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Municipal Lawyer

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Message from the Chair

Back in the days when I was a real lawyer—instead of a supervisor, editor, manager, and bureaucrat—I actually practiced law. And the law I practiced was mostly municipal law. But municipal law, as you readers know, covers an amazingly diverse 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, with few exceptions (I never found myself in surrogate's court on behalf of a municipal client, though I'm sure some of you have).

As a young village counsel, I discovered certain truths about my municipal clients. First, they needed a clear answer, even when the law was unclear—preferably the answer they sought, but better a clear answer than a three-armed lawyer one. Second, at public meetings (of which no end exists for a municipal attorney), they needed that answer immediately. Researching the issue was rarely an option—whether they could go into executive session or not, whether a supermajority was needed on a vote or not, and endless other questions. Third, they looked to me to keep them out of trouble, so I learned that an effective municipal counsel must occasionally play the role of consigliere. Finally, often knowledge mattered less than common sense. The work was endlessly fascinating.

More importantly, the work—representing municipal clients—really means something. I trained at one of the large New York City law firms, and I acknowledge the necessity of the work they do. But as I tell my New York Practice students at Fordham when I give my Dutch Uncle's Speech that first class each semester, when Microsoft sues Apple and the big firms duke it out, no one really cares who wins—not even the shareholders, as long as the value of their stock doesn't go down—and the lawyers get paid well either way. But municipal service is different. What we as municipal counsel do really matters. And in many ways, what happens at the municipal level has a greater impact

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upon people's lives than the actions of the state or federal government or even corporate America: Is your garbage picked up or not? May your neighbor build a deck blocking your view? Will be you be awakened at 7:00 a.m. every Saturday morning by a leaf blower? Will your street's only tree, which toppled in the last storm, be replaced?

As part of that same speech, I tell my students about a man down in Texas who was so incredibly decadent that the devil paid him a visit to show him what was in store for him if he did not mend his ways. But in his brief sojourn in hell, the man was astounded to see champagne fountains surrounded by great orgies. Not surprisingly, the man continued his decadent ways until his death, when he returned to hell, this time as a permanent resident. But the fountains were dried up, and fire and brimstone tortured the denizens. The man sought out the devil and asked what was going on because it had been very different when he had visited years before. "When was that?" the devil asked. The man explained, and the devil replied, "Oh yeah, you were a summer associate then." And so it is. Whatever the attractions of big firm practice—and I value greatly my own big firm experience—they are often illusory. The surveys bear it out: the lawyers most satisfied with their jobs are those in government service. Because being a municipal attorney really means something.

Among the Section's priorities during the next two years is the recruitment of law students into the Section through regular law school visitation, law student mentoring, and the establishment of a relationship between the Section and one or more law schools. I invite every member of the Section to participate in this endeavor. As I tell my students, I am enormously proud to be a lawyer, and even prouder to be a municipal lawyer. I have had a wonderful legal career, but the best part has been municipal practice. I suspect that is true of many of you as well. We need to get the word out to those students. Please join us. You may reach me at davies@coib.nyc.gov or our Section liaison, Beth Gould, at bgould@nysba.org.

Mark Davies

From the Editors

This is our first issue as the new editors of the *Municipal Lawyer*. We are excited to be involved in the newsletter; we also know that we have very large shoes to fill given the editorial experience and legal expertise of the outgoing editor, Touro Law Center Dean Patricia Salkin.

We already have introduced ourselves on the listserv. Now we'd like to tell you a bit more about ourselves and why we are serving as editors. Rodger Citron has been a professor at Touro Law Center since 2004. He teaches Civil Procedure and Administrative Law and served as a reporter on the New York Pattern Jury Instruction Committee for four years. Rodger believes it is important to know how the law actually operates as well as the substance of the rules; hence he leaped at the opportunity to become involved with a publication written for—and often by—practicing lawyers.

Sarah Adams-Schoen was recently named the inaugural Director of Touro Law Center's Land Use and Sustainable Development Law Institute. She has been a professor at Touro Law Center since August 2012, when she moved to Long Island from Portland, Oregon. Sarah practiced law for nine years before transitioning to full-time teaching. Mirroring her diverse practice, she teaches in a variety of areas, including legal writing, environmental criminal law, and energy law. Prior to becoming a lawyer, Sarah was a policy analyst for Metro, the tri-county regional government in Portland, Oregon. Like Rodger, Sarah leapt at the opportunity to get to know the New York municipal bar and the current legal issues affecting practicing New York attorneys.

This issue has, as usual, an array of articles on a number of different topics. Martin Schwartz examines a United States Supreme Court case from 2012, *Rehberg v. Paulk*, in which the Court held that grand jury witnesses are absolutely immune from liability under 42 U.S.C. § 1983 for their testimony, and even for conspiring to give false testimony.

Karen Richards also explores a topic that relates to law enforcement—the circumstances under which a municipality may be liable for failure to supply adequate police protection. As she explains, courts have never imposed general liability simply from the failure to supply adequate police protection. Liability may be found only where a "special relationship" exists between the municipality and the injured party.

Moving beyond law enforcement, Andrew Orenstein and Tahesha Gilpin provide a helpful summary of the Uniform Notice of Claim Act, which became effective in June 2013. This Act revamped the network of statutes governing the filing of Notices of Claims against governmental entities in order to provide plaintiffs with a uniform, fair and statutorily consistent procedure for commencing a proceeding in the courts of New York. As the authors explain, in addition to traditional methods, claimants now have the option of filing notices of claim upon governmental entities for property damage, personal injuries, or death, where such notices are required as a precondition to suit, by serving them upon the Secretary of State in addition to service by traditional means.

The practice of municipal law involves compliance as well as litigation, of course. Michael Lewyn discusses the New York State Environmental Quality Review Act (SEQRA), which aims to protect the environment by requiring the government to consider the harmful environmental impacts of its actions. However, Professor Lewyn contends that SEQRA in fact creates its own harmful environmental impacts that should be considered when evaluating the law.

Every lawyer knows someone who decided—wisely or not—to attend law school because that person was averse to the rigor of mathematics. Ann Nowak's article reminds us that math can help us understand the law. In particular, she explains why municipal lawyers might want to review their high school mathematics lessons about set theory before drafting statutes or codes. Using as an example a recent case before the Southampton Town Zoning Board of Appeals involving whether plain plastic strips demarcating a religious boundary constitute "signs" under the Town Code, Professor Nowak argues that the application of set theory, particularly in the form of Venn diagrams, can help to prevent ambiguity of language in statutory construction and thus reduce the need for litigation to clarify the meaning of a statute or regulation.

Thomas Schweitzer provides a preview of a case currently pending before the Supreme Court, *Town of Greece v. Galloway*. The case involves the practice of official prayers before town meetings, which the United States Court of Appeals for the Second Circuit found

to be unconstitutional based upon the particular practices for arranging and performing those prayers. As Professor Schweitzer notes, the Court's Establishment Clause jurisprudence is not always clear on what is permissible with respect to legislative prayer. His article not only considers how *Galloway* should be decided but also concludes with a plea for the Court to provide more guidance in this area of the law.

The daily demands of law practice make it difficult to appreciate that lawyers often wrestle with problems and issues that have existed for centuries, even millenia. Mark Davies, Steven G. Leventhal and Thomas J. Mullaney enlighten us with the first part of a two-part abbreviated history of government ethics laws.

After that plunge into the historical past of ethics laws, we bring you back to the present with Jackie Gross's article on the more than 20 blogs hosted by the New York State Bar Association.

Dean Salkin turned the *Municpal Lawyer* over to us in fine shape. We will succeed if we do no more than maintain the quality of the newsletter. Of course, we hope to do more than that. We will need your help with each issue. Please keep sharing your ideas, submitting your articles, and letting us know what we can and should do to continue the high quality of this publication.

Sarah Adams-Schoen
Rodger D. Citron

Supreme Court Holds Grand Jury Witnesses Absolutely Immune from § 1983 Liability

By Martin A. Schwartz

Police officer perjury is a terrible blight on the criminal justice system. The issue was recently explored by Michelle Alexander in her op-ed article in the *New York Times*, "Why Police Lie Under Oath." The article quoted former San Francisco Police Commissioner Peter Keane's disturbing conclusion that "[p]olice officer perjury to justify illegal dope searches is commonplace[,] a routine way of doing business in courtrooms everywhere in America."[1] The problem is neither limited to police perjury to justify drug searches nor limited geographically. Ms. Alexander found that New York City police officers "engage in patterns of deceit in cases involving charges as minor as trespass."[2]

Police officer perjury compromises the integrity of the criminal justice system, and can have serious adverse consequences for criminal suspects and defendants, worst of all being wrongfully convicted and serving time for a crime the defendant did not commit. As Ms. Alexander so aptly put it, "[a]s a juror, whom are you likely to believe: the alleged criminal in an orange jumpsuit or two well-groomed police officers in uniforms who just swore to God they're telling the truth, the whole truth and nothing but."[3]

And yet, some three decades ago the United States Supreme Court in *Briscoe v. LaHue*[4] held that police officers are absolutely immune from claims for money damages under 42 U.S.C. § 1983 for allegedly giving perjurious testimony at a criminal trial. Although § 1983 authorizes the assertion of federal constitutional claims against state and local officials, absolute immunity effectively deprives the § 1983 complainant of a meaningful remedy. Last term, the Supreme Court in *Rehberg v. Paulk*[5] extended the absolute witness immunity recognized in *Briscoe v. LaHue* to grand jury witnesses. In a unanimous opinion written by Justice Samuel A. Alito, Jr., the Court in *Rehberg* held that grand jury witnesses are absolutely immune from § 1983 liability for their testimony, and even for conspiring to give false testimony.

Charles Rehberg, a CPA, sent anonymous faxes to the management of a hospital in Georgia, criticizing the hospital's management and operations. The district attorney's office then launched an investigation against Rehberg, which, according to Rehberg, was undertaken as a favor to hospital officials. Rehberg was indicted in state court for, *inter alia*, assaulting a physician, burglary, and making harassing telephone calls. After all of the criminal charges were dismissed, Rehberg brought suit in federal district court under 42 U.S.C. § 1983 seeking money damages against James Paulk, the chief investigator in the local district attorney's office, in his personal capacity. The complaint alleged that Paulk conspired to present and presented false testimony to the grand jury against Rehberg, causing him to be indicted in violation of his constitutionally protected rights.

"Police officer perjury compromises the integrity of the criminal justice system, and can have serious adverse consequences for criminal suspects and defendants, worst of all being wrongfully convicted and serving time for a crime the defendant did not commit."

Section 1983 claims are generally assertable against state and local officials and municipalities,[6] although not against states or state entities.[7] A § 1983 plaintiff may seek money damages against a state or local official in her personal capacity based upon her allegedly unconstitutional conduct.[8] A personal-capacity claim (also referred to as an individual-capacity claim) seeks a judgment for money damages payable out of the official's private funds. By contrast, an official-capacity claim against an official is tantamount to a claim against the governmental entity.[9] For example, an official capacity claim against the Mayor of the City of New York is tantamount to a claim against the City. *Rehberg v. Paulk* concerns only personal-capacity claims.

Although § 1983 makes no mention of immunity from liability, United States Supreme Court precedent firmly establishes that state and local officials sued for money damages in their personal capacities may assert an immunity defense.[10] Some officials sued under § 1983 are entitled to assert an absolute immunity, while others are entitled to assert qualified immunity. Generally speaking, officials who carry out judicial, prosecutorial and legislative functions are shielded by absolute immunity, while officials who carry out law enforcement and other executive functions are protected by

qualified immunity. As we will see, whether an official is entitled to assert an absolute immunity or qualified immunity depends on the nature of the function she carried out.

Absolute immunity shields an official from monetary liability even if she acted in a blatantly unconstitutional manner, and even if she acted maliciously or otherwise in bad faith.[11] Qualified immunity provides somewhat lesser protection, shielding an official from personal liability so long as she did not violate clearly established federal law.[12] Nevertheless, qualified immunity is a quite formidable defense, just not as formidable as absolute immunity. The Supreme Court in *Rehberg v. Paulk* had to decide whether Paulk's grand jury testimony, and his alleged participation in a conspiracy to give false testimony, were protected by absolute immunity. The Court held that Paulk was protected by absolute witness immunity for those actions.

The Court in *Rehberg* reiterated its approach for determining whether an official sued for damages under § 1983 is entitled to an absolute or qualified immunity. Because it is assumed that Congress was familiar with the common-law immunities in place when the original version of § 1983 was enacted in 1871, the Court first looks for "guidance" to those common law immunities.[13] In other words, the Court does not simply make a '"freewheeling'" determination of whether recognition of an immunity defense is sound policy.[14] On the other hand, the Court has not applied the common law immunities "mechanically," and has considered both developments in the law since 1871 as well as policy concerns underlying § 1983.[15] The Court in *Rehberg* gave the following example. In 1871, it was common for criminal cases to be prosecuted by private parties who did not enjoy absolute immunity.[16] Since 1871, the great majority of criminal offenses have, of course, been prosecuted by public prosecutors,[17] and common-law courts afforded them absolute immunity from malicious prosecution and defamation claims. Even though the common-law in 1871 did not afford prosecutors absolute immunity, the Supreme Court has afforded them absolute immunity from § 1983 liability for carrying out their advocacy functions. In the seminal case of *Imbler v. Pachtman*,[18] the Court held that prosecutors are absolutely immune for initiating and prosecuting a criminal case. Since *Imbler* was decided in 1976, an extensive body of Supreme Court and circuit court decisional law, guided by common-law concepts as well as policy considerations, has attempted to flesh out the scope of absolute prosecutorial immunity.[19]

The Court applies a "functional approach" under which the immunity to which a § 1983 defendant is entitled depends not upon the official's title, but upon the nature of the particular function at issue in the case at hand.[20] An official may thus be entitled to absolute immunity for carrying out one function though qualified immunity for another. Prosecutors, for example, enjoy absolute immunity for carrying out their advocacy functions, though qualified immunity for their actions that are essentially investigatory or administrative in nature. The line between the two types of functions is sometimes difficult to discern.[21]

Although at common-law trial witnesses enjoyed immunity only from slander and libel claims,[22] in *Briscoe v. LaHue*,[23] the Supreme Court recognized a much broader absolute immunity for trial witnesses sued under § 1983 that encompasses *any constitutional claim* based on the witness's testimony. The Court in *Briscoe* held that a police officer who gave allegedly perjurious testimony at a criminal trial was protected from § 1983 liability by absolute witness immunity. It reasoned that police officers should not testify with the lurking fear of monetary liability, and expressed concern that some officers might shade their testimony in favor of a potential § 1983 claimant because of that fear.[24] And, the Court did not want police officers diverting their energies from their police responsibilities to the defense of § 1983 claims based upon their testimony in a criminal trial.[25] These are legitimate reasons supporting absolute immunity for the trial testimony of police officers. The problem is that on the other side of the lawsuit there may be a § 1983 plaintiff who suffered a serious deprivation of constitutional rights because of perjurious police testimony, but is denied relief because of absolute immunity.

Nevertheless, the Court in *Rehberg v. Paulk* extended the absolute witness immunity recognized in *Briscoe v. LaHue* for trial testimony to law enforcement officer witnesses who testify before the grand jury. The Court found that the same justifications for granting absolute immunity for trial witnesses apply to grand jury witnesses. "In both contexts, a witness's fear of retaliatory litigation may deprive the tribunal of critical evidence. And, in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony," because in each instance perjury is subject to criminal prosecution.[26] The Court overlooked the reality that perjury prosecutions are fairly uncommon.

The Court in *Rehberg* held that absolute immunity protects not only the in-court testimony of grand jury witnesses, but also witness preparation and even alleged conspiracies to give perjured testimony. The Court was concerned that were the rule "otherwise 'a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.'"[27] In the "vast majority" of claims against grand jury witnesses, the witness and prosecutor engaged in preparatory activity, such as preliminary discussions in which the witness related the "substance of her intended testimony."[28] Failure to immunize an alleged conspiracy to

give false testimony and trial preparation would thus make it easy for § 1983 claimants to evade absolute witness immunity. The extension of absolute immunity to witness preparation and conspiracies effectively put the Court's "stamp of approval" on the majority view in the circuits that absolute witness immunity encompasses witness preparation and conspiracies, and effectively overturned the Second Circuit's minority view that absolute witness immunity was limited to the testimony itself and did not encompass either conspiracies to give false testimony or witness preparation.[29]

The Court perhaps attempted to soften the immunity blow a bit with ambiguous footnote one, stating that the extension of absolute immunity to conspiracies to give false testimony and witness preparation "[o]f course does not mean that absolute immunity extends to *all* activity engaged in by a witness outside the grand jury room."[30] The Court offered as examples decisions in which it has "accorded only qualified immunity to law enforcement officials who falsify affidavits"[31] and who "fabricate evidence concerning an unsolved crime."[32]

Brief ambiguous "of course" footnotes can "of course" muddy the waters and cause great mischief. Section 1983 plaintiffs' attorneys will undoubtedly rely on footnote one in their attempts to escape the clutches of absolute immunity, while defendants' counsel will attempt to distinguish footnote one away. In the author's view the footnote suggests that the officer's out-of-court conduct will not be protected by absolute witness immunity if it was too far removed from her in-court testimony. Of course, how far is too far, and whether or not the officer's conduct constitutes witness preparation, will have to be determined on a case-by-case basis.

In a final attempt to avoid the clutches of absolute immunity, Rehberg argued that Paulk was not protected by absolute immunity because he was a "complaining witness." Rehberg relied upon Supreme Court precedent to support the conclusion that law enforcement officials who submitted affidavits in support of applications for arrest warrants were not entitled to absolute immunity because they were "*complaining* witnesses."[33] Prior to its decision in *Rehberg v. Paulk*, the Court had not provided a workable definition of "complaining witness." *Rehberg* resolved that a grand jury witness is not a "complaining witness" because at common law in 1871 a "complaining witness" referred to an individual who procured an arrest and initiated a criminal prosecution;[34] a witness who only testified before a grand jury was not a complaining witness. In fact, "it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury…."[35] The term "complaining witness" is misleading, a "misnomer," because a complaining witness need not testify at all.[36] The Court thus ruled that even though a law enforcement officer who testifies before the grand jury or at trial may be an important witness, he is not a complaining witness.[37]

Most states that do not use the grand jury system provide a preliminary hearing procedure.[38] The Court in *Rehberg* cited, with apparent approval, circuit court decisions holding that witnesses at a preliminary hearing are entitled to the same absolute immunity granted grand jury witnesses.[39] Although this part of the Court's decision is dicta, it follows logically from the rationale of the Court's extension of absolute immunity to grand jury testimony.

The Court's decision in *Rehberg v. Paulk* does not resolve the immunity to which other witnesses are entitled, for example, witnesses in civil litigation, before administrative agencies, and in arbitration proceedings. One reason these issues do not arise with great frequency in § 1983 litigation is because a suable § 1983 defendant must be a person who acted under color of state law. Law enforcement officers who testify pursuant to their official responsibilities clearly act under color of state law. Private witnesses clearly do not, unless they conspired with a public official.

The decision in *Rehberg v. Paulk* is strictly limited to the issue of immunity from § 1983 liability enjoyed by grand jury witnesses. The decision does not deal with the type of conduct engaged in by law enforcement officials that may be actionable as a constitutional wrong under § 1983. Nor did the Court deal in *Rehberg* with the right of a § 1983 plaintiff to obtain disclosure of grand jury testimony. Although the Court referred to the importance of grand jury secrecy,[40] and in passing stated that absolute witness immunity "may not be circumvented…by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution,"[41] the Court did not decide when disclosure of grand jury testimony may be ordered in a § 1983 action.[42]

To summarize the Supreme Court's important rulings in *Rehberg v. Paulk*:

1. Grand jury witnesses are protected by absolute witness immunity;
2. Absolute witness immunity shields not only the testimony itself, but also an alleged conspiracy to give false testimony and trial preparation;
3. Via strong dictum, witnesses who testify at preliminary hearings are shielded by absolute witness immunity; and
4. Although "complaining witnesses" do not enjoy absolute immunity, merely testifying before the grand jury does not render a witness a "complaining witness."

Endnotes

1. Michelle Alexander, *Why Police Lie Under Oath*, N.Y. Times, Feb. 3, 2013, at 4, *available at* http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html. Peter Keane is presently a law professor at Golden State University Law School.
2. Alexander, *supra* note 1. *See, e.g., People v. Perino,* 19 N.Y.3d 85, 90, 945 N.Y.S.2d 602, 605 (2012) (affirming conviction for perjury of New York City police officer).
3. Alexander, *supra* note 1.
4. 460 U.S. 325, 326 (1983).
5. 132 S. Ct. 1497, 1500 (2012).
6. Municipalities are not subject to liability on the basis of respondeat superior, but only when the violation of the plaintiff's federally protected rights is attributable to the enforcement of a municipal policy of practice. *Monell v. N.Y.C. Dep't of Soc. Servs*., 436 U.S. 658, 691 (1978).
7. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (state officials liable in personal capacity); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978) (municipal entities may be sued under § 1983).
8. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 68 (1989).
9. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).
10. *See, e.g., Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012).
11. *See, e.g., Shmueli v. City of N.Y.*, 424 F.3d 231, 237-38 (2d Cir. 2005) (prosecutorial immunity).
12. *See, e.g., Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012).
13. *Rehberg,* 132 S. Ct. at 1502.
14. *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).
15. *Id.* at 1503-04.
16. *Id.*
17. *Id.* at 1504.
18. 424 U.S. 409 (1976).
19. *See* 1 Martin A. Schwartz, Section 1983 Litigation § 9.05 (4th ed. 2012).
20. *Forrester v. White,* 484 U.S. 219, 224 (1988). *See also Burns v. Reed,* 500 U.S. 478, 486 (1991).
21. *See* Martin A. Schwartz, *Developments in Prosecutorial Immunity*, N.Y.L.J. March 5, 2013, p. 3 col. 1.
22. *Rehberg,* 132 S. Ct. at 1505.
23. 460 U.S. 325 (1983).
24. *Id.* at 333.
25. *Id.* at 343.
26. *Rehberg,* 132 S. Ct. at 1505. Perjury before a grand jury, like perjury at trial, is a serious criminal offense. *Id.*
27. *Id.* at 1506 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part)).
28. *Id.* at 1506-07.
29. *San Fillipo v. United States*, 737 F. 2d 246, 255 (2d Cir. 1984), *cert. denied,* 470 U.S. 1035 (1985). *Accord, Dory v. Ryan*, 25 F. 2d 80, 81 (2d Cir. 1994).
30. *Rehberg,* 132 S. Ct. at 1507 n.1 (emphasis added).
31. *Id.* (citing *Kalina v. Fletcher,* 522 U.S. 118, 129-31 (1997) and *Malley v. Briggs*, 475 U.S. 335, 340-45 (1986)) (dictum).
32. *Id.* (citing *Buckley v. Fitzsimmions*, 509 U. S. 259, 272-76 (1993)).
33. *Id.* (citing *Malley,* 475 U.S. at 340-41 and *Kalina,* 522 U.S. at 131).
34. *Id.* at 1507 (citing *Kalina,* 522 U.S. at 131).
35. *Id.* at 1508.
36. *Id.* at 1507.
37. The Court in *Rehberg* said that it would be anomalous to permit a police officer who testifies before the grand jury to be sued for maliciously procuring an unjust conviction when it is the prosecutor, who is shielded by absolute immunity, who is responsible for the decision to prosecute.
38. The Fifth Amendment right to grand jury indictment in "capital and other infamous cases" has not been incorporated into the Fourteenth Amendment and thus does not apply to the states. *Hurtado v. California,* 110 U.S. 516, 524 (1884).
39. 132 S. Ct. at 1510 (citing *Brice v. Nkaru*, 220 F.3d 233, 239, n. 6 (4th Cir. 2000); *Curtis v. Bembenek,* 48 F.3d 281, 284-85 (7th Cir. 1995)).
40. *Rehberg,* 132 S. Ct. at 1509 (referring to fact that allowing civil actions against grand jury witnesses risks "subversion of grand jury secrecy").
41. *Rehberg,* 132 S. Ct. at 1506 (emphasis supplied).
42. For an analysis of the impact of *Rehberg* on disclosure of grand jury testimony, see *Marshall v. Randall*, 719 F.3d 113, 115-18 (2d Cir. 2013) (*Rehberg* does not preclude use of grand jury testimony to impeach credibility of defendant officer). See also *Frederick v. City of N.Y.,* No. 11 Civ. 469 (JPO), 2012 WL 4947806 at *3 (S.D.N.Y. Oct. 11, 2012) (interpreting *Rehberg* as prohibiting use of grand jury testimony only against testifying witness, and not against third parties); *Maldonado v. City of N.Y.,* No. 11 Civ. 3514(PKC)(HPB), 2012 WL 2359836 at *4 (S.D.N.Y. June 21, 2012). On the issue of the privilege for grand jury testimony and when the privilege may be overcome, see Schwartz, Section 1983 Litigation: Federal Evidence § 8.04 (5th ed. 2012).

Martin Schwartz teaches constitutional law, evidence, and criminal procedure at the Touro College Jacob D. Fuchsberg Law Center. Professor Schwartz was managing attorney of the Research and Appeals Bureau of Westchester Legal Services. Publishing widely on civil rights issues, he is the author of a multi-volume treatise as well as numerous articles and books on Section 1983 civil rights litigation. Professor Schwartz is chair of the Practising Law Institute's annual program on Section 1983 litigation and Trial Evidence Program and co-chair of its annual Supreme Court Review Program.

Police Protection and the "Special Relationship" Exception

By Karen M. Richards

When a municipality acts in a proprietary capacity, it is subject to the same principles of tort law as a private entity.[1] By contrast, a municipality is rarely liable for claims arising out of the performance of a governmental function.[2] When a municipality provides police protection, it is performing a classic governmental function requiring a legislative-executive decision as to how a municipality's resources will be allocated.[3] For example, if injuries arise from the municipality's failure to supply adequate police protection, unless there exists a "special relationship" between the municipality and the injured party, the courts have never imposed general liability simply from the failure to supply adequate police protection.[4] This conclusion stems from recognition that municipal resources are limited and the duty to provide police protection ordinarily is owed to the general public and not to a particular individual or class of individuals.

To establish a special relationship, a plaintiff has the burden of proving: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the injured party's justifiable reliance on the municipality's affirmative undertaking.[5] All four elements must be proven, and if not, the claim will fail.

The First Element

The first element, an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party, usually involves a clear promise to take specific action on behalf of a specific individual. The promise must be definite enough to generate justifiable reliance by a plaintiff. Vague and ambiguous assurances are general statements that do not rise to the level of an affirmative duty to protect an individual.[6] The following cases illustrate this principle.

In *Lance v. State*, after Anthony McIntosh was released from prison and was on parole, he allegedly threatened the life of his wife and subsequently murdered her.[7] The claimants, co-administrators of Mrs. McIntosh's estate, claimed that, prior to her death, Mrs. McIntosh had relayed the threats to a parole officer, and that, after receiving notice of the threat, the State of New York was negligent in failing to immediately attempt to apprehend Mr. McIntosh, in failing to take him into custody, and in failing to place Mrs. McIntosh under protection.[8] The claimants could not demonstrate, however, that the State had an affirmative duty to act because the parole officer's statements were not definitive promises to take actions to protect Mrs. McIntosh. The parole officer had told Mrs. McIntosh that, "*if* Anthony McIntosh appeared as scheduled, he would be questioned and *based upon* his responses, he *may* either be taken into custody, or given a parole condition ordering him to stay away from her residence."[9] The court found these statements were of a "highly contingent nature," and therefore, that the claimants had not demonstrated the assumption of an affirmative duty to act.[10]

In *Damato v. City of New York*, the plaintiffs claimed the police made two statements promising to provide them with protection from gang members.[11] Several days before a confrontation outside his home with a gang of youths, Damato had reported to a community affairs officer at the precinct that a gang had attacked his son several times. The officer informed him that there was a shortage of manpower, but "[he] would see if [he could] get a patrol in that area."[12] On the day of the confrontation with the gang, but before it occurred, the police responded to a 911 call placed by Damato. The responding police officer told Damato that a patrol car would be kept in the area, not to worry about it, to call 911, and they would "get there right away."[13] The court ruled that these statements did not create a special relationship because the police did not promise to keep watch at the plaintiffs' home and did not specify at what time or for how long they would keep a patrol car in the area. The court opined, "At most, the police assured plaintiff that they would respond to a 911 call—an obligation that is owed to the public at large. An assurance to perform a basic police function, without more, does not amount to a promise to act affirmatively on behalf of plaintiff."[14]

On the other hand, if statements by police are definite in nature, they may give rise to a justifiable reliance, which is another element the plaintiff must prove and is more fully discussed later in this article.[15] For example, in *Thomas v. City of Auburn*, a bar patron, Jimmy Lee Rouse, had engaged in an altercation with two other patrons, Thomas and Tillman, and threatened to kill them.[16] The bartender, Reddick, called the police, who responded to the bar and who were told of the death threat when they interviewed Reddick, Thomas, and Tillman. The officers assured the three men that they could finish boarding a window broken in the altercation and could finish closing the bar. The officers also told the men they would go around the building and then escort them home. The court found these statements were sufficient for the jury to have found that the officers assured the three men of having police protection, thus establishing justifiable reliance.[17]

The Second Element

A plaintiff must also prove that a municipality's agents knew their inaction could lead to harm. This essential element was missing in the following cases.

In *Swift v. City of Syracuse*, a four-year-old child, who had been left by her mother in her maternal grandmother's care for the evening, was taken from the grandmother's house by her father.[18] There was no custody order in effect and the child's parents were not married and were not living together. Two police officers responded within minutes after being dispatched by 911, but one left shortly thereafter because he deemed the situation to require only one officer. The grandmother told the remaining officer that she was concerned for the child's welfare and believed the father was intoxicated. She gave three possible locations where the father may have taken the child.

The officer began checking two of the locations given to him by the grandmother, but before he could check the third location, he suspended his search to investigate an assault complaint. An hour after the grandmother's call to 911, the officer was called to a fire at the third location, where, as it turned out, the father had taken the child. The fire resulted in a fatality, and, although the father and child escaped, the child suffered serious and disfiguring burns. The Fourth Department affirmed the lower court's grant for summary judgment to the city because the plaintiff had failed to raise an issue of fact as to whether the police had knowledge that their inaction would lead to harm to the child. Significantly, the grandmother assured the officer that the father loved his daughter and would do nothing to harm her.

In *Escribano v. Town of Haverstraw*, a police officer had observed a swerving vehicle being operated by Mr. Escribano.[19] The police officer stopped Mr. Escribano's vehicle and issued him a ticket for a seatbelt violation. Shortly after being stopped and ticketed, Mr. Escribano crashed the car, and his son, a passenger in the car, was killed. Plaintiffs alleged that, as a result of the investigative stop, the officer had knowledge that Mr. Escribano was experiencing diabetic shock, and thus the defendants owed a special duty of care to the plaintiffs. The court disagreed, finding there was no indication that the officer had knowledge that any inaction on his part could lead to harm because the record was devoid of any evidence that he was aware that Mr. Escribano was experiencing diabetic shock.

In *Euell v. Incorporated Village of Hempstead*, when the police responded to the home of the plaintiff's mother, she advised them that her son suffered from a mental illness and had ingested an entire bottle of pills.[20] After the officers unsuccessfully attempted to restrain the plaintiff by administering electroshock with a taser three times, the plaintiff escaped to his bedroom and set it on fire. The court found that the direct contact between the police and the plaintiff "was not of a kind that meaningfully alerted them to his intent to set fire to his room" and "there was no basis for the police to have realized that their failure to move more expeditiously or violently to detain the plaintiff could lead to the harm that occurred."[21]

The Third Element

The element of direct contact between the municipality's agents and the injured party serves to rationally limit the class of persons to whom the municipality owes a duty of protection.[22] Generally, this contact must be between the municipality and the injured party; however, if the person who had direct contact with a police officer relays the officer's assurances to the injured party, the direct contact requirement may have been met.[23]

For example, in *Thomas, supra*, there was no dispute that the police officers made assurances to the bartender, but there was conflicting testimony as to whether the officers made assurances of protection to Thomas and Tillman, who had been threatened by Rouse. When Rouse was escorted from the bar, but before leaving in a car, he threatened he would be back. The defendants contended that Thomas and Tillman were inside the bar when the assurance of protection was made to the bartender outside the bar. Thomas admitted that he did not hear the officers' assurance, but he testified that when the bartender came back inside the bar, he told Thomas that he and Tillman could remain at the bar "because we was being protected."[24]

Without advising the men that they were leaving, the officers left the scene to search for Rouse's vehicle, and while they were searching, Rouse returned to the bar and fired a shotgun, injuring Thomas and killing Tillman.

The court found that, even assuming that both Thomas and Tillman were inside the bar when the assurance of protection was made to the bartender outside the bar, "the assurance was extended to all three men, and the circumstances were such that the officer who gave the assurance knew, or should have known, that it would be conveyed to Thomas and Tillman."[25] According to the majority, it was unrealistic to suggest that Thomas and Tillman:

> were in no different position from any other citizen or that the City owed them no "special duty" simply because Reddick, rather than they, had been the party in direct contact when the assurance was made. This is not an instance where the plaintiff was unaware that the assurance had been made or where the police did not extend the assurance for the benefit of the victim. The police had direct contact with Thomas and Tillman, who were physically present in the area to be protected, and their interests in receiving protection were the same as that of the bartender. It would thus be wholly unrealistic to suggest that [Thomas and Tillman] were in no different position from any other citizen or that the City owed them no "special duty" simply because Reddick, rather than they, had been the party in direct contact when the assurance was made.[26]

By contrast, not all of the defendants in *Cuffy v. City of New York* were able to establish the direct contact element. Joseph and Eleanor Cuffy had been involved in numerous disputes with their tenants, Joel and Barbara Aitkins.[27] When an officer declined to take action, Joseph Cuffy went to the local precinct to ask for protection for his family. He told Lieutenant Moretti that he intended to move his family immediately if an arrest was not made. Moretti told Cuffy not to worry and that something would be done "first thing in the morning."[28] Cuffy went back to his family and told his wife to unpack.

The following evening, Eleanor Cuffy and her sons, Ralston and Cyril, were severely injured by the Aitkins. The court found that Ralston's connection to Moretti's assurances was too remote—he did not live with his parents and it could not be said that the assurances Lieutenant Moretti conveyed to Joseph Cuffy were obtained on Ralston's behalf.[29] However, although Eleanor Cuffy and Cyril Cuffy did not have direct contact with Lieutenant Moretti, they lived with Joseph Cuffy, and therefore, "the 'special duty' undertaken by the City through its agent must be deemed to have run to them. It was their safety that had prompted Joseph Cuffy to solicit the aid of the police, and it was their safety that all concerned had in mind when Lieutenant Moretti promised police assistance."[30]

Although "the direct contact requirement has not been applied in an overly rigid manner," it is often not found to be satisfied when a third party has called the police.[31] For example, it was not satisfied when a call to 911 was made by tenants of an apartment complex who heard the victim calling for help,[32] or when a witness called the police for assistance on behalf of the victim of an abduction,[33] or when the plaintiff's friend called 911 when his friend was being assaulted,[34] or where the call to 911 was placed through an alarm company,[35] or where the decedent's employer called the police about death threats received by his employee.[36]

In many cases the direct contact is verbal, but the requirement is "some form of direct contact," and thus this element can also be satisfied by a defendant's conduct. For example, in *Bloom v. City of New York*, the plaintiff teacher, observing what he believed to be an impending fight between two students, asked a security guard to assist him.[37] The security guard accompanied the teacher to the scene of the confrontation, but when a fight ensued, the security guard stood by and took no action, whereas the teacher intervened and was injured. The court, in deciding that the lower court erred in granting the defendants' motion to dismiss the complaint, found that, although there was no verbal promise to provide protection, a jury could find that a reasonable person would construe the guard's actions in accompanying the plaintiff to the scene of the confrontation as an implicit promise that aid would be forthcoming.

The Fourth Element

The fourth element, justifiable reliance on the municipality's undertaking, is clearly the most burdensome element for a plaintiff to prove. Justifiable reliance is not established by merely demonstrating the injured party had a belief in, some hope of, or an expectation of adequate police protection or assurances that help would be forthcoming.[38] A plaintiff has the burden of showing that a defendant's conduct actually lulled the injured party into a false sense of security, thereby inducing him to either relax his own vigilance or forgo other avenues of protection and placing himself in a worse position than he would have been had

the defendants never assumed the duty.[39] The Court of Appeals has described this element as "critical" because it "provides the essential causative link between the 'special duty' assumed by the municipality and the alleged injury."[40]

In *Hanna v. St. Lawrence County*, Andrew Longshore physically assaulted the plaintiff, his live-in girlfriend, held her hostage for several hours, and threatened to kill her.[41] After the incident, the plaintiff sought refuge in friends' houses for over a week before returning to her home. Following Longshore's release from jail, when the plaintiff advised county deputies that there were many guns in Longshore's grandmother's house, where he was under house arrest, the deputies told the plaintiff that the house had been searched and all weapons had been removed. When she expressed concern that the grandmother's house was in close proximity to her own home, she was told by the deputies that "it's not an issue, you're safe."[42] She was also repeatedly advised that there was "no way" that Longshore could come after her because of the electronic monitoring device that had been placed upon his ankle.[43] These statements reassured the plaintiff and eventually convinced her that she was safe. The court therefore denied the defendants' motion for summary judgment. It found that a question of fact existed as to whether the deputies' assurances lulled the plaintiff into a false sense of security and induced her to relax her own vigilance and forgo other avenues of protection, such as relocating to a safe house or to a different residence as she had done immediately after the attack.

This critical fourth element was missing in *Grieshaber v. City of Albany* because the decedent was already being attacked when she called 911. The 911 operator, who told the victim that "help was on the way," could hear scuffling noises and the decedent screaming to someone in the room to get out.[44] The record "undeniably" revealed that the decedent was struggling with her assailant before, during, and after the 911 call, and, therefore, her conversation with the 911 operator "did not induce her either to relax [her] own vigilance or to forgo other available avenues of protection."[45] The Third Department "[r]egrettably" reversed the lower court's order and granted summary judgment in favor of the city and dismissed the complaint.[46]

Conclusion

Determining whether a special relationship exists is intensively fact-based. Unless a plaintiff proves the existence of all four elements necessary to establish a special relationship, there is no recovery against a municipality for injuries sustained when a municipality fails to furnish adequate police protection.

Endnotes

1. *Miller v. State*, 62 N.Y.2d 506, 511, 478 N.Y.S.2d 829, 832 (1984).
2. *Id*.
3. *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 375 (1987); *Kirchner v. City of Jamestown*, 74 N.Y.2d 251, 256, 544 N.Y.S.2d 995, 998 (1989).
4. *Lewis v. City of New York*, No. 23759/1997, 2008 WL 787243, at *7 (Sup. Ct., Bronx Co. 2008); *Valdez v. City of New York*, 18 N.Y.3d 69, 75, 936 N.Y.S.2d 587, 592 (2011) ("Although in a colloquial sense, we should be able to depend on the police to do what they say they are going to do—and no doubt the police have an obligation to fulfill that trust—it does not follow that a plaintiff injured by a third party is always entitled to pursue a claim against a municipality in every situation where the police fall short of that aspiration." Thus, the Court of Appeals has restricted the scope of duty by requiring a special relationship "because the government is not an insurer against harm suffered by its citizenry at the hands of third parties.").
5. *Cuffy*, 69 N.Y.2d at 260.
6. *Brown v. City of New York*, 73 A.D.3d 1113, 1114, 902 N.Y.S.2d 594, 595 (2d Dep't 2010).
7. No. 109594, 2010 WL 5022844, at *1 (N.Y. Ct. Cl. 2010).
8. *Id*. at *3.
9. *Id*.
10. *Id*. The court also found the claimants did not prove the fourth element because Mrs. McIntosh told the parole officer that she did not think her husband would report to the parole officer, and therefore, she could not have justifiably relied on any expectation of him being arrested.
11. No. 06 Civ. 3030(DC), 2008 WL 2019122, at *3 (S.D.N.Y. 2008).
12. *Id*. at *4.
13. *Id*.
14. *Id*. (stating that statements containing the qualifier "we'll try" fall short of the firm commitment required to establish a promise to assume a special duty to plaintiff).
15. *Thomas v. City of Auburn*, 217 A.D.2d 934, 936, 629 N.Y.S.2d 585, 586 (4th Dep't 1995), *leave to appeal denied*, 1995 WL 582125 (4th Dep't 1995).
16. *Id.*
17. *Id*.
18. 30 A.D.3d 1089, 1090, 816 N.Y.S.2d 656, 657 (4th Dep't 2006). While an Assistant Corporation Counsel III, Ms. Richards was involved in the defense of this case.
19. 303 A.D.2d 621, 621, 757 N.Y.S.2d 310, 311 (2d Dep't 2003).
20. 57 A.D.3d 837, 837, 871 N.Y.S.2d 224, 225 (2d Dep't 2008).
21. *Id*. at 838.
22. *Cuffy v. City of New York*, 69 N.Y.2d 255, 261, 513 N.Y.S.2d 372, 375 (1987).
23. *Greene v. City of New York*, 205 A.D.2d 584, 585, 613 N.Y.S.2d 418, 419 (2d Dep't 1994), *leave to appeal denied*, 84 N.Y.2d 808 (1994).
24. *Thomas*, 217 A.D.2d at 935.
25. *Id*.
26. *Id*. One justice disagreed, opining that "[o]ne cannot deduce from the statements by the police that they were assuming an obligation to protect all persons in the area, including Thomas and Tillman, who were not even employees of the bar." *Id.* at 937 (Lawton, J., dissenting).
27. *Cuffy*, 69 N.Y.2d at 261.
28. *Id*. at 259.

29. Unlike the plaintiffs in *Thomas*, there was no indication that Ralston Cuffy was aware of the assurances.

30. The Court of Appeals found that Eleanor and Cyril Cuffy did not justifiably rely on the assurances and dismissed the complaint. Their justifiable reliance had dissipated by midday because they were aware that the Aitkins had not been arrested or otherwise restrained as promised, and yet, despite this awareness, they remained in their home.

31. *Cuffy*, 69 N.Y.2d at 261.

32. *Merced v. City of New York*, 75 N.Y.2d 798, 800, 552 N.Y.S.2d 96, 96–97 (1990).

33. *Kirchner v. City of Jamestown*, 74 N.Y.2d 251, 256, 544 N.Y.S.2d 995, 998 (1989).

34. *Wood v. Nigro*, 81 A.D.3d 1453, 1454, 916 N.Y.S.2d 869, 869 (4th Dep't 2011).

35. *Nicolosi v. City of New York*, 224 A.D.2d 505, 505, 637 N.Y.S.2d 792, 792 (2d Dep't 1996).

36. *Greene v. City of New York*, 205 A.D.2d 584, 585, 613 N.Y.S.2d 418, 419 (2d Dep't 1994)), *leave to appeal denied*, 84 N.Y.2d 808 (1994).

37. 123 A.D.2d 594, 594, 507 N.Y.S.2d 13, 14 (2d Dep't 1986).

38. *Clark v. Town of Ticonderoga*, 291 A.D.2d 597, 598, 737 N.Y.S.2d 412, 414 (3d Dep't 2002); *Grieshaber v. City of Albany*, 279 A.D.2d 232, 237-38, 720 N.Y.S.2d 214, 216 (3d Dep't 2001), *leave to appeal denied*, 96 N.Y.2d 719 (2001); *Sachanowski v. Wyoming Cnty. Sheriff's Dep't*, 244 A.D.2d 908, 908, 665 N.Y.S.2d 197, 198 (4th Dep't 1997), *leave to appeal denied*, 92 N.Y.2d 801 (1998) (where the plaintiff was only told that the deputy would come out to the plaintiff's house shortly to take the complaint).

39. *Brandes v. City of New York*, No. 7815/10, 2010 WL 5129107 at *1 (Sup. Ct., Kings Co. 2010).

40. *Cuffy*, 69 N.Y.2d at 261.

41. 34 A.D.3d 1146, 1146, 825 N.Y.S.2d 798, 799 (3d Dep't 2006).

42. *Id*. at 1148.

43. *Id*.

44. *Grieshaber*, 279 A.D.2d at 235.

45. *Id*. at 236. The police had arrived at the scene at 6:52 p.m. but waited until 7:45 p.m. to enter the victim's apartment. The delay was a result of waiting for an animal control officer to subdue the decedent's dog.

46. *Id*. at 234.

Karen M. Richards is an Associate Counsel at the Office of General Counsel, The State University of New York. The views expressed are her own and do not necessarily represent the views of The State University of New York or any other institution with which she is or has been affiliated.

An Update on the Uniform Notice of Claim Act

By Andrew J. Orenstein and Tahesha C. Gilpin

The Uniform Notice of Claim Act, which became effective in June 2013, revamped the network of statutes governing the filing of Notices of Claims against governmental entities. The new Act, which contains several amendments to the general municipal law as well as the civil practice law, is designed to provide plaintiffs with a uniform, fair and statutorily consistent procedure for commencing a proceeding in the courts of New York.

In addition to traditional methods, claimants now have the option of filing notices of claim for property damage, personal injuries, or death upon governmental entities where such notices are required as a precondition to suit by serving them upon the Secretary of State in addition to service by traditional means.[1] To comply with the Act, municipalities, public authorities, school districts and other entities that enjoy the protections afforded by a notice of claim requirement must now file a certificate with the Department of State.[2] The Department of State has provided a form on its website to facilitate this filing, but users are cautioned that not all of the information called for in the form is required pursuant to the Act.

When claimants exercise the option of serving the Secretary of State with notices of claim, service is complete upon personal delivery of the notice to the Department of State.[3] For a fee of $250, split between the state and the entity or entities that are named, the Department will forward the notice to the named entity.[4] The Act, which purports to demystify notice of claim procedure, will assist a claimant who is uncertain as to where to serve a given entity. However, it will not save a claimant who designates an incorrect entity in their notice or serves it outside the time limit prescribed by law.

Pursuant to section 53(2) of the General Municipal Law, all entities that are entitled to notice of claims had until the middle of July 2013 (30 days from the date the Act went into effect) to file a certificate designating the Secretary of State as an agent for service of such notices.[5] This certificate must identify the person and address to which the Department of State should forward notices that are served upon the Secretary.[6] This filing must also identify the applicable time limit (usually 90 days from the date of injury) within which notice must be filed.[7] Each public entity must amend its filing to reflect changes to this information.[8] Furthermore, the Certificate of Designation for Service of Notice of Claim can be filed electronically.[9]

Upon navigating to the Department of State website, a user will find a form where all of the statutorily required information can be provided. The form additionally calls for identification of "[a]ny statutory provisions uniquely pertaining to the public corporation and the commencement of an action or proceeding against it."[10] Though the Act nowhere requires entities to provide this information, it says that the Department of State "should" publish such information on its website, presumably to educate the bar and the public:

> The secretary of state *shall*…post on the departmental website a list of any public corporation…entitled to receive a notice of claim as a condition precedent to commencement of an action or proceeding, and that has filed, pursuant to this section, a certificate with the secretary of state designating the secretary as the agent for service of a notice of claim. The list *should* identify the entity…the address…of the public corporation to which the notice of claim shall be forwarded by the secretary of state, *and any statutory provisions uniquely pertaining to such public corporation and the commencement of an action or proceedings against it.*[11]

Because the Act does not require entities to disclose the idiosyncrasies of the statutes that govern the form, content and timing of their notices of claim, we believe that entities should consider withholding this information at this time. Absent a specific mandate to the contrary, even a public entity generally has no obligation to educate an adverse party regarding its defenses. This interpretation appears consistent with another portion of the Act which explicitly states that the Act leaves unchanged defenses that are available where notices of claim are defective or filed late without leave of court: "[N]othing in this section shall be deemed to alter, waive or otherwise abrogate any defense available to a public corporation as to the nature, sufficiency, or appropriateness of the notice of claim itself, or to any challenges to the timeliness of the service of a notice of claim…."[12]

So even though the Act may have been drafted to simplify the process of serving notices of claim upon municipalities and public entities, it is not at all clear from the language of the statute that it was meant to do more than provide an alternative means of ensuring that well drafted and directed notices reach the right offices. Though an entity is entitled to provide additional guidance in the spirit of its public service mission, we do not believe that the Act requires disclosure of statutory defenses.

An entity that does not file the requisite certificate will waive its right to notice of claims that are served upon the Department of State.[13] It will also waive its share of the fee that is collected pursuant to the Act.[14]

Endnotes

1. N.Y. GEN. MUN. LAW §53(2) (McKinney 2013). The requirement to provide notice as a condition precedent to bringing an action against a government entity is set out in N.Y. C.P.L.R. § 217-a (McKinney 2013).
2. N.Y. GEN. MUN. LAW §53(2) (McKinney 2013).
3. N.Y. GEN. MUN. LAW §50-e (f) (McKinney 2013) ("Service of a notice of claim…may be made by personally delivering to and leaving with the secretary of state…at the office of the department of state.")
4. N.Y. GEN. MUN. LAW §53(4) (McKinney 2013).
5. N.Y. GEN. MUN. LAW §53(2) (McKinney 2013).
6. *Id.*
7. *Id.*
8. *Id.*
9. Certificate of Designation for Service of Notice of Claim, https://appext20.dos.ny.gov/noc_public/f?p=800:8:1970150130012.
10. *Id.*
11. N.Y. GEN. MUN. LAW §53(5) (McKinney 2013) (emphasis added).
12. N.Y. GEN. MUN. LAW §53(3)(c) (McKinney 2013).
13. N.Y. GEN. MUN. LAW §53(2) (McKinney 2013).
14. *Id.*

Mr. Orenstein is a member and Ms. Gilpin is an associate of Harris Beach PLLC in the firm's New York City office. Prior to joining the firm, both represented the City of New York, Mr. Orenstein as Senior Counsel and Ms. Gilpin as an Assistant Corporation Counsel. They are experienced trial attorneys who defend a diverse range of clients, including municipalities, in a wide range of matters. www.Harrisbeach.com.

SEQRA and Infill

By Michael Lewyn

I. Introduction

The New York State Environmental Quality Review Act (SEQRA) requires state and local governments to issue environmental impact statements addressing significant environmental harm caused by their own actions.[1] Although numerous states have similar statutes, SEQRA is more burdensome in a few respects. For example, while most state environmental review statutes cover only government projects,[2] SEQRA also covers private sector projects requiring government permits.[3] Furthermore, SEQRA requires governments to consider not just the impacts of projects upon the physical environment, but also their socio-economic impacts,[4] unlike some other states' environmental statutes.[5]

This article contends that the stringencies of SEQRA occasionally have harmful environmental consequences because SEQRA can easily be used to delay "infill development"—that is, new housing and commerce in already developed areas such as cities and older suburbs.[6] When this occurs, development shifts from older areas to newer suburbs that tend to be more dependent on automobiles, and thus, produce more pollution.

Part II of this article introduces readers to SEQRA. Part III shows how SEQRA discourages infill development. Part IV explains why this anti-infill bias is environmentally harmful. Finally, Part V suggests possible reforms to SEQRA that might mitigate the law's anti-infill bias.

II. A Brief Guide to SEQRA

The federal government enacted the National Environmental Policy Act (NEPA) in 1970[7] in order to ensure that federal agencies considered the potential environmental impact of their actions.[8] Under NEPA, the agency proposing the action (known as the "lead agency")[9] will typically[10] begin the environmental review process by preparing an Environmental Assessment (EA), a document which "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement."[11] If, after drafting the EA, the lead agency decides that its actions will create a significant environmental impact, it will create an environmental impact statement (EIS).[12] The EIS must address not only the environmental impacts of the proposed action, but also any possible alternatives.[13]

New York's "little NEPA" statute, SEQRA, is almost as old as NEPA itself. It was enacted in 1975 and became effective the following year.[14] SEQRA applies not only to state government actions, but also to actions by local governments,[15] including rezoning[16] and other land use-related permits.[17]

Like NEPA, SEQRA creates a multi-step environmental review process. The lead agency begins the process by drafting an environmental assessment form (EAF) to determine whether its proposed action will affect the environment.[18] If the lead agency concludes that environmental impacts from its action are unlikely to be significant, it drafts a "negative declaration" so stating.[19] Otherwise, the agency issues a "positive declaration" declaring that the impacts require an EIS.[20] The agency then prepares a draft EIS and solicits public comments on that document.[21] After receiving public comments on the draft EIS, the agency issues a final EIS,[22] which addresses the adverse impacts of the proposed action[23] and must certify that such impacts will be mitigated where practicable.[24] Citizens may challenge an agency decision (including either an EIS or a decision not to issue an EIS) under SEQRA.[25]

New York's Department of Environmental Conservation (DEC) has enacted regulations implementing SEQRA.[26] These regulations provide that for certain government projects designated as "Type I"[27] actions, a rebuttable presumption exists that the project creates environmental impacts significant enough to require the preparation of a full EIS.[28] Projects designated as Type I actions include all zoning changes affecting twenty-five or more acres.[29] On the other hand, these regulations categorically exclude thirty-seven types of actions, known as Type II actions, from SEQRA scrutiny.[30] Zoning decisions affecting just one house are usually categorized as Type II actions.[31] Government actions that are neither Type I nor Type II actions are labeled as "unlisted actions"[32] and may require an EIS if they create a significant impact.[33] The overwhelming majority of government actions subject to SEQRA are unlisted.[34]

SEQRA does not prohibit all environmentally harmful government action. Instead, SEQRA requires the government to disclose such environmental harm in the EIS[35] and to "minimize adverse environmental effects to the maximum extent practicable."[36] In determining what is "practicable," agencies may balance environmental concerns against other public policies.[37]

On review, courts may not "weigh the desirability of any action or choose among alternatives"[38] but must

ascertain whether the EIS and the agency's decision was arbitrary, capricious, or otherwise infected by errors of law or procedure.[39] As a practical matter, this means that courts generally uphold agency decisions, especially after an EIS has been filed.[40]

III. SEQRA and Infill Development

"Infill development" is development that occurs in already developed neighborhoods (often in cities or older suburbs).[41] "Greenfield" development, by contrast, occurs on "pristine, undeveloped land typically located in low density suburban areas."[42] Both types of development often require rezoning or similar legal changes,[43] and are thus subject to SEQRA.[44] But SEQRA's broad definition of "environmental impact" means that urban infill projects will often require an EIS, even if they create no impact upon the physical environment.[45] As will be shown below, greenfield projects are less likely to require an EIS.[46]

A. The Environmental Impacts of Infill

SEQRA defines the term "environment" to include not just the physical environment, but "existing patterns of population concentration, distribution or growth, and existing community or neighborhood character."[47] SEQRA's broad definition of the term "environment" suggests that any development that adds a significant amount of residences or businesses to an existing neighborhood will usually require an EIS, since such development affects "existing patterns of population" and "neighborhood character."

The New York Court of Appeals addressed this issue in the 1986 decision of *Chinese Staff & Workers Ass'n v. City of New York* (Chinese Staff I).[48] In that case, a developer proposed to build a high-rise condominium on a vacant lot in New York's Chinatown neighborhood.[49] The city declined to draft an EIS on the ground that the project would have no significant environmental impact.[50]

The court held that as a general matter, SEQRA's definition of "environment" encompasses "existing *patterns of population concentration*, distribution or growth, and existing community or *neighborhood character*."[51] Thus, any effect that a project might cause on "population patterns or existing community character…is a relevant concern in an environmental analysis."[52]

Applying this principle, the court found that even though the proposed development itself displaced no residents or businesses,[53] SEQRA nevertheless required the city to consider the risk of "long-term secondary displacement"[54]—that is, the possibility that new construction might make Chinatown more desirable and thus a more expensive place to live, which in turn could lead some current residents to move.[55] Therefore, the court suggested that the proposed new construction (combined with likely construction on other nearby sites)[56] might lead to such secondary displacement, and that this possibility would require an EIS.

At a minimum, *Chinese Staff I* suggests that whenever new development might make a neighborhood more valuable (thus creating a risk of increased rents), the lead agency must consider this possible impact in deciding whether to draft an EIS. More broadly, *Chinese Staff I* implies that **any** change in existing "population patterns" is an environmental impact under SEQRA, and therefore (if significant) requires an EIS. Such a rule suggests that any development that significantly increases neighborhood population requires an EIS, because building new housing by definition affects population patterns.

A more recent Appellate Division case supports this interpretation of *Chinese Staff I*. In *Chinese Staff & Workers Ass'n v. Burden* (Chinese Staff II),[57] the city of New York rezoned a Brooklyn neighborhood and declined to draft an EIS.[58] The court upheld the Department of City Planning's decision to not draft an EIS for two reasons: first, the rezoning "decreas[ed], rather than increased, the potential for development by imposing building height limits."[59] Second, because "the [city] projected an increase [of housing stock] of only 75 units, it was [reasonable] to conclude that the rezoning would not have any adverse socioeconomic impacts."[60]

The *Chinese Staff II* court's emphasis on the small number of added housing units and on the decreased potential for development implies that any zoning decision that does add a significant number of new businesses or housing units to a neighborhood is likely to create significant socio-economic impact and would therefore require an EIS under SEQRA.

B. Does Greenfield Development Also Require an EIS?

Because significant infill development by definition increases the number of people and businesses in a neighborhood, it is likely to require an EIS under SEQRA. As a practical matter, this may be less true of greenfield development. Infill development occurs in places with neighbors, and where there are neighbors, there is "Not in My Back Yard" (NIMBY)[61] resistance to development.[62] This occurs because residents of an existing neighborhood may suffer any perceived costs from new development (e.g., increased traffic, changes in neighborhood look and feel) while the benefits of new development (such as an increased supply of housing) are citywide or region-wide.[63] Thus, dissatisfied NIMBYs have a strong motive to use SEQRA to delay new development.[64]

By contrast, greenfield development occurs in places with relatively few neighbors. Where there are few neighbors, there are few potential NIMBYs,[65] and thus fewer people likely to demand an EIS or complain that

an existing EIS is inadequate. So, on balance, SEQRA is more likely to affect infill development than greenfield development.

Admittedly, SEQRA does not prevent a municipality from permitting development with significant environmental impact. Because SEQRA allows government agencies to balance environmental impacts against other social considerations, litigants are rarely able to persuade courts to stop a project completely (as opposed to delaying the project by requiring an EIS).[66]

Nevertheless, SEQRA imposes a significant burden upon developers. For a developer, "time is money"[67] because a developer will often be paying interest on a construction loan while its project is being debated, but will be unable to receive money from buyers or renters until the project is actually built.[68] Thus, a developer suffers financially by waiting for the EIS process to wind down—a process which may take years.[69]

IV. Why SEQRA's Bias Is Environmentally Harmful

Given that all legislation has a disproportionate impact upon someone, should we care whether SEQRA penalizes infill development?

Already developed areas (especially in central cities) tend to have more mass transit riders (and fewer drivers) than greenfield areas.[70] This is the case because as a neighborhood becomes more developed, it becomes more compact—that is, more people live within walking distance of shops, jobs, public transit, and other neighborhood destinations.[71] By contrast, in areas with lower density, fewer people live within a short walk of a bus or train stop, and transit ridership will therefore be low,[72] which means that transit agencies will be disinclined to serve such areas.[73]

It follows that more greenfield development means more driving, and more driving means more pollution, as one-third of U.S. greenhouse gas emissions come from automobiles.[74] It also follows that because infill development requires less driving, more infill development means less pollution.

Recent studies support this view. A study sponsored by the U.S. Department of Energy suggests that doubled residential density alone reduces household vehicle miles traveled by five to twelve percent.[75] If increased density was accompanied by other pro-transit land use policies and by improved public transit, vehicle miles traveled could be reduced by as much as twenty five percent,[76] causing U.S. greenhouse gas emissions to be reduced by eight to eleven percent.[77]

Similarly, Harvard economist Edward Glaeser and UCLA economist Matthew Kahn recently conducted a study finding that low-density, automobile-oriented places emitted more greenhouse gases from transportation than more pedestrian and transit-oriented places.[78] For example, New York City, the region with the highest use of public transit,[79] emitted only 19,524 pounds of carbon dioxide (a major greenhouse gas,[80] also known as "CO2") per household from automobiles and transit users combined,[81] the lowest amount among ten metropolitan areas studied. By contrast, several automobile-oriented, lower-density regions emitted over 25,000 pounds of transportation-related CO2 per household.[82]

Moreover, suburbs, which tend to be less compact and more automobile-oriented,[83] have significantly higher per-household CO2 emissions from transportation. For example, New York's suburban households emitted over 3,800 more pounds of transportation-related CO2 per household than did city residents.[84]

If, as suggested above, infill development reduces driving and thus reduces pollution, and SEQRA discourages infill development, it logically follows that SEQRA actually increases driving and the resulting pollution.

V. How to Reform SEQRA to Facilitate Infill

As shown above, SEQRA disproportionately burdens infill development, but infill development in transit and pedestrian-friendly areas is environmentally beneficial. Thus, SEQRA may actually discourage environmentally friendly infill development. Can New York eliminate SEQRA's negative consequences without eliminating SEQRA's more desirable features?

One possible reform might be to enact statutes resembling California's 2008[85] amendments to its own "Little NEPA,"[86] the California Environmental Quality Act (CEQA).[87] In relevant part, these amendments streamline CEQA review for "transit priority projects," defined by the statute as projects that are predominantly residential, providing a minimum density of at least twenty dwelling units per acre, and located within a half mile of major transit service (such as a bus or train with service intervals of no more than fifteen minutes during peak hours).[88]

Under CEQA as amended, government generally[89] reviews such projects as part of a "sustainable communities environmental assessment" (SCEA),[90] which is less onerous than traditional CEQA review.[91] Under an SCEA, a developer need not address potential growth-inducing impacts of a project, nor need it address possible car and truck traffic induced by the project.[92] In addition, the developer need not discuss the pros and cons of a lower-density alternative to the project.[93]

I propose that SEQRA be amended to incorporate (a) CEQA's definition of transit priority projects, and (b) CEQA's provision that developers of such projects need not address environmental impacts related to growth, such as increased population or traffic.[94] Thus, SEQRA

as amended would (as to transit priority projects) overrule New York case law suggesting that urban growth justifies an EIS on the ground that growth of areas well-served by public transit is environmentally helpful rather than environmentally harmful.

A recent law review article criticizes CEQA's streamlining for transit priority projects, arguing that if transit agencies do not increase service as a mitigation measure, transit systems may become overloaded.[95] This argument should not prevent reform, however, because if improved transit must precede density, neither the transit nor the density may ever get built. In an area where density is low and transit ridership is therefore already low,[96] transit opponents and NIMBYs will fight transit by arguing that the density is not present to support transit,[97] and will fight additional density by contending (quite reasonably) that in the absence of transit, more density will only lead to more traffic congestion.[98]

In sum, limiting SEQRA review of transit-friendly development to truly environmental concerns (as opposed to concerns related to population growth) would be an environmentally friendly policy because it would contribute to steering growth to infill sites served by public transit, thus increasing transit ridership and reducing auto-related pollution.

VI. Conclusion

The purpose of SEQRA is to protect the environment by requiring the government to consider the harmful environmental impacts of its actions. But SEQRA in fact creates its own harmful environmental impacts. Thanks to SEQRA, someone who wants to build houses or apartments in an already developed city or inner suburb must sometimes spend years going through the EIS process. By contrast, greenfield development in rural areas or outer suburbs is less likely to require an EIS or to lead to litigation over the adequacy of an EIS. Thus, SEQRA discourages infill development in New York, and encourages developers to build on greenfield sites. Since greenfield development typically leads to more driving and thus to more pollution, SEQRA may lead to an increase, rather than a decrease, of pollution.

New York can make SEQRA more environmentally friendly by limiting environmental review for compact developments near public transit, thus preserving the benefits of SEQRA without discouraging transit-friendly infill.

Endnotes

1. N.Y. Envtl. Conserv. Law § 8-0109 (McKinney 2006).
2. *See* William Fulton & Paul Shigley, Guide To California Planning 156 (3rd ed. 2005) ("most state [environmental review] laws…apply only to public development projects").
3. *See* Stewart E. Sterk, Environmental Review in the Land Use Process: New York's Experience with SEQRA, 13 Cardozo L. Rev. 2041, 2042-43 (1992); Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 Urb. Law. 949, 956-57 (2006) (contrasting New York approach with "state only" approach of North Carolina and Indiana).
4. *See* Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y. 2d 359, 366, 502 N.E. 2d 176, 180, 509 N.Y.S. 2d 499, 503 (1986) (SEQRA requires consideration of "social or economic" factors as well as "physical environment").
5. *See* John Watts, *Reconciling Environmental Protection With the Need for Certainty: Significance Thresholds for CEQA*, 22 Ecology L.Q. 213, 241 n. 170 (1995) ("[a]bout half the states…require consideration of [socio-economic] impacts"); Sterk, *supra* note 3, at 2043 (some "states define the environment to embrace only natural and historical resources").
6. *See infra* Part III.
7. *See* Anne L. Hanson, *Offshore Drilling in the United States and Norway: a Comparison of Prescriptive and Performance Approaches to Safety and Environmental Regulation*, 23 Geo. Intl'l Envtl. L.Rev. 555, 559 (2011).
8. *Id.*
9. *See* Emily M. Slaten, "*We Don't Fish in Their Oil Wells, and They Shouldn't Drill In Our Rivers": Considering Public Opposition Under NEPA and the Highly Controversial Regulatory Factor*, 43 Ind. L. Rev. 1319, 1324 (2010), citing 40 C.F.R. § 1508.16.
10. The agency may also designate certain routine actions as "categorically excluded" from NEPA review. *See* Slaten, *supra* note 9, at 1325; 40 C.F.R. § 1508.4 ("Categorical Exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency").
11. 40 C.F.R. § 1508.9(a)(1).
12. *See* 40 C.F.R. § 1502.9(b).
13. 42 U.S.C. § 4332(2) (2013).
14. *See* Village of Chestnut Ridge v. Town of Ramapo, 45 A.D. 3d 74, 85, 841 N.Y.S. 3d 321, 332 (2d Dept. 2007).
15. *See* Mark A. Chertok and Ashley S. Miller, *Environmental Law: Climate Change Impact Analysis in New York under SEQRA*, 60 Syracuse. L.Rev. 925, 925-26 (2010).
16. *Id.* (SEQRA governs "zoning amendments"); Neville v. Koch, 79 N.Y. 2d 416, 426, 583 N.Y.S. 2d 802, 806, 593 N.E. 2d 256, 260 (1992) ("rezoning is an 'action' subject to SEQRA").
17. *See* Paul D. Selver, The Public Review Process: Land Use Diligence and Comments on Structuring the Deal to Shift Land Use and Environmental Risks, 582 PLI/Real 899, 906-10 (2010) (subdivision approval, variances, and numerous other land use procedures subject to SEQRA).
18. *See* Edna Sussman et al., *Climate Change Adaptation: Fostering Progress Through Law and Regulation*, 18 N.Y.U. Envtl. L. J. 55, 79 (2010); Sterk, *supra* note 3, at 2045. Although the lead agency is technically responsible for drafting the EAF, EIS and similar documents, as a practical matter a developer often drafts such documents, which in turn are used by the lead agency. *See* Carolyn A. Zenk, *New York State Environmental Quality Review Act*, http://www.linkedin.com/pub/vanessa-puerta/27/58b/b52.
19. *See* Citizens Against Retail Sprawl v. Giza, 280 A.D. 2d 234, 236, 722 N.Y.S. 2d 645, 648 (4th Dept. 2001), quoting N.Y. Comp. Codes R. & Regs. tit. 6 § 617.2[y] (2000).
20. *See* N.Y. Comp. Codes R. & Regs. tit. 6 § 617.2(a)(c) (2000). *See also* Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y. 2d 359, 364, 502 N.E. 2d 176, 179, 509 N.Y.S. 2d 499, 502 (1986) (citations omitted) ("whether an EIS is required…depends on whether an action may or will not have a significant effect on the environment.") If the agency foresees significant environmental impacts but has an enforceable commitment to mitigate those impacts, it may avoid an EIS by creating a

"conditioned negative declaration." N.Y. COMP. CODES R. & REGS. tit. 6 § 617.2(h) (2000). *See also* Mark A. Chertok & Ashley S. Miller, *Environmental Law: Climate Change Impact Analysis in New York Under SEQRA*, 59 SYRACUSE L. REV. 763, 765 (2009).

21. *Id. See also* Jackson v. New York State Urban Development Corp., 67 N.Y. 2d 400, 415, 494 N.E. 2d 429, 435, 503 N.Y.S. 2d 298, 304 (1986) (describing draft EIS process in more detail).
22. *See* Selver, *supra* note 17, at 904.
23. *See* Chertok & Miller, *supra* note 15, at 927. In addition, a final EIS must address all comments on the Draft EIS, as well as any project changes, new information, and changes in circumstances since the issuance of the Draft EIS. *Id.*
24. *Id.* at 927-28.
25. *See* Gregory D. Eriksen, *Breaking Wind: Facilitating Wind Energy Development in New York State*, 60 SYRACUSE L. REV. 189, 196 (2009) (challenges to decisions of SEQRA lead agencies usually take form of a petition under Article 78 of the New York Civil Practice Law and Rules); H.H. Warner, LLC v. Rochester Genesee Reg'l Transp. Auth., 87 A.D. 3d 1388, 1390, 930 N.Y.S. 2d 131, 132 (4th Dept. 2011).
26. *See* Chertok & Miller, *supra* note 15, at 926 (DEC drafted relevant regulations).
27. *See* N.Y. COMP. CODES R. & REGS. tit. 6 § 617.4 (2000).
28. *See* Chinese Staff & Workers Ass'n v. Burden, 88 A.D. 3d 429, 932 N.Y.S. 2d 1, 2 (1st Dept. 2011) (presumption rebuttable if lead agency makes "reasoned elaboration" for finding of no significant impact).
29. *See* Sterk, *supra* note 3, at 2044-45.
30. *Id.*, tit. 6 § 617.5[c].
31. *Id.*, tit. 6 § 617.5[c](1)(2)(9-10)(12) (listing numerous examples); Patricia Salkin, *The Historical Development of SEQRA*, 65 ALBANY L. REV. 323, 340-44 (2001) (listing numerous other examples of Type II actions).
32. N.Y. COMP. CODES R. & REGS. tit. 6 § 617.2(a)(k) (2000) (defining "unlisted" actions).
33. *Id.*, tit. 6 § 617.7 (agency must determine significance of environmental impact as to both Type I and unlisted actions).
34. *See* Chertok & Miller, *supra* note 15, at 926.
35. *See supra* note 23 and accompanying text.
36. Jackson, 67 N.Y. 2d at 415, 494 N.E. 2d at 434, 503 N.Y.S. 2d at 303.
37. *Id.*
38. *Id.* at 416, 494 N.E. 2d at 436, 503 N.Y.S. 2d at 305.
39. *Id.*, 494 N.E. 2d at 435, 503 N.Y.S. 2d at 304 (citation omitted).
40. *See infra* note 66.
41. *See* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1033 (2001) ("infill" is "re-use of developed urban parcels"); Hubble Smith, *Finding the Will to Infill*, L.V. BUS. PRESS., Jan. 16, 2012, at 6, 2012 WLNR 3573525 (infill development, "broadly defined [is] new construction on vacant parcels with utility and infrastructure already in place and surrounded by existing homes and businesses.")
42. Anne Marie Pippin, *Community Involvment in Brownfield Redevelopment Makes Cents: A Study of Brownfield Redevelopment Initiatives in the United States and Central and Eastern Europe*, 37 GA. J. INT'L AND COMPARATIVE L. 589, 596 (2009).
43. *See* Bill Lurz, *Don't Give Up On Developing Land*, HOUSING GIANTS, Nov. 24, 2008, at 7 ("many of the best infill sites will require…rezoning"); *Your Right to Know*, ATLANTA JOURNAL AND CONSTITUTION, MARCH 3, 2005, at 1 ("Usually …developments require rezoning").
44. *See supra* note 16 and accompanying text.
45. *See infra* Part III-A.
46. *See infra* Part III-B.
47. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 2013).
48. 68 N.Y. 2d 359, 502 N.E.2d 176, 509 N.Y.S. 2d 499 (1986).
49. *Id.* at 362, 502 N.E. 2d at 177, 509 N.Y.S. 2d at 500.
50. *Id*. at 362, 502 N.E. 2d at 178, 509 N.Y.S. 2d at 501. (More precisely, the city issued a "conditional negative declaration," which means that the project would "not have any significant effect on the environment if certain modifications were adopted by the developer.") *Id.*
51. *Id.* at 366, 502 N.E. 2d at 180, 509 N.Y.S. 2d at 503 (emphasis added) (citations omitted).
52. *Id.*
53. *Id.*, 509 N.E. 2d at 181, 509 N.Y.S. 2d at 504.
54. *Id.*
55. *Id.* (using term); *see also* Diane K. Levy, Jennifer Comey, and Sandra Padilla, *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16-SPG J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 238, 240 (2007) ("secondary displacement" occurs when gentrification leads to higher rents, and existing residents cannot remain in neighborhood).
56. Chinese Staff I, 68 N.Y. 2d at 367, 509 N.E. 2d at 181, 509 N.Y.S. 2d at 504 (noting that numerous nearby sites available for development and that displacement could occur near those sites).
57. 88 A.D. 3d 425, 932 N.Y.S. 2d 1 (1st Dept. 2011), affirmed, 2012 WL 2399597 (N.Y.).
58. *Id.* at 427-28, 932 N.Y.S. 2d at 2.
59. *Id.*
60. *Id.* at 434, 932 N.Y.S. 2d at 6.
61. Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RES. L. REV. 81, 90 (2012) (using term).
62. *See* Greg Greenway, *Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California*, 10 PEPP. DISP. RESOL. L.J. 433, 442 (2010) (NIMBY resistance limits infill development).
63. *Id.*
64. *See* John W. Caffry, *The Substantive Reach of SEQRA: Aesthetics, Findings and Non-Enforcement of SEQRA's Substantive Mandate*, 65 ALB. L. REV. 393, 414 (2002) (persons most likely to be dissatisfied with agency action include "concerned citizens who live near project sites" as well as environmental groups).
65. *Cf*. Sarah Townsend, Ministers to Study New Airport, Planning, Jan. 28, 2011, at 12 (British officials are building new London airport on a "greenfield" site to "get around the NIMBY problem").
66. *See* Caffry, *supra* note 64, at 412 (during 1990s, court challenges to agency SEQRA determination prevailed in 28 percent of the cases where no EIS prepared, and 10 percent of cases where final EIS prepared).
67. Sterk, *supra* note 3, at 2084.
68. *See* Chad Lamer, *Why Government Policies Encourage Urban Sprawl, and the Alternatives Offered by New Urbanism*, 13 KAN. J.L. & PUB. POL'Y 391, 402 (2004).
69. *See* PATRICK GALLAGHER, *Reviewing the Environmental Review*, FAIRFAX COUNTY BUSINESS JOURNAL, Sept. 26, 2011 at 19 ("the review process of any development moves ahead at [lead agencies'] discretion, sometimes taking as many as four of five years before a decision is rendered.")
70. *See* Thomas Merrill & David M. Schizer, *Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan*, 27 YALE J. ON REG. 1, 20 (2010) ("alternative

modes of transportation, such as walking, bicycling or public transportation, are impossible or inconvenient in suburbs and exurbs"); Michael Lewyn, *Sprawl in Canada and the United States*, 44 URB. LAW. 85, 96-97 (2012) (central cities consistently have more public transit ridership than region as a whole).

71. *Id.* at 111, 119-20.
72. *See* Pamela Blais, PERVERSE CITIES 60-61 (2010) (citing numerous studies).
73. *Id.* at 61 (a "minimum threshold density is needed to support a rudimentary level of transit service (say, about every half hour). As densities increase, so, too, does the economic viability of higher levels of service.")
74. Merrill & Schizer, *supra* note 70, at 17.
75. *See* TRANSPORTATION RESEARCH BOARD, DRIVING AND THE BUILT ENVIRONMENT ii-iii (2009) (describing authors and sponsorship), 2 (describing conclusions), at http://www.nap.edu/catalog.php?record_id=12747#toc ("TRB"); *see also* ABT ASSOCIATES, *Research on Factors Relating to Density and Climate Change 5* (2010), *available at* http://www.nahb.org/fileUpload_details.aspx?contentID=139993&fromGSA=1 (this view supported by "weight of the evidence").
76. TRB, *supra* note 75, at 2-3. *See also id.* at 31-66 (describing relationship between density and vehicle miles traveled in more detail).
77. *Id.* at 4.
78. *See* Edward L. Glaeser & Matthew Kahn, *The Greenness of Cities*, at 1, *at* http://www.hks.harvard.edu/rappaport/downloads/policybriefs/greencities_final.pdf ("low-density development… is associated with far more carbon dioxide emissions than higher-density construction").
79. *Id.* at 5.
80. *See* Massachusetts v. EPA, 549 U.S. 497, 504-05 (2007) (carbon dioxide a major greenhouse gas).
81. *See* Glaeser & Kahn, *supra* note 78, at 5.
82. *Id. See also Sierra Club, Sprawl Report 2001: A Summary, at* http://www.sierraclub.org/sprawl/report01/summary.asp (suggesting that most auto-oriented regions have more smog).
83. *See* Brookings Institution, *Where the Jobs Are: Employer Access to Labor by Transit*, New York-Northern New Jersey-Long Island NY, NJ-PA Metro Area at http://www.brookings.edu/research/papers/2012/07/11-transit-jobs-tomer/~/media/Research/Files/Papers/2012/7/transit%20labor%20tomer/pdf/New_York.pdf (table showing that in New York City, 58.1 percent of residents can reach typical job in 90 minutes via public transit; only 14.4 percent of suburban jobs equally accessible).
84. *See* Glaeser & Kahn, *supra* note 78, at 8 (suburbanites emitted 6172 more pounds of automobile-related emissions per household than city residents; however, this gap was partially offset by city residents' generation of 2367 more pounds of public transit-related emissions per household).
85. *See* John Darakjian, *SB 375: Promise, Compromise, and the New Urban Landscape*, 27 UCLA J. ENVT'L. L. & POL'Y 371, 372 (2009) (amendments part of SB 375, enacted in 2008).
86. Katherine M. Baldwin, *NEPA and CEQA: Effective Legal Frameworks for Compelling Consideration of Adaptation to Climate Change*, 82 S. CAL. L. REV. 769, 771 (2009) (CEQA one of the "Little NEPA" statutes).
87. CAL. PUB. RES. CODE. § 21000 (West 2013).
88. *See* CAL. PUB. RES. CODE. § 21155 (West 2013).
89. In fact, certain projects are completely exempt from CEQA review. *See* Darakjian, *supra* note 85, at 393 (citation omitted). However, this section of CEQA is likely to be used quite rarely, because it is limited to projects that provide significant amounts of low-income housing and open space. *Id.*
90. CAL. PUB. RES. CODE. § 21155.2(b) (West 2013).
91. *See* Darakjian, *supra* note 85, at 393 (describing SCEA as "truncated" form of review).
92. *See* Byron K. Toma, *The Error of Streamlining CEQA for Transit Priority Projects: Why California Transit Agencies May Share the Same Future as Polar Bears*, 18 U. BALT. J. ENVTL. L. 171, 191-92 (2011). In addition, a statute enacted in 2012, S.B. 226, seeks to extend these protections to other infill projects; however, some commentators contend that this statute is quite narrow. Norman F. Carlin & David R. Farrabee, *CEQA Streamlining Legislation: Some Small Steps Toward, But No Giant Leap*, at http://www.pillsburylaw.com/index.cfm?pageid=34&itemid=40292 (S.B. 226 contains so many limits that "[f]ew projects will pass through the eye of this needle.")
93. *See* Matthew D. Francois, *An Update on Climate Change Regulations and how the California Model Might be Replicated Elsewhere*, ASPATORE, 2012 WL 1200516, *5 (environmental impact statement "is not required to reference, describe, or discuss a reduced-density alternative to address the impacts of car and light-duty truck trips generated by the project."). I note that in California, the transit priority project exception to CEQA applies only to projects that include mitigation measures already articulated in prior environmental impact statements, and that are consistent with a regional plan. *See* Toma, *supra* note 92, at 191 (streamlining allowed only if project "has incorporated all feasible mitigation measures, performance standards, or criteria articulated in the prior applicable [environmental review]" such as review "related to a General Plan"); Annika E. Leerssen, *Smart Growth and Green Building: An Effective Partnership to Significantly Reduce Greenhouse Gas Emissions*, 26 J. ENVTL. L. & LITIG. 287, 309-10 (2011); Darakjian, *supra* note 85, at 387-89 (describing sustainable communities strategy). I do not favor adopting these limits in New York, since they vitiate the benefits of the streamlining I have proposed and because I believe that a transit priority project is environmentally friendly and thus should not require "mitigation measures."
94. It could also be argued that SEQRA be amended to completely exclude socio-economic impacts from the definition of "environment," Sterk, *supra* note 3, at 2085-86 (making proposal). This proposal would effectively extend my proposed reform to all projects. Because this article is primarily about the impact of SEQRA upon areas most likely to be served by public transit, the broader proposal is thus beyond the scope of this article.
95. *See* Toma, *supra* note 92, at 194 (expressing concern over "time delays and commuter frustration.")
96. *See supra* notes 71-73 and accompanying text.
97. *See, e.g.*, Steve Harrison, *November Ballot Spot Likely: Signatures Clear The Way For Revote on Transit Tax*, CHARLOTTE OBSERVER, June 1, 2007, at 1A (opponents of Charlotte light rail expansion argue that "plan to build additional light-rail lines doesn't make sense for a low-density city such as Charlotte."); Jim Beamgard, *Bus Line Wants to Carry Riders Farther, Faster—A Conversation with Ray Miller*, TAMPA TRIBUNE, August 7, 2005, at 1 (opponents of rail in Tampa "say we'll never have the densities here needed…[so] it really doesn't take cars off the road.")
98. *See, e.g.*, EDITORIAL, SOUTH FLORIDA SUN-SENTINEL, MAY 28, 2006, at 4H ("high-density developments will only worsen traffic congestion if mass transit is not available to replace the automobile for significant numbers of people.")

Michael Lewyn is an Associate Professor at Touro Law Center. He received his B.A. at Wesleyan University, his J.D. at the University of Pennsylvania and his L.L.M. at the University of Toronto. **He would like to thank Albert Monroe, Leon Lazer and Peter Appel for their helpful comments.**

Applying Mathematical Set Theory to Statutory Construction of Municipal Sign Laws

By Ann L. Nowak

Introduction

An ambiguity in the town code of Southampton, New York, recently created a controversy over whether thin strips of plain plastic would be signs if they were affixed to utility poles to demarcate a religious boundary.[1] The town's chief building inspector determined that the strips would be signs, even though they bore no writing or other distinguishing characteristics.[2]

The proponents of the project appealed to the Zoning Board of Appeals (ZBA). At the ZBA hearing, members of the public argued about whether these pieces of plastic would fall under the town's definition of "signs."[3] If the strips were "signs," attaching them to utility poles would be prohibited.[4]

Some residents favored the project and told the ZBA that the town's definition of "signs" clearly did not apply to the plastic strips. But other residents opposed the project and told the ZBA that the town's definition of "signs" clearly did apply to the plastic strips.[5]

This case illustrates why municipal lawyers might want to review their high school mathematics lessons about set theory before drafting statutes. The application of set theory—particularly in the form of Venn diagrams—can help to prevent ambiguity of language in statutory construction. It is this ambiguity that gives rise to differences in interpretation, and these differences frequently lead to litigation over the meaning of a statute.[6]

The Case[7]

The East End Eruv Association, Inc., a group of Orthodox Jews, sought to create an area known as an "eruv" in the western part of Southampton Town. An "eruv," under Jewish law, is an area outside the home in which Orthodox Jews are allowed to push or carry things on the Sabbath when such activity would otherwise be prohibited. The creation of an eruv allows worshippers to carry keys and push strollers or walkers to and from the synagogue. The eruv is conceptual. It has no walls or roof, but its outer borders are marked by thin plastic strips called "lechis" that are attached to utility poles. At a hearing before the Southampton Town Zoning Board of Appeals on April 3, 2013, an attorney for the applicant stated that lechis serve as conceptual "doors" to an eruv and, therefore, do not convey a message. Thus, he explained, lechis are not signs under the language of the town code.[8]

The Regulation

Southampton Town's sign law defines a "sign" as follows (emphasis added):[9]

> SIGN
>
> Any material, device or structure displaying, or intending to display, one or more messages visually **and** used for the purpose of bringing such messages to the attention of the public, but excluding any lawful display of merchandise. The term "sign" shall also mean and include any display of one or more of the following:
>
> A. Any letter, numeral, figure, emblem, picture, outline, character, spectacle, delineation, announcement, trademark, or logo**; and**
>
> B. Colored bands, stripes, patterns, outlines or delineations displayed for the purpose of commercial identification.

The problem with the town's definition of a sign is that it is ambiguous. The highlighted words demonstrate some of the ambiguities that create confusion and give rise to multiple interpretations. Although the word "and" is conjunctive—properly used to combine two elements—writers sometimes mistakenly use "and" when they mean "or," which may be the case in the Southampton statute.[10]

If the word "and" is read in its proper use as a conjunctive, rather than as a disjunctive (or), the statute's meaning is as follows: A sign must include all parts of the definition. That is, for something to be a sign, it must either send a message or intend to send a message, and it must contain at least one element from part A or B.

But, because part B contains the word "and" before the words "commercial identification," the words "commercial identification" could be read to modify not only all the other words in part B but also those in

part A. This is because part A also ends with the word "and," which joins the two parts. Did the scrivener intend to fuse the two parts? This is unclear. And that is the problem.

Ambiguity in Statutes

Ambiguity in statutes comes from conflicts between the intended relationship of words and the reader's perceived relationship of those words. The "syntactic ambiguity" caused by the word "and" is common.[11]

This is an example of a sentence in which the word "and" might be conjunctive or disjunctive:[12]

"*Persons who are law teachers and members of the A.B.A. will qualify.*"[13]

What does that mean? Did the scrivener mean to say that persons who are BOTH law teachers and members of the A.B.A. will qualify? Or did the scrivener mean to say that EITHER those persons who are law teachers OR those persons who are members of the A.B.A. will qualify? That is, was the word "and" meant to be conjunctive or disjunctive?

But this kind of "either-or" ambiguity is just the beginning of the havoc that the word "and" can create. The following is an example of a situation where the word "and" can create four possible interpretations of one sentence:

"*All law professors and students at Yale should have little trouble understanding this.*"[14]

This seemingly simple sentence can be interpreted four different ways:

1. All law professors everywhere (not just those at Yale) plus all students at Yale (not just law students there) should have little trouble understanding this.
2. All law professors everywhere (not just those at Yale) plus all law students at Yale should have little trouble understanding this.
3. All law professors at Yale plus all students at Yale (not just law students there) should have little trouble understanding this.
4. All law professors at Yale plus all law students at Yale should have little trouble understanding this.

Now look at Southampton's definition of a "sign." The multiple uses of the word "and" between elements of the definition give rise to at least three interpretations of the definition:

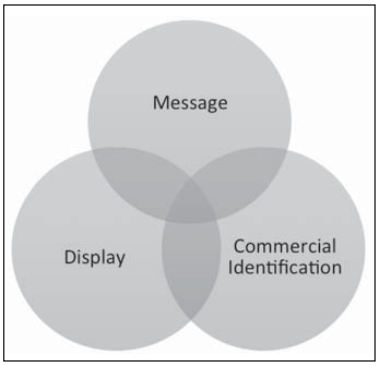
1. A sign is a message that must also contain elements of both section A and elements of section B.
2. A sign is a message that must also contain elements of either Section A or elements of Section B.
3. A sign is a message that could, but doesn't have to, contain elements of either section A or section B.

This is where an application of the principles of mathematical set theory becomes helpful. They help to clarify which elements should be grouped with which other elements to become a set. For example, does 4 + 3 x 2 = 10 or 14?[15] It depends. If you group the first two numbers into a set, the answer is 14. But if, instead, you group the second two numbers into a set, the answer is 10. That is, (4 + 3) x 2 = 14, but 4 + (3 x 2) = 10.[16]

Set theory becomes a lot more complicated when you are examining several sets, and each set contains numerous elements. This is where Venn diagrams are handy. For those of you who have long forgotten your pre-college mathematics lessons, set theory is a branch of mathematical logic that can be applied to collections of elements. Mathematicians often use non-numerical depictions known as Venn diagrams to show the logical connection between elements of various sets.[17] Similarly, at the pre-drafting stage, a scrivener of municipal statutes can use Venn diagrams to avoid unintentional conjunctions or disjunctions of sets. By creating a Venn diagram for each possible intersection of the sets of elements in a statute, a scrivener can see clearly the syntactic ambiguities and clarify them.

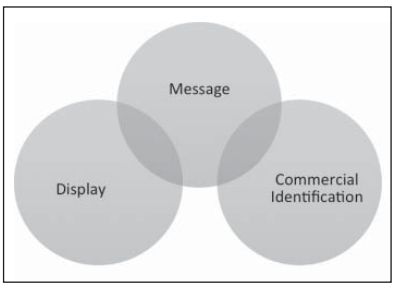
In the case of Southampton's definition of a "sign," the three interpretations would be represented in a Venn diagram as follows:

Figure 1:



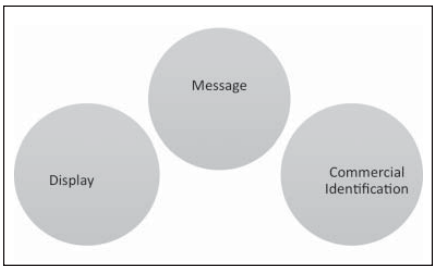
In Figure 1, the triangular area at the intersection of the three circles shows one interpretation of the town's definition of a sign. That is, the small area in which all three circles overlap shows that a sign must contain all three of these elements: a message, a display and a purpose of commercial identification. In this scenario, the word "and" is always conjunctive.

Figure 2:



In Figure 2, the two elliptical areas where the circles overlap show another interpretation of Southampton's definition of a sign. That is, the overlapping areas show that a sign must contain either of two combinations of elements: a display that sends a message or a commercial identification that sends a message. In this scenario, the word "and" is sometimes conjunctive. (That is, it is sometimes conjunctive and sometimes disjunctive.)

Figure 3:



In Figure 3, the three independent circles show yet another interpretation of Southampton's definition of a sign. That is, the separation between each circle shows that if a sign contains a message, the sign doesn't have to contain either a display or a commercial identification. In this scenario, the word "and" is never conjunctive. (That is, it is disjunctive.)

The Pink Flamingo Scenario

To understand the implications of what can happen if the word "and" is interpreted as being conjunctive versus disjunctive, consider the following hypothetical:

Question: In the Town of Southampton, is a pink flamingo whirligig a sign if a homeowner displays it on the front lawn of a residence? (Note, when reading the town's sign ordinance, that the town code defines the word "shall" as being mandatory.[18])

Task: Apply the elements of the three sets that make up the definition of a sign in Southampton: (a) a material, device or structure that sends or is intended to send a message to the public, (b) a display that contains a character or spectacle, and (c) a display for commercial identification.

Analysis: A pink flamingo whirligig is made of wood (a "material"). Decorating your front lawn with it (a "display") demonstrates that you have a sense of humor or that you find pink flamingo whirligigs attractive (sends "a message to the public"). When the flamingo's little legs whirl around like the cartoon character Road Runner, the whirligig (a "character") draws attention to itself (a "spectacle").[19] But the determination of whether this whirligig is a sign hangs on one crucial word—"and"—at the end of section A of the definition of a sign. Recall that the definition of a sign includes the following:

> The term "sign" shall also mean and include any display of one or more of the following:
>
> A. Any letter, numeral, figure, emblem, picture, outline, character, spectacle, delineation, announcement, trademark, or logo; **and**
>
> B. Colored bands, stripes, patterns, outlines or delineations displayed for the purpose of commercial identification.[20]

If you believe that the word "and" was meant to be conjunctive between parts A and B of the definition, then the words "for commercial identification" at the end of part B modify each and every item in part A because the word "and" links them. This means that your character or spectacle would have to be displayed for the purpose of commercial identification to be deemed a sign. If your pink flamingo whirligig lawn ornament were not displayed for commercial identification, it would not be a sign.

Alternatively, if you believe that the word "and" was not meant to fuse parts A and B, then your whirling flamingo lawn ornament would be a sign. This is because the words "for commercial identification" in part B would apply only to part B and not to part A.

The Bottom Line

If you believe that the word "and" at the end of part A was meant to be conjunctive, then a lechi is not a sign because it is not displayed for purposes of "commercial identification." That is, if your pink flamingo whirligig is not a sign for this reason, then neither is a lechi.

Alternatively, if you believe that the word "and" was meant to be disjunctive (acting as "or"), then your whirling flamingo lawn ornament might be a sign. This is because the words "for commercial identification" would apply only to part B, but not to part A. If the word "and" was meant to be disjunctive, the determination of whether a whirligig or a lechi is a sign would be based on the application of other factors in the town's definition of a sign (for example, the word "message").

Municipal attorneys in other towns and villages should take a lesson from Southampton's lechi case and check their own sign ordinances for syntactic am-

biguities. They should also tell their children to pay attention in math class because a seemingly useless lesson can, years later, actually become useful.

Endnotes

1. Shaye Weaver, *ZBA Hears Case for Eruv*, Southampton Press, Apr. 11, 2013, at A1, a*vailable for subscriber at* http://www.27east.com.
2. *Id.*
3. *Id.*
4. Southampton, N.Y., Town Code § 330-203B(10), *available at* http://ecode360.com/8702596.
5. Weaver, *supra* note 1.
6. *See* Phillip M. Kannan, *Symbolic Logic in Judicial Interpretation*, 27 U. Mem. L. Rev. 85, 85 (1966) (courts are often asked to decipher ambiguous syntax in statutes); *see also* Layman E. Allen, *Symbolic Logic: A Razor-Edge Tool for Drafting and Interpreting Legal Documents*, 66 Yale L.J. 833, 833 (1957) (litigation over the meaning of statutes is often the result of the writer's unintentional failure to convey the intended meaning clearly).
7. Weaver, *supra* note 1. The public hearing concerning this case was televised throughout the Town of Southampton and was also available for viewing online on the town's web site during the week following the hearing. A transcript of the hearing was made part of the record as Exhibit A to the applicant's Supplemental Memorandum of Law.
8. In re East End Eruv Ass'n, Transcript of Public Hearing at 28 (Southampton Town Zoning Board of Appeals Apr. 4, 2013).
9. Southampton, NY, Town Code § 330-201, *available at* http://ecode360.com/8702596.
10. *See* http://www.thefreedictionary.com/and (defining "and" as conjunctive) (last visited July 15, 2013); http://www.thefreedictionary.com/or (defining "or" as disjunctive) (last visited July 15, 2013).
11. *See* Rudy Engholm, *Logic and Laws: Relief from Statutory Obfuscation*, 9 U. Mich. J.L. Reform 324 (1975-1976) (describing how to locate syntactic ambiguity in statutes through the use of mathematics and symbolic logic).
12. *See* http://www.thefreedictionary.com/conjunctive (stating that "conjunctive" means "serving to join") (last visited July 15, 2013); http://www.thefreedictionary.com/disjunctive (stating that "disjunctive" means "lacking connection") (last visited July 15, 2013).
13. Layman E. Allen, *Some Uses of Symbolic Logic in Law Practice*, 3 M.U.L.L. Mod. Uses Log. L. 119, 125-130; also published at 8 Prac. Law. 51 (1962).
14. Allen, *supra* note 6, at 860.
15. *Id*.
16. To further explain the difference between the two equations: The equation "(4 + 3) x 2" means that you first add 4 and 3, which equals 7. Then multiply 7 by 2, which produces 14. The equation "4 + (3 x 2)" means that you add 4 to the product of 3 x 2. The product of 3 x 2 is 6. Adding 4 to 6 produces 10.
17. For a basic refresher on set theory and Venn diagrams, see http://www.mathisfun.com/sets/venn-diagrams.html.
18. Southampton, NY, Town Code § 330-4C, *available at* http://ecode360.com/8702596.
19. Road Runner is a popular television cartoon character created for Warner Bros. in 1948.
20. Southampton, NY, Town Code § 330-201, *available at* http://ecode360.com/8702596.

Ann L. Nowak is the Director of the Writing Center at Touro College Jacob D. Fuchsberg Law Center; A.B., Barnard College of Columbia University; M.A., Boston University; J.D., CUNY School of Law.

Is Prayer Constitutional at Municipal Council Meetings?

By Thomas A. Schweitzer

The Supreme Court may be about to make a major decision involving the First Amendment Establishment Clause[1] and local governments in this year's United States Supreme Court Term. On May 20, 2013, the Court granted the petition for certiorari of the Town of Greece, New York in a case challenging official prayers at town council meetings.[2] It is hard to imagine a greater facial violation of "the wall of separation between church and state"[3] than prayer at a session of an American law-making body.[4] Nevertheless, the constitutionality of legislative prayer has been generally upheld since the Supreme Court decided *Marsh v. Chambers* in 1983.[5]

This article will discuss *Galloway v. Town of Greece*, the case currently pending at the Supreme Court. It will begin with a brief discussion of *Lemon v. Kurtzman*[6] and *Marsh* to provide the background necessary for understanding the issues raised by *Galloway*. The article then will examine the district and circuit court decisions in *Galloway* and the Establishment Clause issues posed by the case. Next, it will note issues raised by other lower court decisions involving legislative prayer after *Marsh*.

Moving from description of the rather muddled state of precedent in this area to the Supreme Court's duty, in deciding *Galloway*, to clarify and decide the constitutional issues, the article will recommend that the Court not only affirm the Second Circuit's decision in *Galloway* but also either overturn or sharply limit the *Marsh* precedent. As this recommendation seems unlikely to be followed, the article ends with a plea that the Court decide *Galloway* in a way that provides lower courts with greater guidance when addressing the wide variety of fact patterns and legal issues raised by municipal prayer cases after *Marsh*.

Background: The *Lemon* Test and the *Marsh* Case

In 1971, the Supreme Court announced in *Lemon v. Kurtzman* what became the leading test for evaluating the constitutionality of a law or practice under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[7]

The *Lemon* test, as it is known, represented the Court's attempt to accommodate competing if not contradictory goals of the Establishment Clause: On the one hand, the Clause "severs the link between Church and State"; on the other hand, it "does not disassociate religion from government."[8] The *Lemon* test has been widely criticized by commentators and at least seven Supreme Court justices,[9] and it has been significantly watered down in more recent cases.[10] Nevertheless, it never has been officially repudiated by the Court and is frequently applied by the Court in Establishment Clause cases.[11]

Despite the fact that *Lemon* was the Court's leading Establishment Clause case, the Court declined to apply the *Lemon* test twelve years later in *Marsh v. Chambers*.[12] Instead, the Court invoked the early history of the Republic in rejecting an Establishment Clause challenge in a case involving legislative prayer.

The facts in *Marsh* were as follows: The Nebraska Legislature[13] began each session with a prayer offered by a chaplain who was chosen every two years by the Legislative Council and paid with public funds. Ernest Chambers, a state legislator who thought that this violated the Establishment Clause, sued to enjoin the practice. The defendants included State Treasurer Frank Marsh and Robert Palmer, a Presbyterian minister who had held the chaplaincy position for sixteen years.

The federal district court applied the *Lemon* test separately to the challenged practices of prayer and funding for the chaplain. It upheld the constitutionality of offering daily prayers but concluded that use of state funds to pay Reverend Palmer's salary of $320 per month and to publish books of his prayers was unconstitutional.[14]

On appeal, the United States Court of Appeals for the Eighth Circuit held that actions of the Nebraska Legislature had to be viewed as a whole because "[t]he funding is inextricably bound up with the prayers themselves."[15] It concluded that the chaplaincy practice violated all three elements of the *Lemon* test and enjoined the entire practice.[16]

The Supreme Court granted certiorari and then reversed the Eighth Circuit in an Opinion by Chief Justice Warren Burger. The Court upheld the Nebraska chaplaincy practice in its entirety.[17] The lynchpin of the Court's decision was that the First Congress both ratified the Bill of Rights, including the First Amendment, and enacted a statute to pay chaplains. Indeed, a final agreement was reached on the language of the Bill of Rights on September 25, 1789, only three days after Con-

gress passed the statute.[18] The Court concluded that those who drafted the First Amendment could not have believed that paid chaplains violated the Establishment Clause.

The Court declared that "the practice of opening legislative sessions with prayer has become part of the fabric of our society" and the practice of invoking divine guidance on lawmakers "is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[19] Nor was paying the chaplain of a particular denomination with public funds a violation of the Establishment Clause, the Court explained, because the first Continental Congress had also compensated its chaplain.[20] Furthermore, the Court held that "absent proof that the chaplain's reappointment stemmed from an impermissible motive… his long tenure does not in itself conflict with the Establishment Clause."[21]

In addition, the Court suggested that it was not incumbent on courts to scrutinize legislative prayers in order to eliminate sectarian messages. It stated: "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer."[22]

The only elaborations by the Supreme Court of its holding in *Marsh* were provided in two subsequent cases: *County of Allegheny v. American Civil Liberties Union*[23] and *Lee v. Weisman*.[24] The *Allegheny* Court emphasized that even the *Marsh* Court had recognized that not all practices that were 200 years old were necessarily automatically constitutional and that legislative prayers that affiliate the government with any one specific faith or belief were unconstitutional. It further stated: "The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'"[25]

Public school commencements are functions of state government and thus are subject to Establishment Clause strictures. As in *Marsh*, the challenged event in *Lee v. Weisman* was a prayer preceding the program.[26] Because the Court in *Lee* squarely distinguished the *Marsh* precedent,[27] however, it has scant relevance to legislative prayer.

Galloway in the District Court

Greece is a town of about 94,000 residents, located just outside Rochester. Since 1999, the Greece Town Council had arranged for religious invocations to be delivered by clergy and other individuals at the beginning of its monthly meetings. Christian clergymen delivered the vast majority of the prayers.[28] Beginning in September 2007, Susan Galloway and Linda Stephens, neither of whom is a Christian, complained without success to the town about its prayer practice.[29] On February 28, 2008, Galloway and Stephens, arguing that the town's prayer practices violated the Establishment Clause, sued the town and Supervisor John Auberger for a declaratory judgment and injunctive relief.

Although Galloway felt that prayer was inappropriate at government meetings, she only asked the Town Board to make the prayers "nonsectarian." Stephens regarded all legislative prayer as inappropriate and believed that "sectarian prayers" were "more offensive than nonsectarian ones."[30] Plaintiffs contended that *Marsh* and *Allegheny* forbade all sectarian prayer; however, they did not oppose "inclusive and ecumenical" prayer.[31] They also claimed that the town's procedure for selecting clergy was unconstitutional because it favored Christians over other faiths.[32]

The parties conducted extensive discovery, described in detail in the decision of United States District Court Judge Charles J. Siragusa. The district court found that Supervisor John Auberger had instituted the Town of Greece's informal policy of inviting local clergy to offer prayers at the beginning of Town Board meetings in 1999 after he observed this practice at meetings of the Monroe County Legislature. From that time through 2010, responsibility for inviting clergy to deliver prayers at Town Board meetings was delegated to employees of the Town's Office of Constituent Services. They consulted a "Community Guide" published by the Town Chamber of Commerce for a list of religious organizations within the town's borders. Before each meeting, a clerk would make telephone calls to such groups until she found a clergyman willing to offer the prayer. In the course of time, groups who did not wish to participate were removed and others were added.

Almost all places of worship in the Town of Greece were Christian, as were most of the prayer givers.[33] Some of the prayers were Christian in nature and contained explicit references to Jesus Christ.[34] The district court found no evidence that the town clerks who selected the prayer givers were biased;[35] they did not attend the Board meetings themselves, and there was no indication of their religious affiliation, if any. After plaintiffs sued the Town, moreover, the clerk in charge added a "Wiccan Priestess"[36] and a Jewish layman to the list of approved prayer givers. A representative of the Baha'i Assembly of Greece had also been added to the list and delivered an invocation at a Town Board meeting during this period.[37]

Because there was little disagreement between the parties on the underlying facts, Judge Siragusa decided that a trial was unnecessary and the parties submitted cross-motions for summary judgment. On August 5, 2010, he granted the Town's motion and entered judgment in its favor and against the plaintiffs.

The district court concluded that the Town of Greece's legislative prayer practices were consistent with *Marsh*. It found that there was no indication in the record that the town's prayer policy had been established for an improper purpose such as "to proselytize or advance any one, or to disparage any other, faith or belief."[38] Instead, its policy was to invite all the denominations in the town and to even welcome volunteers, like atheists and members of non-Judeo-Christian religions, to give invocations.[39]

The court added that "[t]he mere fact that prayers may contain a reference to Jesus or another deity does not make them proselytizing. Instead, limited references such as, 'in Jesus's name,' are, under the facts of this case, 'tolerable acknowledgment[s] of beliefs widely held among the people of this country.'"[40]

The court also rejected the argument that only nonsectarian prayer should be tolerated.[41] In support of this conclusion, it noted that legislative prayer in Congress over the years had often been "overtly sectarian"[42] and took "judicial notice" of two recent sectarian invocations that ministers had delivered in recent months in the House of Representatives.[43]

Finally, the district court rejected plaintiffs' contention that the town should instruct potential prayer givers that their prayers should be "inclusive and ecumenical."[44] It found that "[p]laintiffs' proposed nonsectarian policy, which would require town officials to differentiate between sectarian prayers and nonsectarian prayers, is vague and unworkable, as *Pelphrey* demonstrates."[45] Accordingly, the court found as a matter of law that the town had not violated the Establishment Clause, and it granted the town's motion for summary judgment.

Galloway in the Second Circuit

In a unanimous decision, the Second Circuit reversed the district court's grant of summary judgment to the Town of Greece and remanded the case for further proceedings and appropriate relief. The author of the decision, Judge Guido Calabresi, initially noted that the scope of the issues had narrowed on appeal, as the plaintiffs had abandoned their argument that the town intentionally discriminated against non-Christians in its selection of prayer givers.[46]

The only remaining issue on appeal was whether the district court had erred in rejecting plaintiffs' claim that the town's prayer practice had the effect, even if not the purpose, of establishing religion in violation of the Establishment Clause. The Second Circuit concluded that, based on the totality of the circumstances, the plaintiffs had demonstrated that the town's prayer practice impermissibly affiliated the town with a single creed, Christianity.[47]

After discussing the applicable law, the Second Circuit noted that there was no precise criterion or formula for determining whether there was an Establishment Clause violation in connection with legislative prayer. Instead, as Judge Calabresi wrote, "we see 'no test-related substitute for the exercise of legal judgment.'"[48] After reviewing the entire record, the court concluded that the town's prayer practice had to be viewed as an endorsement of the Christian faith.

The Court found a number of facts that supported this conclusion. It noted that "[i]n the town's view, the preponderance of Christian clergy was the result of a random selection process."[49] However, the town had invited clergy almost exclusively from places of worship within the town's borders, which were overwhelmingly Christian, while some town residents might be members of congregations outside the town or of no congregation at all. In addition, the town had neither informed members of the public that they could volunteer to offer prayers, nor had it publicly solicited prayer volunteers. As a result, the town's selection process could not result in "a perspective that is substantially neutral amongst creeds."[50] Instead, the process virtually ensured that a Christian viewpoint overwhelmingly predominated.

Furthermore, the Court noted, prayer givers often appeared to speak on behalf of all present and even the town itself. Prayer givers often asked the audience to participate and to signify their assent by standing or bowing their heads. "It is no small thing for a non-Christian (or for a Christian, for that matter) to pray 'in the name of Jesus Christ,'" the Court wrote.[51] This "placed audience members who were nonreligious or adherents of non-Christian religions in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation[.]"[52] Thus, even though the prayers refrained from proselytization, the unending succession of "often specifically sectarian Christian prayers"[53] would create the impression in an objective, reasonable person that "the town's prayer practice associated the town with the Christian religion."[54]

The Court emphasized that it was not stating that legislative prayers to open town meetings violated the Establishment Clause, even if they occasionally were sectarian in nature.[55] The Constitution required, however, that the prayers offered "do not express an official town religion, and do not purport to speak on behalf of all the town's residents or to compel their assent to a particular belief."[56] In summary, "a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause."[57]

The Larger Context

Galloway is one of a number of cases decided by lower courts involving challenges to legislative prayer at the municipal level. (Interestingly, the absence of reported cases involving challenges to chaplains in state legislatures suggests that most of the states have accepted *Marsh* and have not encountered difficulty in applying its holding to their proceedings.)[58] In fact, the cases involving prayers at town and city council meetings reveal a distressing degree of divisiveness between the dominant Christian prayer givers and adherents of minority and non-Western religions, as well as among the different Christian groups.[59] It is regrettable that prayers which no doubt are intended to bring community members together and to unite them in the important enterprise of self-government should engender such disharmony.

This welter of cases may be due to the fact-and-history-specific nature of the Court's decision in *Marsh*. (*Galloway* shares this fact-specific approach to deciding the case.) In essence, federal courts called upon to adjudicate disputes about legislative prayer are engaged in building a body of constitutional common law. Applying a strict version of the traditional rules for adjudicating only cases and controversies, one could argue that the Supreme Court should not go beyond the specific facts and legal issues present in *Galloway* when it decides the case.

Nevertheless, my view is that such a fact-specific decision would be unfortunate. For three decades, lower courts have struggled to understand and apply *Marsh* to the legislative prayer controversies they were called upon to adjudicate. These cases, of course, were never heard by the Supreme Court. However, their diverse fact patterns raise a number of issues that the Court could—and should—address.

The major split among the approximately dozen progeny of *Marsh* involves the issue of whether only "nonsectarian" prayer is constitutional. Six courts have answered this question in the affirmative,[60] but at least two have held that sectarian prayers, at least within limits, can be constitutional.[61] The reason for this seems obvious: the ambiguous, even cryptic, language from *Marsh* noted above.[62]

The Court observed that while Chaplain Robert E. Palmer had earlier given explicitly Christian prayers before the Nebraska Legislature, he had removed all references to Christ after a 1980 complaint from a Jewish legislator.[63] Thus, in context, one could understand the Court's statement to mean that Palmer's prayers were only constitutional because they were nonsectarian, and some courts have held thus.[64]

One could also understand the Court to mean that so long as the speaker refrained from proselytizing or disparaging other religions, there would be no constitutional problem, and that other forms of sectarian prayer were permissible. Some courts have so held.[65]

Determining whether or not a prayer is "sectarian" is not necessarily a straightforward matter. As noted above, the court of appeals in *Pelphrey* observed that counsel for plaintiff in that case deemed "Heavenly Father" and "Lord" nonsectarian, even though his clients testified to the contrary.[66] Judge Middlebrooks, dissenting in *Joyner*, claimed that "there is no clear definition of what constitutes a 'sectarian' prayer."[67]

The Author's Recommendation

Thirty years of its misbegotten progeny have exposed the deep flaws in *Marsh,* which arguably was wrongly decided and inarguably failed to provide adequate guidelines for deciding the controversies that were certain to arise around the vexing issue of municipal legislative prayer. In deciding the constitutionality of a hired, paid long-term chaplain, the Court gave no guidance to town and city councils about how they could administer a program of legislative prayer by volunteers without violating the Establishment Clause.

By relying on Eighteenth Century history as the basis for its decision and simply brushing aside the dominant test, which it had fashioned over the years to govern Establishment Clause cases,[68] the Supreme Court took the easy way out. It avoided a decision which would no doubt have provoked a firestorm of protest[69] and it emerged relatively unscathed. But the expediency of this approach came at the cost of engendering doctrinal confusion that has plagued lower courts ever since. This time, at long last, the Court should strive for a broad, comprehensive disposition which seeks to resolve the many issues engendered by *Marsh* and left unresolved for so long.

As part of its task in *Galloway*, the Court should face forthrightly a regrettable consequence of applying the *Marsh* holding to municipal legislative prayer: divisiveness and conflict among people of different faiths.[70] Such conflict arguably takes its greatest toll when waged by members of the same local community. The Supreme Court has highlighted divisiveness as part of the entanglement "prong" of the *Lemon* test,[71] and a noted authority asserted that "political division on religious lines is one of the principal evils that [the] First Amendment sought to forestall."[72]

As Judge Calabresi noted in *Galloway*, "People with the best of intentions may be tempted, in the course of giving a legislative prayer, to convey their views of religious truth, and thereby run the risk of making others feel like outsiders."[73]

In my view, the progeny of *Marsh* at the municipal level sadly mirror what Justice Felix Frankfurter called

"the strife of sects."[74] The divisiveness is not theoretical; it is an unfortunate reality. Even without acting with such an intention, many Christian prayer givers in various parts of the country have delivered prayers at city council meetings that appeared to be official. Their effect was to affiliate the local government with Christianity and to make nonbelievers and adherents of nonwestern religions or no religion feel uncomfortable and feel like outsiders. Thirty years of divisiveness and judicial division are enough; *Marsh* should be overruled.

And yet I am aware that such a decision could be regarded as a radical one that could set off a furor on the religious right. If total overruling is not possible, a coherent half measure would be to preserve *Marsh*'s holding for state legislatures and Congress, but to overrule it at the municipal level. While such a course might seem inconsistent, a persuasive case for it is made in the dissent of Judge Donald M. Middlebrooks in *Pelphrey*.[75] He views *Marsh* as an "outlier in Establishment Clause jurisprudence,"[76] and argues that the rationale for the Court's decision based on 1789 history should not apply to local governments at a time when Massachusetts and other states had established churches.[77] The Court could do worse than reach the same conclusion.

Endnotes

1. U.S. Const. amend. 1 ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…").
2. Galloway v. Town of Greece, 732 F.Supp.2d 195 (W.D.N.Y. 2010), *rev'd*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, Docket 12-696, May 20, 2013. The oral argument before the Supreme Court is scheduled for November 6, 2013.
3. *See* Everson v. Board of Education, 330 U.S. 1, 16 (1947). The expression "a wall of separation between church and state" comes from an 1802 letter from President Jefferson to the Danbury, Connecticut Baptists.
4. Marsh v. Chambers, 463 U.S. 783, 800-01 (1983) (Brennan, J., dissenting) ("[I] have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional").
5. *Id.* at 783.
6. Lemon v. Kurtzman, 403 U.S. 602 (1971).
7. *Id*. at 612.
8. *See* Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated, or Rejected?*, 4 Notre Dame J. L. Ethics & Pub. Pol'y 513, 513 (1990). The conceptual disarray in the Supreme Court's Establishment Clause jurisprudence is largely due to sharp and irreconcilable differences among the justices on the substantive law. Broadly speaking, the Court is divided between strict "separationists," who are suspicious of even indirect government aid to religion, and "accommodationists" who are more sympathetic to such aid. The justices rarely change sides in these matters, but changes occur when they retire and are replaced by nominees with different views.
9. McCreary County v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J. dissenting) ("[A] majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun '*Lemon* Test' that embodies the supposed principle of neutrality between religion and irreligion.") *See also* Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398-399 (1993) (Scalia, J. concurring in judgment) (collecting criticism of *Lemon*); Van Orden v. Perry, 545 U.S. 677, 692, 693 (2005) (Thomas, J. concurring); Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J. concurring in part and concurring in judgment); County of Allegheny v. ACLU, 492 U.S. 573, 655-656, 672-673 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting); *see also* Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (disparaging "the Sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"); Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment) ("I am no more reconciled now to *Lemon* I than I was when it was decided…. The threefold test of *Lemon* I imposes unnecessary, and…superfluous tests for establishing [a First Amendment violation].")
10. *See* Agostini v. Felton, 521 U.S. 203, 222-223 (1997) (quoting Mitchell v. Helms 530 U.S. 793, 794 (2000)). The Supreme Court recast the "entanglement" prong of the *Lemon* test "as simply one criterion relevant to determining a statute's effect." Thus, the Court in effect conflated the effects and entanglement prongs, turning the three-part *Lemon* test into a two-part test. The Supreme Court has introduced and applied several additional Establishment Clause tests in recent decades. Justice O'Connor proposed a modified endorsement test in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). Justice Kennedy introduced a "coercion test" in *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Court applied a neutrality test in *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 839 (1995); *see* Wynne v. Town of Great Falls, South Carolina, 376 F.3d 292, 302, n.8 (4th Cir. 2004). Yet another test, the "totality of the circumstances" test influenced by Justice O'Connor's approach, was applied by the Second Circuit in *Galloway*, as discussed *infra*.
11. According to the author's calculation, the Supreme Court applied the *Lemon* test in thirty Establishment Clause cases in the twenty years after *Lemon v. Kurtzman*.
12. *See* Marsh v. Chambers, 463 U.S. 783, 796 (Brennan, J., dissenting).
13. Nebraska legislature: A History Of The Unicameral. http://nebraskalegislature.gov/about/history_unicameral.php (Nebraska is the only state with a unicameral legislature).
14. Chambers v. Marsh, 504 F.Supp. 585, 592 (D.Neb. 1980).
15. Chambers v. Marsh, 675 F.2d 228, 233 (8th Cir. 1982).
16. *Id.* at 235.
17. Marsh v. Chambers, 463 U.S. 783 (1982).
18. *Id.* at 788. ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the state, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable").
19. *Id.*
20. *Id*. at 794.
21. *See id*. at 793. The Court suggested that Chaplain Palmer was reappointed because the Legislature was satisfied with his services and not because of any "preference" given to his religious views.
22. *Id*. As discussed *infra*, the question of whether the content of legislative prayers should be evaluated by courts has been difficult to resolve.

23. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

24. Lee v. Weisman, 505 U.S. 577 (1992). *See id*. at 588. The First Amendment principles that apply to prayers delivered to a public school graduation that are different from those which apply to legislative prayer. *See also* Thomas A. Schweitzer, "Lee v. Weisman *and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable*?," 69 U. Det. Mercy L. Rev. 113, 119, n. 23 (1992).

25. *Id*. at 793 n. 14. *Allegheny*, of course, did not involve legislative prayers, and this led one federal judge to discount this statement as mere dicta. *See* Joyner v. Forsyth County, North Carolina, 653 F.3d 341, 360 (4th Cir. 2011) (Niemeyer, J., dissenting) ("*Allegheny*'s dicta, however, do not govern legislative prayer cases, and…[n]othing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer" (quoting Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 281, n. 3 (4th Cir. 2005)). Even if they are technically "dicta," however, declarations in a decision by the Supreme Court arguably should not be so easily brushed aside. Judge Calabresi in *Galloway* treated the above statement from *Allegheny* as an important gloss on *Marsh*, and this seems clearly correct.

26. *See* Lee v. Weisman, 505 U.S. at 588. The school principal invited a rabbi to offer an invocation and benediction at a public middle school graduation and provided him with a pamphlet entitled "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews. The Court commented that this was an improper attempt by the principal to direct and control the content of the prayers. *Id.*

27. *Id.* at 596. ("[I]nherent differences between the public school system and a session of a state legislature distinguish this case from Marsh v. Chambers…").

28. *See* Galloway v. Town of Greece, 681 F.3d 20, 24 (2d Cir. 2012) (describing some prayers as explicitly Christian, containing language such as "In Jesus's name we pray.")

29. *See* Galloway v. Town of Greece, 732 F.Supp.2d 195, 196 (W.D.N.Y. 2010) (Galloway is Jewish, and Stephens is an atheist).

30. *Id.* at 204.

31. *Id.* at 210. ("Plaintiffs contend that prayers may only refer to a 'generic God,' and must not refer to any particular deity or to any religious belief, such as the Holy Trinity that is specific to a particular religion or group of religions"). *Id*. at 241.

32. *Id.*

33. *See* Galloway v. Town of Greece, 681 F.3d 20, 31 (2d Cir. 2012).

34. *Id*. at 206. Judge Siragusa quoted completely ten of the prayers which plaintiffs found objectionable. One typical example included the following: "Heavenly Father, you guide and govern everything with order and love. Look upon this assembly of our town leaders and fill them with the spirit of their wisdom. May they always act in accordance with your will." *Id*.

35. Galloway v. Town of Greece, 732 F.Supp.2d 195, 217 (W.D.N.Y. 2010) ("Based on the entire record in this case, there is no evidence that Sofia, Wagoner, or Fiannaca [the Town's clerks who compiled the list of local religious bodies to invite to offer prayers] intentionally excluded non-Christians from giving prayers at Town Board meetings.") *See also id.* at 219. ("[T]here is no evidence that policymaking Town officials were aware that non-Christian groups were allegedly being excluded.").

36. *Id*. at 202.

37. *Id.*

38. *Id.* at 239.

39. *Id*. The district court explicitly rejected plaintiffs' claim that a Jehovah's Witness congregation, a Vietnamese Buddhist congregation and a Jewish synagogue located outside town were excluded by the Town for religious reasons.

40. Galloway v. Town of Greece, 732 F.Supp.2d 195, 241 (W.D.N.Y. 2010) (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1982)).

41. Galloway v. Town of Greece, 732 F.Supp.2d at 241.

42. *Id.* at 241-42.

43. On April 15, 2010, Rev. Clyde Mighells, of Lighthouse Reformed Church, ended his opening prayer with the words, "It is in the blessed name of our Lord, Jesus Christ, that we lay these requests at Your feet. Amen." *Id.* at 242. On June 30, 2010, Rev. Robert Henderson of First Baptist Church in Lincoln, Illinois, ended his opening prayer with the words, "These things we pray in the name of our Lord Jesus Christ. Amen." *Id.*

44. *Id.* at 243.

45. *Id*. *See* Pelphrey v. Cobb County, Georgia, 547 F.3d 1263, 1266 (11th Cir. 2008). The Eleventh Circuit in *Pelphrey* squarely rejected the claim of plaintiffs in that case that under *Marsh*, only nonsectarian legislative prayers could satisfy Establishment Clause requirements. *See also id*. at 1272. ("[W]e would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions."). It also noted that plaintiff taxpayers disagreed with their counsel as to whether "Heavenly Father" and "Lord" were nonsectarian." *Id.*

46. Galloway v. Town of Greece, 681 F.3d 20, 26 (2d Cir. 2012).

47. *Id.* at 34.

48. *Id.* at 30.

49. *Id.* at 31.

50. *Id.*

51. *Id. See also* Joyner v. Forsyth County, North Carolina, 653 F.3d 341, 354 (4th Cir. 2011) (""To…Jewish, Muslim, Baha'I, Hindu, or Buddhist citizens[,] a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden.' See Amicus Br. of American Jewish Congress et al. 8. Such burdens run counter to the Establishment Clause…").

52. *See Galloway*, 681 F.3d at 32 (stressing the problem of persons feeling obliged to show deference to prayers they did not believe in, if only by standing and bowing their heads, lest they be deemed disrespectful or irreverent).

53. *Id.*

54. *Id.*

55. *See id.* at 34. The Second Circuit noted that a number of cases had interpreted *Allegheny*'s gloss on *Marsh* to preclude sectarian prayer. The court denied, however, that the Establishment Clause precludes all legislative invocations that are "denominational in nature" (which evidently means "sectarian"), as these cases seem to suggest. The court gave two reasons for this conclusion. First, in disapproving of the school district's action in *Lee* instructing the rabbi to make his prayers nondenominational, the Supreme Court had not favored establishment of "a civic religion" any more than the original form of Establishment. *See also id.* at 29. Second, even after *Allegheny*, it was difficult to read *Marsh* as holding that every denominational prayer affiliated the government with a religion and thereby violated the Establishment Clause.

56. *Id.* at 34.

57. *Id.*

58. The only exception is *Hinrichs v. Bosma*, 400 F.Supp.2d 1103 (S.D.Indiana 2005), *stay denied*, 440 F.3d 393 (7th Cir. 2006), *rev'd and remanded for lack of standing*, 506 F.3d 584 (7th Cir. 2007). The district court had found that the legislative prayer practices of the Indiana House of Representatives in the 2005 session "when viewed as a whole, are well outside the boundaries established

by the Supreme Court in Marsh v. Chambers." 400 F.Supp.2d at 1125-26.

59. *E.g.*, *Wynne*, *supra* (finding that Town Council's prayers referring to Jesus Christ "promoted one religion over all others, dividing the Town's citizens along denominational lines"), 376 F.3d 298-99; *Simpson*, *supra* (members of Board of Supervisors disparaged and disrespected Wiccan plaintiff), 404 F.3d 285, n. 4; Turner v. City Council of Fredericksburg, 534 F.3d 352, 354 (4th Cir. 2008) (Baptist pastor and city council member sued, claiming violation of his Free Exercise and Free Speech rights, when he was forbidden to deliver prayer which would violate the council's policy since he intended to close the prayer in the name of Jesus Christ); Joyner, *supra* ("To plant sectarian prayers at the heart of local government is a prescription for religious discord"), 653 F.3d at 355.

60. Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004); Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005); Hinrichs v. Bosma, 400 F.Supp.2d 1103 (S.D.Indiana, 2005); Turner v. City Council of Fredericksburg, 534 F.3d 352 (4th Cir. 2008); Joyner v. Forsyth County, 653 F.3d 341 (4th Cir. 2011).

61. Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008); Galloway v. Town of Greece, 732 F.Supp.2d 195 (W.D.N.Y. 2010).

62. Marsh v. Chambers, 463 U.S. 795, 794-95 (1983). ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.")

63. *Id.* at 793.

64. Town Council meetings in Great Falls, South Carolina opened with prayers which often invoked Jesus Christ as "Savior," and a Wiccan sued to challenge this practice. Wynne v. Town of Great Falls, 376 F.3d 292, 301-02 (4th Cir. 2004). The Fourth Circuit affirmed the district court's order permanently enjoining such prayers as unconstitutional. Concluding that the Supreme Court apparently intended to limit its holding upholding prayer in *Marsh* to nonsectarian prayers, it concluded, "The invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of 'advance[ment]' of one particular religion that *Marsh* cautioned against." *Accord*, Joyner v. Forsyth County, 653 F.3d 341, 342 (4th Cir. 2011) ("…Supreme Court precedent and our own [cases] establish that in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide.").

65. As noted above, the Court in *Marsh*, after finding that Chaplain Palmer's prayers contained neither efforts to proselytize nor disparagement of other faiths or beliefs, stated: "That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." 463 U.S. at 794-95. The Eleventh Circuit in *Pelphrey v. Cobb County*, 547 F.3d 1263 (2008) took this to mean that *Marsh* did not prohibit sectarian prayer, so long as it contained no proselytizing or disparagement of other religious faiths or beliefs. The majority of those offering prayers at the Cobb County Commission's meetings were Christian, and their prayer often ended with the words "in Jesus' name we pray." *Id.* at 1267. The court rejected plaintiffs' argument that *Marsh* permitted only "nonsectarian" prayers at commission meetings: "[T]he Court never held that the prayers in *Marsh* were constitutional because they were 'nonsectarian'…To read *Marsh* as allowing only non-sectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer 'is not of concern to judges where…there is no indication that the prayer opportunity has been exploited to proselytize or advance any one…faith or belief. " *Id.* at 1271. *Accord*, Galloway, 681 F.3d 29 (*Marsh* "is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause.")

66. *Id.* at 1272. ("We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard.").

67. 653 F.3d at 364. In addition, other cases subsequent to *Marsh* raise a series of issues that seem to be beyond the scope of *Galloway* but should nevertheless be resolved by the Court. Among these are the following: Since most of the municipal councils involved turned the podium for prayers over to outside volunteers, both clerical and lay, should that make a difference regarding the applicable rule? If a town or county is overwhelmingly dominated by people of one faith, does the town council bear the same burden of trying to locate and invite minority religion prayer givers? What is the constitutionally preferred method of compiling a list of prayer givers, and should prayer givers be chosen from the list at random? If the list of prayer givers turns out to be overwhelmingly Christian, for instance, are the efforts of the city council staff to find minority religion prayer givers irrelevant? Can and should the Court use this case to attempt to formulate a single test for constitutionality under the Establishment Clause? Because of the conflicting interpretations by lower courts of *Marsh*'s holding, the Supreme Court should endeavor to provide a clear and comprehensive set of guidelines to address these issues if it decides to uphold legislative prayer in general.

68. The three-part test set out in Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) was the culmination of decades of case law.

69. The Supreme Court cases outlawing prayer in public schools, *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abingdon School District v. Schempp*, 374 U.S. 203 (1963) created furious reactions all over the country, which led to numerous proposed Constitutional amendments to overrule their holdings. *See generally* Frederick Mark Gedicks and Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W.Va.L.R. 275, 283-84 (2007).

70. Joyner v. Forsyth County, 653 F.3d 341, 347 (2011) ("More broadly, while legislative prayer has the capacity to solemnize the weighty task of governance and encourage ecumenism among its participants, it also has the potential to generate sectarian strife. Such conflict rends communities and does violence to the pluralistic and inclusive values that are a defining feature of American public life").

71. Lemon, 403 U.S. at 622.

72. Paul Freund, "*Public Aid to Parochial Schools*," 82 Harv.L.Rev. 1680, 1692 (1969). *Accord*, Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting).

73. Galloway v. Town of Greece, 681 F.3d 20, 34 (2d Cir. 2012).

74. Illinois *ex rel*. McCollum v. Board of Ed., 333 U.S. 203, 217 (1948).

75. Pelphrey v. Cobb County, 547 F.3d 1263, 1282-91 (Middlebrooks, J., dissenting).

76. *Id*. at 1286.

77. *Id.* at 1288 ("[T]he Massachusetts Constitution at the time, largely written by John and Samuel Adams, established a state religion financed by tax payers, authorized mandatory church attendance and the imposition of criminal sanctions for blasphemy, and discriminated against Catholics").

Thomas A. Schweitzer is a Professor of Law at Touro Law Center, where he teaches Law and Religion and a number of other courses.

An Abbreviated History of Government Ethics Laws—Part I[1]

By Mark Davies, Steven G. Leventhal and Thomas J. Mullaney

Mark Davies

Steven G. Leventhal

Thomas J. Mullaney

This article, the first of two parts, sets forth an abbreviated history, if not a magical mystery tour, of government ethics laws. At the heart of government ethics law is the concern about—and therefore the enduring attempt to regulate—conflicts of interest. Conflicts of interest, actual or perceived, compromise a public official's attempt to protect and promote the common good. In addition, they undermine the notion of fairness that is essential to effective and trustworthy government.[2]

Accordingly, much of this article explores the history of efforts to regulate conflicts of interest. Many municipal attorneys assume that government ethics restrictions arose after the Watergate scandal of the Nixon Administration in the 1970s, a view probably shared by most municipal officials, civic groups, and citizens. But that simply is not so. In fact, these kinds of restrictions go back not decades or even centuries, but millennia. They were ancient when the baby Moses was pulled out of the bulrushes. Understanding that antiquity, even in this extremely cursory form, can, the authors believe, help provide some much needed context to modern conflicts of interest laws, such as Article 18 of the General Municipal Law and municipal ethics codes.[3]

One major caveat to this article is in order: None of the authors is a historian, let alone a legal historian or philosopher or theologian. We therefore welcome any corrections or additions to the examples cited in this article, corrections and additions that we will seek to post on the Section's website.

Code of Hammurabi

The earliest government ethics provision that the authors have been able to locate is section five of the Code of Hammurabi, promulgated by the King of Babylon in the 18th century B.C.E. and, literally, carved in stone. That provision read:

> If a judge has given a verdict, rendered a decision, granted a written judgment, and afterward has altered his judgment, that judge shall be prosecuted for altering the judgment he gave and shall pay twelvefold the penalty laid down in that judgment. Further, he shall be publicly expelled from his judgment-seat and shall not return nor take his seat with the judges at a trial.[4]

One may assume that this provision was aimed at judges' accepting gifts in return for altering a decision.

Hinduism

Throughout the ancient Hindu texts of the Vedanta and the Upanishads run threads of government ethics, particularly in the concept of *dharma* (the principle of doing right things, of duty) and in the Tirukkural's elucidation of *artha*, along with *dharma* one of the four goals (*purusharthas*), which includes good government.[5] For example, the Tirukkural admonishes that "the tyrant's request for gifts from his people is like the armed highway robber's demand couched in the language of politeness."[6]

Buddhism

Buddhism teaches that "if an important minister of state neglects his duties, works for his own profit or accepts bribes, it will cause a rapid decay of public morals."[7] The Buddhist ideals of government, or ten royal virtues, are set forth in the *dasa-raja-dharma*.[8] Using public office for private gain or public resources for oneself, exploiting those who come before one, or accepting gifts from those who appear before one would all violate these precepts.[9] A corrupt official would be a "bribe eater."[10]

Confucius (551-479 B.C.E.)

Ethics permeated Confucianism, which became the foundation of Chinese public service.[11] To be sure, Confucianism, to use a modern terminology, was a

values-based rather than a compliance-based system—a system of virtues as opposed to legal prohibitions.[12] Thus,

> The Master said, "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good."[13]

Such a statement goes to the heart of the ongoing debate in the United States over values-based versus compliance-based government ethics systems. Values-based ethics laws promote positive conduct but lack sufficient specificity to permit civil fines and other enforcement (except disciplinary action). A values-based provision may read: "public officials shall place the interest of the public before themselves." Compliance-based ethics laws (technically, conflicts of interest laws) provide bright-line, civilly and criminally enforceable rules but focus on negative conduct and interests. Such a provision may read: "a public official shall not accept a gift from any individual or firm doing business with the government agency served by the official."[14] While the authors of this article remain firmly committed to compliance-based government ethics laws, we also believe that a recitation of values provides a solid and necessary foundation upon which to erect those laws. Thus, for example, the preamble to the ethics code might provide:

> An officer or employee…should endeavor to pursue a course of conduct which will not raise suspicion among the public that he [or she] is likely to be engaged in acts that are in violation of his [or her] trust.[15]

Indeed, Confucius concluded that government should dispense with the military (and even food) before acting in such a way as to undermine the confidence of the people in their leader, for without confidence a people cannot stand.[16]

Hebrew Scriptures (Tanakh)

Throughout the Hebrew Scriptures, generally, bad things happen to bad kings, bad judges, and bad officials.

Perhaps the most infamous misuse of position arose when King David sees the beautiful Bathsheba bathing (technically, immersing herself in a mikva). Smitten, David has her brought to the palace, where he makes love to her while her husband, Uriah, is away at war. David, of course, gets Bathsheba pregnant. To cover up the pregnancy, David has Uriah brought to the palace and tries to cajole him into sleeping with his wife, but the upright Uriah refuses because his comrades are camping in an open field. So David writes to the commanding officer, Joab: "Set Uriah in the forefront of the hardest fighting, and then draw back from him, so that he may be struck down and die." Joab does, Uriah is killed, and David takes Bathsheba for his wife.[17] Now those are misuse of office violations if there ever were ones.[18] But the Lord is not pleased. And as a consequence of David's misdeeds, the child born to Bathsheba and David dies.[19]

Another famous misuse of office story in the Hebrew Scriptures forms the basis of the festival of Purim, when Haman, the grand vizier of the Persian King Ahasuerus, misused his office and employed the king's signet ring to send letters "to all the king's provinces, giving orders to destroy, to kill, and to annihilate all Jews, young and old, women and children, in one day, the thirteenth day of the twelfth month, which is the month of Adar, and to plunder their goods."[20] But in the end, of course, Esther saved her people, and Haman was hung on his own gallows.[21]

An illustration of misuse of resources arose when the Priest Eli at Shiloh permitted his sons to steal the people's offerings to the Lord for themselves. As punishment, Eli lost the priesthood and his family died young.[22]

As for gifts to officials, the Torah admonishes: "You must not distort justice; you must not show partiality; and you must not accept bribes, for a bribe blinds the eyes of the wise and subverts the cause of those who are in the right. Justice, and only justice, you shall pursue…."[23] The JPS Torah Commentary points out that "gifts" is probably a better translation than "bribes" because the word includes not only payoffs, but also simply private payments for doing one's official job—i.e., gratuities.[24] In any event, taking these gifts has consequences. According to Isaiah:

> Everyone loves a bribe and runs after gifts. They do not defend the orphan, and the widow's cause does not come before them. Therefore says the Sovereign, the LORD of hosts, the Mighty One of Israel: Ah, I will pour out my wrath on my enemies, and avenge myself on my foes! I will turn my hand against you; I will smelt away your dross as with lye and remove all your alloy.[25]

By contrast, the prophet Elisha refused a gift from Naaman, commander of the army of the king of Aram, after healing Naaman of leprosy.[26] And when Elisha's servant, Gehazi, runs after Naaman and asks him for a talent of silver and two changes of clothing,

Elisha transferred Naaman's leprosy to Gehazi and his descendants forever,[27] "[s]o [Gehazi] left [Elisha's] presence leprous, as white as snow."[28] Elisha did not tolerate solicitation or acceptance of gifts from those "doing business" with him.[29]

One may suspect that David, Haman, Eli, and Gehazi may have jumped at the chance to settle their cases for a civil fine and a suspension from office.[30]

The Greek Philosophers

The Greek philosophers were mainly concerned with the idea of living a good life, which they called *eudaimonia*,[31] and with defining the traits and habits that contributed to living a good life. However, they did not devote much attention to defining the particular moral and legal rules which would lead to a good life, or whether those rules were fixed or relative. From Socrates on, the philosophers argued that justice was a part of the definition of a good life.[32] Some pointed out that the best life for a particular individual might be one where everyone else must obey the law, but he is free to do what he wants. But generally the Greek philosophers developed a contract theory of justice, in which the members of a society required order, and laws provided a framework for pursuit of the common good.[33] As a practical matter, the institution of democracy both permitted and required individuals' involvement in running the community and shaping its goals.

In the Nicomachean Ethics, Book V, Aristotle observed that the pursuit of justice could be defined to mean "law abiding," or could also mean being equitable or fair. He noted that whatever is unfair is lawless, but not everything lawless is unfair.[34] This led him to the conclusion that being a good man is not always the same as being a good citizen. A person with the best character would not only be just and virtuous himself, but would also put justice and virtue into practice within society. Justice involves looking beyond a particular individual's desires, whether good or bad, and considering the viewpoint of the community.[35]

Aristotle considered whether rules of justice are merely conventional, or are valid everywhere like laws of nature.[36] He concluded that justice is both fixed by nature and also is variable in certain ways. Aristotle noted that the rules of justice ordained by man are not the same in all places. He believed that people could see which types of rules were conventional and which were fixed by nature.

The Greek philosophers addressed what it meant to live a good life. They recognized that to do so requires the practice of justice and other virtues within a community, but did not derive a general theory on the best form of government for that community, or on the individual's relationship to it.

The Romans

The Roman Assembly, in 449 B.C.E., ratified the Duodecim Tabularum, or the Law of the Twelve Tables, which were erected before the Senate House (curia) in the Forum of Rome. They provided that "[a] judex or an arbiter legally appointed who has been convicted of receiving money for declaring a decision shall be punished capitally."[37] In other words, throw them to the lions.

Christian Testament (New Testament)

Although Christianity is inseparable from Judaism, the origins of these faiths are very different, which influences what they have to say about government ethics. Biblical Judaism, as many readers know, was integrally connected to the land and nation of Israel. Christianity, on the other hand, was from its very beginnings anti-imperial and counter-cultural and largely remained so until it was co-opted by the Roman Empire with the conversion of Constantine and his Edict of Milan in 313 C.E.[38] As a result, the Christian Testament, which was completed around 100 C.E., has very little to say about ethical government (as opposed to ethical living), despite repeatedly excoriating the Roman Empire, most notably in the book of Revelation, which calls the Roman Empire "Babylon the great, mother of whores and of earth's abominations."[39] Probably not the kind of statement that is likely to win one friends in high places.

So, although the Christian Testament is very useful in overthrowing government, it is far less helpful in governing and, unlike the Hebrew Scriptures, does not have much to say about government ethics in our sense of conflicts of interest.

Islam

By contrast, the Qur'an, revealed in the early 7th century C.E., like the Hebrew Scriptures, has much to say about government ethics, at least in the broader sense. An article by a group of Islamic professors notes that "[t]he essence of Qur'anic guidance on good governance is the understanding of the concept of *amānah* (trust) and *adālah* (justice) within the framework of the Islamic worldview."[40] They quote the Qur'anic commandment to "render…what is held in trust with you, and…when you judge among the people do so equitably."[41] And, they continue: "The sincere administration of *amānah* has honesty and justice as its prerequisites."[42]

In the context of government ethics, the virtues of truth and justice are opposed by the notion of corruption. The Qur'an discusses that subject as well. According to Dr. Yassin El-Ayouty, a friend of the authors who is a scholar in Islamic law and very knowledgeable about the Qur'an:

(1) In the Qur'an, there are about 50 verses enjoining corruption, corruptors, and corrupted. The term in Arabic is *fasad* (corruption).

(2) *Fasad* is regarded as (a) Evil (to society) and (b) Insurrection (*fitnah*) against society.

(3) *Fasad*, after reform has been undertaken, is a bigger sin as it represents regression.

(4) All the prophets (in the Qur'an), beginning with Moses, have warned against corruption.

(5) Corruptors in the eyes of God are losers.

(6) God is against corruption as it retards development and chokes off progress.

(7) Those who lord it unjustly over their subjects are agents of corruption.

(8) *Fasad* is an instrument of selling people short (ripping them off).[43]

Charlemagne (742-814 C.E.)

Charlemagne is known—at least to some—as the father of Europe.[44] His reign included attention to government ethics. Although it focuses on fealty to the Emperor, the Capitulary of Charlemagne of 802, which was the charter of the Holy Roman Empire,[45] contains some government ethics provisions, such as:

> [O]ur judges, counts, or envoys shall not have a right to extort payment of the remitted fine, on their own behalf, from those destitute persons to whom the emperor has, in his mercy, forgiven what they ought to pay by reason of his balm.[46]

Apparently this proscription developed in response to the Emperor waiving a destitute person's fine and an official then collecting it anyway and keeping it for himself.

Before moving on, one should emphasize that, while this article focuses on the history of government ethics in the sense of conflicts of interest, the sacred texts focus far more on ethics in the broader sense, what one would nowadays call social justice or distributive justice[47] for the oppressed. For example, Jeremiah records:

> Thus says the LORD: Go down to the house of the king of Judah, and speak there this word and say:… "Act with justice and righteousness, and deliver from the hand of the oppressor anyone who has been robbed. And do no wrong or violence to the alien, the orphan, and the widow, nor shed innocent blood in this place."[48]

Many similar passages exist in the other scriptural works, and even in "secular" works, such as Charlemagne's Capitulary, which proclaims "the poor, widows, orphans and pilgrims shall have consolation and protection…."[49]

Louis IX's Grande Ordinance of 1254

Jumping forward 450 years from Charlemagne's Capitulary to France of 1254, the High Middle Ages, one finds King Louis IX (a/k/a St. Louis) sitting on the throne. After his return from leading the disastrous Seventh Crusade where he lost his entire army, was captured and ransomed for an amount equal to the annual income of the Kingdom of France,[50] Louis promulgated the Grande Ordonnance in 1254 to address abuses of power by some of his officials.[51] Some of the provisions of the Ordonnance sound remarkably modern:[52]

> 4. The provincial governor will also promise not to receive a gift, or any favor from any person, whether from that person or through others, in money, silver, or gold, or in any other moveable or immovable things, or in personal kindness, except edibles and drinkables whose value in one week does not exceed the sum of 10 whole parisian coins and that they… will apply diligence in good faith, that their wives or other relations (sister, brothers, other relatives, consultants, or household staff) not receive such gifts, but if they do, they will compel them to give restitution [in] good faith to the gift-giver, under judgment.[53]
>
> 5. They will also promise that they will not borrow from their subordinates, nor from those who have a case in their presence, or they whom they know will live nearby—through themselves or through others—beyond the sum of 20 pounds, which they will return on the day of mutual agreement, within two months; it is also allowed that a creditor may wish to postpone the repayment.[54]
>
> 6. It will also be added…that the provincial governors will not give or send anything to members of our council, or to their wives, their children, or other household members, or to those whom we will send to visit the land or inquire of their deeds.[55]
>
> 13. We will vigorously keep our provincial governors from buying any possessions in their districts, through

> themselves, or through another, during their administration, or to put forth anything fraudulently without our permission; but if they do, we wish that the purchase be void and that the possessions thus bought be applied to our treasury, if it pleases us….[56]

Preussisches Allgemeines Landrecht of 1794

The first comprehensive law governing public officials of which the authors are aware may be found in the Prussian General State Law of 1794,[57] which arose from reforms instituted by Friedrich the Great (r. 1740-1786) and his father Friedrich-Wilhelm (r. 1713-1740).[58] Among its many provisions, that law prohibited buying one's office or position[59] and also prohibited misusing one's office for private gain: "No one shall misuse his office to injure or benefit another."[60]

Empire Public Officials Law of 1873

A century later, in 1873, Bismarck's Germany enacted a separate, comprehensive law governing (the relatively few) officials of the German Empire.[61] This law included specific conflicts of interest provisions, including:

- A prohibition on disclosure of confidential government information, even after leaving government service;[62]
- A prohibition on receipt of gifts from certain sources;[63] and
- Restrictions on holding other government positions and on engaging in certain private business or employment, absent a waiver—namely

> No Reich's official shall without prior approval of the highest official hold another public office or engage in private employment that provides ongoing compensation or run a business. This same approval is required for a Reich's official to serve on the board of a company that engages in purchasing [e.g., serving pro bono on the board of a nonprofit such as the Y would not require permission but serving pro bono on the board of a manufacturing company would]; but permission may not be given if the position is directly or indirectly compensated. The permission may be revoked at any time. These provisions shall not apply to honorary consuls or retired officials.[64]

So an official, without getting permission, could serve pro bono on a not-for-profit board but would need a waiver to serve pro bono on a for-profit board. Compensated board service, however, was strictly prohibited, although a waiver was available to hold an outside job or have an outside business.

This law remained in effect until January 26, 1937, when it was repealed by the Nazi regime, which enacted in its place a new German Public Officials Law[65] that, among other things, required that every public official at every level of government swear an oath of loyalty and obedience to "the Führer of the German Reich and people, Adolf Hitler,"[66] thereby, in the words of one commentator, "radically contradicting all of the tradition of German public officials."[67]

This ends Part I of our survey of government ethics law through the ages. In Part II, to be published in the next issue of the *Municipal Lawyer*, we will describe the history of government ethics laws in the United States and New York City as well.

Endnotes

1. This article is based on a panel conducted by the authors at the 19th annual Ethics in New York City Government Seminar, co-hosted by the New York City Conflicts of Interest Board and New York Law School on May 21, 2013.
2. *See generally* Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 Georgia J. Int'l & Comp. L. 319 (1988); Mark Davies, *A Practical Approach to Establishing and Maintaining a Values-Based Conflicts of Interest Compliance System* (2011), at http://www.nyc.gov/html/conflicts/downloads/pdf2/international/DaviesArticle_final.pdf.
3. For a discussion of how conflicts of interest, particularly favoring one's family, can lead to political decay, see Francis Fukuyama, The Origins of Political Order: From Prehuman Times to the French Revolution (2011), especially pp. 453-454.
4. Translated by L. W. King, at http://avalon.law.yale.edu/subject_menus/hammenu.asp.
5. *See* http://www.sanskrit.org/www/Hindu%20Primer/dharma.html; http://www.vmission.org.in/vedanta/articles/4puru.htm.
6. Tirukkural, Part 6, at http://www.google.com/url?sa=t&rct=j&q=%22tyrant%E2%80%99s%20request%20for%20gifts%20from%20his%20people%20%22&source=web&cd=3&ved=0CD0QFjAC&url=http%3A%2F%2Fxa.yimg.com%2Fkq%2Fgroups%2F15025843%2F1475161935%2Fname%2FTirukkural&ei=ktpdUbrlJtbh4APH2YDACA&usg=AFQjCNFR7gxXJiSArXxRT-IXc-NLgfMq8w.
7. Bukkyo Dendo Kyokai. The Teachings of Buddha, Kosaido Printing Co., Ltd. p. 153 (2004).
8. Gunaseela Vitanage, *Buddhist Ideals of Government*, at http://www.bps.lk/olib/bl/bl011-p.html; Venerable K. Sri Dhammananda Maha Thera, *Buddhism and Politics*, at, http://buddhanet.net/budsas/ebud/whatbudbeliev/229.htm.
9. Shyamon Jayasinghe, *The Current Relevance of Dasa Raja Dharma*, at http://sannasa.sinhalajukebox.org/2011/Oct/2011Oct_page14.pdf.
10. Guide to Buddhism A to Z, Bribery, at http://www.buddhisma2z.com/content.php?id=474.
11. C.F. Aiken, *Confucianism*, The Catholic Encyclopedia (1908), at http://www.newadvent.org/cathen/04223b.htm.
12. See Jeffrey Riegel, *Confucius*, Stanford Encyclopedia of Philosophy (2013), at http://plato.stanford.edu/entries/confucius/#ConEth.

13. ANALECTS 2:3, at http://nothingistic.org/library/confucius/analects/.
14. *See, e.g., A Practical Approach to Establishing and Maintaining a Values-Based Conflicts of Interest Compliance System*, pp. 10-12, at http://www.nyc.gov/html/conflicts/downloads/pdf2/international/DaviesArticle_final.pdf.
15. N.Y. PUB. OFF. LAW § 74(3)(h).
16. ANALECTS 12:7, at http://nothingistic.org/library/confucius/analects/.
17. 2 Samuel 11.
18. *See, e.g.,* N.Y.C. Charter § 2604(b)(3) ("No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant").
19. 2 Samuel 12:13-18.
20. Esther 3:13.
21. Esther 7:10. The JPS translation of the Tanakh reads "stake" instead of "gallows." Esther 5:14, 7:10. For a review of some of the eerie parallels between Haman and Hitler, *see* Liz Paratz, "A Tarantino Purim?" http://galusaustralis.com/2010/02/2724/a-tarantino-purim/.
22. 1 Samuel 2:27-3:14.
23. Deut. 16:19-20. *See also* Exodus 23:8 ("You shall take no bribe, for a bribe blinds the officials, and subverts the cause of those who are in the right").
24. Jeffrey H. Tigay, THE JPS TORAH COMMENTARY: DEUTERONOMY, p. 161 (5756/1996). *See, e.g.,* N.Y.C. Charter § 2604(b)(13) ("No public servant shall receive compensation except from the city for performing any official duty or accept or receive any gratuity from any person whose interests may be affected by the public servant's official action").
25. Isaiah 1:23-25. *See also* Proverbs 17:8, 29:4.
26. 2 Kings 5:1-16.
27. 2 Kings 5:19-27.
28. 2 Kings 5:27. The authors gratefully acknowledge Yehuda Shapiro for calling their attention to this example of misuse of office.
29. *See, e.g.,* N.Y.C. Charter § 2604(b)(5) ("No public servant shall accept any valuable gift, as defined by rule of the [ethics] board, from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city, except that nothing contained herein shall prohibit a public servant from accepting a gift which is customary on family and social occasions").
30. *See, e.g.,* N.Y.C. Charter § 2606(b) (authorizing New York City's ethics board to impose civil fines up to $25,000 per violation and to recommend to the appointing authority or other appropriate body disciplinary action, including suspension or removal from office or employment).
31. Gisela Striker, *Greek Ethics and Moral Theory*, The Tanner Lectures on Human Values (Stanford University, May, 1987), 183.
32. *Id.* at 189.
33. *Id.* at 190.
34. Aristotle, Nichomachean Ethics, Book V, Sec. 2 (Tr. by W.D. Ross).
35. "[W]e call those acts just that tend to produce and preserve happiness and its components for the political society." *Id.*, Book V, Sec. 1.
36. "[S]ome think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia)." *Id.*, Book V, Sec. 7.
37. Yale Law School, The Avalon Project, *Twelve Tables*, Table IX, 3, at http://avalon.law.yale.edu/ancient/twelve_tables.asp.
38. Harvey Cox, THE FUTURE OF FAITH, pp. 5 ("Emperor Constantine the Great (d. 367 CE) made his adroit decision to commandeer Christianity to bolster his ambitions for the empire"), 6 ("The empire became 'Christian,' and Christianity became imperial"), 63 ("Early Christianity was a fiercely anti-imperial movement, and for good reason"), 70 ("It is undeniable that from the outset Christianity was both anti-imperial and counterimperial").
39. Rev. 17:5.
40. Ibrahim M. Zein, Abdullah Al-Ahsan, & Muhammad Arif Zakaullah, *Qur'anic Guidance on Good Governance*, p. 3 (2008), at http://www.csrnyc.com/images/Guidance_in_the_Koran_on_Human_Rights,_Governance.pdf.
41. Qur'an 4:58 (Ahmed Ali translation 1984).
42. Ibrahim M. Zein, Abdullah Al-Ahsan, & Muhammad Arif Zakaullah, *Qur'anic Guidance on Good Governance*, pp. 9-10, 12 (2008), at http://www.csrnyc.com/images/Guidance_in_the_Koran_on_Human_Rights,_Governance.pdf.
43. April 14, 2005, fax from Dr. Yassin El-Ayouty to Mark Davies, on file with Mr. Davies. *See also* http://quranictopics.blogspot.com/2010/04/fasadmischief.html.
44. *See* http://www.history.com/topics/charlemagne.
45. As has been pointed out, the Holy Roman Empire was neither Holy, nor Roman, nor an Empire. Voltaire, ESSAI SUR L'HISTOIRE GENERALE ET SUR LES MOEURS ET L'ESPIRIT DES NATIONS, Ch. 70 (1756) ("*Ce corps qui s'appelait et qui s'appelle encore le saint empire romain n'était en aucune manière ni saint, ni romain, ni empire.*").
46. Yale Law School, The Avalon Project, Capitulary of Charlemagne, ¶ 29 (802), at http://avalon.law.yale.edu/medieval/capitula.asp.
47. Maurianne Adams, Lee Anne Bell, & Pat Griffin (eds), TEACHING FOR DIVERSITY AND SOCIAL JUSTICE, p. 1 (2007); Julian Lamont & Christi Favor, *Distributive Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2013), at http://plato.stanford.edu/entries/justice-distributive/#Welfare.
48. Jeremiah 22:1-3. *See also* Exodus 22:21-24; Deut. 10:17-19, 24:17, 27:19; Job 29:12-17; Psalm 82:3-4; Isaiah 1:17, 10:1-2; Zechariah 7:9-10; 2 Esdras 2:20-22.
49. Yale Law School, The Avalon Project, Capitulary of Charlemagne, ¶ 14 (802), at http://avalon.law.yale.edu/medieval/capitula.asp.
50. *See* Stephen Batchelor, MEDIEVAL HISTORY FOR DUMMIES, p. 233 (2010).
51. *See* http://www.britannica.com/EBchecked/topic/348849/Louis-IX/4284/Achievement-of-peace-and-administrative-reforms.
52. The authors thank Thomas Colton, retired chair of the Latin Department at Sleepy Hollow High School, for his translation of the medieval Latin.
53. *Cf.* N.Y.C. Charter § 2604(b)(5), *supra* n. 29.
54. *Cf.* N.Y.C. Charter § 2604(b)(14) ("No public servant shall enter into any business or financial relationship with another public servant who is a superior or subordinate of such public servant").
55. *Cf.* N.Y.C. Ad. Code § 3-225 ("No person required to be listed on a [lobbyist] statement of registration pursuant to [N.Y.C. Ad. Code § 3-213(c)(1)] shall offer or give a gift to any public servant").
56. *Cf.* N.Y.C. Charter § 2604(b)(3), *supra* n. 18.
57. Allemeines Landrecht für die Preußischen Staaten, Theil 2, Titel 10 (1794), at http://ra.smixx.de/Links-F-R/PrALR/PrALR-II-10.pdf; http://dlib-pr.mpier.mpg.de/m/kleioc/0010/exec/wrapsmallpage/%22129325_00000053.gif%22/big/%221%22. *See also* http://www.britannica.com/EBchecked/topic/480984/Prussian-Civil-Code.
58. *See* Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 GEORGIA J. INT'L & COMP. L. 319, 335 (1988).

59. Allemeines Landrecht für die Preußischen Staaten, Theil 2, Titel 10, §§ 72-74 (1794). *Cf.* N.Y.C. Charter § 2604(b)(10) ("No public servant shall give or promise to give any portion of the public servant's compensation, or any money, or valuable thing to any person in consideration of having been or being nominated, appointed, elected or employed as a public servant").

60. Allemeines Landrecht für die Preußischen Staaten, Theil 2, Titel 10, § 86 (1794) ("Niemand soll sein Amt zur Beleidigung oder Bevortheilung Anderer mißbrauchen"). *Cf.* N.Y.C. Charter § 2604(b)(3), *supra* n. 18.

61. Das Reichsbeamtengesetz von 31 März 1873, at https://play.google.com/store/books/details/Germany_Das_reichsbeamtengesetz_vom_31_m%C3%A4rz_1873_u?id=Qc8OAAAAYAAJ&hl=en and http://books.google.com/books?id=KM4OAAAAYAAJ&pg=PA134&lpg=PA134&dq=reichsbeamtengesetz+1873+pflichten&source=bl&ots=RCDGNGLawU&sig=SngYTkd0Pt40nRG9WBwBhp8ywsY&hl=en&sa=X&ei=aCNnUdyYCMPi4AO66YDABQ&ved=0CEQQ6AEwAg#v=onepage&q=reichsbeamtengesetz%201873%20pflichten&f=false.

62. Das Reichsbeamtengesetz von 31 März 1873, § 11, Reichsgesetztblatt ("RGBl.") 61 (1873) ("Ueber die vermöge seines Amtes ihm bekannt gewordenen Angelegenheiten, deren Geheimhaltung ihrer Natur nach erforderlich oder von seinem Vorgesetzten vorgeschrieben ist, hat der Beamte Verschwiegenheit zu beobachten, auch nachdem das Dienstverhältnis ausgelöst ist"). *Cf.* N.Y.C. Charter § 2604(b)(4) ("No public servant shall disclose any confidential information concerning the property, affairs or government of the city which is obtained as a result of the official duties of such public servant and which is not otherwise available to the public, or use any such information to advance any direct or indirect financial or other private interest of the public servant or of any other person or firm associated with the public servant; provided, however, that this shall not prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest") and § 2604(d)(5) ("No public servant shall, after leaving city service, disclose or use for private advantage any confidential information gained from public service which is not otherwise made available to the public; provided, however, that this shall not prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest").

63. Das Reichsbeamtengesetz von 31 März 1873, § 15 ("Die vom Kaiser angestellten Beamten dürfen Titel, Ehrenzeichen, Geschenke, Gehaltsbezüge oder Rumunerationen von anderen Regenten oder Regierungen nur mit Genehmigung des Kaisers annehmen"). *Cf.* N.Y.C. Charter § 2604(b)(5), *supra* n. 29.

64. Das Reichsbeamtengesetz von 31 März 1873, § 16 ("Kein Reichsbeamter darf ohne vorgängige Genehmigung der obersten Reichsbehörde ein Nebenamt oder eine Nebenbeschäftigung, mit welcher eine fortlaufende Remuneration verbunden ist, übernehmen oder ein Gewerbe betreiben. Dieselbe Genehmigung ist zu dem Eintritt eines Reichsbeamten in den Vorstand, Verwaltungs- oder Aussichtsrath einer jeden auf Erwerb gerichteten Gesellschaft erforderlich. Sie darf jedoch nicht ertheilt warden, sofern die Stelle mittelbar oder unmittelbar mit einer Rumeration verbunden ist. Die ertheilte Genehmigung ist jederzeit widerruflich. Auf Wahlkonsuln und einstweilen in den Ruhestand versetzte Beamte finden diese Bestimmungen keine Anwendung"). *Cf.* N.Y.C. Charter §§ 2604(a), (c)(6), and (e), which provide as follows:

    N.Y.C. Charter § 2604(a)(1):

    > 1. Except as provided in paragraph three below [which authorizes the ethics board to grant orders permitting the interest],
    >
    > (a) no public servant shall have an interest in a firm [that is, either a position with the firm or an ownership interest in the firm] which such public servant knows is engaged in business dealings with the agency served by such public servant…
    >
    > (b) no regular employee shall have an interest in a firm which such regular employee knows is engaged in business dealings with the city, except if such interest is in a firm whose shares are publicly traded, as defined by rule of the board.

    N.Y.C. Charter § 2604(c)(6):

    > This section [2604] shall not prohibit:…
    >
    > a public servant from acting as attorney, agent, broker, employee, officer, director or consultant for any not-for-profit corporation, or association, or other such entity which operates on a not-for-profit basis, interested in business dealings with the city, provided that:
    >
    > (a) such public servant takes no direct or indirect part in such business dealings;
    >
    > (b) such not-for-profit entity has no direct or indirect interest in any business dealings with the city agency in which the public servant is employed and is not subject to supervision, control or regulation by such agency, except where it is determined by the head of an agency, or by the mayor where the public servant is an agency head, that such activity is in furtherance of the purposes and interests of the city;
    >
    > (c) all such activities by such public servant shall be performed at times during which the public servant is not required to perform services for the city; and
    >
    > (d) such public servant receives no salary or other compensation in connection with such activities.…

    N.Y.C. Charter §§ 2604(e):

    > A public servant or former public servant may hold or negotiate for a position otherwise prohibited by this section, where the holding of the position would not be in conflict with the purposes and interests of the city, if, after written approval by the head of the agency or agencies involved, the board determines that the position involves no such conflict. Such findings shall be in writing and made public by the board.

65. RGBl. I, 39 (1937), at http://www.verfassungen.de/de/de33-45/beamte37.htm.

66. Deutsches Beamtengesetz (DBG) § 4(1) (1937).

67. W. Thiele, DIE ENTWICKLUNG DES DEUTSCHEN BERUFSBEAMTENTUMS 62 (1981). That said, ironically, scrubbed of the extensive Nazi overlay—as the allies did after the War—the German Public Officials Law (Deutsches Beamtengesetz or DBG) contains the core of a modern public officials law for a democratic state. *See* Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 GEORGIA J. INT'L & COMP. L. 319, 342-345 (1988). In regard to government ethics, the DBG regulated conflicts of interest (§ 5), confidentiality (§§ 8-9), outside business activities (§§ 10-11), gifts (§ 15), and penalties (§§ 21-23).

Mark Davies is the Executive Director of the New York City Conflicts of Interest Board, the ethics board for the City of New York, and Chair of the Section. Steven G. Leventhal is the former chair of the Nassau County Board of Ethics and is Co-Chair of the Section's Ethics and Professionalism Committee. Thomas J. Mullaney and Steve are partners in the Roslyn firm of Leventhal, Cursio, Mullaney & Sliney, LLP. The views expressed in this article do not necessarily represent the views of any of the aforementioned entities.

Blogs for Municipal Lawyers

By Jackie L. Gross

Did you know that the New York State Bar Association hosts over 20 blogs written by and for its various Sections and Committees? You can access most of these blogs either by clicking on "Blogs" from the NYSBA home page, www.nysba.org, or going directly to **www.nysba.org/blogs**.

Once you start clicking around, you will see how relevant many of the blogs are for municipal law practitioners. As Barbara Beauchamp, NYSBA's Manager of Internet Services, explains, "NYSBA blogs provide a wonderful opportunity for members to gather substantive information on a wide variety of topics ranging from technical tips to important case alerts to substantive articles on civil rights, labor law, the environment, health law and more. All of NYSBA's blog content is generated by members of NYSBA's Sections and Committees—offering the perspective of experienced working attorneys."

Here are some examples:

The General Practice Section's blog, **http://nysbar.com/blogs/generalpractice/**, was the first NYSBA blog out of the box—and also appears to be one of the bar association's most frequently updated blogs. The blog is described as offering "tips, tricks and tools to help general practice attorneys." Because municipal attorneys are by and large true "general practitioners," this blog is chock full of entries appealing to municipal lawyers too. Here is a short sampling:

- If you're interested in learning about a new Warning Alert and Response Network Act, known as the WARN Act (as opposed to the more familiar plant closing law, the Worker Adjustment and Retraining Notification Act, also known as the WARN Act) which provides the FCC with the authority to adopt standards for cell phone companies to transmit emergency alerts, see Wireless Emergency Alerts on the iPhone--iPhone J.D., **http://nysbar.com/blogs/generalpractice/2013/07/wireless_emergency_alerts_on_t.html**
- For a survey and an overview article on ethical concerns about storing documents online, see The Ethics of Cloud Computing for Lawyers | Solo, Small Firm and General Practice Division, **http://nysbar.com/blogs/generalpractice/2012/12/the_ethics_of_cloud_computing.html**
- For those lawyers preferring dictation over typing, see Dictation—Online Speech Recognition with Google Chrome, **http://nysbar.com/blogs/generalpractice/2012/12/dictation_-_online_speech_reco.html**

Another blog of interest to many municipal attorneys is Envirosphere—the Environmental Law Section's blog, **http://nysbar.com/blogs/environmental/**. This blog was named by Lexis-Nexis as one of the top blogs in 2011 for the environmental law and climate change community. Here are some entries from Envirosphere:

- If you still notice idling trucks and buses in your neighborhood, be sure to read, "NYCDEP Takes on Idling Vehicles," which is part of the NY Environmental Law Section Enforcement Update for May 2013: **http://nysbar.com/blogs/environmental/2013/06/ny_environmental_section_enfor_4.html**
- To find out about local governments' e-waste recycling costs, see "Report Found that New York's Electronic Recycling Law Has Increased Access to E-Waste Collection Sites for Rural New Yorkers and Reduced Costs for Rural Communities": **http://nysbar.com/blogs/environmental/2012/10/report_found_that_new_yorks_el.html**
- For information about the New York Department of Environmental Conservation's new environmental assessment forms, see "DEC Issues Final Rule Creating Model Forms for Conducting Environmental Assessments Under SEQRA": **http://nysbar.com/blogs/environmental/2012/09/dec_issues_final_rule_creating.html**

Finally, NYSBA's Committee on Attorneys in Public Service publishes the CAPS Blog, **http://nysbar.com/blogs/CAPS/**. The CAPS Blog (managed by the author of this article) is by, for and about attorneys working in the public service arena. Here are some recent entries:

- If you have been pondering the cost/balance ratio of law school against a public service career, read "Is a Public Service Career Worth It?," **http://nysbar.com/blogs/CAPS/2012/10/is_a_public_service_career_wor.html**

- For an article examining whether governments should be subject to estoppel liability like the private sector, see "Can the Government Be Estopped?," **http://nysbar.com/blogs/CAPS/2010/12/can_the_government_be_estopped.html**
- To read about the importance of interns in the publishing of U.S. Supreme Court decisions, see "Running of the Interns," **http://nysbar.com/blogs/CAPS/2013/07/running_of_the_interns.html**
- For information relating to the federal government's effort to assist software developers who want to create apps using government data, see "Government as Enabler (in a good way!)," **http://nysbar.com/blogs/CAPS/2012/06/government_as_enabler_in_a_goo.html**

Space does not permit giving examples from all of the other NYSBA blogs, but just to whet your appetite, here is a list of some of the other NYSBA blogs:

- Animalaw, **http://nysbar.com/blogs/animalaw**, from the Committee on Animals and the Law
- Business Law Section Blog, **http://nysbar.com/blogs/businesslaw/**
- Business Torts and Employment Litigation Blog, **http://nysbar.com/blogs/nybusinesslitigation**, from the Business Torts and Employment Litigation Committee of NYSBA's Torts, Insurance, and Compensation Law Section
- E-Discovery Blog, **http://nysbar.com/blogs/EDiscovery/**, from the Commercial and Federal Litigation Section
- The Entertainment, Arts and Sports Law Blog, **http://nysbar.com/blogs/EASL**
- The Good We Do, **http://nysbar.com/blogs/thegoodwedo**, stories of New York attorneys making a difference in the lives of those in need
- Guantánamo and Beyond, **http://nysbar.com/blogs/executivedetention/**, from the Committee on Civil Rights
- Labor & Employment Law NY ("LENY"), **http://nysbar.com/blogs/LENY**, from the Labor and Employment Law Section
- Law, Youth & Citizenship Mock Trial Blog, **http://nysbar.com/blogs/mocktrial**, from the Law, Youth & Citizenship Department of the NYSBA
- Lawyers in Transition Blog, **http://nysbar.com/blogs/lawyersintransition**
- New York State Bar Association Journal, **http://nysbar.com/blogs/barjournal**, the *NYSBA Journal*'s editorial blog
- Real Property Law Section Blog, **http://nysbar.com/blogs/RPLS**
- Resolution Roundtable, **http://nysbar.com/blogs/ResolutionRoundtable/**, from the Dispute Resolution Section
- Securities Litigation and Arbitration Blog, **http://nysbar.com/blogs/securitieslitigation**, from the Commercial and Federal Litigation Section
- Supraspinatus, **http://nysbar.com/blogs/healthlaw**, from the Health Law Section
- Thrive, **http://nysbar.com/blogs/thrive**, from the Committee on Law Practice Management
- The Torts, Insurance and Compensation Law Weblog, **http://nysbar.com/blogs/TICL/**

One final note: If you think you are too busy to read and regularly follow all of these and other interesting blogs out in the "blogosphere," you should read the General Practice Section's blog entry entitled, "Sui Generis: Why You Need an RSS Feed Reader," **http://nysbar.com/blogs/generalpractice/2010/06/sui_generis_why_you_need_an_rs.html**. This entry explains how to aggregate all of your favorite blogs in one place so you can see all of those blogs' most recent headlines at a glance. What municipal lawyer wouldn't be interested in something that's both efficient and helpful?

Jackie L. Gross is the chair of the Blog Subcommittee of NYSBA's Committee on Attorneys in Public Service ("CAPS"). She is a deputy county attorney for the County of Nassau on Long Island. If you have suggestions or story ideas for the CAPS blog, or any of NYSBA's blogs, you can contact Ms. Gross or the NYSBA at caps@nysba.org.

Introducing Touro Law Center's 2013-14 Municipal Law Fellows

The Municipal Law Section is pleased to introduce the *Municipal Lawyer's* student editors. Touro Law Center students Paige Bartholomew and Brian Walsh have been awarded Municipal Law Fellowships and will serve as student editors for 2013-2014.

(l-r) Paige Bartholomew, Brian Walsh, and Sarah Adams-Schoen

Paige Bartholomew is a second-year student at Touro Law Center. Born and raised on Long Island, Paige received her Bachelor's degree from Siena College, majoring in Political Science and minoring in Spanish. She is a member of the *Touro Law Review*, Touro Honors Program, and the PHI ALPHA DELTA Law Fraternity. She has interned for the Hon. Leonard Wexler, assisting in jury selection, attending conferences in chambers, and sitting in on civil trials. As an undergraduate, Paige interned for the Nassau County District Attorney in the Vehicular Crimes Bureau, conducting extensive research to assist in drafting new legislation. She received the CALI Award for Academic Excellence in both Criminal Law and Civil Procedure.

Brian Walsh is a second-year student in Touro Law Center's evening program. Brian received his Bachelor of Arts degree from Quinnipiac University, majoring in legal studies and minoring in political science. He currently works for a major automobile insurance carrier, representing the company in binding arbitration and settlement conferences. Brian is a member of the Touro Honors Program and was named to the Touro Law Center Dean's List in the Spring 2013 semester.

Both Brian and Paige are looking forward to deepening their understanding of municipal law and getting to know the members of the Municipal Law Section.

Section Committees and Chairs

The Municipal Law Section encourages members to participate in its programs and to contact the Section Officers (listed on the back page) or Committee Chairs for information.

Bylaws
Owen B. Walsh
Owen B. Walsh, Attorney at Law
34 Audrey Avenue
P.O. Box 102
Oyster Bay, NY 11771-0102
obwdvw@aol.com

Employment Relations
Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Ethics and Professionalism
Mark Davies
New York City Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007
davies@coib.nyc.gov

Steven G. Leventhal
Leventhal, Cursio, Mullaney & Sliney, LLP
15 Remsen Avenue
Roslyn, NY 11576-2102
sleventhal@lcmslaw.com

Green Development
Daniel A. Spitzer
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
spitzer@hodgsonruss.com

Membership
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

Municipal Finance & Economic Development
Kenneth W. Bond
Squire Sanders (US) LLP
30 Rockefeller Plaza, 30th Floor
New York, NY 10112
kenneth.bond@squiresanders.com

Legislation
G. Brian Morgan
Daniels and Porco, LLP
1 Memorial Avenue
Pawling, NY 12564
morgancounsel@aol.com

A. Joseph Scott III
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207-2986
ascott@hodgsonruss.com

Mandate Relief Task Force
Sharon N. Berlin
Lamb & Barnosky LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
snb@lambbarnosky.com

Michael E. Kenneally Jr.
The Association of Towns
150 State Street
Albany, NY 12207
mkenneally@nytowns.org

NEW YORK STATE BAR ASSOCIATION
MUNICIPAL LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

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Publication Policy: All articles should be submitted to the co-editors, Prof. Rodger Citron (rcitron@tourolaw.edu) and Prof. Sarah Adams-Schoen (sadams@tourolaw.edu) at the Touro Law Center and must include a cover letter giving permission for publication in the *Municipal Lawyer*. We will assume your submission is for the exclusive use of the *Municipal Lawyer* unless you advise to the contrary in your letter. If an article has been printed elsewhere, please ensure that the *Municipal Lawyer* has the appropriate permission to reprint the article.

For ease of publication, articles should be e-mailed or sent on a CD in electronic format, preferably Microsoft Word (pdfs are not acceptable). A short author's biography should also be included. Please spell check and grammar check submissions.

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