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Alan Schoenfeld

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Attorney's Fees "R" Us: The Significant Public Purpose Doctrine Comes to State Court

Alan Schoenfeld†


**INTRODUCTION**

The awarding of attorney's fees in civil rights cases is a central component of a well-ordered civil rights regime. The Senate Report on the Civil Rights Attorney's Fees Awards Act of 1976 claimed that numerous pieces of civil rights legislation "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."¹ Noting that "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer,"² those citizens and their lawyers, acting as private attorneys general,³ "must have the opportunity to recover what it costs them to vindicate these rights in court."⁴ The award of attorney's fees is particularly important for those plaintiffs who win only nominal damages⁵—a frequent occurrence in civil rights lawsuits—and therefore cannot pay attorneys out of their compensatory or punitive damage awards.

Along these same lines, the curtailment of opportunities to recover attorney's fees in civil rights cases has been a central feature of the recent retrenchment of "the capacity of progressive public-interest lawyers to bring

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2. Id.
3. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam) ("When a plaintiff brings an action under [Title II of the Civil Rights Act of 1964], he cannot recover damages. If he obtains an injunction, he does so not for himself but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.").
5. See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 20, at 85 (1935) ("Nominal damages are damages awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage, as in the case of rights of bodily immunity or rights to have one's material property undisturbed by direct invasion. The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated.").
cases.\textsuperscript{6} The Supreme Court's definitive statement on this issue came in \textit{Farrar v. Hobby},\textsuperscript{7} in which the Court adopted a strict standard for assessing attorney's fees in civil rights cases, holding that plaintiffs winning only nominal damages are not entitled to attorney's fees. Justice O'Connor carved out a narrow exception to this rule in her concurrence, arguing that lawyers winning only nominal fees for their clients while still serving a significant public purpose by litigating the case were entitled to attorney's fees.

In the wake of \textit{Farrar}, state courts interpreting the surfeit of state and local civil rights provisions have been confronted with two significant jurisprudential problems. First, ought they to adopt the \textit{Farrar} standard? Because the majority of state and local civil rights laws are based on analogous federal statutes, canons of statutory construction would counsel reliance on Supreme Court doctrine in interpreting all the statutes similarly. But many state and local ordinances are meant to reach farther than federal statutes and the Supreme Court’s narrow interpretation of them, so reliance on \textit{Farrar} might be counterproductive to the local laws' aims. Second, if states do adopt the \textit{Farrar} standard for a given state or local civil rights law, how should they think about the significant purpose exception? That is, in what circumstances—narrow or otherwise—should they consider a given lawsuit to have served a significant public purpose in spite of its having only nominally prevailed?

This Comment addresses one such case. In \textit{McGrath v. Toys "R" Us}, the New York Court of Appeals adopted the \textit{Farrar} standard for the award of attorney's fees in cases brought under the New York City Human Rights Law (NYCHRL). But in applying the conservative \textit{Farrar} standard to the Law, the court also adopted an extraordinarily broad definition of significant public purpose, awarding attorney's fees to three preoperative transsexuals who were harassed while shopping in a Brooklyn Toys "R" Us store. The question at the core of this Comment is why the court would adopt such a conservative standard for setting attorney's fees but then carve out such a broad public purpose exception.

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In the last few years, a disturbing pattern of legal attacks on public-interest lawyers has emerged, targeting every one of the principal sources of support for progressive public-interest law: the Legal Services Corporation ("LSC"), state Interest on Lawyers Trust Account ("IOLTA") programs, law school clinics, and civil rights attorney's fees. The attacks seek to win political disputes not by offering better arguments, but by defunding or otherwise hobbling the advocates who make the arguments for the other side.

\textit{Id.} at 209-10.

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The first Part of this Comment analyzes the legal doctrine applicable to attorney’s fees in civil rights cases where the prevailing party wins only nominal damages, a small but significant subset of civil rights suits. It traces the evolution of the Farrar standard in the Second Circuit and in New York. Part II analyzes the McGrath case, in which the Farrar standard is applied to NYCHRL notwithstanding evidence of contrary legislative intent. Ultimately, I argue that the adoption of the Farrar standard, while formally conservative, actually affords state courts substantially more latitude to encourage civil rights litigation than do other interpretations of attorney’s fee provisions.

I. THE FARRAR STANDARD

In Farrar v. Hobby, a jury found for the plaintiffs in a § 1983 suit, but awarded them no money on their claim for seventeen million dollars. The district court awarded them more than $300,000 in attorney’s fees, however. As the Fifth Circuit bluntly put it in reversing this fee award, “The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing.” On appeal to the Supreme Court, the Farrars sought to demonstrate that they were the prevailing party within the meaning of the federal attorney’s fees statute and, therefore, were entitled to a fee award. The Supreme Court bifurcated its reasoning in Farrar. It reaffirmed its longstanding position that civil rights plaintiffs who recover damages in any amount, however nominal, qualify as the “prevailing party” under the federal civil rights attorney’s fee provision and therefore, at the discretion of the court, may be allowed attorney’s fees. In overturning the fee award, however, the Court established a presumption against the awarding fees to such plaintiffs, regardless of the fact that they formally prevailed. This decision significantly constrained the ability of civil rights attorneys to collect fees.

Central to the Court’s generous “prevailing party” analysis is a conception of civil rights statutes as deterrent and behavior-modifying. As to the issue of

10. See 42 U.S.C. §1988 (“In any action or proceeding to enforce [certain civil rights statutes], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs . . . .”).
11. Farrar, 506 U.S. at 112.
12. Id. at 115.
13. For example, in Texas State Teachers Ass’n v. Garland Independent School District, the Supreme Court’s attorney’s fees decision most immediately preceding Farrar, the Court held that the plaintiffs prevailed within the meaning of the attorney’s fee statute because they “materially altered the [defendant] school district’s policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities.” 489 U.S. 782, 793 (1989).
whether the Farrars had prevailed, Justice Thomas, writing for the majority, reasoned as follows:

[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affect[] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.14

Only those plaintiffs vindicating important civil rights and effecting some sort of sustainable change are regarded as victors in civil rights litigation. This is an admittedly broad understanding of legal victory: The Court itself has noted its "generous formulation" of the term "prevailing party."15

But as one hand gives, the other takes away. Without differentiating among the extraordinarily diverse pool of plaintiffs who might be awarded only nominal damages, Justice Thomas noted,

In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . In a civil rights suit for damages . . . the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury.16

The standard established in Farrar applies to all federal civil rights statutes covered by the attorney's fee provision codified at 42 U.S.C. § 1988.17 Justice Thomas's decision would deny attorney's fees to civil rights plaintiffs incapable of demonstrating that they had suffered some sort of compensable injury. This reading radically truncated the class of plaintiffs entitled to attorney's fees and, as noted in the Senate Report quoted above,18 thus diminished the capacity of poor plaintiffs even to bring civil rights lawsuits in the first place.

Recognizing the disadvantage wrought on civil rights plaintiffs by this narrow reading, Justice O'Connor, in concurrence, carved out a narrow exception to the rule. Justice O'Connor clarified Justice Thomas's decision and

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18. See supra notes 1-4 and accompanying text.
stressed that the Court’s other attorney’s fee decisions “make[] clear that an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages [were] proved.”19 She then sketched out factors other than the magnitude of the damages awarded that the district court ought to consider in determining whether to award attorney’s fees. The “relevant indicia of success—the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served20—are all factors to which the court ought to be attentive in awarding attorney’s fees. In carving out this exception, Justice O’Connor cast the decisive vote for a majority and gained some ground on Justice Thomas’s fulsome retreat from the policy goal of leveling the playing field for civil rights plaintiffs.

Lower courts implementing the Farrar decision have had to engage in largely unguided analysis of whether nominally successful plaintiffs in civil rights suits are entitled to fee awards, their determination hemmed in only by Justice Thomas’s formal definition of “prevailing party” and Justice O’Connor’s formless recommendation that courts consider the “public purpose” served by the suit. In the Second Circuit, plaintiffs were awarded attorney’s fees when they “prevailed on a significant legal issue—namely, that landlords can be held liable for employing real estate brokers who are engaged in racial steering.”21 In that case, quoting Justice O’Connor’s Farrar concurrence, the court noted that “[o]ne does not search ‘in vain for the public purpose’ this litigation has served.”22 Other plaintiffs in the circuit have been denied fees subject to Farrar reasoning where the litigation, like “[t]he vast majority of civil rights litigation[,] does not result in ground-breaking conclusions of law.”23 Yet there seems to be little consensus on how to determine when new ground has actually been broken.

The implementation of the Farrar standard becomes more complex at the state level, where state courts have been asked to rule on the applicability of Farrar to state and local civil rights laws.24 Many state and local civil rights laws were enacted in response to the curtailment of individual rights of action at the federal level, or in response to the omission of particular protected

20. Id. at 122.
22. Id. (quoting Farrar, 506 U.S. at 122 (O’Connor, J., concurring)).
classes in federal laws. Yet because most of them are patterned after corollary federal statutes, courts are inclined to interpret the local and state laws in pari materia with their federal counterparts. The question of whether to adopt the Farrar standard for those laws therefore presses on some of the most difficult issues of statutory interpretation and federal-state relations.

II. THE MCGRATH LITIGATION

In December 2000, Donna McGrath, Tanya Medina, and Tara Lopez—all preoperative transsexuals—were harassed while shopping in a Brooklyn Toys “R” Us. They filed a claim with the New York City Commission on Human Rights, and Toys “R” Us offered them 100 “Geoffrey Dollars”—coupons for use in the store—to settle the case. McGrath and her friends filed a diversity suit in federal district court under NYCHRL, contending that Toys “R” Us’s employees had violated the statute by discriminating against the three women in public accommodation. The jury found for the three plaintiffs, but awarded them only nominal damages—one dollar each.

McGrath petitioned for the award of attorney’s fees and was awarded nearly $200,000 for her lawyers by the District Court. In making this award, the court adopted the Supreme Court’s reasoning in Farrar that “the most important factor in determining the reasonableness of a fee is the degree of success obtained.” However, it also noted that there is “no rule that an award of nominal damages will never support a fee award.” Indeed, it noted that “[t]his case is one of those unusual and infrequent instances in which attorneys fees should be awarded.”

Toys “R” Us appealed the award to the United States Court of Appeals for the Second Circuit, contending that the fee award was unreasonable “given that the jury awarded each plaintiff only $1 in nominal damages.” Because the Second Circuit was sitting in diversity and there were “ambiguities in New York law regarding the standards applicable to determining a reasonable fee

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26. See infra note 48 and accompanying text.
32. Id. at *4.
33. Id. at *5-6.
34. Id. at *6.
award’ under the attorney’s fee provision of NYCHRL in a case of nominal
damages, it certified a series of questions to the New York State Court of
Appeals, namely the procedures for awarding attorneys’ fees in “partial
victory” cases. The federal Court of Appeals asked the state Court of Appeals
(1) whether New York applies the *Farrar* standard to NYCHRL; (2) whether, if
the *Farrar* standard applies, the attorney’s fee provision authorizes a fee award
to a prevailing plaintiff “who receives only nominal damages but whose lawsuit
served a significant public purpose”; and (3) whether the particular outcome in
the *McGrath* case—“the first . . . favorable jury verdict on a claim of unlawful
discrimination against transsexuals in public accommodation . . . even though
the law’s prohibition of discrimination against transsexuals in employment . . .
has previously been recognized”—constituted such a significant public
purpose. The Court of Appeals answered all three questions in the
affirmative.

In answering the first and second questions, determining the applicability of
*Farrar* to the New York City Human Rights Law, the state court noted that
“[w]here our state and local civil rights statutes are substantively and textually
similar to their federal counterparts, our Court has generally interpreted them
consistently with federal precedent.” Noting that “the City Counsel [sic] adopted
a fee provision that appears to have been modeled after the federal
statutes interpreted in *Farrar,*” the court concluded that the *Farrar* standard is
applicable to attorney’s fee claims under NYCHRL.

This analysis flies in the face of the Law’s legislative history, which
provides significant evidence that the City Council intended the Human Rights
Law to be construed broadly. As the Anti-Discrimination Center of Metro New
York noted in its amicus brief to the state Court of Appeals,

A principal goal of both the City Council and the Mayor in enacting the 1991
amendments [to the City Human Rights Law] was to steer a course more protective
of civil rights than was being followed on either the state or federal level, an
intention manifest from the legislative history of the 1991 amendments: “[T]he
‘legislative history’ of the NYCHRL makes clear that it is to be even more liberally
construed than the federal and state anti-discrimination laws.”

36. *Id.* at 247-48.
37. Pursuant to the *Erie* doctrine, federal courts sitting in diversity must apply relevant underlying
state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Second Circuit’s local rules permit the
court to “certify to the highest court of a state an unsettled and significant question of state law that will
control the outcome of a case pending before this Court.” 2d Cir. R. 0.27. The New York Court of
Appeals permits such certification from federal courts and courts of last resort. N.Y. Ct. App. R. 500.17(a).
38. *McGrath*, 356 F.3d at 254. The Court of Appeals certified a fourth question as well, which
quickly became moot: “If the *Farrar* standard does not apply, what standard should a court use to
determine what constitutes a reasonable fee award for a prevailing party who has received only nominal
damages?” *Id.*
40. *Id.* at 526.
41. Brief and Legislative Materials Appendix of Amici Curiae Anti-Discrimination Center of Metro
As amici suggested, a reading of the Law consistent with the City Council's intent demanded a rejection of the narrow \textit{Farrar} standard, because such a reading would unduly limit the availability of attorney's fees and thereby hamper efforts to enforce the Law in court. The court rejected amici's broad reading of the legislative history, noting only that the legislative history included "many general statements . . . indicating that the private right of action provision, adopted to keep the City at the forefront of human rights protection, should be liberally construed."\textsuperscript{42} With respect to attorney's fee provisions, "no distinct standard . . . is described, nor is there any criticism of the federal approach to such awards."\textsuperscript{43} Rejecting a broad general intent expressed by the legislature in favor of a canon of statutory interpretation that favors narrow reading in the absence of clear, specific legislative intent, the Court of Appeals rejected amici's argument that the \textit{Farrar} standard was antithetical to the aims of the City Council and the Human Rights Law.

But this reasoning is arguably anachronistic. Plaintiffs and amici argued that, because the Law was amended in 1991 and \textit{Farrar} decided in 1992, the City Council could not have intended to apply the \textit{Farrar} standard. Rather, it would have applied the prevailing federal law at the time, the Second Circuit's decision in \textit{Ruggiero v. Krzeminski}\.\textsuperscript{44} In \textit{Ruggiero}, the Second Circuit affirmed its liberal standard for determining the availability of attorney's fees, holding that a jury verdict in plaintiffs' favor was sufficient to "change[] the legal relationship' between the Ruggieros and the Officers in that a violation of rights had been found,"\textsuperscript{45} thus qualifying plaintiffs for a fee award regardless of whether damages awarded were nominal or substantial. Had the City Council sought to import any federal legal standard as its model for interpretation of the Human Rights Law, it would have been \textit{Ruggiero}'s, as amici noted:

\begin{quote}
  The idea that, at the same time that the New York City Council was expanding its Human Rights Law in numerous profound respects, it would have been contemplating as a model the more restrictive Fifth Circuit view (the Circuit from which \textit{Farrar} arose) over a less restrictive Second Circuit view is, to put it mildly, highly implausible.
\end{quote}

The state Court of Appeals dispatched with this argument by noting that the "City Council has not hesitated in other circumstances to amend the New York City Human Rights Law to clarify its disagreement with evolving Supreme Court precedent."\textsuperscript{47} Given that twelve years separated \textit{Farrar} and \textit{McGrath}, the

\begin{footnotes}
42. \textit{McGrath}, 821 N.E. 2d at 524.
43. \textit{Id.} at 525.
44. 928 F.2d 558 (2d Cir. 1991).
45. \textit{Id.} at 564.
47. \textit{McGrath}, 821 N.E.2d at 525.
\end{footnotes}
McGrath v. Toys "R" Us, Inc.

City Council had ample time to repudiate the Farrar standard and adopt its own, or command reliance on another case, like Ruggiero.

This last point seems to have been determinative in the court's decision to adopt the Farrar standard. Most evidence suggests that the New York City Council sought to differentiate its human rights statute from federal civil rights law, sweeping more classes within its ambit and strengthening the rights of action and remedies. Yet the state Court of Appeals regarded itself as bound by traditional canons of statutory interpretation to import federal standards to structurally analogous statutes, for the sake of consistency and administrative clarity.48

In responding to the Second Circuit's third certified question, the Court of Appeals tempered the ostensibly bright-line rule they established by approving the Farrar standard. Having endorsed a strict reading of the Human Rights Law as a matter of statutory interpretation, the state Court of Appeals then took a split-the-difference approach in its interpretation of the "significant public purpose" exception, adopting a "groundbreaking,"49 liberal conception of the doctrine. At the time of the McGrath trial, the applicability of the Human Rights Law to transsexuals was uncertain, yet there was strong evidence that the Law protected members of that class. Because some lower courts had determined that NYCHRL protected transsexuals from employment discrimination,50 and the Law had since been amended explicitly to include transsexuality within the range of classes protected by the statute,51 the defendants argued that "this litigation was not significant."52

But the Court brushed these facts aside in favor of a broad reading of the public purpose exception. The Court sided with the plaintiffs on this matter, noting that "[a]s was apparent to the City Council, the fact that a handful of lower courts had interpreted the statute broadly did not put to rest the scope of

48. The canon of in pari materia counsels courts to interpret consistently those statutes that use similar language or are modeled on other statutes. See WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION 1039-53 (3d ed. 2001). The Court of Appeals specifically adverts to this rule when it states, "[w]here our state and local civil rights statutes are substantively and textually similar to their federal counterparts, our Court has generally interpreted them consistently with federal precedent." McGrath, 821 N.E.2d at 522.


50. See McGrath, 821 N.E.2d at 519.

51. The Code, which prohibits discrimination on the basis of gender, now provides: "The term 'gender' shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth." NEW YORK CITY ADMIN. CODE ch. 1, tit. 8, § 8-102(23) (2002).

52. McGrath, 821 N.E.2d at 519. Two dissenting judges on the Court of Appeals agreed with defendants on this point. While he approved the application of the Farrar standard to the NYCHRL, dissenting Judge Read noted, "plaintiffs failed to accomplish any important public goal as private attorneys general by litigating a civil rights issue that had already been resolved in favor of transsexuals by the courts." Id. at 529-30 (Read, J., dissenting in part).
Ascribing great importance to the expressive function of jury verdicts and the public education function central to civil rights statutes, the court adopted a commodious understanding of “significant public purpose”:

In this case, the District Court reasoned that the verdict was significant and performed a public purpose because it involved a series of “firsts”—e.g., it was the first public accommodation case that went to verdict under the New York City Human Rights Law, and was the first judgment in favor of transsexuals. We cannot conclude that a judgment in favor of a historically unrecognized group can never serve an important public purpose; a groundbreaking verdict can educate the public concerning substantive rights and increase awareness as to the plight of a disadvantaged class. Particularly in the civil rights arena, a jury verdict can communicate community condemnation of unlawful discrimination. It is therefore reasonable for a court to consider whether the verdict served this function in determining the significance of the relief obtained, although this is neither the only factor that may be considered nor will it necessarily be determinative.54

This understanding of “significant public purpose” affords courts almost limitless ability to apply Justice O’Connor’s *Farrar* exception to civil rights cases. If the judgment in any way sensitizes the public to the “plight of a disadvantaged class,” it has served a public purpose. Indeed because, prior to the jury’s verdict in *McGrath*, “many city residents might have been unaware . . . that discrimination against transsexuals was prohibited,”55 the case served a significant public purpose. Similar arguments can be marshaled for a large set of civil rights violations.

What, then, is the upshot of the New York Court of Appeals’ decision to adopt both the conservative *Farrar* standard and a capacious understanding of its traditionally narrow public purpose exception? The logic lies in the court’s understanding of the educational and behavior modification functions played by civil rights statutes. Paradoxically, the *Farrar* standard might afford courts the opportunity to advance civil rights litigation even farther than more liberal standards for the award of attorney’s fees. Under the *Ruggiero* standard, for example, a jury verdict is prima facie evidence of a party having prevailed in litigation. There is no opportunity for a court to note explicitly the significant public purpose served by the litigation, or to articulate its understanding of the meaning of the jury verdict or other outcome. Under the *Farrar* standard, particularly as it is embraced by the New York Court of Appeals, courts are afforded a unique opportunity to underscore the political importance of certain court judgments and, in doing so, consecrate the cases as having particular educative or expressive implications.

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53. *Id.* at 527.
54. *Id.*
55. *Id.*
CONCLUSION

Amidst attacks on the capacity of civil rights attorneys to bring lawsuits and the federal retrenchment of civil rights laws, states and localities are jealously (and appropriately) guarding their right to guarantee expansive protection to minorities. While attorney's fees are only one small component of the full array of antidiscrimination tools available to advocates and activists, they play an important strategic and symbolic role in guaranteeing the rights of disadvantaged groups.

McGrath is significant not simply because it substantially alters the terrain of civil rights litigation in New York, but also because it portends the coming of a great battle in civil rights litigation more broadly. As cities and states attempt to stanch the tide of the federal retreat from civil rights protections by passing their own statutes, they must be attentive not only to the substance of the statutes, but also to how they are likely to be interpreted by courts. McGrath counsels careful attention on the part of legislators to the prevailing modes of statutory interpretation in a given jurisdiction and to the manifold ways in which legislation can provide its own interpretive guidelines.
