COMMISSION ON HUMAN RIGHTS
40 RECTOR STREET, NEW YORK, NY 10006
Telephone: (212) 306-7560 TDD: (212) 306-7686
Fax: (212) 306-7658 www.nyc.gov

PATRICIA L. GATLING
Commissioner and Chair

Testimony of Clifford Mulqueen
Before the Committees on Civil Rights and Finance
March 17, 2014

Chairperson(s), members of the Council, good morning.

Thank you for the opportunity to testify regarding Intro. # 1215, which would amend the New York City Human Rights Law to include interns among the group of individuals protected from employment discrimination under City law. The Commission and the Administration welcome this effort to address the effects of the District Court decision in *Wang v. Phoenix Satellite Television US, Inc.*, which brought this issue into the limelight.

We support the Council's effort to protect this class of vulnerable individuals, and we look forward to working with the Council to ensure that interns are not subject to discrimination. To this end, we'd like to work with Council staff on the definition of "intern" to ensure that it will further the intent of the legislation without creating difficulties of proof that would impede enforcement. In addition, we believe that the draft

does not provide as much protection for interns as the Council would intend. Sub-section (d) lists several areas of the City Human Rights Law where the protection would apply, which creates an implication that other provisions of the law would not be applicable. We recommend instead the use of general language about interns that triggers their coverage by all relevant employment discrimination provisions in the law.

We look forward to working with the Council on this Introduction and I welcome your questions at this time.

THE CITY OF NEW YORK
OFFICE OF THE PRESIDENT
BOROUGH OF MANHATTAN

BOROUGH PRESIDENT GALE A. BREWER
TESTIMONY TO THE NEW YORK CITY COUNCIL'S
COMMITTEE ON CIVIL RIGHTS
MARCH 17, 2014

Good morning, and thank you, Chair Mealy, for the opportunity to testify today in support of Intro 173 of 2014, a bill I introduced with Council Member Jimmy Vacca of the Bronx.

In my more than thirty years of public service, I've had over 1000 interns – fondly referred to as the "Brew Crew". With their participation we've saved lives, kept tenants in their homes, obtained 'one shot deals', created an "age-friendly" neighborhood, organized tenant associations in NYCHA developments, provided seniors farm-fresh affordable produce, mapped the condition of street trees and pot holes, helped seniors get assistance in preparing their homes for bed bug extermination, investigated the taxi 'lost and found' claim system, drafted proposals on Bus Rapid Transit, and made streets safer and greener. The opportunity to mentor these interns, see them flourish, and watch them go on to careers in public policy, activism, or private sector jobs has been one of the greatest rewards of my career.

And yet we have learned that not every intern works in a supportive environment, and therefore I encourage the Council to pass Intro 173.

MUNICIPAL BUILDING · 1 CENTRE STREET, 19TH FLOOR · NEW YORK, NY 10007
PHONE (212) 669-8300 FAX (212) 669-4306
MANHATTANBP.NYC.GOV

THE CITY OF NEW YORK
OFFICE OF THE PRESIDENT
BOROUGH OF MANHATTAN

This bill would explicitly protect interns, paid and unpaid, from discrimination or harassment in the workplace. Currently, the federal judge's interpretation of the city's human rights law leaves unpaid interns unprotected because they are not legally defined as employees. When an unpaid intern in a New York City media office was sexually harassed by her boss starting in 2010, she filed suit; the Federal Court ruled though that she had no legal claim due to her unpaid status.

This exception in the New York City Human Rights Law violates the spirit of the law protecting employees from discrimination and harassment on the basis of factors including gender, race, age, sexual orientation, disability, marital status, and military status. It fails to protect those – often students working at a business or agency in furtherance of their education – from discrimination or harassment. And interpreting the law to allow discrimination or harassment of interns could lead to a less supportive and fair working environment for all employees. We must ensure that unpaid interns have the same full protection of the New York City Human Rights Law as all other workers.

MUNICIPAL BUILDING · 1 CENTRE STREET, 19TH FLOOR · NEW YORK, NY 10007
PHONE (212) 669-8300 FAX (212) 669-4306
MANHATTANBP.NYC.GOV

PIANKO
LAW GROUP PLLC

55 Broad Street, #13F New York, NY 10004
T: (646) 801-9675 F: (646) 381-3612
E: mpianko@gmail.com

Maurice Pianko, Esq.

WRITTEN TESTIMONY OF MAURICE PIANKO, ESQ.

NEW YORK CITY COUNCIL

COMMITTEE ON CIVIL RIGHTS

Re: In relation to proposed legislation prohibiting discrimination against unpaid interns

Submitted: March 17, 2014

Over the past century, labor laws evolved to protect children, to protect from exploitation, to protect worker's health, both long term and short, to protect individuals from harassment and discrimination. All these dangers reared their head in the offices, factories, and workplaces across America and Americans addressed these social ills. Unfortunately, but not surprisingly, this was a long time before unpaid internships became common place.

Now this is why I am here. Interns are not protected by basic laws covering workers. The avoidance of minimum wage laws is a necessary conversation to have but that is only economic. There is a much more immediate threat to these individuals which is why I am here.

A Syracuse University graduate working an unpaid internship was brought into a hotel room by her boss under the guise of business, sexually harassed, accosted, hugged and kissed by him and she had no recourse. The court dismissed her complaint citing that the applicable labor laws covered employees, not unpaid workers. Whether she should have received pay according to minimum wage laws is that conversation I mentioned, but what she suffered cuts right to a person's dignity and basic human rights. Surely when we think back to those workers, unionizers and legislators all fighting for some legal form of workplace protection, we can not honestly believe they intended this for those workers privileged enough to receive a paycheck, but rather for any worker in the environment, unpaid interns were obviously not purposely excluded – just accidently overlooked.

If I may explain, like the Syracuse grad case - the wrongful categorization of a worker as an unpaid intern is setting American youth up for further exploitation. I say "youth" but this affected demographic has no age limits. For example in one of the biggest intern cases of late, the Black Swan case, the coffee-fetching receipt-collecting unpaid employee was 40 years old. The omnipresence of unpaid internships is staggering. And if anyone has any doubt of this, you need more friends under 30.

How are internships set up? Interns make zero dollars per hour. Some unpaid internships last for 3 to 6 months or as long as the intern can be strung along, which in the current economic climate is quite a long time. So an intern making zero dollars per week, working, say, 30 hours a week, for six months, would make approximately, well you guessed it, zero dollars. And what do the employers make from this deal – 6 months of free labor.

Why is this? Because not many companies are hiring for money. Why aren't they hiring? Well, aside from hurting economy, many places are unable to afford more employees but still concerned about production and competition. Any bit of extra labor helps. So only unpaid positions are posted. No student is suing because it is expensive and they are chasing the job at the end of the tunnel. Other individuals learn this is what they must do and they apply and perpetuate this system of "payment by experience". In this last snow-storm I tried to get someone to shovel my driveway for the experience, but it just doesn't work.

Minimum wage laws and all major employment regulations are being ignored – note, this is very important, minimum wage laws do apply to every individual who is doing the work of an employee.
Let no one ever try to claim that a person is excluded from these protections because they are called an intern. Employers across the state and the country simply believe that they can evade every legal liabilities state and federal government have imposed through the branding these workers as "interns".

There is very clear cut statutory language and case law that says otherwise and the sooner we can address this system of exploitation, the sooner we can avoid the shame we feel as Americans and New Yorkers when verdicts like I mentioned before are issued giving employers carte blanche permission to underpay, abuse, and harass.

The New York State Department of Labor has established 11 factors in determining if a New York worker may legally be classified as an unpaid intern. This directly applies to the for-profit sector, not necessarily to non-profits or government. Furthermore, there is basic enforceable omnipresent case law which reiterates that internships were established and intended for learning not for the benefit of the organization. How many interns can we think of that take more from the company than they give? Not many.

Likely there are some interns who are deserving of their status as unpaid interns but many, many more who are simply unpaid employees. These unpaid workers, whether employee or intern, can just as easily suffer from discrimination, harassment, sexual harassment, workplace injuries, or long term health problems as any employee but they lack basic legal protections. Some statutes infer that they could be covered but this would likely be fought in expensive litigation rather than settled quickly. And expensive litigation is expensive to someone making zero dollars per hour.

By inaction we will permit the sexual abuse, racial discrimination, and workplace harassment against America's youth essentially reversing a century of basic human rights protections. Inaction would send a loud message to employers in the state which says "stop hiring paid employees, unpaid workers are free, they can be bossed around and overworked, and we are protected from any sexual abuse we choose to commit." Where will this end? If we do not send a clear message that the basic rights extended to paid labor is meant for all workers, we run the risk of workplace safety regulations not applying, unpaid interns working in hazardous conditions, handling dangerous materials all because they do not get a pay check.

This is not a partisan issue. This is the protection of basic human rights. This is about the branding of workers as an unprotected class, undeserving of pay, excluded from protections, fair game for abuse and harassment, below legal protections. We must brand our youth as worthy, as workers, as meaningful, as deserving of dignity and protection lest they learn the profits of exploitations rather than the virtue of human dignity and respect.

Fair Play Legislation, Inc.

Contact: Craig Gurian, 646-389-3337, craiggurian@fairplaylegislation.org

OPTION A

Define "employee," "employ," and "employment," deter other efforts to evade the provisions of the law, and supplement language designed to prevent courts from undermining the intent of the Council. Proposed text follows:

§ 1. Subdivision 5 of section 8-102 of title 1 of chapter eight of the administrative code of the city of New York is amended to read as follows:

(5) (a) For purposes of subdivisions one, two, three, twenty-two, subparagraph one of paragraph a of subdivision twenty-one, and paragraph e of subdivision twenty-one of section 8-107 and section 8-107.1 of this chapter, the term "employer" does not include any employer with fewer than four persons in his or her employ. For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.

(b) The term "employee" means a person who performs work for an employer, whether temporary or permanent, whether for a fixed or open-ended duration, and regardless of whether the work is secured directly by the employer or by another person. The term employee encompasses persons who are paid or unpaid interns, and also encompasses volunteers. A person shall be treated as an employee of such employers as maintain full or partial control: (i)

over the terms, conditions of privileges of the person's work; (ii) over the conduct of the person's work; or (iii) the right of the person to continue to work, regardless of whether there is any integration of operations between the employers and regardless of which employer directly compensates the person.

(c) The term "employ" means to secure or to utilize, directly or indirectly, the services of an employee.

(d) The term "employment" means work performed by an employee for an employer and the condition or state of being an employee.

§ 2. Section 8-130 of chapter 1 of title eight of the administrative code of the city of New York is amended to read as follows:

8-130 Construction.

(a) The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.

(b) Exceptions to and exemptions from the reach of this title shall be construed narrowly and in furtherance of this title's overriding goals of minimizing evasion and maximizing deterrence.

(c) Neither legislation by which the Council seeks to expand coverage pursuant to this title, nor legislative provisions introduced but not adopted, nor potential constructions of this title not addressed by the Council shall be interpreted as foreclosing a construction of a provision of this title otherwise available pursuant to section (a) of this section unless the Council states so explicitly.

OPTION B

Clarify in the construction section that interns are already covered by a variety of provisions, deter other efforts to evade the provisions of the law, and supplement language designed to prevent courts from undermining the intent of the Council. Proposed text follows:

§ 1. Section 8-130 of chapter 1 of title eight of the administrative code of the city of New York is amended to read as follows:

8-130 Construction.

(a) The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.

(b) Subdivisions 1, 2, and 4 of section 8-107 of this chapter are intended to encompass actions by covered entities in relation to persons, including interns, performing work for those covered entities, and any court decision to the contrary is herewith legislatively overruled.

(c) Exceptions to and exemptions from the reach of this title shall be construed narrowly and in furtherance of this title's overriding goals of minimizing evasion and maximizing deterrence.

(d) Neither legislation by which the Council seeks to expand coverage pursuant to this title, nor legislative provisions introduced but not adopted, nor potential constructions of this title not addressed by the Council shall be interpreted as foreclosing a construction of a provision of this title otherwise available pursuant to section (a) of this section unless the Council states so explicitly.

IMPORTANT CONSIDERATIONS FOR THE COMMITTEE REPORT

The Council took a landmark step in 2005 when it passed the Local Civil Rights Restoration Act ("Restoration Act").[1] The legislation was an amendment to defend the integrity of the New York City Human Rights Law ("City HRL") from narrow interpretations of its provisions from an increasingly conservative state and federal judiciary."[2] The most important provision of the legislation was enhancing the existing liberal construction requirement of City HRL. Now, the Council made explicit, all the provisions of the City HRL would have to be construed liberally for the accomplishment of the "uniquely broad and remedial purposes thereof," and this would have to be done "regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."[3]

Consistent with the intent of the comprehensive 1991 Amendments to the City Human Rights Law passed under Mayor Dinkins,[4] the Restoration act represented an insistence that the City HRL "must meld the broadest vision of social justice with the strongest law enforcement deterrent, and that the judges interpreting the law take its protections to the furthest reaches of

---

[1] Local Law 85 of 2005.

[2] "It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law." Restoration Act, § 1.

[2] "It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law." Restoration Act, § 1.

[3] Restoration Act, § 7, amending City HRL § 8-130.

[4] Local Law 39 of 1991.

what is constitutionally permissible."[5]

Appellate courts have recognized the significance of the Restoration Act's enhanced liberal construction provision. *Williams v. New York City Housing Authority,* the seminal case, held that "the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) all provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes and (c) cases that had failed to respect these differences were being legislatively overruled."[6]

New York's Court of Appeals subsequently held that every provision of the City Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[7]

Not all courts have followed the requirements of the Restoration Act, and this legislation was motivated by the decision in *Wang v. Phoenix Satellite Television US, Inc.*,[8] a decision that erroneously found that interns were not covered under the law.[9] The court in *Wang* purported to follow Restoration Act analysis, but it did not. The court ignored the fact that the Council saw

---

[5] "A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law," 33 Fordham Urb. L.J. 255, 262 (2006), the authoritative analysis of the intent and intended consequences of the Restoration Act.

[6] Williams v. New York City Housing Authority, 61 A.D.3d at 67-68, 872 N.Y.S.2d at 31 (First Dept. 2009).

[7] Albunio v. City of New York, 16 N.Y.3d at 477-78, 922 N.Y.S.2d at 246 (N.Y. 2011).

[8] 2013 WL 5502803 (S.D.N.Y. Oct. 3, 1013).

[9] No inference should be drawn by action in respect to this decision that the Council in any way condones or accepts any decision that fails to adhere to the terms of the Restoration Act. On the contrary, this legislation precludes courts from drawing any such inference in the absence of an explicit legislative statement to the contrary.

the enhancing liberal construction provision as "obviating the need for wholesale textual revision of the myriad specific provisions of the law. While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, § 8-130's specific *construction* provision required a 'process of reflection and reconsideration' that was intended to allow independent development of the local law 'in all its dimensions' (*Return to Eyes on the Prize*, 33 Fordham Urb. L.J. at 280).'"[10] By trying to lock in interpretations of the word "employer" that pre-existed or ignored the Restoration Act and asserting that the Council should have acted in 1991 to change the means of the term, the *Wang* court did exactly what the Restoration Act sought to prevent.

New York's Court of Appeals could have done the same thing in *Albunio*. There, the question was the meaning of the term "oppose" in the context of the law's retaliation provision. "Oppose" was not a word new to the statue -- either in 2005 or in 1991. But the Court of Appeals properly recognized that *all* provisions of the law must be interpreted to accomplish the City HRL's uniquely broad and remedial purposes. There is no warrant to treat "employer" (or "employ") any differently.

The *Wang* court failed to consider that the only limitation placed on the term "employer" is the minimum number of employees (4) before which an employer is covered by City HRL § 8-

[10] Williams v. City of New York, *supra*, 61 A.D.3d at 74, 872 N.Y.S.2d 37. The *Williams* court added a footnote pointing out that a letter in support of the Restoration Act from the Association of the Bar of the City of New York (now the New York City Bar Association) said that "the expectation that the undoing of narrow construction of the law by legislative amendment 'should no longer be necessary if there is judicial appreciation for the Restoration Act's intention that the law provide 'the greatest possible protection for civil rights,' and that a statement in support of the Restoration Act from the Brennan Center for Justice had noted the suggestion that the Council should "limit itself to specifically overruling individual interpretations that it views as unduly restrictive" but that "this approach has proven ineffective in the past, as the courts have tended to construe narrowly specific Council amendments." *Id.*

102(5). Section 8-107(1)(a) does *not* use the limiting language that only refusals to hire or employ *for pay,* or discrimination in terms and conditions of employment *for pay* are proscribed.

Not having considered the absence of limiting language, the *Wang* court also failed to do anything beyond looking to state and federal cases (which serve only as the floor below which the City HRL cannot fall). It did not look incorporate any of the key considerations intended to guide judicial analysis under the Restoration Act: "The Council directs courts to the key principles that should guide the analysis of claims brought under the City HRL: 'discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation' (Committee Report, 2005 N.Y. City Legis. Ann., at 537).

The *Wang* court did not appreciate that the concern of the Council was that, in respect to covered *workplaces* (i.e., all but the smallest), discrimination must not play a role.[11] Allowing discrimination against interns in covered workplaces would allow discrimination to pollute any and every such workplace.

It should also be pointed out that there are two other protections for interns currently provided under the law, protections apparently not argued by the plaintiff in the case and certainly not considered by the *Wang* court.

One is City HRL § 8-107(2)(c) which prohibits discrimination in the terms, conditions, or privileges of "such programs" as are described in Section 8-107(2)(b: "guidance program, an apprentice training program, on-the-job training program, or other occupational training or retraining program." To the extent that internships provide training, they come within the ambit

[11] *See* also City HRL § 8-101 (which, as part of the 1991 Amendments, added the policy that law was intended to prevent discrimination from "playing any role in actions relating to employment, public accommodations, and housing."

of Section 8-107(2) as well.

Coverage is also provided by the broad public accommodation provision of the City HRL (Section 8-107(4)). Rather than being limited to "places" of public accommodation, "providers" of public accommodation are covered, too. City HRL § 8-102(9) defines the term "place or provider of public accommodation" to "include providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind..." To the extent that a covered entity is providing a benefit to an intern (and is not just getting benefits from an intern), that covered entity is providing a type of "goods, services, facilities, advantages or privileges." City HRL § 8-107(4)(a) makes it illegal "directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof."

In taking action to underline the fact that interns are covered, the Council intends to be understood to be again providing an *illustration* of the application of Restoration Act principles, not in any way relieving courts from the obligation to engage in such analysis themselves, nor accepting in any way the proposition that the Council's failure to respond to erroneous decision from courts represents acceptance or ratification of those decisions. This legislation therefore precludes courts from trying to use Council inaction (or limited action) as a means to limit coverage of the City Human Rights Law. It also emphasizes the point that evasion of the law is not to be countenanced.

Forthcoming in "A Nation of Widening Opportunities? The Civil Rights Act at Fifty"
(Samuel Bagenstos and Ellen Katz, eds., University of Michigan Press 2014)
DO NOT CITE PRIOR TO PUBLICATION

TAKING SERIOUSLY TITLE VII'S "FLOOR, NOT A CEILING" INVITATION

Craig Gurian[*]

Introduction

For more than 25 years, it has been the practice of federal and state judges around the country to throw victims of workplace sexual harassment out of court because they have not been harassed "enough." The practice is a function of the judicially created doctrine that only "severe or pervasive" harassment is actionable under Title VII.[1] In New York City, however, the "severe or pervasive" requirement has been rejected by virtue of case law[2] that developed in the wake of the 2005 Local Civil Rights Restoration Act,[3] a law designed to "underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes"[4] in a manner to accomplish the City Human Rights Law's "uniquely broad and remedial purposes."[5]

This sea change in harassment doctrine is but one of several ways in which the Restoration Act has brought new strength to local anti-discrimination provisions. Some of the Act's changes sought to vindicate provisions in the comprehensive 1991 amendments to the City

---

[*] Executive Director, Anti-Discrimination Center; Adjunct Professor of Law, Fordham Law School. Mr. Gurian was the principal drafter of the 2005 New York City Local Civil Rights Restoration Act and a principal drafter of the comprehensive 1991 revisions to the New York City Human Rights Law.

[1] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). In many cases, judges are more hostile to these claims than the originally articulated doctrine required. *See, e.g.*, Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 87 (2003).

[2] Williams v. New York City Hous. Auth., 872 N.Y.S.2d 27 (App. Div. 2009).

[3] New York City, N.Y., Local Law No. 85 Int. No. 22-A (2005) [hereinafter Restoration Act]. The Restoration Act is found in New York City Legislative Annual 528-35 (2005), *available at* www.antibiaslaw.com/RestorationAct.pdf.

[4] Restoration Act § 1.

[5] Restoration Act,§ 7, *amending* New York City, N.Y., Admin. Code tit. 8, § 8-130. The "City Human Rights Law" compromises the entirety of Title 8 of the Admin. Code.

Human Rights Law[6] that judges had long ignored; others responded to Supreme Court decisions hostile to civil rights enforcement that were issued subsequent to the 1991 Amendments. All reflected an intent to develop a distinct — and distinctly plaintiff-friendly — jurisprudence.

While the animating perspective of the Restoration Act is a striking departure from the norm, the authority of New York City (or any other jurisdiction) to forge protections stronger than those provided by federal law was not new. From the beginning, Title VII disclaimed preemption, stating that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present *or future* law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.[7]

Title VII was designed to act as a floor below which civil rights protections could not fall, not a ceiling above which those protections could not rise. Over the decades, this invitation has been used most commonly in states and cities around the country to extend employment discrimination protection to workplaces with fewer than the 15-employee minimum required by Title VII. It has also been used to provide compensatory damages beyond those available under Title VII, and to prohibit on a state level additional types of discrimination (such as discrimination on the basis of sexual orientation) beyond that proscribed by Title VII.

It is less common, however, for a state or local law to be designed specifically to fight back against the narrowing contours of Title VII, especially by means of directing state and federal judges to modify their approach to statutory interpretation. Under the Restoration Act,

---

[6] New York City, N.Y., Local Law No. 39 (1991) [hereinafter "1991 Amendments"]. The 1991 Amendments are found in New York City Legislative Annual 145–81 (1991), *available at* www.antibiaslaw.com/LL39.pdf.

[7] 42 U.S.C. § 2000e-7 (2013) (emphasis added), originally enacted as Section 708 of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (July 2, 1964).

judges are required to probe critically the question of whether interpretations of federal or state civil rights law provisions genuinely further the purposes of their local counterpart.[8]

This article identifies the approach and architecture of the Restoration Act and explains the ways in which the local law's attempt both to protect the New York City Human Rights Law against erosion and to expand the law's reach still further has begun to have an impact. It then illustrates several additional barriers to strong coverage and enforcement that could be tackled if civil rights advocates focused more of their efforts on the state and local level. Finally, it offers some observations about what is needed to deepen the Restoration Act's early success locally and to spur efforts like the Restoration Act in jurisdictions across the country.

I. Why was a Restoration Act needed?

The short answer is that courts were not paying heed either to the language of the 1991 Amendments or the City Council's intention in passing them.[9]

Every change made by the 1991 Amendments — whether dealing with protected classes, vicarious liability, theories of discrimination, or damages — had been aimed at augmenting coverage, limiting evasion, or otherwise strengthening enforcement. And the City Council's intentions had been unmistakable. As then-Mayor David Dinkins stated when he signed the bill, the intention was that "judges interpreting the City's Human Rights Law . . . take seriously the

[8] *Cf.* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (warning against the practice of reflexively importing federal constitutional decisions when interpreting counterpart state constitutional guarantees, instead of making sure that the relied-upon decisions are "logically persuasive and well-reasoned" and pay due regard to "the policies underlying specific constitutional guarantees").

[9] The long answer, a comprehensive examination of the intent and intended consequences of the Restoration Act written in the immediate aftermath of the passage of the legislation, is found in Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law,* 33 FORDHAM URB. L.J. 255 (2006).

requirement that this law be liberally and independently construed."[10] Nevertheless, courts were prior to the Restoration Act almost universally refusing to do more than engage in what I have elsewhere dubbed "rote parallelism,"[11] simply assuming that the result under the City Human Rights Law would be identical to that under federal civil rights law or New York State human rights law.[12]

A year before the enactment of the Restoration Act, New York's highest court made plain just how completely it was prepared to ignore the plea for independent interpretation that underlay the 1991 Amendments and the liberal construction requirement of the City Human Rights Law as it existed in 2004.

The case before the court related to the private right of action that had been created by the 1991 Amendments — one that provided for uncapped compensatory damages, uncapped punitive damages, and for attorney's fees.[13] Only that kind of regime allows for the possibility of making a victim whole, punishing a wrongdoer sufficiently to create an actual deterrent, and providing a sufficient incentive for private counsel to undertake representation. At the time that the 1991 Amendments were enacted, the Supreme Court had not yet cut back on the availability of fees in cases that resulted in the award of only nominal damages and prevailing doctrine in the

---

[10] Remarks by Mayor David N. Dinkins at Public Hearing on Local Laws 2 (June 18, 1991) (on file with the New York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/MayorsRemarks061891.pdf [hereinafter Dinkins's Remarks]. The requirement referred to by the mayor was set forth in section 8-130 of the City Human Rights Law (textually unchanged by the 1991 Amendments).

[11] *See* Gurian, *supra* note 9, at 262.

[12] Prior to the 1991 Amendments, those complaining of discrimination had no private right of action and were forced to proceed administratively. After the 1991 Amendments established a private right of action, many cases were filed. Before the passage of the Restoration Act, literally hundreds of cases were disposed of on the basis that a City Human Rights Law claim must fall where a federal or state civil rights claim had not been made out, often in nothing more than a footnote that asserted the (unanalyzed) proposition of equivalence and citing other courts that had habitually made the same error.

[13] New York City, N.Y., Admin. Code § 8-502(a) [hereinafter N.Y.C. Admin. Code § 8-502(a)].

Second Circuit was that attorney's fees were available in such cases.[14] The federal limitation on those fees occurred a year later, in 1992, when the Supreme Court issued its 5-4 decision in *Farrar v. Hobby* and concluded that, where nominal damages are awarded, the only reasonable fee is no fee at all."[15]

In *McGrath v. Toys "R" Us, Inc.*,[16] New York's Court of Appeals acknowledged that the City Council in passing the 1991 Amendments could not have had the intention to apply the yet-to-be decided *Farrar* doctrine, but imported *Farrar* nonetheless because of the court's "general practice of interpreting comparable civil rights statutes consistently," asserting that policies underlying the City Human Rights Law were "identical" to those underlying federal civil rights statutes.[17] In importing *Farrar, McGrath* engaged in no analysis of whether *Farrar* had *actually* been consistent with *either* federal or local civil rights policy.

Perhaps most importantly, *McGrath* stated that the City Council's failure to take affirmative action to rebut *Farrar* represented the Council's implicit ratification of the importation of *Farrar*.[18] As such, the protections of the City Human Rights Law would be subject to being automatically ratcheted down every time federal or state law was narrowed by judicial construction.

Along with this sort of refusal to construe the City Human Rights Law liberally, the period between 1991 and 2005 was characterized by the wholesale failure of courts to recognize even basic modifications in statutory text. For example, it had already been illegal under the City Human Rights Law "to retaliate . . . against any person," but the 1991 Amendments modified

---

[14] *See, e.g.*, Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991).
[15] 506 U.S. 103, 115 (1992).
[16] 821 N.E.2d 519 (N.Y. 2004).
[17] *Id.* at 525.
[18] *Id.* at 525-26.

that language so that it became illegal "to retaliate *in any manner*...against any person."[19] Surely, the addition of the phrase "in any manner" was intended to mean and do *something*. Year after year, however, judges failed to appreciate that the legislative change had any meaning at all.

In a particularly acute example of judicial lawlessness in 2003, a state appellate court, in the case of *Priore v. N.Y. Yankees*,[20] conjured up an entirely imaginary legislative history to get around the fact that the 1991 amendments had made individuals liable for their own discriminatory workplace conduct. The City Council had taken the phrase common to Title VII and many state employment discrimination statutes that it was unlawful for "an employer" to engage in certain actions and broadened that to make it unlawful for an employer "or an employee or agent thereof" to engage in those actions.[21] Mayor Dinkins had explained that the 1991 Amendments had taken "the fundamental step of making all people legally responsible for their own discriminatory conduct"[22]

Several courts had started to abide by the plain language (and plain import) of this change.[23] All of this, however, was of no moment to an intermediate appeals court panel that

---

[19] 1991 Amendments, § 1; New York City Legislative Annual 160 (1991).
[20] 761 N.Y.S.2d 608 (App. Div. 2003).
[21] 1991 Amendments, § 1; New York City Legislative Annual 152-53 (1991).
[22] Dinkins's Remarks, *supra* note 10, at 4. The statement was consistent with the Committee Report that had accompanied the legislation. *See Report on Prop. In. No. 465-A and Prop. Int. No 536-A before the Comm. On Gen. Welfare* 9-10 (1991) [hereinafter 1991 Committee Report], *available at* www.antibiaslaw.com/LL39CommitteeReport.pdf (noting that the employment discrimination provisions had been "silent" as to individual liability of employees and agents, but that the "amendment would make explicit such individual liability").
[23] *See, e.g.*, Murphy v. ERA United Realty, 674 N.Y.S.2d 415, 417 (App. Div. 1998) (Section 8-107(1)(a) of the New York City Human Rights Law "expressly provides that it is unlawful for 'an employer or an employee or agent thereof' to engage in discriminatory employment practices. Accordingly, the plaintiff has a cause of action under this provision against the employer as well as her co-employees"); Harrison v. Indosuez, 6 F. Supp. 2d 224, 233-34 (S.D.N.Y. 1998) ("As the [City law] specifically allows for employee liability, there is no question that the law is applicable against [the defendant] in his individual capacity."); Alvarez v. J.C. Penney Co., No. 96 CV 5165, 1997 WL 104772, at *2 (E.D.N.Y. Feb. 14, 1997) ("the plain language of the Code provides for liability against individual employees").

simply did not want to believe that anyone would (or should) want to impose individual liability. To achieve its ends, the *Priore* court claimed that the added language ("or an employee or agent thereof") was simply reflecting language that had been in a New York State Human Rights Law provision dealing with licensing agencies. This was a complete fabrication. The section of the City Human Rights Law at issue did not have anything to do with licensing agencies (a different section was created for that), and the added language about employees or agents was language *not* found in the State Human Rights Law.[24] But the *Priore* court needed to create a "context."

Priore rejected the idea that the change in statutory language "automatically open[s] the door to an entirely new category of defendants" — stating that the new language had to be read "in context" (that is, the context it had invented) — and asserted that there was "no indication in the local ordinance, explicit or implicit, that it was intended to offer a separate right of action against any and all fellow employees based on their independent and unsanctioned contribution to a hostile environment."[25] For the First Department of the Appellate Division (covering cases arising in Manhattan and the Bronx), individual liability was dead.[26]

For civil rights advocates, City Human Rights Law development since 1991 — or, more precisely, the *lack* of independent development since 1991 — meant that the City Council had to send a message to the judiciary that could not be ignored.

II. A hybrid approach

[24] *Priore* is discussed in more detail in Gurian, *supra* note 9, at 272-75.
[25] Priore v. N.Y. Yankees, 761 N.Y.S.2d at 614.
[26] The decision did not purport to remove liability for aiding and abetting and abetting an act of discrimination, proscribed separately by N.Y.C. Admin. Code § 8-107(6). But the idea that the added language would add nothing to that aiding and abetting proscription violated elementary rules of statutory construction.

In some respects, the Restoration Act proceeded conventionally, making specific changes to specific provisions. Thus, for example, protection against discrimination based on domestic partner status was added to the City Human Rights Law's proscriptions against discrimination in employment, housing, and public accommodations,[27] and the maximum civil penalty available in a case brought administratively was raised to $250,000.[28]

The Restoration Act also went back to try to give force to the City Council's intent to have a broad anti-retaliation provision (the "in any manner" language having been insufficient to do the job). It explicitly set forth in the anti-retaliation provision the proviso that retaliation complained of need not result in either an "ultimate action" or a "materially adverse change" in terms and conditions in order to be actionable.[29]

In a direct rejection of the Supreme Court's dramatic narrowing of the circumstances in which attorney's fees would be available in cases where the litigation had acted as a catalyst for a change in policy on the part of the defendant,[30] the Restoration Act explicitly declared that fees would be available in such cases.[31]

But the most important contribution of the Restoration Act was the undoing of rote parallelism. Section 1 of the Restoration Act stated the "sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil

---

[27] Restoration Act (*amending* N.Y.C. Admin. Code §§ 8-107(1), (2), (4), (5), (9), and (18)).
[28] *Id.*, (amending N.Y.C. Admin. Code § 8-126(a)).
[29] *Id.*, (amending N.Y.C. Admin. Code § 8-107(7)).
[30] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001).
[31] Restoration Act, (amending N.Y.C. Admin. Code § 8-502(f)). The Committee Report that accompanied the Restoration Act specifically adopted the analysis set forth in Justice Ginsburg's dissent in *Buckhannon. See Local Civil Rights Restoration Act of 2005 before Comm. On Gen. Welfare, Human Rights Law*, [hereinafter 2005 Committee Report] New York City Legislative Annual 536-39 (2005) at 538-39, n. 9, *available at* www.antibiaslaw.com/2005CommitteeReport.

rights of all persons covered by the law."[32] It went on to "underscore" that the law's provisions "are to be construed independently from similar or identical provisions of New York state or federal statutes."[33] And, in contrast to *McGrath's* downward ratchet effect, it created an upward ratchet effect: interpretations of the provisions of counterpart federal and state statutes could be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[34]

Section 1 of the Restoration Act set forth its purpose; section 7 did the work of amending the construction section of the law. Rather than requiring liberal construction to accomplish the "purposes" of the law, the Council now required such construction to accomplish the "uniquely broad and remedial" purposes.[35] Any decision that asserted that the purposes of the City Human Rights Law were equivalent to the purposes of counterpart statutes simply could not be harmonized with this language.

For good measure, the Council added additional language making clear that the liberal construction was required "regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."[36]

Each element of the Restoration Act's legislative history focused on the importance of independent construction,[37] and included this statement made on the floor of the City Council at the meeting at which it voted on the Restoration Act:

> Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights

---

[32] Restoration Act, § 1.
[33] *Id.*
[34] *Id.*
[35] Restoration Act, § 7 (amending N.Y.C. Admin. Code § 8-130).
[36] *Id.*
[37] The sources of construction are discussed in detail in Gurian, *supra* note 9, at 260-62.

protections are in jeopardy.

> There are many illustrations of cases, like *Levin* on marital status, *Priore*[,] *McGrath* and *Forrest* that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore the text of specific provisions of the law, or both.
>
> With [the Restoration Act], these cases and others like them will no longer hinder the vindication of our civil rights.[38]

The question, of course, was whether the courts would heed what the Council had done.

III. The courts take notice

In civil rights, as in other areas of life, victory can be fleeting. Nevertheless, the tentative judgment to be made eight years after the passage of the Restoration Act is that an independent City Human Rights Law jurisprudence has indeed begun to take shape, despite some continuing resistance in the judiciary. Much work remains for the law to fulfill its intended potential; ironically, the greatest need is for civil rights advocates to be willing to take up more wholeheartedly what the Restoration Act has offered through its enhanced liberal construction provision and articulate in specific cases the specific reasoning that demands specific departures from existing legal doctrine.

Williams v. New York City Housing Authority,[39] decided early in 2009, was not the first case to take account of the passage of the Restoration Act, but it represented the most thorough and important exposition by any court, let alone an appellate court, of the Act's intent, and demonstrated how the process of independent construction should proceed. The overview from *Williams:*

> the Restoration Act notified courts that (a) they had to be aware that some

[38] Annabel Palma, Statement at the Meeting of the New York City Council 41-42 (Sept. 15, 2005) (transcript on file with the office of the New York City Clerk).
[39] 872 N.Y.S.2d 27 (App. Div. 2009).

> provisions of the City HRL were textually distinct from its State and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes and (c) cases that had failed to respect these differences were being legislatively overruled.[40]

Reiterating that the Restoration Act had legislatively overruled *McGrath,* the court was careful to point out that the City Council envisioned the enhancement of the liberal construction provision as "obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law."[41] The court continued:

> While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, § 8-130's specific *construction* provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions[.]"[42]

The legislative history provided a guidance form multiple sources as to how courts should proceed to perform the task of deciding how provisions of the City Human Rights Law should be interpreted. *All* of the legislative history pointed in the direction of choosing an interpretation that maximized coverage;[43] a related lesson was that it would be a mistake to imagine that, for City Human Rights Law purposes, the upper bound of coverage was in any way a "settled" question. Every provision of the law had to be examined in light of the direction to courts to interpret to fulfill the law's uniquely broad and remedial purpose. Consistent with this, the court cited with approval the argument I had made in *Return to Eyes on the Prize:*

> areas of law that have been settled by virtue of interpretations of federal or State law "will now be reopened for argument and analysis.... As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law[.]"[44]

---

[40] *Id.* at 32.
[41] *Id.* at 36-37.
[42] *Id., quoting* Gurian, *supra* note 9, at 280.
[43] *Id.* at 37, n.20.
[44] *Id.* at 39, n.24.

One of the specific issues before the *Williams* court was the scope of protection against sexual harassment, and the court demonstrated how the process of "reflection and reconsideration" was supposed to be handled. In the first instance, the court, true to the language of the statute before it, treated sexual harassment as one type of gender-based discrimination in terms and conditions of employment. It then asked, "[W]hat constitutes inferior terms and conditions based on gender."[45]

Rather than taking the Supreme Court's approach as the necessary answer for City Human Rights Law purposes, *Williams* stated that the "severe or pervasive" doctrine — characterized by the Supreme Court as a "middle path"[46] — hindered those local objectives: "Experience has shown," the court stated, "that there is a wide spectrum of harassment cases falling between 'severe or pervasive' on the one hand and a 'merely' offensive utterance on the other."[47] Keeping with its focus on whether conduct created inferior terms and conditions, the court got to the heart of workplace reality:

> It would be difficult to find a worker who viewed a job where she knew she would have to cope with unwanted gender-based conduct (except what is severe or pervasive) as equivalent to one free of unwanted gender-based conduct.[48]

Williams concluded that the purposes of the City Human Rights Law could best be achieved by allowing severity and pervasiveness to go only to the question of damages, not to the question of underlying liability. In the ordinary case, therefore, liability is established when

[45] *Id.* at 37.
[46] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
[47] *Williams*, 872 N.Y.S.2d at 38 (citation omitted).
[48] *Id.* at 38, n.22.

there is evidence of an employee being treated less well than others because of gender.[49] To "narrowly target" concerns about "truly insubstantial" cases, the court recognized an affirmative defense "whereby defendants can still avoid liability if they provide that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"[50]

Critically, *Williams* illuminated how to tie an enhanced liberal construction analysis to each of the guideposts for interpretation set out in the Committee Report that accompanied the Restoration Act:

(1) "Traditional methods and principles of law enforcement ought to be applied in the civil rights context."[51] Determining liability by the existence of differential treatment without regard to severity or pervasiveness creates a greater incentive for employers to "create workplaces that have zero tolerance," and, the court ruled, maximizing deterrence is a traditional method and principle of law enforcement.[52]

(2) "Discrimination should not play a role in decisions made by employers, landlords, and providers of public accommodation." The court stated that the "severe or pervasive" rule was inconsistent with the "play no role" principle because it means that "discrimination is allowed to play *some significant* role in the workplace."[53]

(3) "'[v]ictims of discrimination suffer serious injuries for which they ought to receive

---

[49] The holding of *Williams* as to sexual harassment, and its approach more broadly, was adopted by New York's Appellate Division, Second Department — the intermediate level appeals court with jurisdiction over the boroughs of New York City not covered by the First Department — in *Nelson v. HSBC Bank USA*, 929 N.Y.S.2d 259 (App. Div. 2011). *Nelson* deployed the liberal construction requirement of the City Human Rights Law as enhanced by the Restoration Act to find as well that the Restoration Act had retroactive effect. *Id.* at 262-63.
[50] *Williams,* 872 N.Y.S.2d at 41 (internal citation omitted).
[51] This and the following two guideposts are found in 2005 Committee Report, *supra* note 31.
[52] *Williams*, 872 N.Y.S.2d at 38.
[53] *Id.*

full compensation.'" The court stated that "severe or pervasiveness" contradicts the principle that discrimination injuries, without limitation, are serious injuries.[54]

It should be immediately apparent that this kind of analysis is transferable to virtually any issue that would arise in the anti-discrimination law context.

New York's Court of Appeals has grappled with the Restoration Act in two important cases. The first was principally a matter of accepting that the City Human Rights Law meant what it appeared to say. In *Zakrzewska v. New School*,[55] the court took up the question of whether the *Faragher-Ellerth* affirmative defense to employer liability[56] applied to employment discrimination claims in the City Human Rights Law context.[57]

The court concluded it did not: section 8-107(13) of the City Human Rights Law "creates an interrelated set of provisions to govern an employer's liability for an employee's discriminatory conduct in the workplace" that "simply doesn't match up with the *Faragher*-Ellerth defense."[58] For acts of those employees or agents who exercised managerial or supervisory authority, the section provides for strict liability,[59] and the existence of anti-discrimination policies and procedures can only go to the question of whether civil penalties

---

[54] *Id.* (internal citation omitted).
[55] 928 N.E.2d 1035 (N.Y. 2010).
[56] *See* Faragher v. Boca Raton, 524 U.S. 775, 777-78 (1998) and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (the two cases, decided on the same day, hold that an affirmative defense to a harassment claim, available where the bad actor is a supervisor or manager, "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise").
[57] *New School*, 928 N.E.2d at 1038-39.
[58] *Id.* at 1039.
[59] Id at 1039-40.

(administratively) or punitive damages (in a civil action) should be mitigated.[60] The court ruled that the statutory text made clear that the provision, contrary to the employer's position, applied to *all* supervisors and managers,[61] a very different result from the Supreme Court's recent decision finding that an employee is a "supervisor" for Title VII vicarious liability purposes only if he or she is empowered by the employer to take tangible employment actions against the victim.[62] It is only in the context of actions of non-supervisory co-workers that the existence of anti-discrimination policies and procedures can be considered in determining liability (and only where the conduct is *not known* to managers or supervisors but *should have been*).[63]

Beyond the implications of confirming strict liability, the case represented a belated recognition that the 1991 Amendments (of which the addition of section 8-107(13) was part) constituted a "major overhaul" of the City Human Rights Law.[64]

New School, of course, represented a circumstance where all the court needed to do was to resist the *Priori*-like urge to say, "The statute just *can't* mean what it says." An even more important pronouncement from the New York Court of Appeals came the following year (2011) in a retaliation case brought against the New York City Police Department.[65] The question at issue was the meaning of the term "oppose"; that is whether action was taken against the plaintiff for having opposed discrimination. One can say with absolute certainty that, in the pre-Restoration Act, *McGrath* era, the court would simply have looked at how Title VII and the State Human Rights Law had interpreted the term.

---

[60] *Id.* at 1039, (discussing paras. (b)(1) and (e) of N.Y.C. Admin. Code § 8-107(13)). Strict liability also exists where the acts of a non-supervisory employee were known to someone exercising managerial or supervisory responsibility and the employee failed to take "immediate and appropriate corrective action." *Id.*
[61] *Id.* at 1040.
[62] Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).
[63] *New School,* 928 N.E.2d at 1039.
[64] *Id.*
[65] Albunio v. City of New York, 947 N.E.2d 135 (N.Y. 2005).

Now, however, a unanimous court recognized that the enhanced liberal construction provision introduced by the Restoration Act required it to construe the language of the retaliation provision, "*like other provisions of the City's Human Rights law,* broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[66]

This holding could not be more significant. First, the requirement of enhanced liberal construction analysis is applicable not only to the term "oppose," but to *every* term found in the law.[67] Second, it captures the intent of the Restoration Act to require judges to weigh alternative interpretations, not pick the road that has previously been most frequently selected. Third, it dispenses with the prominent notion in Title VII jurisprudence that Congress wanted Title VII tailored to "balance" the interests of employers. Fourth, courts are *not* asked to indulge their own policy preferences in rendering interpretations, but rather to adhere to a policy decision already made by the City Council to take the most pro-plaintiff position that is reasonably possible.

In the case at hand, the only evidence that the plaintiff had opposed discrimination was that, at a meeting, she reacted to her supervisor's criticism of her recommendation to transfer a third party into the unit in which she worked by telling the supervisor that the person she had recommended "'was the better candidate for the job'" and that "'[i]f I had to do it all again, I would have recommended [the same person] again.'"[68] This is not the usual basis for a finding that discrimination has been opposed. But the court found, "While [plaintiff] did not say in so many words" that her preferred candidate "was a discrimination victim" on the basis of perceived sexual orientation, "a jury could find that both [the supervisor and plaintiff] knew that he was, and that [plaintiff] made clear her disapproval of that discrimination by communicating

[66] *Id.* at 137 (emphasis added).
[67] The continuing desire to exempt "to discriminate" — the most basic term in the law — from this analysis (a desire that may stem from conceptual confusion or ideological resistance) is discussed, *infra,* in Section IV.
[68] *Albunio,* 947 N.E.2d at 136.

to [her supervisor], in substance, that she thought [the supervisor's] treatment of [her candidate] was wrong."[69]

By the time *Albunio* was decided, the Second Circuit Court of Appeals had also, separately, provided direction on the Restoration Act. In *Loeffler v. Staten Island University Hosp.*,[70] a public accommodations case, the Second Circuit ruled that the Restoration Act "confirm[ed] the legislative intent to abolish 'parallelism' between the City HRL and federal and state anti-discrimination law . . . ."[71] The court aptly described the City Human Rights Law as having a "one-way ratchet" where state and federal enactments serve only as a floor for coverage, not the ceiling.[72] *Weiss v. JPMorgan Chase* is an example of a district court following *Loeffler's* command.[73] *Weiss* declined to apply the Supreme Court's decision in *Gross v. FBL Financial Services*,[74] the case that had required a showing of but-for causation in age discrimination cases (rejecting what, at least in some circuits, had been the use of mixed-motive analysis). Noting that the City Human Rights Law does not differentiate between age and other types of discrimination claims, the court reasoned that application of *Gross* in an age case would mean that mixed-motive analysis would not be available in any employment discrimination claims, including those involving protected classes where Title VII provides for mixed motive analysis.[75] Reducing City Human Rights Law below that Title VII floor was impermissible, the court ruled, also finding that an independent interpretation of the City Human Rights Law allowing liability where protected class basis was "a motivating factor" was consistent with the

[69] *Id.* at 138.
[70] 582 F.3d 268 (2d Cir. 2009).
[71] *Id.* at 278.
[72] *Id.*
[73] No. 06 Civ 4402(DLC), 2010 WL 114248 (S.D.N.Y. Jan. 13, 2010).
[74] 557 U.S. 167 (2009).
[75] *Weiss*, 2010 WL 114248, at *3.

law's text.[76]

In sum, the application of the Restoration Act has generated a strong body of basic case law on which to build.

IV. Unfinished business and attempts at sabotage

In many respects, though, the Restoration Act's work has just begun. I am not aware, for example, of any case that has specifically recognized that *Priore's* excision-by-fiat of individual liability has been legislatively overruled.[77] And another element of *Williams,* that which rejected the Supreme Court's limitations on continuing violation doctrine for City Human Rights Law purposes,[78] has only, to my knowledge, been applied by one federal court.[79] More broadly, large areas of the law simply have not been subject to any reexamination yet.

The most troubling developments in the last few years are circumstances where courts have not very subtly attempted to evade the requirements of the Restoration Act. Two areas have stood out: the treatment of sexual harassment claims and the attempt to wall off "procedural" matters from enhanced liberal construction analysis.

---

[76] *Id.* at *4.

[77] Although when a judge simply looks at the text of the statute without reference to *Priore*, he or she has no problem concluding that individual liability is provided for. *See, e.g.*, Malena v. Victoria's Secret Direct, LLC, 886 F. Supp. 2d 349, 366 (S.D.N.Y. 2012).

[78] In *Williams*, the court noted that, both before 1991 Amendments and until such time as the Supreme Court decided *National R.R. Passenger Corp. v Morgan*, 122 S.Ct. 2061 (2002), "discrete acts" of discrimination otherwise outside the limitations period had been actionable in the Second Circuit as continuing violations if part of a continuing pattern. *Williams*, 872 N.Y.S.2d at 35. *Williams* rejected the *Morgan* limitation for City Human Rights Law purposes: "the Restoration Act's uniquely remedial provisions are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period." *Id.*

[79] In *Sotomayor v. City of New York,* 862 F. Supp. 2d 226, 250-51 (E.D.N.Y. 2012), the federal district court followed this analysis.

Wilson v. N.Y.P. Holdings, Inc.[80] is a 2009 Southern District case that came to be cited repeatedly.[81] What did the court treat as no more than "petty slight and trivial inconveniences" (the *Williams* affirmative defense)? Comments that included "training females is like 'training dogs'" and "'women need to be horsewhipped.'"[82] Among the cases citing *Wilson* is *Mihalik v. Credit Agricole Cheuvreaux North America, Inc.*,[83] another case where the conduct complained of — which included evidence that the chief executive officer "explicitly told [plaintiff] that male employees should be respected because they were 'male' and thus 'more powerful' than women"[84] — was found to fit the "petty slights and trivial inconveniences" exception.[85] The district court's decision in *Mihalik,* too, was then cited again and again by other judges in the Southern District.[86]

That these cases contravene *Williams* (and the intent of the Restoration Act) was first pointed out in a remarkably critical footnote reference in a subsequent case decided by the appellate court that had decided *Williams.* The principal focus of 2011's *Bennett v. Health Management Systems, Inc.*[87] will become clear later in this section, but the court was also concerned that the *Williams* affirmative defense be treated as the "narrowly drawn affirmative defense" it was intended to be, that it was important for "borderline" fact patterns be allowed to

---

[80] No. 05 Civ. 10355, 2009 WL 873206 (S.D.N.Y. Mar. 31, 2009).
[81] *See, e.g.*, Bermudez v. City of New York, 783 F. Supp. 2d 560, 593 (S.D.N.Y. 2011); Fullwood v. Association for the Help of Retarded Children, Inc., 2010 WL 3910429 (S.D.N.Y. 2010).
[82] *Wilson,* 2009 WL 873206 at *28 (internal citation omitted).
[83] 09 Civ. 1251, 2011 WL 3586060 (S.D.N.Y. July 21, 2011), *vacated and remanded by* 715 F.3d 102 (2d Cir. 2013).
[84] This fact was not adverted to in the district court's opinion, but was cited in the Second Circuit remand. *See* Mihalik v. Credit Agricole Cheuvreaux North America, Inc., 715 F.3d 102, 113 (2d Cir. 2013).
[85] *Mihalik,* 2011 WL 3586060, at *9-10.
[86] *See, e.g.*, Ardigo v. J. Christopher Capital, LLC, 2013 WL 1195117 (S.D.N.Y. Mar. 25, 2013) Clarke v. Pacifica Foundation et. al., 2011 WL 4356085 (S.D.N.Y. Sept. 16, 2011).
[87] 936 N.Y.S.2d 112 (App. Div. 2011).

be heard by a jury, and it be understood that one could "easily imagine a single comment that objectifies women being made in circumstances where [the] comment would, for example, signal views about the role of women in the workplace and be actionable."[88] The court skewered *Wilson* and *Mihalik* for, among other things, "ignoring the *Williams* holding," relying on cases that "nominally acknowledge *Williams* but ignore its teaching."[89]

Two years later, the Second Circuit vacated and remanded *Mihalik,* and taught many of the lessons of the Restoration Act again. Specifically in the context of sexual harassment, the circuit rejected the district court's analysis for placing "too much emphasis on *Williams*'s recognition that the NYCHRL should not 'operate as a "general civility code,"' and too little emphasis on its exhortation that even 'a single comment' may be actionable in appropriate circumstances."[90] The question remains whether lower courts will take the guidance provided (and the rebukes) seriously.

Another area of resistance or confusion is found in connection with what are sometimes called procedural matters. Is the manner in which the *McDonnell-Douglas* framework is or is not used a matter beyond enhanced liberal construction analysis? *Bennett* found that it was not: "the identification of the framework for evaluating the sufficiency of evidence in discrimination cases does not in any way constitute an exception to the Section 8-130 rule that all aspects of the City HRL must be interpreted to accomplish the uniquely broad and remedial purposes of the law,"

---

[88] *Id.* at 123, n.16.
[89] *Id.*
[90] *Mihalik*, 715 F.3d at 114 (citations omitted). There was also a retaliation claim in the case. In vacating the district court's grant of summary judgment on this claim, the circuit built on both *Albunio* and the retaliation holding of *Williams* (not previously discussed in this article). A court needs to make the assessment of whether complained-of conduct was "'reasonably likely to deter a person from engaging in protected activity[]'" with "a keen sense of workplace realities, of the fact that the 'chilling effect' of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct." *Id.* at 112 (internal quotation marks omitted), (quoting *Williams*, 872 N.Y.S.2d at 34).

and for the court to "create an exemption from the sweep of the Restoration Act for the most basic provision of the City HRL — that it is unlawful 'to discriminate' — would impermissibly invade the legislative province."[91]

Yet a divided panel of the same appellate court later issued a ruling in *Melman v. Montefiore Medical Center* that states that neither the Restoration Act nor the Committee Report "set forth a new framework for consideration of the sufficiency of proof of claims under the [City Human Rights Law] or indicates that the *McDonnell Douglas* framework is to be discarded."[92] The statement of the *Melman* majority is a *non sequitur:* that the Restoration Act did not set forth specific modifications to *McDonnell-Douglas* does nothing to limit a court's obligation to interpret the term "to discriminate" like it must interpret all other terms of the law: pursuant to the direction of the enhanced liberal construction provision. It is as though that majority could not (or did not wish to) appreciate that *McDonnell-Douglas* is not an immutable principle of the physical universe that predates all legislation, but rather a judicial creation designed to give one of many possible answers to how to give shape the identifying what constitutes discrimination.[93]

As a practical matter, *Melman* adhered to *Bennett.* It was, for example, confirmatory of the principle that the City Human Rights Law insists that discrimination "play no role" and that mixed motive analysis is applicable to every case. *Melman* accepted *Bennett's* direction that summary judgment of City Human Rights Law claims should only be granted if "no jury could find defendant liable under any of the evidentiary routes — *McDonnell Douglas,* mixed motive,

[91] *Bennett,* 936 N.Y.S.2d at 116-17 (citation omitted).
[92] Melman v. Montefiore Med. Ctr., 946 N.Y.S.2d 27, 30 (App Div. 2012).
[93] *Cf. Albunio,* 947 N.E.2d at 137 (requiring the selection of the broadest, most plantiff-friendly interpretation reasonably possible).

'direct' evidence, or some combination thereof[.]"[94]

The Second Circuit in *Mihalik* also confirmed that the "no evidentiary route" principle was to be applied in all City Human Rights Law cases,[95] but observed in a footnote that, comparing *Bennett* with *Melman,* "[i]t is unclear whether, and to what extent, the *McDonnell-Douglas* burden-shifting analysis has been modified for NYCHRL claims."[96] In fact, however, apart from its opening statement about what the Restoration Act had not explicitly done, *Melman* did not speak to or rebut some of *Bennett's* other conclusions.

For example, *Bennett* had rejected the *Reeves* standard for failing to take sufficiently into account:

> (a) the traditional power to be accorded to the inference of wrongdoing that arises from evidence of consciousness of guilt; (b) the importance of deterring a defendant's proffer of false reasons for its conduct; and (c) the impropriety of a court weighing the strength of evidence in the context of a summary judgment motion.[97]

Picking up themes sounded by the dissent in *Hicks*,[98] *Bennett* had ruled that

> Once there is some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, such as whether a false explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive co-existing with other legitimate reasons.[99]

---

[94] *Melman*, 946 N.Y.S.2d at 30 (internal quotation marks omitted) (quoting *Bennett*, 936 N.Y.S.2d at 124).
[95] *Mihalik,* 715 F.3d at 113.
[96] *Id.* at 110, n.8. New York's Appellate Division, Second Department has recently issued a *Melman*-like decision. Brightman v. Prison Health Serv., Inc., 970 N.Y.S.2d 789 (App. Div. 2013). As in *Melman,* the court asserts that the Restoration Act's enhanced liberal construction provision did not "alter the procedural framework" applicable to City Human Rights Law claims, but neither addresses the reasoning in *Bennett* nor engages in its own liberal construction analysis. *Id.* at 791. Likewise, it fails to cite its decision in *Nelson* (which accepted the need for broad construction in all respects), and its decision in *Furfero v. St. John's Univ.*, 941 N.Y.S.2d 639, 642 (App. Div. 2012), by which it adopted *Bennett.*
[97] *Bennett*, 936 N.Y.S.2d at 122.
[98] Hicks v. St. Mary's Honor Ctr., 509 U.S. 502, 525 (1993) (Souter, J., dissenting).
[99] *Bennett*, 936 N.Y.S.2d at 123.

Melman simply did not attempt to articulate a substantive objection to *Bennett's* reasoning or conclusion.

In light of the dictates of *Albunio*, it is difficult to imagine that "to discriminate" will be walled off from enhanced liberal construction analysis. Likewise, it is hard to believe that *Bennett*'s interpretation (picking up on what was, after all, a four-Justice dissent in *Hicks*) will be found not to fall within a "reasonably possible" pro-plaintiff construction of "discrimination," but the ultimate willingness of judges to follow *Albunio* faithfully remains to be determined.

V. How might other jurisdictions proceed?

I do not suggest that a push for state and local legislation would represent a cure-all for the problems and limitations in federal anti-discrimination law doctrine. First, and most obviously, there are many jurisdictions that would not be politically congenial to such an effort. Second, states and localities are not empowered to undo congressional or Supreme Court efforts to stymy state-based remedies. The Class Action Fairness Act of 2005 is a particularly notable example of the former;[100] the Supreme Court's repeated expansions of the Federal Arbitration

[100] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in various sections of 28 U.S.C.). CAFA provides for the removal of most class actions initiated in state court under state law regardless of the absence of complete diversity between and among the parties. *See* 28 U.S.C. § 1332(d). This is not to say that potential workarounds might not exist (perhaps, for example, creating a state-based pattern-and-practice declaratory judgment action with the availability of attorney's fees). I, for one, am dubious, of the workaround reflected in the Ninth Circuit's recent resolution of *Romo v. Teva Pharm. USA, Inc.*, 731 F.3d 918, (9th Cir. 2013) will survive (the court rejected removal to federal court under CAFA's mass action provision, 28 U.S.C. § 1332(d)(11(B)(i), because a request to "coordinate" proceedings in state court did not explicitly state that the coordination would involve a joint trial — a joint trial being the trigger for removal). *Id.* at 920-25. *Cf.* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013) (holding unanimously that a voluntary stipulation by a representative of a putative class not to seek damages in excess of the CAFFA threshold for removal does not remove the case from CAFA's scope because the representative cannot bind members of the class).

Act are examples of the latter.[101]

Nevertheless, the list of non-preempted problems or limitations in anti-discrimination law doctrine is very long indeed, and, hence, the list of ways that state or local legislation can be helpful is very long, too. Some are suggested by the kinds of changes made either by the Restoration Act directly or by the 1991 Amendments before them, [102] but there are many more.

From the point of view of the restoration of rights, an examination of closely divided Supreme Court decisions on civil rights is the obvious place to begin. *Bennett* went back to 1993 to draw on the dissent in *St. Mary's Honor Center v. Hicks*,[103] but one could just as easily turn to the Supreme Court's last term in which the term "supervisor" was defined extraordinarily narrowly for the purpose of the determination of vicarious liability under Title VII[104] and plaintiffs were stripped of the ability to use mixed motive analysis in Title VII retaliation cases.[105]

Another source for potential state or local legislative activity is legislation that has been stymied on the federal level. The Paycheck Fairness Act,[106] for example, has not been able to get through Congress. It would prohibit retaliation against employees for discussing salary information and would require the defense to a claim under the Fair Labor Standards Act that women were being paid less than men to be a bona fide factor other than sex that the employer proves is job-related, consistent with business necessity, and "not based upon or derived from a

---

[101] *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (mandatory arbitration applies to all employment contracts other than those of transportation workers); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (preempting a California Supreme Court doctrine that had defined some class-arbitration waivers in consumer arbitration agreements as unconscionable and hence unenforceable).

[102] *See* Gurian, *supra* note 9, at 284-87 for a discussion of many of the issues tackled by the 1991 Amendments.

[103] *Hicks,* 509 U.S. at 525-43.

[104] Vance v. Ball State Univ., 133 S. Ct 2434 (2013).

[105] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

[106] Most recently introduced as Payroll Fairness Act, S. 84,113th Cong. (2013).

sex-based differential in compensation."[107]

Disparate impact liability is another obvious area for state and local legislating. Although national civil rights organizations have, surprisingly, failed to take advantage of it, the City Human Rights Law's provision is a useful model of a disparate impact scheme more robust than provided by Title VII.[108] First, it applies to all protected classes and to all contexts of discrimination. This avoids (and fixes) the problem that arose in *Smith v. City of Jackson*;[109] it also provides a basis for the building of a broader coalition than is offered when legislation extends protection for a single protected class group.

Second, unlike Title VII (even as amended by the Civil Rights Act of 1991), the City Human Rights Law's disparate impact provision permits a plaintiff to identify a *group* of practices that cause a disparate impact without demonstrating "which specific policies or practices within the group results in such disparate impact" (something that can be devilishly difficult for a plaintiff).[110]

The City Human Rights Law also gives the concept of less discriminatory alternative an important tweak: where the plaintiff "produces substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity," the burden is on the covered entity to "prove that such alternative policy or practice would not serve the covered entity as well."[111] There is no limitation on compensatory or punitive damages set forth in the City Human Rights Law, either in the context of a civil action generally, or for disparate impact

---

[107] *Id.*, §§ 3(a) and (b). The defense would not apply where the employee proves that there is a less discriminatory alternative available that the employer refuses to adopt despite the alternative's ability to meet the employee's business need. *Id.*, § 3(a).
[108] N.Y.C. Admin. Code § 8-107(17).
[109] 544 U.S. 228, 240 (2005) ("the scope of disparate-impact liability under [the] ADEA is narrower than under Title VII").
[110] N.Y.C. Admin. Code § 8-107(17)(a)(2).
[111] *Id.*

claims in particular.[112]

Robust state and local legislation proscribing conduct that causes disparate impact based on protected class status might also help reduce the impact of *Ricci v. DeStefano*,[113] the 2009 case in which the Supreme Court, treating the desire to *avoid* race-based disparate impact to be a species of intentionally-discriminatory action, held that an employer's decision not to certify the results of a job examination that it believed had a racially disparate impact was "impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[114] According to *Ricci,* "a threshold showing of a significant statistical disparity...and nothing more" is "far from a strong basis in evidence that the [employer] would have been liable under Title VII had it certified the results."[115]

If, as Justice Scalia has urged, the Supreme Court takes up the question of whether disparate impact provisions violate the equal protective clause,[116] all bets are off. But within the confines of *Ricci,* a state or local law that makes disparate impact claims easier to prove would likewise make it easier for an employer to have the requisite "strong basis in evidence." Such a case would place Title VII's floor-not-a-ceiling provision under a rare highlight: those in favor of broader disparate impact provisions would argue that § 2000e-7 blessed such extensions of civil rights protections; those seeking to limit disparate impact would argue that disparate impact proscription beyond that provided by Title VII represented intentional discrimination that §

---

[112] N.Y.C. Admin. Code § 8-502(a) (providing that a civil action shall allow a plaintiff to seek "damages, including punitive damages, and...injunctive relief and such other remedies as may be appropriate"); *see also* N.Y.C. Admin. Code § 8-107(17) (section setting forth disparate impact claims contains no damage limitation).
[113] 557 U.S. 557 (2009).
[114] *Id.* at 563.
[115] *Id.* at 587 (citation omitted).
[116] *Id.* at 594 (Scalia, J., concurring).

2000e-7 does *not* permit a jurisdiction to sanction on the basis that such legislation "purports to require or permit the doing of any act which would be an unlawful employment practice."[117]

One set of important questions that each state or locality has to answer concerns who is proscribed from committing discriminatory conduct, who is responsible for such conduct, and what relationship a person needs to have with a discriminatory actor to be protected. At the most basic level, there is the question of the size at which an employer becomes covered. For example, those working at the smallest employers, while not a large part of the labor force, are not a trivial part, either. In California alone, there are more than 1.1 million people working in firms with fewer than five employees.[118] Should those people not have protection against discrimination? Though California has extended protection against discriminatory harassment to employees of employers of all sizes,[119] employers with fewer than five employers are exempt from the other employment discrimination provisions (like discriminatory hiring and firing).[120]

Decisions as to who is covered are no less subject to political compromise than other legislative matters (perhaps more so, given the hold that the idea of not "burdening" small businesses has on the American imagination). But as a matter of what discrimination law seeks to provide baseline protection against, size should not matter. Another context of discrimination — that which occurs in public accommodations — provides interesting perspective on this question. The value sought to be upheld in state statutes that commonly have a list of places — bowling alleys, ice cream parlors, etc. — where discrimination shall not be allowed is that *public*

[117] 28 U.S.C. § 2000e-7.
[118] 2012 size-of-business data *available at* the website of California's Economic Development Department, http://www.labormarketinfo.edd.ca.gov/Content.asp?pageid=138 (last accessed on October 4, 2013).
[119] Cal. Gov. Code §§ 12940(j)(1), (j)(4)(A) (West 2013).
[120] Cal. Gov. Code §§ 12940(4)(A), 12926(d) (West 2013).

life shall not be polluted by bias, regardless of how transitory an interaction might be.[121] One's employment — even at the smallest employer — is no less a matter of public life should ought not be polluted by discrimination.

Similarly, a person victimized by bias in connection with work is harmed regardless of whether the victimizer is an "employer" or the victim is an "employee" or "independent contractor." California has taken some steps here, as well, although only in the harassment context. Harassers are individually liable, persons "providing services pursuant to a contract" are protected, and extensive vicarious liability is set forth.[122] Other states have the opportunity to expand coverage as much or more, including, for example, considering whether to protect one business entity from discrimination by another business entity because of the protected class status of the first entity's employers, agents, or associates.[123]

I would be remiss if I did not touch on one additional prospective addition to state and local anti-discrimination statutes. Ever since 1982, standing for fair housing organizations and

---

[121] It was this recognition that led to a provision in the 1991 amendments that changed the focus on the public accommodations provisions of the City Human Rights Law from one focused on "place" to one that covered "providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind." N.Y.C. Admin. Code § 8-102(9).

[122] Cal. Gov. Code § 12940(j); *see* Roby v. McKesson Corporation, 219 P.3d 749 (Cal. 2010) (confirming individual liability and discussing statutory provision generally). The state, however, is still stuck with the "severe or pervasive" standard. *See, e.g.*, Miller v. Dep't of Corr., 115 P.3d 77, 89-92 (Cal. 2005).

[123] Minnesota has made it unlawful for a person who engages in a trade or business or in the provision of a service to "to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose." Minn. Stat. Ann. § 363A.17 (West 2013). The Minnesota Supreme Court gave effect to the language insofar as permitting an injured business to sue, but excluded the individual discriminated against (who was not a party to a contract) from being able to sue. Krueger v. Zeman Constr. Co., 781 N.W.2d 858 (Minn. 2010). The court majority asserted that the statutory language unambiguously did not provide for such liability, but noted in the alternative its fear: under the plaintiff's theory, every person affected by the defendant's conduct could have an individual cause of action, and "[t]here is no indication that the legislature intended such an expansive reading of the statute." *Id.* at 864.

Cite as 33 Fordham Urb. L.J. 255 (2006)

A RETURN TO EYES ON THE PRIZE: LITIGATING UNDER THE RESTORED NEW YORK CITY HUMAN RIGHTS LAW

*Craig Gurian**

"The Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law."

—New York Statutes, Construction of Amendments[1]

"The courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy."

—New York Statutes, Construction of Amendments[2]

INTRODUCTION

Fifteen years ago, in 1991, New York City enacted comprehensive reforms to its local Human Rights Law[3] in order to fight a civil rights counter-revolution that was already restricting civil rights protections on the national level.[4] These reforms never achieved their potential, a failure due, in significant measure, to the unwill-

* Executive Director of the Anti-Discrimination Center of Metro New York; Scholar-in-Residence, Fordham Law School's Stein Center for Law and Ethics; and Adjunct Associate Professor of Law at Fordham Law School. Professor Gurian was the principal drafter of the Local Civil Rights Restoration Act and built and led a coalition of more than forty civil rights and allied groups that worked for its passage. This article is dedicated to Lori, Mollie, Alison, and Nico.

1. N.Y. STAT. LAW § 193(a) (McKinney 2005).

2. *Id.* § 95.

3. N.Y.C. ADMIN. CODE tit. 8 (1991). These amendments ("1991 Amendments") are found in NEW YORK CITY LEGISLATIVE ANNUAL 145–81 (1991). [hereinafter 1991 LEG. ANN.]. The 1991 Amendments resulted from passage of Local Law 39 of 1991, *available at* www.antibiaslaw.com/LL39.pdf. Title 8 of the Administrative Code is popularly known as the "City Human Rights Law." Except where otherwise specified, references to Title 8 refer to the provisions of the City Human Rights Law as they existed once the 1991 Amendments had been enacted.

4. In 1991, the United States was in the third year of generally conservative judicial appointments by President George Herbert Walker Bush, an administration that followed directly eight years of highly conservative appointments by President Ronald Reagan. The concern from those who believed in vigorous civil rights enforcement was not limited to national developments: "Even on the state level," then Mayor David N. Dinkins stated, "narrow interpretations of civil rights laws have retarded progress." Remarks by Mayor David N. Dinkins at Public Hearing on Local Laws 1 (June 18, 1991) [hereinafter Mayor David N. Dinkins, Remarks] (on file with the New

ingness of judges to engage in an independent analysis of what interpretation of the City Human Rights Law would best effectuate the purposes of that law.[5] This unwillingness has not been an isolated phenomenon. On the contrary, virtually every judge who has presided over a City Human Rights Law matter has simply asserted that the City Human Rights Law was nothing more than a carbon copy of its federal and state counterparts.[6]

The recent enactment of the Local Civil Rights Restoration Act ("Restoration Act")[7] reflects the New York City Council's concern that the City Human Rights Law "has been construed too narrowly."[8] The law explicitly rejects the "carbon copy" theory: "In particular, through passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes."[9]

The Restoration Act proceeds along two basic tracks. One track consists of a series of amendments to particular sections of the law. These amendments are significant in and of themselves and in terms of understanding the direction in which the Council wishes to see the law proceed. These amendments expand retaliation protection, raise the maximum civil penalties that may be awarded in proceedings brought administratively,[10] protect domestic partners

---

York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/MayorsRemarks061891.pdf.

5. In fairness, advocates for victims of discrimination must also take responsibility for the stunted state of City Human Rights Law. On far too many occasions, courts have not been asked to engage in this independent analysis.

6. More often than not, the assertion is set out in a footnote. When the assertion is in the body of a decision, the proposition is set out in brief, conclusory terms without any discussion. *E.g.,* Payne v. MTA New York City Transit Authority, 349 F. Supp. 2d 619, 629 (E.D.N.Y. 2004) ("Since claims brought under the State HRL and City HRL are analyzed under the same substantive standards as claims brought under Title VII, summary judgment is granted in favor of defendant with respect to [plaintiff's] state and local law claims, as well.").

7. N.Y.C. LOCAL LAW NO. 85 OF 2005 (Oct. 3, 2005) [hereinafter Restoration Act]. The Restoration Act is found in NEW YORK CITY, LEGISLATIVE ANNUAL (2005) (forthcoming). The text of the Restoration Act is available at www.antibiaslaw.com/RestorationAct.pdf. The Restoration Act was signed into law on October 3, 2005, to be effective immediately. For an analysis of which provisions of the Restoration Act are to be given retroactive effect, see discussion *infra* notes 337–50 and accompanying text.

8. Restoration Act, *supra* note 7, § 1.

9. *Id.*

10. Unlike Title VII, the City Human Rights Law permits an aggrieved party to seek administrative enforcement through the City's Human Rights Commission or judicial enforcement through the bringing of a court action. *See* N.Y.C. ADMIN. CODE §§ 8-109, 8-502(a). Judicial actions may be brought directly; administrative

against all forms of discrimination proscribed by the law,[11] require administrative investigations to be thorough, and restore the availability of attorney's fees in catalyst cases. I defer exploration of these amendments until Part II of this article only because it is the Restoration Act's other track that is intended to be transformative.

That second track is designed to eliminate the mechanism by which judges have failed to give the local law the expansive interpretation that the Council has intended. The Act states that provisions of state and federal civil rights statutes should be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[12] This ought not be a revolutionary proposition. That idea, after all, has found explicit statutory expression for forty years.[13] Nevertheless, the reality is that there has been very little independent development of the local law, even in circumstances where the language of a specific City Human Rights Law provision varies from that of its federal or state counterpart.[14]

The Act also amends section 8-130, the construction provision of the City's Human Rights Law, something the 1991 amendments had not done. In so doing, the Restoration Act takes direct aim at the premises and practices that have underlain interpretations of the statute. The construction provision—which is an operative provision as much as any other section of the law—is revised as follows (additions italicized; deletions bracketed):

> The provisions of this [chapter] *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.*[15]

Assertions that the purposes of the City Human Rights Law are no broader than those other civil rights laws are simply not tenable

---

filing is not a prerequisite. *Id.* Rather than civil penalties, judicial actions provide for uncapped punitive damages. *Id.*

11. The City Human Rights Law's proscriptions include those barring discrimination in employment, housing, and public accommodations.

12. Restoration Act, *supra* note 7, § 1.

13. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-7 (2005); Title II, 42 U.S.C. § 2000a-6(b) (2005) (proscriptions against discrimination in public accommodations); Fair Housing Act, 42 U.S.C. § 3615 (2005); Americans With Disabilities Act, 42 U.S.C. § 12201(b) (2005).

14. *See* discussion *infra* notes 33–90 and accompanying text.

15. Restoration Act, *supra* note 7, § 7.

in the face of this amendment. Likewise, the practice of robotically importing interpretations of federal and state civil rights statutes is inconsistent with the demand that liberal construction analysis must be performed without the result of that analysis being restricted or supplanted by the fact that federal and New York state civil rights laws have reached a result less friendly to victims of discrimination.

There are three crucial consequences of the Restoration Act's declaration of independence. First, there will be no warrant to ratchet down the protections of the City Human Rights Law in the likely event that federal and state civil rights protections are constricted further.[16] Indeed, the legislative history of the Restoration Act makes clear that the Council thought that federal and state civil rights laws had, by 1991, already been narrowed too far.

Second, areas of the law that have been treated as settled under City Human Rights Law, because they are settled for purposes of the counterpart statutes, will now be reopened for argument and analysis. *This result follows directly from the Restoration Act's intention that decisions that have failed to construe City Human Rights Law provisions independently and robustly are not to be treated as controlling, and may only be afforded persuasive weight in limited circumstances.*[17] As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law, including the parameters of actionable sexual harassment, the vitality of protection against discrimination on the basis of marital status, the availability of a remedy for those persons with disabilities who need what the Second Circuit has characterized as "economic accommodations," and the appropriate scope of damages.

Third—and this consequence is, unfortunately, of more moment than might at first be apparent—the Restoration Act's removal of the crutch of assumed equivalence will persuade more judges to take a look at the actual language of specific provisions of the City's Human Rights Law. Doing so will cause them to see more differences with federal and state law—including differences in the areas of individual liability, vicarious liability, punitive damages, availability of compensatory damages in mixed motive cases, the nature of burden shifting in disparate impact cases, the scope of

16. This will mean, for example, that the broad standing that currently exists for fair housing organizations will not be able to be abridged. *See* discussion *infra* notes 274–85 and accompanying text.

17. *See* discussion *infra* notes 91-116 and accompanying text.

"public accommodations," and the obligation of a housing provider to make and pay for reasonable modifications—than they have previously taken the time to recognize.

It turns out—as the legislative history of the Restoration Act demonstrates—that the City Council had all three consequences unmistakably in view when passing the bill.[18] Will judges, consistent with the principles of statutory construction cited at the head of this article, be prepared to recognize that the City Council "intended a material change in the law," even where the changes are more far-reaching than they themselves would have enacted? Will they consider the "mischief to be remedied by the new legislation," even if they personally believe that the remedy is actually the mischief? Will they "construe the act in question so as to suppress the evil and advance the remedy," even if their own views of what discrimination law should be are aptly summarized by the motto: "defendants are already too burdened"? No legislation ever devised has provided a one hundred percent guarantee against judicial lawlessness, and so an article written in the immediate aftermath of the passage of the Restoration Act cannot set forth the answers to these questions with certainty.

Some things are clear, however. Any judge who takes seriously the principle that a court must honor the will of the legislature now faces a new reality and an important challenge. The need today for the development of the provisions of the City Human Rights Law by the process of judicial decision-making is not unlike the need for the development of the provisions of Title VII by the process of judicial decision-making which followed the passage of the Civil Rights Act of 1964.[19] Any civil rights advocate who is dispirited with national developments can seek to take advantage of the opportunities for the expansion of civil rights protections offered by the Restoration Act: (1) directly in New York City, by embarking on litigation that has been effectively foreclosed elsewhere; or (2) in other states and municipalities where there is the political will to insist that anti-discrimination laws be interpreted robustly, by seeking to pass similar legislation to make real the protections of civil rights law.

18. *See* discussion *infra* notes 21–25 and accompanying text.

19. It is true that many aspects of federal anti-discrimination law that were entirely developed by judicial interpretation are handled by specific statutory provisions of the City Human Rights Law. Even so, remarkably few provisions of City Human Rights Law have received thoughtful and independent analysis at any time.

President Lincoln said—140 years ago—"let us strive on to finish the work we are in."[20] That task is still not completed; it is time that we got back to work.

PART I: BROAD, ROBUST, AND INDEPENDENT INTERPRETATION

A. Sources for Construction

To understand the intent and consequences of the Restoration Act, one begins, of course, with the text of the statute itself,[21] but one must also consider the Act's legislative history. One key source was the report submitted to the full Council by the Committee on General Welfare, the committee from which the Restoration Act emerged.[22]

Another key source was statements made when the full Council considered and passed the bill at its meeting of September 15, 2005. At that meeting, Council Member Annabel Palma, a member of the Committee on General Welfare, brought the attention of her colleagues to the intent and consequences of the legislation:

> Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy.
>
> There are many illustrations of cases, like *Levin* on marital status, *Priore*[,] *McGrath* and *Forrest* that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore the text of specific provisions of the law, or both.
>
> With Intro. 22, these cases and others like them, will no longer hinder the vindication of our civil rights.
>
> The work of the Anti-Discrimination Center was particularly important to the development and passage of this bill, and its testimony is an excellent guide to the intent and consequences of legislation we pass today.
>
> Statements from the Brennan Center and the Association of the Bar were also important to the Committee. I have copies of all three and invite my colleagues to take a look at them and review them.

---

20. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

21. The Restoration Act was introduced as "Int. 22" (in the nomenclature of the City Council, a bill is referred to by its "Intro" number); the amended version that was passed by the Committee and then by the Council was referred to as "Int. 22-A."

22. COMM. ON GEN. WELFARE, REPORT ON PROP. INT. NO. 22-A (Aug. 17, 2005) [hereinafter 2005 COMMITTEE REPORT], *available at* http://antibiaslaw.com/CommitteeReport081705.pdf. The 2005 COMMITTEE REPORT is found in the 2005 New York City Legislative Annual. NEW YORK CITY, LEGISLATIVE ANNUAL (2005) (forthcoming).

> And I would also like that a copy of each be placed in the record for today's Stated Meeting.[23]

In addition to the Center Testimony, Brennan Statement, and Bar Letter referred to in the referred to in Council Member Palma's statement regarding the intent and consequences of the legislation—the items directly and explicitly brought to the full Council's attention before the vote on the bill—additional testimony had been taken at General Welfare Committee hearings from a variety of civil rights and allied groups who supported the bill.[24]

Finally, it is clear that the thrust of the 1991 amendments to the City's Human Rights Law needs to be considered if one is to understand the Restoration Act: "Prop. Int. 22-A," explains the 2005 Committee Report, "aims to ensure construction of the City's Human Rights Law in line with the purposes of the fundamental amendments to the law enacted in 1991."[25]

What is striking about each of these sources—the Restoration Act's text, the 2005 Committee Report, Council Member statements, the testimony and statements cited to the full Council, addi-

---

23. Annabel Palma, Statement at the Meeting of the New York City Council 41–42 (Sept. 15, 2005) (transcript on file with the office of the New York City Clerk). Council Member Bill deBlasio, the Chair of the Committee on General Welfare, emphasized that "localities have to stand up for their own visions" of "how we protect the rights of the individual," regardless of federal and state restrictiveness. Bill deBlasio, Statement at the Meeting of the New York City Council 47 (Sept. 15, 2005) (transcript on file with the New York City Clerk's Office). Council Member Gale Brewer, the chief sponsor of the Restoration Act, stated that she wanted to reiterate the comments of Council Members Palma and deBlasio, and that it was important to make sure that civil rights protections "are stronger here than [under] the State or federal law." Gale Brewer, Statement at the Meeting of the New York City Council 48–49 (Sept. 15, 2005) (transcript on file with the New York City Clerk's Office).

Council Member Palma was referring to the testimony of the Anti-Discrimination Center, dated April 14, 2005 [hereinafter Center Testimony] (on file with the New York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/CenterTestimony041405.pdf; the Statement of the Brennan Center for Justice, dated July 8, 2005 [hereinafter Brennan Center Statement] (on file with the New York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/BrennanStatement070805.pdf; and a letter from the Association of the Bar, dated August 1, 2005 [hereinafter Bar Association Letter] (on file with the New York City Council's Committee on General Welfare), *available at* www.antibiaslaw.com/BarAssociationLetter080105/pdf. The cases she referred to are: *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001); *Priore v. N.Y. Yankees*, 761 N.Y.S.2d 608 (App. Div. 2003); *McGrath v. Toys "R" Us, Inc.*, 821 N.E.2d 519 (N.Y. 2004); and *Forrest v. Jewish Guild for the Blind*, 819 N.E.2d 998 (N.Y. 2004).

24. Ironically, the only testimony against the bill at any of its hearings was that from representatives of the New York City Commission on Human Rights.

25. 2005 COMMITTEE REPORT, *supra* note 22, at 2.

tional hearing testimony, and the 1991 Amendments—is that they are all remarkably consistent. In short, they convey, individually and in the aggregate, a vision that the City's Human Rights Law must meld the broadest vision of social justice with the strongest law enforcement deterrent, and that the judges interpreting the law take its protections to the furthest reaches of what is constitutionally permissible.

B. The Mischief to be Remedied

Federal and state courts routinely import federal or state standards when dealing with a city's human rights law, a practice that has continued unabated over the years.[26]

The practice of automatic importation—or rote parallelism—undermines proper administration of the City Human Rights Law. The practice was unwarranted for three principal reasons, which are discussed in turn below.

1. *Rote parallelism disregards the City's intent in passing the 1991 Amendments*

The legislative history of the 1991 Amendments explicitly conveyed the local desire to have the City Human Rights Law construed robustly. For example, then Mayor Dinkins stated that "it is the intention of the council that judges interpreting the City's Human Rights Law are not to be bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed."[27]

The Committee Report that accompanied the 1991 Amendments, noting that the legislation would "put the city's law at the forefront of human rights laws," went on to state that, "[f]aced with restrictive interpretations of human rights laws on the state and federal levels, it is especially significant that the city has seen fit to

26. *See e.g.*, Mack v. Otis Elevator Co., 326 F.3d 116, 122 n.2 (2d Cir. 2000) ("Our consideration of claims brought under the state and city human rights law parallels the analysis used in Title VII claims.") (quoting Cruz v. Coach Stores, Inc., 202 F.3d 560, 565 n.1 (2d. Cir. 2000)), *cert. denied,* 540 U.S. 1016 (2003); Forrest v. Jewish Guild for the Blind, 819 N.E.2d 998, 1007 n.3 (N.Y 2004) (internal citations omitted) ("The standards for recovery under the New York State Human Rights Law . . . are the same as the federal standards under [T]itle VII. . . . Further, the human rights provisions of the New York City Administrative Code mirror the provisions of the [State Human Rights Law] and should therefore be analyzed according to the same standards.").

27. Mayor David N. Dinkins, Remarks, *supra* note 4, at 1.

strengthen the local human rights law at this time."[28] It also stated that "particular attention should be given" to the construction section of the law.[29]

Unfortunately, the Council made no changes to the text of the construction provision itself except to remove language dealing with the issue of election of remedies.[30] This meant that there was no ready textual flag in the law to alert judges that a different regime was intended. Worse, because there was no private right of action under the City Human Rights Law until the enactment of the 1991 Amendments, and because judicial actions were not permitted to be commenced until nine months thereafter,[31] the temptation was overwhelming to shy away from developing a new body of law, and instead to rely on what had been twenty eight years of development of federal employment discrimination law and twenty four years of development of federal housing discrimination law, not to mention an even longer period during which the provisions of the State Human Rights Law and the City Human Rights Law were, in fact, largely identical.

The lack of modifications to the text of the construction provision gave the State Court of Appeals a means by which to ignore the intention of the 1991 Amendments: the court ultimately dismissed the language of the Committee Report cited above as statements which "merely reflect the broad policy behind the local law to discourage discrimination."[32]

2. *Rote parallelism ignores the liberal construction that has long been required*

The "liberal construction" requirement was not a new invention of the 1991 Amendments. The requirement, as mentioned earlier, had already been a part of the City Human Rights Law. An identically-worded requirement had long been incorporated into the

28. COMM. ON GEN. WELFARE, REPORT ON PROP. INT. NO. 465-A AND PROP. INT. NO. 536-A 12 (1991) [hereinafter 1991 COMMITTEE REPORT] (on file with Committee), *available at* www.antibiaslaw.com/LL39CommitteeReport.pdf.

29. *Id.*

30. The provision, previously codified as section 8-112 of the New York City Human Rights Law, was redenominated section 8-130. *See* 1991 LEG. ANN., *supra* note 3, at 175.

31. 1991 Amendments, *supra* note 4, § 4(7); 1991 LEG. ANN., *supra* note 3, at 180.

32. McGrath v. Toys "R" Us, Inc., 821 N.E.2d 519, 524–25 (N.Y. 2004) (*citing* Krohn v. N.Y.C. Police Dep't, 811 N.E.2d 8, 12 (N.Y. 2004)). The City Council's rejection of the premises of *McGrath*, and its rejection of *McGrath*'s mechanism for analyzing cases, is discussed at length. *See infra* notes 91–120 and 154–65 and accompanying text.

State Human Rights Law.[33] Indeed, in interpreting cases arising under the State Human Rights Law, the Court of Appeals used to recognize that: "Analysis starts by recognizing that the provisions of the Human Rights Law must be liberally construed to accomplish the purposes of the statute . . . ."[34]

The idea that federal civil rights laws provide a floor below which other laws cannot fall, not a ceiling above which they can rise, is not a new invention either. Title VII, for example, provides that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a state, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.[35]

Sometimes, federal law has been used to provide useful guidance consistent with the liberal construction requirement. In *In re Aurecchione v. New York State Division of Human Rights,* for example, the Court of Appeals examined the question of whether pre-determination interest was available under the State Human Rights Law, notwithstanding the fact that the law makes no explicit reference to pre-determination interest.[36] In the context of recognizing that "a liberal reading of the statute is mandated to effectuate the statute's intent,"[37] the Court of Appeals itself considered what result would best further the State Human Rights Law's purpose of making a victim whole. Reviewing a Supreme Court case that considered Title VII's purpose in making a victim whole,[38] the Court of Appeals noted that federal case law in this area "proves helpful to the resolution of this appeal,"[39] and ruled that the award of pre-judgment interest was appropriate in the case.

---

33. N.Y. EXEC. LAW § 300 (McKinney 2005).

34. Cahill v. Rosa, 674 N.E.2d 274, 276 (N.Y. 1996).

35. 42 U.S.C. § 2000e-7 (2005); *see also* 42 U.S.C. §§ 2000a-6(b) (public accommodations provisions of the Civil Rights Act of 1964); 3615 (Fair Housing Act); 12201(b) (Americans with Disabilities Act).

36. *In re* Aurecchione v. N.Y. State Div. of Human Rights, 771 N.E.2d 231, 233 (N.Y. 2002).

37. *Id.* at 233.

38. Loeffler v. Frank, 486 U.S. 549, 558 (1988).

39. *Aurecchione,* 771 N.E.2d at 233. The Court of Appeals in *Aurecchione* (albeit in the context of comparing federal law with *State* not *City* Human Rights Law) was already relying on a consistent interpretation of state and federal civil rights laws in view of broad areas of similarity between them. In *Aurecchione,* though, the Court

The problem is that the seeking of guidance has morphed into rote parallelism, diverting judges from the task of determining what interpretation of the statute best achieves its purposes. Whereas *Aurrecchione* drew on a federal case because that federal case persuasively addressed the "make whole" relief about which the Court of Appeals was concerned,[40] the Court of Appeals ignored the statutory obligation of liberal construction altogether in the case of *McGrath v. Toys "R" Us, Inc.*[41] The court simply assumed that the purposes of federal civil rights law were the same as those of the City Human Rights Law, ignored the fact that the United States Supreme Court case being imported had not examined or purported to examine what result would best fulfill the purposes of federal civil rights law, and did not itself engage in examining the consequences of its ruling on the rights of people who could prove they had been subject to discrimination.

McGrath was a case which posed the question of what standard to apply regarding the award of attorney's fees where a plaintiff who had proved discrimination to the satisfaction of a jury was only awarded nominal damages. When the City Council passed the 1991 Amendments by which a private right of action was created, and simultaneously enacted an attorney's fee provision in connection with that private right of action,[42] it was acting in the shadow of the Second Circuit's then longstanding view that attorney's fees were available in nominal damages cases.[43]

A year *after* the City Council had acted, the Supreme Court, in its 5-4 *Farrar* decision, sharply cut back on the availability of attor-

---

was still looking at the purposes of the State Human Rights Law. *Id.* ("Clearly, a central concern of the Human Rights Law is to make . . . victims 'whole'.").

40. *Aurecchione* did foreshadow later problems with its uncritical references to federal and state law being "textually similar and ultimately employ[ing] the same standards of recovery." *Id.*

41. 821 N.E.2d 519 (N.Y. 2004).

42. Previously, aggrieved parties could only proceed administratively, through the New York City Commission on Human Rights.

43. *E.g.*, Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991) (decided March 18, 1991, just three months before the City Council amended the New York City Human Rights Law) ("The jury's determination that appellants' fourth and fourteenth amendment rights were violated by the search conducted by the Officers assuredly is significant. . . . Although no compensatory damages were awarded, the jury's determination 'changes the legal relationship' between the Ruggieros and the Officers in that a violation of rights had been found."); McCann v. Coughlin, 698 F.2d 112, 128 (2d Cir. 1983) ("Our decisions indicate that an award is not barred merely because the action was settled or the plaintiff was awarded only nominal damages."); Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981) (reversing district court denial of attorney's fees award where plaintiff only won one dollar in nominal damages on a § 1983 claim).

ney's fees in cases which result in nominal damages only.[44] While the Supreme Court acknowledged that the plaintiff who had won a liability verdict was a "prevailing party," the majority concluded that where the prevailing party only is awarded nominal damages, "the only reasonable fee is usually no fee at all."[45]

Despite the fact that the City Council could not have had the Supreme Court's not-yet-developed *Farrar* rule in mind,[46] the Court of Appeals in *McGrath* proceeded to import the *Farrar* standard.[47] The court's principle justification for doing so was based on its "general practice of interpreting comparable civil rights statutes consistently, particularly since these broad [state and city] policies are identical to those underlying the federal statutes."[48] The court also stated that, if the City Council had disagreed with *Farrar,* it could have amended the City Human Rights Law to say so.[49]

The premises underlying the *McGrath* decision were faulty and misguided, especially in an era of continuing cutbacks in the reach of federal civil rights protections. As the Brennan Center pointed out to the Council in urging support for the Restoration Act, "the court was wrong to assume that the federal decision relied on had considered whether the restrictive rule furthered the purposes of federal civil rights law."[50] In fact, the Supreme Court in *Farrar* did not ever address or purport to address the question of whether its rule would help or hinder the enforcement of civil rights protections.[51]

Had any analysis been done of the role of attorney's fees in civil rights litigation, that analysis would have strongly suggested that the *Farrar* rule did not accord with the purposes of federal civil rights law, let alone the purposes of City Human Rights Law. The Senate Report on the Civil Rights Attorney's Fee Awards Act of

---

44. Farrar v. Hobby, 506 U.S. 103, 115 (1992).

45. *Id.*

46. The Court of Appeals reluctantly acknowledged this: "Granted, it is not surprising that the legislative history [of the 1991 Amendments] does not address the *Farrar* rule since the amendments predated *Farrar* by one year." *McGrath,* 3 N.Y.3d at 433.

47. *Id.* at 434.

48. *Id.* at 433.

49. *Id.* at 433-34.

50. Brennan Center Statement, *supra* note 23, at 4.

51. If the Supreme Court had evaluated that issue, the Court of Appeals would still have had the question of whether the Supreme Court's evaluation was persuasive in determining what rule met the purposes of the City Human Rights Law, but, in *Farrar*, there was not a question of agreeing or disagreeing with the Supreme Court's liberal construction analysis—there simply, literally, was no liberal construction analysis.

1976, for example, pointed out that a variety of civil rights laws—including the public accommodations provisions of the Civil Rights Act of 1964 (provisions which do not provide for damages)—"depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."[52] That report made plain how judges were to proceed: *"In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws."*[53]

It is difficult to understand how *Farrar* could accord with the intention of Congress to use "the broadest and most effective remedies available." Nevertheless, because of the "general practice" of the Court of Appeals to assume that there is federal and local equivalence, the court was blinded to its obligation to scrutinize *Farrar* to see *whether in fact* the reasoning of that decision was actually helpful in deciding the City Human Rights Law case the Court of Appeals had before it.[54]

So much was the Court of Appeals under the spell of rote parallelism, it failed to conduct its own analysis of whether adopting the *Farrar* rule for City Human Rights Law actions would further the purposes of the counterpart guarantees contained in City law. Such an analysis would have had to come to grips with the fact that the Council had in 1991 done the exact opposite of narrowing the cases where fees would be available. It created the private right of action (and accompanying attorney's fee provision), identified the goal of the City Human Rights Law as preventing discrimination from playing "any role" in actions related to the various activities covered by the law, identified individual prosecution as part of the City's overall effort to fight discrimination, referred to the availability of fees without indicating that any subcategory of those who had proved discrimination would be denied fees, and did all of

52. S. REP. NO. 94-1011, at 5910 (1976).

53. *Id.* at 5910-11 (emphasis added).

54. The Court and other automatic importers have lost sight of the admonition made almost thirty years ago by the late Supreme Court Justice William J. Brennan, Jr. Justice Brennan, writing in the context of state constitutional provisions, cautioned that state court judges "do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) [hereinafter Brennan, *Protecting Individual Rights*]; *see* Brennan Center Statement, *supra* note 23, at 8.

these things in the context of comprehensive reforms, all of which significantly expanded the reach of the law.[55]

Liberal construction analysis would have had to come to grips with the difficulties the *Farrar* rule imposes on persons seeking counsel to vindicate their rights. Describing a case as a "nominal damages case" is an after-the-fact construct. Attorneys, by contrast, need to make decisions about case selection in real time, long before they know whether they will be able to get a jury to award monetary damages. If proving liability is not sufficient to warrant a fee award, they will be discouraged not only from taking on cases where they "know" damages will not be awarded, but from taking on any cases where, though they have no doubt about proving that a defendant discriminated, they may have questions as to whether a plaintiff's actual damages will be recognized by a jury.[56]

None of the foregoing was considered, and, as such, a rule was imported without *any court* having ever engaged in the liberal construction analysis that had been required by section 8-130 of the local Human Rights Law.

The Court of Appeals' alternative suggestion that the City Council could have changed the attorney's fees provision—and, therefore, its conclusion that the Council's failure to do so represents an implicit adoption of the ratcheted down federal standard—is both disingenuous and detrimental to the efficient and effective operation of the City Human Rights Law. The City Council *had* an explicit provision of law in place—the construction requirement of section 8-130—that it was entitled to have enforced. Both the Council and the Mayor had expressly noted the importance of having that provision enforced. Each had said that federal and state law were already too narrow as of 1991. Just because courts have subsequently failed to meet their obligations to engage in liberal construction analysis is no reason to suppose that the Council af-

55. *See* 1991 LEG. ANN., *supra* note 4.

56. *Cf.* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). In that case, which limited the circumstances under which a losing plaintiff would be vulnerable to paying attorney's fee to a defendant, the Supreme Court cautioned district courts "to resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Id.* at 421-22. In other words, if plaintiffs who had a good faith belief that their rights had been violated faced the risk that not prevailing would expose them to paying the defendant's attorney's fees, the resulting chilling effect "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.*

firmatively believed at any time that *Farrar* was the one area of federal law where the City should go along with the federal civil rights rollback.

What the Court of Appeals was really doing in *McGrath* was providing a formal announcement that the scope and content of the New York City Human Rights Law would always be at the mercy of the latest federal or state retrenchment. Perhaps the Supreme Court will come to embrace the thrust of the 2004 Seventh Circuit decision written by Judge Richard Posner wherein he suggested that the Fair Housing Act is not intended to prohibit post-acquisition harassment in the fair housing context.[57] Presto—the City Human Rights Law would, on a *McGrath* analysis, no longer proscribe such conduct either.[58] The City Council should not be forced to leap into action to protect the City's law every time some *other* law is cut back.[59]

3. *Rote parallelism blinded judges to those areas where the City law is textually distinct*

The easy habit of "dropping the footnote" has led judges to misconstrue provisions of the City Human Rights Law on a regular basis, committing either the sin of failing to bother to read the statute, or the sin of failing to believe what they have read.

In *Forrest,* for example, the Court of Appeals, asserting that the provisions of the City Human Rights Law "mirrored" those of the

57. Halprin v. Prairie Single Family Homes, 388 F.3d 327, 329 (7th Cir. 2004) ("The Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but *access* to housing."). *Halprin* is now not alone. *See, e.g.*, Cox v. City of Dallas, 430 F.3d 734, 741 (5th Cir. 2005) (citing the quoted *Halprin* language with approval, and rejecting a claim based on impaired "habitability," but not ruling out claims of constructive eviction); *see also* discussion *infra* notes 268–273 and accompanying text.

58. The protection provided by the Restoration Act against this particular result is discussed *infra* at notes 268–273 and accompanying text.

59. The existing practice of rote parallelism has also meant that other doctrines clearly inconsistent with a liberal construction requirement have become known as "well established" despite the absence of liberal construction analysis, and have thus been effectively shielded from challenge on a local level. For example, very real victims of very real harassment are regularly deprived of the opportunity to have their cases go to a jury because of the requirement—imposed as a matter of federal caselaw—that the victim demonstrate that the harassment is "severe or pervasive." Less burdensome requirements, more consistent with the City Human Rights Law's twin focus on victim's rights and maximum deterrence, could easily be developed—see *infra* notes 190–213 and accompanying text—but my research has found no case where a federal or state judge has thus far treated the question of the appropriate standard under City law as anything other than a closed question, already determined by the contours of federal law.

State Human Rights Law,[60] stated in dicta that, even if the quantum of harassment had been sufficient to be actionable, the defendant would not be liable for its supervisor's harassment under the State Human Rights Law because an "employer cannot be held liable [under state law] for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it."[61] The court was apparently contemplating the City Human Rights Law as well, because the footnote to its vicarious liability discussion referenced the availability of the federal *Faragher/Ellerth* affirmative defense under *both* City and State Human Rights Law in "hostile work environment" cases.[62]

The court correctly set forth the law insofar as it referred to the State Human Rights Law.[63] It ignored, however, the explicit statutory text of section 8-107(13)(b) of the City Human Rights Law, which provides for three separate and independent circumstances under which an employer shall be liable for the conduct of "an employee or agent" that is in violation of the relevant employment discrimination provision of the statute.[64] One of these is where "the employee or agent exercised managerial or supervisory responsibility."[65] Section 8-107(13)(b)(1) imposes no requirement that the employer encourage, condone, or acquiesce in the conduct.[66] In fact, *Totem Taxi,* one of the cases cited by *Forrest* for the

60. Forrest v. Jewish Guild for the Blind, 819 N.E.2d 998, 1007 n.3 (N.Y. 2004).

61. *Id.* at 311.

62. *Id.* at 312 n.10. The federal affirmative defense was established in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

63. The Court did not deal explicitly with two circumstances where the employer would be automatically liable: (1) where the employee is a proxy of the employer; or (2) where the acts involved are "quintessentially" those of an employer. *See, e.g.*, *Faragher*, 524 U.S. at 789-90 (person sufficiently high in managerial hierarchy may have his acts imputed to employer; a discriminatory discharge or failure to promote is the act of the employer). Neither of these circumstances was present in *Forrest*, so the Court of Appeals had no reason to address them.

64. N.Y.C. ADMIN. CODE § 8-107(13)(b). The relevant substantive provision is section 8-107(1)(a). Note that employers in the housing, public accommodations, and retaliation contexts are strictly liable for the conduct of their employees and agents in all circumstances. *Id.* § 8-107(13)(a).

65. *Id.* § 8-107(13)(b)(1).

66. A memorandum summarizing major provisions of the 1991 Amendments stated that, in respect to: "[l]iability of employers for acts of employees and agents," the 1991 Amendments provide for "[s]trict liability in housing and public accommodations" and provide for "[s]trict liability in employment context for acts of managers and supervisors." 1991 LEG. ANN., *supra* note 3, at 187. The Council designed the vicarious liability section to, *inter alia*, "hold employers to a high level of liability for employment discrimination." 1991 COMMITTEE REPORT, supra note 28, at 6.

contrary proposition,[67] was a motivating factor for creating a distinct vicarious liability regime as part of the 1991 Amendments.[68]

It is true that there is a provision of the employer liability section that sets forth an affirmative defense which involves pleading and proving the establishment of, and compliance with, "policies, programs and procedures for the prevention and detection of unlawful discriminatory practices."[69] This affirmative defense, however, does not apply to the question of liability for the conduct of employees and agents who exercise managerial or supervisory responsibility. It is only relevant to a liability determination in the context of co-employee harassment where the question is whether the employer should have known of the discriminatory conduct and failed to exercise reasonable diligence to prevent such conduct.[70] In other words, the City Council made a different choice in 1991 about liability of supervisors and managers than did the Supreme Court in 1998,[71] but the blinders of rote parallelism prevented the *Forrest* court from seeing this.

Another egregious example of the "failure to read" problem is a state case posing the question of whether "Work Experience Program" participants were protected against sexual harassment.[72] The judge, believing that participants could not be classified as employees, and asserting that the State and City Human Rights Laws "are limited in applicability to the employment relationship," dismissed the complaint.[73] In fact, even if the Work Experience Program participants were not employees, they may well have been

67. *Forrest*, 3 N.Y.3d at 311 (citing *In re* Totem Taxi, Inc. v. N.Y. State Human Rights Appeal Bd., 480 N.E.2d 1075 (N.Y. 1985)).

68. "Even on the state level, narrow interpretations of civil rights laws have retarded progress. For example, the State Court of Appeals has made it virtually impossible to hold taxi companies responsible for the discriminatory acts committed by their drivers." Mayor David N. Dinkins, Remarks, *supra* note 4, at 1.

69. N.Y.C. ADMIN. CODE § 8-107(13)(d).

70. Section 8-107(13)(e) specifies that section 8-107(13)(b)(3)—the "should have known" about co-employee harassment section—is the only liability determination able to be affected by the establishment of the affirmative defense. It then goes on to provide that the establishment of the affirmative defense shall be considered as a factor in mitigating the amount of punitive damages or civil penalties to be imposed.

71. 1998 was the year that *Faragher* and *Ellerth* were decided. By making the affirmative defense only go to mitigation, not elimination, of punitives, it also made a different decision from what the Supreme Court made in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). *See infra* notes 292–302 and accompanying text.

72. McGhee v. City of New York, No. 113614/01, 2002 WL 1969260 (N.Y. Sup. Ct. 2002).

73. *Id.* at *3. *Cf.* United States v. City of N.Y., 359 F.3d 83, 91-97 (2d Cir. 2004) (holding that New York City work experience program participants are employees within the meaning of Title VII).

covered under the "provider of public accommodations" section and the "training program" sections of the law.[74]

Priore v. New York Yankees[75] presented a twist on the problem illustrated by the foregoing cases. In *Priore,* the First Department may have read the statute, but apparently did not want to believe what it said. Before the 1991 Amendments, individuals were liable for their own discriminatory acts in the housing and public accommodations contexts, but were not generally liable in the employment context.[76] The 1991 Amendments took each of the various employment discrimination provisions, all of which had proscribed workplace conduct by "employers," and expanded each of those provisions to proscribe workplace conduct by the entity "or an employee or agent thereof."[77] This was one change that several decisions on both the state and federal level did not seem to have trouble appreciating.[78] Notwithstanding this, the *Priore* court held that "There is no indication in the local ordinance, explicit or im-

74. *See* N.Y.C. ADMIN. CODE §§ 8-102(9), 8-107(2)(c), 8-107(4).

75. Priore v. N.Y. Yankees, 761 N.Y.S.2d 608 (App. Div. 2003).

76. Compare the pre-1991 Amendments versions of sections 8-107(5)(a) and 8-107(2) of the New York City Human Rights Law (proscribing conduct by persons in the housing and public accommodations realms, respectively) with the pre-1991 Amendments version of section 8-107(1)(a) (only proscribing conduct by "employers" in the workplace realm). The term "persons," pre-1991 Amendments, had been defined pursuant to section 8-102(1) to include "individuals" (the 1991 Amendments, *inter alia,* replaced "individuals" with "natural persons"). The provisions cited are contained in 1991 LEG. ANN., *supra* note 3, at 155-56, 153-54, and 152 respectively. The impact of the change is evidenced by the outcome of *In the Matter of the Complaints of Abdalkwy v. Douglas Elliman-Gibbons & Ives*, Nos. EM00106-4/19/88, EM00104-4/19/88, EM00105-4/19/88, 1991 WL 1288827, *18 (N.Y.C. Com. Hum. Rts., June 28, 1991) (decision and order). In this employment case, which arose prior to the 1991 Amendments, the individual discriminator was found not liable because he had neither a financial interest in the employer entity nor the power to do more than carry out decisions made by others. The Administrative Law Judge in her February 25, 1991 Recommended Decision and Order had noted that "[o]nly amendment of the Code by legislation can remedy this problem." *Id.* at 25 n.4.

77. N.Y.C. ADMIN. CODE §§ 8-107(1)(a), (1)(b), (1)(c), (1)(d), (2), (3).

78. *See, e.g.*, Murphy v. ERA United Realty, 674 N.Y.S.2d 415, 417 (App. Div. 1998) (Section 8-107(1)(a) of the New York City Human Rights Law "expressly provides that it is unlawful for 'an employer *or an employee* or agent thereof' to engage in discriminatory employment practices. Accordingly, the plaintiff has a cause of action under this provision against the employer as well as her coemployees."); Lee v. Overseas Shipholding Group, No. 00 CIV. 9682(DLC), 2002 U.S. Dist. LEXIS 15355, at *21 (S.D.N.Y. Aug. 21, 2002) (individual liability under City law "regardless of ownership or decision-making power"); Kojak v. Jenkins, No. 98 Civ. 4412(RPP), 1999 WL 244098, at *7 n.5 (S.D.N.Y. Apr. 26, 1999) (employment discrimination sections of City law "clearly provide for individual, personal liability"); Harrison v. Indosuez, 6 F. Supp. 2d 224, 233-34 (S.D.N.Y. 1998) ("As the [City law] specifically allows for employee liability, there is no question that the law is applicable against [the defendant] in his individual capacity."); Alvarez v. J.C. Penney Co., No. 96 Cv. 5165, 1997 U.S.

plicit, that it was intended to afford a separate right of action against any and all fellow employees based on their independent and unsanctioned contribution to a hostile environment."[79]

The *Priore* court chose not to pay heed to the relevant portion of then-Mayor Dinkins' statement in signing the 1991 Amendments:

> I myself was surprised to learn that under current local law, an employee who has been the victim of sexual or racial harassment at the hands of a co-worker can sue her employer but cannot sue the co-worker himself. Without the possibility of legal action, co-worker harassment has continued to poison many of our workplaces. *The new law takes the fundamental step of making all people legally responsible for their own discriminatory conduct.*[80]

The *Priore* court compounded its error by failing to consider the Committee Report accompanying the 1991 Amendments. The report had stated that the pre-Amendments employment discrimination provisions of City law were "silent as to the individual liability of their employees and agents for such practices,"[81] but the 1991 Amendments, "would make explicit such individual liability."[82]

How, then, did the court in *Priore* try to justify its conclusion that there was no individual liability? The court literally had to invent a legislative history. It asserted that, when the City extended liability to "an employer *or an employee or agent thereof,*" it did so merely "in substitution for the State statute's 'employer *or licensing agency*'."[83] In fact, however, section 8-107(1)(a) of the City Human Rights Law did not deal with licensing agencies before the 1991 Amendments, and it did not deal with licensing agencies

---

Dist. LEXIS 21695, at *6 (E.D.N.Y. Feb. 14, 1997) ("the plain language of the Code provides for liability against individual employees").

79. *Priore,* 761 N.Y.S.2d at 614.

80. Mayor David N. Dinkins, Remarks, *supra* note 4, at 3-4 (emphasis added).

81. COMM. ON GEN. WELFARE, REPORT ON PROP. INT. NO. 465-A AND PROP. INT. NO. 536-A: SECTION-BY-SECTION ANALYSIS 9–10 (1991) [hereinafter 1991 COMMITTEE REPORT ANALYSIS] (on file with Committee of General Welfare), *available at* www.antibiaslaw.com/LL39CommitteeReport.pdf.

82. *Id.*; *see also* 1991 LEG. ANN., *supra* note 3, at 187 (documenting contemporaneous memoranda summarizing the impact of the impact of the 1991 Amendments). The law went from having a standard under which an employee was only liable where he or she "had the power to do more than carry out decisions made by others" to a regime where "employees and agents are responsible for their own discriminatory acts." *Id.*

83. *Priore,* 761 N.Y.S.2d at 614.

after the 1991 Amendments.[84] There had been a *separate* provision of the City Human Rights Law that had dealt both with *age* discrimination by employers and with licensing agencies.[85] The proscription against age discrimination *by employers* was moved into section 8-107(1)(a); the proscription against age discrimination *by licensing agencies* was moved into an entirely different section, to join other proscriptions on certain conduct by licensing agencies.[86] Accordingly, the revision to section 8-107(1)(a) did not represent a *substitution* of language from the State Human Rights Law, it represented an *addition* of language not found in the State Human Rights Law.[87]

To go along with its tale of how the language of the law changed, the *Priore* court provided a theory of Council intent. It speculated that the Council had only wanted to permit individual liability where the individual had been acting with or on behalf of the employer in some agency or supervisory capacity.[88] The problem is, if that were the Council's purpose, it need not have acted at all: section 8-107(6) of the City Human Rights Law already was broader, providing that it "shall be an unlawful discriminatory act for *any person* to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."[89]

The *Priore* court was surely aware of the basic rule of statutory construction that, "in the interpretation of a statute, the court must assume that the Legislature did not deliberately place in the statute a phrase intended to serve no purpose, but must read each word and give to it a distinct and consistent meaning . . . ."[90] Unfortunately, this knowledge was overborne by the court's belief that the

84. *See* N.Y.C. ADMIN. CODE § 8-107(1)(a) (examining both the pre-1991 Amendments version and the version in place after the 1991 Amendments); 1991 LEG. ANN., *supra* note 3, at 154.

85. *See* N.Y.C. ADMIN. CODE § 8-107(3-a) (in effect prior to the 1991 Amendments, but deleted by those amendments); 1991 LEG. ANN., *supra* note 3, at 155.

86. *See* N.Y.C. ADMIN. CODE §§ 8-107(1)(a), 8-107(9); 1991 LEG. ANN., *supra* note 3, at 156, 160.

87. In other words, a proscription on conduct by "employers and employees and agents thereof" was, not surprisingly, intended to have broader effect than a proscription on conduct by "employers" alone. Further proof of the baselessness of the Court's interpretation is found in the fact that the phrase "or employees or agents thereof" was added to each and all of the operative employment discrimination proscriptions, N.Y.C. ADMIN. CODE §§ 8-107(1) and 8-107(2), even one where the phrase modified only the term "labor organization." *Id.* § 8-107(1)(c); 1991 LEG. ANN., *supra* note 3, at 152.

88. *Priore*, 761 N.Y.S.2d at 614.

89. *See* 1991 LEG. ANN., *supra* note 3, at 160.

90. N.Y. STAT. LAW § 98 (McKinney 2005).

Council should not have wanted to do what it had done. The only "substitution" involved in the case was the court's insertion of itself as a replacement for the legislative branch of local government.

C. The Rejection of the Rote Parallelism Model: Different Premises; Different Procedure

The Restoration Act renders the rote parallelism model obsolete, and deprives cases decided via that model (and without consideration of liberal construction principles) of any precedential value.

The Restoration Act requires that provisions of the City's Human Rights Law hereafter be construed liberally to accomplish the "uniquely broad and remedial" purposes of the local law, "regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."[91] There is much packed into these new phrases; the revised construction section comprises the single most important sentence of the Restoration Act.[92]

A fundamental *premise* of *McGrath*—and of the entire rote parallelism school—was that the purposes of the City Human Rights Law are "identical" to those of its state and federal counterparts.[93] That premise is unequivocally rejected: post-Restoration Act local law now provides that its purposes are "uniquely broad and remedial." This alone makes the application of rote parallelism logically indefensible, and it requires judges to recognize two things. First, since the local law's purposes are even more broad and remedial than those of state and federal civil rights laws, interpretations of those other laws naturally constitute a floor of rights below which

91. Restoration Act, *supra* note 7, at 13, *amending* N.Y.C. ADMIN. CODE § 8-130.

92. One seemingly minor change—from requiring liberal construction of the "chapter" containing the substantive provisions of the City's Human Rights Law to requiring liberal construction of the entire City Human Rights Law "title"—was necessitated by the argument actually advanced by the City Law Department in another Court of Appeals case that liberal construction did not apply at all because the case had been commenced in court pursuant to Chapter 5 of the City Human Rights Law, and that Chapter did not itself have a liberal construction provision. *See Brief of Defendant at 2004 WL 1091832*, *25-26, Krohn v. N.Y.C. Police Dep't, 811 N.E.2d 8 (N.Y. 2004) (No. 03508) (". . . section 8-130 limits application of the 'liberal construction' provision to chapter one of the [New York City Human Rights Law], entitled 'Commission on Human Rights.' Nothing in the New York City Human Rights Law instructs courts to apply a rule of liberal construction to section 8-502(a), the provision creating a private right of action for 'damages, including punitive damages,' which appears in chapter five.").

93. McGrath v. Toys "R" Us, Inc., 821 N.E.2d 519, 525 (N.Y. 2004).

interpretations of City Human Rights Law should not fall.[94] Second, a judge must search out what the broader and more remedial purposes of the City Human Rights Law actually are in order for that judge to assess what potential interpretation of a particular provision would serve the law's overall purposes best.[95]

The fundamental *procedure* of *McGrath*—and of the entire rote parallelism school—was, by definition, to import interpretations of federal or state civil rights laws automatically. That procedure is unequivocally condemned: the process of liberal construction to accomplish the uniquely broad and remedial purposes of the local law must be allowed to proceed "regardless of whether federal or New York State civil and human rights laws . . . have been so construed."[96] The demand for broad and independent construction came, *inter alia,* from the Center's testimony,[97] from the Brennan Center Statement,[98] and from the Bar Association Letter,[99] and is reflected, *inter alia,* in Council Member Palma's statement,[100] in the

94. *See, e.g.*, 2005 COMMITTEE REPORT, *supra* note 22, at 5 ("provisions of the human rights law may not be construed less liberally than interpretations of comparably worded federal and state laws").

95. See discussion *infra* notes 121–65 and accompanying text regarding how to do so.

96. Restoration Act, *supra* note 7, § 7 *amending* N.Y.C. ADMIN. CODE § 8-130.

97. "In the end, *regardless of federal interpretations,* the primary task of a judge hearing a City Human Rights Law claim is to find the interpretation for the City law that most robustly further[s] the purposes of the City statute." Center Testimony, *supra* note 23, at 6 (emphasis added).

98. The bill would "require judges to interpret the local law *independently of any limitations* that may have been imposed on its federal and state counterparts." Brennan Center Statement, *supra* note 23, at 1 (emphasis added).

99. "Intro 22-A requires courts to construe the City's Human Rights Law *independently* and in light of the *Council's clear intent to provide the greatest possible protection for civil rights.*" Bar Association Letter, *supra* note 23, at 4 (emphasis added).

100. "Insisting that our local law be interpreted *broadly and independently* will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy." Annabel Palma, Meeting of the New York City Council 41 (Sept. 15, 2005) (transcript on file with the New York City Clerk's Office) (emphasis added).

2005 Committee Report,[101] and in Section 1 of the Restoration Act itself.[102]

Because judges have often thought that the existence of similarly or identically-worded counterparts is reason enough to ignore the requirement of liberal construction, the Restoration Act is careful to state explicitly that the need to proceed independently to find the result that best fits the purposes of the City Human Rights Law must go forward even where the differently-construed federal and state counterparts have provisions "comparably-worded to provisions of this title."[103] In the same way that Justice Brennan's 1977 call for independent analysis in the protection of rights beyond the level protected federally did not exempt state guarantees that linguistically tracked the federal provision,[104] so the Restoration Act insists on such independent analysis in all circumstances.

What then to do with existing caselaw? The philosophy of the Restoration Act is simply inconsistent with a court hereafter according weight to prior federal or state decisions merely because those decisions spoke to an aspect of City Human Rights Law (or of comparably-worded state or federal law). Each of the statements specifically brought to the full Council's attention make the point. "[M]any federal decisions," according to Center testimony, "are not helpful to the interpretative process because those decisions themselves give no consideration to principles of liberal construction."[105] The Bar Association Letter similarly pointed out that, "[j]udges interpreting federal law may not necessarily use this

101. The bill "explicitly states that the human rights law must be construed *independently* from both federal and New York State civil and human rights law, including laws with comparably worded provisions." 2005 COMMITTEE REPORT, *supra* note 22, at 4-5 (emphasis added). The 2005 COMMITTEE REPORT also incorporates the view expressed by Mayor Dinkins in connection with the passage of the 1991 Amendments: "[I]t is the intention of the Council that judges interpreting the City's Human Rights Law are not [to be] bound by restrictive state and federal rulings and are *to take seriously the requirement that this law be liberally and independently construed.*" *Id.* at 2 (emphasis added) (internal citation omitted).

102. "In particular, through passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed *independently* from similar or identical provisions of New York state or federal statutes." Restoration Act, *supra* note 7, § 1 (emphasis added).

103. Restoration Act, *supra* note 7, § 7, *amending* N.Y.C. ADMIN. CODE § 8-130.

104. Brennan, *Protecting Individual Rights*, *supra* note 54, at 500-01 (citing with approval the many examples then existing "where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, *even where the state and federal constitutions are similarly or identically phrased*") (emphasis added). This point was quoted in the Brennan Center Statement, *supra* note 23, at 8.

105. Center Testimony, *supra* note 23, at 6.

principle of liberal construction."[106] It bears mention here that another premise of *McGrath* is thus undercut: the fact that a federal or state law has broad purposes does not allow the assumption that a decision construing such a law has actually considered those purposes.

In view of the concerns about the pitfalls of importing decisions that have interpreted counterpart civil rights statutes, the Restoration Act only allows an interpretation of a state or federal civil rights law to be used as an "aid in interpretation" of the City Human Rights Law in two ways. One permissible use is insofar as the interpretation of a similarly-worded state or federal law is viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[107] This provision follows both from the traditional notion of federal civil rights protections as a floor,[108] and as a consequence of the Restoration Act's aim "to ensure construction of the City's Human Rights Law in line with the purposes of fundamental amendments to the law enacted in 1991."[109] The 1991 Amendments, as previously discussed, had already seen state and federal law as too constrained, and sought to build beyond those constraints.[110] As such, the Council knew that while it wanted judges to spend significant time considering the outer limits of how far the law needed to go to best accomplish its purposes, judges could, in general, safely rely on the fact that the Council would not want the local law to be any less protective than the *most protective* posture of federal or state law as they existed in 1991 or at any time thereafter.[111] In contrast, the interpretation of the counterpart law is emphatically *not* to be used "to limit or restrict the provisions of this title from being construed more liberally than [the counter-

106. Bar Association Letter, *supra* note 23, at 2; *see also* Brennan Center Statement, *supra* note 23, at 8 (pointing out that "the current habit of automatically relying on interpretations of state or federal law is exactly the opposite of the practice recommended by Justice Brennan").

107. Restoration Act, *supra* note 7, § 1.

108. *See* 42 U.S.C. §§ 2000e-7, 2000a-6(b), 3615, 12201(b) (2005).

109. *See* 2005 COMMITTEE REPORT, *supra* note 22, at 2.

110. *See supra* notes 28–32 and accompanying text; *see also infra* notes 127-43 and accompanying text.

111. Because it is theoretically possible (albeit currently wildly unlikely) for a decision construing federal law to go further in the protection of federal rights than would be justified to fulfill the purposes of the City Human Rights Law, the use of the federal law decision as an aid in interpretation is permissive. *See* Restoration Act, supra note 8, § 1; *cf.* Restoration Act, *supra* note 7, § 7 (amending N.Y.C. ADMIN. CODE § 8-130) (using the mandatory "shall" in describing the obligation to construe the local law to accomplish its uniquely broad and remedial purposes).

part] laws in order to accomplish the purposes of the human rights law . . . ."[112]

The second permissible use must be inferred from the purpose of the construction provision, and from the analysis that underlies the Restoration Act. As underlined in section 8-130 of the revised New York City Human Rights Law, the point of the entire exercise is to find the construction that best accomplishes law's purposes.[113] As such, it is the persuasive value of an opinion that has cogently grappled with how best to achieve the purposes of a counterpart civil rights statute that makes it potentially useful to the analysis of the local law,[114] not the mere fact that the decision announced a result. As Justice Brennan wrote in urging judicial vigilance in the defense of civil rights, it is only where decisions construing rights guaranteed federally have looked at the relevant policies underlying the grant of rights and have considered, in a well-reasoned and logically persuasive way, whether the proposed constructions serve those underlying policies, that such decisions may "properly claim persuasive weight as guideposts" when interpreting counterparts to the federal guarantees.[115]

These two uses are the only ways that existing caselaw may be validly used as precedent. To restate Justice Brennan's proposition: those decisions that have not looked at the relevant policies, and those decisions which have failed to conduct well-reasoned and logically persuasive analyses, may not properly claim persuasive weight as guidelines in connection with the construction of the City's Human Rights Law.[116]

---

112. 2005 COMMITTEE REPORT, *supra* note 22, at 5.

113. *See* Bar Association Letter, *supra* note 23, at 2 (the bill "makes it clear that judges must consider the legislative intent underlying provisions of the Human Rights Law, and ask which interpretation of the law will best fulfill the objectives of the law, *rather than adopting, as a matter of course, the prevailing interpretation of similar provisions of federal or state law*") (emphasis added).

114. *See* Center Testimony, *supra* note 23, at 5-6 (the reasoning of state and federal opinions construing counterpart statutes "like the reasoning contained in law review articles and other sources . . . can suggest *potential* interpretations, and, in some situations, will be found to be persuasive by the judge hearing the City Human Rights Law claim") (emphasis in original).

115. Brennan, *Protecting Individual Rights*, *supra* note 54, at 502.

116. One non-precedential use should be added. While the fact that a particular result ("Interpretation A") arises from a decision that has failed this test means that the decision has no precedential value, that fact does not mean that a judge may not *consider* Interpretation A along with plaintiff's proposed result ("Interpretation B"), defendant's proposed result ("Interpretation C") (likely Interpretation A in disguise), and the judge's own tentative result ("Interpretation D"). The judge would not *adopt* Interpretation A, however, unless it was the interpretation that best fulfilled the purposes of the local law.

It should not be necessary to belabor further the fact that the Restoration Act stands as a rejection for *McGrath* and its ilk. The 2005 Committee Report specifically states that the amendment to section 8-130 of the New York City Human Rights Law is designed to overcome *McGrath*.[117] But it is important to note one final aspect of *McGrath*—its Council-should-just-fix-specific-provisions theory—and explain why the Restoration Act intended that this kind of theory should not again rear its ugly head. First, unlike in 1991, the Council did with the Restoration Act modify a specific provision—section 8-130—to reflect its desired mode of construction. Second, the design of the Restoration Act completely rebuts *McGrath's* premise that Council inaction in respect to an unduly narrow judicial interpretation of a particular substantive provision of the City Human Rights Law can fairly be interpreted as implicit ratification of that judicial error.

The Council could have limited itself to the particular substantive and procedural fixes discussed in Part II of this article. It chose not to do so. It saw that the law had been construed too narrowly, that the process of narrowing was ongoing, and that even the use of distinct language in the statute had not been sufficient to protect the law. It thus developed a solution that was designed to accommodate more than the specific fixes set out in other sections of the Restoration Act, and more than the numerous other problematic areas of law that had been brought to the Council's attention. In short, it developed a process of reflection and reconsideration (the requirement of independent construction) that is intended to serve as a continuing shield and sword for the City Human Rights Law in all its dimensions.[118]

Nothing in the language of section 8-130 of the New York City Human Rights Law limits the requirement of broad and indepen-

117. 2005 COMMITTEE REPORT, *supra* note 22, at 4-5. Indeed, the version of Intro 22 that was ultimately enacted had stronger language than the original, pre-*McGrath* version. The original version is found at NEW YORK CITY COUNCIL PROCEEDINGS 2004 338-40 (Feb. 4, 2004). The characterization of the local law's purposes as "uniquely broad and remedial" was added later, as was the unequivocal statement that local law construction needed to proceed "regardless" of how federal or state law had been construed. 2005 COMMITTEE REPORT, *supra* note 22, at 4-5. The Restoration Act's first version had no initial "purpose" section; only the final version had an initial "purpose" section that underlined both the need for independent construction and the idea of comparable civil rights laws as a floor below which the City law cannot fall, not a ceiling above which it may not rise. *Id.* at 5.

118. *Cf.* N.Y. STAT. LAW § 95 cmt. ("A statute framed in language of general import, not only may be deemed applicable to temporary existing evils, but may be construed to meet those which subsequently arise.").

dent construction to particular provisions; when the 2005 Committee Report refers to the need to defend the "protections" of the City Human Rights Law against "restrictive interpretations," it uses the term "protections" without limitation.[119] As advocates made clear to the City Council, the revised construction provision should obviate the need to fix specific substantive provisions over and over again. "Amendments such as these," wrote the Association of the Bar, "should no longer be necessary after Intro 22-A is enacted because Intro 22-A requires courts to construe the City's Human Rights Law independently and in light of the Council's clear intent to provide the greatest possible protection for civil rights."[120]

D. Providing Guidance

There is nothing mysterious about what judges need to do to fulfill the legislative intent of the Restoration Act. Step one is to revive the tradition of liberal construction that used to prevail routinely. Step two is to adapt that tradition to a statute whose structure, language, and intent all point to a body of law far less concerned with preserving the prerogatives of covered entities, and far more concerned with preventing and punishing discrimination in all its manifestations (and with compensating victims of such acts), than are the counterpart federal and state statutes. Step three is to heed the specific guidance generated in connection with the passage of the Restoration Act.

1. *Reviving the tradition*

When New York's Court of Appeals was faced thirty one years ago with a city seeking to disclaim responsibility for sex discrimination on the grounds that any discrimination acts were attributable only to an independent entity, the court would not hear of it:

> Since the statute is to be "construed liberally for the accomplishment of the purposes thereof" (Executive Law, § 300), the City of Schenectady should not be permitted to avoid responsibility for discriminatory acts of persons appointed by it and under a procedure which it itself established, pursuant to the labor rela-

119. 2005 COMMITTEE REPORT, *supra* note 22, at 2.

120. Bar Association Letter, *supra* note 23, at 4. *See also* Brennan Center Statement, *supra* note 24, at 7 ("Rather than being reactive—waiting, for example, until after the Supreme Court cuts back on standing for testers and fair housing organizations, and then waiting further, for the years it frequently takes to achieve a specific legislative restoration—Intro 22 will provide a means of preventing such dismantling of New York City's civil rights protections in the first place.").

> tions agreement. Sexual discrimination in employment being deplorable, *it is the duty of courts to make sure that the Human Rights Law works and that the intent of the Legislature is not thwarted by a combination of strict construction of the statute and a battle with semantics.*[121]

Even the United States Supreme Court has—not so long ago—recognized the importance of looking to the purposes of a statute in determining how to construe it.[122] It had to decide whether after-acquired evidence of serious wrongdoing (that is, that which would have resulted in dismissal) should operate in all cases to bar all relief for an earlier violation of the Age Discrimination in Employment Act (ADEA).[123] Before it could reach a conclusion, it needed to look at the purposes of the statutory scheme:

> The ADEA and Title VII share common substantive features and also a common purpose: "the elimination of discrimination in the workplace." . . . Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination. . . . Deterrence is one object of these statutes. Compensation for injuries caused by the prohibited discrimination is another.[124]

Having identified compensation and deterrence as goals of the statute, the Court turned to the mechanism used by the statutes to effectuate the goals:

> The ADEA, in keeping with these purposes, contains a vital element found in both Title VII and the Fair Labor Standards Act: It grants an injured employee a right of action to obtain the authorized relief. 29 U.S.C. § 626(c). The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45, 94 S. Ct. 1011, 1018, 39 L.Ed.2d 147 (1974) ("[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices"); *see also* Teamsters v. United States, 431 U.S. 324, 364, 97 S.Ct. 1843, 1869, 52 L.Ed.2d 396 (1977).[125]

---

121. City of Schenectady v. State Div. on Human Rights, 335 N.E.2d 290, 295 (N.Y. 1975) (emphasis added) (internal citation omitted).

122. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358 (1995).

123. *Id.* at 360.

124. *Id.* at 358 (internal citations omitted).

125. *Id.*

The Court concluded that a comprehensive ban on all relief in all cases would be contrary to the effective administration of the ADEA:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.[126]

One might disagree with the Court's ultimate conclusion[127] but, it is clear to see, the exploration of statutory purposes is essential.

2. *Adapting to the enhanced enforcement focus of the City Human Rights Law*

As has already been discussed, a court, seeking to construe a provision of the City Human Rights Law, must take account of: (a) the Council's belief that the law has heretofore been construed too narrowly; (b) the fact that the purposes of the City Human Rights Law are "uniquely broad and remedial; and (c) the Council's intention that the law be construed "in line with the purposes of fundamental amendments to the law enacted in 1991."[128]

What the phrases "uniquely broad and remedial purposes" and "fundamental amendments" reflect is the fact that, in 1991, the City Human Rights Law shifted decisively away from the "let's see if we can conciliate and become friends" philosophy that animated the first generation of modern civil rights statutes. The City Human Rights Law became instead a statute that had at its core traditional law enforcement values. These included the belief that deterrence was necessary to maximize compliance, and that deterrence could only be achieved: (a) under a regime that maximized responsibility for discriminatory acts and concurrently minimized

126. *Id.* at 358-59.

127. Some would argue, for example, that the Court did not adequately address what it acknowledged was the "not insubstantial" concern that "employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims . . . ." *Id.* at 363. The view that Rule 11 sanctions would help to "deter most abuses" has proven to be unduly optimistic.

128. *See* Restoration Act, *supra* note 7, §§1, 7; 2005 COMMITTEE REPORT, *supra* note 22, at 2.

the leeway accorded covered entities to evade such responsibility; and (b) where non-compliance was seen to have serious consequences.

Built into the law was the belief that a system that truly has "zero tolerance" for discrimination must punish violations severely, especially because every act of discrimination is seen to represent an injury not only to the individual victim, but to the City as a whole. Joined to this core belief in civil rights enforcement as law enforcement, and, in some respects, a function of it, was the view that the needs of victims of discrimination are sufficiently important that they trump—in all but the most limited circumstances—concerns about any burdens to be placed on covered entities.

Given the scant attention paid by courts to the changes effected by the 1991 Amendments,[129] it may at first seem unlikely that the sea change described above actually occurred. Could it be that the 1991 Amendments merely distinguished its local law in a few requests from its state and federal counterparts? If so, one might reasonably infer that the changes actually meant that the City was fundamentally satisfied with (and had implicitly adopted) the basic principles, assumptions, and concerns of state and federal civil rights law.

In fact, any skepticism about the scope of the philosophical change represented by those amendments is quickly and simply put to rest by reading the 1991 Amendments.[130] They were numerous, substantive, and dramatic. They included the creation of two new mechanisms for fighting discrimination: one, a private right of ac-

129. A rare exception where the existence of the legislative history was noticed was *Burger v. Litton Industries*, No. 91 Civ. 09181996 WL 421449, at *19 (S.D.N.Y. Apr. 25, 1996), *adopted*, No. 91 Civ. 09181996 WL 609421 (S.D.N.Y. Oct. 22, 1996)) ("the 'legislative history' of the [New York City Human Rights Law] makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws") (internal citation omitted). Referencing the language in *Burger*, the Second Circuit, in a case frequently cited for the proposition of parallelism, came tantalizingly close the following year to grappling with the 1991 Amendments before providing that it "need not consider those issues here, as [plaintiff] has not challenged the district court's dismissal of her state and city human rights claims on appeal." Torres v. Pisano, 116 F.3d 625, 629 n.1 (2d Cir. 1997); *see also In re* 119-121 East 97th Street Corp. v. N.Y.C. Comm'n on Human Rights, 642 N.Y.S.2d 638, 644 (App. Div. 1996) ("The legislative history of the amendments to the Administrative Code, including the civil penalty provision, indicates that they were intended to strengthen and expand the enforcement mechanisms of the law so the Commission could prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate.").

130. 1991 Amendments, *supra* note 3; 1991 LEG. ANN., *supra* note 3.

tion for aggrieved persons; and two, vesting of the City's Law Department with explicit statutory authority to investigate and prosecute instances of systemic discrimination. Recognizing that discrimination harmed the City itself, the 1991 Amendments imposed—for cases proven in the administrative context—civil penalties designed to "vindicate the public interest."[131]

Rather than capping compensatory and punitive damages in the manner of Title VII out of concern for what uncapped awards might mean for covered entities, the City defined the private right of action as one that included *uncapped* compensatory and *uncapped* punitive damages.

Rather than excluding damages in disparate impact cases and in mixed motive cases, as the Civil Rights Act of 1991 did in connection with Title VII cases, the City Human Rights Law contains no such exclusion. The 1991 Amendments to the City law, however, did include as part of the fundamental policy of the law the idea that discrimination must "play no role."[132]

Disparate impact was explicitly covered in all contexts and in respect to all protected classes, with burdens of proof requiring more of a defendant than is the case pursuant to federal law.[133]

Under federal law, a covered entity which has failed to provide reasonable accommodation as required by the Americans with Disabilities Act is nevertheless sheltered from exposure to damages if it had made good faith efforts to identify and make such accommodation.[134] The 1991 Amendments contained no such exemption.

Under the Americans with Disabilities Act and the Fair Housing Act, only those impairments which substantially limit a major life function allow a person to meet either statute's definition of disability.[135] The 1991 Amendments, by contrast, have no such restriction.

Under the Fair Housing Act, a covered entity is only required to permit a person to make reasonable modifications to a dwelling.[136]

131. N.Y.C. ADMIN. CODE § 8-126(a); 1991 LEG. ANN., *supra* note 3, at 174.

132. N.Y.C. ADMIN. CODE § 8-101. This was echoed in Mayor David N. Dinkins' remarks on June 18, 1991. See Mayor David N. Dinkins, Remarks, *supra* note 4, at 2.

133. For example, even when a defendant has shown that a practice "bears a significant relationship to a significant business objective," a plaintiff only has to produce "substantial evidence" that "an alternative policy or practice with less disparate impact is available. The defendant bears the burden of persuasion that the alternative policy or practice "would not serve the covered entity as well." N.Y.C. ADMIN. CODE § 8-107(17)(a).

134. 42 U.S.C. § 1981a(a)(3) (2005).

135. *See* 42 U.S.C. § 12102(2)(A) and 42 U.S.C. § 3602(h)(1), respectively.

136. 42 U.S.C. § 3604(f)(3)(A).

Under the 1991 Amendments, the covered entity is both obliged to make and pay for such modifications, unless to do so would be an undue hardship.[137]

The 1991 Amendments limited the then-existing exemption to the City Law's fair housing provisions. Until the 1991 Amendments, rental apartments in owner-occupied two-family buildings were not covered by the law's anti-discrimination provisions. The 1991 Amendments severely curtailed that exemption.[138]

Not wanting to permit a covered entity to evade liability by claiming that it was unaware of the needs of persons with disabilities, the 1991 Amendments triggered the obligation to make reasonable accommodation to persons with disabilities as soon as the entity *should have known of the disability,* a provision not available under the Americans with Disabilities Act.[139]

The minimum number of employees required for an employer to be covered under the City law had been four (meaning that hundreds of thousands of New York City workers not covered by Title VII were covered by the local law). The 1991 Amendments broadened coverage still further by requiring that natural persons not themselves employers who were independent contractors for an employer would be counted as employees for coverage purposes.[140]

The 1991 Amendments adopted strict vicarious liability provisions, provisions unknown under Title VII. In the co-employee workplace harassment context, the City was not satisfied with imposing vicarious liability on the employer where it failed to take "immediate and appropriate corrective action" after one of its supervisors or managers learned of the discriminatory conduct.[141] Employers would also be vicariously liable where they *should have known* about the conduct, but failed to exercise reasonable dili-

137. *See infra* note 252 and accompanying text.

138. A comparison of the pre-1991 Amendments version of section 8-107(5)(a)(4)(a)(1) of the Administrative Code of the City of New York, with its post-1991 Amendments counterpart, shows that the exemption is no longer available where the housing accommodation is "publicly-assisted," as broadly defined in section 8-102(11), or where it has been publicly advertised, listed, or otherwise offered to the general public. *See* 1991 LEG. ANN., *supra* note 3, at 156.

139. *Compare* N.Y.C. ADMIN. CODE § 8-107(15)(a) *with* 42 U.S.C. § 12112(b)(5)(A) (2005).

140. N.Y.C. ADMIN. CODE § 8-102(5).

141. *Id.* § 8-107(13)(b)(2). It should be reemphasized that outside the contexts of section 8-107(1) (employment) and section 8-107(2) (apprentice training program) employers are strictly liable for the conduct of all employees or agents, regardless of position, not just for those employees or agents who exercise supervisory or managerial authority. *Id.* § 8-107(13)(a).

gence to prevent such conduct.[142] For the first time, the City even identified circumstances under which employers would also be held responsible for conduct of independent contractors.[143]

As Mayor Dinkins pointed out, a "fundamental step" of the 1991 amendments was making individuals responsible for their own discriminatory conduct.[144]

Impatient with the litigation that had swirled around the definition of what entities would be considered a "place of public accommodation," the 1991 Amendments adopted sweeping language covering places *or providers* of "goods, services, facilities, accommodations, advantage or privileges of any kind."[145] The message was this: a laundry list of covered types of establishments was not enough to encompass the City's overarching goal of preventing discrimination whenever a covered entity interacted with a member of the public.[146]

The changes in administrative procedure also represented a major shift. The City believed that discrimination cases had matured to a level well beyond the simple and relatively informal process that may have sufficed in the 1960s—a time when the routine brazenness of discrimination meant that cases were factually simple, a time when a sophisticated discrimination defense industry did not yet exist, and a time when the hope for voluntary compliance was still strong. The 1991 Amendments treated the administrative process as now deserving of the seriousness of a full-blown plenary proceeding, requiring timely answers, authorizing demands for record production and retention, placing the "prosecutorial bureau" of the Commission on Human Rights in the role of party to all administrative complaints, contemplating full pre-trial discovery and the ability to compel discovery, and providing that the Commission could impose civil penalties for the violation of its orders (in addition to enforcing its orders through court action).[147]

142. *Id.* § 8-107(13)(b)(3). The "duty of care" standard under federal law, looking to whether appropriate preventative measures were taken, only applies in the context of supervisory or managerial misconduct.

143. *Id.* § 8-107(13)(c).

144. Mayor David N. Dinkins, Remarks, *supra* note 4, at 4-5.

145. N.Y.C. ADMIN. CODE § 8-102(9).

146. This description of amendments is only a partial one. Among others: elimination of a previously existing exemption for many educational institutions; the broadening of the proscription against retaliation to proscribe retaliation "in any manner"; and a new proscription against marital status discrimination in the employment context.

147. N.Y.C. ADMIN. CODE §§ 8-111, 8-114, 8-117, 8-118, 8-125; 1991 LEG. ANN., *supra* note 3, at 168-71, 174.

* * *

The 1991 Amendments were consistent in tone and approach: every change either expanded coverage, limited an exemption, increased responsibility, or broadened remedies. In case after case, the balance struck by the Amendments favored victims and the interests of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into state and federal law. In view of this strong pattern, interpretations of "open" areas of law are only fairly construed consistent with the spirit that animated that pattern.

3. *Acting in compliance with guidance specifically related to the Restoration Act*

The guidance on how to carry out liberal construction in the manner intended by the Restoration Act is clear and consistent. The Anti-Discrimination Center's testimony referenced the principles described in the preceding section, including the need to maximize coverage and counteract evasion.[148] The Brennan Center, identifying the "stronger law enforcement focus provided by the local law," explained that the task was to construe the law bearing these purposes in mind.[149] The Bar Association pointed to the City Council's "clear intent to provide the greatest possible protection for civil rights."[150]

The 2005 Committee Report echoes these concerns when discussing how judges should approach issues of interpretation arising under the construction provision of City Human Rights Law. The Report says that decision makers should be guided by certain principles. The first principle specified is that "discrimination should not play a role in decisions made by employers, landlords, and providers of public accommodations"; the second is that "traditional methods and principles of law enforcement ought to be ap-

148. *See* Center Testimony, *supra* note 23, at 5 (citing the need to: "(a) maximize the coverage provided by the law; (b) make certain that discrimination plays no role in the various decisions made each day in New York City by employers, landlords, and providers of public accommodations; (c) strictly limit the zone in which discrimination may be practiced; (d) maximize the deterrent effect of the law, with the recognition that traditional methods and principles of law enforcement should be applicable in the civil rights context; (e) minimize and counteract evasion of the law, including attempts to feign ignorance of the requirements of the law, or otherwise to engage in diversionary legal tactics; (f) always compensate victims of discrimination fully; (g) maximize access to the courts; and (h) treat discrimination injuries as serious injuries both to the individual victim, and to New York City.").

149. Brennan Center Statement, *supra* note 23, at. 4.

150. Bar Association Letter, *supra* note 23, at 4.

plied in the civil rights context"; and the third is that "victims of discrimination suffer serious injuries for which they ought to receive full compensation."[151] The Report concludes with an explanation of the importance of the civil penalties being enhanced by the Restoration Act, an explanation encapsulating the Council's "zero tolerance" policy: the imposition of penalties, according to the Report, "sends a strong signal to those who discriminate that such acts cause serious injury, to both the persons directly involved and the social fabric of the city as a whole, *which will not be tolerated.*"[152]

One cannot review the Council's recitation that the City Human Rights Law had been construed too narrowly, the Council's characterization of the law's purposes as being "uniquely broad and remedial," the Council's goal of vindicating the purposes of the 1991 Amendments, the relentless broadening of those amendments, the testimony on which the Council relied, and the other aspects of the Restoration Act's legislative history, without emerging with the clear sense that any doubts about the interpretation of the law should be resolved in favor of giving the law the broadest and most powerful reach that is possible. Consistent with this approach, any exemptions to the law's coverage must be construed narrowly.[153] Application of these considerations to more than a dozen illustrations of areas of the law is covered in Section F of this article. First though, it is important to set out explicitly the Restoration Act's respect for—and consistency with—principles of judicial independence.

E. Maintaining Judicial Independence

The legislative history makes clear that the Restoration Act is not in any way designed to place judges in a straightjacket, but rather, is designed to combat the mischief of rote parallelism, and

151. 2005 COMMITTEE REPORT, *supra* note 22, at 5. The Report also insists that there must always be "thoughtful, independent consideration of whether the proposed interpretation would fulfill the uniquely broad and remedial purposes of the City's human rights law." *Id.* at 5, n.8.

152. *Id.* at 6.

153. *See* City of Edmonds v. Oxford House, Inc., 514 U.S. 526, 531-32 (1995) ("[W]e are mindful of the [Fair Housing Act's] stated policy 'to provide, within constitutional limitations, for fair housing within the United States. We also note precedent recognizing the FHA's 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision. Accordingly, we regard this case as an instance in which an exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy.]'") (internal citations omitted).

to remind, empower, and require judges to fulfill their essential role as active and zealous agents for the vindication of the purposes of the law. The expectations of and for the Restoration Act were expressed consistently. The Bar Association pointed out, for example, that the Act "does not preclude judges from adopting the prevailing interpretation of federal law . . . so long as they conclude that the federal interpretation best serves the broad remedial purposes of the Human Rights Law."[154] The key is taking the time to engage in the process of asking "which interpretation of the law will best fulfill the objectives of the law."[155]

The Brennan Center observed that "[i]t is a fundamental task of a court to use its best judgment to determine [which interpretation] best fulfills the purpose of the statute under examination. The provision of Intro 22 in question requires a court to do nothing more than engage in that process with due regard for the underlying purposes of the law."[156]

The Anti-Discrimination Center's testimony made this same point: "The bill does not oblige a judge to accept a particular argument that an advocate is advancing, but it does insist that judges thoughtfully consider whether the interpretation being advanced, or a different one, would address the purposes of the City Human Rights Law most robustly."[157] In language almost identical to that testimony, the 2005 Committee Report noted that, "The bill does not require a decision maker to accept any particular argument being advanced by an advocate, but underscores the need for thoughtful, independent consideration of whether the proposed interpretation would fulfill the uniquely broad and remedial purposes of the City's Human Rights Law."[158]

In an era where the phrase "judicial restraint" is frequently used more as a term of approbation than one that has reliable meaning, it is important to decode the ways in which the Restoration Act expects and does not expect judges to exercise restraint. Restraint is expected both in resisting the urge towards rote parallelism, and in respect to not substituting a judge's own, more conservative set of social policy decisions for the policy judgments made by the Council. On the other hand, *activism is expected* in seeing that the

154. Bar Association Letter, *supra* note 23, at 2.

155. *Id.*

156. Brennan Center Statement, *supra* note 23, at 9.

157. Center Testimony, *supra* note 23, at 5.

158. 2005 COMMITTEE REPORT, *supra* note 22, at 5 n.8.

law as interpreted fulfills its extraordinarily broad intended reach.[159]

When construing a statute that is effectively "new territory" because of the absence of serious work to construe it heretofore; that announces that "there is no greater danger to the health, morals, safety and welfare of the city" than discrimination;[160] that describes discrimination as "menac[ing] the institutions and foundation of a free democratic state";[161] and that insists that discrimination be proscribed "from playing any role in actions relating to employment, public accommodations, and housing,"[162] it is well to consider what a Supreme Court—very different in composition from today's Court—did in the early days after the enactment of the Fair Housing Act. In surveying what was then also new territory, citing the fact that the language of the Fair Housing Act was "broad and inclusive"[163] and was intended to vindicate "a policy that Congress considered to be of the highest priority,"[164] that Court concluded that "only a generous construction" of its provisions would give vitality to those provisions and carry out the purposes of the statute.[165] In passing the Restoration Act, the Council was depending on the judiciary to play a comparable role today.

F. Illustrations of the Intended Construction Principles

As the City Human Rights Law is hereafter used, there will emerge numerous areas for interpretation beyond those brought to the Council's attention. This fact should not operate to suggest any limitation of the liberal construction principles that are the focus of this article.[166] Nevertheless, there were quite a few areas of con-

159. *See supra* note 129 and accompanying text.
160. N.Y.C. ADMIN. CODE § 8-101.
161. *Id.*
162. *Id.*
163. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972).
164. *Id.* at 211.
165. *Id.* at 212.
166. *Cf.* Mayers v. Ridley, 465 F.2d 630 (D.C. Cir 1972). In that case, the D.C. Circuit, empanelled *en banc,* treated a question not specifically addressed in the Fair Housing Act: did the Act cover a Recorder of Deeds who had been accepting and filing racially restrictive covenants? The lead concurrence began by acknowledging that "there is nothing in the legislative history tending either to support or to refute the inference arising from the language that the Act prohibits statements of racial preference emanating from the Recorder's office," and by noting that, "[i]n all likelihood, few congressmen even addressed their thinking to this particular problem." *Id.* at 634. That acknowledgment, however, did not operate as evidence that coverage should not lie: "no court has ever held that Congress must specifically indicate how a statute should be applied in every case before the judiciary can go about the business

cern that did animate the Restoration Act, and an examination of those is instructive, both for the particular resolution intended, and for their illustrative value.

1. *First order of business*

Four cases were consistently identified by name as inconsistent with statutory language and purposes: *McGrath, Levin, Forrest,* and *Priore*. Council Member Palma's statement regarding the intent and consequences of the bill stated flatly: "With Intro 22, these cases, and others like them, will no longer hinder vindication of our civil rights."[167] The areas of law to which these cases (erroneously) spoke are treated first.

i. McGrath: Attorney's fees in "nominal damages" cases

In rejecting *McGrath*'s importation of *Farrar* and making clear that attorney's fees are available in cases that result in only nominal damages, courts will (1) avoid importing a restriction not mentioned by the language of the City Human Rights Law and not contemplated by the 1991 Amendments, (2) further the ability of victims of discrimination to secure counsel, and (3) thereby vindicate the statute's intent to see that no instance of discrimination is allowed to stand unchallenged. The phrase "victim of discrimination" is deliberate: the only people being denied fees under the *McGrath/Farrar* rule are those who have proved to a jury's satisfaction that the defendant did engage in an unlawful discriminatory practice.[168]

---

of applying it." *Id.* at 634. The opinion pointed to a then-recent Supreme Court decision which had recognized that:

> [M]ost Congressional discussion of the public accommodations of the Civil Rights Act of 1964 had focused on places of spectator entertainment, not recreational areas." Nonetheless, the Supreme Court had held the Act applicable to a lake club with boating and dancing facilities, remarking that the Act's coverage should not be "restricted to the primary objects of Congress' concern" since the purpose of the law was "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.

Id. at 634–35. The *Ridley* Court, too, was unwilling to restrict the reach of the Fair Housing Act to "the primary objects of Congress' concern." *Id.* at 634.

167. Each of these four cases was also cited as an example of improper judicial construction. *See* Bar Association Letter, *supra* note 23, at 1 n.1; Brennan Center Statement, *supra* note 23, at 3 n.4, 5 n.6, and 6 n.8; Center Testimony, *supra* note 23, at 2 nn.1-4.

168. It is true that the most harsh effects of *Farrar* can theoretically be avoided in federal court if the plaintiff seeks and is granted equitable relief, although in *McGrath,* such relief was not sought. Leaving aside the infrequency with which such relief is granted in an individual case where only nominal money damages are

ii. Levin: Marital status

Consider the following exchange between a landlord and a couple to whom he has shown an available apartment:

Landlord: Did you like it?

Couple: We did. We'd like to rent it.

Landlord: Are you married?

Couple: No.

Landlord: Well, because you are not married, I will not rent the apartment to you.

Couple: Is there any other reason?

Landlord: No.

One might think that this is a straightforward single-motive, intentional discrimination case. The City Human Rights Law has long prohibited housing discrimination on the basis of marital status.[169] As early as 1977, the City Human Rights Commission considered the argument of a landlord who "believed that unmarried persons planning to live together would be more likely to have financial difficulties culminating in the breaking of their lease than would married persons living together."[170] The Commission rejected the argument:

> It was subjective decisions of this very type, so clearly mired on preconceived stereotypical attitudes, which served to make finding housing so great a problem for unmarried people, and which was in large part responsible for the legislative enactment under which this Commission's jurisdiction has been involved in this case.[171]

New York's highest court, however, has seen things differently. In rulings most recently affirmed in *Levin v. Yeshiva University,* the Court of Appeals has held that protection against being intentionally discriminated against on the basis of marital status only applies to an individual who has been discriminated against, not to persons who have been discriminated against because of a "disqualifying relationship."[172] In the court's conception, "marital status" corresponds only to the box an individual would check off on a form.

---

awarded, there is an additional problem for cases brought in state court. New York has a rule that strongly discourages the inclusion of a demand for equitable relief: the plaintiff who does so loses the right to a jury trial.

169. N.Y.C. ADMIN. CODE § 8-107(5)(a)(1). The provision was added in 1973.

170. Mandel v. Reinhart, No. 6481-H, 1977 WL 52818, at *7 (N.Y.C. Com. Hum. Rts., Feb. 28, 1977) (decision and order).

171. *Id.* at *7.

172. Levin v. Yeshiva Univ., 754 N.E.2d 1099, 1102 (N.Y. 2001)). As was pointed out in Center testimony, the case did not purport to analyze the right of an unmarried

The court did not consider the fact that the City Human Rights Law provision in question states that a housing provider is forbidden to withhold or deny housing "from any person *or group of persons*" based on the protected class status (including marital status) of "such person *or persons,*"[173] and did not consider that the common understanding of "marital status" encompasses the status of a couple.[174] In the illustrative conversation cited above, for example, it would be the very unusual landlord who would have been satisfied with the answer "Yes, each of us is a 'married person,'" if the two people were having an affair (and were only married persons in the sense of being married to others). In the real world, the landlord was asking, "Are you married to one another?"[175]

Not surprisingly, the Court did not–either in *Levin* or in the predecessor cases–consider what interpretation of marital status would best fulfill the purposes of the statute, nor did it consider the City Human Rights Law independently of its consideration of the State Human Rights Law. A rule that only prohibits a landlord from excluding *all* unmarried persons (*regardless* of whether they are living alone or together) leaves a great deal of room for the kind of stereotypical assumptions about marital status to play a role in decisions relating to housing, the very assumptions that had long ago been condemned by the Commission on Human Rights.

The Council specifically contemplated that *Levin* could not stand in the face of the expanded and revived liberal construction provision, and anticipated that courts would be obliged to strike it down. In the meantime, the Council added protection for registered domestic partners,[176] but that protection is only an "interim mea-

individual to be free from intentional discrimination in the terms and conditions of a rental or sale, and did not purport to deal with disparate impact claims. Center Testimony, *supra* note 23, at 2 n.2.

173. N.Y.C. ADMIN. CODE § 8-107(5)(a)(1).

174. *Cf.* Smith v. Fair Employment & Hous. Comm'n., 12 Cal. 4th 1143, 1155 (Sup. Ct. 1996) ("To determine what a statute means, 'we first consult the words themselves, giving them their usual and ordinary meaning.' The usual and ordinary meaning of the words 'marital status,' as applied to two prospective tenants is that a landlord may not ask them whether they are married or refuse to rent to them because they are, or are not.") (internal citation and footnote omitted).

175. In the course of more than two years of work on what became the Restoration Act, and conversations with literally hundreds of people, the task of explaining the Court's conception of marital status was more difficult than anything else. Each and every person found the Court's cramped interpretation of marital status either entirely counterintuitive or incomprehensible, or both.

176. *See infra* notes 311-13 and accompanying text.

sure."[177] As the 2005 Committee Report put it, the domestic partnership protection was being enacted "[p]ending judicial reconsideration of the proper scope of protection from discrimination based on marital status . . . ."[178]

The decision to create an interim solution arose from objections that had been raised by the Bloomberg Administration to the language in the original version of the bill. That language had defined marital status to include the status of a person "in relation to another person," without any qualification whatsoever as to the nature of the relationship between the two people involved.[179] The Bloomberg Administration repeatedly denounced the proposed provision as unintentionally extending protections far beyond the Council's desire to stop discrimination against unmarried couples.[180] The Council's solution, as noted above, was to have the courts draw the parameters of "couples" protection as part of the judiciary's liberal construction function.[181]

The task is one that the courts should readily be able to handle. In *Braschi v. Stahl Co.*, for example, New York's Court of Appeals

177. Center Testimony, *supra* note 23, at 7 (pointing out that "the broader question will have to be revisited after the courts have re-examined their previous marital status rulings in light of each and all of the requirements of revised Section 8-130").

178. 2005 COMMITTEE REPORT, *supra* note 22, at 2.

179. See Intro 439 of 2003 (the predecessor bill to Intro 22), NEW YORK CITY COUNCIL PROCEEDINGS 1518 (2003) and the original version of Intro 22, NEW YORK CITY COUNCIL PROCEEDINGS 338 (2004).

180. The Commission on Human Rights first claimed that the language "extends the law to protect based upon personality traits, individual qualities and characteristics." Comm'r Patricia Gatling, New York City Commission on Human Rights, Statement at Hearing of New York City Council Committee on General Welfare 2 (Oct. 16, 2003) (on file with Committee on General Welfare). A year later, the Commission still thought the language was too broad:

> I'm still not clear on what the class of people are. I'll give you an example: Before I got married, I had a roommate for 12 years. We lived in an apartment together. We shared household expenses. We even had a summer house that we rented together with a group of other people. That I assume would not be the type of relationship you're looking to protect. Yet the way this is written or the way I understand the proposal as the definition of marital status. I would think that's inappropriate.

Clifford Mulqueen, General Counsel, New York City Commission on Human Rights, Testimony at Hearing of New York City Council Committee on General Welfare 73-74 (Sept. 22, 2004) (transcript on file with the New York City Clerk's Office).

181. *See supra* text accompanying notes 172-74. While the Council did step back from its initial language protecting even two people with the most tenuous ties between them, there is, of course, no evidence that the Council was seeking to narrow the scope that the existing marital status provision would have given to unmarried couples had the *Levin* court paid heed to the intentions of the framers of the 1991 Amendments, nor any evidence that the Council wanted to exempt marital status from the enhanced liberal construction requirements of the Restoration Act.

was faced with the problem of how to define "family" for the purpose of determining who has survivor protection from eviction pursuant to the rent control laws.[182] In that case, the Court of Appeals recognized that statutes are to be interpreted "so as to avoid objectionable consequences and to prevent hardship or injustice," and that, "where doubt exists as to the meaning of a term, and a choice between two constructions is afforded, the consequences that may result from the different interpretations should be considered."[183] The court went on to point out that, "since rent-control laws are remedial in nature and designed to promote the public good, their provisions should be interpreted broadly to effectuate their purposes."[184]

The court concluded that the term "family"

> should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. *The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.* In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.[185]

After the court had acted, the holding was codified in regulation, and affords protection where there is a showing of "emotional and financial commitment, and interdependence" between the two people involved.[186] In the context of marital status protection for couples, the same principles referenced in *Braschi* demand, at minimum, that couples who hold themselves out as "partners" (that is, two people with an emotional and financial commitment to, and interdependence between, each other) be protected as couples against discrimination.[187]

---

182. Braschi v. Stahl Co., 543 N.E.2d 49, 50–51 (N.Y. 1989).

183. *Id.* at 52.

184. *Id.* (internal citations omitted).

185. *Id.* at 53–54 (emphasis added).

186. New York City Rent and Eviction Regulations, N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1993).

187. Independent of what comes to be done in terms of protecting couples as couples, it bears repetition that *Levin* did not foreclose claims by an unmarried individual that he or she was being discriminated against in terms and conditions either intentionally or as a matter of disparate impact.

iii. Forrest: Vicarious liability

As discussed above in part I.B.3, and as described to the Council, *Forrest* disregarded the distinct language and legislative history of the 1991 Amendments which had established strict employer liability for the acts of employees who exercised supervisory or managerial responsibility. The case also disregarded the fact that the affirmative defense available under the City Human Rights Law was narrower than that available under the *Faragher/Ellerth* affirmative defense the Supreme Court later created in 1998. The City Law, after all, treated an employer's "reasonable steps to prevent" as only being relevant to liability in non-supervisory, non-managerial harassment situations. Neither *Forrest's* importation of a state vicarious liability standard contrary to the express language of the City Law, nor the case's importation of a federal affirmative defense inconsistent with the City Law, can have continuing vitality.

iv. Priore: Individual liability

As pointed out to the Council, this, too, is an area where a court simply refused to apply the language of the law.[188] Most other courts had previously recognized that the Council, having proscribed in 1991 discrimination not only by an employer, but by "an employee or agent thereof," meant that discrimination by employees or agents of employers was also to be prohibited. If the First Department had thought that the Council had not really meant to move beyond the proscriptions of State law,[189] the Restoration Act makes that belief impossible to sustain, and *Priore* must be abandoned.

2. *Key challenges*[190]

i. Abandoning the "severe or pervasive" requirement in harassment cases

An employer has two high-paid employees in a particular department, one man and one woman. The employer tells the wo-

188. *See* Brennan Center Statement, *supra* note 23, at 6.

189. This belief had no basis in fact. *See infra* notes 75–90 and accompanying text.

190. The illustrations that follow are not designed to suggest that other issues brought to the Council's attention are not important for courts to examine. For example, the scope of what constitutes "adverse action" needs to be reexamined. A restrictive interpretation both undermines enforcement of the statute, and is inconsistent with the concerns that animated the Council's elimination of the materiality requirement in retaliation cases. The parameters of the "continuing violation" doctrine need to be explored anew, especially since, as of the 1991 Amendments—and, indeed, until the Supreme Court's decision in *National Rail Road*

man that, because of her gender, she will henceforth be paid ten cents less per hour than her male counterpart. Though the gross economic loss (assuming a fifty hour week) is only five dollars per week (less, after taxes), the woman would be able to tell her employer with confidence that the employer's action is prohibited pursuant to Title VII. "I am entitled," she says, "not to be discriminated against in the terms and conditions of my employment." The fact that her out-of-pocket damages are small does not undercut the fact that a gender-based distinction in terms and conditions has been effected. In other words, liability is one issue and damages another.

When it comes to harassment claims, however, the courts conflate the issues of liability and damages. As most recently summarized by the Supreme Court in *Clark County School District v. Breeden,* "sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment."[191] The Court went on to underline the fact that a "recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[192]

The "severe or pervasive" rule invited lower courts to "discriminate against one term or condition of employment by assigning a significantly lower importance to the right to work in an atmosphere free from discrimination."[193] As a result, there is a wide range of conduct—all of it treating one person less well than another *because of gender*—which courts tolerate.

In a recent case in New York,[194] for example, a plaintiff had alleged that, in the course of a five month period, the defendant's vice-president (who was also head of the sales department): had repeatedly told her–in the presence of other employees–that she was "sleeping with the wrong employee";[195] had photographed

Corporation v. Morgan, 536 U.S. 101 (2002)—there was a split among the circuits in terms of the applicability of continuing violation theory, even under Title VII.

191. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (internal citations omitted).

192. *Id.* at 271.

193. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 87 (2003).

194. Schiano v. Quality Payroll Sys., Inc., No. 03CV492(DRH)(ETB), 2005 WL 1638167 (E.D.N.Y. July 12, 2005).

195. The vice-president apparently knew that plaintiff was "romantically involved" with a co-employee. *Id.* at *1.

himself at a party "placing his hand on [plaintiff's] upper thigh and pulling her skirt up two or three inches"; had twice said in the presence of other employees that he should accompany plaintiff on vacation (instead of her boyfriend); had, on about half-a-dozen occasions, approached plaintiff from behind while she was working and "placed his hands on her back, neck or shoulders and leaned into her"; had at least one conversation with plaintiff about how "hot" she was and "the type of underwear she wore"; and, after a partition was, at plaintiff's request, installed around her desk to protect her from the vice-president, who would "leer" at plaintiff as he went by her workspace.[196]

The judge, citing the fact that the conduct occurred "intermittently" over a five or six-month period, concluded that it was "not particularly 'frequent' under the Title VII standard."[197]

Characterizing the conduct to which plaintiff alleged she was subjected as "occasional touching, rude comments, and hostile stares,"[198] the judge concluded that this conduct "cannot be said to amount to more than 'relatively innocuous incidences of overbearing or provocative behavior.' As such, they do not reach the requisite level of employment-altering severity."[199]

As detailed in *License to Harass,* trivialization of harassment as seen in *Schiano* is a frequent occurrence, and there are a variety of techniques used to insulate employers from liability for conduct that treats women poorly merely because they are women.[200] These include requiring that the conduct be severe *and* pervasive (instead of severe *or* pervasive), and include the phenomenon of courts "tolerating conduct that would be considered sexual assault or attempted sexual assault under the criminal law" and requiring "proof that the conduct tangibly affected the plaintiff's job performance."[201] Other techniques include parsing evidence to avoid a finding of severe or pervasive; and rejecting "evidence of harassment that occurred before the employer took some remedial action even though it does not stop the harassment."[202]

While the Supreme Court sees the "severe or pervasive" standard as important to preventing "Title VII from expanding into a

196. *Id.* at *1-2.
197. *Id.* at *4.
198. *Id.* at *5.
199. *Id.*
200. *Johnson, supra* note 193, at 111–34.
201. *Id.* at 111, 115.
202. *Id.* at 111, 115, 131-33.

general civility code,"[203] the focus of the City Human Rights Law in light of the 1991 Amendments and the Restoration Act is different. Its focus is instead making certain that discrimination not play any role in the workplace or elsewhere.

In fact, at the time the 1991 Amendments were being considered and enacted, the City Commission on Human Rights had questioned the prevailing federal standard. In 1989, an Administrative Law Judge (ALJ) of the Commission had made a post-hearing recommendation that the Commission dismiss a case that had revolved around one alleged incident of harassment, and the Commission affirmed the view of its Law Enforcement Bureau that the ALJ had "applied the wrong standard" for determining liability in a sexual harassment case, stating: "The Bureau correctly notes that the Commission is not bound by federal civil rights law. The New York City Human Rights Law is a separate and independent statute. Indeed, in many instances the City's law provides victims of discrimination with broader protection than that provided by federal law."[204] The Commission remanded the case to the ALJ for further consideration of the "proper standard."[205]

On remand, the ALJ explained that he agreed that, if proven, "[a] single act of harassment . . . would be sufficient to constitute sexual harassment," but because his decision was based on a determination that the complainant was not credible, he again recommended that the case be dismissed.[206] When the Commission reviewed the recommendation in April of 1990, the Commission rejected it, citing "complex and important credibility issues," and decided to constitute a panel of three Commissioners to "consider and suggest guidelines for hearing and deciding sexual harassment cases."[207]

No further action was taken prior to the 1991 Amendments, and, thus at the time of their enactment, there was an open question to

203. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

204. Murphy v. John Foleros King Pub, No. 03124079-EP, slip op. at 2 (N.Y.C. Com. Hum. Rts., Oct. 12, 1989) (decision and order) (on file with the library of New York City's Office of Administrative Trials and Hearings (OATH)).

205. *Id.* at 2-3.

206. It was alleged that a proprietor of the defendant had put his hand up the complainant's skirt. Murphy v. John Foleros King Pub, No. 03124079-EP, slip op. at 2 (N.Y.C. Com. Hum. Rts., Mar. 6, 1990) (recommended decision and order on remand) (on file with the library of New York City's Office of Administrative Trials and Hearings (OATH)).

207. Murphy v. John Foleros King Pub, No. 03124079-EP, slip op. at 3-4 (N.Y.C. Com. Hum. Rts., Apr. 25, 1990) (en banc) (decision and order) (on file with the library of New York City's Office of Administrative Trials and Hearings (OATH)).

be considered by the Commission as to what standard to apply in light of the fact that the City Human Rights Law is a "separate and independent statute." Sadly, this matter was not ultimately considered–in 1994, early in the Giuliani Administration, the Commission decided that a further hearing was not necessary. It did so simply as a matter of agreeing that the complainant had not presented sufficient credible evidence, not as an analysis of the legal standard.[208]

The need to address this issue was argued to the Council during the consideration of the Restoration Act by multiple parties in connection with the need for enhanced liberal construction language.[209] A simple solution (one that neither turns the City Human Rights Law into a general civility code nor a shield for discriminators) would adopt a standard which attaches liability whenever the covered entity is shown to have treated the plaintiff less favorably than others because of a protected status—regardless of the level of pervasiveness or severity of the discriminatory harassment —unless a covered entity demonstrated as an affirmative defense that the discriminatory harassment complained of consisted of no more than what a reasonable victim of discrimination would consider petty slights and trivial annoyances.

The elimination of the "severe or pervasive" requirement, coupled with the addition of a burden shift, would tackle the real issue: too many judges are unwilling to allow juries to evaluate contested issues in the sexual harassment context, preferring to arrogate the fact-determining role unto themselves (via the improper granting of motions for summary judgment). If a defendant had the burden of persuasion that the conduct complained of consisted of "no more than petty slights and trivial annoyances," summary judg-

208. Murphy v. John Foleros King Pub, Complaint 03124079-EP (N.Y.C. Com. Hum. Rts., May 26, 1994) (decision and order) (on file with the library of New York City's Office of Administrative Trials and Hearings (OATH)).

209. *See* Brennan Center Statement, *supra* note 23, at 5 (complaining that "without any consideration of what standard would best further the purposes of the City Law, women who have been sexually harassed are routinely thrown out of court without getting a chance to have a jury hear their claims because a judge uses the federal standard that they have not been harassed enough"); Center Testimony, *supra* note 23, at 2 ("We have long had the problem of judges insisting that harassment [has] to be 'severe or pervasive' before it is actionable, even though such a requirement unduly narrows the reach of the law."); Kathryn Lake Mazierski, President, New York State National Organization for Women, Testimony at Hearing of the New York City Council's Comm'n on Gen. Welfare 50 (Sept. 22, 2004) (transcript on file with New York City Clerk's Office) (noting that the federal standard "continually hurts women").

ment would be improvidently granted far less frequently than it is now. As the Second Circuit has recently reaffirmed:

> A party faces a significantly heightened standard to obtain judgment as a matter of law on an issue as to which that party bears the burden of proof. "It is rare that the party having the burden of proof on an issue at trial is entitled to a directed verdict." Granite Computer Leasing Corp. v. Travelers Indem. Co., 894 F.2d 547, 551 (2d Cir.1990). Indeed, "[a] verdict should be directed in such instances only if the evidence in favor of the movant is so overwhelming that the jury could rationally reach no other result." *Id. See also* Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 109 (2d Cir. 2001); 9 *Moore's Federal Practice* § 50.05 (2004) ("[G]ranting judgment as a matter of law for a party who bears the burden of proof is an extreme step that may be taken only when the evidence favoring the movant is so one-sided that, absent adequate evidentiary response by the nonmovant, it could not be disbelieved by a reasonable jury.").[210]

This result will not please all stakeholders, but its appropriateness is measured, as with other areas of the law, by how competing values are to be properly weighed. For some judges, for example, the most pressing concern may be that, if summary judgment motions are not readily granted, "we are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly."[211] A very different value system acknowledges that "the hostile judicial climate in relation to [sexual harassment] claims means that many victims of sexual harassment never step forward. Many of [those] who do are usually informed by attorneys that the way the law stands now, their claims will not be taken seriously."[212]

The pattern of the City Human Rights Law—its preferred method of balancing or weighing values—is to focus its concern on removing the inhibitions that prevent victims from coming forward, and to accept the cost of trial for covered entities as a necessary price of doing everything possible to eliminate all forms of discrimination. And in this particular area, as the Second Circuit has noted, it is especially important that juries get to play their role:

---

210. Fairbrother v. Morrison, 412 F.3d 39, 53 (2d Cir. 2005).

211. Bray v. Marriott Hotels, 110 F.3d 986, 1003 (3d Cir. 1997) (Alito, J., dissenting).

212. *Mazierski, supra* note 209, at 48-49.

> Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation.
> The factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment. Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.[213]

Disaggregating liability and damages in the manner suggested will still allow covered entities the tools needed to defend themselves against truly trivial charges and against damages out of proportion to the harm suffered, but will make an important contribution to the fight to eliminate gender-based discrimination—regardless of whether that discrimination manifests itself in pay disparities, promotional disparities, or harassment.

ii. No artificial limits on reasonable accommodation

The Second Circuit, in a 2-1 decision constituting a significant blow against the rights of people with disabilities, ruled in 1998 that it is "fundamental" that the Fair Housing Act "addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps."[214] The case involved plaintiffs who alleged that they were unable to work because they were disabled, and thus needed the assistance of the federal Section 8 program. The accommodation requested was a waiver of the landlord's policy against allowing Section 8 tenants.

The Second Circuit majority thought this sort of accommodation was not contemplated by the Fair Housing Act: "What stands between these plaintiffs and the apartments [at issue] is a shortage of money, and nothing else."[215] For the majority, the Fair Housing Act did not "elevate the rights of the handicapped poor over the rights of the non-handicapped poor. Economic discrimination . . . is not cognizable as a failure to make reasonable accommodations

213. Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998).
214. Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301 (2d Cir. 1998).
215. *Id.* at 302.

. . . ."[216] The majority contrasted what it considered an accommodation appropriately linked to a disability: when a seeing-eye dog is permitted despite a "no pets" policy, wrote the majority, that accommodation responds directly to a disability.[217]

Salute was decided before the Supreme Court's decision in *U.S. Airways v. Barnett,* a case arising under the Americans with Disabilities Act.[218] That case held that a person with a disability similarly situated to a person without a disability may have preference (an accommodation) if the accommodation responds to the need created by the disability, even if the policy in question poses barriers to the non-disabled person as well. As the Supreme Court pointed out: "Were that not so, the 'reasonable accommodation' provision could not accomplish its intended objective . . . [m]any employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability."[219] The case also rejected Justice Scalia's reasoning that a policy that burdens the disabled and non-disabled alike is therefore not a disability-related obstacle.[220]

In view of *Barnett,* it seems unlikely that *Salute* could survive as a matter of Fair Housing Act jurisprudence. Indeed, a post-*Barnett* case, *Giebeler v. M&B Associates,*[221] dealt with the case of a man who did not have earned income because his disability rendered him unable to work. The man sought to have his mother, a financially responsible person, be a co-signer on the lease, and wanted to have the landlord's "no co-signer" policy waived. Permitting the co-signing would have caused the landlord no financial harm; on the contrary, the proposed co-signer met the landlord's financial qualifications. Nevertheless, the landlord refused. The Ninth Circuit found that the waiver of the policy represented, first of all, a type of accommodation contemplated by the Fair Housing Act, and, as applied to the facts of the case, was a reasonable accommodation.[222]

---

216. *Id.*

217. *Id.* at 301-02.

218. U.S. Airways v. Barnett, 535 U.S. 391 (2002). Though *Barnett* was an Americans with Disabilities Act case, courts interpreting the disability rights provisions of the Fair Housing Act frequently analogize to the ADA. *See, e.g.*, Tsombinidis v. West Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003).

219. *Barnett*, 535 U.S. at 398.

220. *See id.* at 413.

221. 343 F.3d 1143 (9th Cir. 2003).

222. *Id.* at 1145.

Giebeler adopted the reasoning of the dissent in *Salute,* which had pointed out that, in the seeing-eye dog and other examples cited by the Second Circuit majority:

> [I]t is not the handicap *itself* that is directly accommodated by the change in a policy. Rather, it is the *need* that was created by the particular handicap that is accommodated. Thus, a person's blindness creates the need for a seeing-eye dog, and a person's multiple sclerosis leads to impaired mobility, which, in turn, creates the need for a priority parking space close to the tenant's residence.[223]

Having identified the request for a waiver of the "no-cosigner" policy as an "accommodation," the Ninth Circuit found that: (1) the plaintiff had demonstrated that the proposed accommodation was reasonable on its face; and that (2) the defendant had failed to meet its burden of showing that, in the particular circumstances, agreeing to the request would have caused it undue hardship.[224]

Whatever the ultimate result under the Fair Housing Act, the type of accommodation sought in the *Giebeler* case would certainly be covered under the City Human Rights Law. In contrast to the ADA, the threshold coverage provisions of which the Supreme Court has felt the need to interpret "strictly" to make certain that no more people are covered than Congress intended,[225] the City Human Rights Law has no such concerns. Not only does the Restoration Act's overall focus on the broadest possible coverage preclude judicial carving out of a category of accommodation, the disability provisions themselves offer specific additional evidence of the desire to go even further than the Fair Housing Act or the ADA.

For example, one has a "disability" for purposes of City Human Rights Law regardless of whether one's impairment substantially limits one in a major life activity or not.[226] Housing providers have qualitatively more extensive obligations regarding modifications to premises than are required under the Fair Housing Act.[227] The obligation to make accommodation arises not only where a covered

223. *Salute,* 136 F.3d at 308 (Calebresi, J., dissenting), cited with approval in *Giebeler,* 343 F.3d at 1153.

224. *Giebeler,* 343 F.3d at 1140-42.

225. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197-98 (2002) (stating its conclusion that the terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act").

226. N.Y.C. ADMIN. CODE § 8-102(16)(a).

227. *See* discussion *infra* notes 252–56 and accompanying text.

entity actually knows of a disability, but also where the covered entity should know of a disability.[228]

Most importantly, the accommodation language itself is framed extremely broadly. The requirement is to make reasonable accommodation to the "needs" of persons with disabilities (not to "disabilities" directly).[229] The law also sets out a different analysis than pertains under federal law.

A plaintiff does have to *identify* an accommodation that would enable him to overcome a disability-generated need "to enjoy the right or rights in question,"[230] but "reasonable accommodation" is defined as "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business."[231] Every accommodation, therefore, that "can be made" is reasonable except for those a covered entity proves would pose an "undue hardship."[232] The category of accommodations under federal law that are "unreasonable" though they do not cause "undue hardship,"[233] simply does not exist under the City Law. Finally, the City Law places the burden of persuasion on a covered entity on the question of whether the person with a disability could, with the proposed accommodation, enjoy the rights in question.[234]

Because a waiver of a "no co-signer" or "no guarantor" rule of the sort at issue in *Giebeler* could enable a person unable to work because of a disability to rent or buy an apartment, such an accommodation is required by the City Human Rights Law unless the covered entity could prove that, in the particular circumstance, the waiver would cause an undue hardship.

The issues raised by the conflicting cases of *Salute* and *Giebeler* were much on the minds of those seeking the independent construction sought to be guaranteed by the Restoration Act.[235] Simi-

228. N.Y.C. ADMIN. CODE § 8-107(15)(a); 1991 LEG. ANN., *supra* note 3, at 163.
229. N.Y.C. ADMIN. CODE § 8-107(15)(a); 1991 LEG. ANN., *supra* note 3, at 163.
230. N.Y.C. ADMIN. CODE § 8-107(15)(a); 1991 LEG. ANN., *supra* note 3, at 163.
231. N.Y.C. ADMIN. CODE § 8-102(18); 1991 LEG. ANN., *supra* note 3, at 149.
232. The burden of persuasion of demonstrating undue hardship is placed on the defendant. N.Y.C. ADMIN. CODE § 8-102(18); 1991 LEG. ANN., *supra* note 3, at 149.
233. U.S. Airways v. Barnett, 535 U.S. 391, 401–06 (2002).
234. N.Y.C. ADMIN. CODE § 8-107(15)(b).
235. *See, e.g.*, Edith Prentiss, Representative of Disabled In Action, Statement at Hearing of the New York City Council Committee on General Welfare (Sept. 22, 2004) (on file with the Committee):

> Another problem is landlords who reject applicants able to pay rent from sources other than a paycheck. Many landlords have a policy against permitting a parent or other relative to co-sign, or be a guarantor on a lease. Reasonable accommodation under existing law should mean that a landlord has to change that policy in the case of a person with a disability. To do so

lar issues, also appropriately requiring accommodation under the local law, were brought up as well:

> When someone is able to afford the rent with disability, pension, or other unearned income, they should be allowed to do so, even if the landlord usually requires earned income. When considering whether someone does have enough money to afford an apartment, it is important for landlords to accommodate people with disabilities by converting after-tax income to its larger pre-tax equivalent. The strengthening of the liberal construction provision of the law will help us in these respects as well.[236]

The example of "converting after-tax income to its larger pre-tax equivalent" represents another circumstance where people with disabilities can be helped, without housing providers being hurt. When a housing provider develops an income requirement, that housing provider is contemplating that the income to be measured will involve pre-tax dollars. The housing provider requires an income of "x" because the housing provider understands that, after taxes, the prospective tenant will only have seventy percent or eighty percent of "x" left over (depending on tax bracket). A person with disabilities who is applying based on post-tax funds does not need the higher gross amount in order to yield the seventy percent or eighty percent "left over" that the housing provider is actually looking for. Converting the post-tax funds of a person with disabilities to their pre-tax equivalent is an accommodation that simply allows apples to be compared with apples.

iii. No undervaluation of compensatory damages

Damage awards in the discrimination context have frequently been the subject of reduction, by both trial and appellate courts.[237]

> causes no harm to the landlord: he is assured of the rent. Nevertheless, landlords refuse to do so, causing even more apartments to be off-limits to people with disabilities. . . . If a person with a disability brought this kind of case in federal court in California, they would win. But in New York, they would lose because the court dismisses this problem as being only 'economic discrimination.' The City Human Rights Law offers a means independent of federal law by which to vindicate the rights of qualified applicants. But it will only work if the law is amended, as is proposed by Intro 22, to require courts to interpret the local law independent of federal law, with a view towards liberally interpreting the statute to accomplish its broad objectives.

Id.

236. Alexander Wood, Executive Director, Disabilities Network of New York City, Statement at Hearing of New York City Council Committee on General Welfare (Sept. 22, 2004) (on file with Committee).

237. New York courts have not hesitated to use their authority to determine that an award is not "reasonably related to the wrongdoing" or not "comparable to other

It is the rare case in which the fact that the injury is a *discrimination injury* is affirmatively treated as placing the harm suffered in the category of "serious injury." *Broome v. Biondi*,[238] a case involving the discriminatory denial of an application to sublet a co-op apartment, was one such case. There had been limited testimony as to emotional distress. The court's description is reproduced here in full:

> Shannon Broome stated that she felt embarrassed and humiliated by the entire approval process and the ultimate denial of their sublet application. She testified that she felt as if she were experiencing her "worst nightmare." Shannon Broome was reduced to tears during the June 13th Beekman board interview, and again upon hearing the news that their sublet application had been rejected. She also testified that she was reluctant to tell her husband that the Beekman board rejected their application because she "knew how much it was going to upset him." Gregory Broome testified that he felt "angry" and "demoralized" by the hostile manner in which he and his wife were treated at the June 13th interview and that "it was difficult for [his] feelings to go away." He described how he was especially humiliated that he had swallowed his pride and submitted to the board's interrogation during the June 13th interview without defending himself or his wife. Gregory Broome also stated that his confidence at work was affected by his "fear that clients would somehow not trust [his] advice after they met [him]." Each of the Broomes testified that they had to pass the Beekman Hill House every day to reach a park to walk their dog and were

awards for similar injuries." *See, e.g.,* Manhattan and Bronx Surface Transit Operating Auth. v. New York State Executive Dep't, 632 N.Y.S.2d 642, 644 (App. Div. 1995) (purporting to apply these standards to reduce a $30,000 mental anguish award to $7,500 in an age discrimination case conducted before the State Division on Human Rights). Likewise, federal courts have not hesitated to apply the "shocks the judicial conscience test." *See* Rainone v. Potter, 388 F. Supp. 2d 120, 122-23 (E.D.N.Y. 2005). The court reviewed the range within which awards have been constricted and noted:

> In the employment discrimination context, there appears to be a 'spectrum' or 'continuum' of damage awards for emotional distress. . . . At the low end of the continuum are what have become known as 'garden-variety' distress claims in which district courts have awarded damages for emotional distress ranging from $5,000 to $35,000. . . . The middle of the spectrum consists of 'significant' ($50,000 up to $100,000) and 'substantial' emotional distress claims ($100,000). . . . Finally, on the high end of the spectrum are 'egregious' emotional distress claims, where the courts have upheld or remitted awards for distress to a sum in excess of $100,000. These awards have only been warranted where the discriminatory conduct was outrageous and shocking or where the physical health of plaintiff was significantly affected.

Id.

238. 17 F. Supp. 2d 211 (S.D.N.Y. 1997).

> reminded constantly of their emotional pain caused by the board's actions.[239]

The jury awarded each plaintiff approximately $114,000 in emotional distress damages and $205,000 each in punitive damages. Despite the limited testimony, and despite the absence of medical testimony, the court denied a motion to reduce the awards.[240] Citing what the court described as "illuminating" research on the serious,[241] ongoing costs of discrimination, the court concluded that:

> In the face of persistent housing discrimination which continues unabated some 30 years after Congress passed the Fair Housing Act to stamp out decades of such discriminatory behavior, the genuine emotional pain associated with such discrimination should not be devalued by unreasonably low compensatory damage awards, especially when one considers the difficulty a plaintiff faces in establishing that he or she was a victim of housing discrimination.[242]

The Restoration Act echoes *Broome*'s message that the genuine pain associated with discrimination claims should not be undervalued. The City Human Rights Law's purposes are said to be not only uniquely broad, they are "uniquely broad *and remedial.*"[243] One of the core principles intended by the Council to guide decision makers is that "victims of discrimination suffer serious injuries, for which they ought to receive full compensation."[244]

There are two possibilities to explain the frequency with which verdicts are reduced: one is that judges need to be vigilant to guard against the possibility of juries rendering awards without an adequate evidentiary basis that injury has been suffered; the other is that juries recognize, in a way that most judges are unwilling to, that exposure to discrimination is itself—without more—a serious dignitary injury. Put another way, the vigilance-against-excessiveness school does not assign any baseline value to the insult to dignity itself; the (much smaller) vigilance-against-unreasonably-low-awards school does so. The Restoration Act stands with the latter

239. *Id.* at 223 (transcript references omitted).

240. *Id.* at 223-24 (citing, *inter alia,* to cases that had upheld mental anguish awards of $150,000, $250,000, $450,000, and $500,000). Both plaintiffs' lawyers and discrimination defense lawyers would agree that these sustained awards represent the exception to the rule.

241. *Id.* at 225 n.9.

242. *Id.* at 226 (citations omitted).

243. Restoration Act, *supra* note 7, § 7 *amending* N.Y.C. ADMIN. CODE § 8-130.

244. 2005 COMMITTEE REPORT, *supra* note 22, at 5.

camp, and thus counsels judges to defer more to a jury's consideration of the nature of the discrimination injury.

3. *Resisting the urge to import exemptions not set forth in the local law*

i. Disparate impact claims in the age discrimination context

The Supreme Court concluded in *Smith v. City of Jackson, Mississippi*[245] that "the scope of disparate-impact liability under the [ADEA] is narrower than under Title VII."[246] One reason for this is that the ADEA, unlike Title VII, has a provision insulating from disparate-impact liability employer decisions based on a reasonable factor other than age.[247] The other reason cited by the Court is the way that Congress legislatively overruled *Ward's Cove,* a case which had, *inter alia,* introduced requirements that made it significantly more difficult for plaintiffs to prevail in disparate impact cases.[248] When Congress rejected major aspects of the Court's disparate impact holding, it did so by amending Title VII, the statute that the Supreme Court had been interpreting in *Ward's Cove.* The Supreme Court in *Smith* seized on the fact that Congress had not amended the ADEA as evidence that Congress had implicitly endorsed the continued use of the disparate impact standards of *Ward's Cove* in the age discrimination context.[249]

The City Human Rights Law, on the other hand, has no "reasonable factor of other than age" provision that limits its age discrimination coverage.[250] Moreover, it has an independent, distinct, post-*Ward's Cove* provision governing disparate impact claims and the burdens of proof relating thereto. That provision covers all types of discrimination, including age, without qualification.[251] Restrictions on disparate impact claims applicable to the ADEA cannot, therefore, be said to be applicable to the City Human Rights Law.

---

245. 125 S. Ct. 1536 (2005).

246. *Id.* at 1544 (plurality opinion).

247. *Id.*

248. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 653–60 (1989).

249. *Smith*, 125 S. Ct. at 1544-45. While Congress would have been aware that courts frequently analogize between and among different discrimination laws, the normal judicial practice is to import good law, not rejected doctrine. As such, the idea that Congress would have thought that it was necessary to act separately to amend the ADEA is curious, to say the least; it certainly does not reflect liberal construction principles.

250. *See* N.Y.C. ADMIN. CODE § 8-107(1).

251. N.Y.C. ADMIN. CODE § 8-107(17).

ii. Housing providers must make and pay for accommodations

Under the Fair Housing Act, as amended in 1988, housing providers only need to *permit* a person with a disability to make reasonable modifications to existing premises.[252] The modifications are to be made at the expense of the person with a disability.[253] When the City Human Rights Law was amended in 1991, it used quite different language. In language directed at all covered entities (housing providers, employers, etc.), it required covered entities to "make" reasonable accommodations.[254] It did not include a provision requiring the person with a disability to pay for the modifications. On the contrary, its distinctive accommodation provision treats *all* accommodations that assist a person with a disability to enjoy the housing or other right in question as reasonable, unless and until the covered entity demonstrates that the accommodation would pose an undue hardship.[255]

Where a covered entity is able to demonstrate that making and paying for an modification would cause it undue hardship, that covered entity is not required to pay for the modification. Restricting the law by judicial construction to allow covered entities to shirk their obligation to pay for accommodation where to do so would *not* cause an undue hardship would be contrary to the choices made by the City Council.[256]

---

252. 42 U.S.C. § 3604(f)(3)(a) (2005).

253. *Id.*

254. N.Y.C. ADMIN. CODE § 8-107(15)(a); 1991 LEG. ANN., *supra* note 3, 162-63. The City law uses the term "accommodation" to refer both to "accommodations" and "modifications." *See* United Veterans Mutual Housing No. 2 Corp. v. N.Y.C. Comm'n on Human Rights, N.Y.L.J., Mar. 2, 1992, at 1 (N.Y. Sup. Ct.), *aff'd,* 616 N.Y.S.2d 84 (App. Div. 1994) (affirming an order of the Human Rights Commission to a housing provider to establish a policy by which it would make and pay for all accommodations, including common area modifications such as the installation and maintenance of ramps, except where doing so would cause undue hardship and noting that the 1991 Amendments mooted the challenge to the Commission's interpretation by explicitly adopting the Commission's interpretation). The use of the single term "accommodation" is a reflection of the fact that different contexts of discrimination (housing, employment, and public accommodations) are covered by the one provision. Note that even under federal law, physical modifications to the workplace are contemplated by the reasonable accommodation provision of the Americans with Disabilities Act. *See* 42 U.S.C. § 12111(9)(a) (2005).

255. *See* N.Y.C. ADMIN. CODE § 8-102(18) ("The term 'reasonable accommodation' means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship").

256. It should be noted that, in 2003, the Bloomberg Administration attempted to cut back the scope of the law so that housing providers would only be responsible for paying for modifications to common areas, not individual units. Its proposed amend-

iii. Damages are available for both impact and mixed motive violations

Under Title VII, damages are not permitted to be awarded against defendants who have been found to have engaged in disparate impact violations.[257] Likewise, where a plaintiff has demonstrated an intentional discriminatory practice that was unlawfully motivated, and the defendant has demonstrated that it would have taken the same action in the absence of the impermissible mitigating factor, no damages may be awarded.[258]

The City Human Rights Law, by contrast, contains neither restriction. As to disparate impact, the 1991 Amendments treated disparate impact violations merely as one type of violation to be codified in the "unlawful discriminatory practices" section of the law.[259] At the same time, it re-codified the section of the law dealing with the relief that could be ordered by the Commission after a hearing which found that "any unlawful discriminatory practice has occurred."[260] While making some changes—like specifying the ability of the Commission to order a coop to approve a coop sale—it left intact the provision that permits the award of "compensatory damages to the person aggrieved by such practice."[261] The phrase "such practice" refers unmistakably to "any unlawful discriminatory practice," without limitation.

Similarly, a judicial cause of action was defined by the 1991 Amendments to be one "for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate . . . ."[262] The cause of action was available to anyone claimed to be aggrieved "by an unlawful discriminatory practice defined in chapter one of this title."[263] Disparate impact violations are one such practice so defined. Again, no exclusion was placed on the availability of damages.

---

ment to the City's Human Rights Law was denominated "Intro 417 of 2003." That bill was abandoned in the face of opposition from the civil rights community.

257. 42 U.S.C. § 1981a(a)(1) (2005).

258. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2005).

259. N.Y.C. ADMIN. CODE § 8-107 ("Unlawful Discriminatory Practices"); *Id.*§ 8-107(17) (defining when an "unlawful discriminatory practice based on disparate impact" is established).

260. Section 8-120(a) of the Administrative Code of the City of New York was replaced with section 8-109(2)(c). *See* 1991 LEG. ANN., *supra* note 3, at 166, 172.

261. *Id.* The compensatory damages provision is found at section 8-120(a)(7) of the Administrative Code of New York.

262. N.Y.C. ADMIN. CODE § 8-502(a); 1991 LEG. ANN., *supra* note 3, at 177.

263. N.Y.C. ADMIN. CODE § 8-502(a); 1991 LEG. ANN., *supra* note 3, at 177.

Just as the 1991 Amendments did not exclude damages in the disparate impact context, the Amendments did not exclude them in the context of a covered entity which proved that it would have taken the same action complained of, even in the absence of an impermissible motive. Naturally, a defendant's demonstration that it would have taken the same action against a plaintiff even in the absence of an impermissible motive will operate to limit or exclude some types of damages (*e.g.*, backpay) in most circumstances. Rather than being seen as a bar to all damages, however, that demonstration is properly seen under the City Human Rights Law as a factor to be considered in parsing and mitigating the damages to be awarded.

The Commission on Human Rights did so in one of the few mixed motive cases it decided.[264] The Commission held that the legitimate motives could be taken into account when fashioning the remedy, but, explicitly contrasting its view of the City Law with that of Title VII, ruled that a flat prohibition of damages was inappropriate. Taking the view that "[a]n employee's egregious conduct. . . does not justify an employer's unlawful discrimination," the Commission awarded mental anguish damages to a complainant who had been on the receiving end of an explicitly bigoted epithet closely linked to his discharge.[265] Refusing to exclude damages is a conclusion consistent with the Restoration Act's concern that every discrimination injury be treated as a serious injury.[266]

In terms of punitive damages (and civil penalties to be awarded administratively), the City Human Rights Law has had since 1991 an explicit mechanism by which such damages or penalties may be mitigated.[267] Mitigation is not elimination, however. A defen-

264. In terms of liability, the Commission's Administrative Law Judge ruled that once a complainant demonstrated that "discriminatory animus played a motivating role in the decision-making process," the liability of the respondent was established. Cassas v. Lenox Hill Hospital, No. EM-0191B-10/30/89-DES, 1997 WL 1052039, at *4 (N.Y.C. Com. Hum. Rts., Feb. 6, 1997) (recommended decision and order). The ALJ further ruled that "[a] complainant does not bear the burden of proving that discrimination was the sole reason, true reason or principal reason an adverse employment action was taken." *Id.* The recommended decision and order was adopted by the Commission. Cassas v. Lenox Hill Hosp., No. EM-01918-10/30/89-DES, 1997 WL 1051928 (N.Y.C. Com. Hum. Rts., Mar. 26, 1997) (decision and order).

265. *Cassas*, 1997 WL 1052039, at *8 (recommended decision and order), *adopted*, Cassas v. Lenox Hill Hosp., 1997 WL 1051928 (N.Y.C. Com. Hum. Rts., Mar. 26, 1997) (decision and order).

266. *See* 2005 COMMITTEE REPORT, *supra* note 22, at 5-6; *see also* N.Y.C. ADMIN. CODE § 8-101 (setting forth the intention that discrimination be prevented "from playing any role").

267. N.Y.C. ADMIN. CODE §§ 8-107(13)(e), 8-126(b).

dant's persistence in a policy that it knows or should know has a distinctly disparate impact, where it has not bothered to examine less discriminatory alternatives that are available, may well be one circumstance where some punitives damages or civil penalties should be awarded. Likewise, in a mixed motive context, the intentionally discriminatory features of a candidate selection process are not retroactively insulated from blameworthiness by the fact that the ultimate result was not altered by the impermissible considerations.

4. *No further rollback*

i. Continuing to cover acts of post-acquisition harassment

The doctrine that the Fair Housing Act does not or may not cover acts of post-acquisition conduct was invented by Judge Posner in 2004.[268] The ruling was made in the face of HUD Regulations in effect since 1989 (that is, at the time of the adoption both of the 1991 Amendments and of the Restoration Act), which included on its list of "terms and conditions" those violations which occur after a property has been acquired by sale or lease.[269] Specifically, the regulations have prohibited failing or delaying maintaining or repairing a dwelling,[270] and limiting the "use of privileges, services or facilities associated with a dwelling."[271]

Halprin and its progeny were specifically cited in testimony to the Council as an illustration of potential weakening of federal law against which the Restoration Act would protect the local law.[272] The idea that a covered entity would be permitted to harass an existing tenant because of protected class is utterly repugnant to the City Human Rights Law's broad and inclusive proscriptions on discrimination, and could not properly be imported.[273]

---

268. Halprin v. Prairie Single Family Homes, 388 F.3d 327, 330 (7th Cir. 2004).

269. 24 C.F.R. § 100.65 (2005).

270. 24 C.F.R. § 100.65(b)(2) (2005).

271. 24 C.F.R. § 100.65(b)(4) (2005).

272. *See* Center Testimony, *supra* note 23, at 3; Brennan Statement, *supra* note 23, at 7 ("The independent construction provision would provide a buffer against the application of the doctrines to the City's Human Rights Law, and would help advocates argue against any other ratcheting down of the local law based on narrowed understandings of state and federal civil rights law.").

273. For an extended discussion of why *Halprin* is "problematic," "anomalous," and "clearly wrong," even in terms of federal law, see ROBERT G. SCHWEMM, HOUSING DISCRIMINATION, LAW AND LITIGATION 14 §§ 9-22 (2005).

ii. Preserving broad organizational standing

In 1982, the Supreme Court ruled in *Havens Realty Corp. v. Coleman*[274] that the Fair Housing Act had "conferred on *all 'persons'* a legal right to truthful information about available housing," without regard to race.[275] This principle was used in *Havens* to grant standing to "testers" (persons who act in an investigatory capacity for a fair housing organization, but who have no actual intention to secure the property being viewed)[276] but is not limited to testers alone. The definition of "person" in the Fair Housing Act, like the City Human Rights Law, is broad, and encompasses a corporation,[277] the usual form of not-for-profit fair housing organization.

A corporation, of course, can only act through its agents.[278] As such, a fair housing not-for-profit seeks information through its agents (testers), and is itself deprived of truthful information about available housing in violation of the *Havens* rule if its agents are so deprived because of protected class status.[279]

This result is the only one consistent with Congress' intent. Rather than relying on government prosecutions alone, "Congress created this right so that private persons could enforce the statute as private attorneys general without running afoul of Article III."[280] Private fair housing organizations are the "persons" best suited to play the contemplated private attorneys general role. Indeed, in 1992, as part of the Housing and Community Development Act, Congress found, *inter alia,* that "their proven efficacy of private nonprofit fair housing enforcement organizations and com-

274. 455 U.S. 363 (1982).

275. *Id.* at 373 (emphasis supplied; internal quotation in original).

276. *Id.*

277. 42 U.S.C. § 3602(d) (2005); N.Y.C. ADMIN. CODE § 8-102(1). The 1991 Amendments broadened the City Law's definition of "person" in a number of ways, including the addition of "organizations" within its ambit. *See* 1991 LEG. ANN., *supra* note 4, at 145.

278. William Meade Fletcher, 2 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 434 (2005) ("That a corporation can act only through agents is too elementary a proposition to require the citation of authority.").

279. In *Havens* itself, the fair housing organization based its own claim for standing, and it was granted on the grounds that the defendant's conduct has forced it into a "diversion of resources" and had caused "frustration of mission." *Havens*, 455 U.S. at 378-80. The fact that fair housing organizations have thereafter fit their cases into a "diversion of resources" or "frustration of mission" box does not alter the availability of standing under *Havens* for *all 'persons'* discriminatorily denied truthful information.

280. Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990).

munity-based efforts makes support for these organizations a necessary component of the fair housing enforcement system."[281]

Unlike the tester—who is but an agent of the testing organization, who acquires information only for the testing organization, and who may have only a transitory participation in fair housing work—a testing organization is the tester's principal, has ongoing participation in fair housing work and is the ultimate recipient of the information (or misinformation) about housing availability. The testing organization, therefore, has an even stronger claim to standing than does the tester.

It would surprise no one if the Supreme Court someday soon were to cut back on a broad standing decision of a very different 1982 Supreme Court. But the City Human Rights Law should not be cut back in tandem. Even before the 1991 Amendments, the City Human Rights Law had been interpreted by the Commission on Human Rights to have intended the broadest possible standing. Citing *Trafficante* and *Havens,* the Commission concluded that, just as the Supreme Court had ruled that Congress had intended "to define standing as broadly as is permitted by Article III of the Constitution,"[282] the City Human Rights Law echoes this construction by the inclusion of [language] which provides that this title 'shall be construed liberally for the accomplishment of the purposes thereof'."[283]

Because the kind of analysis engaged in by *Trafficante* and *Havens* broadly considered an all-encompassing anti-discrimination goal, that analysis can usefully be seen "as a floor below which the City Human Rights Law cannot fall."[284] Moreover, the issue of maintaining broad standing was specifically put before the Council in testimony and statements as one of the goals and consequences of passing the Restoration Act.[285] Regardless of what the Supreme

281. Housing and Community Development Act, 15 U.S.C. § 1615 (1992).

282. Folan v. Festinger, No. 92681-H, 1983 WL 207649, at *7 (N.Y.C. Com. Hum. Rts., Dec. 22, 1983) (decision and order) (quoting Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972)).

283. *Id.* A decision contemporaneous with the adoption of the 1991 Amendments stated that it is "well settled that the use of testers is an investigative tool looked upon with favor by federal and state courts, and by this Commission." Childs v. Milman, No. FH 167052489, 1991 WL 790571, at *12 (N.Y.C. Com. Hum. Rts., Oct. 25, 1991) (recommended decision and order), *adopted by* No. FH 167052489DH, 1992 WL 814977 (N.Y.C. Com. Hum. Rts., Apr. 8, 1992) (decision and order).

284. *See* Restoration Act, *supra* note 7, § 1.

285. *See* Center Testimony, *supra* note 23, at 4 ("We will be able to protect against the time when federal courts cut back on standing for testers and for fair housing organizations."); *see also* Brennan Center Statement, *supra* note 23, at 7 ("Rather than being reactive—waiting, for example, until after the Supreme Court cuts back on

Court comes to do, both testers and fair housing organizations should be found to have standing under the City Human Rights Law for the discriminatory deprivation of truthful information regarding available housing.

5. *Overcoming the inhibition effect*

Civil rights advocates have been on the defensive for so long that it is sometimes hard to imagine that fruitful new legal territory is available to be utilized. The Restoration Act is both a response to advocates who sought new momentum in the fight against discrimination, and a call to others to take up this fight with renewed vigor. The illustrations discussed below each arise from statutory language, or were referenced in testimony in the course of consideration of the Restoration Act.

i. Discrimination in the delivery of City services

The assertion is frequently made that there are gross disparities in the delivery of City services (and in the burden of City infrastructure) depending on the neighborhood in which one lives.[286] Because New York City is so highly segregated,[287] such neighborhood variations would yield strong racial disparities.[288]

---

standing for testers and fair housing organizations, and then waiting further, for the years it frequently takes to achieve a specific legislative restoration—Intro 22 will provide a means of preventing such dismantling of New York City's civil rights protections from occurring in the first place.").

286. *See* NYC Environmental Justice Alliance, http://www.nyceja.org/campaigns.html (last visited Jan. 10, 2006) ("New York City has one of the lowest standards of open space access (acres per 1000 residents) in the United States. . . . 37 of 59 community districts (63%), more than previously thought, are not meeting the standard of 2.5 acres per 1000 residents with regard to access to open space. Of these 37 districts, 24 have the highest number of residents of color (65% or more) and 18 are of the lowest median household income ($16,000-$30,000). These communities are also the one's [sic] carrying the rest of the City's environmental burdens from waste transfer stations to power plants.").

287. *See, e.g.*, JOHN ICELAND ET AL., U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000 85-87 (2002) (finding that the New York primary metropolitan statistical area, which encompasses New York City, as well as Westchester, Putnam, and Rockland Counties, was the single most segregated major metropolitan area in the United States for Hispanics and Latinos); *see also* Current-Day Segregation in New York City, Analysis of Census 2000 Data and Maps by Professor Andrew A. Beveridge for the Anti-Discrimination Center of Metro New York, www.antibiaslaw.com/nycseg.pdf.

288. The existence of educational segregation, for example, is a direct function of residential segregation. *See, e.g.*, GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 329 (1996) ("The school segregation that exists in any given community today shows the enduring ef-

Because the City Human Rights Law defines public accommodations to include a provider of any and all services,[289] and because the City is not excluded from that definition,[290] the delivery of City services is open to a challenge pursuant to the distinctive disparate impact provisions of the law.[291]

ii. Limiting the circumstances where punitive damages can be evaded

Under the *Kolstad* standard, good faith compliance measures that are taken by a covered entity act as a safe harbor against punitive damages under federal law.[292] In contrast, the currently operative provision of the City Human Rights Law explicitly provides that such good faith measures only mitigate liability for punitive damages.[293] Courts have assumed that other aspects of *Kolstad*—like the requisite mental state required for the imposition of punitive damages, and who has to have that mental state—are areas where the City Human Rights Law tracks the federal standard.[294] In fact, no court has engaged in an independent assessment of whether these aspects of *Kolstad* actually serve the purposes of the City Human Rights Law.

In terms of the required mental state, *Kolstad* requires that a defendant have acted in reckless disregard of a perceived risk that

---

fects of practices and expectations rooted in past discrimination in housing."). The disparities in the education system have been the subject of constant criticism, including even criticism from those running the system. *See, e.g.*, Chancellor Joel Klein, New York City Dep't of Ed., Remarks at a "Teach for America" Dinner (May 19, 2004) ("It is clear to me that the purpose that animated and compelled [*Brown v. Board of Education*] is not being fulfilled here in New York City—or across our nation. We have not remedied the broad disparities in either educational opportunities or student achievement that were the driving force behind *Brown*. These disparities deprive our children of equality. They restrict children's life choices. That is wrong. And it is a stark reminder that the fight for civil rights in this country is not over.").

289. N.Y.C. ADMIN. CODE § 8-102(9).

290. On the contrary, the Committee Report accompanying the 1991 Amendments pointed out the City schools would be covered by the public accommodations provision. *See* 1991 COMMITTEE REPORT ANALYSIS, *supra* note 81, at 4 ("The amendment would also eliminate the current exclusion of public libraries, schools, colleges, and other educational institutions. . . . Although a variety of other laws . . . cover certain aspects of discrimination . . . the City has an independent and overriding interest in routing out discrimination from its schools.").

291. N.Y.C. ADMIN. CODE § 8-107(17).

292. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 546 (1999).

293. N.Y.C. ADMIN. CODE § 8-107(13)(e).

294. *E.g.,* Farias v. Instructional Sys., Inc., 259 F.3d 91, 101-02 (2d Cir. 2001) (federal law is not adopted where City law (as in the case of mitigation of punitives) has explicitly adopted a standard different from the federal standard, but federal law is adopted where City law is silent).

its actions will violate civil rights law.[295] Given the City Human Rights Law's overriding concern that covered entities be made to recognize the seriousness with which they must take their obligations, advocates will likely question why a defendant who recklessly disregards the risk that its conduct will harm the plaintiff should not, as a matter of local law, be liable for punitive damages.[296] Such conduct is blameworthy regardless of whether the defendant is disregarding, as required by *Kolstad,* a known risk of violating the law.[297]

In terms of *who* must possess the requisite culpable mental state, *Kolstad* limits the class for federal law purposes to managerial employees.[298] Restricting the universe of those for whom an employer may be held liable in punitive damages to managerial employees, however, is a restriction contrary to the choice made by the City Human Rights Law. The vicarious liability provisions do not by their terms exclude any type of damages from the application of the principle of vicarious responsibility.[299] Moreover, the employer in the housing or public accommodations context become automatically liable based on the conduct of the employee or agent, without limitation.[300] The employer in the workplace context becomes automatically liable based on the conduct of the employee or agent who exercises supervisory or managerial authority, without limitation.[301] These provisions reflect an overriding concern of the City Human Rights Law that employers are obliged to take all reasonable steps to prevent their employees and agents from discriminating. The potential of having punitive damages im-

295. *Kolstad,* 527 U.S. at 536.

296. Where a defendant *intends* that its conduct harm the plaintiff, of course, the question of reckless disregard does not come into play, and punitive damages are properly founded on a theory of malice. *Kolstad* did nothing to upset that aspect of the law. *Id.* (describing recklessness as an alternative to a showing of malice or "evil motive or intent").

297. This issue was brought to the Council's attention through the testimony of the Anti-Discrimination Center. *See* Center Testimony, *supra* note 23, at 4.

298. *Kolstad,* 527 U.S. at 542-43 (noting that a managerial employee must be an "important" employee). Of course, when the employer itself participates in harassment, where the discriminatory acts are quintessentially employer acts, or where the participant is sufficiently high in the employer's organization to be considered an alter ego of the employer, the employer is more properly said to directly liable. *Faragher,* 524 U.S. at 788-90. Direct liability analysis can extend to the imposition of punitive damages. *Cf.* Deters v. Equifax Credit Info. Svcs., Inc., 202 F.3d 1262, 1269-70 (10th Cir. 2000) (company directly liable in punitives because of reckless indifference on the part of the employee it designated to respond to complaints of discrimination).

299. *See* N.Y.C. ADMIN. CODE §§ 8-107(13)(a),(b), and (c).

300. *See id.* § 8-107(13)(a).

301. *See id.* § 8-107(13)(b)(1).

posed based solely on the mental state of the employee gives the employer added incentive not only to disseminate anti-discrimination policies, but to make sure they are effectively policed.[302]

PART II: THE OTHER PROVISIONS OF THE RESTORATION ACT

Though the need for broad and independent interpretation of the City Human Rights Law was of paramount importance in drafting the Restoration Act, there are specific changes rendered by the Act that are themselves of great importance.

A. Retaliation

The Second Circuit's "materiality" standard for an action to be adverse is rejected. The Restoration Act provides that retaliation:

> need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.[303]

The Committee Report explicitly states that the amendment:

> would make clear that the standard to be applied to retaliation claims under the City's differs from the standard currently applied by the Second Circuit in retaliation claims made pursuant to Title VII of the Civil Rights Act of 1964; it is in line with the standard set out in guidelines of the Equal Employment Opportunity Commission and applied to retaliation claims by federal courts in several other circuits.[304]

The EEOC Guidelines take the position that the "degree of harm suffered by the individual 'goes to the issue of damages, not liability.'"[305] The Guidelines explain the policy reasons for this

---

302. The local law's emphasis of maximizing effective policing of policies is reflected in the fact that the "good faith" factors for mitigation of punitive damages specify that the required policies must be policies for the prevention "and detection" of discrimination. *Id.* § 8-107(13)(d)(1). One such policy that is specified is one that has "[p]rocedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors *specifically directed at the prevention and detection* of [discriminatory] practices." *Id.* § 8-107(13)(d)(1)(iv) (emphasis added).

303. Restoration Act, *supra* note 7, § 3, *amending* N.Y.C. ADMIN. CODE § 8-107(7).

304. 2005 COMMITTEE REPORT, *supra* note 22, at 3.

305. 2 EEOC COMPLIANCE MANUAL § 8, 13 (1998) (internal citation omitted), *available at* eeoc.gov/policy/docs/retal.pdf.

view in terms remarkably similar to those that animated the Restoration Act:

> This broad view of coverage accords with the primary purpose of the anti-retaliation provisions, which is to '[m]aintain[ ] unfettered access to statutory remedial mechanisms.' Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEOC statutes and conflict with the language and purpose of the anti-retaliation provisions.[306]

As such, many manifestations of retaliation that would not necessarily meet a materiality standard, do meet the EEOC test. The Committee Report that accompanied the Restoration Act noted that "lateral transfers, unfavorable job references, and change in work schedules" would be among the conduct that would be actionable under the test contemplated by the Restoration Act.[307]

When construing the enhanced retaliation provision, it is important to remember that the 1991 Amendments had already sought to broaden coverage by adding to the then-existing anti-retaliation section a phrase that attempted to make clear that it was illegal to retaliate "in any manner."[308] Combined with the policy grounds for the EEOC's position, cited with approval by the 2005 Committee Report, as well as with the Restoration Act's own goal to ensure "that New York City does everything within its power to identify and root out discrimination,"[309] it is clear that the Restoration Act's "reasonably likely to deter" standard is intended to cover a very wide range of conduct.

There may well be some types of conduct, which, if examined without regard to chilling effect, might not, at first blush, seem more than trivial. But a useful question to be posed is this: "What would happen if the policy manual of the covered entity being sued had stated that opposition to discrimination would be responded to by the retaliatory conduct that the covered entity was proved to

306. *Id.* at 8-15 (internal citations omitted).

307. 2005 COMMITTEE REPORT, *supra* note 22, at 3 n.4, (citing a review of the state of the law in *Ray v. Henderson*, 217 F.3d 1234, 1241-43 (9th Cir. 2000)). Another case cited in *Ray* found that an employer's "cancellation of a public event honoring an employee" could constitute actionable conduct. *Ray*, 217 F.3d at 1242.

308. *1991 Amendments*, *supra* note 3, §1, *amending* N.Y.C. ADMIN. CODE § 8-107(7) (1989); *see* 1991 LEG. ANN, *supra* note 4, at 160.

309. 2005 COMMITTEE REPORT, *supra* note 22, at 4.

have engaged in?"[310] If the response publicized were simply that the employee's supervisor would be less effusively friendly for a few days, it is not likely that any employees would be deterred from opposing discrimination in the future. But, if the "full advance disclosure of retaliation" manual explained that the cost of opposing discrimination would be the loss of all future social intercourse with other employees, the workplace reality would be that some people—indeed, many people—would become less likely to oppose discrimination than they otherwise would be. And the chilling effect would take place even in the absence of any fear of discharge, demotion, transfer, or poor references. The need to make a real world evaluation of how a particular type of conduct (in particular circumstances) would be perceived is another case where the determination is best suited to a jury after trial, not to a judge on a summary judgment motion.

B. Domestic Partnership

The Restoration Act prohibits discrimination on the basis of "partnership status" across all contexts of discrimination covered by the City Human Rights Law. "Partnership status" means the status of being in a "domestic partnership," as that term is already defined under New York City law. An individual can be in a domestic partnership, and thus have partnership status, as can a couple. The 2005 Committee Report specifically states that "life partners" and others who are domestic partners under New York City law are to "receive protection from all forms of discrimination addressed by the human rights law, *just as married partners do.*"[311]

Health insurance and other employer-provided benefits are clearly "terms, conditions or privileges of employment," and, hence, the terms of the operative provision of the City Human Rights Law are applicable to a covered entity's refusal to provide such insurance or benefits to domestic partners. Claims will undoubtedly be made that the Employee Retirement Income Security Act (ERISA) preempts the local law in this one respect. It is beyond the scope of this article to attempt to resolve the preemp-

310. It is worth noting here that it is only where a covered entity has intentionally taken *some* action against a plaintiff *because of* opposition to discrimination, *and the plaintiff has proven that a causal link exists between the opposition and the action in response*, that a defendant faces liability.

311. 2005 COMMITTEE REPORT, *supra* note 22, at 2-3 (emphasis added).

tion question,[312] but the way that City Law itself handles the question is instructive.

The 1991 Amendments provided that the employment discrimination provisions as they related to employee benefit plans "shall not be construed to preclude an employer from observing the requirements of [an ERISA plan] that is in compliance with applicable federal discrimination laws *where the application of [the City Law provision] would be preempted by such act.*"[313] On one level, this language may seem unnecessary: if there were federal preemption, that preemption would operate regardless of whether a state or local statute explicitly referenced it. On another level, however, the provision demonstrates that City Law made a conscious choice to go as far as permissible. The *only* limit being imposed was any limit that existed by the operation of preemption, and no additional limitation should be inferred.

C. Catalyst Case Fees

Buckhannon[314] is rejected for City Human Rights Law purposes. As amended, section 8-502(f) of the New York City Human Rights Law specifies that a prevailing party who may be awarded costs and fees "includes a plaintiff whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement or as a result of a judgment in such plaintiff's favor."[315] The change is another example of the Council wanting to make certain that the law in no way discourages individuals and organizations from playing a vigorous private attorney general role.

---

312. Given that the City Human Rights Law does not seek to specify the substance of coverage to be provided, does not seek to regulate the administration of the benefits program, and does not cause a burden to plan administrators, one would imagine that the argument against section 1144 preemption to be strong. *See* 29 U.S.C. § 1144 (2005).

313. N.Y.C. ADMIN. CODE § 8-107(e)(i) (emphasis added); 1991 LEG. ANN., *supra* note 3, at 152.

314. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health, 532 U.S. 598 (2001).

315. Restoration Act, *supra* note 8, § 8, *amending* N.Y.C. ADMIN. CODE § 8-502(f); *see also* 2005 COMMITTEE REPORT, *supra* note 22, at n.10 (citing the dissent of Justice Ginsburg in *Buckhannon*, 532 U.S. at 627-28, and explaining that an analysis of the entitlement to costs and fees in a catalyst case can be based "on a three part analysis, which requires: (1) that the respondent provide at least some of the benefit sought by the lawsuit; (2) that the suit stated a genuine claim; and (3) that the suit was a substantial or significant cause of the act providing the relief").

D. Civil Penalties

When civil penalties were introduced to the City Human Rights Law in 1991, they were designed to vindicate the public interest, and were available up to $50,000 even where there had been no showing of willfulness or maliciousness, and up to $100,000 where there had been such a showing.[316] A problem that emerged was that the caps were too low to achieve their purpose of vindicating the public interest. In a case of harassment of a person with AIDS several years ago, the appellate court reduced the Commission-imposed civil penalty from $75,000 to $25,000, *even though it believed that the defendant had acted abhorrently*.[317] Nevertheless, because the landlord was not one of the City's largest, the court cut the penalty.[318] The pre-Restoration Act caps thus acted not only to prevent adequate punishment of larger wrongdoers; they also worked to ratchet down penalties for smaller wrongdoers below what is appropriate.

The Restoration Act raises the caps to $125,000 without a showing of willfulness or maliciousness, and to $250,000 with such a showing.[319] The Council intended that these higher civil penalties reflect the fact that all acts of discrimination cause serious injury both to the individual victim and to the City,[320] and that these higher penalties will demonstrate that discrimination "will not be tolerated."[321]

The fact that the caps were more than doubled should also be a factor in restraining judges who might otherwise be inclined to reduce punitive damage awards in cases brought in court. A 250 percent increase in penalties available administratively strongly suggests that it is actually the award of "inadequate penalties" that is the key problem about which courts need to worry. Likewise, the Council's emphasis on the societal injury caused by discrimination should make judges skeptical that punitive awards are excessive. Punitive damages can only meet the law's goals of punishment, individual deterrence, and general deterrence if they are sufficient to "sting."

---

316. N.Y.C. ADMIN. CODE § 8-126(a); 1991 LEG. ANN., *supra* note 3, at 174.

317. *In re* 119-121 E. 97th St. Corp. v. N.Y.C. Comm'n on Human Rights, 642 N.Y.S.2d 638, 644 (App. Div. 1996).

318. *Id.*

319. Restoration Act, *supra* note 8, § 6.

320. 2005 COMMITTEE REPORT, *supra* note 22, at 6.

321. *Id.*

There are what purport to be constitutional limitations on the size of punitive damage awards.[322] One of the factors to be considered in "due process excessiveness" analysis is a comparison of the punitive damages awarded with the civil penalties available for similar conduct. In *BMW of North America, Inc. v. Gore*, the case that established the factors cited by *State Farm*, there was a $2,000,000 punitive damage award.[323] That award represented an amount one thousand times the maximum civil penalty that could have been imposed by the state's Deceptive Trade Practices Act, a ratio that the Court found to be strongly indicative of excessiveness.[324] Under the City Human Rights Law as revised by the Restoration Act, by contrast, that $2,000,000 punitive damage award would only represent an amount eight times the amount that can now be imposed administratively.[325] Both in terms of conveying the seriousness with which the City views discriminatory conduct, and by reducing the ratio between maximum civil penalties on the one hand and punitive damage awards measured in the millions of dollars on the other, the Restoration Act has made larger punitive damage awards more sustainable.

E. Thorough Investigations

Citing a report on the City's failure to enforce its Human Rights Law,[326] the Council imposed a requirement that the administrative investigations of the Commission on Human Rights be "thor-

322. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418, 425 (2003) (Internal citations omitted) (To determine whether a punitive damage award is excessive and violates the Due Process Clause, it is necessary to consider three factors, the most important of which is the degree of reprehensibility of the defendant's misconduct; also to be considered is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award," although a greater ratio may be necessary where the "monetary value of noneconomic harms might have been difficult to determine"; and, lastly, "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."). *But see id.* at 430-31 (Ginsburg, J. dissenting) (internal citations omitted) ("It was not until 1996 . . . that the Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably large. . . . If our activity in this domain is now "well established" [as claimed by the majority], it takes place on ground not long held.").

323. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 567 (1996).

324. *Id.*

325. Restoration Act, *supra* note 7, § 6.

326. *See* 2005 COMMITTEE REPORT, *supra* note 22, at 4 n.5 (citing CRAIG GURIAN, ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, AT THE CROSSROADS: IS THERE HOPE FOR CIVIL RIGHTS LAW ENFORCEMENT IN NEW YORK? 6-10 (2003), *available at* www.antibiaslaw.com/crossroads.pdf.

ough."[327] Among the many problems that the report had found was the fact that the Commission had been engaging "in a process of what might be called 'asymmetrical skepticism.'"[328] "No probable cause determinations" repeatedly rely

> on the idea that a complainant has not "rebutted" the contentions of the respondent—contentions generally contained in an answer or position statement prepared by respondent's counsel. In essence, the Commission will say to an (almost always unrepresented) individual: "Go ahead and disprove what respondent's counsel has written." The respondent's attorney's position winds up being treated as true unless conclusively proven false by complainant, without that position ever being challenged directly by Commission inquiry.[329]

The Committee Report specified that, in general, the "thorough" investigation requirement "should include steps such as probing the reasons for a respondent's conduct and actively seeking out facts from witnesses."[330] As such, the new requirement—in addition to causing the Commission to changes its practices—should mean that state courts reviewing challenges to determinations by the Commission need to be more probing in assessing whether an investigative determination was based on adequate investigation.

F. Technical Changes

Even if a complaint had previously been filed with the State Division of Human Rights, the City Human Rights Law had permitted an action to be commenced under its provisions if the State complaint had first been dismissed by the State Division for "administrative convenience."[331] Subsequent to the 1991 Amendments, the State Human Rights Law was changed to permit an "annulment" of a complainant's election of remedies.[332] The Restoration Act makes clear that such annulments revive an aggrieved party's right to bring a claim under the City Human Rights Law as well.[333]

The 1991 Amendments required that, prior to an action being commenced pursuant to the City Human Rights Law, a copy of the complaint had to be filed with the City Commission and with the

327. Restoration Act, *supra* note 7, § 4, *amending* N.Y.C. ADMIN. CODE § 8-109(g).
328. GURIAN, *supra* note 326, at 9.
329. *Id.*
330. 2005 COMMITTEE REPORT, *supra* note 22, at 4 n.6.
331. N.Y.C. ADMIN. CODE § 8-502(b).
332. N.Y. EXEC. LAW § 297(9) (McKinney 2005).
333. Restoration Act, *supra* note 7, § 8, *amending* N.Y.C. ADMIN. CODE § 8-502(b).

City's Law Department. The purpose was to make certain that the responsible local institutional entities tasked to fight discrimination would remain apprised of (and potentially intervene in) claims of discrimination. Courts have understood that the purpose was not to create a jurisdictional barrier.[334] The Restoration Act modifies the provision to permit the serving of copies of the complaints on the agencies within ten days *after* the commencement of a civil action, and requires the agencies to designate a representative to receive the complaints.[335] The use of the term "serve" was not and is not intended to convey a technical meaning. The purpose is that the complaint is received by the agencies, regardless of the means used.[336]

PART III: ADDITIONAL ISSUES FOR IMMEDIATE RESOLUTION

A. Retroactivity

The Restoration Act has no explicit retroactivity provision; it says only that it is to take effect immediately upon enactment.[337] Nevertheless, New York's Court of Appeals balances two axioms of statutory interpretation in making a determination about retroactivity:

> Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be.[338]

Two of the Restoration Act's provisions are entirely new, and thus will have prospective application only. These are the provision adding domestic partnership as a new basis of protected class status, and the provision increasing the maximum civil penalties

334. *See, e.g.*, Teller v. Am. W. Airlines, Inc., N.Y.S.2d 314, 315 (App. Div. 1997) (provision is designed to provide notice to agencies and failure to comply is not bar to action); Bernstein v. 1995 Assocs., 630 N.Y.S.2d 68, 71-72 (App. Div. 1995) (same).

335. Restoration Act, *supra* note 7, § 8, *amending* N.Y.C. ADMIN. CODE § 8-502(c).

336. Hence, it is contemplated that delivering the copy of the complaint by mail or by overnight delivery service is permissible, without a party first having attempted in-person delivery.

337. Restoration Act, *supra* note 7, § 12.

338. *In re* Gleason, 749 N.E.2d 724, 726 (N.Y. 2001).

that can be awarded in the administrative context.[339] The rest of the provisions, on the other hand, are appropriately applied retroactively.[340]

The two areas of the Restoration Act where retroactivity will be contested are the retaliation provision and the enhanced liberal construction provision. In both cases, the Restoration Act was "designed to rewrite an unintended judicial interpretation" and "reaffirms a legislative judgment about what the law in question should be."[341] The Restoration Act and its legislative history are replete with references to the need for clarification and reaffirmation.[342] The text of the Act itself states that "it is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of all persons covered by the law."[343] The 2005 Committee Report states that the Act "aims to ensure construction of the City's Human Rights Law in line with the purposes of fundamental amendments to the law enacted in 1991."[344]

Specifically with respect to retaliation, the 2005 Committee Report states that the point of the amendment is "to clarify the standard."[345] This clarifying intention is highlighted specifically by the fact that the 1991 Amendments had already attempted to broaden coverage by prohibiting retaliation "in any manner."[346] Here, as in *Gleason,* "the legislative history establishes that the purpose of the amendment was to clarify what the law was always meant to do and say."[347]

A covered entity that has taken negative action against a person prior to the effective date of the Restoration Act cannot be heard to complain of retroactive application on the ground that the retaliation did not rise to the "materiality standard." Such conduct not only comes under the local law's 1991 "in any manner" language, it

339. Where conduct that predates the effective date of the Restoration Act continues on after the effective date, of course, the higher maximums apply.

340. Retroactivity in terms of the filing provisions and the requirement of "thorough" investigations is routine, and does not warrant discussion.

341. *In re* Gleason, 96 N.Y.2d at 122.

342. In both cases, the law conveys a sense of urgency as well. Unlike the 1991 Amendments, which the Council clearly had in view, the Restoration Act does not contain any deferring language. *See* 1991 Amendments, supra note 3, § 4; 1991 LEG. ANN., *supra* note 3, at 180 (setting forth deferred application of some provisions, and explicitly stating that several others were to be applied prospectively only).

343. Restoration Act, *supra* note 7, § 1.

344. 2005 COMMITTEE REPORT, *supra* note 22, at 2.

345. *Id.* at 3.

346. N.Y.C. ADMIN. CODE § 8-107(7); 1991 LEG. ANN., *supra* note 3, at 160.

347. *In re* Gleason, 96 N.Y.2d at 122.

is conduct as to which the covered entity had no legitimate or vested interest.[348]

The enhanced liberal construction provision, of course, has application across the range of all provisions of the local law, and there is no difficulty concluding that the purpose of the provision "was to clarify what the law was always meant to do and say," at least what it was always meant to do and say after the 1991 Amendments. The 2005 Committee Report, for example, not only states that the Restoration Act "aims to ensure construction of the City's Human Rights Law in line with the purposes of fundamental amendments to the law enacted in 1991," it pointedly incorporates Mayor Dinkins' contemporaneous recitation of the Council's intent in 1991 to require liberal and independent construction of the law.[349]

For most provisions of the City Human Rights Law, there was either not a specific interpretation of the language of the City Human Rights Law provision[350]—let alone one according with the existing liberal construction requirement—or an interpretation rendered by the State Court of Appeals. As such, decisions that henceforth determine what the law properly "was" in respect to these provisions in the period from the 1991 Amendments to the enactment of the Restoration Act would not, in most cases, even involve the "overruling" of a decision of the State's highest court, but rather would involve either a simple reading of the substantive statutory language or the application of the pre-Restoration Act liberal construction provision. Retroactive application concerning such "under-interpreted" provisions of the City law cannot be said to upset "settled expectations."

Decisions that have been rendered by the Court of Appeals but have not considered the language or purpose of the City statute not only fail to meet the requirements of amended section 8-130, they failed to meet the liberal construction requirements of the pre-Restoration Act City Human Rights Law. As such, allowing such decisions to govern any proceedings, including proceedings relating to conduct that occurred prior to October 3, 2005, would defeat the

348. The argument to the contrary, that covered entities were somehow relying on the materiality loophole, that is, they were justified in trying to take retaliatory action as close to the line as possible, is not a value to be countenanced under the City Human Rights Law. One hopes, in any event, that it will be an argument that induces the Second Circuit to rethink the utility and appropriateness of its own standard.

349. 2005 COMMITTEE REPORT, *supra* note 22, at 2.

350. For example, the Court of Appeals in *Levin* simply did not interpret the "terms and conditions" provision of the statute.

remedial purposes not only of the Restoration Act, but of the 1991 Amendments as well.

It is important to note that retroactive application cannot seriously be said to impair any "vested interest" of any individual or entity subject to the law. In terms of vicarious liability, for example, a covered entity either did or did not have a vested interest in encouraging, condoning, or furthering harassing conduct by an employee. If it did not, it cannot claim a vested interest in *Forrest's* failure to apply the plain language of section 8-107(13)(b)(1) of the New York City Human Rights Law. If the covered entity did have a vested interest in encouraging, condoning, or furthering such harassing conduct, it is in any event liable under existing State Human Rights Law principles, and is not harmed by application of City law liability stemming in any event from 1991 Amendments language.

There is, finally, an important issue of avoiding confusion in the administration of justice that counsels retroactive application. If courts were to begin to decide cases based on old notions of what the law "was"—as opposed to what the Restoration Act clarified the law was intended to be—we will likely be faced with a new series of decisions that fail to engage in the analysis required by the Restoration Act, the routine citation of which will lead to a failure to take the necessary new steps to determine what, post-Restoration Act, the law "is" hereafter supposed to be.

B. Jury Instructions

Developing and promulgating model jury instructions for cases implicating provisions of the City's Human Rights Law is a task that warrants urgent attention. It is clear that some City Human Rights Law standards already differ from their state and federal counterparts. More will come to differ as judges begin to construe provisions to accomplish the uniquely broad and remedial purposes of the City law. Still others will come to differ as federal law becomes more narrow and, thanks to the Restoration Act, City law resists being ratcheted down. As such, existing instructions need to be thoroughly reviewed: they reflect the carbon copy bias that the Restoration Act seeks to eliminate.

Instructions distinguishing the proof requirements of the City Human Rights Law from those of counterpart civil rights statutes

should not be difficult to develop.[351] Nevertheless, it may be useful to consider the increased use of special interrogatories. Take, for example, a case where Jane Smith alleges that her supervisor, John Jones, sexually harassed her. Smith brings an EEOC charge against her employer, ABC Corporation, but not against Jones, because individuals are not liable under Title VII. After the EEOC fails to investigate her charge in 180 days, plaintiff Smith commences an action in United States District Court for the Eastern or Southern District of New York alleging that ABC violated her rights under Title VII and the City Human Rights Law, and that Jones violated her rights under the latter statute. Because the City Human Rights Law permits individuals to be held responsible for their discriminatory acts,[352] and because there is a common core of operative facts, the federal court assumes supplemental jurisdiction of the City Human Rights Law claim, both as against ABC and as against Jones.

Assume that it has come to be recognized that the City Human Rights Law should not insulate defendants who have engaged in harassment by imposing a "severe or pervasive" hurdle over which to jump, and the alternative formulation suggested earlier in this article has been accepted.[353] Assume as well that the presiding judge has read the strict liability provisions of section 8-107(13)(b)(1). There are basic ways in which instructions relating to the two statutes would need to differ, and for which special interrogatories would be helpful.[354]

The jury would be asked, "Did plaintiff demonstrate that Jones treated her less favorably because of gender?" If the answer were

351. In a case where the retaliation alleged arguably does not meet the federal materiality standard, for example, a judge would point out that the City Human Rights Law claim does not require a showing that the retaliation complained of resulted in an ultimate employment action or a materially adverse change in the terms and conditions of employment, and would further explain that a plaintiff in that circumstance would need to prove that that the retaliatory act or acts complained of were reasonably likely to deter an employee from engaging in protected activity.

352. N.Y.C. ADMIN. CODE § 8-107(1)(a); *see supra* notes 75–90 and accompanying text.

353. See *supra* notes 190–213 and accompanying text for a discussion of the proposal that all harassment should be proscribed except where the covered entity proves as an affirmative defense that the challenged actions "consisted of no more than what a reasonable victim of discrimination would consider petty slights and trivial annoyances."

354. This illustration also assumes that the evidence only supports a single motive charge. Potential differences in the definition of "supervisor" under the two laws, and a variety of differences relating to the imposition of punitive damages are also among the issues not treated here.

"no," then judgment would be entered for both defendants on all claims.

If the answer were yes, the jury would be asked, "Did defendants demonstrate that the conduct alleged consisted of merely petty slights or trivial annoyances? If the answer to this question were "yes," then judgment would be entered for both defendants on all claims.

If the answer to the second question were "no," then plaintiff would have judgment against Jones on the City Human Rights Law claim.

The third question that the jury would need to answer would be, "Did Smith exercise supervisory responsibility for ABC?" If the answer to this question were "yes," then plaintiff would have judgment against ABC on the City Human Rights Law claim.

There would only remain questions relating to the Title VII claim against ABC. One relates to whether the conduct alleged was sufficiently severe or pervasive to create a hostile environment. If the answer to this question were "no," then judgment would be entered for ABC on the Title VII claim.

If the answer to the "severe or pervasive" question were "yes," then a question would need to be posed as to whether defendant had made out both prongs of the *Faragher/Ellerth* defense. A "yes" answer from the jury would yield judgment for ABC on the Title VII claim; an answer of "no" would yield judgment for plaintiff against ABC on the Title VII claim.

Special interrogatories such as these will make it simpler for juries (and judges) to navigate the variety of different standards set out by City, State, and federal civil rights law.

CONCLUSION

There may well be those who say that the 1991 Amendments and the Restoration Act represent a series of policy choices that are distinctly too plaintiff-friendly; that are insufficiently attentive to the needs of covered entities; and that rely too much on a law enforcement model of detect, punish, and deter. In her or his private life, a judge is free to vote for City Council candidates who would make different policy choices. In the meantime, the only lawful and responsible course of judicial action is to respect the policy choices that have been made. These choices respect and honor the unique ability of judges to take center stage in the advance of social justice by the simple and profound task of giving "thoughtful, independent consideration" to what interpretation would best ful-

fill "the uniquely broad and remedial purposes of the City's Human Rights Law."[355]

The fact that few have thus far awakened to the potential of the City Human Rights Law in the fifteen years since this passage of the 1991 Amendments must not and does not change this obligation. It remains a sad fact of our history that Reconstruction Era civil rights statutes went unenforced for many decades. Yet, as a Supreme Court that finally recognized its obligation to give life to Section 1982 wrote: "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today."[356]

355. 2005 COMMITTEE REPORT, *supra* note 22, at 5 n.8.
356. Jones v. Mayer, 392 U.S. 409, 437 (1968).

TESTIMONY OF CHRISTINA ISNARDI ON INTERN CIVIL RIGHTS PROTECTIONS
March 17th, 2013

Good morning, councilmembers, my name is Christina Isnardi, and I am an undergraduate at NYU and an intern advocate. I'm honored to be standing before you all today to express my approval for extending civil rights protections to interns, while also urging the committee to eliminate section c) in the new subdivision 28 to broaden the definition of intern in the amendment to local law.

Last year, I started a successful petition targeting NYU's career center to remove postings of unpaid internships that violated the Fair Labor Standards Act (FLSA). Throughout this campaign, I spoke with thousands of students about this issue, and they shared with me their experiences.

I've also had the "pleasure" to work at four unpaid internships. After speaking with thousands of students on campus and through my own experience, the definition of intern under section c) in the proposed amendment inaccurately describes our position as interns.

Under section c) subsection ii), a person is considered an intern if she is performing work that provides experience for the benefit of the individual performing the work. However, personal experience and the National Association of Colleges and Employers show that unpaid interns spend the majority of their time doing work that benefits the EMPLOYER (1), because interns perform more clerical and non-essential tasks than tasks that develop employable skills.

Section c) subsections i), iii), and iv) also are regularly discarded at internships.

One may argue that interns who DO actually perform work for the benefit of her employer is thus a misclassified employee under the FLSA and should enjoy workplace protections. However, the FLSA makes exemptions for small businesses, most non-profits, and the government (2), so interns working in these sectors CANNOT make this claim. At the same time, these interns will also fail the definition of "intern" defined in this proposed amendment, since they DO perform the work of employees. Therefore, interns working for you, councilmembers, may fail this *amendment's* definition of "intern," while also failing the *FLSA's* definition of "employee."

I ask the council to remove section c) in the new subdivision 28 so ALL interns are included in the definition and may receive civil rights protections at work.

1. "Class of 2012: 60 Percent of Paid Interns Got Job Offers," NACE. http://www.naceweb.org/s08012012/paid-intern-job-offer/
2. "Handy Reference to the Fair Labor Standards Act," DOL Wage and Hour Division. http://www.dol.gov/whd/regs/compliance/hrg.htm

Hearing Testimony
New York City Council
March 17, 2014

My name is Rachel Bien and I am a partner at Outten & Golden LLP, a plaintiffs' employment law firm in New York City. Our firm has brought several lawsuits on behalf of unpaid interns, including *Glatt v. Fox Searchlight Pictures, Inc.*, in which a federal district court granted summary judgment in favor of the interns, finding that they were "employees" entitled to minimum wages and overtime under the Fair Labor Standards Act and New York Labor Law. Some of our other unpaid intern cases include *Wang v. Hearst Corp.*, No. 12 Civ. 793 (S.D.N.Y.), *Ballinger v. Advance Magazine Publishers, Inc. d/b/a Condé Nast*, No. 13 Civ. 4036 (S.D.N.Y.), *Moore v. NBCUniversal, Inc.*, No. 13 Civ. 4634 (S.D.N.Y.); and *Bickerton v. Charles Rose*, No. 650780/2012 (N.Y. Sup. Ct.).

The City Council's proposal to amend the New York City Human Rights Law to protect interns is an important step in the right direction. However, we do not believe that the amendment as it is currently drafted will achieve the Council's goals.

First, by requiring an intern to establish that she meets all of the criteria in the proposed amendment, in particular, the criteria in subsection (c), the proposal places the burden on the wrong party. The criteria in the proposed legislation were developed by the U.S. Department of Labor as requirements that *employers* must meet to show that their interns are part of a *bona fide* intern program and *are not "employees"* entitled to the minimum wage and overtime protections of the Fair Labor Standards Act. Interns should not have to prove *that they are not employees* in order to be protected from discrimination by the New York City Human Rights Law.

In fact, requiring interns to prove that they are part of a *bona fide* training program to be protected would force them to make a choice whether to enforce their right to be free from discrimination under the New York City Human Rights Law or their right to be paid under wage laws.

Second, the proposed amendment, as drafted, would achieve only a small part of its purpose because it would exclude a large number of interns from protection. In our experience, most interns are not participants in *bona fide* training programs, as the amendment presumes. Many interns <u>do</u> displace regular employees, <u>do not</u> work under the close supervision of existing staff, and <u>do</u> perform work that benefits the employer. The proposed amendment would not protect these interns, even though they are among the interns the Council seeks to protect. We believe that the amendment should make clear that all interns are covered, regardless of whether they can prove that they participated in a *bona fide* training program.

Interns who are not part of a *bona fide* training program are no less deserving of protection from discrimination than interns lucky enough to be part of a *bona fide* program. Although many of these interns should be considered employees who are

already covered by the New York City Human Rights Law, courts have incorrectly held that workers who are not paid do not qualify as a "Person" protected by the law. *See Wang v. Phoenix Satellite Television US, Inc.*, No. 13 Civ. 218, 2013 WL 5502803 (S.D.N.Y. Oct. 3, 2013). To correct this narrow construction of the law, the Council should clarify that the definition of "Person" is not limited to paid workers.

Third, the amendment does not include workers whom employers have classified as "volunteers" even though they perform work that benefits the employer. Increasingly, private companies are using volunteers as substitutes for paid employees or temporary workers. For example, our firm recently filed a lawsuit against Major League Baseball, which relied on thousands of unpaid volunteers to staff its All-Star events in July 2013 and July 2008 in New York City. These workers should also be protected from discrimination and harassment on the job.

We propose the following alternative language, which we believe will achieve the Council's goal of protecting interns and other unpaid workers:

Section 1. Section 8-102 of chapter one of title eight of the administrative code of the city of New York is amended by adding new subdivisions 28 and 29 to read as follows:

28. For purposes of subdivisions 1, 3, 15, and 17 of section 8-107, and section 8-107.1 of this title, an individual participating in an internship or training program, or working as a volunteer is considered to be a "person" as defined in subdivision 1 of this section.

29. For purposes of subdivisions 1, 3, 15, and 17 of section 8-107, and section 8-107.1 of this title, the definition of "person" as defined in subdivision 1 of this section includes individuals who work without compensation.

Statement of Peter Walsh

New York City Council, Committee on Civil Rights
Meeting on "Prohibition of discrimination against interns"
Monday, March 17, 10am, Committee Room at City Hall

Good morning. My name is Peter Walsh and I live in the Kensington neighborhood in Brooklyn. Brad Lander is my councilperson. I work with the grassroots group Intern Labor Rights but I'm speaking here today as an individual.

Extending anti-discrimination protections to all interns, trainees, and volunteers is important. However, the wording of the proposed New York Local Law should be changed. The current version risks asking interns to give up their ability to make wage and employment claims and puts an undue burden on interns by asking them to unnecessarily prove details about the nature of their internship. None of that is needed to safely prohibit discrimination against interns.

Imagine an intern finds herself in a bad internship: she is learning nothing, she is receiving no supervision, her school is adding no academic training to the internship and she discovers she has replaced a paid employee. Is it OK for her to be discriminated against? No. So why are those criteria included in this law?

Clauses a, b, and c of the proposed law should simply be removed.

A possible rewording of the law could be:

Be it enacted by the Council as follows:
Section 1. Section 8-102 of chapter one of title eight of the administrative code of the city of New York is amended by adding a new subdivision 28 to read as follows:
28. For purposes of subdivisions 1, 3, 15, and 17 of section 8-107, and section 8-107.1 of this title, an individual working as part of an internship program, a training program or working as a volunteer is considered to be a "person" as defined in subdivision 1 of this section.
§2. This local law shall take effect upon enactment.

Thank you.

Peter Walsh
415 Beverley Road, #1C
Brooklyn, NY 11218
347.723.5049
walshpeter@mac.com

FOR THE RECORD

March 16, 2014

Dear Committee:

I stand in solidarity with everyone at this committee hearing to encourage you to push forth legislation that would extend Civil Rights Legislation to protect unpaid interns.

For far too long employers have been allowed to trample on young people trying to gain experience or employment. They work long hours, do the equivalent to those earning a salary, and in the end, may not even get an offer of employment.

That's just plain wrong.

As the great city that we are, we need to send a clear message: abusing young people for the sake of companies that can pay or those that say that can't but really can - is wrong. We can't afford not to protect our young people!

I like may speaking today was an unpaid intern and fell into the trap. In fact, over and over again due to the lack of sustainable opportunities.

As Spike Lee famously said, "Do The Right Thing!"

We support you. Thank you for your service.

Regards,

Roy Paul
237 Malcolm X Blvd, Apt 10
New York, NY 10027

Cell: 347-433-6120

To: Chair of the Committee on Civil Rights, Council Member Darlene Mealy

From: Ross Perlin, author

I'm writing in regard to Monday's hearing on a City Council measure to end discrimination against unpaid interns in New York. I'm a lifelong New Yorker, a former intern, and the author of *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*, first published in 2011 on the basis of three years of research. *Intern Nation* helped launch a global discussion about a culture of unpaid work centered on young people and the important, often destructive effects of that culture on our society and our economy--notably exacerbating inequality, devaluing work, and harming the broader job market. It was the first book on this phenomenon aimed at a general audience.

I would like to state that the measure before the City Council is a positive step, similar to others currently being undertaken or considered around the country. As two legal scholars have put it, unpaid interns are truly in "legal limbo" when it comes to workplace protections, and any measure to alleviate that is a positive step. However, the larger problem must be borne in mind: thousands of internships each year are illegal under state and federal law, and New York is a capital of such illegal unpaid internships. The lack of workplace protections is just one glaring instance of a more fundamental problem, and a progressive City Council could set a vital national precedent by taking steps against the broader phenomenon. Moreover, one problem regarding internships is the lack of clarity and definition that exists around them--itself a reflection of just what a free-for-all the world of internships has become. The federal six-point test applied by the Department of Labor's Wage and Hour Division, plus relevant New York legislation, has at last been broadly widely circulated and represents a clear and meaningful standard--it would be best to rely on and implement those existing, reasonable standards, as opposed to circulating new definitions and conditions.

Thank you for your attention.
Ross Perlin

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 0173 Res. No. 2014

☒ in favor ☐ in opposition

Date: 3/17/14

(PLEASE PRINT)

Name: CHRISTOPHER ZARA

Address: 15 Vermilyea Ave. #52

I represent: International Business Times

Address: 7 Hanover Square

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: CLIFF MULQUEEN

Address: _____

I represent: NYC COMMISSION ON HUMAN RIGHTS

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☑ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Christine Ismael QUEEN

Address: 11 Waverly Pl, Apt 10F New York, NY

I represent: Myself COMMISSION ON HUMAN RIGHTS

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☑ in favor ☐ in opposition

Date: 3/17/14

(PLEASE PRINT)

Name: Peter Walsh

Address: 415 Beverley Road, 1C

I represent: self Brooklyn, NY Intern Labor Rights

Address: internlaborrights.com

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: 3/17/14

(PLEASE PRINT)

Name: Maurice Pianko

Address: 55 Broad Street, #13F, NY, NY 10004

I represent: Interjustice-Corp

Address: Same

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 173 Res. No. _____

☒ in favor ☐ in opposition

Date: 3/17/14

(PLEASE PRINT)

Name: Michael Franklin

Address: _____

I represent: Fair Pay Campaign

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 173 Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Rachel Bien

Address: 3 Park Ave. 29th fl. NY, NY 10016

I represent: unpaid interns

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 173 Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Manhattan Burough President Gale Brewer

Address: 1 centre Street, 19th floor

I represent: _____

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 173 Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: CRAIG GILBIAN

Address: ~~50~~ 57 W 57 ST 10019

I represent: FAIR PLAY LEGISLATION

Address: SAME

Please complete this card and return to the Sergeant-at-Arms