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Municipal Lawyer

A publication of the Municipal Law Section of the New York State Bar Association, produced in cooperation with Touro Law Center

Message from the Chair

Join a Section committee!

Why? Because committees are where the action is. Because committees provide you with opportunities to connect with other attorneys in the same practice area. Because committees help hone your practice skills. And because committees, through their reports, articles, and CLE presentations, offer you the chance to get your name out there and advance the profession.

Last year, the Section restructured its committees. This year we are actively recruiting committee members and leaders.

Here are our committees, with the names and contact information of their chairs:

- The *Employment Relations Committee* addresses such matters as collective bargaining issues, employment and personnel policies, and civil service.

  Chair: Sharon N. Berlin, Lamb & Barnosky, Melville, snb@lambbarnosky.com.

- The *Ethics and Professionalism Committee* addresses issues such as statutory conflicts of interest, gifts to public officials, local ethics codes and boards of ethics, appearances of impropriety, lobbying acts, and Rules of Professional Conduct specific to municipal attorneys and practice.

  Co-Chairs: Steven G. Leventhal, Leventhal, Cursio, Mullaney & Sliney, LLP, Roslyn, sleventhal@lcmslaw.com.

  Mark Davies, New York City Conflicts of Interest Board, davies@coib.nyc.gov.

- The *Finance Committee* addresses matters relating to the finances of the Section.

Inside

From the Editors 3
(Sarah Adams-Schoen and Rodger D. Citron)

Land Use Law Update: New York's New Climate Change Resiliency Law 4
(Sarah J. Adams-Schoen)

Sustaining Sustainability: The Enforcement of Land Use Regulations and the Trend Toward Post-Occupancy Enforcement 7
(Drew Gamils)

Is Preparation Part of the Task? The Court of Appeals Answers "Yes" in *Wittorf v. City of New York* 11
(Lisa M. Cobb)

Are Transgender and Other Gender Nonconforming Persons Accorded Statutory Protection From Discrimination? 13
(Karen M. Richards)

Floyd v. City of New York: When the Stop-and-Frisk Case Became the Judicial Reassignment Case 24
(Paige Bartholomew)

The New York Environmental Enforcement Update: 2013 Annual Report 32
(Michael J. Lesser)

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Chair (Section Treasurer and First Vice-Chair): Carol L. Van Scoyoc, White Plains Corp. Counsel's Office, cvanscoyoc@whiteplainsny.gov.

- The *Land Use, Green Development and Environmental Committee* addresses such matters as SEQRA, zoning and planning, federal clean air/clean water acts, and RLUIPA. The Committee also examines ways municipalities can encourage, through legislation or incentives, sustainable design of structures, increased energy efficiency, and reduced impact on scarce resources.

  Co-Chairs: Lisa M. Cobb, Stenger, Roberts, Davis & Diamond, LLP, Wappingers Falls, lcobb@srddlaw.com.

  Daniel A. Spitzer, Hodgson Russ LLP, Buffalo, dspitzer@hodgsonruss.com.

- The *Law Student Committee* works to incorporate law students into the work of the Section and to address their needs, including employment needs, in the municipal context.

  Chair: Amber Marie Gonzalez, New York City Conflicts of Interest Board, Gonzalez@coib.nyc.gov.

  Student Co-Chair: Heidi Kolence, Touro College Jacob D. Fuchsberg Law Center, Heidi-Kolence@tourolaw.edu.

- The *Legislation Committee* is primarily designed to keep Section members aware of developments in legislation affecting municipal practice.

  Chair: A. Joseph Scott, III, Hodgson Russ LLP, Albany, ascott@hodgsonruss.com.

- The *Liability and Insurance Committee* addresses representation of parties in personal injury litigation involving municipalities.

  Chair: Michael E. Kenneally, Jr., New York State Municipal Workers' Compensation Alliance, Albany, mkenneally@nycompalliance.org.

- The *Membership and Diversity Committee* works to develop the Section's membership, strengthen its diversity, and evaluate and improve the Section's services to its members.

  Co-Chairs: Nichelle A. Johnson, City of Mount Vernon, njohnson@cmvny.com.

  A. Thomas Levin, Meyer, Suozzi, English & Klein, P.C., Garden City, ATLevin@msek.com.

- The *Municipal Counsel Committee* is aimed at Section members who are attorneys for municipal entities or serve in a similar capacity either in house or in private practice. This committee addresses issues such as advising local boards, drafting local laws, procurement, and open meetings and FOIL.

  Co-Chairs: E. Thomas Jones, Town of Amherst, etjlaw@roadrunner.com.

  Jeannette Koster, Town of Yorktown, jkoster@yorktownny.org.

  Carol L. Van Scoyoc, White Plains Corp. Counsel's Office, cvanscoyoc@whiteplainsny.gov.

- The *State and Federal Constitutional Law Committee* is primarily designed to keep Section members abreast of developments in State and federal constitutional law. Public officials frequently deal with issues arising out of the First Amendment (employee speech, prayers/invocations at board meetings, holiday displays), Equal Protection Clause, and Due Process Clause (use of public facilities/changing benefits/salary). The committee also addresses issues arising under the New York State Constitution, such as separation of powers, home rule, and the like.

  Chair: Adam L. Wekstein, Hocherman Tortorella & Wekstein, LLP, White Plains, a.wekstein@htwlegal.com.

- The *Taxation, Finance and Economic Development Committee* addresses issues such as real property taxation, real property assessments and grievances, exemptions, and tax cap.

  Co-Chairs: Kenneth W. Bond, Squire Sanders, New York City, kenneth.bond@squiresanders.com.

  Michael E. Kenneally, Jr., New York State Municipal Workers' Compensation Alliance, Albany, mkenneally@nycompalliance.org.

Municipal law covers an astonishingly broad range of subjects—from land use law to environmental, civil rights, labor, constitutional, criminal, and administrative law; litigation of all sorts; matters of finance, taxation, health, ethics, insurance, and economic development—all at the federal, state, and local levels. In fact, municipal lawyers practice just about every type of law that exists.

Our committees seek to provide our members with opportunities to delve into each of those areas. If you don't see your area of municipal practice covered, then let us know and help us expand one of our existing committees or set up a new one. If you'd like to co-chair a committee, let us know. But in any event, join a committee. Like the old ad slogan goes, "You'll be glad that you did."

Mark Davies

From the Editors

As with any area of law, municipal law encompasses matters from the mundane to the exciting, and anywhere in between. The articles in this issue of *Municipal Lawyer* showcase the splashier side of municipal practice—the sizzle, if you will, to go along with the steak. A number of this issue's contributing authors delve into topics that have received media attention and continue to spark heated debate.

Considering Climate Week in New York City, the Environmental Protection Agency's new rules for curbing emissions from existing power plants, and the recent United Nations Climate Summit, the question of how we should respond to climate change continues to be—no pun intended—a hot topic at all levels of government. Two articles in this issue address the municipal role in climate change adaptation and mitigation.

The Land Use Law Update by **Sarah Adams-Schoen** discusses New York's newly enacted Community Risk and Resiliency Act, which, among other things, requires state agencies to work together to create model local laws and provide technical support to local governments to help make New York communities more resilient to climate-related risks.

Of course, local laws are effective only if they are enforced—an often-overlooked point that **Drew Gamils** explores in her article, "Sustaining Sustainability: The Enforcement of Land Use Regulations and the Trend Toward Post-Occupancy Enforcement." Drew examines the need for post-occupancy enforcement of green building and infrastructure laws, providing examples from throughout New York.

Moving beyond environmental law, **Lisa Cobb** updates readers on the New York Court of Appeals' decision in *Wittorf v. City of New York*. Admittedly *Wittorf* is more steak than sizzle. The Court of Appeals held the City liable for a bicyclist's injuries that were caused by a pothole the City was about to repair. Rejecting the City's argument that it was engaged in traffic control, a governmental function for which it would be immune, and reversing the First Department, the Court held that the City was engaged in road repair, a proprietary activity that subjected it to liability. Lisa concludes with some guidance on how to evaluate the factors considered by the Court in determining whether, in a particular case, a municipality is performing a governmental action or engaged in proprietary activity.

Frequent *Municipal Lawyer* contributor **Karen Richards**, provides an overview of statutory protections against discrimination for transgender and other gender nonconforming individuals under Title VII, Title IX, and the New York State Human Rights Law. In addition to identifying both coverage and gaps in the law, Karen provides a useful glossary of terms for readers unfamiliar with the issues facing gender nonconforming individuals. Ultimately, Karen asks whether, "as a greater understanding of the serious issues faced by transgender and other gender nonconforming people is developed, amendments will be enacted to expressly include this population under the protection of federal and state statutes."

Paige Bartholomew examines one of the most newsworthy decisions by the United States Court of Appeals for the Second Circuit last year in the litigation over the New York City Police Department's "stop-and-frisk" tactics. As readers may recall, the Second Circuit removed the trial court judge in the case because it concluded that the appearance of impartiality surrounding the litigation had been compromised. Paige's article provides a comprehensive account of the Second Circuit's decision. What may have been most notable about the case, she observes, is that the court of appeals issued its order *sua sponte*, without having been asked to remove the trial court judge.

Finally, **Michael Lesser** provides readers with a short summary of the 2013 edition of his e-book on environmental enforcement, which compiles New York State environmental enforcement information from disparate statewide sources to assist government attorneys, policy makers, regulators, defense counsel and the public in evaluating the impact and effectiveness of environmental enforcement. The e-book is published by the NYSBA Environmental Law Section (ELS) and can be downloaded from the ELS website.

Sarah Adams-Schoen and Rodger Citron

Land Use Law Update: New York's New Climate Change Resiliency Law

By Sarah J. Adams-Schoen

New York State's lawmakers passed 2,603 bills over the course of the 2013-14 session, 658 of which passed both houses.[1] Although counties and local governments are likely focusing their attention on budget-related items such as the property tax freeze/rebate program, local governments—and zoning and planning officials and practitioners in particular—should also take note of the newly enacted Community Risk and Resiliency Act (CRRA).[2]

Governor Andrew Cuomo signed the CRRA into law on September 22, 2014, in conjunction with Climate Week 2014 in New York City, proclaiming that "New York State will not allow the national paralysis over climate change to stop us from pursuing the necessary path for the future."[3] The Governor described the Act as "a comprehensive package of actions that help strengthen and reimagine our infrastructure with the next storm in mind." The legislation implements some of the recommendations made by the NYS 2100 Commission, established following Superstorm Sandy.[4]

The CRRA amends the Environmental Conservation Law, Agriculture and Markets Law, and Public Health Law.[5] The Act requires New York State agencies to consider sea level rise and some other future physical climate risks in certain permitting, funding and regulatory decisions, including smart growth assessments; siting of wastewater treatment plants and hazardous waste transportation, storage and disposal facilities; design and construction regulations for petroleum and chemical bulk storage facilities and oil and gas drilling permits; and the designation of properties listed in the state's Open Space Plan.[6] The Act also requires the New York Department of Environmental Conservation (DEC) to adopt sea level rise projections by January 1, 2016, and to update those projections every five years.[7]

Of particular note to municipal officials and lawyers, as well as land use scholars and practitioners, the Act also:

(1) Requires the DEC and New York Department of State (DOS) to work together to prepare model local zoning laws to help communities incorporate measures related to physical climate risks into their local laws, and to provide guidance on the implementation of the Act, including the use of resiliency measures that utilize natural resources and natural processes to reduce risk.[8]

(2) Provides funding, subject to appropriation, to municipalities for local waterfront revitalization planning projects that mitigate future climate risks. Projects may include preparation of new local laws, plans, and studies, and construction projects.[9]

(3) Allows the imposition of contractual requirements and conditions upon any municipality that receives state assistance payments for waterfront revitalization pursuant to ECL section 54-1101 "to ensure that a public benefit shall accrue from the use of such funds by the municipality including but not limited to, a demonstration that future physical climate risk due to sea level rise, and/or storm surges and/or flooding, based on available data predicting the likelihood of future extreme weather events, including hazard risk analysis data if applicable, has been considered."[10]

(4) Provides funding on a competitive basis, subject to appropriation, to municipalities or not-for-profits toward the cost of coastal rehabilitation projects that consider future climate risks.[11]

(5) Allows the Commissioner of the Office of Parks, Recreation and Historic Preservation to enter into maintenance and operation agreements for open space land conservation projects in urban areas or metropolitan park projects with municipalities, not-for-profits, and unincorporated associations, if the project demonstrates consideration of climate-change related risks.[12]

According to Governor Cuomo, the law responds to the significant risks New Yorkers face from increases in both sea level (approximately 13 inches since 1900 along New York's coast) and the proportion of total precipitation that arrives in heavy rainfall events.[13] Indeed, the International Panel on Climate Change's (IPCC) most recent assessment report (AR5) warns that climate-related weather extremes pose extreme risks to human health and well-being, including: "alteration of ecosystems, disruption of food production and water supply, damage to infrastructure and settlements, [and] morbidity and mortality."[14]

Significantly for municipalities throughout New York, the IPCC warns that these risks are exacerbated by "a significant lack of preparedness."[15] Although municipal governments have taken more action to protect against climate-related risks than the federal government or state governments, U.S. municipalities nevertheless lag behind their counterparts throughout the world.

According to a survey administered in 2011, the United States has the lowest percentage of cities pursuing adaptation planning out of all regions surveyed (59%), while Latin American and Canadian cities have the highest (95% and 92% respectively).[16]

Moreover, not only are many localities unprepared for climate-related risks, many land-use planning and zoning practices are actually *increasing* local vulnerability.[17] Thus, it is of critical importance that "city and municipal governments act[] now to incorporate climate change adaptation into their development plans and policies and infrastructure investments."[18]

However, adjusting land-use regulations and taking other local actions to build resilience requires technical expertise and resources that many localities lack. Local governments throughout the United States need more state (and federal) support for climate-related risk adaptation and mitigation planning and implementation. Nearly all U.S. cities report that securing funding for adaptation is a challenge (95%) and only 6% of U.S. cities report that the federal government fully understands the realities they face with respect to adaptation.[19] Here in New York, a number of NY Rising communities recently identified the need for just this kind of technical assistance in their Community Reconstruction Plans.[20]

New York's new law is the first state climate change law in the nation to require state agencies to collaborate on the development of model codes, and one of only a small handful of state laws that require the compilation and analysis of state-specific climate data.[21] Hopefully, the Community Risk and Resiliency Act is a major step in the direction of providing the support to localities that they need to prepare for and mitigate climate-related risks.

Endnotes

1. *See* New York State Association of Counties, 2014 New York State Legislative Session Summary: The Impact on New York's Counties (tentative) 4 (July 7, 2014), *available at* http://nysac.org/legislative-action/documents/NYSAC2014NYSLegSessionSummary-final-7-3-14.pdf.
2. Community Risk and Resiliency Act, 2014 N.Y. Laws ch. 335. The Act becomes effective on March 21, 2015, and applies to all applications and permits received after the adoption of guidance on the implementation of the Act but no later than January 1, 2017. *Id.* § 19. The text of the bill (Assembly Bill 06558/Senate Bill 06617-B) is available at http://assembly.state.ny.us/leg/?default_fld=&bn=A06558&term=2013&Summary=Y. The Act was approved in both houses by wide margins, and had support from a diverse group of stakeholders including: The Nature Conservancy in New York, The New York League of Conservation Voters, The Business Council of New York State, the General Contractors Association, The Reinsurance Association of America, The American Institute of Architects New York State, The Municipal Arts Society of New York, Audubon New York, Natural Resources Defense Council, Environmental Advocates of New York, and The Adirondack Council. *See* LegiScan, Votes: NY S6617 | 2013-2014 | NY General Assembly, http://legiscan.com/NY/votes/S06617/2013 (last visited Oct. 25, 2014); LegiScan, Bill Sponsors: NY S6617 | 2013-2014 | NY General Assembly, http://legiscan.com/NY/sponsors/S06617/2013 (last visited Oct. 25, 2014).

   On a related note, the Governor also signed into law this session Senate Bill 06959, which extended the deadline for eligible municipalities to exercise the provisions of the Superstorm Sandy Assessment Relief Act, and Senate Bill 03702, which provides a process for rebating property taxes on residential property seriously damaged by Superstorm Sandy in cities of one million or more.
3. State of N.Y., Exec. Chamber Proclamation (Sept. 21, 2014), *available at* http://www.governor.ny.gov/sites/default/files/documents/ClimateWeek2014.pdf. The Governor also proclaimed the week of September 22-28, 2014 "Climate Week." *Id.*
4. *See generally* N.Y. State, Governor Andrew M. Cuomo, NYS 2100 Commission, http://www.governor.ny.gov/NYS2100Commission (last visited Oct. 24, 2014).
5. Community Risk and Resiliency Act, 2014 N.Y. Laws ch. 335.
6. *Id.* §§ 2-5, 9, 14, 14a, 15. For the most part, the physical climate risks addressed by CRRA are limited to sea level rise, storm surges and flooding. Consequently, although CRRA applies to both coastal and inland flood-prone areas, CRRA does not require consideration of climate-change related risks unrelated to flooding such as heat waves, wildfires, and drought.
7. *Id.* § 17.
8. *Id.* § 14 ("The department of state, in cooperation with the department of environmental conservation, shall prepare model local laws that include consideration of future physical climate risk due to sea level rise, and/or storm surges and/or flooding, based on available data predicting the likelihood of future extreme weather events including hazard risk analysis and shall make such laws available to municipalities."); *id.* § 16 (requiring DEC, in consultation with DOS to prepare implementation guidance and develop guidance on "the use of resiliency measures that utilize natural resources and natural processes to reduce risk"). CRRA does not mandate a deadline for the model laws, and municipalities are not required to adopt them.
9. *Id.* § 10.
10. *Id.*
11. *Id.* § 11.
12. *Id.* §§ 6, 7. The Act also applies to the Commissioner of Agriculture and Markets evaluation of applications for state funding for local farmland protection programs, *id.* § 12, the Commissioner of Health's evaluation of applications for state funding for drinking water projects, *id.* § 13, and DEC's consideration of applications for certain "major projects," including applications for permits under the following programs: protection of waters; sewerage service for realty subdivisions; liquefied natural and petroleum gas; mined land reclamation; freshwater wetlands; tidal wetlands; and coastal erosion hazard areas, *id.* § 15. Note, however, that some of DEC's largest programs are not included in the list of covered programs, including water supply and water transport; wild, scenic and recreational rivers; water quality certifications; State Pollutant Discharge Elimination System; air pollution; and solid and hazardous waste collection, treatment, and disposal. *See* Michael B. Gerrard, *New Statute Requires State Agencies to Consider Climate Risks*, N.Y.L.J., Nov. 13, 2014, p. 1.
13. Press Release, *Governor Cuomo Signs Community Risk and Resiliency Act* (Sept. 22, 2014), *available at* http://www.governor.ny.gov/press/09222014-resiliencyact.
14. IPCC, *Summary for Policymakers*, *in* Climate Change 2014: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the International Panel on Climate Change 6 (Christopher B. Field et al. eds. 2014) (footnote omitted), *available at* http://www.ipcc.ch/report/ar5/wg2/.
15. *Id.*

16. JoAnn Carmin et al., Progress and Challenges in Urban Climate Adaptation Planning: Results of a Global Survey 14 (2012), *available at* http://www.icleiusa.org/action-center/learn-from-others/progress-and-challenges-in-urban-climate-adaptation-planning-results-of-a-global-survey. The United States also has the lowest percentage of cities that have completed an assessment of their vulnerabilities and risks (13%). *Id.* at 10.

17. *See* Press Release, *supra* n. 13 ("climate changes, coupled with land-use planning, zoning and investment that allow and sometimes encourage development in at-risk areas, have resulted in more people, businesses and public infrastructure existing in vulnerable areas").

18. IPCC, Climate Change 2014: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the International Panel on Climate Change, ch. 8 at 6 (2014), *available at* http://www.ipcc.ch/report/ar5/wg2/.

19. Carmin et al., *supra* n. 16, at 24; *see also* Don Knapp, *Survey: U.S. Cities Report Increase in Climate Change Impacts, Lag Global Cities in Planning*, on Sustainable Cities & Counties Blog, http://www.icleiusa.org/blog/survey_us_cities_report_increase_in_climate_impacts_lag_in_adaptation_planningworldwide-progress-on-urban-climate-adaptation-planning (last visited Aug. 16, 2014).

20. *See* NY Rising Community Reconstruction Program, Community Reconstruction Plans, *available at* http://stormrecovery.ny.gov/nyrcr/final-plans (last visited Oct. 27, 2014).

21. *See, e.g.,* Alaska Department of Environmental Conservation, Alaska's Climate Change Strategy: Addressing Impacts in Alaska Executive Summary 2-2 (revised Jan. 2010), http://www.climatechange.alaska.gov/aag/docs/aag_ES_27Jan10.pdf (referencing various projections made by the Alaska Climate Research Center); *id.* at 4-10, 11, 12, 13 (recommending creation of coordinated, accessible statewide system for key data collection, analysis, and monitoring); Colorado Climate Action Plan 27 (Nov. 2007), *available at* http://www.colorado.gov/governor/images/nee/CO_Climate_Action_Plan.pdf (stating intent to work with federal and state agencies and water users to establish and maintain clearinghouse of updated climate projection data).

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Sustaining Sustainability: The Enforcement of Land Use Regulations and the Trend Toward Post-Occupancy Enforcement

By Drew Gamils

It is critical that municipalities adopt and enforce land use regulations to protect natural resources, create green buildings and infrastructure, and promote community resiliency. Today, many new regulations promote sustainable development, land and water conservation, and stormwater management. In New York, recent flooding caused by stormwater runoff from major storms is a primary concern in emerging land use regulations and has increased municipal adoption of green infrastructure laws requiring, for example, pervious surfaces, on-site retention, and enhanced vegetation. Local code enforcement officers ensure that these new standards are met at the point of occupancy of residential and commercial buildings, but these standards create a new challenge: how to ensure that these green infrastructure components remain functional over time. The same can be said for a number of other green building requirements coming into vogue, including water-conserving indoor fixtures and appliances and energy-conserving features both inside and outside new and retrofitted buildings. There is a noticeable national trend toward post-occupancy inspections and enforcement, which is the subject of this article.

I. Land Use Enforcement and Environmental Protection

In New York, local governmental land use bodies impose a number of conditions on land development projects to protect the environment. This is particularly true with conditions imposed under the State Environmental Quality Review Act (SEQRA). Under SEQRA, an environmental impact assessment is required for the majority of projects and activities proposed by a state agency or local government to mitigate the project's adverse impacts on natural resources. In addition, local governments that have adopted a number of their own environmental laws to protect slopes, wetlands, stream beds, and other resources also impose conditions on project approvals to enforce the standards in those laws. Typically, these conditions are noted in the planning board's approval of a special use permit, subdivision, or site plan application.

Pre-occupancy compliance with conditions imposed on developers to mitigate adverse environmental impacts, or ensure compliance with local environmental laws, is fairly well assured. Building permits may not be issued until the responsible local official certifies that the developer has obtained all required land use approvals, and Certificates of Occupancy may not be issued until the developer has complied with any conditions imposed by the planning board in its approval resolution that relate to the construction of the project. These are powerful enforcement weapons and suffice, in most cases, to ensure that the conditions imposed are met at the point of construction and occupancy.

Increasingly, for the reasons noted above, environmentalists, planners, and lawyers have become interested in post-occupancy enforcement. As green building laws proliferate, professionals have noted that the environmental gains of these new standards can be lost if, over-time, building owners and occupants do not maintain pre-occupancy conditions. Pervious surfaces can become clogged, green roofs neglected, on site vegetation die out, and water and energy conservation fixtures removed and replaced. Slowly, in various parts of the nation, techniques are emerging to accommodate the need for the maintenance of green features and fixtures now required by law.

A. Stormwater Management as an Example

Stormwater is water that runs off the land's surface as a result of rain or melting snow or ice. Naturally occurring surface runoff is a valuable ecosystem function, and over centuries has played a large part in shaping the landscape. Land development, however—particularly impervious surfaces, such as buildings, roads, and parking areas—can prevent stormwater from infiltrating the soil. This development increases the volume and velocity of runoff, causing flooding, and interferes with the natural processing of nutrients, sediments, and other contaminants.

Stormwater management has been described as "the process of controlling and cleansing excess runoff so it does not harm natural resources or human health."[1] The inclusion of stormwater management plans as part of the site plan and subdivision review process is within the broad authority granted to municipalities in many states.[2] States have authorized local governments to enact stormwater programs and ordinances through comprehensive plans, zoning ordinances, and subdivision and site plan regulations. Some states have set up grant programs to aid local governments in stormwater management. In addition, some municipalities have created utility systems to fund stormwater programs.

In New York, stormwater management provides a good example of a critically important green development strategy that requires proper enforcement of locally adopted regulations and practices. Stormwater management encompasses the need for flood control, erosion and sediment control, water quality management, and groundwater replenishment. It has also given birth to a movement toward green infrastructure

including a large number of techniques that are capable of ensuring zero net increase in runoff after construction. EPA is particularly keen on using green infrastructure techniques to manage stormwater as a method of guiding and encouraging communities to comply with Phases I and II of its stormwater management regulations. For this purpose, land use laws and building codes are reformed to ensure that buildings have downspouts connected to drainage or retention facilities; are equipped with rainwater harvesting devices; and that sites are required to use permeable pavement, green parking, bioswales, planter boxes, and rain gardens. Site plan and subdivision regulations are amended to include a variety of low-impact development features, the most ambitious of which attempt to retain pre-development hydrological conditions on the site.

B. Post-Occupancy Enforcement

It is obvious that many of the construction features that manage stormwater must be maintained over time for their benefits to be realized. To demonstrate how the benefits of green development features are being preserved in various contexts nation-wide, this article examines a variety of post-occupancy inspection and enforcement techniques.

1. Require Post-Occupancy Documentation

Municipalities may require an applicant, performing new construction, to submit a document at several phases of construction and at various post-occupancy intervals to show the project is operating as planned. The specific intervals are for the municipality to decide, but some communities require post-occupancy documentation one year and five years after completion (such as in the example below). Others require documentation at 18 months and 24 months after completion, as recommended by the International Green Construction Code (IgCC).

Under Greenburgh, New York's Green Building Initiative and Energy Construction Standards, applicants of relevant projects must submit documentation showing compliance with standards at several phases in the development process. Pre-permitting responsibilities include submitting checklists, worksheets, and other documentation that may be necessary to show compliance with the green building requirements. They must meet with the Town's Green Building Compliance Official (GBCO) to discuss proposed green building measures prior to any public hearing regarding the site plan application. Applicants may not obtain a building permit until the GBCO has approved this documentation. The applicant, owner, or tenant is also required to submit documentation: prior to the issuance of a certificate of occupancy, verifying the green building measures approved in the pre-permitting documentation were implemented; after one year of occupancy of the building, showing that the building is being operated according to the previously approved efficiency and conservation standards; and again after five years of occupancy of the building, showing that the building is being operated according to the previously approved efficiency and conservation standards.

2. Develop Ordinance with Maintenance Guidelines and Inspections

Water conservation is a major concern in the United States. In many areas, there is a growing trend to adopt water-efficient landscapes to conserve water. These landscapes are designed to better survive droughts and conserve water. Some municipalities have developed an ordinance that requires or encourages water-efficient landscapes. In order to be effective towards post-occupancy enforcement, these water-efficient landscape ordinances include maintenance recommendations and guidelines, such as a maintenance checklist, to help residents preserve their water-efficient landscapes. Regular inspections are also used to ensure compliance and measure the effectiveness of the landscape post-occupancy.

An example of this approach is the Water-Efficient Landscaping Regulation in Sarasota County, Florida. This regulation requires resourceful landscape planning and installation, water-efficient irrigation, and encourages appropriate maintenance measures to promote the conservation of water resources. In an attempt to enforce maintenance, the regulations ensure that property owners receive a maintenance checklist.[3] In addition, local law requires inspections by the Code Enforcement Officer or designated inspectors "at reasonable hours of all land uses or activities regulated by Water-Efficient Landscaping Regulations in order to insure compliance with the provisions" included in the Water-Efficient Landscaping Ordinance.[4] The code enforcement officer is also responsible for initiating the enforcement proceedings. The Board of County Commissioners of Sarasota County is authorized to select Special Magistrate candidates who can issue citations, assess fines against violators, and hold hearings as provided in the Sarasota County, Florida Code of Ordinances.

Another example is the Water Efficient Irrigation Ordinance in San Francisco, California. The purpose of this ordinance is to regulate landscape irrigation practices and plant use.[5] Property owners and developers are expected to design and build drainage facilities including, but not limited to, culverts, retention and detention basins, and drainage swales. The ordinance also requires irrigation audits for a landscaped area by a Certified Landscape Irrigation Auditor, the project applicant, or a Public Utilities Commission Water Service Inspector.[6] An irrigation audit includes inspections, system tests, precipitation rates, and runoff reports. If a site violates the waste water provision of the ordinance, property owners can be fined.[7]

San Francisco's Green Landscaping Ordinance seeks to achieve increased permeability through front yard and parking lot controls and encourages responsible water use through increasing "climate appropriate" plantings. According to the San Francisco Planning

Department, 20% of a front yard must be plant material, and 50% must be permeable. Examples of approved permeable surfaces include porous asphalt, in-ground planters, and loosely set paving. There is a full guide to help property owners maintain landscapes to comply with the ordinance and understand the benefits of such landscapes. In addition, the Code Enforcement team of the Planning Department helps maintain and improve the quality of San Francisco's neighborhoods by operating programs that ensure compliance with the City's Planning Code. Code enforcement officials will respond to any complaints regarding code violations. The complaint is logged and assigned to an Enforcement Planner in charge of the area. Each complaint is investigated in order of priority. If a violation occurs the Enforcement Planner sends a notice to the property owner. The Enforcement Planner may conduct a site visit to further investigate the violation.[8]

Also in San Francisco, the Public Utilities Commission is working on a water budget report program that provides a report to property owners with dedicated irrigation meters. These reports include information on how property owners can meet their calculated water budget. Sites that go over their designated water budget, after complying with the ordinance, are brought to the attention of enforcement officials.[9] The General Manager of the Public Utilities Commission may issue a written warning entered on the user's water service record and delivered to the property owner by any reasonable means. The written warning may include information regarding the violation, educate the violator on restrictions, provide resources to assist with compliance, and set a deadline for corrective action. If violations are not corrected to the General Manager's satisfaction, administrative penalties and other available legal remedies can be taken pursuant to San Francisco's Administrative Code.

In areas where flooding and stormwater management are of great concern, it is also important to create ordinances that establish inspections and maintenance requirements to promote resource protection. Grand Traverse County, Michigan, has adopted both a construction and post-construction runoff control ordinance. The ordinance requires the preparation of an erosion and stormwater runoff control plan for earth-disturbing activities in order "to effectively reduce accelerated soil erosion and sedimentation during construction and after construction is completed."[10] The ordinance further requires property owners to provide stormwater management easements for facility inspections and the maintenance or preservation of stormwater runoff infiltration and detention areas and facilities, including 100-year flood routes.

3. Create a Commercial Audit Program

Municipalities may implement an irrigation inspection program by adopting ordinances that require mandatory audits and inspections of new irrigation systems and commercial entities. Through such programs, commercial water users are required to submit an audit periodically, and must continue to follow audit requirements.

The City of Allen, Texas, implemented an Irrigation Inspection Program through an ordinance requiring mandatory audits and inspections of new irrigation systems and all commercial entities. Under this ordinance, all irrigation systems installed are required to comply with the Texas Commission of Environmental Quality's Landscape Irrigation Standards and the city's irrigation standards. Immediately following installation, an irrigation system audit and inspection is required for all new irrigation systems. For new developments, documentation of the audit and inspection must be submitted to the city prior to issuing a Certificate of Occupancy. The commercial account holder must hire a certified auditor and submit an audit every 3 years. They cannot be grandfathered from the audit requirements. In addition, all audits must be performed according to the latest edition of the Recommended Audit Guidelines, published by the Irrigation Association. Any person, firm, or corporation who violates any provision of this Code is guilty of a misdemeanor and upon conviction is subject to a fine of up to $2,000. Each day that a violation exists or continues constitutes a separate and distinct offense. Overall, the Commercial Audit Program has contributed to a decrease in annual water consumption and repairs to irrigation systems.

4. Offer Financial Incentives and Disincentives

Municipalities may develop an incentive program that encourages property owners to undergo substantial property changes to meet stringent water efficiency standards; for example, to convert conventional landscapes to xeriscapes. Municipalities may provide incentives for actions that deter the same or subsequent property owners from converting back to old landscapes because it is more cost effective to maintain water efficient changes than to convert back to conventional landscaping.

Through its WaterWise Landscape Rebate Program, Austin Water pays residents to swap out grass for more drought resistant native plants. According to Austin Water, the program maintains and enforces itself.[11] The program requires participants to convert automatic irrigation spray heads to drip irrigation or to cap off the zone completely. In order to revert back to grass the homeowner would have to put added work and money to reinstall automatic irrigation systems; therefore, the program embodies a natural financial incentive to maintain these new landscaping features rather than converting them back at some point in the future. Education is an important element to the maintenance of the program. Residents are aware of the frequent droughts and realize that grass requires a lot of water that could be used for other important functions. The state legislature supports water-efficient landscapes and their growing popularity. In Austin, Texas it is common to see water-efficient landscapes more frequently than

manicured lawns. As a result, the program does not need to provide a large amount of rebate money to create a major incentive and new residents who move into the community are likely to follow the community and maintain these efficient landscapes.[12]

5. Offer Stormwater Management Fee Reductions

Municipalities may create stormwater management programs that control runoff from residential properties through a fee and fee reduction approach. Under such programs, customers are charged a stormwater utility cost based on a property's total impervious surface. A reduction in costs is then offered to those who employ stormwater control measures.

The Northeast Ohio Regional Sewage District has an individual residential property credit. Customers receive a reduction in stormwater management fees if they take measures to reduce stormwater runoff from their property. Credits are obtained through the installation and continued use, operation, and maintenance of an approved stormwater control measure. Such measures include rain gardens, on-site stormwater storage, pervious pavement, and vegetated filter strips—all green infrastructure measures that aid in groundwater recharge. After three years, recertification is required to continue to receive credits. In addition, maintenance guidelines are provided to help ensure the effectiveness and longevity of each control measure. These guidelines include some simple maintenance measures to maintain efficiency such as cleaning gutters, checking hoses, and winterizing structures. If ownership of the property changes, a new application must be submitted in order to receive the credit.

6. Provide Property Tax Abatements

Municipalities may provide a property tax abatement to incentivize the maintenance of water-efficient landscapes. Through such programs, residents who alter their property to install water efficient landscapes and increase their property value can be eligible for a yearly tax abatement program that requires maintenance and inspections.

The City of Cincinnati and the Reinvestment Area Residential Tax Abatement offer a tax abatement for improvements to property that includes new construction and renovation. The abatement requires an annual exterior inspection for all new and existing tax abatements to ensure that the property is well maintained. Another example is the New York City Green Roof Property Tax Abatement Program. This program requires a maintenance plan that includes semi-annual inspection, plans for plant replacement, monthly inspections of drains, and maintenance of green roofs for a minimum of four years.[13]

C. Using Emerging Techniques to Sustain Sustainable Development

Post-ccupancy enforcement techniques ensure that the benefits of standards and conditions imposed by local environmental laws and original project approvals continue into the future. It is imperative that municipalities promote the long-term enforcement of land use ordinances and environmental regulations to protect our natural resources and meet the needs of the local community. Throughout the country, water conservation, stormwater management, and sustainable development are key issues that must be addressed to ensure a livable future. This article demonstrates that gradually the law of the land is evolving to encompass sustainable development standards and to ensure that they can be sustained over time.

Endnotes

1. Jim Gibbons et al., NEMO Project Fact Sheet 7 Reviewing Site Plans for Stormwater Management (December 1995).
2. N.Y. Gen. City Law §§ 27-a, 32, 33; N.Y. Town Law §§ 274-a, 276, 277; N.Y. Village Law §§ 7-725-a, 7-728, 7-730.
3. Water-Efficient Landscaping Regulation Checklist, *available at* http://sarasota.ifas. available at ufl.edu/Hort/WEL/ord/docs/ordchecklist.htm.
4. Ordinance No. 2001-081. Water-Efficient Landscaping Regulation, *available at* http://sarasota.ifas.ufl.edu/Hort/WEL/ord/docs/ord.htm.
5. In accordance with California's State Water Conservation in Landscaping Act.
6. Water Efficient Irrigation Ordinance, *available at* http://www.sfwater.org/index.aspx?page=689.
7. Interview with Julie Ortiz, Water Conservation Manager, San Francisco Public Utilities Commission, September 20, 2013. Contact information: jnortiz@sfwater.org (415) 551-4739.
8. San Francisco Planning Department, http://sf-planning.org/index.aspx?page=2202.
9. Water Efficient Irrigation Ordinance, *available at* http://www.sfwater.org/index.aspx?page=689.
10. Grand Traverse County Soil Erosion and Stormwater Runoff Control Ordinance, *available at* http://www.stormwatercenter.net/Model%20Ordinances/Post%20Construction%20Stormwater%20Management/grand_traverse_county_soil_erosi.htm.
11. Christopher Charles, Christopher.Charles@austintexas.gov (512) 972-0366, Conservation Program Associate, Austin Water, October 8, 2013.
12. WaterWise Rebate Program, *available at* http://austintexas.gov/department/waterwise-landscape-rebate.
13. New York City Green Roof Property Tax Abatement Program, *available at* http://www.nyc.gov/html/dob/html/sustainability/green_roofs.shtml.

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Is Preparation Part of the Task? The Court of Appeals Answers "Yes" in *Wittorf v. City of New York*

By Lisa M. Cobb

The Court of Appeals recently revisited the issue of governmental tort liability in *Wittorf v. City of New York*.[1] Plaintiff was injured when she rode her bicycle into a pothole that was about to be repaired. The court was called upon to determine whether the City was engaged in road repair, a proprietary activity that would subject the City to liability, or the preliminary act of traffic control, a governmental function for which it would be immune. Because there would be no need for traffic control in the absence of the repair, the court concluded the City's actions were proprietary and found it liable.

Proceedings in the Trial Court

On the day before the New York City Marathon in 2005, plaintiff and her then-boyfriend were riding their bicycles on Manhattan's West Side, planning to cross through the Park to join friends on the East Side.[2] The 96th Street entrance to the Park already was closed for the Marathon, so plaintiff and her companion traveled to the 65th Street entrance.[3]

Upon arriving, they noticed workers putting up cones to block the street.[4] Plaintiff testified that she saw no repair vehicles, signage or other indication of any hazard.[5] Her boyfriend assumed that the road was being blocked in anticipation of the next day's marathon. Such was not the case. In fact, traffic was being blocked from the road to permit the repair of a "special condition," a defect in the roadway larger than a pothole.[6] The worker did not inform the cyclists of the reason for the road closure and gave them permission to ride through.[7]

The holes were located under an overpass, making them difficult to see.[8] Plaintiff successfully avoided one hole but, in doing so, rode into another.[9] She suffered severe facial injuries including fractures and avulsion injuries, requiring more than twenty-one surgeries.[10] Following a jury trial, she was awarded in excess of $3.3 million in total damages, for past and future pain and suffering and medical expenses.[11]

The jury found that the roadway was not in a reasonably safe condition but that the City could not be held liable because it did not have written notice of the defect and it did not affirmatively create the condition.[12] Plaintiff also argued at trial that the City was liable for its worker's failure to warn her of the dangerous condition.[13] The jury agreed, finding that the Department of Transportation employee was sixty percent negligent in permitting plaintiff to enter the roadway and that his negligence was a substantial factor in causing her injuries.[14] Plaintiff, however, was found to be forty percent negligent and her negligence also was deemed to be a substantial factor in causing her injuries.[15]

In a post-verdict motion, the City argued that the negligence of its employee should not have been placed before the jury because he was acting in a discretionary governmental capacity and was therefore immune from liability.[16] More specifically, the City argued that the employee was engaged in the discretionary activity of traffic control when he decided to close the entire roadway to traffic rather than just one lane and when he allowed plaintiff to ride through.[17] In support, the City cited several cases in which police officers were found to be immune from liability for traffic management decisions that led to injury.[18]

In opposition, plaintiff argued that the worker was acting in a proprietary rather than governmental capacity at the time of the accident, noting that he was not a police officer charged with protecting the public; rather, he was an employee hired to repair the roads.[19]

The trial court agreed with the City, concluding that the worker was engaged in a discretionary governmental activity and that the question of the City's negligence should not have been placed before the jury.[20] The court granted the City's motion to set aside the verdict.[21]

The First Department Affirms the Trial Court but Is Reversed by the Court of Appeals

Plaintiff appealed. The First Department affirmed trial court, describing a "continuum of responsibility" for municipal defendants, with purely governmental functions at one end of the spectrum and purely proprietary functions at the other.[22] A court's duty is to determine where on the continuum the municipality's actions lie.[23] The First Department stated that the specific act that caused the injury was the relevant act, not the general activity that the municipal worker was performing.[24]

The appellate court agreed that the work being engaged in by the City employee was traffic control because the work to repair the hole in the roadway had not yet commenced.[25] Justice Sallie Manzanet-Daniels, the lone dissenter, asserted instead that the act that led

to the injury—waving plaintiff through and/or failing to warn her of the danger—was integrally related to the repair of the road. The purpose that caused the employee to be at the site in the first place was proprietary.[26]

Plaintiff appealed again, and the Court of Appeals agreed with the dissent.[27] It reiterated its statement of the framework to be applied to municipal negligence cases articulated in *Applewhite v. Accuhealth, Inc.*[28] and used by the appellate court. Applying that framework to the facts, the court concluded that the employee was engaged in a proprietary function for two reasons. First, the only reason that the employee was present in the Park was to perform the road repair.[29] Second, the work could not be done until the road was closed to traffic, meaning that the actions of the employee were in preparation for, and a necessary component of, the road repair.[30]

The Court of Appeals contrasted this holding to its decision in *Balsam v. Delma Engineering Corp*.[31] In *Balsam*, a police officer's failure to place flares at the scene of a car collision caused a subsequent accident.[32] Such inaction was held to be part of the governmental function of traffic control.[33] The sole purpose for the officer's presence at the scene in *Balsam* was the governmental function of keeping the public safe.[34] No claim was made that the police officer in *Balsam* had any duty to maintain the property on which the accident occurred.[35] In contrast, in *Wittorf*, the sole purpose for the worker's presence at the scene was the repair, and the City had a duty to keep the roads in repair.[36]

Applying the same law to the same facts, the Court of Appeals reached the opposite conclusion as the First Department. Despite this seeming lack of clarity, however, practitioners can glean some insight into the Court's rationale from its citation to *Balsam.* In assessing their case, litigants should consider three specific components: (1) the purpose of the worker's presence at the scene (i.e., maintenance or safety); (2) whether the specific action that caused the injury was a necessary component of (i.e., in preparation for) the activity; and (3) whether the municipality has a duty to maintain the property. Although by no means conclusive, the analysis of these factors should help litigators foresee whether municipal liability will be found.

Endnotes

1. 23 N.Y.3d 473, 991 N.Y.S.2d 578 (2014).
2. *Wittorf v. City of New York*, 33 Misc.3d 368, 370, 928 N.Y.S.2d 842, 844 (N.Y. Sup. Ct., N.Y. Co. 2011), *aff'd*, 104 A.D.3d 584, 961 N.Y.S.2d 432 (1st Dep't 2013), *rev'd*, 23 N.Y.3d 473, 991 N.Y.S.2d 578 (2014).
3. *Wittorf*, 33 Misc.3d at 370.
4. *Id.*
5. *Id.*
6. *Id*. at 372 ("A 'special condition' is a project involving a defect 'bigger than a pothole' but less than road resurfacing.") (citation omitted).
7. *Id*. at 371.
8. *Wittorf*, 33 Misc.3d at 371.
9. *Wittorf*, 23 N.Y.3d at 477.
10. *Wittorf v. City of New York*, 104 A.D.3d 584, 588, 961 N.Y.S.2d 432, 436 (1st Dep't 2013), *aff'd*, 23 N.Y.3d 473, 991 N.Y.S.2d 578 (2014).
11. *Wittorf*, 33 Misc.3d at 373.
12. *Wittorf*, 104 A.D.3d at 585.
13. *Id.* at 588.
14. *Id.* at 585.
15. *Wittorf*, 33 Misc.3d at 373.
16. *Id*. at 374.
17. *Id*. at 374-75.
18. *Id*. at 375-76. *See, e.g.*, *Devivo v. Adeyemo*, 70 A.D.3d 587, 894 N.Y.S.2d 747 (1st Dep't 2010); *Shands v. Escalona*, 44 A.D.3d 524, 843 N.Y.S.2d 504 (1st Dep't 2007); *Gonzalez v. County of Suffolk*, 228 A.D.2d 411, 643 N.Y.S.2d 651 (2d Dep't 1996).
19. *Id*. at 376. Where a municipality acts in a proprietary capacity, it is subject to the same principles of tort law as a private entity. *Id*.
20. *Wittorf*, 33 Misc.3d at 382.
21. *Id*. at 382.
22. *Wittorf*, 104 A.D.3d at 586.
23. *Id.*
24. *Id.*
25. *Id*.
26. *Id*. at 586, 589. The appellate court granted leave to appeal on the certified question. Order Granting Leave to Appeal, *Wittorf v. City of New York,* No. M-1951, 2013 WL 3214536 (1st Dep't Jun. 27, 2013).
27. *Wittorf*, 23 N.Y.3d at 481.
28. 21 N.Y.3d 420 (2013).
29. *Wittorf*, 23 N.Y.3d at 480.
30. *Id.*
31. 90 N.Y.2d 966 (1997).
32. *Balsam*, 90 N.Y.2d at 968.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Wittorf*, 23 N.Y.3d at 481. In light of its reversal of the decisions of the lower courts, the Court of Appeals remanded the matter to the trial court for consideration of the City's argument that the jury's award of future medical expenses was against the weight of the evidence and plaintiff's argument that the City had notice of the dangerous condition. *Id.*

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Are Transgender and Other Gender Nonconforming Persons Accorded Statutory Protection From Discrimination?

By Karen M. Richards

Introduction

While much attention has been focused on the rights of lesbian, gay, and bisexual persons, little has been given to the rights of transgender and other gender nonconforming persons.[1] Some statutes, such as the American with Disabilities Act and the Rehabilitation Act of 1973, explicitly exclude "transsexualism" and "gender identity disorders," while other statutes do not specifically include this population from protection against discrimination.[2] As a result, transgender individuals who were discriminated against often found themselves without a judicial remedy.

This article provides a brief overview of selected cases where the issue was whether transgender and other gender nonconforming people are accorded statutory protection from discrimination under Title VII, Title IX, and New York State Human Rights Law.

I. Title VII Encompasses Claims of Discrimination for Nonconformance to Socially Constructed Gender Expectations

When Congress enacted the Civil Rights Act, its major concern was race discrimination.[3] "Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate."[4] The dearth of legislative history supporting sex as a basis of discrimination, together with the circumstances surrounding its inclusion in Title VII, indicated to courts "that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."[5] The legislative history also did "not show any intention to include transsexualism in Title VII."[6] "Had Congress intended more," reasoned the Seventh Circuit, "surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation."[7]

Proposals to amend the Civil Rights Act to prohibit discrimination on the basis of "sexual preference" were defeated.[8] Congress' rejection of the amendments, even after courts specifically held that Title VII did not protect transsexual persons from discrimination, further supported the position taken by many courts that "sex should be given a narrow, traditional interpretation, which would also exclude transsexuals."[9] Courts thus declined to expand the definition of sex "beyond its common and traditional interpretation" of biological male or biological female, reasoning that to do so would take them "out of the realm of interpreting and reviewing and into the realm of legislating."[10]

The consistently narrow interpretation of "sex" by courts and their refusal to expand its definition beyond that of birth-assigned sex resulted in discrimination claims brought by transsexual persons being routinely dismissed.[11] It was not until 1989, twenty-five years after the Civil Rights Act was passed, when the United States Supreme Court heard the seminal case of *Price Waterhouse v. Hopkins*, that the judicial landscape changed.[12] The Supreme Court's decision in *Price Waterhouse* would eviscerate the approach of excluding transsexual persons from the protection of Title VII.[13]

In *Price Waterhouse*, Ann Hopkins proved that gender-based stereotypes played a substantial role in Price Waterhouse's decision to not admit her to its partnership.[14] Ms. Hopkins joined Price Waterhouse in 1978, and four years later, she was proposed for partnership, the only woman among 88 candidates.[15] During the review of her candidacy, although there was considerable respect for her abilities and record of achievement, a number of partners criticized her interpersonal skills.[16] Some of the comments suggested these criticisms were because she was a woman.[17] For example, one partner described her as "macho," while another suggested that she "overcompensated for being a woman," and a third suggested she should take "a course at charm school."[18] But "the *coup de grace*" was when the head partner in her division advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[19]

The Supreme Court held that Title VII barred discrimination based on sex stereotyping—that is, failing to act and appear according to expectations defined by gender.[20] Justice Brennan wrote:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group…[21] It takes no special

> training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor…does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[22]

Ms. Hopkins was later admitted to a partnership under Title VII by a judicial order.[23] She retired from Price Waterhouse in 2002 and authored a book, *So Ordered: Making Partner the Hard Way*.[24]

Attempts to minimize sex stereotyping by characterizing it as a "term of art" or "the *Price Waterhouse* loophole" generally failed.[25] Although the Supreme Court did not explicitly interpret "sex" as including transsexuals, the Ninth Circuit and other courts found "[t]he initial judicial approach [of refusing to extend the protection of Title VII to transsexuals because discrimination against transsexuals is on the basis of gender rather than sex] has been overruled by the logic and language of *Price Waterhouse*."[26]

Most federal courts adopted the *Price Waterhouse* approach and found that "transsexuality is not a bar to [bringing a] sex stereotyping claim" under Title VII.[27] For example, in *Glenn v. Brumby*, the Eleventh Circuit noted that six members of the Supreme Court in *Price Waterhouse* agreed that Title VII bars "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender,"[28] and as aptly stated by the Sixth Circuit in *Smith v. City of Salem*:

> discrimination against a plaintiff who is a transsexual and therefore fails to act and/or identify with his or her gender is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior has been held to be impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.[29]

While the Second Circuit has not ruled squarely on this issue, it recognized in *Miller v. City of New York* that "discrimination on the basis of a failure to conform to sex stereotypes can evidence the sort of difference in treatment of persons of different genders that is actionable under Title VII."[30] Federal district courts in New York have also recognized a claim based on sex stereotyping.[31]

For example, in *Tronetti v. TLC Healthnet Lakeshore Hospital*, Dr. Tronetti, a male-to-female transsexual, filed a complaint in the Western District of New York on the basis of sex discrimination—"to wit, sex-stereotyping (*i.e.,* an expected conformity to a masculine gender role), a hostile work environment and retaliation."[32] TLC argued that transsexuals are not protected under Title VII. Since Tronetti, however, was "not claiming protection as a transsexual, but rather, [was] claiming to have been discriminated against for failing to 'act like a man,'" the court found an actionable claim was alleged under Title VII.[33]

Following *Price Waterhouse*, there is judicial recognition in many jurisdictions, including New York, that "sex" in Title VII "encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[34] Further, there is recognition that "discrimination against a transgender individual because of his or her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[35]

II. The Title IX Term "On The Basis of Sex" Is Interpreted in the Same Manner as Similar Language in Title VII

In *Miles v. New York University*, a transsexual student, who alleged she was sexually harassed by a professor, brought a Title IX action against the university.[36] Title IX prohibits "discrimination under any education program or activity receiving Federal financial assistance."[37] The issue before the court was whether Title IX protected a biological male who was subjected to discriminatory conduct while perceived as female.[38] The parties agreed that it is well-established in New York that "in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."[39]

The university argued that Miles was not protected under Title IX because, although admitted to the school as a female and at all relevant times treated as a female, she was in fact a male-to-female transsexual.[40] The court rejected this argument:

> The simple facts are, as the university was forced to admit, that [the professor] was engaged in indefensible sexual conduct directed at plaintiff which caused her to suffer distress and ultimately forced her out of the doctoral program in her chosen field. There is no conceivable reason why such conduct [which included the fondling of breasts,

> buttocks, and crotch, forcible attempts to kiss, and repeated propositioning for a sexual relationship] should be rewarded with legal pardon just because, unbeknownst to [the professor] and everyone else at the university, plaintiff was not a biological female. So far as we can determine, no other defendant has ever sought to justify such conduct by this type of defense.[41]

The court concluded that there was no doubt that the professor's conduct, assuming it could be proven, "related to sex and sex alone. Title IX was enacted precisely to deter that type of behavior, even though the legislators may not have had in mind the specific fact pattern here."[42]

In recent years, the U.S. Department of Justice, Civil Rights Division ("DOJ") and the U.S. Department of Education, Office for Civil Rights ("OCR") have resolved a number of cases involving gender-based harassment in public schools. The complaints were investigated under Title IX of the Education Amendments of 1972 and Title IV of the Civil Rights Act of 1964, both of which prohibit discrimination against students based on sex.[43]

In 2013, DOJ, OCR and the Arcadia Unified School District (the "district"), a public school in California, entered into a settlement agreement to resolve an investigation into allegations of discrimination against a student, who was born female but identified as a male.[44] The complaint alleged that the district did not allow the student to use restrooms and locker rooms consistent with his male gender identity and that during a district-sponsored overnight camp, the student was not allowed to stay in a cabin with male students but was instead required to stay in a cabin separate from his classmates.

The student's parents met with middle school and district administrators to discuss the student's transgender status and requested the district allow the student to use male-designated restrooms and locker rooms.[45] The student's parents provided information, including information from the student's health care providers, that the medically appropriate standard of care for a transgender adolescent is to support his or her self-identified gender and to treat a transgender student as the gender consistent with his or her gender identity in all settings, including routine activities and access to sex-specific facilities.[46] Citing generalized concerns about safety and privacy, the district refused this request.[47]

Under the settlement agreement, which must be overseen by a third-party expert consultant whose costs will be borne by the district, the district agreed, among other things, to:

- work with a consultant to support and assist the district in creating a safe, nondiscriminatory learning environment for students who are transgender or do not conform to gender stereotypes;
- amend its policies and procedures to reflect that gender-based discrimination, including discrimination based on a student's gender identity, transgender status, and nonconformity with gender stereotypes, is a form of discrimination based on sex;
- train administrators and faculty on preventing gender-based discrimination and creating a nondiscriminatory school environment for transgender students;
- provide the student access to sex-specific facilities designated for male students at school and at all district-sponsored activities, including overnight events and extracurricular activities on and off campus, consistent with his gender identity, although the student could request access to private facilities based on privacy, safety, or other concerns;
- treat the student the same as other male students in all respects in the education programs and activities offered by the district;
- ensure that any school records containing the student's birth name or reflecting the student's assigned sex, if any, are treated as confidential, personally identifiable information, are maintained separately from the student's records, and are not disclosed to any district employees, students, or others without the express written consent of the student's parents or, after the student turns 18 or is emancipated, the student; and
- provide documentation of its compliance with the agreement.[48]

The Arcadia settlement agreement provides insight into DOJ's and OCR's commitment to ensuring that transgender students are provided with the right to attend school free from discrimination based on sex.

III. The Word "Sex" in New York State Human Rights Law Covers Transsexuals

One of the most well-known cases confronting the issue of transsexual individuals' rights under New York State Human Rights Law is the 1977 case of *Richards v. United States Tennis Association*, where Dr. Richards claimed the defendants prevented her from qualifying and participating in the U.S. Open Tennis Tournament in the Women's Division by requiring her to take the Barr test to determine whether she was a female.[49] The court found the defendants knowingly instituted the test for the sole purpose of preventing her from participating in the tournament because the test, which determined sex through an examination of chromosomes, would classify Dr. Richards as male, thus making her ineligible to participate in the tournament. The only justification for using a sex determination test was to prevent men masquerading as women from competing

against women, a justification which the court rejected as applied to Dr. Richards because the overwhelming medical evidence demonstrated that Dr. Richards was a female.[50] The court found that requiring her to pass the Barr test in order to be eligible to participate in the tournament was "grossly unfair, discriminatory and inequitable, and violative of Dr. Richards' rights under the Human Rights Law of this state."[51]

In the years after *Richards* was decided, many courts found, as one court frankly stated, that the statute "outlaws discrimination against transsexuals as a form of unlawful 'sex' discrimination."[52]

IV. Gender Identity Disorder Is a Disability Under New York Human Rights Law

The Americans with Disabilities Act and the Rehabilitation Act of 1973 explicitly exclude "transsexualism" and "gender identity disorders"[53] from the definition of disability.[54] New York State Human Rights Law, however, broadly defines disability, in part, as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques…"[55] Courts have concluded that this definition encompasses a transgender person clinically diagnosed with Gender Identity Disorder ("GID").[56]

For example, in *Doe v. Bell*, a minor with GID alleged that the New York City Administration for Children's Services ("ACS"), by barring her from wearing feminine clothing at the all-male foster care facility in which she lived, violated the Human Rights Law by engaging in unlawful disability and sex discrimination.[57] The court held that ACS violated the statute by failing to reasonably accommodate Doe's GID and that Doe was entitled to relief in the form of an exemption from its dress policy to the extent that it barred her from wearing skirts and dresses.[58]

Although the court found that ACS's dress code policy did not discriminate against Doe because it was neutral on its face and applied to all persons at the facility who wished to wear feminine clothing, whether or not they suffered from GID,[59] the court stated that the Human Rights Law:

> is not simply a prohibition on discriminatory actions taken because of a person's disability. Quite the contrary, the State Human Rights Law, like federal disability discrimination statutes, requires covered entities to provide to persons with disabilities reasonable accommodations not offered to other persons in order to ensure that persons with disabilities enjoy equality of opportunity.[60]

Exempting Doe from the dress policy was a reasonable accommodation, according to the court, because "the treatment she has received for her GID calls for her to wear feminine clothing, including dresses and skirts" and "[g]ranting her an exemption from the dress policy avoids…psychological distress."[61]

ACS argued that it had previously placed Doe in two group homes for gay, lesbian, bisexual, and transgendered youth—where there were no restrictions on dressing in a feminine manner—only to find her discharged from both of these facilities for misconduct, and "[b]ut for [Doe's] repeated and serious misconduct at these facilities, no issue of the denial of a claimed right to wear female clothing would even exist."[62] The court disagreed.

> The ACS' obligation to act in a nondiscriminatory fashion is not satisfied merely by providing a small number of facilities at which children with GID are assured nondiscriminatory treatment. At each and every facility run and operated by the ACS, it must comply with the Human Right Law's mandate to provide reasonable accommodations to persons with disabilities. That Doe engaged in misconduct that led to her expulsion from the foster care facilities designed for gay, lesbian, bisexual, and transgendered youth gives ACS no license to discriminate against her by denying her a reasonable accommodation.[63]

The court also rejected ACS's argument that its dress policy was necessary to protect the safety of residents and staff because a male in feminine clothing created a sexual dynamic that could lead to unsafe and emotionally harmful sexual behavior, even though Doe was allowed to wear fake breasts, make-up, women's blouses, scarves, nails, and hair weaves.[64] The court recognized that it is "well established that a disabled person is not entitled to an accommodation that would jeopardize the health and well-being of others" but "[a]t the same time, courts must be wary of adverse treatment visited on persons with disabilities based on a need to protect others from them, lest overbroad generalizations about a disability be used as justification for discrimination."[65] However, there was "simply no rational basis" for treating dresses and skirts differently because ACS could not explain why Doe was allowed certain feminine items of clothing and accessories but could not wear dresses and skirts without endangering the safety of its residents and staff.[66]

V. Jurisdictions Have Enacted Laws Prohibiting Discrimination Against Transgender Persons

The New York City Human Rights Law was enacted in 1965,[67] and, although transsexual persons were

not specifically referenced in the law as protected, courts found the law was "intended to bar all forms of discrimination in the workplace and to be broadly applied."[68] The City Council also viewed the law as protecting transsexual persons, but, to erase any doubt, the law was clarified in 2002 by redefining "gender" as "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."[69]

Decades after New York City enacted its Human Rights Law, the cities of Albany, Binghamton, Buffalo, Ithaca, Rochester, and Syracuse and the counties of Albany, Suffolk, Tompkins, and Westchester have laws prohibiting discrimination against transgender people.[70] These jurisdictions recognized that "[e]xisting state and federal human rights laws guarantee protection against discrimination based upon race, creed, sex, color, national origin, marital status, physical and mental disability" but do not "provide similar protection against discrimination based upon sexual or affectional preference or orientation or gender identity or gender expression."[71]

VI. Traditionally Sex-Segregated Facilities Present Unique Issues

The issue of whether a transgender person should use traditionally sex-segregated facilities, such as restrooms, based on anatomical sex or gender identity is subject to much debate.[72] To date, the majority of courts have held in favor of defendants who cited safety concerns or exposure to liability as the basis for bathroom policies based on anatomical sex.[73]

In *Hispanic Aids Forum v. Estate of Bruno*, a non-profit organization, which provided treatment and education services for persons affected by HIV/AIDS, alleged that the defendants refused to renew its lease because the plaintiff's transgender clients were using common area restrooms that did not coincide with their biological sex and that other tenants in the building were complaining.[74] "[T]he only discernible claim set forth in the complaint is that plaintiff's transgender clients were prohibited from using the restrooms not in conformance with their biological sex, as were all tenants," which the court found did not trigger either the State or New York City Human Rights Law.[75]

Adopting the reasoning of the Minnesota Supreme Court's decision in *Goins v. West Group*, the court "squarely held that barring transgender persons from using the public bathrooms that do not correspond to their biological sexual assignment does not constitute discrimination."[76] However, since the court also found that the plaintiff made "vague allusions to a connection between defendants' refusal to renew the lease and plaintiff's refusal to prohibit its transgender from using the building's common areas, including the main entrance," it granted the plaintiff leave to re-plead if it chose "to pursue those assertions with an adequate degree of specificity."[77]

VII. The EEOC Held That Discrimination Against a Transgender Individual Violates Title VII

In *Macy v. Holder*, the U.S. Equal Employment Opportunity Commission ("EEOC") unanimously concluded "that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on…sex,' and such discrimination therefore violates Title VII."[78] Macy, a police detective, alleged she was denied a job with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") after informing ATF that she was in the process of transitioning from male to female. Specifically, Macy claimed she was discriminated against on the basis of "sex stereotyping, sex discrimination based [on] gender transition/change of sex, and sex discrimination based [on] gender identity."[79]

The EEOC found that since *Price Waterhouse*, "courts have widely recognized the availability of the sex stereotyping theory as a valid method of discrimination 'on the basis of sex' in many scenarios involving individuals who act or appear in gender-nonconforming ways"[80] and also "have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex' in scenarios involving transgender individuals."[81] It further found "[t]here has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex."[82]

The EEOC explained that an employer has engaged in disparate treatment when it discriminates against someone because the person is transgender, regardless of whether the employer discriminates:

> [B]ecause the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Courts' admonition that "an employer may not take gender into account in making an employment decision."[83]

While noting that most courts determined that a transgender plaintiff was protected under a theory of gender stereotyping, the EEOC stated that "evidence

of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."[84] The EEOC thus concluded that a transgender person who experienced discrimination based on gender may establish a prima facie case of sex discrimination "through any number of different formulations."[85]

Conclusion

At both the state and federal level, progress toward protecting the equal rights of transgendered and gender nonconforming people has been made primarily through judicial and agency determinations, but express state and federal statutory recognition of the rights of these populations continues to lag. As one New York court noted:

> [Although t]he legal and political community has made great strides in the last decade toward assuring legal equality for lesbian, gay and bisexual persons[,]…with regard to transgendered and other gender nonconforming people, there has been far less progress in addressing their legal rights. In fact, there has been a considerable lack of understanding in the courts with regard to issues of concern to this population.[86]

There has also been a lack of understanding by Congress and other legislative bodies. For example, in 1964, when Title VII was enacted, topics relating to "sex" were "shrouded in secrecy."[87] Half a century after the statute's adoption, issues regarding gender identity are freely discussed. Yet, "[d]espite the fact that the number of persons publicly acknowledging…gender or sexual identity issues has increased exponentially since the passage of Title VII, the meaning of the word 'sex' in Title VII [has] never been clarified legislatively."[88] In fact, attempts to amend Title VII to be more inclusive have consistently failed.

Similarly, while New York's Human Rights Law prohibits discrimination in areas such as employment, housing, public accommodations, and education because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics or marital status, it does not ban discrimination based upon gender identity and expression.[89] However, the Gender Expression Non-Discrimination Act ("GENDA"), which would strengthen the Human Rights Law by banning discrimination based upon gender identity and expression, has been introduced numerous times in the New York State Assembly and Senate but has never come to a vote on the floor of the Senate.

Perhaps, as a greater understanding of the serious issues faced by transgender and other gender nonconforming people is developed, amendments will be enacted to expressly include this population under the protection of federal and state statutes.[90] In the meantime, transgender and other gender nonconforming persons may look to cases, such as *Price Waterhouse v. Hopkins*, *Richards v. United States Tennis Association*, *Doe v. Bell*, and their progeny, for support.

Endnotes

1. The author uses terms as they appear in cases or statutes. The following definitions are included to assist readers:

   Transgender: "[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms—including *transgender*… [A] transgender identity is not dependent upon medical procedures." GLAAD, GLAAD Media Reference Guide—Transgender Issues, http://www.glaad.org/reference/transgender (2014) [hereinafter "GLAAD Media Reference"].

   Transsexuals: "individuals whose gender expression or identify is perceived to conflict with the sex assigned to them at birth, and who may or may not begin or continue the process of hormone replacement therapy and/or gender confirmation surgery." New York City Commission on Human Rights, Guidelines Regarding Gender Identity Discrimination: A Form of Gender Discrimination Prohibited by The New York City Human Rights Law 2 (2006) [hereinafter "NYC Guidelines"], *available at* http://www.trans-health.org/sites/www.trans-health.org/files/NYC%20GenderDisGuidelines.pdf. Transsexual is an "older term that originated in the medical and psychological communities. [It is s]till preferred by some people who have permanently changed—or seek to change—their bodies through medical interventions (including but not limited to hormones and/or surgeries). Unlike *transgender, transsexual* is **not** an umbrella term. Many transgender people do not identify as transsexual and prefer the word *transgender*. It is best to ask which term an individual prefers." GLAAD Media Reference, *supra* n.1.

   Gender identity: "[o]ne's internal, deeply held sense of one's gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices. Unlike gender expression (see below) gender identity is not visible to others." *Id.*

   Gender expression: "the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions." NYC Guidelines, *supra* n.1, at 2. "Typically, transgender people seek to make their gender expression match their gender identity, rather than their birth-assigned sex." GLAAD Media Reference, *supra* n.1.

   Gender Dysphoria: a diagnosis identified by American Psychological Association in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V). "[P]eople whose gender at birth is contrary to the one they identify with will be diagnosed with gender dysphoria. This diagnosis is a revision of DSM-IV's criteria for gender identity disorder and is intended to better characterize the experiences of affected children, adolescents, and adults." As of the 2013 DSM-V, the DSM no longer includes the diagnosis "Gender Identity Disorder." American Psychiatric Association, DSM-V Development,

www.DSM5.org (2014). The American Psychiatric Association explained this change as follows:

> DSM-5 aims to avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender… It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition. *Id.* ("For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.").

GLAAD explains:

> The necessity of a psychiatric diagnosis remains controversial, as both psychiatric and medical authorities recommend individualized medical treatment through hormones and/or surgeries to treat gender dysphoria. Some transgender advocates believe the inclusion of Gender Dysphoria in the DSM is necessary in order to advocate for health insurance that covers the medically necessary treatment recommended for transgender people. GLAAD MEDIA REFERENCE, *supra* n.1.

Sex: "[t]he classification of people as male or female. At birth infants are assigned a sex, usually based on the appearance of their external anatomy… However, a person's sex is actually a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics. *Id.* "Intersex individuals are born with chromosomes, external genitalia, and/or an internal reproductive system that varies from what is considered 'standard' for either males or females. NYC GUIDELINES, *supra* n.1, at 3.

Sexual orientation: "an individual's enduring physical, romantic and/or emotional attraction to another person. Gender identity and sexual orientation are not the same. Transgender people may be straight, lesbian, gay, or bisexual. For example, a person who transitions from male to female and is attracted solely to men would identify as a straight woman." GLAAD MEDIA REFERENCE, *supra* n.1.

Sex reassignment surgery: "doctor-supervised surgical interventions, [which] is only one small part of transition [*see transition* below]…Not all transgender people choose to, or can afford to, undergo medical surgeries." *Id.* GLAAD recommends avoiding the phrase "sex change operation" and referring "to someone as being 'pre-op' or 'post-op.'" *Id.*

Transition: "[a]ltering one's birth sex." *Id.* Transitioning "is not a one-step procedure; it is a complex process that occurs over a long period of time. Transition includes some or all of the following personal, medical, and legal steps: telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery." *Id.*

2. This article does not discuss every potential claim that may be asserted by a transgender or gender nonconforming person. The focus is on cases decided by courts in New York where violations of Title VII, Title IX, or the New York State Human Rights Law were alleged.

3. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (citations omitted) ("This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination.").

4. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *see also Ulane,* 742 F.2d. at 1085-86 (stating "Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation."), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.,* 667 F.2d. 748, 750 (8th Cir. 1982) (stating "the legislative history does not show any intention to include transsexualism in Title VII").

5. *Ulane,* 742 F.2d at 1085.

6. *Sommers,* 667 F.2d. at 750.

7. *Ulane,* 742 F.2d at 1085.

8. *Sommers*, 667 F.2d at 750 (stating "Three such bills were presented to the 94th Congress and seven were presented to the 95th Congress"), *citing Holloway*, 566 F.2d at 662 n.6; *see also Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541, at *4 (E.D. La. 2002) (noting "From 1981 through 2001, thirty-one proposed bills have been introduced in the United States Senate and the House of Representatives which have attempted to amend Title VII and prohibit employment discrimination on the basis of affectional or sexual orientation. None have passed.").

9. *Ulane,* 742 F.2d at 1085; *see also Holloway*, 566 F.2d at 662 (stating, "Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against 'sexual preference.' None have been enacted into law."); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286-87 (E.D. Pa.1993) ("Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism."); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 370 (E.D. Md. 1977) ("The gravamen of the Complaint is discrimination against a transsexual and that is precisely what is not reached by Title VII.").

10. *Ulane,* 742 F.2d at 1086.

11. In *Grossman v. Bernards Twp. Bd. of Educ.*, 1975 WL 302 (D.N.J. 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976), *cert. denied*, 429 U.S. 897 (1976), the court granted the defendant's motion to dismiss the complaint for failure to state a claim. When a teacher underwent sex-reassignment from male to female, she was dismissed on the basis that it was "a fundamental and complete change in his [sic] role and identification to society, thereby rendering himself [sic] incapable to teach children in Bernards Township because of the potential her…presence in the classroom presents for psychological harm to the students of Bernards Township." *Id*. at *2 (internal quotation marks omitted). The court concluded that she was discharged "not because of her status as a female, but rather because of her change in sex from the male to the female gender." *Id*. at *4.

    Similarly, in *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa.1993), the court stated that if "the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to be female" and found she failed to state a claim upon which relief may be granted. *Id*. at 287.

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

13. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2005); *see also Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (stating "federal courts have recognized with near-total uniformity that the approach [taken by earlier courts such as *Ulane*, *Sommers*, and *Holloway*] has been eviscerated").

14. *Price Waterhouse*, 490 U.S. 228.

15. *Price Waterhouse,* 737 F. Supp. 1202 (D.D.C. 1990), *aff'd*, 920 F.2d 967 (D.C. Cir.1990).

16. *Price Waterhouse*, 920 F.2d at 970.

17. *Id*.

18. *Price Waterhouse*, 490 U.S. at 253.
19. *Id*.
20. *Id.* at 250-251.
21. *Id.* at 251.
22. *Id.* at 256.
23. *Price Waterhouse v. Hopkins,* 737 F. Supp. 1202 (D.D.C. 1990), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).
24. The U.S. Equal Employment Opportunity Commission, Celebrating The 40th Anniversary of Title VII (June 2004), http://www.eeoc.gov/eeoc/history/40th/panel/hopkins.html.
25. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2005) (noting "these characterizations are almost identical to the treatment *Price Waterhouse* itself gave sex stereotyping in its briefs to the U.S. Supreme Court").
26. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (where a pre-operative male-to-female transsexual prisoner sued a state prison guard and other prison officials under § 1983 and the Gender Motivated Violence Act 42 U.S.C. §13981(c) and a unanimous panel held that "the initial judicial approach taken in cases such as *Holloway*, have been overruled by the logic and language of *Price Waterhouse*" and employed the Title VII sex stereotyping theory); *see also Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011); *Finkle v. Howard Cnty., Md.*, 2014 WL 1396386, at *7 (D. Md. 2014); *Kastl v. Maricopa Cnty. Cmty. Coll.*, 2009 WL 990760, at *1 (9th Cir. 2009).
27. *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007); *see also Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[T]he standards of liability under Title VII, as they have been refined and explicated over time, apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs. In other words, just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity [citing *Price Waterhouse*] a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."); *Smith,* 378 F.3d at 575 ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *Schwenk*, 204 F.3d at 1202 ("What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one. Thus, under *Price Waterhouse,* 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women— *and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); *see also Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (finding under *Price Waterhouse* that a bank's refusal to give a loan to a biologically male plaintiff, but who was dressed in traditionally feminine attire when he requested a loan application, stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act); *see also Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010) (recognizing the validity of sex stereotyping Title VII claims where a female "tomboyish" plaintiff was told by her employer that she should be "pretty" and have the "Midwestern girl look" were because she is a woman); *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005) (stating "The Third Circuit has held [in *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257, 263-64 (3d Cir. 2001),] that a plaintiff may satisfy her evidentiary burden by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes.").
28. *Glenn*, 663 F.3d at 1315.
29. *Smith*, 378 F.3d at 575.
30. *Miller v. City of New York*, 2006 WL 1116094 (2d Cir. 2006*), citing Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000). In *Simonton*, the Second Circuit cited and quoted *Schwenk*, 204 F.3d at 1202, and *Higgins*, 194 F.3d at 261 n.4.
31. *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. 2003); *Lugo v. Shinseki*, 2010 WL 1993065, at *11 (S.D.N.Y. 2010); *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 314 (S.D.N.Y. 2003) (recognizing that the Second Circuit in *Simonton* acknowledged *Price Waterhouse*), *aff'd*, 398 F.3d 211 (2d Cir. 2005); *Trigg v. New York City Transit Auth.*, 2001 WL 868336, at *5 (E.D.N.Y. 2001) (stating "The Second Circuit has interpreted *Price Waterhouse* as 'imply[ing] that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex.'"), *aff'd*, 50 Fed. Appx. 458 (2d Cir. 2002).
32. *Tronetti*, 2003 WL 22757935, at *3 (Tronetti also filed a complaint with the New York State Division of Human Rights on the basis of disability (*i.e.*, Gender Dysphoria) and also asserted claims for disability discrimination and violation of the Family Medical Leave Act).
33. *Id*. at *4. TLC argued that Tronetti was not protected by Title VII because Tronetti was neither male nor female. This argument was soundly rejected by the court, which stated that "[t]ranssexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex. Indeed, the Supreme Court has held that sex-stereotyping is evidence of sex discrimination." *Id*.
34. *Wilson*, 42 Misc. 3d 677, 685, 978 N.Y.S.2d 748, 755, *citing Glenn*, 663 F.3d at 1318 and *Schwenk*, 204 F.3d at 1202.
35. *Glenn*, 663 F.3d at 1316; *accord Schwenk*, 204 F.3d at 1202; *Wilson*, 42 Misc. 3d 677, 978 N.Y.S.2d at 755; *Smith*, 378 F.3d at 574-75; *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).
36. *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).
37. 20 U.S.C. § 1681(a).
38. *Miles*, 979 F. Supp. at 249.
39. *Id*.; *see also Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995); *see also Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 n.9 (N.D.N.Y. 2011) ("Courts examine Title IX precedent when analyzing discrimination 'on the basis of sex' under Title IX").
40. *Miles*, 979 F. Supp. at 248.
41. *Id*. at 250.
42. *Id*. (denying the university's motion for summary judgment).
43. *See*, *e.g.*, The United States Department of Justice, United States Reaches Agreement with Arcadia, California, School District to Resolve Sex Discrimination Allegations, http://www.justice.gov/opa/pr/2013/July/13-crt-838.html (July 24, 2013) (In 2012, the Justice Department entered into a consent decree with the Anoka-Hennepin School District in Minnesota, where a complaint alleged that students were being harassed by other students because they did not dress or act in ways that conform to gender stereotypes).
44. Resolution Agreement Between the Arcadia Unified School District, U.S. Department of Education, and the U.S. Department of Justice (July 24, 2013), DOJ Case No. DJ 168-12C-70, OCR Case No. 09-12-1020, *available at* http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.
45. Arcadia Notification Letter, from U.S. Departments of Justice and Education to Asaf Orr, at 3 (July 24, 2013), DOJ Case No. DJ 168-12C-70, OCR Case No. 09-12-1020, *available at* http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Notification_Letter_07.24.2013.pdf.
46. *Id*. at 3 n.5.
47. *Id*. at 6 (The United States' investigation did not reveal safety or privacy issues for the student or other students.).

48. Resolution Agreement Between the Arcadia Unified School District, U.S. Department of Education, and the U.S. Department of Justice, at 2-7 (July 24, 2013), DOJ Case No. DJ 168-12C-70, OCR Case No. 09-12-1020, *available at* http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.

49. *Richards v. United States Tennis Assoc.*, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (Sup. Ct. New York Cnty. 1977). The defendants stated their primary concern in instituting the test was to insure fairness, claiming there was a competitive advantage for a male who had sex reassignment surgery. However, there was testimony that Dr. Richards would not have an unfair advantage competing against other women.

50. *Id.* Judge Ascione did not strike down the Barr body test because it was a recognized and acceptable tool for determining sex, but he recognized that it is not and should not be the sole criterion in a case such as *Richards*, where the plaintiff by all other known indicators of sex was a female, psychologically, socially, and also physically after having sex reassignment surgery. He therefore granted Dr. Richards' request for a preliminary injunction against the defendants.

51. *Id.* at 721, *citing*, Executive Law § 290 *et seq*.

52. *Rentos v. Oce-Office Sys.*, 1996 WL 737215, at *9 n.3 (S.D.N.Y. 1996); *see Maffei v. Kolaeton Indus., Inc.*, 164 Misc. 2d 547, 626 N.Y.S.2d 391 (Sup. Ct. New York Cnty. 1995) (noting that the *Richards* court found discrimination in violation of Executive Law §296); *Rentos*, 1996 WL 737215 (S.D.N.Y. 1996) ("While the court spoke more clearly on the question of City law, I interpret its allusions to the more expansive application of the State law compared with Title VII, as well as its citation to the *Richards* case, as evidence of an equivalent conclusion that the State law similarly outlaws discrimination against transsexuals as a form of unlawful 'sex' discrimination."); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. 2003) (holding that a transgender plaintiff's claims under Title VII and the New York State Human Rights Law were actionable).

    The court in *Buffong v. Castle on the Hudson*, 2005 WL 4658320 (Sup. Ct. Westchester Cnty. 2005), found that case law supported the view that a transgender person could bring a claim under the Human Rights Law because "sex" in the statute covered transsexuals, although the legislature had not adopted proposed legislation that would specifically include transgender persons in the statute. In this case, the plaintiff alleged that after a colleague found a high school yearbook photo showing him as a woman, he was mocked by fellow employees, had his name changed from "Eric" to "Erica" on the work schedule, had his hours cut, and was fired. The court denied the defendant's motion to dismiss the complaint for failure to state a cause of action.

53. The term "Gender Identity Disorder" is used in this section, as it was the term used by the court.

54. 42 U.S.C. § 12211; 29 U.S.C. § 706(8)(F)(i); *see Michaels v. Akal Sec., Inc.*, 2010 WL 2573988 (D. Colo. 2010) (stating "the Rehabilitation Act expressly excludes 'transvestism, transsexualism… [and] gender identity disorders not resulting from physical impairments' from the definition of disability" and citing 29 U.S.C. §§ 705(20)(B), 705(20)(F)(i)); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) (stating certain conditions are explicitly excluded from the broad definition of "disability" in the Americans With Disabilities Act, such as "[t]ransvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, [and] other sexual behavior disorders" and stating "the plain language of the statute indicates that transsexualism is excluded from the definition of disability no matter how it is characterized, whether as a physical impairment, a mental disorder, or some combination thereof"); *Rentos v. Oce-Offices Systems*, 1996 WL 737215 (S.D.N.Y. 1996) (stating that Congress expressly defined "disability" in the Americans with Disabilities Act in a way that excluded transsexualism); *Wilson v. Phoenix House*, 42 Misc. 3d 677, 978 N.Y.S.2d 748, 763 (Sup. Ct. Kings Cnty. 2013) ("Gender Identity Disorder is a disability under both the New York State Human Rights Law and the New York City Human Rights Law").

55. N.Y. Exec. Law § 292(21).

56. *Doe v. Bell*, 194 Misc. 2d 774, 754 N.Y.S.2d 846 (Sup. Ct. New York Cnty. 2003) (applying N.Y. Exec. Law § 296(18)(2)); *see also Tronetti v. TLC Healthnet Lakeshore Hospital*, 2003 WL 22757935 (W.D.N.Y. 2003); *Maffei v. Kolaeton Industries, Inc.*, 164 Misc. 2d 547, 626 N.Y.S.2d 391 (Sup. Ct. New York Cnty. 1995); *Rentos v. Oce-Office Systems*, 1996 WL 737215 (S.D.N.Y. 1996); *Wilson v. Phoenix House*, 42 Misc. 3d 677, 978 N.Y.S.2d 748, 763 (Sup. Ct. Kings Cnty. 2013); *Hispanic Aids Forum v. Estate of Bruno*, 16 Misc. 3d 960, 839 N.Y.S.2d 691 (Sup. Ct. New York Cnty. 2007).

57. *Doe*, 194 Misc. 2d at 775, 754 N.Y.S.2d at 847.

58. *Id.* at 786, 754 N.Y.S.2d at 855.

59. *Id.* at 780, 754 N.Y.S.2d at 851 (stating "The policy does not target persons who have GID and there is nothing in the record to suggest that the dress policy was promulgated to subject persons with disabilities to adverse treatment.").

60. *Id.* at 780, 754 N.Y.S.2d at 852.

61. *Id.* at 783, 754 N.Y.S.2d at 853 (finding "Moreover, it allows Ms. Doe the equal opportunity to use and enjoy the facilities at Atlantic Transitional—a right that would be denied to her if forced to endure psychological distress as a result of the ACS's dress policy.").

62. *Id.* at 777, 754 N.Y.S.2d at 849.

63. *Id.* at 786-87, 754 N.Y.S.2d at 856.

64. *Id.* at 785, 754 N.Y.S.2d at 855.

65. *Id.* at 784, 754 N.Y.S.2d at 854-55.

66. *Id.* at 786, 754 N.Y.S.2d at 855.

67. *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 435 (2004). When the city's Human Rights Law ("NYCHRL") was enacted in 1965, it referred to discrimination based on "sex" but subsequently substituted the term "gender" for the word "sex." *Maffei v. Kolaeton Industry, Inc.*, 164 Misc. 2d 547, 554-55, 626 N.Y.S.2d 391 (Sup. Ct. New York Cnty. 1995). The court stated the reason for the change was not apparent but noted that one court which determined that transsexuals were not covered by the word "sex" in Title VII observed that its result would be different if "gender" had been used. *Id*. at 554, *citing Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993).

68. *Maffei*, 164 Misc. 2d at 555 (finding "an employer who harasses an employee because the person, as a result of surgery and hormone treatments, is now of a different sex has violated our City prohibition against discrimination based on sex").

69. *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 435 (2004) ("this modification was specifically referred to by the City Council as a clarification rather than an expansion"); New York City Administrative Code 8-102(23); *see Bumpus v. New York City Transit Auth.*, 2008 WL 399147, at *4 (Sup. Ct. Kings Cnty. 2008) (stating "The Human Rights Law affords protection to transgender people in New York City").

70. Empire State Pride Agenda Foundation, State of the Law for Transgender New Yorkers, http://www.prideagenda.org/advancing-justice/transgender-equality-justice/state-law-transgender-new-yorkers (last visited Oct. 17, 2014) (listing local jurisdictions that passed laws prohibiting discrimination based upon gender identity and expression); Empire State Pride Agenda Foundation, Facts About Discrimination, http://www.prideagenda.org/advancing-justice/transgender-equality-justice/facts-about-discrimination (last visited Oct. 17, 2014) (stating that 60.31% of New Yorkers live in these cities and counties).

71. *See*, *e.g.*, Local Law No. 7 of 2012 City of Syracuse (defining "gender identity or expression" in its local law as meaning "transgender status or identity, actual or perceived gender identity, or gender-related appearance, behavior, mannerisms, or

other characteristics of an individual, with or without regard to the individual's assigned sex at birth" and noting that "[s]ince 1990, more than one hundred sixty (160) separate jurisdictions throughout the country have seen fit to enact legislation to extend human rights protections to persons based on their gender identity or expression. These jurisdictions include fifteen (15) states plus Washington, D.C., one hundred and forty three (143) cities and counties, including the following jurisdictions in New York State: Albany, Binghamton, Buffalo, Ithaca, and Tompkins County, New York City, Rochester, and Suffolk County and Westchester County"). *See, e.g.*, Suffolk County Resolution No. 802-2001, § 2(G); Rochester Mun. Code, Ch. 63 (2001); Buffalo City Code § 35-12 (2002); *see also* Empire State Pride Agenda Foundation, TRANSGENDER EQUALITY & JUSTICE, http://www.prideagenda.org/advancing-justice/transgender-equality-justice (last visited Oct. 17, 2014) (stating that the District of Columbia, Puerto Rico, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Maine, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington have enacted statues prohibiting discrimination against transgender people).

The City of Syracuse passed its local law three years after a jury in Onondaga County found the murder of a transgender victim in Syracuse was a hate crime. It reportedly was only the second time in the United States that a jury found a hate crime law applied to transgender victims. *The Post-Standard*, August 18, 2009, *citing, Transgender Legal Defense & Education Fund*. The *Post-Standard*, November 27, 2014, reported that "The Onondaga County District Attorney's Office vowed to prosecute Dwight DeLee a second time after the state's highest court upheld the dismissal of his hate-crime conviction due to confusing jury instructions." For an example of a hate crime law, see N.Y. Penal Law §485.05 (race, color, national origin, ancestry, gender, religion, religious practice, age, disability, sexual orientation).

Executive Order No. 33, signed by Governor David A. Paterson on December 6, 2009, provides that "No State agency shall discriminate on the basis of gender identity against any individual in any matter pertaining to employment by the State including, but not limited to, hiring, termination, retention, job appointment, promotion, tenure, recruitment and compensation." "Gender identity" is defined in the Order as "having or being perceived as having a 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 sex assigned to that person at birth." Order No. 33 was continued by Governor Andrew M. Cuomo on January 1, 2001. N.Y. Exec. Order 33 (Dec. 16, 2009), *available at* http://www.governor.ny.gov/archive/paterson/executiveorders/eo_33.html; N.Y. Exec. Order 2 (Jan. 1, 2011), *available at* http://www.governor.ny.gov/executiveorder/2.

72. *See* gradPSYCH Blog, WHAT'S IN A NAME? AN INCLUSIVE NAME FOR AN INCLUSIVE COMMITTEE, http://www.gradpsychblog.org/tag/lgbtq/ (reporting that a 2002 study found that 50% of transgender or nonconforming persons "had been harassed or assaulted in public restrooms. Further, people who use a restroom that does not correspond with their 'legal' sex designation may be arrested or labeled a' sex offender' if caught.").

73. *See, e.g.*, *Estitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) ("Title VII's prohibition on sex discrimination, however, does not extend so far. It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual. As discussed above, however, Etsitty may not claim protection under Title VII based upon her transsexuality *per se.* Rather, Etsitty's claim must rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes. However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." The Tenth Circuit therefore upheld a ruling by the lower court that it was legally permissible to fire a transgender woman because "use of women's public restrooms by a biological male could result in liability."); *see also Michaels v. Akal Sec., Inc.*, 2010 WL 2573988 (D. Colo. 2010) (where employee was directed to use restrooms compatible to her anatomical gender while on company payroll until she provided tangible evidence proving she had undergone sex reassignment surgery); *Sturchio v. Ridge*, 2005 WL 1502899 (E.D. Wash. 2005) (stating that the court was unaware of any requirement imposed on an employer to permit a male going through a gender change to use the women's restroom); *Kastl v. Maricopa Cnty. Cmty. Coll.*, 2009 WL 990760 (9th Cir. 2009) (affirming that safety was a legitimate, nondiscriminatory justification under Title VII for banning the plaintiff from using the women's restroom until she could prove completion of sex reassignment surgery); *but see supra* nn.44-48 and accompanying text (discussing settlement agreement between Arcadia Unified School District, U.S. Department of Education, and U.S. Department of Justice where the school district's cited generalized concerns about safety and privacy for not allowing a transgender student to use male-designated restrooms and the United States' investigation did not reveal safety or privacy issues for the student or other students).

74. *Hispanic Aids Forum v. Estate of Bruno*, 16 A.D.3d 294, 792 N.Y.S.2d 43 (1st Dep't 2005).

75. *Id*. at 299 (stating "the complaint, as it stands, alleges not that the transgender individuals were selectively excluded from the bathrooms, which might trigger one of both of the Human Rights Laws [State and City of New York], but that they were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms—their biological assignment").

76. *Hispanic Aids Forum v. Estate of Bruno*, 16 Misc. 3d 960, 966, 839 N.Y.S.2d 691, 697 (Sup. Ct. New York Cnty. 2007). In *Goins*, although the Minnesota Human Rights Act "was clearly written to encompass transgender individuals," Minnesota's highest court nonetheless "concluded that the defendants' designation of restroom use, applied uniformly, on the basis of 'biological gender,' rather than biological self-image, was not discrimination." *Goins v. West Group*, 635 N.W.2d 717 (Sup. Ct., Minn. 2001), *citing* Min. Stat. Ann. Ch. 363A. Goins, a transgender woman who was anatomically male was asked by her employer to use a unisex bathroom after female co-workers expressed concerns about sharing a restroom with a male. The co-workers' complaints were viewed by West as a hostile work environment concern and Goins was instructed to use a unisex bathroom. When Goins continued to use the women's restroom, she was threatened with disciplinary action. Instead, she quit and sued based on Minnesota's statutory prohibition against discrimination for "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." *Id*. at 722.

Minnesota's Supreme Court granted West's motion for summary judgment, recognizing "the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender." *Id*. at 723. The court believed the legislature did not intend to restrict an employer's discretion in the gender designation of workplace shower and locker room facilities and further believed the Minnesota Human Rights Act "neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender." *Id*.

In *Cruzan v. Minneapolis Pub. Sch. Sys.*, 294 F.3d 981 (8th Cir. 2002), Cruzan, a non-transgender female teacher, claimed the school district violated her rights by allowing 30-year employee, Debra Davis, to use the women's faculty restroom after Davis's transition from male to female. When Cruzan saw Davis exit a privacy stall in a restroom, she complained to the school

principal. After exhausting administrative remedies, Cruzan filed an action under Title VII and the Minnesota Human Rights Act for religious discrimination and sexual harassment based on a hostile work environment.

The Eighth Circuit dismissed Cruzan's claims. The school district's decision to allow Davis to use the women's faculty restroom did not have any adverse effect on Cruzan's title, salary, or benefits, nor did it create a working condition that created an abusive work environment. The school district's policy was not directed at Cruzan, she had convenient access to numerous restrooms other than the one used by Davis, and she did not assert that Davis engaged in any appropriate conduct.

77. *Hispanic Aids Forum*, 16 A.D.3d at 299.

78. *Macy v. Holder*, 2012 WL 1435995 (E.E.O.C. 2012) (noting "The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that '[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination 'because of … sex' under Title VII").

79. *Id.* at *3.

80. *Id.* at *7, *citing Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010); *Prowel v. Wise Bus. Forms, Inc*. 579 F.3d 185 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

81. *Id*. (discussing *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)).

82. *Id.*, *citing Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Michaels v. Akal Sec., Inc.*, 2010 WL 2573988 (D. Colo. 2010); *Lopez v. River Lakes Imaging and Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (W.D. Pa. 2006); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. 2003); *Doe v. United Consumer Finance Servs.*, 2001 WL 34350174 (N.D. Ohio 2001).

In light of the EEOC's decision in *Macy*, the Office of Federal Contract Compliance Programs recently issued a Directive on Gender Identity and Sex Discrimination (DIR 2014-02), announcing that effective August 19, 2014, it will follow the EEOC and investigate claims of gender identity discrimination as sex discrimination. U.S. Dep't of Labor, Office of Federal Contract Compliance, Dir. 2014-02 (Aug. 19, 2014), *available at* http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

83. *Id.* at *7, *citing Price Waterhouse*, 490 U.S. at 244.

84. *Id.* at *10.

85. *Id*.

86. *Wilson v. Phoenix House*, 42 Misc. 3d 677, 683, 978 N.Y.S.2d 748, 755 (Sup. Ct. Kings Cnty. 2013).

87. *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541, at *4 (E.D. La. 2002).

88. *Id*.

89. As of the time this article was written, GENDA was once again pending in the New York Legislature.

90. One out of every three transgender New Yorkers have been homeless, two out of three have experienced discrimination at work, and nearly 30% have faced a serious physical or sexual assault. Empire State Pride Agenda, Gender Expression Non-Discrimination Act, *available at* http://www.prideagenda.org/igniting-equality/current-legislation/gender-expression-non-discrimination-act.

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Floyd v. City of New York: When the Stop-and-Frisk Case Became the Judicial Reassignment Case

By Paige Bartholomew

"In matters of ethics, appearance and reality often converge as one."[1]

I. Introduction

Justice Kennedy's statement from a twenty-year old case involving the federal statute for judicial recusal applied with full force to a series of United States Court of Appeals for the Second Circuit decisions reassigning *Floyd v. City of New York*—the well-publicized stop-and-frisk case—to a new district court judge. The three-judge court of appeals panel (hereinafter "Panel") concluded that, despite the fact that Judge Scheindlin did not engage in any sort of judicial misconduct or display any actual bias with respect to the stop-and-frisk cases, the appearance of impartiality surrounding the litigation had been compromised by her improper application of the related case rule and by media interviews she gave to the press throughout the course of the trial.

The Panel's *sua sponte* order of reassignment came as a surprise in a case involving controversial issues with respect to the constitutional rights of citizens in their encounters with police on the streets. The stop-and-frisk case became the judicial reassignment case and prompted a number of questions for observers of the case, including: Under what circumstances may a judge be removed from a case? Does a trial court judge have an opportunity to protest reassignment? What does the practice of reassignment tell us about the relationship between appellate and trial court judges?

This article will address those questions. It begins with a brief description of the underlying litigation, discusses the Second Circuit's decisions reassigning the case to another trial court judge, and provides a brief update on developments in the case since the Second Circuit's decisions.

II. The Underlying Litigation

There have been two significant legal challenges to the NYPD's stop-and-frisk policies and practices—*Daniels et al. v. City of New York* and *Floyd v. City of New York*. Judge Shira A. Scheindlin presided over both cases.

In 1999, the Center for Constitutional Rights and civil rights attorney Jonathan Moore filed a class action lawsuit in the United States District Court for the Southern District of New York, challenging the constitutionality of the NYPD's stop-and-frisk policies.[2] That case, *Daniels v. City of New York*, accused the NYPD of violating the Fourth Amendment by conducting stop and frisks without reasonable suspicion. *Daniels* was randomly assigned to Judge Scheindlin, who ultimately approved a settlement agreement between the parties in 2003.[3] The settlement agreement required the NYPD to maintain a written anti-racial profiling policy that complies with both the New York State and United States Constitutions.[4]

In December 2007, and just ten days before Judge Scheindlin's supervisory authority over the *Daniels* settlement period was set to expire, she heard argument on a motion brought by the plaintiffs to extend the settlement period.[5] The plaintiffs in *Daniels* sought to hold the City in contempt of the settlement agreement, arguing that, although the City promulgated policies that prohibited racial profiling, the City failed to actually comply with the new policies.[6] Judge Scheindlin refused to hold the City in contempt, finding that the City had substantially complied with the terms of the settlement agreement. However, the transcript from the *Daniels* hearing indicated that Judge Scheindlin made on-the-record comments to plaintiffs' counsel, suggesting that instead of litigating the issue of whether the City complied with the terms of the settlement agreement, the plaintiffs should file a new lawsuit and mark it as "related" to *Daniels*.[7]

Subsequently, the plaintiffs in *Daniels* withdrew their contempt motion and filed a new, related lawsuit—*Floyd v. City of New York*. When filing the lawsuit, the plaintiffs in *Floyd* took Judge Scheindlin's advice and marked the case as "related" to *Daniels*.[8] Accordingly, *Floyd* was assigned to Judge Scheindlin.[9]

Similar to *Daniels*, the plaintiffs in *Floyd* alleged "that the NYPD had engaged in an unconstitutional pattern and practice of using race and/or national origin rather than reasonable suspicion as the determinative factor in deciding whether to stop and frisk individuals."[10] They contended that this pattern and practice, which principally victimizes African-American and Latino males, violated both the United States and New York Constitutions.[11]

Following a nine-week bench trial, Judge Scheindlin held that the City of New York violated the plaintiffs' rights under the Fourth Amendment and Equal Protection Clause of the Fourteenth Amendment.[12] In a separate opinion, Judge Scheindlin ordered a series remedies intending to bring the NYPD's use of stop-and-frisk into compliance with the Constitution.

The equitable remedies issued in *Floyd* were threefold. First, Judge Scheindlin required the NYPD to promptly revise its policies and training regarding stop and frisk to adhere to constitutional standards as well as New York state law.[13] The district court's order also required the NYPD to institute new mechanisms for the training, supervision, monitoring, and disciplining of officers with respect to stop and frisk activity.[14] Second, the parties were required to participate in a joint remedial process in which they would develop their own remedial measures that would eventually supplement the reforms discussed above.[15] Third, and perhaps the most controversial remedial measure taken by Judge Scheindlin, was the requirement that NYPD patrol officers wear body cameras for a one-year period, with the City responsible for the costs of this project.[16] Judge Scheindlin also appointed a monitor to oversee these reforms for an undefined period of time.[17]

On August 27, 2013, the City wrote a letter to Judge Scheindlin requesting a stay of the remedies until the Second Circuit reached a decision on the merits of the City's appeal.[18] Judge Scheindlin denied the City's request, finding that "[a] stay of this Court's orders would encourage NYPD to return to its former practice of conducting thousands upon thousands of improper stops—including those based merely on a person entering or exiting a building in which he or she resides."[19]

III. The Second Circuit's *Sua Sponte* Disqualification and Reassignment

After Judge Scheindlin denied the City's request, the City appealed to the Second Circuit Court of Appeals, seeking a stay of the *Floyd* remedies. The City's appeal was on the merits; it did not raise a challenge with respect to Judge Scheindlin's lack of impartiality. However, following oral argument, the Panel granted the stay, and acting *sua sponte*, removed Judge Scheindlin from the case.[20] This decision came as a surprise to the parties and close observers of the case.[21]

In an order dated October 31, 2013 ("Initial Order"), the Panel found that Judge Scheindlin ran afoul of the Code of Conduct for United States Judges.[22] Specifically, the court cited to Canon 2 of the Code of Conduct, which provides, "[a] judge should avoid impropriety and the appearance of impropriety in all activities."[23] According to the Panel, the appearance of impartiality surrounding the stop-and-frisk litigation was compromised by Judge Scheindlin's improper application of the "related case rule" and by her participation in various media interviews.[24] The Panel concluded that "in the interest and appearance of a fair and impartial administration of justice," the stop-and-frisk cases would be assigned to a different, randomly assigned district judge on remand.[25]

The Second Circuit's initial order disqualifying Judge Scheindlin from the *Floyd* case sparked an array of reactions from the parties to the litigation, various interest groups, and Judge Scheindlin herself. On November 8, 2013, in response to the Second Circuit's initial order, Burt Neuborne requested leave to appear as counsel for Judge Scheindlin, or as *amicus curiae* on her behalf.[26] This request was made under Rule 21(b)(4) of the Federal Rules of Appellate Procedure governing mandamus proceedings, providing for appellate review of motions for judicial disqualification pursuant to 28 U.S.C. § 455 and authorizing counsel to appear on behalf of the District Judge in order to address the factual and legal sufficiency of the Panel's *sua sponte* order of removal.[27] The next day, Neuborne filed a letter urging the Second Circuit to vacate the order of reassignment.[28]

On November 11, 2013, the plaintiffs in *Floyd* filed a motion with the Second Circuit for reconsideration and rehearing en banc.[29] The plaintiffs asserted that the Panel lacked appellate jurisdiction to reassign the case, disqualification was improper, reassignment was inappropriate, and that a new appellate Panel should be randomly assigned for further appeal.[30] Specifically, the plaintiffs argued that Judge Scheindlin's press statements did not provide a valid basis for disqualification because "Judge Scheindlin expressly refused to comment on the merits of *Floyd*, and…the public had an interest in understanding the jurist overseeing the trial of this historic proceeding."[31]

The plaintiffs also argued that Judge Scheindlin's acceptance of *Floyd* as a related case did not constitute a valid basis for her removal. The plaintiffs contended that the local rules on relatedness "compel judges to accept cases as related where it would serve judicial efficiency and district courts should be accorded considerable latitude in applying local procedural rules."[32] In the plaintiffs' view, it was only logical for Judge Scheindlin to accept *Floyd* as related to *Daniels*, given the fact that both cases concerned the same parties, attorneys, discovery documents, and claims.[33]

Lastly, the plaintiffs addressed the Panel's concerns regarding Judge Scheindlin's statements during the *Daniels* hearing. Casting these statements in a different light, the plaintiffs in *Floyd* asserted that Judge Scheindlin's "intra-judicial" comments did not actually cause the *Daniels* plaintiffs to file a new lawsuit.[34] According to the plaintiffs, Judge Scheindlin was merely "noting

the proper procedures for plaintiffs to follow should they have evidence supporting new claims against the City for racial profiling and unconstitutional stop-and-frisk practices."[35]

IV. The Panel's November 13 Decisions

On November 13, 2013, the Panel issued two decisions further explaining its order to reassign the *Floyd* case to a different judge. In the first opinion, the Panel denied Judge Scheindlin's motion for appellate review of her reassignment, holding that the Judge's motion "lack[ed] a procedural basis."[36] As previously mentioned, Judge Scheindlin's motion was made pursuant to Rule 21(b)(4) of the Federal Rules of Appellate Procedure—a rule governing mandamus proceedings. However, the Panel explained that Rule 21 did not apply because there had been no petition for a writ of mandamus in these proceedings.[37] Thus, because there had been no petition for a writ of mandamus, Judge Scheindlin had no basis to appear on her own behalf in order to address the factual and legal sufficiency of the Panel's *sua sponte* order of removal.

The Panel also concluded that Judge Scheindlin did not have standing to challenge the order of reassignment.[38] It noted that, while reassignment may be frustrating to judges who have spent enormous amounts of time, energy and resources on a particular case, reassignment does not constitute legal injury to the judge.[39] The Panel explained that a district judge does not have a legal interest in a case or its outcome and therefore suffers no legal injury by reassignment and that reassignment is an "ordinary tool used by our judicial system to maintain and promote the appearance of impartiality across the federal courts."[40]

In the second opinion, the Panel elaborated on its decision to disqualify Judge Scheindlin and reassign *Floyd* to a new district court judge. In doing so, it emphasized at least three times that there was no finding of actual bias or misconduct on the part of Judge Scheindlin. The Panel nevertheless justified its *sua sponte* reassignment pursuant to the recusal statute, 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[41] The purpose of § 445(a), the Panel wrote, is to provide an internal check to ensure the just operation of the judiciary and that "justice [satisfies] the appearance of justice."[42] In other words, the statute establishes an "objective standard designed to promote public confidence in the impartiality of the judicial process."[43] In addition, even if the question of a judge's partiality is unclear, the public's interest in the appearance of a fair trial tips the scale in favor of a judge's disqualification from the case.[44]

In deciding whether removal was proper, the Panel analyzed the actions taken by Judge Scheindlin in their totality in order to determine if the appearance of impartiality had been compromised.[45] Following a review of the record, the Panel concluded that Judge Scheindlin's statements during the *Daniels* hearing, which appeared to have resulted in the *Floyd* case being forwarded to her, in conjunction with her statements to the media, had the effect of causing a reasonable observer to question her impartiality.[46]

A. The *Daniels* Hearing

In its decision, the Panel referred to various portions of the transcript from the *Daniels* hearing, italicizing each of Judge Scheindlin's statements that appeared troublesome. Specifically, the Panel took issue with the remarks whereby Judge Scheindlin counseled the *Daniels* plaintiffs to bring a new lawsuit and indicated that she would accept it as a related case.

> [I]f you got proof of inappropriate racial profiling in a good constitutional cast, why don't you bring a lawsuit? You can certainly mark it as related.… If one had only your letter, it would look like you have a lawsuit. So instead of struggling to tell me about a stipulation of settlement, why don't you craft a lawsuit?[47]

During her colloquy with counsel, Judge Scheindlin also suggested a possible basis for the new lawsuit:

> [W]hat I am trying to say—I am sure I am going to get in trouble for saying it, for [$350] you can bring that lawsuit…. The City violates its own written policy, the City has a policy that violates—they have violated their policy, here is the proof of it, please give us the remedy. Injunction or damages, or whatever lawyers ask for in compliance. [I]f you think they are violating their written policy, sue them.[48]

She further intimated that if the plaintiffs were to file such a lawsuit, they would be able to acquire relevant documents from the government:

> [T]here is enough in the public record to craft the suit. And then in that suit simply say, we want produced all that was produced in the 1999 lawsuit. I don't know how you could lose getting it. It may be a question of whether it is still going to be under protective order or not. But I can hardly imagine not getting it. You know what I am saying? It is so obvious to me that any Judge would require them to reproduce it to

> you in the same format that you have it, that you will have it again. Whether or not it remains confidential.[49]

When the plaintiffs in *Daniels* indicated their willingness to file a new lawsuit against the City, Judge Scheindlin again asserted that the cases were related and that she would accept the newly filed case. "And as I said before, I would accept it as a related case, which the plaintiff has the power to designate."[50] Less than a month later, the plaintiffs filed the *Floyd* action.

In the Panel's view, "a reasonable observer viewing this colloquy would conclude that the appearance of impartiality had been compromised."[51] While the Panel acknowledged that generally a district judge may advise a party of its legal or procedural options, it concluded that Judge Scheindlin went too far by advising the *Daniels* plaintiffs of a potential legal claim against the City, urging the plaintiffs to assert this new claim, intimating that the claim would be viable, suggesting that the plaintiffs would receive the documents they sought, and then counseling the party to file the new lawsuit as a related case so that it would be forwarded to her.[52] According to the Panel, Judge Scheindlin's comments could reasonably be seen as "intimating her views on the merits" of the new lawsuit, and as actually causing the plaintiffs to file the *Floyd* action and direct the case to her.[53]

B. The Media Interviews

The Panel also took issue with the various interviews that Judge Scheindlin gave to the news media during the course of the *Floyd* litigation. Judge Scheindlin participated in interviews with the Associated Press, *The New Yorker*, and the *New York Law Journal*. The Panel took issue with the lede of the Associated Press article, which read "[t]he federal judge presiding over civil rights challenges to the stop-and-frisk practices of the New York Police Department has no doubt where she stands with the government."[54] The linchpin of the Panel's concern was the author's implication that Judge Scheindlin is "aligned with plaintiffs."[55] The Panel was also troubled by Judge Scheindlin's quoted comment, "I know I'm not their favorite judge," referring to government attorneys.[56]

The *New Yorker* article described the stop-and-frisk litigation as "an enduring battle" that Judge Scheindlin has fought with the NYPD.[57] The author wrote, "[i]n decision after decision, [Judge Scheindlin] has found that cops have lied, discriminated against people of color, and violated the rights of citizens…. [T]he *Floyd* case represents Scheindlin's greatest chance yet to rewrite the rules of engagement between the city's police and its people."[58] The author also referred to a report prepared by the former mayor's office, which revealed that Judge Scheindlin suppresses evidence on the basis of illegal police searches far more than any of her colleagues.[59] In the author's view, "[t]his may mean that Scheindlin is uniquely courageous—or that she is uniquely biased against cops."[60] The Panel also objected to a quote from one of Judge Scheindlin's former law clerks, who stated, "[w]hat you have to remember about the Judge is that she thinks cops lie."[61]

The Panel cautioned that judges should be extremely reluctant to discuss pending proceedings with the media.[62] As the Panel noted, although Judge Scheindlin did not discuss the *Floyd* case during these interviews, the concern was whether, as a result of the interviews or other extra-judicial statements, a reasonable observer might question the appearance of impartiality. In the Panel's view, the context in which the interviews were conducted was critical—the *Floyd* litigation was still pending, Judge Scheindlin had not yet produced a decision, and public interest in the trial was at its peak.[63] In all three news articles, "Judge Scheindlin describes herself as a jurist who is skeptical of law enforcement, in contrast to certain of her colleagues, whom she characterizes as inclined to favor the government."[64] The Panel explained,

> given the heightened and sensitive public scrutiny of these cases, interviews in which the presiding judge draws such distinctions between herself and her colleagues might lead a reasonable observer to question the judge's impartiality. As the First Circuit put it, "the very rarity of such public statements, and the ease with which they may be avoided, make it more likely that a reasonable person will interpret such statements as evidence of bias."[65]

The Panel stated that although its decision was not a personal attack on Judge Scheindlin, it had a duty to preserve the appearance of justice in all proceedings.[66] The Panel also justified its mandate by stating that reassignment, while not an everyday occurrence, is not unusual in the Second Circuit.[67] To support this proposition, the Panel cited to nine recent Second Circuit decisions in which the court of appeals reassigned the case to a new district court judge.[68] It also noted that, in none of these nine cases was the affected district court judge afforded "an opportunity to be heard" prior to the disqualification.[69] The Panel also cited various decisions from other circuits to support its view that "reassignment is simply a mechanism that allows the courts to ensure that cases are decided by judges without even an appearance of impartiality."[70]

Finally, the Panel acknowledged that although neither party in *Floyd* raised the issue of Judge Scheindlin's possible recusal, there existed no authority against the Panel's *sua sponte* reassignment of the case.[71] The Panel again cited to various Second Circuit

cases whereby reassignment was initiated *sua sponte* by the court, and concluded "given the importance of maintaining the judiciary's appearance of impartiality, we think that it is well within our discretion to order reassignment of these cases."[72]

V. Motions for *En Banc* Reconsideration

In response to the Panel's November 13 *per curium* decisions, the *Floyd* plaintiffs filed a supplemental motion for *en banc* reconsideration. The plaintiffs argued that the Panel's removal decision was unsupported by 28 U.S.C. § 2106, a federal statute governing a federal appellate courts' ability to assign a case to a different judge on remand.[73] In interpreting § 2106, the plaintiffs asserted, the United States Supreme Court has held that a "federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes (such as 28 U.S.C.A. §§ 144 or 455) alone, but on the appellate courts' power to require such further proceedings to be had as may be just under the circumstances."[74] In determining whether a new judge should be assigned on remand, the Second Circuit has previously considered

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected; (2) whether reassignment is advisable to preserve [the] appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness.[75]

The plaintiffs argued that under § 2106, the Panel should have, but did not, consider that reassignment would cause undue waste of judicial resources and prejudice to the plaintiffs.[76] Instead, the Panel grounded its authority on 28 U.S.C. § 455(a), but disregarded the fact that removal under this section typically follows an explicit request or motion for removal, which did not occur here.[77]

In addition, the plaintiffs characterized the Panel's "attempt to cast its action as routine" as misleading.[78] The plaintiffs noted that many of the cases cited in the Panel's supplemental opinion differed from the case at bar because reassignment in those cases occurred *after* the court reached a full decision on the merits of the appeal.[79] In the plaintiffs' view, "by addressing the merits before considering disqualification, these decisions ensured that the public could not unfairly question the soundness of the ruling on review, and that any concerns about the propriety of those rulings were immediately eliminated."[80]

In fact, plaintiffs argued, the only cited cases that did not discuss the merits before addressing reassignment were those in which the sole question on appeal was disqualification of the district judge.[81] Moreover, in most of the cited cases, reassignment was ordered pursuant to § 2106, even though some of the opinions did not expressly cite to the statute.[82] For example, many of the cited cases considered the difficulties remand would present to the original judge, the potential waste of judicial resources, prejudice to the plaintiffs, and damage to the appearance of justice that would flow from removal.[83] According to the plaintiffs, these are considerations that the Panel declined to entertain, and would have weighed heavily against removing Judge Scheindlin.

The plaintiffs also argued that the Panel's reasons for disqualifying Judge Scheindlin, whether viewed separately or in their totality, were not justified.[84] In the plaintiffs' view, Judge Scheindlin's comments to the *Daniels* plaintiffs regarding the new lawsuit were taken out of context. The plaintiffs contended that Judge Scheindlin merely suggested that it would be a waste of time and resources to adjudicate the terms of the settlement agreement.[85] It was in this context that Judge Scheindlin suggested that *if* the plaintiffs had evidence of unconstitutional racial discrimination, they could file a new lawsuit and mark it as related to *Daniels*.[86] According to the plaintiffs, a reasonable observer would not have questioned the court's impartiality when a non-objective, interested party to the case—the City of New York—did not raise the issue of Judge Scheindlin's recusal, even though the City sought to vacate Judge Scheindlin's order.[87] The plaintiffs further argued that the mere suggestion that a party mark a case as related should not form the basis for a district judge's removal from a case.[88] Rather, advising that a party mark a case as related is one of many recommendations that judges routinely provide to litigants to preserve judicial economy.[89]

Lastly, the plaintiffs argued that neither Judge Scheindlin's statements to the media, nor statements made about her by others, justified her disqualification.[90] The plaintiffs again argued that her comments to the press were taken out of context. According to the plaintiffs, a full reading of the Associated Press article actually reveals that Judge Scheindlin took a rather impartial position regarding disputes between private citizens and the government. For example, the Associated Press article contained the following excerpt: "'I do think that I treat the government as only one more litigant,' she said during the interview that proceeded with a single rule: no questions about the trial over police tactics that reaches closing arguments Monday."[91]

In an order dated November 25, 2013, the Second Circuit held in abeyance all motions for *en banc* reconsideration.[92] The Panel did so in order to "maintain and

facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution."[93] And that is what the parties did. The City, with the consent of the plaintiffs, requested that the Second Circuit remand the stop-and-frisk cases back to the District Court to permit the parties to engage in settlement negotiations.[94] Accordingly, the Panel lifted the stay for the limited purpose of allowing the parties to explore the possibility of a settlement.[95]

VI. Current Developments

Just one day after Judge Scheindlin was removed from *Floyd*, the case was reassigned to Southern District Court Judge Analisa Torres.[96] Meanwhile, the plaintiffs and the City finally reached an agreement to resolve the City's appeal in *Floyd*, and moved in the District Court for an order modifying the remedial order. Instead of proposing a new settlement agreement, the City agreed to accept Judge Scheindlin's remedial order subject to certain modifications.[97] Specifically, the City sought to place a three-year time limit on the court-appointed monitor's term instead of the "unspecified term" initially proposed by Judge Scheindlin.[98]

On July 30, 2014 Judge Torres granted the proposed modification, finding that it "equitable to the parties" and in the public interest.[99] Following the election of Mayor Bill de Blasio, the City of New York voluntarily withdrew its appeal with prejudice.[100] The City's police unions, however, are still arguing that they should be able to continue the appeal of Judge Scheindlin's ruling.[101]

Today, stop-and-frisk numbers are down nearly ninety percent in New York City.[102] Between the first half of 2012 and the last half of 2013, the number of reported police stops has dropped from 337,410 to 33,699.[103] This decline does not immunize the police from public scrutiny, however. The death of Eric Garner—the Staten Island man who died while NYPD officers were arresting him for selling untaxed cigarettes—once again placed the NYPD's tactics under close public scrutiny. In Ferguson, Missouri, the fatal shooting of an unarmed African-American teenager, Michael Brown, also has led to nationwide public scrutiny of police tactics. Judge Scheindlin publicly commented on these incidents at a Bronx County Bar Association dinner, asserting that if the police in question had been wearing body cameras, "neither incident would have ended with a dead body."[104]

Interestingly, the Southern District revised its "related case rule" after Judge Scheindlin's reassignment.[105] Under the amended rule, a three-judge panel will review each case where a claim of relatedness has been made in order to "maximize the randomness of the assignment of cases."[106] As Chief Judge Loretta A. Preska explained, the amended rule would serve to limit litigators from "judge shopping," and would promote consistency across the court regarding which cases are deemed related.[107]

The cloud of controversy surrounding the NYPD's stop-and-frisk practices seems to have settled, at least to some extent. Ironically, in such a controversial case, the unusual developments with respect to the Panel's *sua sponte* removal of Judge Scheindlin may be the enduring legacy of *Floyd*. Although Judge Scheindlin spent nearly fifteen years trying to find a resolution to the stop-and-frisk litigation, the Panel's concern over the appearance of her impartiality took center stage in the *Floyd* litigation. What makes the trial court judge's removal even more noteworthy is that the Panel reassigned the case *sua sponte*, despite the fact that neither party to the case raised the issue of Judge Scheindlin's impartiality. Over seventy years ago, however, Justice Hugo Black, writing for a unanimous Supreme Court, stated that "there may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."[108]

Endnotes

1. *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring).
2. *Daniels v. City of New York*, No. 99-cv-1695 (S.D.N.Y. Mar. 8, 2001).
3. Stipulation of Settlement, *Daniels v. City of New York*, No. 99-cv-1695 (Sep. 24, 2003), *available at* https://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf.
4. *Id.*
5. *Ligon v. City of New York*, 736 F.3d 118, 124 (2d Cir. 2013) *vacated in part*, 743 F.3d 362 (2d Cir. 2014)
6. *Id.*
7. *Id.* at 122; *see* S.D.N.Y.R. 13 cmt.

   > This rule authorizes the transfer of later-filed cases to the judge to whom an earlier filed related case is assigned…It seeks to strike a balance between the benefits that may be achieved by avoiding unnecessary duplication of effort, expense and burden on the Court and parties through the assignment of related matters to a single judge and the desirability of enriching the development of the law by having a plurality of judges examine in the first instance common questions of law.

   Id.
8. *Ligon*, 736 F.3d at 122.
9. *Id.*
10. *Floyd v. City of New York*, 813 F. Supp. 2d 417, 423 (S.D.N.Y. 2011).
11. *Id.*
12. *Floyd v. City of New York*, 959 F.Supp.2d 540, 667 (S.D.N.Y. 2013).
13. *Id.* at 563.

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Floyd v. City of New York*, 959 F.Supp. 2d 692, 692 (S.D.N.Y. 2013).
19. *Id.* at 696.
20. *Ligon v. City of New York*, 538 F.Appx. 101, 102 (2d Cir. 2013) (opinion of Walker, J., Cabranes, J., Parker, J.).
21. *See, e.g.*, Joseph Goldstein, *Court Blocks Stop-and-Frisk Changes for New York Police*, N.Y. Times (Oct. 31, 2013), <http://www.nytimes.com/2013/11/01/nyregion/court-blocks-stop-and-frisk-changes-for-new-york-police.html?_r=0> (describing the Second Circuit's initial order as an "unexpected twist").
22. *Id.*
23. *Id.*
24. *Id. See, e.g.*, Mark Hamblett, *Stop-and-Frisk Judge Relishes Her Independence*, N.Y. L.J. (May 5, 2013) <http://www.newyorklawjournal.com/id=1202600625151/StopandFrisk-Judge-Relishes-Her-Independence;> Larry Neumeister, N.Y. *'Frisk' Judge Calls Criticism "Below-the-Belt,"* The Associated Press (May 19, 2013), <http://news.yahoo.com/ny-frisk-judge-calls-criticism-below-belt-160257320.html>; Jeffrey Toobin, *A Judge Takes on the Stop-and-Frisk*, The New Yorker (May 27, 2013), <http://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2>.
25. *Id.*
26. *Ligon v. City of New York*, 736 F.3d 166, 169 (2d Cir. 2013).
27. *Id.*; *see also* Fed. R. App. P. 21(b)(4) ("The court of appeals may invite or order the trial-court judge to address the pettition or may invite an amicus curiae to do so.").
28. *Ligon*, 736 F.3d at 169.
29. Plaintiffs' Motion for En Banc Consideration at 14, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 11, 2013), *available at* <http://www.ccrjustice.org/files/11-11-13%20Motion%20to%20Reconsider%20En%20Banc%20Mem%20of%20Law.pdf>.
30. *Id.*
31. *Id.* at 14.
32. *Id.* at 12-13.
33. *Id.* at 13.
34. Plaintiffs' Motion for En Banc Reconsideration at 12, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 11, 2013), *available at* <http://www.ccrjustice.org/files/11-11-13%20Motion%20to%20Reconsider%20En%20Banc%20Mem%20of%20Law.pdf>.
35. *Id.*
36. *Ligon v. City of New York*, 736 F.3d 166, 169 (2d Cir. 2013).
37. *Id.* at 170.
38. *Id.*
39. *Id.* at 171.
40. *Id.* at 171, 172.
41. *Ligon v. City of New York,* 736 F.3d 118, 123 (2d Cir. 2013); 28 U.S.C. § 455 (a).
42. *Id.*
43. *Id.*
44. *Id.* at 124.
45. *Id.*
46. *Ligon*, 736 F.3d at 124.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Ligon*, 736 F.3d at 125.
52. *Id.*
53. *Id.* at 124.
54. Larry Neumeister, *NY 'Frisk' Judge Calls Criticism 'Below-The-Belt,'* The Associated Press (May 19, 2013), <http://news.yahoo.com/ny-frisk-judge-calls-criticism-below-belt-160257320.html>.
55. *Ligon*, 736 F.3d at 127.
56. *Id.*
57. Jeffrey Toobin, *A Judge Takes on the Stop-and-Frisk,* The New Yorker (May 27, 2013), <http://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2>.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Ligon v. City of New York*, 736 F.3d 118, 126 (2d Cir. 2013).
63. *Id.* at 127.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Ligon*, 736 F.3d at 127.
68. *Id.* at 128, n.29.
69. *Id.*
70. *Id.* at 129.
71. *Id.*
72. *Ligon*, 736 F.3d at 129.
73. 28 U.S.C. § 2106
74. *Liteky*, 510 U.S. 540, 554 (1994).
75. *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977).
76. Plaintiffs' Supplemental Motion for En Banc Reconsideration at 3, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 18, 2013), *available at* <http://www.ccrjustice.org/files/Pls%20MOL%20ISO%20of%20Supp%20Motion%20for%20En%20Banc%20Reconsid.pdf>.
77. *Id.* at 5.
78. *Id.*
79. *Id.*
80. *Id.*
81. Plaintiffs' Supplemental Motion for En Banc Reconsideration at 4, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 18, 2013), *available at* <http://www.ccrjustice.org/files/Pls%20MOL%20ISO%20of%20Supp%20Motion%20for%20En%20Banc%20Reconsid.pdf>.
82. *Id.*
83. *Id.*
84. *Id.* at 6.
85. *Id.*
86. Plaintiffs' Supplemental Motion for En Banc Reconsideration at 6, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 18, 2013),

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87. *Id.* at 8.
88. *Id.* at 10.
89. *Id.*
90. *Id.* at 11.
91. *See supra* note 54.
92. *Ligon v. City of New York*, 743 F.3d 362, 364 (2d Cir. 2014).
93. *Id.*
94. *Id.* at 365.
95. *Id.*
96. John Riley, *New Judge Assigned to Stop and Frisk Case*, NEWSDAY (Nov. 1, 2013), <http://www.newsday.com/news/new-york/new-judge-assigned-to-stop-frisk-case-1.6360591>.
97. *Floyd v. City of New York*, No. 08 Civ. 1034, 2014 WL 3765729 (S.D.N.Y. Jul. 30, 2014).
98. *Id.* at *1.
99. *Id.*
100. Motion to Withdraw Appeal, *Floyd v. City of New York*, No. 13-3088 (S.D.N.Y. Aug. 6, 2014).
101. Mara Gay & Mark Morales, *New York City Police Unions Ask Again to Appeal Stop-and-Frisk Decision,* WALL ST. J. (Oct. 16, 2014), < http://online.wsj.com/articles/new-york-city-police-unions-ask-again-to-appeal-stop-and-frisk-decision-1413423643>.
102. Ian Reifowitz, *This is What Activism Can Accomplish: Look at the Drop in NYC Stop-And-Frisks*, HUFFINGTON POST, (Oct. 25, 2014 10:28 PM), <http://www.huffingtonpost.com/ian-reifowitz/this-is-what-activism-can_b_5869714.html>.
103. Mike Bostock, *Stop and Frisk is All But Gone in New York*, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/interactive/2014/09/19/nyregion/stop-and-frisk-is-all-but-gone-from-new-york.html?_r=0>.
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106. *Id.*
107. *Id.*
108. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

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The New York Environmental Enforcement Update 2013 Annual Report

Published by the Environmental Law Section of the New York State Bar Association
Written and Compiled by Michael J. Lesser, Esq.
Edited by Samuel J. Capasso III, Esq.

The NYSBA Environmental Law Section ("ELS") has published an "E-Book" entitled "NY Environmental Enforcement Update 2013 Annual Report." It is a compilation of the monthly 2013 NY Environmental Enforcement Update blog entries previously posted in the Section's blog "Envirosphere" and can be downloaded directly from the ELS website by clicking on the title in the left margin menu at http://www.nysba.org/Environmental/ or directly at http://www.nysba.org/Sections/Environmental/NY_Environmental_Enforcement_Update_2013_Annual_Report.html.

The purpose of the E-Book and the underlying monthly blog is to collate New York State-based environmental enforcement information from disparate statewide sources to assist government attorneys, policy makers, regulators, defense counsel and the general public in evaluating the impact and effectiveness of environmental enforcement on environmental quality, public health and the economy. The items compiled represent one view of the broad environmental enforcement issues faced by New York's environmental practitioners.

The E-Book itself consists of monthly chapters divided by topical entries for different areas of practice. Subject titles for each monthly chapter include: General N.Y. Enforcement News; State, Local and Federal Civil and Criminal Enforcement Actions; State and Federal Administrative Enforcement Settlements, Decisions and Commissioner's Orders; and, on the lighter side, "Weird News." A "People in the News" section is also included to follow the always changing staff of state, local and federal agencies. While not comprehensive, the E-Book is compiled using approximately 25 main online sources with primary sources such as government web sites preferred.

Finally, the E-Book is published in a common Adobe 9.0 pdf format so that it can be downloaded and used as both a monthly historical chronicle and a searchable reference work. Accordingly, the content of this E-Book may be accessed in several ways including:

- Chronologically by month;
- By linking within each monthly chapter via the chapter TAGS; and,
- By key word search (via the Adobe tool bar) within the text of the document.

Of course, the original hyperlinking within the individual blog items can still be used to find the original source materials and additional information (subject to web content changes).

The E-Book was compiled and written by Municipal and Environmental Law Section member Michael J. Lesser and edited by ELS member Samuel J. Capasso III. Michael Lesser is currently Of Counsel to Sive Paget & Riesel P.C. and was formerly an Assistant Counsel and enforcement attorney with the New York State Department of Environmental Conservation.

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