term "culpable conduct." And I would say that if you would analyze that and the subsequent case law, you'd find a very clear decision by the courts in this state.

But let me give you one true case. Jamie Key, in 1980, was living in a community in Nassau County. And he drank alcohol, got

intoxicated, and got into an argument with a cotenant. He picked up a knife, he went after the cotenant, a neighbor called the police officers, the police officer arrived at the scene, and he ran at the cotenant with all intents that could be perceived by the witnesses to murder him, or at least stab him.

And when, as the officer retreated and yelled, "Drop the knife, drop the knife, drop the knife," Mr. Key continued advancing upon the officer and the person behind him, and he was shot by the officer. Mr. Key was convicted of a felony of menacing a police officer.

Nonetheless, Mr. Key brought a case against the Nassau County Police Department, and I was the attorney assigned to defend the county.

I brought a motion for summary judgment, and it was denied on the basis of the fact that Section 1411 of the Civil Practice Law and Rules denied the court the discretion to grant such a motion, since the conduct of the plaintiff must be compared with the conduct of the officer.

That case ended after a month, greater than a month of trial, 23 witnesses, enormous expense in terms of the costs for the county, with a defendant's verdict. That is the case which is the genesis of this bill. That case should have been dismissed. It was not.

This law will allow the court greater discretion in applying either contributory negligence as a standard or comparative negligence as a standard upon a felonious plaintiff.

SENATOR SCHNEIDERMAN: Through you, Mr. President, if the sponsor will continue to yield.

ACTING PRESIDENT MEIER: Senator Balboni, do you continue to yield?

SENATOR BALBONI: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: Thank you.

I find that analogy -- and I too carry resentments relating to cases that I lost when I was trying cases. But I do think

that your assertions about what this bill would do don't line up with the facts.

From what you're saying, justice was done in that case. Maybe justice sometimes cost a little more than we would like if we were in a totalitarian regime or a regime where we make it difficult for people to go to court, or a regime under the English system where you're punished if you're the loser in a case. But that's the American system of justice.

I mean, why isn't -- is it only a matter of the inconvenience and the expense of not being able to get a summary judgment granted quite so easily that makes the operation established in Barker v. Kallash and other cases like this barring a plaintiff from recovery, quote, whose injuries are the direct result of his commission of serious criminal or illegal conduct, close quote.

Why doesn't that do the job, while still preserving a plaintiff's right to his day in court so a judge can evaluate whether serious criminal or illegal conduct was at issue instead of any culpable conduct?

SENATOR BALBONI: Mr. President, through you, I would suggest that the gentleman has a problem not with this statute, not with the proposed statute, but you have a problem with the "unworthy heir" doctrine that we codified in 1994, Section 4.16 of the Estates, Powers and Trusts Law, that you have a conflict with Barker versus Kallash, that you have a conflict with Riggs versus Palmer, that you have a conflict with the extensive body of law that the state has developed which says the very thing that you oppose.

You call it draconian. Many people in this state call it common sense. That is your right. But I assure you, if you were to ask somebody who was the victim of a robbery in their house whether or not they should be subject to any civil liability as a result of that person entering their house, they would answer no.

SENATOR SCHNEIDERMAN: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, I do, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: I think that what we have here is -- to me, I don't see how the statute that you're proposing achieves the result that you're talking about. I still do not understand how a statute that makes it impossible for a court to undertake the inquiry you're describing by posing such a low threshold accomplishes its goal.

If you will, let me posit another hypothetical. What if there is a drug deal, two drug dealers, a deal goes bad, arrests - and as in the movies, while the police are grappling with the two criminals, one shoots the other. Now, according to this statute, the drug dealer with the gun couldn't be sued; is that correct?

SENATOR BALBONI: No.

SENATOR SCHNEIDERMAN: Well, could you please explain to me that -- the person who was shot was engaged in culpable conduct resulting in a felony. How could it

be possibly be an exception to this rule? Unless there's some other -- you seem to be suggesting there's some hidden exceptions that aren't in the bill itself but embedded in the body of New York case law. How would that not fall within this section?

SENATOR BALBONI: It's the drug dealer's exception.

SENATOR SCHNEIDERMAN: Ah, the drug dealer's exception. I'm sorry, through you, Mr. President, I don't seem to have gotten the full copy of the legislation, since -

SENATOR BALBONI: Well, I am concerned that you are taking on the cause of the drug dealers.

But notwithstanding that, I will answer your question. Like I said, it's very difficult to apply legislative intent in a statutory enactment to an individual hypothetical situation. You've now provided this body with all of the facts. In addition to which, you are asking for myself as the sponsor to now operate in a judicial capacity. I am ill-equipped to do so. We do not have

witnesses, we do not know what testimony would come in, we have no idea how the case would be presented.

Therefore, you are guilty of the same sin as Senator Connor, assuming that the ability to bring a lawsuit in and of itself is a remedy. It is not.

Therefore, I'm unable to address whether or not the application of this statute to that hypothetical scenario is in any way appropriate.

SENATOR SCHNEIDERMAN: Well, through you, Mr. President -

ACTING PRESIDENT MEIER: Senator Balboni, do you continue to yield?

SENATOR BALBONI: Yes, I do, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: I trust that our rule regarding civility will govern your assertions as to my taking the side of drug dealers as we proceed.

I am merely trying to illustrate the most fundamental of American principles

regarding our civil justice system, which is that even a plaintiff or a party who is not free of conduct has access to the courts, has the ability to make their case and show that they have a claim that should be heard.

I do not for a moment accept the fact that you're unable to address these hypotheticals, because with the finely keen, honed legal mind that you have, I think you're avoiding the reality that there is no drug dealer exception, that that person in the hypothetical I described would be barred from bringing a civil action.

Once again, isn't this statute a statute that only makes -- that makes it impossible to get the full hearing that maybe was inconvenient for you in the case you described in Long Island -- but you achieved the right result from your point of view in that. The only difference now is that a judge would never hear the competing claims. Isn't that all this statute does?

SENATOR BALBONI: Mr. President, by way of an answer, Senator Schneiderman, we are at a fundamental point of disagreement,

and so let me state it clearly.

It is my position that if you commit a felony, you cease to have rights. That is my assertion. That is what is embedded in our statutory law, it is what has been articulated in our common law.

And that if you believe that someone who commits a felony should retain the right to sue, then you are free to vote no on this particular measure. But I also suggest that perhaps you should introduce legislation to allow felons to vote or to allow felons to sue on a contract, which is illegal, or to allow people to bring an action to recover insurance proceeds after they've committed a fraud, or any of the -- or, like I said, the unworthy heir doctrine, which would allow beneficiaries of an estate who have committed a crime from being able to bring those type of proceedings.

I disagree with you.

SENATOR SCHNEIDERMAN: Well, through you, Mr. President, I appreciate the enumeration of the disabilities under which felons labor in the State of New York.

The point of our civil justice system, which I believe this legislation, however well-intended, is an attack on, is not just whether a felon gets their rights heard in court. I think that's a good thing. It also has to do with standards of culpable conduct for the defendants who now will be able to avoid calling witnesses, having a full and fair hearing in front of a judge. They can knock them out on summary judgment.

You are in fact -- through you, Mr. President, I believe the sponsor is in fact limiting the liability of another culpable person in the name of restricting the rights of a felon. And I don't see how you can possibly avoid, although you can evade -- and I don't really understand the Palsgraf analogy at all. Negligence of the heir is not enough? I mean, I've been thinking about that, and I can't figure out how that fits into this either.

But I don't really understand the basis for this attack on the civil justice system. If one person does a wrong, why should we let another person who commits an

independent wrong off the hook? Can you answer that question?

SENATOR BALBONI: Mr. President, once again, there is a fundamental disagreement. Our civil justice system is created for the benefit of our citizens. It is okay in our system of justice to treat felons differently. We do it all the time.

And I would respectfully refer the gentleman to Section 3212 of the CPLR as to what constitutes a motion for summary judgment and its attendant doctrines -- that you need an affidavit sworn to by an individual who has actual facts and knowledge of the facts in order to survive a motion for a summary judgment. That is the basis upon which the court would make this analysis.

Like I said, it is the comparable and the culpable analysis that the court would do at the outset to determine whether or not the felonious activity is indeed relevant. I'm attempting to use other words so we don't get caught up in this "culpable" concept, because that seems to be giving people difficulty.

And therefore, again, you know, you've got to take a look at the job that a justice has to do when considering any individual case that's brought before them.

So I do not believe that this limits today -- and Senator Schneiderman, your characterization of a lawsuit as being convenient or, you know, avoiding a lawsuit as a mere convenience flies in the face of the statistics about the costs that municipalities undertake in trying cases, about the costs that insurance companies and doctors and all the individuals -- and litigants and witnesses -- you know, to just slough it off and say, Oh, a trial is not that big a deal, just go forward with it, well, that's frankly kind of an irresponsible statement.

Our justice system is a sacred thing. It should be utilized for the benefits of our citizens, not for the benefit of our felons.

SENATOR SCHNEIDERMAN: Through you, Mr. President, if the sponsor will yield for another question.

ACTING PRESIDENT MEIER: Senator

Balboni, do you yield for another question?

SENATOR BALBONI: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: You mentioned before that the judicial analysis that would into the decision on a motion for summary motion would involve whether the culpable conduct at issue was relevant to the felony. I do not see any provision in the statute for that. Where do you get that?

If you were going to modify the statute, say something like any culpable conduct relevant to a felony that was -- you know, that the person was convicted of, that might be a different issue. But I don't see any requirement for relevance. It just says any culpable conduct resulting in a felony. Is there something I'm missing regarding relevance?

SENATOR BALBONI: Yes, Black's Law Dictionary. And the case law.

SENATOR SCHNEIDERMAN: Well, through you, Mr. President -

ACTING PRESIDENT MEIER: Senator Balboni, do you yield?

SENATOR BALBONI: Yes, I do, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: Thank you. I appreciate that.

And I'm not -- I haven't memorized Black's Law Dictionary or the case law in this area, but I have a fair amount of experience at reading statutes. And I -- actually, let me let Senator Balboni sit down.

Mr. President, on the bill.

ACTING PRESIDENT MEIER: Senator Schneiderman, on the bill.

SENATOR SCHNEIDERMAN: I understand Senator Balboni's concern. I just don't see how this proposed statute fairly accomplishes the issues that he is concerned with.

Yes, our civil justice system is burdensome, it is expensive. Our system of voting is also burdensome and expensive. But the civil justice system in this country is

really one of the great creations of American democracy.

And I respectfully submit that efforts to limit people's access to the courts -- for someone regardless of their station in life to be able to go to court and say, Yes, I can be heard, I can have a claim heard, it doesn't matter if I'm poor, it doesn't matter if I am the victim of circumstances resulting in me, you know, perhaps being engaged in some sort of criminal activity, I can be heard, and my relative culpability, my fault will be considered and weighed against the fault of someone else in that civil proceeding.

That I do think is a precious right. And I think statutes like this proposed statute that limit people's access to the courts do a great disservice to really the greatest institution of our government, which is a system that has enabled us to actually be a government of laws and not of men. The rule of law is paramount.

And when you start limiting the access of someone who you don't approve of,

we're on a slope that leads to all sorts of unpleasant consequences, and I think history speaks well to that.

Ah, thank you. I now am going to read a few short selections -- no, just kidding. I will have this available for further questions.

I think that this is a mistake, and I think it's a mistake partly because -- I appreciate Senator Balboni's desire for everyone to get summary judgment and deny every felon the possibility for a hearing even under the most egregious circumstances where the conduct of the defendant is completely disproportionate to the conduct of the felon.

But I believe that the current state of our law that provides for already limitations on the recovery by someone who has committed a crime more than covers this issue. And I think that this opens the door to a lot worse things.

I think what we should be working on -- and we just came from a long session of the Codes Committee, hearing about the Rockefeller Drug Laws. We should be working

on the issue of opening up the courts so that we can see what is actually happening to people, not closing it off.

I mean, there was a lot of discussion in the hearing on the Rockefeller Drug Laws of the fact that what is defined as a felony, what is defined as a serious felony, may in fact be quite arbitrary in certain areas in the State of New York. And I think that that is something that should be of concern to anyone who would draft a statute so broadly as to say any culpable conduct resulting in any felony.

You know, there are things that are felonies now that I suspect after we reform the Rockefeller Drug Laws will no longer be felonies. So let's not be too quick to impose additional burdens on those who are felons, those who have committed crimes. I think that they should be subject to the full punishment of the criminal law, but this statute doesn't help make that punishment more just. This statute just takes off the hook others whose culpable conduct should also be punished.

I intend to vote no, Mr. President.

But I thank the sponsor for his brief, concise, timely, and civil answers.

ACTING PRESIDENT MEIER: Senator Hassell-Thompson.

SENATOR HASSELL-THOMPSON: Thank you, Mr. President. If the Senator will yield to a question.

ACTING PRESIDENT MEIER: Oh, I'm sure he would.

Senator Balboni, do you yield for a question from Senator Hassell-Thompson?

SENATOR BALBONI: Yes, I do, Senator.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR HASSELL-THOMPSON: Senator, I have sat here and I really have listened to this debate very, very carefully. And I think that before it's all over, you guys are going to make me go to law school. You're making it fascinating to me.

SENATOR BALBONI: Thank you.

SENATOR HASSELL-THOMPSON: But because I lack the sophistication that you do, I need you to help me with something. Can you

apply -- through you, Mr. President -- this ruling in the case of Bernard Goetz, which is the case we're all more familiar with, tell me how this case -- how this bill would apply to that case.

SENATOR BALBONI: You've asked a very, very good question. It probably wouldn't. Because the question becomes whether or not the act of shooting Mr. Goetz was a break in the culpable nature. And also it's not -- you're talking about the Goetz case versus the McCummings case? I'm sorry.

SENATOR HASSELL-THOMPSON: Not versus, no. The subway shooting.

SENATOR BALBONI: Right, okay.

SENATOR HASSELL-THOMPSON: Throu gh you, Mr. President.

SENATOR BALBONI: Mr. President, I don't believe -- again, neither case would particularly involve this particular situation.

SENATOR HASSELL-THOMPSON: Mr. President, if the Senator will continue to yield.

ACTING PRESIDENT MEIER: Senator

Balboni, do you continue to yield?

SENATOR BALBONI: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR HASSELL-THOMPSON: Again, because I lack sophistication -

SENATOR BALBONI: May I say, Mr. President, you do not lack sophistication.

SENATOR HASSELL-THOMPSON: No, I do. In the case of law, I lack sophistication. And so I acknowledge that.

So let me stumble through this. And I need you to really help me with this, because a piece of this, as I've looked at this -- Bernard Goetz was a vigilante. And the outcome of that case was, if I remember correctly, that the two young men who participated in the efforts to rob him later were able to sue him, and they won their case based upon the condition in which he was - they were left, based upon his action as a vigilante.

How would this not apply? Through you, Mr. President.

SENATOR BALBONI: I'm sorry, Mr. President, when you say "this," do you mean the current law, how did the current law not apply?

SENATOR HASSELL-THOMPSON: No, the proposed bill. Your proposed bill.

SENATOR BALBONI: Oh, the section -- how would it not apply?

SENATOR HASSELL-THOMPSON: How would it not apply.

ACTING PRESIDENT MEIER: Senators, as delighted as I am that we can have this Socratic dialogue, can I ask both Senators to address the chair.

SENATOR HASSELL-THOMPSON: We said through you, but you didn't hear us.

ACTING PRESIDENT MEIER: I understand that. Why don't we try to do this in a little more organized fashion.

Senator Balboni, do you yield to a question?

SENATOR BALBONI: Yes, I do, Mr. President.

ACTING PRESIDENT MEIER: Thank you.

SENATOR BALBONI: And in response to the Senator's question, Mr. President, if I may proceed -

ACTING PRESIDENT MEIER: Go ahead.

SENATOR BALBONI: The Bernard Goetz case had elements to it that I am unfamiliar with. In other words, I don't recall what the disposition of the issue of whether or not -- I know he had an unlicensed handgun. I don't recall if the possession of that was a felony and if in fact -

SENATOR HASSELL-THOMPSON: Yes, it was.

SENATOR BALBONI: Was he convicted of a felony?

SENATOR HASSELL-THOMPSON: Mr. President, through you.

ACTING PRESIDENT MEIER: Senator Balboni, do you continue to yield?

SENATOR BALBONI: Yes, Mr. President, I do.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR HASSELL-THOMPSON: My

understanding of the case, and some of the other attorneys -- Senator Paterson, whatever -- they probably could bail me out if they were available. But in this case, he was, because he had an unlicensed handgun.

And based upon that case, they were able to win their civil suit against him based upon the condition that they were in based upon the shooting.

SENATOR BALBONI: Mr. President, through you, I'm not sure that that was the predicate for liability. And again, I'm not -- that went to a jury trial. That could, that case -- and depending upon what the fact pattern was -- and I apologize again, I don't recall what the fact pattern was with specificity -- and depending upon what the supporting documentation was in the motion for summary judgment and its defense, it could or it may not have survived the application of this statute when it was brought at the time of trial.

In other words, I don't know what factors would have been involved in the judge's consideration as to whether or not the

actions of Bernard Goetz were culpable -- I mean, I'm sorry, the actions of the individuals were culpable in their injuries. So, I'm sorry, I'm at a loss to say whether or not in my opinion that this case would apply.

SENATOR HASSELL-THOMPSON: Thank you.

Mr. President, on the bill.

ACTING PRESIDENT MEIER: Senator Hassell-Thompson, on the bill.

SENATOR HASSELL-THOMPSON: I have a lot of difficulty with this bill, Mr. President, primarily because the case that I am the most familiar with is the Bernard Goetz case.

And my sense of this would be that it would bar any civil actions against anyone, in that position as a self-appointed vigilante, from the victims for being able to recover for actions that were proven to be felonious.

And therefore, I've got to think some more about this one, because I really - I just have this sense that underlying all of your best intentions -- and believe me, I

think that I've stood here and I've made it very, very clear that I represent a population of people who are as much in favor of law and order as you are. And because of that, they have sent me here to be very vigilant about the kinds of laws and the things that we pass to reduce criminal activities in communities, however that may apply.

SENATOR BALBONI: Mr. President, would the Senator yield for just a quick question.

ACTING PRESIDENT MEIER: Senator Hassell-Thompson, do you yield for a question from Senator Balboni?

SENATOR HASSELL-THOMPSON: Yes, I do, Mr. President.

SENATOR BALBONI: Thank you, Mr. President.

Senator Hassell-Thompson, do you recall whether or not the individuals who were shot by Bernard Goetz were actually convicted of a felony?

SENATOR HASSELL-THOMPSON: Through you, Mr. President, I do not think that they were ever actually prosecuted.

SENATOR BALBONI: See, that's the difficulty of the application of this statute to that instance. Because, Mr. President, through you, if they were not convicted of a felony, then the statute would not apply. There would be no bar to a suit.

It was presumed, as I recall, that they were attempting to rob Mr. Goetz. But whether or not that actually resulted in a criminal conviction as a felony would be the critical factor in determining whether or not this statute would bar their lawsuits.

But let me ask the question, Senator. Through you, Mr. President, if the Senator would yield.

ACTING PRESIDENT MEIER: Senator Hassell-Thompson, do you yield to a question from Senator Balboni?

SENATOR HASSELL-THOMPSON: I'll continue to yield.

ACTING PRESIDENT MEIER: Go ahead, Senator Balboni.

SENATOR BALBONI: Thank you, Mr. President.

For the purpose of this debate, if

those individuals were convicted of a felony of attempted robbery on Mr. Goetz and were injured in his defending himself, do you believe that they should have been able to sue him?

Or would you agree that the application of assumption of risk, that they knew the risk of going onto a subway car and just picking somebody out, that they might have a gun on them, that they might get violent, that there might be some instance where they might get injured because they were participating in a violent felony -- would you agree that our court system should not be in the business of addressing that cause of action?

SENATOR HASSELL-THOMPSON: Through you, Mr. President, I was pretty much prepared to answer that question until you said were the courts prepared to address that issue.

SENATOR BALBONI: Mr. President, through you, if I may just continue with the statement.

ACTING PRESIDENT MEIER: Senator

Hassell-Thompson, do you -

SENATOR HASSELL-THOMPSON: I continue to yield, Mr. President.

SENATOR BALBONI: That's what this bill does. This bill takes these courts out of the business of addressing those claims. That's what we're doing here.

We're saying that if you are engaged particularly in a violent activity, a violent felony, that under the definition of assumption of risk you should know and be aware that you are taking a chance, you're stepping outside the boundaries of society, you're committing a crime, a felony, the most serious of our crimes.

And therefore, you don't have the right to then after that activity to go back into court and say, Now, society that I've flaunted, come and help me -- because you don't deserve that help.

Would you agree with that sentiment?

SENATOR HASSELL-THOMPSON: In answer to that question, absolutely not. I think that the courts absolutely should

address the cases.

I think they should address it primarily -- through you, Mr. President - because again, according to that case and several others, particularly as we explore and as these cases are brought, the behavior of everyone, the behavior of everyone is explored in these cases.

And as we began to talk earlier, we talked about police action, the use of excessive force. Because the police department has in these cases, in all of these cases, unlimited, on-the-spot discretion as to the amount of excessive force that they choose to use.

And so that it is up to the court to make the determination in these cases whether or not the excessive force that was used was appropriate. And in the case of Bernard Goetz, he was a vigilante. He was not a peace officer, not a law officer. He had no right, no ruling, no authority to carry that gun. And because he chose to do that, he broke the law. There's a presumption of guilt on his part.

So no, all of these cases need to come to the courts. And I do not and will not participate in any kind of legislative action -- you've helped me to decide. I must vote against this bill. Because what we must not do is ever preclude anyone from having the opportunity to go into court and get a fair hearing.

And that fair hearing may not be prescribed by you and some of these people as being fair and appropriate. But as long as there is a Constitution, that Constitution protects everyone with that inalienable right until such time they are proven guilty.

So therefore, through you, Mr. President, I do not agree, and therefore I will vote against this bill.

Thank you.

ACTING PRESIDENT MEIER: Any other Senator wishing to speak on the bill?

Senator Brown.

SENATOR BROWN: Thank you, Mr. President. Through you, Mr. President, would Senator Balboni yield for one question?

ACTING PRESIDENT MEIER: Senator,

do you yield for a question?

SENATOR BALBONI: Yes, I do.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR BROWN: Senator, does this bill give the court the discretion to make a determination if a suit brought by a convicted felon can be heard or cannot be heard?

SENATOR BALBONI: Yes, it does.

SENATOR BROWN: Thank you, Senator.

SENATOR BALBONI: Yes, and that's why I'm surprised at Senator Thompson's description of the Constitution giving an absolute right to everybody to participate in the system. It doesn't. There's nowhere in it that says that felons can participate.

And as a matter of fact, we in our jurisprudential system say that you can't. But this law says that a court will decide that on a motion for summary judgment.

So there is that discretion. Thank you, Mr. President.

ACTING PRESIDENT MEIER: Any

other Senator wishing to speak on the bill?

Hearing none, debate is closed.

Read the last section.

SENATOR PATERSON: Mr. President.

ACTING PRESIDENT MEIER: Senator Paterson, why do you rise?

SENATOR PATERSON: I just wanted to say, as I said before.

ACTING PRESIDENT MEIER: Senator Paterson, I closed debate.

SENATOR PATERSON: I was standing, Mr. President.

ACTING PRESIDENT MEIER: I'll take your word for it.

SENATOR PATERSON: No, I honestly was standing, Mr. President.

ACTING PRESIDENT MEIER: I'll take your word for it. Go ahead.

SENATOR PATERSON: I just wanted to thank Senator Balboni for his responses on behalf of all the members who asked questions and just put in the record, Mr. President, that last year we debated this bill and 13 members voted against it. Twelve of them are still here among us. They are Senators

Connor, Dollinger, Duane, Montgomery, Mendez, Markowitz, and also the firm of Sampson, Schneiderman, Smith, Smith, and Stavisky, and the artist formerly known as Paterson.

ACTING PRESIDENT MEIER: Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

ACTING PRESIDENT MEIER: Call the roll.

SENATOR PATERSON: Mr. President, may I have a slow roll call on that bill.

ACTING PRESIDENT MEIER: More than five Senators have arisen.

The Secretary will call the roll slowly.

THE SECRETARY: Senator Alesi.

SENATOR ALESI: Yes.

ACTING PRESIDENT MEIER: Senator Balboni.

SENATOR BALBONI: Yes.

THE SECRETARY: Senator Bonacic.

SENATOR BONACIC: Yes.

THE SECRETARY: Senator Breslin.

SENATOR BRESLIN: Yes.

THE SECRETARY: Senator Brown.

SENATOR BROWN: To explain my vote, Mr. President.

ACTING PRESIDENT MEIER: Senator Brown, to explain his vote.

SENATOR BROWN: This debate was quite educational for me. And I've been torn on this, because I have looked at these situations where felons, where criminals have then sued the people they've tried to perpetrate crimes against.

I'm a little concerned that maybe this piece of legislation goes just too far in terms of giving people the ability to do harm to a felon greater than the harm that the felon does to them. And not that I cry or bleed or have sympathy for people who commit crime. I just think that it could potentially put someone who is committing a crime in a situation where they could be injured beyond the level of crime that they were committing, even though that they are a felon.

So even though I'm -- I in principle in a lot of ways agree with this piece of legislation, and really thank Senator

Balboni for his thoughtfulness, his response to all of our questions, I think I'm going to be in the position of having to vote in the negative on this piece of legislation.

ACTING PRESIDENT MEIER: Senator Brown will be recorded in the negative.

The Secretary will continue to call the roll.

THE SECRETARY: Senator Bruno.

(Senator Bruno was indicated as voting in the affirmative.)

THE SECRETARY: Senator Connor.

(No response.)

THE SECRETARY: Senator DeFrancisco.

SENATOR DeFRANCISCO: Yes.

THE SECRETARY: Senator Dollinger.

(No response.)

THE SECRETARY: Senator Duane.

ACTING PRESIDENT MEIER: Senator Duane, to explain his vote.

SENATOR DUANE: Thank you, Mr. President.

I do have to say that the debate

that I heard on the floor today really helped me to break through the hypertechnical nature of the malarkey that's in this bill, and it really helped me to understand the hypertechnical malarkey in the bill. And that's why I've decided to vote no.

I do have to say, though, that I think it's too bad that Senators don't stay in the chamber and hear the debate. We get paid a lot of money to be here, and I think we should be here to listen to the debate.

Unless of course we're called to a committee meeting off the floor during a debate, which I object to, because I think we should be here and not miss the debate on the floor. People who work in factories or, you know, farmworkers -- farmworkers, you don't even know when they're going to get off. And factory workers maybe get a half an hour off for lunch. They don't really have the luxury that we have to walk on and off, to hear the hypertechnical malarkey of some of these bills being discussed.

I just thought I should put that on the record as I vote no on this bill. Thank

you, Mr. President.

ACTING PRESIDENT MEIER: Senator Duane will be recorded in the negative.

Continue to call the roll.

THE SECRETARY: Senator Espada.

ACTING PRESIDENT MEIER: Senator Espada, to explain his vote.

SENATOR ESPADA: Thank you, Mr. President, to explain my vote.

I heard the sponsor indicate that this is about fundamental disagreements, and I think it is about that. Even though, time after time, there are specific situations that are offered by way of a bill or a proposition here that attempt to pigeonhole and really put a stranglehold on due process. I think no one could be more eloquent on that point than a nonlawyer, my colleague, Senator Thompson earlier.

This is an example of medicine being more deadly than the disease. The unintended consequences here, unforeseen by us humans is just too drastic and arbitrary a measure for the state to take, because indeed it would result in arbitrary actions. I don't

know where we would be without the video camera in the Rodney King matter. It might have been discussed; I was out of the chambers. But the fact of the matter is that Rodney King would be without the right or recourse to civil action and many other future Rodney Kings and others would be without the recourse.

I think that there is enough law, wrongful plaintiff rule on the books right now to get rid of frivolous lawsuits. Our rights are not frivolous. Due process is not frivolous. And I intend and do so vote in the negative.

ACTING PRESIDENT MEIER: Senator Espada will be recorded in the negative.

Continue to call the roll.

THE SECRETARY: Senator Farley.

SENATOR FARLEY: Aye.

THE SECRETARY: Senator Fuschillo.

SENATOR FUSCHILLO: Yes.

THE SECRETARY: Senator Gentile.

SENATOR GENTILE: Aye.

THE SECRETARY: Senator Gonzalez.

(No response.)

THE SECRETARY: Senator Goodman.

SENATOR GOODMAN: Aye.

THE SECRETARY: Senator Hannon.

SENATOR HANNON: Yes.

THE SECRETARY: Senator Hassell-Thompson.

(No response.)

THE SECRETARY: Senator Hevesi.

SENATOR HEVESI: Mr. President, to explain my vote.

ACTING PRESIDENT MEIER: Senator Hevesi, to explain his vote.

SENATOR HEVESI: Thank you, Mr. President.

I too listened carefully to the debate and the discussion on this issue, and it is somewhat of a close call. And a lot of my colleagues raised some very good points here. But Senator Balboni had some good responses to those issues that they raised.

And at the end of the day, we have to make a decision on what's in the best overall interest and have we satisfied the lion's share of situations which are likely to

arise and is the problem that we seek to address remedies in a greater extent than the potential harm that we may cause by a piece of legislation. And I'm satisfied in this case that barring somebody from suing them civilly when they were in the process of committing a felonious act is sufficient that we need to take some action here.

And I may have drafted the bill in a slightly different way, but at the end of the day I think that this is a worthy piece of legislation. And since Senator Balboni sponsored it and his expertise in this field is unchallenged and unmatched, and I have the greatest of respect for him, I'm satisfied with his answers to the very worthy questions of my colleagues.

I will be voting aye.

ACTING PRESIDENT MEIER: Senator Hevesi will be recorded in the affirmative.

Continue to call the roll.

THE SECRETARY: Senator Hoffmann.

SENATOR HOFFMANN: Aye.

THE SECRETARY: Senator Johnson, excused.

Senator Kruger.

SENATOR KRUGER: Yes.

THE SECRETARY: Senator Kuhl.

SENATOR KUHL: Aye.

THE SECRETARY: Senator Lachman.

SENATOR LACHMAN: To explain my vote.

ACTING PRESIDENT MEIER: Could we have some order in the chamber, please.

Senator Lachman, to explain his vote.

SENATOR LACHMAN: In 1999, there was an A version of this bill that I voted no on. The bill was slightly changed, and I voted yes on the bill last year. My concerns are splitting me in half, but I'm going to make a decision.

I have serious reservations about the bill regarding public safety issues. And even though there were changes between the A version and the current version, I'm not sure that these changes go far enough to offer more protections to the public which I would like to see in the future.

However, the bill does send the

message, and the message that the bill sends to the public is that criminals will not be able to profit after committing a felony. I therefore vote yes.

ACTING PRESIDENT MEIER: Senator Lachman will be recorded in the affirmative.

Continue to call the roll.

THE SECRETARY: Senator Lack.

SENATOR LACK: Aye.

THE SECRETARY: Senator Larkin.

SENATOR LARKIN: Aye.

THE SECRETARY: Senator LaValle.

SENATOR LAVALLE: Aye.

THE SECRETARY: Senator Leibell.

(No response.)

THE SECRETARY: Senator Libous.

SENATOR LIBOUS: Aye.

THE SECRETARY: Senator Maltese.

(No response.)

THE SECRETARY: Senator Marcellino.

SENATOR MARCELLINO: Aye.

THE SECRETARY: Senator Marchi.

(No response.)

THE SECRETARY: Senator

Markowitz.

SENATOR MARKOWITZ: No.

THE SECRETARY: Senator Maziarz, excused.

Senator McGee.

SENATOR McGEE: Yes.

THE SECRETARY: Senator Meier.

SENATOR MEIER: Yes.

THE SECRETARY: Senator Mendez, excused.

Senator Montgomery.

SENATOR MONTGOMERY: No.

THE SECRETARY: Senator Morahan.

SENATOR MORAHAN: Yes.

THE SECRETARY: Senator Nozzolio.

(No response.)

THE SECRETARY: Senator Onorato.

ACTING PRESIDENT MEIER: Senator Onorato, to explain his vote.

SENATOR ONORATO: To explain my vote, Mr. President.

I have to concur with Senator Balboni on this bill. I think there are some areas that have room for improvement, but I have never been in the belief that a person

committing a felony on another individual should ever have the right to recover damages from the individual.

While, again, I have some reservations about the bill, I think it's a step in the right direction. And perhaps if and when the Assembly takes it up, there could be a reconciliation to address more of the concerns that were expressed here today. But I do vote yes.

ACTING PRESIDENT MEIER: Senator Onorato will be recorded in the affirmative.

THE SECRETARY: Senator Oppenheimer.

SENATOR OPPENHEIMER: Yes.

THE SECRETARY: Senator Padavan.

SENATOR PADAVAN: Yes.

THE SECRETARY: Senator Paterson.

SENATOR PATERSON: No.

THE SECRETARY: Senator Rath.

SENATOR RATH: Aye.

THE SECRETARY: Senator Saland.

SENATOR SALAND: Aye.

THE SECRETARY: Senator Sampson.

SENATOR SAMPSON: No.

THE SECRETARY: Senator Santiago.

SENATOR SANTIAGO: No.

THE SECRETARY: Senator Schneiderman.

(No response.)

THE SECRETARY: Senator Seward.

SENATOR SEWARD: Yes.

THE SECRETARY: Senator Skelos.

SENATOR SKELOS: Yes.

THE SECRETARY: Senator A. Smith.

SENATOR ADA SMITH: No.

THE SECRETARY: Senator M. Smith.

SENATOR MALCOLM SMITH: No.

THE SECRETARY: Senator Spano.

SENATOR SPANO: Aye.

THE SECRETARY: Senator Stachowski.

ACTING PRESIDENT MEIER: Senator Stachowski, to explain his vote.

SENATOR STACHOWSKI: Mr. President, briefly to explain my vote.

I am going to vote yes on this issue. I happen to think even though the arguments were a little weak in supporting it, I still will vote for it because I, along with

Senator Onorato, don't believe that the perpetrator of a crime should be recovering damages.

And I'll have to agree with one thing Senator Hevesi said, and that is that nobody explains a one-house bill like Senator Balboni.

(Laughter.)

THE SECRETARY: Senator Stafford.

SENATOR STAFFORD: Aye.

THE SECRETARY: Senator Stavisky.

ACTING PRESIDENT MEIER: Senator Stavisky, to explain her vote.

SENATOR STAVISKY: I found the discussion here very interesting, particularly for a nonlawyer. I had complained in the past that I did not understand a term, "mens rea," that my colleague had used. And when it was explained to me and I heard the debate here today, I understood fully what they were speaking about. And I commend Senator Balboni on his -

ACTING PRESIDENT MEIER: The stenographer is struggling to try to hear this, please.

Senator Stavisky, go ahead.

SENATOR STAVISKY: And I commend Senator Balboni for the fervor of his arguments.

I thought it was interesting because earlier we had quite a number of schoolchildren sitting in the chamber, in the balcony, and I think this was a wonderful opportunity for schoolchildren to watch a deliberative body in action.

My major regret is that I had two committees called off the floor during the debate on this bill, and therefore I could not hear all of the arguments. But it seems to me, on balance, that we are overprotecting the vigilantes of the world, that this becomes a vigilante protection bill, and, Mr. President, I vote no.

ACTING PRESIDENT MEIER: Senator Stavisky will be recorded in the negative.

The Secretary will continue to call the roll.

THE SECRETARY: Senator Trunzo.

SENATOR TRUNZO: Yes.

THE SECRETARY: Senator Velella.

SENATOR VELELLA: Yes.

THE SECRETARY: Senator Volker, excused.

Senator Wright.

SENATOR WRIGHT: Aye.

ACTING PRESIDENT MEIER: Call the absentees.

THE SECRETARY: Senator Dollinger.

(No response.)

THE SECRETARY: Senator Connor.

ACTING PRESIDENT MEIER: Senator Connor, to explain his vote.

SENATOR CONNOR: Thank you, Mr. President.

While I appreciate Senator Balboni's expertise in this area in the -- I'm sorry, Mr. President, I'm having a hard time with the noise.

ACTING PRESIDENT MEIER: Can we have some order in the chamber, please.

SENATOR CONNOR: While I appreciate Senator Balboni's expertise and the work that he's done in this field, and I certainly appreciate the vigor with which he

explained his bill and defended his bill and the courtesy he showed to all the members who questioned him, I'm going to vote no because I really think we've lost track in the whole area of tort law of one of the functions of traditional tort law, and that is to deter people from maintaining dangerous conditions, conditions that are frankly dangerous to the public at large.

And one of the reasons we impose absolute liability in those situations is not just to compensate someone who is injured, but to deter the people responsible for it from having those sorts of conditions. And that's important not just to the victim of a particular accident, but it's important to all -- it's important to all -- I'm sorry, Mr. President, this is really -

ACTING PRESIDENT MEIER: Can we have some order in the chamber, please.

SENATOR CONNOR: Thank you, Mr. President.

But it's important to all of society and all the people we need to protect, whether they're engaged in wrongdoing or not.

Some of these conditions affect -- frankly, they affect whoever happens to walk into the condition, whether they're engaged in criminal conduct or not. That's a very important function of tort law. Therefore, I vote no.

ACTING PRESIDENT MEIER: Senator Connor will be recorded in the negative.

The Secretary will continue to call the absentees.

THE SECRETARY: Senator Gonzalez.

(No response.)

THE SECRETARY: Senator Hassell-Thompson.

ACTING PRESIDENT MEIER: Senator Hassell-Thompson, to explain her vote.

SENATOR HASSELL-THOMPSON: Thank you, Mr. President.

A lot less passionately than I discussed this bill. I really did listen very carefully, and I think that the two points that my able Senator, who -- I believe his intentions are pure. And I think that I understand very clearly the attitude and the intent.

My concern became evident when the

Senator asked me the question did I think that the court should be addressing these kind of cases. And I guess I belong to that antiquated group of people who believe that everything that appears to be isn't what is. And that with these cases being appropriately tried in the courts, that information usually comes to light that perhaps did not come to light before.

And so I am not prepared to always summarily take away from the courts the ability to use the discretion that they already have in trying these cases.

And also, if I understand New York State law at all, we have something called wrongful plaintiff rule under common law that already bars compensation to criminals when there are serious violations of the law. And so I see this as duplicative and repetitive and somewhat unnecessary, but I also see it as very dangerous because it again does not allow the kinds of civil action -- and even though the bill speaks to felonies, the continuing use of the word "violent felony" by the Senator in his explanation of the bill also

begun to disturb me, because I didn't see that in the context of the bill.

So therefore, I think that the bill has some problems and some issues, and I think that at this point I could not vote in favor.

ACTING PRESIDENT MEIER: Senator Hassell-Thompson will be recorded in the negative.

The Secretary will continue to call the absentees.

THE SECRETARY: Senator Leibell.

SENATOR LEIBELL: Aye.

THE SECRETARY: Senator Maltese.

SENATOR MALTESE: Aye.

THE SECRETARY: Senator Marchi.

SENATOR MARCHI: Aye.

THE SECRETARY: Senator Nozzolio.

(No response.)

THE SECRETARY: Senator Schneiderman.

ACTING PRESIDENT MEIER: Senator Schneiderman, to explain his vote.

SENATOR SCHNEIDERMAN: Thank you, Mr. President.

I found that the debate -- and I

remember the debate from last year on this bill, and if anything I'm more convinced than ever that this represents a flawed approach to civil justice, as Senator Connor pointed out, a badly flawed approach to our tort system.

And I think that what we are seeing here is the effort to eliminate access to our civil justice system, not based on the merits of the case but based on the fact that some people, as evidently Senator Balboni represented in a proceeding, want to be able to get summary judgment instead of having a full trial on an issue of tremendous importance.

And I do not see that this furthers any interests of justice that are not legitimately served by the current set of statutes. We already have a statute barring wrongful plaintiffs from obtaining recovery. We already have a system where they would be required to bear the burden of proof in a case.

So this is just a bill to restrict access to the courts. This is just a bill to limit judicial ability to conduct a full and

fair hearing. I think this is wrongfully - no, I think it's wrongfully construed. Well, it may be appropriate in some cases, but it may not be in others. I'm sorry, Senator Hevesi was trying to help me here.

But the fact of the matter is the only one who can determine that is a judge after a full and fair hearing. This will reduce the level of justice in our state. I vote no.

ACTING PRESIDENT MEIER: Senator Schneiderman will be recorded in the negative.

Record the negatives and announce the results.

THE SECRETARY: Ayes, 40. Nays, 14.

ACTING PRESIDENT MEIER: The bill is passed.

Senator Skelos.

SENATOR SKELOS: Mr. President, can we please call up Calendar Number 299, by Senator Marcellino.

ACTING PRESIDENT MEIER: The Secretary will read Calendar 299.

THE SECRETARY: Calendar Number

299, by Senator Marcellino, Senate Print 2384, an act to amend the General Municipal Law, in relation to including.

SENATOR OPPENHEIMER: Explanation, please.

ACTING PRESIDENT MEIER: Senator Marcellino, an explanation has been requested of Calendar 299 by Senator Oppenheimer.

SENATOR MARCELLINO: Thank you, Mr. President.

This bill would amend the General Municipal Law to add soil and water conservation districts to the list of authorities and agencies that can enter into agreements and contracts with other units of government and municipalities.

ACTING PRESIDENT MEIER: Senator Oppenheimer.

SENATOR OPPENHEIMER: If the Senator would yield.

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield for a question?

SENATOR MARCELLINO: Surely.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR OPPENHEIMER: Senator Marcellino, I don't understand why we need this. I mean, I thought we were already doing this. How is this going to enhance a municipality's ability to deal with the soil and water conservation?

SENATOR MARCELLINO: Through you, Mr. President, soil and water conservation districts have experienced delays in getting intermunicipal contracts approved because the districts are not listed in Section 99-R of the General Municipal Law, which lists the state agencies with which municipalities can enter into contracts.

This problem manifested itself recently when New York City attempted to contract with soil and water conservation districts to carry out provisions of the New York City Watershed Agreement. This has caused confusion and delays in project delivery.

Section 99-R is intended to cover services not regularly provided to the public as part of the general government services. Stream protection, watershed inspections,

wetland permit assistance, stream bank and channel protection fall under this purpose and are services provided by the soil and water conservation districts. The addition of these districts through Section 99-R will reduce confusion and delays and therefore help municipalities address important conservation purposes.

SENATOR OPPENHEIMER: Thank you, Senator. If you would yield for another question.

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield for a question?

SENATOR MARCELLINO: Certainly.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR OPPENHEIMER: It's my belief that the soil and water board is doing it now, I mean, is helping on the watershed. How are they doing it now, is the question.

SENATOR MARCELLINO: In a very circuitous way, through you, Mr. President. Because what happens, since these districts are not specifically mentioned in 99-R -- I'll give you a specific example. In New York City

there was a contractor -- in New York City Watershed, the Greene County Soil and Water Conservation District had one contract with New York City for a stream restoration project for the Batavia Kill. There was a $2 million contract with New York City. This contract was executed apparently without any problem. Despite the prior contract, when they attempted to do a second contract for additional stream restoration work, they were told no contract could be used or could be signed because the soil and water conservation districts were not specifically listed in Section 99-R of the General Municipal Law.

The water district made phone calls, tried to work it out, and finally wrote a 1½-page letter explaining why the city could contract with them. Eventually, they got the contract, but only after a six-month delay.

Normally a contract with the city could take about a year to negotiate. That would be in addition, this six months was in addition to that year in time. Not only did they miss the construction season, but because of the delay, it also raised concerns from the

EPA. The EPA wanted these projects done, and without delays.

So what we're doing here with this legislation is simply, if you look at the bill itself, we've simply inserted the words "soil and water conservation districts" in appropriate sections of the law so that they are specifically mentioned in the law. Therefore, no new attorney who gets a caseload dumped on his desk would then look at the law and say, Well, you can't do this one, it's not specifically mentioned. We specifically mention them.

This eliminates the need to go back and forth, write letters, and do all the - this has happened numerous times to these soil districts. They've come to us specifically and asked us for this legislation.

It is, by the way, Mr. President, supported by the EPA and environmental advocates, supported by the Farm Bureau, and supported by the New York City Watershed Conservation District.

So this is a technical change. It's an addition. But it would avoid a

tremendous amount of delays and costs and would permit very, very important projects to go forward without unnecessary delay.

SENATOR OPPENHEIMER: Thank you, Senator Marcellino. I don't want you to think that -- I think this is a terrific bill. I was just wondering the necessity for it, because -- and I'll speak on the bill now.

ACTING PRESIDENT MEIER: Senator Oppenheimer, on the bill.

SENATOR OPPENHEIMER: Because I can tell you, in the 1970s and '80s, I was using the soil and water conservation district to help me. In my village where I was mayor, we had flood problems and our main street would sometimes go under two, three, four, five feet of water.

And it was with the help of the soil and water conservation folks, who happened to be the same -- many of them are the same people that work in our county planning department. They have two roles. And they were very helpful to me, because we wanted to take a reservoir that was just above of my village and have that reservoir made

into a water-holding area during exceptionally bad storms.

And our problem emanated from the fact that more and more of the county, Westchester County, was being blacktopped, and so there were less and less areas that were open space that could serve as sponges and as ponding areas and areas where water could rest and not merely flow over, like on blacktop. So that we were having enormous quantities of water come down our streams.

And it was through the help of the county soil and water board that I was able to make a good deal of headway with the flood problems that we were having in our village. And indeed, they did help to overcome the problem, and we do not have severe flooding anymore. Our problem was that we were at the mouth of two rivers, and all the water that was accumulating from the center of the county was coming down and flooding us out at the mouth of the river.

So we got a lot of help from them. I know that in another instance, the soil and water folks have helped with the Blind Brook,

which runs through several communities. And they were able to bring together -- they did a hydrologic survey, and they were able to bring together the communities and really improve the condition of this small river, which also was prone to a lot of flooding. They were also helpful in the soil erosion that was happening on the sides of this -- well, it's really a brook, I guess. It's not a small river. And they made several recommendations, and some of them were as simple as pulling the shopping cart that fell into the brook out so that the brook could flow. But we also have soil erosion problems. And we were able to work with them.

That was pretty much what they did in the '70s and '80s, which was flood control work and helping us with soil erosion, maintenance of streams so that they could flow freely. But in recent years, they have been active in another area which has proven enormously helpful. And Senator Marcellino mentioned the watershed management, which of course has keen application for us here in our -- in Westchester County, because we are

party to the watershed agreement.

But they have also helped in other ways in recent years. For instance, we have hired them to do an independent analysis when a developer has come in and done his or her analysis to meet the SEQRA law, we have found that sometimes it's best to have an independent analysis done. And we have actually hired the soil and water district to come and do that for us. And they've been valuable there.

But I think their main value now in the last few years has been in the area of non-point-source pollution and nutrient management. We have had considerable problems with nutrients flowing into the Long Island Sound which have caused excessive algae blooms which have, when they decomposed, caused fish kills and shellfish kills.

And we have to reduce the amount of nutrients that are going into, in this case, the Long Island Sound, but believe me, we are not the only -- it is not the only body of water that will have to have a nutrient reduction, particularly nitrogen reduction.

Because it is very, very harmful to the living creatures of the sea.

So we need the nutrient management, and we have to be able to get on top of the non-point-source pollution. And you may have been reading about that. It certainly has become much more in the public discourse now, because it is one of the main reasons that we are having this nitrogen problem in many of our waterways.

And that is due to the many different spots that are polluting our water. It's not just a factory or a power plant, it is coming from literally thousands of spots that are contributing to the pollution of our water bodies. And in some cases, it's due to infiltration; in some cases, due to inflow of our sewer lines.

Because sometimes there are cracks in the old sewer lines, and water is flowing into it during heavy rainstorms and causing our sewer treatment plants to shut down. And we have taken steps just in the last year to hold containment areas where we can contain this heavy flow of water during heavy storms.

The other problem with the inflow and infiltration problem is the many houses through the last hundred years that have connected their pipes from the house, their gutters and their leaders, and they have connected these pipes into the sanitary sewer lines that come to their homes instead of into the water lines, the storm sewers that -- the storm sewer lines that run at the end of our properties. And that's merely because the sanitary sewer lines run right to our houses, whereas the storm water lines are up on the streets. And that's a distance, in some cases, of maybe a hundred, 200 feet. And these lines have to be brought at homeowner expense from the house up to the storm-water sewer.

So with these multiple of problems, we have looked to the county soil and water conservation districts, and they have been very, very helpful to us. And believe me, we have so many problems in this area that without them, I don't know how we would be managing.

So in other words, what I'm saying

is this is a terrific bill. And we have had no trouble contracting with our county soil and water conservation board. So if other people have had problems, I certainly commend this legislation so that it can overcome those problems. Because, as I said, I don't know where we'd be without them.

I'll be voting yes.

ACTING PRESIDENT MEIER: Senator Paterson.

SENATOR PATERSON: Thank you, Mr. President. If Senator Marcellino would yield for a question.

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield for a question?

SENATOR MARCELLINO: Yes, I will.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR PATERSON: Senator, under Section 99-R of the General Municipal Law, I'm just wondering what other entities other than these soil and water conservation districts - who can qualify now as a municipality other than an actual county -- other than an actual municipality?

I'm just trying to get an idea of how feasible this is within the ambit of the construct of the law.

SENATOR MARCELLINO: If you would permit me for a second, I have that information for you. I'm just trying to find it.

SENATOR PATERSON: Thank you.

SENATOR MARCELLINO: Section 99-R is rather brief. It says: "Notwithstanding any other provisions of law to the contrary, the governing board of any municipal corporation may enter into agreements and/or contracts with any state agency, including any department, board, bureau, commission, division, office, council, committee or officer of the state, whether permanent or temporary, or a public benefit corporation or a public authority or any unit of the State University of New York, pursuant to and consistent with Sections 355 and 6301 of the Education Law, within or without, such municipal corporation to provide water supplies, street sweeping or maintenance, sidewalk maintenance, drainage, sewage

disposal, or any other services of government not regularly provided to the public as a part of the general government services."

What is missing apparently in some attorneys' minds is it doesn't say soil and water conservation district specifically. So they have rejected contract agreements. This has specifically occurred in numerous occasions in the City of New York in the implementation of the watershed agreement that Senator Oppenheimer spoke so eloquently of.

This law, they came to us and have asked us to alleviate the confusion by simply adding this phrase to the bill and -- to this section of the law in the appropriate locations, so there can be no further confusion.

SENATOR PATERSON: Mr. President.

ACTING PRESIDENT MEIER: Senator Paterson.

SENATOR PATERSON: Actually, if the Senator is willing to continue to yield.

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield?

SENATOR MARCELLINO: Certainly.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR PATERSON: I think it was the example that you gave a little earlier about Greene County and New York City that really drove the point home to me. That in other words, it wasn't as if they couldn't do it, but since there legally wasn't the opportunity for the soil and water conservation district to enter into contracts with the actual agency, they went through this process where they went around in circles and the phone calls, as you described them, and the letter.

So I understand how this situation is cured. My question relates to the soil and water conservation districts themselves. How do they receive their funding? This is state and county, and now they're seeking a greater funding by the state? Would that accurately reflect their view?

SENATOR MARCELLINO: It's all of the above, Senator. And they also get money from the EPF, which matches the amount that the other entities provide.

SENATOR PATERSON: If the Senator is willing to yield.

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield?

SENATOR MARCELLINO: The spirit is willing, sir.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR PATERSON: Thank you, Senator. So in terms of the funding that they actually receive, the operational decisions under the law that you cited are those procedures such as sidewalk repair, water supply, sewage disposal. And I'm curious about this, it was not usually part of the operation of government services.

I would have thought that it would be, because that was one of the operations of government services. And I'm not putting this on you, Senator, that's just what you read. Can you draw the distinction for me as to what is and what is not a government service vis-a-vis the soil and water situations?

Just to clarify, Mr. President, the Senator was reading from the law, and it said

not -- and I'm just paraphrasing, I heard him read it -- it's not usually an operation performed as a government service, as a general government service, I think it said.

SENATOR MARCELLINO: Senator, these agreements that would be signed by municipalities with the soil and water conservation districts could be as limited as working with a farmer, for example, to help that farmer devise a measure where, if cattle in that particular section of his field, leaving what cattle may leave in that section, wouldn't wash off and run into a stream. So they might advise the farmer as to how to manage the water runoff from that section of his field into the nearby waterway so it doesn't affect them and impact them in a negative way.

This might be a relatively small project. It may only be someone going out there and looking at the site and discussing it with them. This is not something where the municipality would have the obligation to repair a sidewalk or repave a street. That would be under normal provisions, maintenance

of streets and programs would fit.

However, here we're talking about engaging people and discussing soil and water conservation mechanisms. The soil districts, these districts were formed in the -- probably back as far as the 1930s when there were soil conservation districts to, you know, deal with the Dust Bowl era to try to help farmers reclaim their fields and reclaim their topsoil. They became expanded to cover water conservation as the need arose.

So we're talking about basically an organization or organizations that every county has one, at least, to go in and advise people on how to protect groundwater. And it's particularly important to New York that these agreements relate to these upstate communities, because the watershed is upstate that provides the water, the drinking water for New York City downstate.

SENATOR PATERSON: So would it be safe to say -- if the Senator would continue to yield.

ACTING PRESIDENT MEIER: Senator Marcellino, do you continue to yield?

SENATOR MARCELLINO: Certainly. Absolutely.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR PATERSON: -- that the conservation districts require more state funding as a result of this added opportunity that they will have to engage in contracts with the municipalities or with the agencies?

SENATOR MARCELLINO: No, Senator, they -- if I might, gentlemen, I can't - please.

When the soil and water conservation districts get signed into contracts, they are reimbursed. They are paid for the work that they do by the municipalities that they engage their contracts with. That's part of the deal. So they get money. They're amply supplied, and they get their money through either EPF direct payoff or the contract agreements that they make with the individual towns, counties, villages, you name it, in that respect.

So there is no need of additional money that has to be put in. We fund them as

necessary, and their contracts fund them as necessary.

SENATOR PATERSON: If the Senator is willing to yield.

ACTING PRESIDENT MEIER: Senator Marcellino, do you continue to yield?

SENATOR MARCELLINO: Sure. Yes.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR PATERSON: Then, Senator, I understand now that they're performing these functions not usually in the general government services that are provided, and they receive their funding from the county and the state. But because contracts will bring them these resources that come from the municipalities that employ them, that will cut out the bureaucracy of having to go through the county.

I understand that there are 58 of these soil and water conservation districts, I assume one for each county and then one for the five counties that cover New York City.

So I guess this -- I hope this doesn't sound pedestrian, but what I'm just

trying to understand is that since there is a SWCD for each county, why has it been in the past so difficult -- and maybe you answered this before. But why has it been so difficult to try and just not add another layer of government but to let them receive their funding by having the county enter into the contract, since the counties already can, and then from there they would -- the money would just filter to the soil and water conservation district because it's wholly held within the county anyway?

SENATOR MARCELLINO: It might not always be a county that is in need of the services. It might be a lesser unit. You could have a village that might be in need of it. So that, you know, by making a circuitous route through the county when they could make a direct contract with the district -- in this case, Greene County was where the problem was. Greene County was making the contract for the Batavia Kill.

So the contract was going through the county, it was between the county and New York City. And as the city operates, as I was

told by a representative from the soil and water conservation district of the City of New York, every once in a while new attorneys are brought in. And as the junior people on the list, a pile of contracts get plunked down on their desk, and they're told to mark them up and make decisions. And they look at these things and they come up with the fact -- some say, okay, yeah, you have a previous contract, and some say -- well, they don't even bother to look, but they say that this is not counted. They don't see the words "soil and water conservation district" specifically in 99-R, and therefore issue a statement that you can cannot sign this agreement, and they advise their superiors not to sign.

That causes a delay, which is all we're trying to eliminate. Ultimately, they know they can get it done. But what's happened is they've lost construction seasons, they've lost working time -- in some cases, six months or more in delays in addition to the normal delay in getting a contract signed with a municipality as big as New York City. This delays the work, it increases the

pollution, it causes great consternation from the EPA, because they want this work done and they don't want to take any nonsense. They don't want to hear that, you know, somebody is making a decision at a junior level that is affecting 9 million people.

Have I confused you enough?

SENATOR PATERSON: No, actually, Mr. President, Senator Marcellino has explained it very well. It truncates the process by which the SWCD can receive the resources it needs to perform the functions that are kind of outside of the regular protections that government provides through general services.

And if he would yield for one last question of a -

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield for a question?

SENATOR MARCELLINO: Surely.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR PATERSON: This question really relates to the perimeters of living in New York City. And of course New York City's

filtration plant is a real concern to all of us that actually live there. And the encumbrances that were forced on New York City by the federal government, and how the soil and water conservation districts might be able to mitigate some of that.

And I wanted to know what the progress has been on that as, I guess, kind of a forerunner to demonstrating why this would be so important to give the option to the SWCDs to speed up the process that they've already started in many other cases.

SENATOR MARCELLINO: Senator, I quite frankly don't have any idea how far progressed they are. But we have been hearing from the people at the New York City soil and water conservation district directly, that they are in need of this legislation so that process can move in a more expeditious manner. My guess is they are working apace, but it's not as fast as they would like it.

ACTING PRESIDENT MEIER: Senator Paterson.

SENATOR PATERSON: All right, Mr. President. I want to thank Senator Marcellino

for his responses and speak on the bill.

ACTING PRESIDENT MEIER: Senator Paterson, on the bill.

SENATOR PATERSON: It really was the issue of the SWCD that exists in Greene County coming in to perform some work for New York City and the delay that was caused by the fact that even though they'd already performed a contract. When they came back to offer services for another need that the city had, it was delayed because of the actual structure.

And that the soil and water conservation district, if they had the contract power that would be implemented if we pass this legislation, really through the auspices of the General Municipal Law and looking upon them as in a sense another municipal corporation, which they basically are, then that would obviously speed up the process and help them to help us.

The concern that I had is just the extra layering of government. See, I thought this is what a government entity is supposed to do. But I guess what would be in a sense

my utopian concepts about how government should run should give way to the value of the pragmatism of just understanding that anything that creates any further complication calls for a further assessment of time.

And in many of these instances, speed is of the utmost quality and need. And so I think that that is probably the best course to go on.

I don't know that I'm always in favor of adding to the plethora of government entities that contract, and what I thought was confusion. But apparently the confusion lies in the fact that heretofore the contracts haven't been able to go through other sources or have been delayed for long periods of time, that even when they were performed we had to come back a second time and start the bureaucracy all over again.

So I understand what Senator Marcellino is saying, and I have no further questions for him.

Thank you, Mr. President.

ACTING PRESIDENT MEIER: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Thank you. Through you, Mr. President, if the sponsor would yield for a few brief questions.

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield for a question?

SENATOR MARCELLINO: Certainly, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: I appreciate the difficulty that led to the drafting of this bill. I must admit, though, that after your colloquy with Senator Paterson, I'm a bit confused as to the funding stream, because it does appear to be somewhat circular.

Where did the soil and water conservation districts get their money? I understood you to say they get it from the municipal corporations, but then they're contracting with the municipal corporations.

SENATOR MARCELLINO: Well, the contract, as you know, requires a payment. They get paid for their work. So that if they put in so many hours, they get paid.

They're eligible for -- you know, to get bonds from government agencies. They can get federal grants. Which a lot of these smaller entities might not able to. A local farmer might not qualify for grant aids, could not get bond act money to resolve an issue concerning his or her particular farm and the problem that it might be as a non-point-source polluter.

So the soil and water conservation district can enter into that agreement and assist them in that level by having access to other funding sources, including grants from the EPF.

SENATOR SCHNEIDERMAN: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Marcellino, do you continue to yield?

SENATOR MARCELLINO: Certainly.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: Is there any reason why the work of these soil and water conservation districts cannot be

performed by units of municipal governments or county governments, as Senator Paterson pointed out? There appears to be an extra layer of government here.

ACTING PRESIDENT MEIER: No, it's not an extra layer of expertise, it's a layer of expertise. They have experts, they have expertise and the ability to marshal these resources where the government might not be able to do that.

They can come in with - specifically related to soil and water conservation projects. That's all they do. So when they go into a site, they are focused on that particular issue. Upstate communities love it, because they get the expertise and the access to additional funding, which helps them relieve a problem in their area. New York City and the water you, Senator, drink and I used to, and my children still do, is cleaner because of it.

SENATOR SCHNEIDERMAN: Thank you.

Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator

Marcellino, do you continue to yield?

SENATOR MARCELLINO: Sure.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: Is there any mechanism by which the local governments can control the soil and water conservation districts? I mean, is there any mechanism through which there is input from the local governments or the ability to veto projects in their jurisdiction?

SENATOR MARCELLINO: There is a board of directors that these districts - each of these county SWCDs are created by the board of supervisors of the county or the designated body. So they're in effect appointed members by either the county executive in some areas or the elected governing body of the county agency. So there is that communication and control on a local level.

SENATOR SCHNEIDERMAN: Thank you.

Through you, Mr. President, one final question, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Marcellino, do you yield for another question?

SENATOR MARCELLINO: Certainly.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: And finally in the legislation you mentioned the expertise in relation to issues of soil and water. But the legislation does appear to provide that in addition to water supply, the contracts could be entered into for street sweeping, maintenance, sidewalk maintenance, and other areas. Is that something that soil and water conservation districts also provide?

SENATOR MARCELLINO: Senator, I was getting some advice from both ears, and I don't have a third ear. So would you please repeat it? I apologize.

SENATOR SCHNEIDERMAN: That's quite all right. I have similar problems myself you.

My question just was that the language -- you mentioned the expertise in areas relating to soil and water conservation. The language here does extend to other types

of municipal work, including sidewalk maintenance and street sweeping. Do soil and water conservation districts provide such services?

SENATOR MARCELLINO: They have their own section of law as well. 99-R specifically deals with those intermunicipal contracts. There is a law establishing these districts that goes back to 1940, I believe.

SENATOR SCHNEIDERMAN: Thank you. Thank the sponsor for his answers.

Through you, Mr. President, on the bill.

ACTING PRESIDENT MEIER: Senator Schneiderman, on the bill.

SENATOR SCHNEIDERMAN: This seems to be a simple addition to our body of law that will make a difference for some municipalities in the state and for the soil and water conservation districts that service them.

I think that the -- there is a broader issue of funding for soil and water conservation programs. We have spent a lot of money from our recent bond issue. I'm afraid

that we don't know where the rest of the money is coming from. And we're at a point with the New York City Watershed in particular where we're really teetering on the edge of serious problems.

There is, as -- the Environmental Protection Agency has required the City of New York to build a filtration plant. And our efforts to come up with alternatives to filtration so far have not been successful.

The difficulty with soil and water conservation districts, as I understand it - and this does make it easier for them to obtain municipal contracts. But the difficulty really is the lack of resources from other sources. And I'm afraid that with the change in administration in Washington, there may be less money coming from the federal government. I'm also concerned with our ability as a state to continue funding environmental programs at the same level.

What we've ended up with after a decade in which there's been this tremendous national economic boom which has benefited New York State in particular because of the

presence here of the securities industry, we still haven't gotten the job done in a lot of important environmental areas. I know that we've also inflated our debt to the point that it makes it very difficult to float new bonds for environmental purposes.

And I think in addition to municipal contracts, we do have to work to ensure that other sources of funds are available for these purposes. I think that the new Environmental Conservation Commissioner does appear to be sensitive to those issues. But I think that in the course of this legislative session, I'm not satisfied that the Governor's proposed budget meets these needs, and I hope that we will be able to work together to ensure that more funds from the state are available.

Thank you, Mr. President. I will vote for the bill.

ACTING PRESIDENT MEIER: Any other Senator wishing to speak on the bill?

Hearing none, debate is closed.

Read the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

ACTING PRESIDENT MEIER: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 56.

ACTING PRESIDENT MEIER: The bill is passed.

Senator Skelos.

SENATOR SKELOS: Mr. President, would you please call up Calendar Number 5, by Senator Maltese.

ACTING PRESIDENT MEIER: The Secretary will read Calendar Number 5.

THE SECRETARY: Calendar Number 5, by Senator Maltese, Senate Print 95, an act to amend the Penal Law, in relation to clarifying.

SENATOR OPPENHEIMER: Explanation, please.

ACTING PRESIDENT MEIER: Senator Maltese, an explanation has been requested by of Calendar Number 5 by Senator Oppenheimer.

SENATOR MALTESE: Mr. President, this bill is an act to amend the Penal Law in relation to clarifying the definition of

physical injury and serious physical injury. This would lower the threshold of what constitutes a physical injury or a serious physical injury.

Taken right from the bill, physical injury would mean impairment of physical condition or physical pain, illness, or the presence of a palpable contusion, laceration, scalding or wound.

Physical injury may be established by the testimony of the victim alone. Physical pain may be established by evidence of the injuries inflicted in the light of common experience. You could read that to mean also common sense. Serious physical injury means physical injury which creates a risk of death or which causes death or loss or impairment of the function of any bodily organ or member or the loss or impairment of any mental faculty or extreme physical pain.

Serious physical injury may be established by proof that the victim required surgery or a course of medical treatment or physical rehabilitation or was admitted to a hospital as a patient for medical treatment.

I'd like to refer to a memo in support by the New York State Coalition Against Domestic Violence, dated in January when the bill was prefiled. "The New York State Coalition Against Domestic Violence supports legislation to amend the Penal Law to codify the definition of physical injury to better correspond with a more commonly understood layperson's meaning. Victims of domestic violence are often subject to an ongoing series of criminally prosecutable, abusive incidents.

"Presently, one of these individual incidents may fail to rise to the level of a misdemeanor offense under the current definition of assault. Additionally, several confessions of harassment will not result in a criminal record that is citeable when future battering occurs.

"The law's failure to adequately respond to the repeated abuse endured by victims of domestic violence is intolerable."

My point can be best made by referring to a case which was before the Supreme Court, Appellate Division First

Department, May 23, 1991. And I'd like to just briefly go into history of the case. A judgment was rendered convicting the defendant upon a jury verdict of murder in the second degree -- which is not at issue here - attempted murder in the second degree -- which is also not an issue -- and assault in the first degree which is at issue, and the sentencing for the appropriate trials.

Defendant was convicted of murdering one man, stabbing and slashing a second, and wounding a third. It's the wounding of the third that's at issue here. Now, this is the opinion of the learned Justices Murphy, Rosenberger, Wallach, and Smith. Unanimous opinion.

"We reduce the assault in the first degree conviction, however, because the evidence does not establish beyond a reasonable doubt the defendant's third victim suffered serious physical injury," which is the definition that we seek to change now. Now, this is -- they're going to recite the litany of what they do not consider serious physical injury.

This victim suffered two stab wounds, one at the base of the neck and one on the right shoulder. The record discloses that the wounds required irrigation and suturing and overnight observation in the hospital and that thereafter the victim had some trouble eating. He also stayed home from work for several weeks because he had difficulty walking.

And this is the clincher. "Taken together, this evidence does not establish a protracted impairment of health or protracted loss or impairment of the function of any bodily organ, and there is no evidence in this record that these injuries were life-threatening or caused protracted disfigurement."

Mr. President, what we're seeking to do is clarify these definitions of both physical injury and serious physical injury so that even the judges of the Appellate Division and the Court of Appeals would understand them.

SENATOR OPPENHEIMER: Thank you, Senator.

ACTING PRESIDENT MEIER: Senator Oppenheimer.

SENATOR OPPENHEIMER: Thank you. I actually don't have any questions; I just want to make a plea for everyone to support this bill.

Because the courts have interpreted the current statutory definitions of physical injury and serious physical injury much too narrowly. And as a result, very often, as was just mentioned by Senator Maltese, the criteria haven't been met and horrendous situations and occasions have occurred because of it. And I thought I'd just very briefly mention four of them.

One, defendants who have caused a victim to bleed or bruise are being prosecuted for assault third degree, which is a Class A misdemeanor, rather than a felony. So apparently blood and bruise is not sufficient.

In another case, a gunshot wound was found insufficient by itself to establish substantial pain. And that was from the People versus Rojas. That was a 1984 decision.

Another instance, a black eye was insufficient proof of physical injury. And that was the Matter of Phillip A. in 1980.

And lastly of the only few I'll mention were two punches to the face were insufficient proof of physical injury, in People versus Jiminez in 1982.

I think we have to have this bill to make assault convictions a whole lot easier to obtain, because women are getting beaten up and bruised and broken and the courts have not deemed it, very often, sufficient evidence.

So I think this is a very good bill. And while I'm standing and talking, I would like to say that there are some other bills that would protect domestic violence victims that I would very much like to see come to the floor.

For instance, a new definition of family would be very much appreciated, because families are not what families were. And now there are unrelated persons, and they often, because they are not a husband or a have a child in common with the other person, they're also getting away with some pretty

unforgivable acts. And it's because we don't call a family what the family now is, which are unrelated people who live full-time or part-time with the woman. And I say woman because the vast majority of the domestic violence is against women, '95 percent. Only 5 percent are against men. So I don't want to sound sexist, but that's why I'm using the word "women."

So also orders of protection against unrelated persons. That's passed many times in the Assembly and has not passed here. And we have to allow orders of protection to be filed against unrelated people. There is much that still has to be done.

Another bill that I think would serve us very well and help us to save many women who are subject to violence is to direct the Secretary of State to accept service of process and mail on behalf of victims of domestic violence. Many of these victims want to keep their address confidential. And if we could have another source -- the Secretary of State, in this case, in this bill -- if that person would accept the service of process and

mail on behalf of the victim, that would be a very valuable addition for women suffering from domestic violence.

So I commend this to you, Senator Maltese. Your interest is appreciated very much. This is an excellent bill, and I urge everyone to support it.

ACTING PRESIDENT MEIER: Senator Duane.

SENATOR DUANE: Thank you. If the sponsor would yield, please.

SENATOR MALTESE: Yes, Mr. President.

SENATOR DUANE: Thank you. I'm wondering whether this bill only applies to the Penal Law, or will it have an impact on, for instance, workers' comp-definition civil suit, other places in other parts of the law?

SENATOR MALTESE: Mr. President, the sections that -- the criminal sections that the bill would apply to are very, very extensive. According to my notes, just about every one of them is under Penal Law Section 120, with one exception are stalking laws. So I believe they would apply, the definitions

would apply only in the Penal Law.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese yields.

SENATOR DUANE: I do understand that. But there are other places where I believe the words "physical injury" and "serious physical injury" could potentially apply. You know, I mean, in workers' comp, if there's an injury on the job, would this impact those proceedings or definitions used by the Workers' Comp Board members and hearing officers?

SENATOR MALTESE: Mr. President, I believe they would not apply unless they specifically refer to the definitions as set out in the Penal Law as would be changed by this legislation.

SENATOR DUANE: Thank you. And if the sponsor would continue to yield.

SENATOR MALTESE: Yes.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: On line 7 of your bill, the words "physical injury" may be established by the testimony of a victim alone. Is that a subjective or an objective standard?

SENATOR MALTESE: Mr. President, in response, the problem up till now has been that the courts have specifically indicated that the physical injury could not be proven by the testimony of the victim alone. And as a result, we've had what can be considered very, very serious omissions, very, very serious injuries that have not gone punished.

An example, Mr. President, is the fact that in the year 2000, the last year that we have records for, we had an amount of 75,318 assaults taking place in the State of New York. Now, those assaults were divided between 49,000 arrests under the felony -- as

a felony, and 25,000 as a misdemeanor.

They become relevant when we see the amount of convictions in those very same instances where we have, for instance, under misdemeanors, 38,000 arrests and only 9,000 convictions of any type. And then when we see that as far as the convictions are concerned, the pleas to the felonies were none, relatively none, but even the pleas to the misdemeanors were only 31 percent. And the plea to a violation, where the maximum sentence is up to 15 days and in some cases a fine, were 68 percent were pleas to violations. And so the assault as a felony was not much better, where we had ultimately a conviction rate that was very few in proportion to the amount of arrests.

So the problem that this bill seeks to address is that in most cases where the prosecutor is not able to prove a case other than by the testimony of the victim in the assault cases, he is forced either to take a plea to a violation, which is not a crime, or to in some cases proceed to trial and ultimately lose the case because so many of

our judges and juries take the position that these assaults are relatively harmless and not as serious as the proponents of the type of legislation that was supported by the Coalition Against Domestic Abuse.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: I sincerely appreciate the statistics and circumstances which the sponsor has just described for us.

But I do want to return to a concern that I have about this bill, and that is whether or not the words "physical injury" -- I'm afraid I'm going to have to repeat it in the same way -- which can be established by the testimony of the victim alone, whether we're creating a subjective standard or an objective standard. I don't know really how to say it and ask the question any more clearly. There may not be an answer.

But I would like to try to get to it if I can.

SENATOR MALTESE: Well, the victim's testimony, while it would be subjective, does not preclude the physical evidence.

What we are trying to do is address a problem where the judges have been totally ignoring the physical victim's testimony. Now, my definition of "objective," according to Merriam-Webster's Collegiate Dictionary, is "expressing or dealing with facts or conditions as perceived without distortion by personal feelings." So the subjective, we have "judgments modified or affected by personal views, experience, or background."

So using Merriam-Webster, I would say that in this case it probably would be both objective and subjective. And after all, the bottom line is that serious physical injury is objective. It's something that is proved by other evidence in addition to the testimony of the victim.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: I want to see if the sponsor maybe would as well as using Merriam-Webster's Dictionary, also consider Black's Legal Dictionary, is that what it's called?

SENATOR MALTESE: Yes, Black's.

Well, Mr. President, if that's a question whether I would consider Black's, Black's was the dictionary that we referred to in law school, a very, very substantial volume. I don't know that I've had many occasions to consult it in the recent past. But I'd certainly be open to any information that my colleague has discerned from Black's Dictionary.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator

Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: And along the same lines, how about a reasonable person's standard?

SENATOR MALTESE: Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese.

SENATOR MALTESE: If I understand the question, the problem here is that some of the judges have not taken a standard that a reasonable person would adopt.

I think when we talk about common sense, sometimes it appears from reading some of the decisions -- we have the case that I cited, the cases that were cited by my colleague Senator Oppenheimer and others - it's pretty obvious that this legislation is badly needed, because what we're trying to do is dot every "i" and cross every "t" so that you would spell out very definitely the situations that would prevail and the

situations that exist that would enable a judge or a jury to convict a person accused of the applicable level of assault.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: Without disagreeing with the problems that have arisen both in the examples provided by the sponsor and by the sort of anecdotal situations described by the sponsor -- and I still don't think that -- and again, you know, I'm not an attorney, but I thought that we need to be clear about whether this is a subjective or an objective standard.

And if that's not what's happening here, then I'll accept that. But I just want to sort of once and for all -- again, not in any way negating or discounting the anecdotal

or, you know, factual situations which the sponsor has given us, I just want to know whether that's one of the things we're trying to achieve in this bill.

SENATOR MALTESE: Mr. President, I understand that these definitions, as I recall when we first put this bill before this body in 1996, was taken from the Model Penal Code. And I am informed by counsel that the definitions are consistent with the FBI's uniform crime reports definition of aggravated assault and simple assault, which is the vast majority of the cases where these definitions would be applicable.

SENATOR DUANE: Thank you. And through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: Is there a remedy if someone abused this provision or if someone

lied in trying to fall under this provision of the law, is there a way that there would be punishment for that or the person who's impacted by that could have their wrong redressed?

SENATOR MALTESE: Mr. President, through you, I think it's a little afield. But certainly all the normal laws and statutes would apply as to perjury and falsely reporting an incident. I think there's a remedy. The remedy I think would be, you know, the criminal penalties for perjury or falsely reporting an incident.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: I understand that. But I have a concern just to be covering all bases for a bill like this, which

I definitely am leaning towards voting for, because I do think we need it.

But just to make sure that we're on very solid ground, it might be difficult to prove that a person is not telling the truth about this. How do you think that we could protect ourselves from someone lying or abusing this provision?

SENATOR MALTESE: Mr. President, I just think that -- speaking as a former prosecutor and, after that, a defense attorney, I think the problem is not with trying to punish those persons, those victims or alleged victims who would come forward with false claims. I think the problem here is one that we're seeking to solve by making a statute absolutely crystal-clear, the assault statutes and those statutes that are similar to them, specifically enumerated.

Here's a situation where we had a law that would appear to be very plain on its face, and yet we perhaps had judges relying on a phrase we also, thinking of Black's, we learned in law school: Expressio unius est exclusio alterius, the fact that the

expression of one would be the exclusion of all others. And therefore, we did not specifically recite every single instance that would apply.

So in this case, what we did is go back to the definitions and add every possible variation, and that included the testimony of the victim, which could be relied on to include -- to be interpreted by the judge and taken into consideration, perhaps not exclusively, but to be taken into consideration in rendering his judgment.

SENATOR DUANE: Through you, Mr. President, if the sponsor could continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: I know I covered part of this before, but I just want to be as thorough as I possibly can about this so that we create good law. Does this bill extend to any other crimes other than domestic violence?

SENATOR MALTESE: Mr. President, these are the crimes that would apply. Assault in the third; reckless assault of a child by a child daycare provider -- I was hoping you'd ask this, by the way -- vehicular assault in the second; vehicular assault in the first; assault in the second degree; assault in the second degree with a deadly weapon; assault in the second degree referring to police, EMT and fire personnel; assault in the second degree with a deadly weapon; some other assaults in the second degree; gang assault; gang assault first; assault, police firefighter; assault first; aggravated assault of a police officer; aggravated assault of a person; hazing stalking, menacing in the first, second and third; hazing second; reckless endangerment in the second; and stalking in the first, second and third degree.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: In the list I didn't hear rape included. Is rape included?

SENATOR MALTESE: I'm not aware of the specific inclusion, but there may be the definitions included in some of the rape -- the recent -- but I'm informed by counsel it's not required for rape.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: Does the sponsor perhaps think that, in that this new definition is good for a whole list of crimes, as he previously listed, that we should probably also include rape in the list?

SENATOR MALTESE: Mr. President, the defining factor of rape is not so much the physical injury or serious physical injury as the basic crime of rape itself. And so I don't think the problem there or the proof - what has to be proved is physical injury or serious physical injury, but the rape itself, the elements of rape. The sexual elements of rape.

SENATOR DUANE: And through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: I know that the Coalition against Domestic Violence has weighed in on this bill in a positive way. I'm wondering whether DAs or judges or bar associations, if they have weighed in on the bill.

SENATOR MALTESE: Mr. President,

first referring back to the rape, I'm advised by counsel it is not included in the rape statute.

And as far as the district attorneys, this was originally proposed, I believe, in 1996, when I first put it in, by District Attorney Charles Hynes of Brooklyn. And we put it in at the time. It has been approved by the DAs Association since then. And the bill itself is being carried in the Assembly by Brian McLaughlin, and I believe at last count it had some 30 cosponsors.

So it is a bill that has a generally accepted level of support and certainly overwhelming support from prosecutors across the state. Also, recollection brings to mind it was a program bill of then Attorney General Dennis Vacco.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: I looked at the list of sponsors of the legislation, and as I had previously said, this seems like a very good bill to me. I'm wondering if any Minority Senators were asked to sign on to the bill and, if not, why not.

SENATOR MALTESE: Mr. President, Minority members were not asked to sign on. And as to the reasons why, I believe I'd have to take that up with the Minority Leader, the Majority Leader. And in addition, I believe the question is rhetorical and that the asker of the question, the questioner knows the answer as well as I.

SENATOR DUANE: Through you, Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR DUANE: Comparatively speaking, I'm, you know, new around here. So

I came from a body where oftentimes bills were wide open to sponsorship by members of both sides of the aisle. So indeed, I don't really know the reason. If the sponsor doesn't know the reason, then so be it. But the sponsor does know, I would appreciate an explanation.

SENATOR MALTESE: Mr. President, I am somewhat familiar with the body that my learned colleague left to join us. And they have their own rules and regulations. And while the Speaker is sometimes very generous to the Minority of five members out of a body of 51, I submit that five members in a body of 51 cannot do any real, and I'll it put it in quotes, mischief.

As far as the reply to the Senator's second part of the question, I'll stand on my original reply.

SENATOR DUANE: On the bill, Mr. President.

ACTING PRESIDENT MEIER: Senator Duane, on the bill.

SENATOR DUANE: Thank you. I'll start with the last section first.

I'm very familiar with the rules of

body that I came from before I came here, and I have become -- I was familiar with the old rules, I'm familiar with the new rules. I may not always utilize them perfectly, but no one could ever say I haven't made best attempts to work within the rules old and new.

And I know of no rule that says that a member on the other side of the aisle is not permitted to sponsor legislation. I don't think there's a bill that I've -- well, there may be a couple of bills which I hogged to myself, but generally I have opened my bills up to sponsorship by everybody in this body, even encouraged people, by writing letters and making phone calls. I've certainly worked hard to pass bills in this body which my name was not officially associated with.

And to a certain extent, I guess it could be said that, you know, nobody should care -- as long as someone doesn't care whose name is on a bill, you can pass anything. Or something like that. It's an expression which I think this body probably invented.

Anyway, this does strike me as a

good bill. I understand that defining something like physical injury or serious physical injury is difficult to do but not impossible to do. I think that for far too long, particularly on issues of domestic violence and violence against women, that the standards were really pretty lax and that this is a way that we have to try to tighten them up and make it possible for victims to - victims and survivors to get redress for crimes committed against them.

I certainly would have liked to have really sat in a committee meeting where we could have heard the members of the Coalition Against Domestic Violence, heard if DAs and other victims' rights groups as well as defense attorneys had any thoughts about how this bill could be best put together. I don't know whether this is the best that we could do. It's certainly the only thing we have in front of us today to try to make a situation better so that people can get redress.

I probably -- in fact, I have decided I'm going to vote in favor of this. I

know you're all losing sleep over what I was going to do on this bill. But I still think it would have been better to actually been able to sit in a committee, had a hearing. I know there was a hearing in the Codes Committee, a brief hearing today on the Rockefeller Drug Laws, which is very important, although we only heard from one side.

But that said, I think that a bill like this deserves to have a full airing by all asides, and open to questions from people on both sides of the aisle. I even think that we could do this kind of a bill, since there seem to be so many sponsors in the Assembly - and I hope there's some Minority sponsors. I don't have any control over there. But whether they do or they don't, I think we're responsible for what happens in our own body here.

But I think it would be good to get everyone's input on it. I mean, the DAs, some DAs were here today on the Rockefeller Drug Laws. We could have asked them about this bill. Their experience could have been added

on to figure out -- it's not that I object to us, you know, talking to each other here. I mean, that's fine. But I do think that there are people who are more expert than we are on these things, and I think we need to have a public space where we could have that kind of hearing, public testimony.

I referred earlier to rules in the body I used to be in and rules here. In the body that I came from, rarely did a bill pass before it had one, two, sometimes three hearings. Oftentimes advocates would come in, the administration would come in. I would have liked to have known what Katie Lapp had to say about this bill. She's someone I've worked with before. I'm always compelled by what she says. There was no forum for her to come and speak about this bill. She may in fact know more than you and I know about this bill. In fact, I bet she does know more about it than we do. Certainly more than I do, I think probably more than you do as well.

And I think it would be -- I think we would be better served to have hearings on bills such as this one so that we could really

hear that much more information. For instance, the issue of rape which I raised. Though I was compelled by what the sponsor said about it, this was really the first time that I thought to raise it. Not only was it the first time I thought to raise it, I think that's because this is the first time I'm getting a chance to mull it over, if you will.

But I would have liked to have heard what others had to say about including rape and the crimes which the definition of physical injury would have been a part of. That's just one example of what could happen in a public hearing. Oftentimes, you know, we can learn things from people that come forward. And actually the people that come forward can learn an awful lot from each other. Sometimes that's the best way to get consensus on a bill and to really make good public policy.

So as I say, I probably will -- I most definitely will be voting in favor of this. But I am disappointed that we didn't have a chance before this. And in a way, we don't really have enough -- you know, two

hours to debate a bill, I mean, that's a pretty good chunk of time. But two hours of a hearing on a bill like this would be better. And then we would have the time from the hearing to discuss with people who were at the hearing ways that we could come together to make a really terrific bill.

And so I'm saddened that even though we have just two -- you know, two hours to discuss this on the floor, I wish that we had had two hours to discuss this in a committee meeting.

I am going to vote for it unless I hear from one of my colleagues some reasons why I shouldn't vote for it. But, you know, I don't think that's the way it should be.

So thank you, Mr. President.

ACTING PRESIDENT MEIER: Senator Hassell-Thompson.

SENATOR HASSELL-THOMPSON: Thank you, Mr. President. On the bill.

Mr. President, through you to Senator Maltese, I think that this is an excellent bill. And one of the things I had some queries about was the bill's attempt to

identify and to define, actually, serious physical attack and injury. Even though I recognize the necessity for it, I wanted us to be very careful that we didn't go so far in the other direction that we did harm.

However, I've been given a copy of the Family Protection and Domestic Violence Intervention Act and an interim report that went to the Governor in January of '99 prepared by the Division of Criminal Justice Services and the Office for the Prevention of Domestic Violence. And part of what I found in reviewing this was the numbers of cases - and there are just hundreds. I don't need to particularly read them.

But I think what the incidences in each of them shows is that in the absence of a definition of serious physical attack, many of these cases ended up being considered as violations, and prosecution did not occur. And in these incidences, which are very, very numerous, you know, it's a sad commentary. Because without the presence of the offender in most of these cases, and with only the victim as the testifying person, most of these

cases do not in fact get prosecuted. So from that perspective, I can appreciate and support the language of the bill.

For a couple of seconds I was a little bit concerned by the victim being the only one to testify. But I also remember a lot about over the years the numbers of cases that I have been involved with with former clients where the act itself of abuse is done very surreptitiously, not in the presence of family members, children, or anyone. So that it's the very insidious kind of ugliness that underlies this kind of abuse and the cowardliness that goes with this, so that there is no physical evidence except those present on the body of the person, and this has not stood up in court.

So I commend you for this bill and the work that you've done on it and the sensitivity that you have brought to attempting to define something that otherwise would go unprosecuted.

Just a sidebar, it was interesting because for a moment there when I thought about extreme physical pain, it occurred to me

someone had written down once that to kick a guy in the scrotum constitutes extreme physical pain, but to send somebody to jail to four and a half to nine years is kind of extreme. However, I know that that's not the kind of thing that you're talking about in this bill, and so I support the bill and I support you in this effort.

SENATOR MONTGOMERY: Mr. President.

ACTING PRESIDENT MEIER: Senator, we have a list going. I do have everyone down that indicated an interest in speaking.

Senator Stavisky has the floor now.

SENATOR STAVISKY: Thank you, Mr. President. I've been listening very carefully to the debate, to the questions, and to the responses. And it's sort of difficult for those of us who are not attorneys and who frankly have very little experience in the criminal justice system.

My question for the sponsor, or my questions for the sponsor, if he would yield -

ACTING PRESIDENT MEIER: Senator

Maltese, do you yield to a question?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR STAVISKY: How would the prosecution of cases improve if this -- in terms of domestic violence if this legislation were enacted? In other words, would it be - would this legislation affect victims of domestic violence or assaults or vehicular accidents or -

SENATOR MALTESE: Mr. President, through you, yes. Because the elements of that recitation of the cases, all the assault cases and the remainder under Section 120 and I believe under Section 160, were all cases that referred to the victim incurring either physical injury or serious physical injury.

And the problem until now, or at least until this bill hopefully becomes law, is that the physical injury or serious physical injury was not proven to the satisfaction of either the prosecutor, who in many cases realized he couldn't meet the

burden of proof and therefore had to make a plea or certainly reduce the charges, in the vast majority of cases, or, where he chose to prosecute the case as is, did not meet the burden of proof imposed by the judge. So as a result, you then ended up with decisions like the one that I read and that Senator Oppenheimer referred to.

I think that the problem here is not so much -- not so much the normal obfuscation that you have in Penal Laws or any type of statutes. If you go back to the physical injury and the changes that we're talking about, we tried to include everything which would be evident to the normal common sense of a juror or the normal common sense of a judge -- I'm sorry, a member of the jury or a juror.

Now, here we're saying physical injury means impairment of physical condition or -- and originally you had a situation where the bill said substantial pain, and that was felt to be sufficient. Unfortunately, case law tells us it was not. So we added, because some judges were saying, well, an illness is

not a physical injury -- and I suppose technically it is not. So we added illness or the presence of a palpable contusion.

And the reason that was added is because in many, many cases, especially in the so-called minor assault cases, you had contusions and bruises which the judges were saying this doesn't rise to the level of a physical injury.

Then we added -- and you can almost go back and pick particular erroneous, in my opinion, judicial decisions that excluded wording, and we are now attempting to add it. And this is not a creation of mine or a creation of any of us here. As was mentioned earlier, it's in the Model Penal Code. It's -- the FBI has come up with these decisions because of cases all over the country where they were faced with similar problems.

So they added scalding, because in some cases judges were saying, well, it's not a physical injury if it's a burn, which by the way defies common sense. And then they went further here with the wording. "Physical

injury may be established by the testimony of the victim alone." Because in so many cases, the only -- it's similar to a homicide. But at least in an assault, you have a living, breathing victim who can testify. But in most cases, especially in spousal abuse, or in abuse -- family abuse, you don't have -- it's not done in the middle of a mall or in the middle of a shopping center or anyplace where there's victims. So they're trying to establish physical injury by the testimony of the victim alone.

And then we went further and said physical pain may be established by evidence of the injuries inflicted in the light of common experience. Because, again, we had - and especially judges coming up with the fact that here this person -- and there's one case in here where the person was hit with a baseball bat. And they said, Well, it doesn't seem to rise to the level of physical pain necessary in order to prove the crime. Well, it's too bad that that judge couldn't have been the recipient of a good blow from a baseball bat, so maybe it would have put some

common sense into his head, because it's self-evident.

And so -- but now we're going to say it's in the light of common experience. If you're hit with a bat, it's common experience that you're going to suffer some pain and that pain rises certainly to the level of a physical injury.

SENATOR STAVISKY: Thank you, Professor Maltese.

SENATOR MALTESE: Unlike Professor Stavisky.

SENATOR STAVISKY: One other question. Mr. President, through you.

SENATOR MALTESE: Sure.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield to another question?

SENATOR MALTESE: Yes.

ACTING PRESIDENT MEIER: He yields.

SENATOR STAVISKY: What has been the experience in other states? Do they have similar statutes?

SENATOR MALTESE: Mr. President, through you, there have been other cases with

very similar statutes, and that's the reason that the model code was adopted. And once the model code was adopted -- and I'm not sure when, but I know we used it in 1996, so it had to be before that -- other states across the country immediately adopted it. And then when the national District Attorneys Association also recommended it, even more states adopted it.

But I couldn't tell you whether - how exactly it conforms to the statutes in other states.

SENATOR STAVISKY: On the bill, Mr. President.

ACTING PRESIDENT MEIER: Senator Stavisky, on the bill.

SENATOR STAVISKY: I commend Senator Maltese for his learned dissertation and his willingness to respond to all kinds of questions from nonspecialists. And I certainly intend to support this bill.

ACTING PRESIDENT MEIER: Senator Gentile.

SENATOR GENTILE: Thank you, Mr. President. And certainly this bill takes us a

long way in this area. But I do wish to ask the sponsor, Senator Maltese, several questions, if he would yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield for a question?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: Senator, first of all, in the area that was earlier spoken about, the area of rape, just to be clear about it, a rape charge and an assault charge are -- may happen -- the incident may happen at the same time, but those are two distinct charges. Am I correct about that?

SENATOR MALTESE: Mr. President, as the former assistant district attorney well knows, yes, you are absolutely correct.

SENATOR GENTILE: So that for the members who might be concerned about this not being in a rape statute, nothing precludes a prosecutor from charging any type of assault in addition to a rape should a victim be hurt during the course of a rape.

SENATOR MALTESE: Yes. Through you, Mr. President, yes.

SENATOR GENTILE: If the Senator will continue to yield, I'll -

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: Thank you. Thank you, Senator.

Also, I'm curious to know your background, since you too are a former assistant district attorney, about this particular statute and the words "substantial pain" which now you are changing. Would you consider that terminology, "substantial pain," as the reason for which many courts have not deemed many of the assaults to be an assault and, rather, a violation or harassment?

SENATOR MALTESE: Mr. President, in response, we're taking out the word "substantial" because the judges and the prosecutors in the appropriate cases simply

didn't seem to be aware of what constituted substantial pain.

So what we're seeking to do with a recitation of the specific instances of what constitutes, essentially, substantial pain, we're seeking to clarify that.

SENATOR GENTILE: Right, by taking out the word "substantial" and just putting in "physical pain."

SENATOR MALTESE: Well, not only "physical pain," but we're elaborating on that by adding illness, presence of a palpable contusion, laceration, scalding, or wound. In other words, in those cases we're implying that these cause pain -- or at least expressing, not even implying, that these cause pain and that it's self-evident that they would cause pain. And then we refer to the ways that physical pain or physical injury might be established by evidence.

SENATOR GENTILE: I see. If the Senator would continue to yield, I do have other questions.

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The Senator continues to yield.

SENATOR GENTILE: Thank you.

Senator, you also include the word "illness" in this definition. I'm just curious as to how that fits into a definition of physical injury.

SENATOR MALTESE: Mr. President, in response to that, I just -- I don't remember the names of the cases, but we had situations where there would be an injury sustained by a victim and the victim thereafter, when called upon to testify, would refer -- for instance, with blows possibly to the stomach, would speak about stomach pains and bowel problems and so on and so forth. The same way which might be more correctly classified as an illness.

And the same thing applies to blows to the head, where the patient would testify that -- to some maladies that would probably be more closely akin to illness rather than an injury as such.

So it's probably the result of an injury that might result in an illness that is

very clearly traceable to the original injury. And therefore, we sought to make it all-inclusive by adding the word "illness."

SENATOR GENTILE: If the Senator would continue to yield -

SENATOR MALTESE: I don't think we're talking, for instance, about, you know, the normal illnesses, whooping cough, scarlet fever or any of the others that are no longer with us.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR GENTILE: So I'm trying to understand, then, what illness -- what illness -- if I'm a prosecutor, what illness would I see in a victim that would make me charge an assault?

SENATOR MALTESE: Well, let's see. I think the -- Mr. President, through you, the only ones I could possibly refer to are the illnesses that might take place as a result of the injury. Possibly by having an injury to a particular organ, you might very well be more susceptible to some illness.

And I don't -- possibly -- I'm told

by counsel possibly burns might cause some illness that would result as a -- would be sustained by the victim as a result of the original injury.

Your guess -- in final answer, your guess is as good as mine.

SENATOR GENTILE: So, Senator, if you would continue to yield.

SENATOR MALTESE: Yes.

ACTING PRESIDENT MEIER: The Senator yields.

SENATOR GENTILE: If I gave you an example. If a kick to the kidneys, for example, produced incontinence, would that be an illness?

SENATOR MALTESE: Mr. President, I knew that if I left it up to the Senator, he'd come up with a good one.

Yes, I think that would be appropriate.

SENATOR GENTILE: That would qualify?

In addition to the kick itself.

SENATOR MALTESE: In addition to the kick itself, which might have other

results, absolutely.

SENATOR GENTILE: So in effect, it would be two counts of assault in that case?

SENATOR MALTESE: Well, no, Mr. President, through you, I think it would be one count of assault with the result being aggravated injuries. But the count I think would still be the same. It was still the original kick.

SENATOR GENTILE: Right. Well, as a prosecutor -

ACTING PRESIDENT MEIER: Senator Gentile, are you asking Senator Maltese to yield?

SENATOR GENTILE: Yes, if he would.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The Senator yields.

SENATOR GENTILE: I would think under the statute you could charge someone for

the pain related to the original kick and then later on for the physical injury created by the illness, whatever that might be. The incontinence or whatever that might be.

SENATOR MALTESE: Well, Mr. President, whatever specific urinary problem the victim would have, we would throw into the counts, as any good district attorney would, so you'd end up a good indictment.

SENATOR GENTILE: If the Senator would continue to yield, because -

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The Senator continues to yield.

SENATOR GENTILE: -- you just mentioned the word "indictment," and that sort of segues into my next question.

And that centers around the issue of the injury being established by the testimony of the victim alone. Given that statement in the law, would that preclude the use of medical records to establish an injury?

SENATOR MALTESE: Mr. President, through you, absolutely not. What we sought to do is in those cases -- and there are very many of them, and I recited earlier the tens of thousands of assaults that take place and the arrests that are made as misdemeanor assaults that are either dismissed or pled down to violations.

What we are seeking to do is simply indicate that if all we have is the testimony of the victim, that if the victim is credible and the -- either the judge or the jury chooses to believe the victim, it can't be overturned on appeal by an overzealous jurist.

SENATOR GENTILE: If the Senator would continue to yield.

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: Thank you, Senator.

However, you and I both know that medical records sometimes are the incontrovertible evidence that a prosecutor

uses to establish a count of the indictment. In this instance if, for example, an injury were borderline, a borderline injury, but the testimony from the victim indicates that the victim felt pain, was hurt and, you know, maybe was doubled over for an hour, yet the medical records at some point that you see medical records don't really support any type of injury that we would know in the common sense, you're a prosecutor in front of a grand jury, how would you make that decision based on this statute whether to go with the testimony alone and charge maybe a D felony for serious physical injury and know somewhere down the road there's nothing to really back that up other than the testimony of a victim who we assume is not a medical expert?

SENATOR MALTESE: Mr. President, I believe that we would -- I'm looking down a list of those instances in D felonies where physical injury is sufficient. There are a great deal of them. But I think that that isn't the type of case -- the case enumerated by the good Senator is not the type of case we're talking about.

The case law that we had and that we were talking about with some of the DAs who came to see us, the typical case was not one that they had even medical testimony or that they had hospital records. In many of those cases, we had no corroborating evidence at all, we simply had the testimony of the victim as to the injury. And that was the problem. So -- and as to what it was, as to what the injury in fact was.

So I think it speaks for itself. Where the prosecutor has additional evidence, certainly he's going to use it and it's going to come out in trial and he'll submit it to a grand jury. But where it is a question of the testimony of only the victim, as covered by "physical injury" and not in "serious physical injury" in those cases covered by the more serious charges, they would have to rely on what they have.

SENATOR GENTILE: If the Senator would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr.

President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: Thank you. Through you, Mr. President.

Senator, then I would assume, then, under this statute you would go ahead and charge a -- charge an assault just based on the testimony, even though that testimony may be a close call. Whether it's really an assault in terms of having physical pain, illness.

It could be somebody, for example, tripping somebody else in the course of whatever else was happening. One -- the defendant tripped the victim, and that victim says, I hurt my knee. Now, that's the testimony of the victim. As a prosecutor, would you feel that to be sufficient enough to go into a grand jury and charge an assault?

SENATOR MALTESE: Mr. President, through you, I wouldn't go into the grand jury, because that would probably be a misdemeanor anyway. And if that was the charge itself, quite frankly, somebody hurt

their knee, I don't think it would reach any type of criminal level.

That's probably the type of case that you would want to settle with a little kick in the pants, possibly, by the arresting officer, rather than anything more than that.

SENATOR GENTILE: Senator, I agree. You caught me on that one. Assault thee would not be a felony even under this statute.

But if you would continue to yield, Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: I also notice that in addition to taking out the word "substantial," you also took out the very much hated word by prosecutors "protracted," the word "protracted," protracted disfigurement or protracted pain.

But in taking out the word

"substantial" and in taking out the word "protracted," you did insert the word "extreme." I'm wondering, Senator, how any less vague is the word "extreme" from all the problems we have been having prior to this with the word "protracted" and the word "substantial"?

SENATOR MALTESE: Mr. President, through you, I took the liberty of having my staff look up some of these commonly accepted words that we think we know the meaning of. And one of the few that actually means exactly what we think it does is "protracted," which they ended up coming forward also with Merriam-Webster, with "to extend forward or outward," which is the -- I took the most simple definition.

I think the problem was that judges and juries were having trouble with "protracted" because they thought it meant very far extended. So when they talked about illnesses, they thought that it would have to involve a lengthy hospital stay or involve a protracted injury or illness.

If you look at the serious physical

injury section as to what we took out, we took out the substantial risk of death, because judges were interpreting it as meaning that you had to have something that practically spoke about an amputation at the neck to have a substantial risk of death. But we did leave in "risk of death," which is the common-sense definition, or an injury which causes death, or -- and then we took out again "serious" and "protracted" disfigurement and "protracted" impairment of health. Same reason. We wanted to leave in "impairment of health," so that if you had a situation that led to a debilitating illness, for instance, you then had a situation that would still fit into serious physical injury.

And then we had protracted loss or impairment of the function of any bodily organ. Same thing. We felt that the courts were coming up with the fact that if you lost the use of a bodily organ for, let's say, a limited period of time, they said, Well, it's not protracted, it's not extended enough.

Then we came up with those learned masters of jurisprudence that indicated that a

portion of an organ is not an organ. So we added "or member," which, if we consult our trusty Merriam-Webster again, came up with a definition of "member" which is "a body part of an organ." Very, very technical, but - and that's being sarcastic. But it spells it out so that even a judge could understand it.

And then we went into the serious physical injury may be established by proof that the victim required surgery. And that was the same thing. For some reason, some judges didn't feel that even injuries that required surgical operation -- and in some cases, they were operations of the stomach, the body cavities, and what have you. They still felt it didn't qualify.

So we added that, and we added "a course of medical treatment or physical rehabilitation," because they were completely knocking out anything that required rehabilitation or therapy or what have you.

So then, to make it all-inclusive, because in the final analysis we wanted to give them the framework that a jury could still exercise its common sense, or a judge

could exercise his common sense -- or a defense lawyer could exercise his common sense and try to weigh whether his client was going to be found guilty, so that he could possibly seek a plea and save the time and expense of the state in seeking the conviction all the way through trial.

So we tried to cover just about everything. And it isn't -- when I say "we," it's the extended "we." As I say, it was the model code. It wasn't my invention. We adopted the model code, and we adopted the FBI rules and regulations.

SENATOR GENTILE: Well, thank you, Senator, for that very full-bodied answer.

I'm still not clear how the word "extreme" is more definitive than the other words. As you so clearly said, we've had tremendous problems with the word "substantial," we had tremendous problems with the word "protracted" as to what that really means.

And having known the problems with that, I just don't want to see us enact the

statute, replace those words and enact a statute that adds the word "extreme." Because I'm not sure how the word "extreme pain" is any more definitive than "protracted pain" or "substantial pain."

SENATOR MALTESE: Mr. President, through you, your guess is as good as mine. We -- I'm looking at the section "extreme physical pain." I think it means extreme physical pain, and I'll have to rely on that.

As to -- one of the few words we didn't look up, because we anticipated a lengthy debate, was "extreme." So "extreme" is extreme.

SENATOR GENTILE: The reason I -

ACTING PRESIDENT MEIER: Senator Gentile, do you want to -- give me something to do, please -

(Laughter.)

SENATOR GENTILE: Yes. Okay, I will. I will do that, Mr. President.

ACTING PRESIDENT MEIER: -- so that I can stay awake.

SENATOR GENTILE: Yes, Mr. President.

SENATOR MALTESE: Thank you very much, Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR GENTILE: This riveting debate. Thank you, Mr. President, if the Senator would yield, I would -

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The Senator yields.

SENATOR GENTILE: Well, Senator, the reason I harp on this is because as a prosecutor, you, I and many others here who have been prosecutors would often go back to the legislative intent of this section to figure out what in the world did the Senate, what in the world did the Assembly, what in the world did the Governor mean by "protracted," what did they mean by "substantial physical pain," "protracted pain or impairment," what did they mean?

And I have to tell you, Senator, the legislative intent, as indicated when this was passed originally, is not clear. Is not

clear. And therefore, as a result, we get many of the cases that you've just cited about wild decisions, chaotic type of rulings by courts as to what is substantial pain, what is protracted impairment of health. We get all -- it's all over the board. Because the Legislature, either in its legislative intent or in its actual wording of the law, was not closer as to what that meant.

So what I'm concerned about now is that we take those words out, but then we introduce a word like "extreme," and we're back to where we started in terms of what are we doing here and what do we mean. And if somewhere down the road a legislator comes back to look at the legislative intent of this bill, what would that legislator -- what would that prosecutor see in terms of legislative intent as to extreme physical pain? I'm not sure it's clear enough, that we're back to where we started from with the words "extreme physical pain." Would you agree with me on that?

SENATOR MALTESE: Mr. President, I think it would -- I agree with the good

Senator. And I think it would take an extremely zealous prosecutor to read this far into the debate and come to the definition of extreme physical pain.

SENATOR GOODMAN: Mr. President.

ACTING PRESIDENT MEIER: Senator Goodman.

SENATOR GOODMAN: May I prevail upon you to permit me to make a very brief introduction of an honored guest who happens to be with us momentarily in the chamber?

ACTING PRESIDENT MEIER: Senator Goodman.

SENATOR GOODMAN: I'm delighted to present to you -- those of you who I know are very enthusiastic watchers of "The Sopranos" will be delighted to know that we have in our presence today Mr. Joe Pantoliano, who would be more familiarly known to you as Ralphie from "The Sopranos." He's in the front row. May we give him a warm New York State Senate welcome.

(Applause.)

SENATOR GOODMAN: Thank you, Mr. President.

ACTING PRESIDENT MEIER: Now may we appropriately enough return to the discussion of pain and mayhem.

(Laughter.)

ACTING PRESIDENT MEIER: Senator Maltese.

SENATOR GOODMAN: -- Mr. President, you might find your kneecaps broken. Thank you.

SENATOR GENTILE: Senator, I don't know who is where, who goes next.

SENATOR MALTESE: Yes. Yes.

SENATOR GENTILE: But anyway, do you see the concern I have about using those types of words, that characterization, extreme physical pain?

SENATOR MALTESE: Yes, Mr. President.

SENATOR GENTILE: Given the history we've already had with this section.

SENATOR MALTESE: Yes.

SENATOR GENTILE: Do you see that?

SENATOR MALTESE: Yes.

SENATOR GENTILE: So at some

point, I would ask that maybe we do an amendment to this section so that we can better define extreme physical pain.

SENATOR MALTESE: Mr. President, in 1996 when we first discussed this legislation, we took the recommendations of Senator Al Waldon, and as a result I think we ended up with this bill. We'll certainly take a look at any suggestions that are made by Senator Gentile.

The problem we have is that what we're trying to do is stay very closely to the model legislation so that we can in turn rely on decisions in other states that are utilizing the same wording. So that in some -- so in some sense, we would have the answer to Senator Gentile's thoughtful concern about what the legislative intent was.

SENATOR GENTILE: Thank you, Senator. I appreciate you taking that into consideration for future amendments to this section.

If the Senator would continue to yield, I do have a question.

SENATOR MALTESE: Yes, Mr.

President.

SENATOR GENTILE: Yes, Mr. President, if the Senator would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

The sponsor yields.

SENATOR GENTILE: Thank you.

Senator, also in the legislation you have, as part of a serious physical injury may be established, and you go through a series of different ways that serious physical injury may be established, proof of a series of things. One of them happens to be admitted or -- was admitted to a hospital as a patient for medical treatment.

Now, Senator, just taking that at face value, what would be the situation if someone were involved in a case, involved in an assault, taken to a hospital but then released the same day, treated and released, treated and released within maybe an hour after coming to the hospital? Would that be sufficient under this section to charge a serious physical injury?

SENATOR MALTESE: Mr. President, through you, I don't -- I believe that it's the normal interpretation of admitted. I assume that an admission usually is for an overnight stay. I don't know any place in the Penal Code or any other definition in the statutes where they speak about "admitted." So -- maybe committed, but not admitted.

So I don't know. But I assume it would be for an overnight stay and it would be weighed accordingly.

SENATOR GENTILE: So, Senator, if you would continue to yield. Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: Thank you, Mr. President.

Through you, Mr. President. So I'm assuming, then, what you're saying is that the word "admitted" presumes that it's at least a 24-hour period of time that someone is in the hospital?

SENATOR MALTESE: Mr. President, through you, what we're seeking to do is establish a level of serious injury, serious physical injury. I think a prosecutor or a juror or a jury would take a look at it and see it for what it really is.

What we're seeking to do is cover those situations where a person, as a result of an injury sustained by a perpetrator, was admitted to a hospital and none of these other conditions applied. And I think that would be weighed as far as whether it was a technical admission, whether the person actually was in the hospital for a couple of hours, or whether the person was in for overnight or six months.

So I think it's a matter of interpretation, and I think it would be weighed accordingly.

SENATOR GENTILE: Then through you, Mr. President, if the Senator would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: Given the types of problems we've had with this section for many years -- and you and I have dealt with those problems -- to leave a section of this law, as you say, to interpretation brings us back into that quagmire of judges and courts and juries deciding one way or the other whether this is a serious physical injury.

Wouldn't it be better, given the history we've had with this section, to really pin down what we mean by an admission to a hospital?

SENATOR MALTESE: Mr. President, I think that we've attempted, as much as possible, to specify exactly what we mean by serious physical injury. And I think admission to a hospital would, under ordinary circumstances, imply that an injury is serious.

So I think as far as the hospital stay itself, I don't know that that is that pertinent. And, quite frankly, I'm very satisfied with the wording of the statute as

it is. "Admitted to a hospital" I think covers those isolated instances where the only thing we had to indicate serious physical injury was an admission to a hospital.

SENATOR GENTILE: And then, Senator -- if the Senator would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you continue to yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR GENTILE: So given what you just said, it still comes down to whether a court or a judge or a jury decides whether just an admission to a hospital rises to the level of a D felony.

SENATOR MALTESE: Mr. President, as the Senator is aware, I don't think that that's the sole criteria. I think that this is one of the factors taken into consideration. And we might very well have other factors -- the injury, the people testifying to the circumstances of the injury,

how -- where it occurred, how it occurred, under what other mitigating circumstances. And then where you have a question as -- only dealing with the severity of the injury, the fact that the person was admitted to a hospital under ordinary circumstances would certainly indicate to a thoughtful person of normal discernment and intelligence that it rises to the level of a serious physical injury.

SENATOR GENTILE: Thank you, Senator.

On the bill.

ACTING PRESIDENT MEIER: Senator Gentile, on the bill.

SENATOR GENTILE: I want to thank Senator Maltese. And certainly he's criss-crossed this bill with definitions.

And unfortunately there was one on the word "extreme" which still troubles me, in that -- not because this is a bad bill. I think this is a great bill and it certainly will be a help to prosecutors and to victims in getting better justice out of assault charges.

However, the word "extreme," as we have discussed, is still troubling to me because I just fear that that word "extreme pain" will take us right back with defense attorneys into this quagmire of what is and what isn't extreme physical pain. And that is just the same quagmire defense attorneys and courts and juries have taken us into with the words "protracted impairment of health" or "substantial physical pain."

And the only reason I object to the word or question the word "extreme" is that I'm afraid we're not going to get out of that quagmire. And that's why, Senator, I suggest and implore that we look at that word, that phrase "extreme physical pain" and maybe do a further definition -- if not in this bill, in a subsequent bill -- to that.

Having said that, let me congratulate you on bringing this forth. Because of any section of the Penal law that has been a real problem for prosecutors and for victims who are not getting the justice they deserve, it has been the assault sections of our Penal Law. And in order -- the way you

have reworded our Penal Law sections on physical injury and serious physical injury I think for the most part will help that whole issue of what is physical injury, what is serious physical injury.

But for that terminology of "extreme physical pain," I think you have done a very excellent job of trying to pin it down the best way we can in terms of what it means.

So I think victims, whether they be domestic violence victims -- whether they be victims of street assaults, whether they be victims of assault or reckless endangerment or any of the myriad areas of the law which these definitions are a part of -- will benefit from the fact that it's more precise with examples of what physical injury is.

But for that word "extreme," I would say this was a perfect amendment to this section of the law. But even with the word "extreme," it's a very good amendment to this section of the law. So I will be voting for it and urge my colleagues to do the same.

Thank you, Mr. President.

ACTING PRESIDENT MEIER: Senator

Montgomery.

SENATOR MONTGOMERY: Mr. President, through you, I wonder if Senator Maltese would answer a couple of questions.

ACTING PRESIDENT MEIER: Senator Maltese, will you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR MONTGOMERY: Thank you.

Senator Maltese, I just want to be clear about the family definition vis-a-vis the legislation here. It refers to domestic -- members of a domestic family.

SENATOR MALTESE: Mr. President, through you, there's no definition of family in the -- this is Senate 95. I think you might be looking at a prior year's bill. I think we had a more elaborate bill in '96 when we debated it with Senator Waldon.

This is simply defines, in one page, physical injury and serious physical injury.

SENATOR MONTGOMERY: Oh, okay.

Through you, Mr. President, then let me ask my question another way.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield to another question?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The Senator yields.

SENATOR MONTGOMERY: In the event that we have a situation where two youngsters are -- get into an altercation and one of those youngsters is injured -- i.e., a black eye or some laceration or other -- and it turns out, as young people do very often get into physical contact with each other, it's not really an instance of abuse or instance of criminal activity that's guiding this physical incident. Would that, at any rate, fall under this legislation?

SENATOR MALTESE: Mr. President, I'm looking at the definition of assault in the third degree, which is punishable by up to one year in prison. A person is guilty of assault in the third degree when, with intent to cause physical injury, he causes such

injury.

I believe that type of an injury would probably classify as an assault third degree. At the same time, I can't see a prosecutor making that anything other than a violation, if they even make an arrest in the first place.

SENATOR MONTGOMERY: Through you, Mr. President, I would like to ask another question.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield to a question?

SENATOR MALTESE: Yes, I do, Mr. President.

ACTING PRESIDENT MEIER: The Senator yields.

SENATOR MONTGOMERY: Okay. So in the case of the incident that I just described, it could be two siblings in a home, it could be two friends, it could be two classmates in a school. But nonetheless, in any event, there is no exception, except through the judgment of the prosecutor, to this law, who it applies to.

SENATOR MALTESE: Well, the -

Mr. President, through you, I think when you're writing criminal statutes, they say that they must be strictly interpreted. And I think that would be one of the situations, aside from any -- if we use the underage defendants as an instance, they would be subject to penalties, of course, appropriate to their ages.

But let's assume that we have two people covered by this. I think that the average prosecutor, even if a cop made an arrest at the scene, possibly to break up a fight, I think common sense would prevail and this is the type of situation that would be resolved with maybe an ACD or something like that.

SENATOR MONTGOMERY: And one last question, Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield to another question?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR MONTGOMERY: Thank you.

Through you, Mr. President, I'd just like to ask Senator Maltese to clarify for me, even in the event of a physical injury -- and I want to continue to focus on -- essentially on minors, on kids who get into these altercations fairly frequently -- what is the level of the conviction? Is that assault in the third degree, or is it more than that? Or how far does that go in terms of physical injury versus serious physical injury?

SENATOR MALTESE: Well, Mr. President, I think you might very well, in that case -- I mean, if I were either a defense lawyer or a prosecutor, I think that would fall within the harassment statutes, which are punishable as violations up to 15 days.

And I think there you would have - even though the injury is classified as a physical injury, I think it would probably be more likely to fall under strikes, shoves, kicks, or otherwise such other person to physical contact or attempts or threatens to do the same.

So I think especially where

youngsters are involved, what you have is common sense prevails. And I don't see, with all that law enforcement has to do, that anybody would seriously attempt to charge what many of us engaged in as youngsters with an assault charge or conviction.

SENATOR MONTGOMERY: Okay. One last question, Mr. President.

SENATOR MALTESE: Yes.

ACTING PRESIDENT MEIER: The Senator yields.

SENATOR MONTGOMERY: Thank you.

Senator Maltese, you have defined physical injury here. I don't recall, from the School Safety Act that we passed last session, what the extent of -- how they define this situation. But you do know that we now have -- it is possible for a young person who is in middle school, high school, even elementary school to be charged with an E felony.

And I'm just wondering, how does this bill, your legislation, mesh with our School Safety Act? Because in that instance, in the event that there is an altercation in a

school, it is possible for a person to be charged with an E felony. And I'm just wondering if this bill further defines what those charges -- what would cause a person to receive such a charge.

SENATOR MALTESE: Mr. President, I'm informed by counsel that she believes that was under the Education Act. What we have here is a definition which can be referred to by other statutes, but it's a definition under the Penal Law. And these are a set of definitions under Article 10 where we're referring only to the Penal Law.

So I guess the bottom line, the answer to your question is I don't know.

SENATOR MONTGOMERY: Okay. Thank you, Senator Maltese.

Mr. President, just briefly on the bill.

ACTING PRESIDENT MEIER: Senator Montgomery, on the bill.

SENATOR MONTGOMERY: These bills like this one and many others that we debate and pass in this chamber are very troublesome because, as I view it, more and more we are

casting the net to younger and younger people to be caught up in the criminal justice system. They are not excluded in any of the legislation. There is no indication that we intend at all for prosecutors to consider age. Even in the School Safety Act, it is not there.

And so while, you know, this looks very good, it's important to protect people, especially people who are involved in domestic violence situations, this really is going to, in addition to making it possible for the prosecutor to more specifically define and prosecute based on the definitions here, it is also going do leave open a very wide area where prosecutors can also bring charges and conviction against younger and younger people for behavior which is essentially what most young people get themselves involved in, especially young males.

And I can say to you especially young African-American males, because they are very contact, physical-contact-oriented. So one is going to get into a fight, the other one is going to get a black eye or whatever it

is that happens when they get into these scrapes, they are friends the next day or the next two days, but if one in a fit of anger calls the police and there is an arrest made -- or some parent, because it's very often the parents who are most outrageous when it comes to this kind of behavior, calls the police, the police come, and that young person is now with a felony conviction.

So while I am extremely concerned and sympathetic about what happens in domestic violence cases, I also am equally concerned about what happens to young men and women who might be caught up in this particular piece of legislation, be charged, and really unnecessarily, because they are just acting out as regular teenagers or below.

So I'm going to be voting no on this bill.

ACTING PRESIDENT MEIER: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Thank you. Through you, Mr. President, if the sponsor would yield for a few brief questions.

ACTING PRESIDENT MEIER: Senator

Maltese, will you yield to a question?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR SCHNEIDERMAN: Thank you. I have questions in two areas. I understand the effort to come up with a definition that is more workable, but I'm concerned that in the drafting there may be some more problems lurking here were this to become law.

First of all, I would ask -- I don't think I understand the elimination of the requirement for "protracted," the word "protracted" being taken out when it comes to the definition in Section 10 of this bill. It would seem to me, then, by taking out "protracted," it's possible that a very painful but very brief impairment, which you may suffer by having the wind knocked out of you or by being kicked in a particularly odious place, could fall into the qualification of serious physical injury. Is that correct?

SENATOR MALTESE: Through you,

Mr. President, what we sought to do by the elimination of "protracted" is having "impairment" stand alone rather than -- in other words, as I see it here, the "protracted" is simply before "impairment of health" or "protracted," again, "loss or impairment of the function of any bodily organ or member."

So I think -- and I don't -- I only can speak for my own thoughts in adopting the language. I don't know what was in the minds of the original drafters. But it seemed to make some sense to me when I read through some of the case law that the word "protracted" was being interpreted by judges to mean an unnecessarily lengthy period of time.

So I think by leaving it out we end up with not having a length of time as a predicate toward the impairment of health or the other situations that are enumerated in the statute.

SENATOR SCHNEIDERMAN: Well, through you, Mr. President, I understand the difficulty. I'm just afraid that by taking out any durational requirement, we're opening

ourselves up to a whole other set of problems.

For example, the impairment, no matter how short in duration, of the function of any bodily organ. Well, you know, if someone loses their breath or passes out - and I actually had to defend someone in a case like this once, where someone passed out as a result of some sort of a chokehold or a game -- not really a chokehold, but a game. That would be a momentary impairment. The person would revive themselves quickly. But under this definition, certainly losing consciousness, however briefly, is an impairment of a function of a bodily organ.

So it seems that maybe we do need to come up with something else. And I'm wondering if you might consider something that made it clear that a duration of a very short period of time was not what was required, but that something beyond the immediate pain of being kicked, perhaps, resulting in no injury, or the impairment through some contact that departed quickly would not be what was intended here.

SENATOR MALTESE: Mr. President,

through you, I agree that that would not be what was intended, certainly under a definition of serious physical injury.

But at the same time, I think although we didn't again say in the light of common experience, I think this is just one element of the crimes that would be -- the perpetrator would be arrested for or charged with or convicted of. And I think that what we're simply trying to do is clarify the definitions.

And we're not going to be able to cover every single extension of law that could possibly be inferred or implied or made up by a good, ingenious district attorney seeking to defend his client.

So I think what we have again I say is pursuant to the model code. We have the same section, pretty much the same section, although I remember that it was exactly the same section adopted as in some other states, and as a result we'll have that other law to rely on. And assuming we have some particularly heinous situation, although I can't imagine it, where somebody is either

released or convicted under the flimsy - either a flimsy case or a case that does not call for such either heinous punishment or slap-on-the-wrist justice, then you'll have one of us coming up with a new definition.

SENATOR SCHNEIDERMAN: Thank you.

Through you, Mr. President, the other area that I'm curious about is wouldn't it be the case that under current law most of what is going to be added to the law of assault by this bill would be covered under the law of harassment?

SENATOR MALTESE: I don't believe so. Because what we're trying to do is cover definitions that are beyond harassment and into the assault categories.

SENATOR SCHNEIDERMAN: Well, no, I understand we're trying to understand the scope of what's covered by assault. But it would seem to me that even absent this statute, most of the examples that have been identified, and particularly in the case of domestic violence, my understanding is that those would currently be covered under the law of harassment, which I realize may in your

view not be sufficient. But it seems to me that we are intruding one area of the law into another. And I'm not saying that's a bad thing. But is it correct that most of these incidents would be covered currently?

SENATOR MALTESE: I don't believe so. I'm looking for my definition of harassment. But I don't believe it involves physical injury in harassment.

The harassment in the third degree that I quoted earlier did not involve, if you recall, any physical injury. It simply spoke of pushing, shoving, and what have you.

Yeah, I'm informed by counsel that it speaks of threat of physical injury rather than physical injury itself.

I think what my colleague is obviously talking about is what happens -- and I refer to earlier when we spoke of the conviction rate, is that where we had charges of either assault third, which was a Class A misdemeanor, or assault second, which was a D felony, we had pleas to violations occurring in 68.60 percent of the time and 47.60 percent of the time. And they were just looking for a

convenient charge to plead to because the case itself either was unprovable under the present definitions or the situation and the facts of the case didn't call for any more.

SENATOR SCHNEIDERMAN: Thank you. Through you, Mr. President, on the bill.

ACTING PRESIDENT MEIER: Senator Schneiderman, on the bill.

SENATOR SCHNEIDERMAN: I appreciate the sponsor's efforts to come to grips with what I think is a failing in the current law. I share the concerns of some of my colleagues that we may be creating other problems. And whenever you have a statute with language that is descriptive rather than more quantitative, you have problems with interpretation.

I think that the difficulty we have here is that in addition to clever defense lawyers, we have some very clever and aggressive prosecutors in this state. I had the pleasure of meeting one from Senator Maltese's district earlier today at the Codes Committee hearing. And I think that we do have to be very, very cautious when we're

expanding this sort of definition.

However, I do agree that the issue of ensuring that the victims of domestic violence have an easier time getting into court is very, very important. I do happen to believe that an expansion of the provisions of the law of harassment, as currently drafted, is an important aspect of this effort to fill in the gaps. And I would urge that that's something else that we should take a look at.

But, you know, I am cognizant of the difficulty involved here and the effort that's being made to fill in these gaps, and I do appreciate that.

ACTING PRESIDENT MEIER: Senator Paterson.

SENATOR PATERSON: Mr. President, if the Senator would yield for a couple of questions.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield to a question from Senator Paterson?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The

sponsor yields.

SENATOR PATERSON: Senator, I'm interested in some terminology, as were some of the previous questioners. And you have here the issue of a palpable -- is it palpable laceration or palpable -

SENATOR MALTESE: I think it was palpable contusion.

SENATOR PATERSON: Palpable contusion, that's it. I'm sorry, I forgot. A palpable contusion.

Now, I'm trying to understand what that means, because palpable can be something you can touch. It's something that you can see, as in something that's noticeable. Or palpable could be something in the mind of the person that believes that it happened, something that would be manifest.

And I'm just wondering, what does palpable mean with respect to the injury described in this bill?

SENATOR MALTESE: Mr. President, through you, first of all, I want to thank Senator Paterson, because my staff members had to look up all these words. And if he hasn't

asked the question, the next time I asked them to do it, they have been much more reluctant. So this time at least I can point to this debate and say that their work was not in vain.

And "palpable" -- and I asked for the simplest definition in each case -- was capable -- quite correctly, as Senator Paterson indicated -- capable of being touched or felt, which was exactly as he spelled it out.

Now, "contusion" I think was injury to tissue, usually without laceration. So we have a situation that I suppose it's an injury to the tissue that you couldn't easily detect by sight. And if we look at "laceration," we have a torn and ragged wound.

So I assume that since -- it would have seemed to me, if I were just talking about laceration, I would have thought it was just about -- would have covered any abrasion. But since it did not, and it speaks of something more serious, torn and ragged wound, it would seem to me it would also cover some sort of scraping or abrasion which would be

palpable.

SENATOR PATERSON: Thank you, Senator. And therefore, Mr. President, if Senator Maltese would continue to yield.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: The sponsor yields.

SENATOR PATERSON: Then is there such an injury that would be nonpalpable? Since "palpable," not only defining those things that are tangible or discernible, would also cover things that are manifest, something that would be subjective in the mind of the victim, would that be palpable?

SENATOR MALTESE: Well, through you, Mr. President, I guess if we look at physical injury and the use of the word "palpable," what we were trying to do is cover something I suppose of a lesser degree than the laceration.

But it's just one of the things that were mentioned in a recitation of a

number of injuries. And therefore, I don't want to venture into the medical arena as to whether or not we could have an injury that palpable -

I'm referred to by counsel, who is being called on more and more on these extremely technical legal terminology, she said a bump on the head might be something that would fall into that category.

(Laughter.)

SENATOR PATERSON: Thank you, Mr. President. If Senator Maltese and his counsel would be willing to yield for yet another question.

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese, do you yield?

The sponsor yields.

SENATOR PATERSON: And, Senator, you've been quite comprehensive in your responses.

I'm just curious about the subjective conclusion of the victim providing the only evidence in a particular type of

case. Specifically, it just -- when a victim signs the corroborating affidavit, they're not going to say, Well, I wasn't really that badly injured. Victims are going to tell you that they were injured, and because they really believe that they were.

Now, outside of any medical reports, medical examinations, photographs from the police, aren't we going down a bit of a dangerous slope? And I recognize the intent, Senator -- and I'd like to parenthetically just set aside my question for a moment just to tell you that domestic violence cases are really difficult in that respect, because they do often involve evidentiary problems that make it difficult for prosecutors.

And we're in this chamber, I came here 15 years ago, when it was still difficult to get, I think, lawmakers to understand the horrible nature of domestic violence and the way that it cripples families and divides family members against each other. And now we've reached that understanding, to a degree. I think there are many that think that we have

some distance to go, and perhaps we're going some of that distance through the adoption of the legislation that you offer.

But as Senator Montgomery so cogently pointed out, we're not talking about a policy here as domestic violence would be. We're really talking about terminology: Assault three, assault two, different types of hazing. But also different types of harassment and aggravated harassment and aggravated assault. So we're really rewriting the terminology so it can be applied to almost any type of case.

Senator Duane raised with you the issue of rape. I would hate to be a district attorney trying a rape case where it was only the conclusion of the victim, regardless of whether or not the victims are right 90 percent of the time, as they probably are in those instances -- but I'm just saying from an evidentiary standpoint, it would be very hard to defend against that without some type of corroborating evidence. And as a person who knows not only the difficulty of prosecution but one of defense, I was just

wondering about your willingness to put that definition into the legislation.

SENATOR MALTESE: Mr. President, through you, I think what we're attempting to do is clarify a definition which is a part of the requirements to fit within certain statutes. And the assault statutes are the statutes that in just about every case but one, where we had the stalking, were applicable here.

I think what we may be forgetting is that it's simply one element of the case which would end up putting it into that classification of assault. For instance, in the case law, the case squibs after the definitions in Article 10, we have a case, Matter of Sean, in 1996, where the victim's testimony that his cheek and jaw were bruised and swollen, that he had difficulty eating, talking, and moving his jaw for several days, and that he took pain medication to reduce the pain, was sufficient to establish that victim sustained a physical injury for purposes of statute, providing that person is guilty of assault in the third degree.

So we have a situation where we're simply trying to particularize the type of injury, which is the physical injury, and we're trying to arrive at an evidentiary proof as to whether it rises to the level of physical injury. So when you pick out that it's only -- that it could be proven only by the testimony of the victim, I think that it is an unfair extension, because the case itself would not end up relying -- in 99 cases out of 100, would not end up relying completely on the unsubstantiated testimony of the victim.

I think that the average judge, and we talk about common sense and what's commonly accepted, would not accept the testimony only of a victim with no other corroboration.

ACTING PRESIDENT MEIER: Senator Paterson.

SENATOR PATERSON: Thank you, Mr. President. That answers my question.

I have one additional question, if Senator Maltese is willing to yield.

ACTING PRESIDENT MEIER: Senator Maltese, will you yield?

SENATOR MALTESE: Yes, Mr. President.

ACTING PRESIDENT MEIER: Senator Maltese yields.

SENATOR PATERSON: Senator, the issue of illness as it's applied to this particular case is an illness that might have arisen out of -- as a result of one of the statutory violations that are listed in the class that you've presented.

I was wondering about the possibility of a preexisting illness that might have been aggravated by some sort of attack. Would that qualify as an illness, or is that something we might need to write into the legislation?

SENATOR MALTESE: Mr. President, through you, you know, harking back to the prior questions and answers, I think that Senator Paterson has come up with the situation that could refer -- that could further explain it. In other words, the aggravation of a preexisting illness could very well be a situation that would not fall within the definition of an injury but could

fall within the definition of an illness. So that might very well be the illness that we speak about in the definition of physical injury.

I think a judge might be more prone to give credence to the aggravation of a previous illness than to classify the aggravation of a previous illness as an injury, which it would not be.

ACTING PRESIDENT MEIER: Senator Paterson.

SENATOR PATERSON: Thank you, Mr. President. On the bill.

ACTING PRESIDENT MEIER: Senator Paterson, on the bill.

SENATOR PATERSON: I have been one who for a long time has really wanted to try to bring the laws that we enact here in this state in line with what I thought would be meeting even the barest threshold of addressing the issue of domestic violence, which we have covered up and left unaddressed for a number of years. But I certainly have not worked any harder on that than Senator Montgomery, who I thought got up and really

raised some very important issues, that domestic violence, as serious and as tragic as it is in our society, has divisive as it is in families, nonetheless makes a very good foil -- not that it was intended that way at all, because I know of Senator Maltese's commitment to this issue. But just in terms of the way you look at the legislation, it almost creates a veil.

I think that we all want to fight domestic violence, but not all these cases would necessarily be domestic violence cases. Just about every kind of assault or attack is listed herein. And when you look at those type of attacks, it really is a little eye-opening when Senator Maltese says that he thinks that only in 1 percent of the cases could you actually rely on the subjective conclusions of a victim to provide the entire breadth of evidence that's used against the perpetrator.

Well, if that's the case, then I don't think we need to have it in this bill, quite frankly. We can help to try to close the loophole which Senator Maltese describes.

He talks about the Rojas case, where a gunshot wound -- this was held in 1984 -- didn't really constitute an injury. He talks about the case of Phillip A., where a black eye did not constitute a sufficient physical injury. And he goes on to talk about the Jiminez case, where two punches to the face didn't advance a physical injury.

Well, you never know. Two punches to the face, depending on who was throwing them, might or might not. A gunshot wound that, you know, perhaps perforated someone's hand for a moment might not be. In most cases, they certainly would be.

But in those seldom instances where they are not that Senator Maltese is trying to address in this legislation, I think he quite properly can do that without going to the - and here's a word that we had a lot of discussion about, "extreme," which is defined as something that's out of the ordinary or going to a great length, or sometimes going to an exaggerated length.

And I think that that's to some degree what this legislation is doing, in

spite of all the good that it does and in light of all of the tremendous work that Senator Maltese and his counsel put into it.

I really have to think about this for a moment. But I'm just sharing with my colleagues my caution about these situations where you get the victim's word and then you have a prosecution, like in To Kill a Mockingbird.

And when you have an unfavorable climate and you have an individual who stands alone being prosecuted, they can't show you a medical report, they can't show you any medical evidence, any type of kit of some sort where there was an examination of the victim, they can't show you any police photos of the victim and -

ACTING PRESIDENT MEIER: Excuse me. Excuse me, Senator Paterson.

Senator Skelos.

SENATOR SKELOS: Mr. President, what time did debate start?

SENATOR PATERSON: Oh, no.

ACTING PRESIDENT MEIER: 3:55, Senator Skelos.

SENATOR SKELOS: Mr. President, pursuant to Rule IX, Section 3-D, I move we chose debate at this time.

ACTING PRESIDENT MEIER: All those in favor of closing debate signify by saying aye.

(Response of "Aye.")

ACTING PRESIDENT MEIER: Opposed, nay.

SENATOR CONNOR: Party vote in the negative.

SENATOR SKELOS: Party vote in the affirmative.

ACTING PRESIDENT MEIER: The Secretary will call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 33. Nays, 23. Party vote.

ACTING PRESIDENT MEIER: Debate is closed, the main question before the house.

Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of November.

ACTING PRESIDENT MEIER: Call the

roll.

(The Secretary called the roll.)

ACTING PRESIDENT MEIER: Senator Paterson, to explain his vote.

SENATOR PATERSON: I'm back.

(Laughter.)

SENATOR PATERSON: Where was I, Mr. President?

ACTING PRESIDENT MEIER: Use your two minutes however you wish, Senator Paterson.

SENATOR PATERSON: Thank you, Mr. President. And thank you, Senator Skelos. I was just getting warmed up.

SENATOR SKELOS: You have two minutes to cool down.

SENATOR PATERSON: Mr. President, Senator Skelos says I have now just about a minute to cool down, so I'll do that just by pointing out that I'm going to vote against this piece of legislation. I think I can vote for it in the future. I really would just like Senator Maltese to augment just the notion of the subjective conclusion of the victim providing the basis for prosecution,

even in the very few cases where it actually occurs.

I really think we need to do that just to make sure that the accused are not put in the position where they have no ability to defend themselves and the burden of proof is switched to the defendant rather than to the plaintiff in order to establish a case.

Everything else about this bill is fantastic. I appreciate Senator Maltese's work. He was extremely responsive to our questioning. We appreciate it more than he'll ever know.

And with that I vote no, Mr. President.

ACTING PRESIDENT MEIER: Senator Paterson will be recorded in the negative.

Senator Connor, to explain his rote.

SENATOR CONNOR: Thank you, Mr. President.

I voted for this legislation last year. And again, it was another one that I have to confess I didn't scrutinize. It looked okay at first reading. I certainly

agree with what Senator Maltese is attempting to accomplish by this legislation.

But upon the close scrutiny that I've heard today and that's come out in the questioning, particularly the concerns expressed by Senator Paterson, I do think this legislation is good, but I think it needs just a little bit of a touchup here to address the concerns that Senator Paterson expressed.

So in view of that at this time, Mr. President, I vote no.

ACTING PRESIDENT MEIER: Senator Connor will be recorded in the negative.

Senator Duane, to explain his vote.

SENATOR DUANE: Thank you, Mr. President.

I am going to vote in favor of in legislation, but I have to say I'm very, very disappointed that debate was cut off. I don't think that victims of domestic violence in this state would be comforted to know that they're only worth two hours of discussion in this body. Certainly an issue of such importance as domestic violence deserves as thorough and thoughtful a discussion as we can

possibly make it. I don't know what it is that we're paid to do here, but certainly if it's not to address the issues of domestic violence, then I don't know why it is that we're here.

I'm going to vote in favor of this, but certainly more needs to be said about domestic violence. And I hope we'll do that another time.

Thank you, Mr. President.

ACTING PRESIDENT MEIER: Senator Duane will be recorded in the affirmative.

Senator Stavisky, to explain her vote.

SENATOR STAVISKY: Yes, to explain my vote.

I wish that there were additional bills concerning domestic violence included. Perhaps later in the session we will have some of the bills that Senator Oppenheimer described earlier.

But I'm delighted with this legislation, and I vote yes.

ACTING PRESIDENT MEIER: Senator Stavisky will be recorded in the affirmative.

Senator Hevesi, to explain his vote.

SENATOR HEVESI: Thank you, Mr. President. I rise in support of this piece of legislation, commend the sponsor for bringing it.

But I also would concur with Senator Duane that this is a very important issue, domestic violence and victims in general in this state. And I too again am dismayed and I'm not going to stop talking about the fact that not permitting sufficient debate to run its course in this body does an injustice not only to this institution but to every member of this institution and the people we represent. It's not right.

And this was an informative debate. This is the fourth bill we've done today. I actually changed a vote that I had made last year based on the debate we had on the first bill today. So these debates are fruitful, they're important. This is a good bill, but there's no reason why we need to cut off debate on it.

So I'll support this legislation.

I'm going to vote yes on this. But we all continue to be disenfranchised by the rules that cut debate off. It's really unfair and really unfortunate.

But in the meantime, I vote yes and commend the sponsor for bringing this legislation. I believe it have a positive impact. I vote aye.

ACTING PRESIDENT MEIER: Senator Hevesi will be recorded in the affirmative.

Senator Onorato, to explain his vote.

SENATOR ONORATO: Mr. President, I rise too to support Senator Maltese. I think he did an outstanding job on providing us with many, many insights into what he's really trying to accomplish.

But again, I know we're going to be revisiting this again. And I would urge him as a layman to get away from all of these technical terminologies so that we can really vote on knowing what is extreme, what is problematic, and try to get back to the basics of plain and pure simple English so that we know exactly what's going on here.

So again, I do support your legislation, and I vote yes.

ACTING PRESIDENT MEIER: Senator Onorato will be recorded in the affirmative.

Senator Stachowski, to explain his vote.

SENATOR STACHOWSKI: Mr. President, to explain my vote.

I'd like to thank Senator Maltese for taking all the questions and answering as thoughtfully as he had. I'd like to thank Senator Gentile for his questioning. I learned an awful lot in their exchange.

I think that the debate served a purpose. I for one, not being a lawyer, learned a lot about all the different facets and how people get off. And I was fascinated by Senator Maltese's reading to us of a case where somebody got stabbed in the neck twice and it wasn't a serious injury. I found that kind of interesting. Not terribly surprising, but very interesting.

And because I always support law and order bills, whether they're one-housers, whether a bill is without a sponsor in the

Assembly or hopefully will eventually get a sponsor, hopefully not, Senator, your good friend Assemblyman Seminerio, because currently I don't think he can get it passed.

But I would like to support the bill and vote yes. Thank you.

ACTING PRESIDENT MEIER: Senator Stachowski will be recorded in the affirmative.

Senator Espada.

SENATOR ESPADA: Thank you, Mr. President.

I indicated that I would be voting no on this matter. And I share my colleagues' laudatory comments with respect to the debate. I actually started out believing strictly that this was a domestic violence measure. But in fact, to the heart of it, it really is the uncorroborated evidence that, you know, would put a defendant in the position where they have inherited the total burden.

And I think that it did turn into what I thought would be an issue of domestic violence into an issue really of really examining the ramifications of the shift in

the Penal Law. And that's why I'm voting no.

ACTING PRESIDENT MEIER: Senator Espada will be recorded in the affirmative.

Senator Breslin, to explain his vote.

SENATOR BRESLIN: Thank you, Mr. President. As a long time president of a -

ACTING PRESIDENT MEIER: Just a second, Senator Breslin. I incorrectly stated Senator Espada's vote. Senator Espada will be recorded in the negative.

SENATOR ESPADA: In the negative, Mr. President.

ACTING PRESIDENT MEIER: I'm sorry.

Senator Breslin.

SENATOR BRESLIN: Thank you, Mr. President.

As the long-time president of a halfway house for women, many of whom were victims of domestic violence, I applaud Senator Maltese for his perseverance, for his patience, and for this bill. I know many, many cases where there was in fact violence committed in these cases against women where

charges were not brought and, if they were brought, they weren't proved because the statute wasn't clear and precise enough, and people escaped because of that.

So even though I thought there was some degree of irony having Ralphie from "The Sopranos" come in during the debate, I still don't think it took that much away from it, and I applaud you and I vote in the affirmative.

Thank you, Mr. President.

ACTING PRESIDENT MEIER: Senator Breslin will be recorded in the affirmative.

Senator Malcolm Smith, to explain his vote.

SENATOR MALCOLM SMITH: Thank you, Mr. President.

I also rise to congratulate my distinguished colleague from Queens. I think what he has done here today says a lot to especially a number of women who are unfortunately in very abusive situations. What happens most of the time is when someone looks to seek charges against someone who has committed such an assault against them,

oftentimes the actual crime itself or the degree of the crime cannot be established due to this vagueness in the law.

And what happens subsequent to that is there is an order of protection which everybody around here knows, orders of protection are just as good as the paper they're on. There have been many deaths that have resulted as a result of orders of protection, because there has not been substantial -- I guess one could say substantial follow-through on that particular order of protection.

What this bill now does is it immediately establishes what the extent of the crime is, or the problem is, and it will then allow the judicial system to make the kind of decision that will put a person in a position where they're not able to commit such a crime again.

I think that Senator Maltese has probably won every woman's vote in the state of New York because of this particular bill. And I am also going to support this bill.

ACTING PRESIDENT MEIER: Senator

Malcolm Smith will be recorded in the affirmative.

Senator Lachman, to explain his vote.

SENATOR LACHMAN: Yes, very briefly I also want to commend Senator Maltese for this bill. I have learned a great deal in the discussion that I heard in the chamber, in the lounge, and in library, with different modulations of temperature in the three different places.

I also want to commend my colleague Senator Gentile, from whom I learned a great deal about the legal implications.

But again, this is a worthwhile bill, and Senator Maltese should be commended for sponsoring it. I will vote yea.

ACTING PRESIDENT MEIER: Senator Lachman will be recorded in the affirmative.

Any other Senator wishing to speak on the bill?

Record the negatives and announce the results.

THE SECRETARY: Those recorded in the negative on Calendar Number 5 are Senators

Connor, Espada, Montgomery, and Paterson.

Ayes, 52. Nays, 4.

ACTING PRESIDENT MEIER: The bill is passed.

Senator Skelos.

SENATOR SKELOS: Mr. President, is there any housekeeping at the desk?

ACTING PRESIDENT MEIER: We have some motions, Senator.

Senator McGee.

SENATOR McGEE: Mr. Chair -- Mr. Speaker -

ACTING PRESIDENT MEIER: No, thank you.

SENATOR McGEE: Mr. President, excuse me, on behalf of Senator Morahan, on page number 10, I offer the following amendments to Calendar Number 149, Senate Print Number 197, and ask that said bill retain its place on Third Reading Calendar.

ACTING PRESIDENT MEIER: The amendment are received and adopted, and the bill will retain its place on the Third Reading Calendar.

SENATOR McGEE: Thank you, Mr.

President.

ACTING PRESIDENT MEIER: Senator Fuschillo.

SENATOR FUSCHILLO: Mr. President, on behalf of Senator Libous, please place a sponsor's star on Calendar Number 307.

ACTING PRESIDENT MEIER: So ordered.

Senator Hevesi.

SENATOR HEVESI: Mr. President, I rise to consent unanimous consent to be recorded in the negative on Calendar Number 329, Senate Print 3948.

ACTING PRESIDENT MEIER: Without objection, Senator Hevesi will be recorded in the negative on Calendar 329.

SENATOR HEVESI: Thank you, Mr. President.

ACTING PRESIDENT MEIER: Senator Skelos.

SENATOR SKELOS: Mr. President, I move we adjourn until Wednesday, April 4th, at 10:00 a.m.

ACTING PRESIDENT MEIER: On motion, the Senate stands adjourned until

Wednesday, April 4th, at 10:00 a.m.

(Whereupon, at 6:10 p.m., the Senate adjourned.)