TESTIMONY OF ROBERT PERRY,
LEGISLATIVE DIRECTOR
OF THE NEW YORK CIVIL LIBERTIES UNION,

Before

THE NEW YORK CITY COUNCIL COMMITTEE ON GOVERNMENTAL OPERATIONS

Regarding

INT. NO. 512,
THE HUMAN RIGHTS IN GOVERNMENT OPERATIONS AUDIT LAW

April 8, 2005

Legislation is often promoted as a landmark. Int. No. 512 in fact proposes a major reform in our local human rights law.

The bill's legislative findings and intent affirm that justice and equality are core principles articulated in our nation's founding documents: the Constitution, the Bill of Rights and the Declaration of Independence.

Drawing on these principles and on principles of human rights that are broadly recognized,[1] the legislation states that the City has an affirmative obligation to enhance

[1] See United Nations Universal Declaration of Human Rights (1948); Convention on the Elimination of All Forms of Racial Discrimination (1969); Convention on the Elimination of All Forms of Discrimination Against Women (1981).

the effectiveness of government by promoting equality and by preventing and eliminating discrimination.[2]

The practical innovation of this legislation is that in its structure and procedures of implementation these great principles are put in the service of a common-sense approach to good governance. The bill lays out a sound working model that prescribes proactive measures to identify inequities and discriminatory conduct in the operations of government, and to promote equality.

To put it simply, the proposed Human Rights Government Operations Audit Law institutionalizes fairness and equity as principles of local governance: in rulemaking, budgeting and planning; in policies and practices, systems and operations.

In a sense the legislative history of this proposal reflects a half century of statutory enactments and judicial rulings that constitute our civil rights laws. Our civil rights statutes – federal, state and local – are the first line of defense against unlawful discriminatory conduct. However, the civil rights framework is essentially vindicative, or remedial, in its application. These laws recognize a legal cause of action – the right to our day in court, so to speak – and a remedy, which may include damages for the harm caused by the discriminatory conduct and an injunction to proscribe the conduct or practice that led to the discrimination.

Human rights principles offer an important contribution in fulfilling the promise of civil rights. The human rights doctrine of social justice recognizes that in order to fulfill the promise of equal opportunity, it is not sufficient that the law provides a remedy for unlawful discriminatory acts after the fact; government must take affirmative measures to prevent discrimination and to promote equality for all -- particularly those who have been marginalized and discriminated against based upon their race, ethnicity, color, national or social origin, gender, sexual orientation, language, religion, immigration status, birth or other status.

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[2] Int. No. 512, Section 1, Declaration of Legislative Findings and Intent.

Rather than limiting a remedy to providing relief for harm suffered, the human rights-based approach institutionalizes proactive measures for identifying inequities and discriminatory policies and practices. Remedial and preventive measures are designed and implemented by creating partnerships among government officials, advocates from the non-profit sector, representatives from affected groups or communities and others with special knowledge or expertise.

The focus here is on systemic problems of discrimination. For this reason the approach to solutions must involve, as one commentator has written, "interdisciplinary collaborations with multiple stakeholders to address problems that are not limited to the articulation of legal norms or the response to potential legal violations." [3] Int. No. 512 would address issues of discrimination by creating interdisciplinary collaborations with multiple stakeholders who are "close to the points of action, who possess intimate knowledge of the relevant facts and who are empowered to act."[4]

It is for this reason I refer to Int. No. 512 as a good governance bill. It is practical. It makes the regulatory process more transparent; and it invites representatives of the City's many communities to participate in creative problem solving, negotiated rule making and alternative dispute resolution.

As demonstrated by the knowledgeable, principled and committed individuals who regularly appear to testify before this Council, New York City's population represents an extraordinary pool of individuals with deep understanding of government operations and

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[3] Susan Sturm, *Lawyers and the Practice of Workplace Equity*, __ Wis. L. Rev. 293-94 (2002) (quoted in Stacy Laira Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 Colum. L. Rev. 768, 777 (2004)).

[4] Archon Fung and Erik Olin Wright, Thinking About Empowered Participatory Governance in Deepening Democracy: Institutional Innovations in Empowered Participatory Governance 3, 22 (Fung and Wright eds., 2003). (Quoted in *Diffusion of Local Regulatory Innovations* at 777. *See supra* n. 3.)

the City's many communities. This bill would enlist that talent in a collaborative working relationship with City employees.

I offer three case examples that illustrate how this legislation could address discrimination in New York City that has had a significant human and financial cost.

Contracting with Minority- and Women-Owned Enterprises

In 1989 New York City voters approved a program to assist minority- and women-owned businesses in obtaining government contracts.[5] Pursuant to this voter mandate the City Council enacted legislation, supported by Mayor Dinkins, that established the Division of Economic and Financial Opportunity. In 1992 the City adopted rules creating a program to increase the participation of businesses owned by women members of minorities in bidding for City contracts.[6] The program rules expired in 1998, during the mayoralty of Rudolph Giuliani. And the Department of Business Services failed to conduct the required disparity study to determine if the program was still necessary.[7]

In 2000 the City Council appropriated funds to conduct such a disparity study. The study was finally undertaken in 2003. Its findings documented gross disparities in the letting of City contracts, to the disadvantage of minority and women-owned businesses. The report found, for example, that minority- and women-owned business represented 46.6 of

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[5] City of New York Disparity Study, January 2005. (Hereinafter, City of New York Disparity Study) (The study was commissioned by The Center for Law and Social Justice, The DuBois Bunche Center for Pubic Policy at Medgar Evers College. The study was conducted by Mason Tillman Associates, Ltd., of Oakland, California.)

[6] City of New York Disparity Study at 11-3. In 1994 Mayor Rudolph Giuliani eliminated a 10 percent "price preference" that was made available to minority- and women-owned businesses who bid for City contracts. The price preference had been the subject of a legal challenge, and was subsequently struck down as a violation of contract bidding procedures in the General Municipal Law. *Seabury Construction Corp. v. Dep't of Environmental Protection*, 607 N.Y.S.2d 1017 (1994).

[7] City of New York Disparity Study at 11-4.

available construction firms, but received only 17.6 percent of construction prime contract dollars for contracts valued at less than $1 million.[8]

The report concluded that the City possesses the statistical findings and the legal basis to support both race- and gender-conscious programs and race- and gender-neutral programs to redress the disparity in City contracts given to minority- and women-owned businesses.[9]

Now, some seven years after the fact, the City will undertake to reinvent the wheel as regards a policy of increasing the participation of minority- and women-owned businesses in the City contracting process. This is precisely the scenario that Int. No. 512 is intended to prevent. Had this bill been law in 1998, the race and gender disparities among recipients of City contracts would have been documented and reported. The Dinkins program of soliciting minority- and women owned businesses might well have been extended. And the public interest in directing contracts to New York's underserved communities might have been better served.

Policing and Race

There is a large body of evidence that demonstrates persons of color are more likely than white Americans to be stopped, questioned, searched, and arrested by the police.[10] In New York City the charge of racial profiling has been a recurring one over the last decade. In reviewing the NYPD's stop-and-frisk data, the United States Commission on

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[8] City of New York Disparity Study at 7-4.

[9] City of New York Disparity Study at 10-21. The report noted that Supreme Court rulings in *Croson v. City of Richmond*, 488 U.S. 469 (1989); and *Adarand v. Pena*, 115 S.Ct. 2097 (1995) and in subsequent decisions interpreting these cases, had raised the constitutional standard, applying a strict scrutiny test when affirmative action programs involving municipal contracting. However, the report concluded that the empirical findings in the Disparity Study provided a legal rationale and justification for creating incentives to increase the involvement of minority- and women-owned enterprises that receive City contracts.

[10] *See*, e.g., Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 Ford. Urb. L.J. 456 (2000).

Civil Rights observed that blacks and Latinos were stopped and frisked in numbers disproportionate to their numbers in the general population.[11] The Civilian Complaint Review Board has published an analysis of police misconduct complaints filed in the late 1990s that found African-Americans accounted for 63 percent of all civilian complaints arising from police-initiated street encounters; Latinos filed 24 percent of these types of complaints.[12]

Finally, a 1999 report by the office of the New York State Attorney General provides a rigorous statistical analysis of the NYPD's stop-and-frisk practices during the late 1990s.[13] The analysis offers compelling empirical evidence that as compared with whites, blacks and Latinos were being disproportionately stopped and frisked by police – and that the disparity existed even when statistics were adjusted for race-specific crime rates and the racial make-up of communities.

What are we doing to address the issue of racial profiling? Legislation enacted in 2004 prohibits racial profiling in New York City.[14] However, the legislation includes a definition of racial profiling that is so vague as to be unenforceable. It lacks a clear, affirmative requirement that a police office must have specific information, other than race, linking to suspected wrongdoing before a police office initiates investigatory activities. The law provides no sanction or penalty for acts of racial profiling.

What's more, at the insistence of the police department, provisions were struck from the bill that would have required the collection and reporting of information, such as race and

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[11] United States Commission on Civil Rights, *Police Practices and Civil Rights in New York City,* August 2000. These data, the Commission report concluded, create a strong inference that "racial profiling plays some role in the stop and frisk practices of the [ ] department [overall]. *Id.* at 106.

[12] CCRB, *Street Stop Encounter Report: An Analysis of CCRB Complaints Resulting from the NYPD's 'Stop and Frisk' Practices*, June 2001.

[13] Office of the Attorney General of the State of New York, *The New York City Police Department's 'Stop and Frisk' Practices: A Report to the People of the State of New York from the Office of the Attorney General*, December 1999.

[14] New York City Administrative Code, § 14-151.

ethnicity, related to police actions involving stop-and-frisk activity.[15] Without this data there is no meaningful way to analyze and assess the ways in which race, ethnicity or national origin enter into the execution of a police stop. We are left with an information vacuum. The information vacuum creates a policy vacuum.

Int. No. 512 would address the information void. Under its provisions a Task Force of public employees and private citizens, appointed by the mayor, could collect and analyze the quantitative and qualitative data necessary to evaluate and monitor the ways in which race enters into routine police stops. What's more, this inquiry may well lead to proposals that could ameliorate racial tensions between the police and community members through innovations in training at the police academy and supervision the precinct level.

As a matter of public policy and professional policing, the collection and auditing of such data is common sense. The auditing of CCRB data, for purposes such as these, has been proposed by the by policing experts Samuel Walker[16] and Paul Chevigny.[17]

Charges of Sexual Harassment in the Work Experience Program

Under the Personal Responsibility and Work Opportunity Act of 1996, the receipt of welfare benefits was conditioned upon participation in certain work activities, such as New York City's Work Experience Program (WEP). In a federal lawsuit filed in 2000, four female WEP workers described an ongoing pattern of sexual harassment by their

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[15] Provisions added to the Administrative Code in 2001, which provide for the collection of stop-and-frisk data, are critically flawed. (*See* New York City Administrative Code § 15-150.) These provisions do not require the reporting of raw data on police stops, but rather selections or summaries of data. The law fails to distinguish between police-initiated stops – the ones most likely to be influenced by improper racial or ethnic considerations – and stops based on witness reports. The law excludes motor-vehicle stops from the reporting requirements.

[16] Samuel Walker, *The New paradigm of Police Accountability; The U.S. Justice Department's 'Pattern or Practice' Suits in Context*, 22 St. Louis U. Pub. Law Rev. (2003).

[17] Paul Chevigny, Police *Violence: Causes and Cures, Edward V. Sparer Public Interest Law Fellowship Forum, Brooklyn Law School*, 7 Journal of Law and Policy (2003).

supervisors.[18] The harassment was aggressive, coercive and persistent. The City moved to dismiss the complaint, arguing that the WEP workers were not entitled to protections against sexual harassment under the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964. The plaintiffs prevailed on this issue and the litigation proceeded on the merits of the claims alleged.

Some five years later the case still proceeds. The process has delayed justice; it has involved the City in defending conduct that is indefensible. The litigation has cost the City hundreds of thousands of dollars; and the City will quite likely be liable for much more in costs and settlement payments before the case concludes.

Int. No. 512 proposes an alternative strategy for identifying and remedying alleged discrimination of this nature. Through a routine human rights audit and analysis, the City's Human Resources Administration would be expected to discover and investigate a pattern of sexual harassment as alleged in the WEP workers' lawsuit. But in this scenario the intervention would have been of a very different nature. Allegations of harassment would have been investigated; hiring and training of investigators would have been reviewed; complaint procedures would have been reassessed. And the WEP workers would have been empowered, rather then being further victimized by the City's assuming a posture of legal adversary. New policies regarding sexual harassment might have been promulgated, along with clear disciplinary sanctions for violating such policies. In this alternative scenario, the lessons learned by the Human Resources Administration might have become the basis for a model sexual harassment policy -- a prototype for agencies and departments citywide.

[18] *U.S. v. City of New York*, 359 F.3d 83 (2004)

Conclusion

I close by making reference to what is a recurring narrative related in newspaper headlines, newscasts and e-mail listserves. This is a narrative of discrimination and human rights violations.

We are exposed to this narrative so frequently that it becomes routine. For example: "Black Male Jobless Focus at Symposium."[19] This news article cited a report by the Community Services Society that found nearly 50 percent of African-American males were not employed. "Discrimination in Low-Wage Markets" – this internet posting summarizes a Princeton University study that found a white applicant just out of prison is just as likely to get a job offer as the black applicant with no criminal history.[20] And just this week the *New York Times* ran a story with the headline, "Sex Trafficking Pleas Detail Abuse of Mexican Women."[21] The gruesome facts of this story describe Mexican women who are being forced into sexual prostitution in New York City. Federal prosecutors initiated an investigation based on a complaint filed with the U.S. Embassy in Mexico City.

These are all violations of human rights. Int. No. 512 would enlist City officials, agency employees and representatives from the City's diverse communities in ending these violations. On behalf of the NYCLU I urge the members of the City Council and Mayor Bloomberg to make this bill law.

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[19] *Daily News*, May 13, 2004 at 6. For a recently published and well-reviewed analysis of the persistence of racial discrimination in the job market, workplace, criminal justice system, and in schools and universities, *see* Michael K. Brown, et al., *White-Washing Race, The Myth of a Color Blind* Society (University of California Press, 2003).

[20] http://paa2005.princeton.edu/download.aspx?submissionId=50874 *See* also Brooke Kroeger, "When a Dissertation Makes a Difference," *New York Times* at B9 (discussing research findings that demonstrate it is easier for a white with a felony conviction to get a job than it is for a black with a clean record).

[21] *New York Times*, April 6, 2005 at B3.