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Municipal Lawyer

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Message from the Chair

I am so proud to report the success of our Section's Annual Meeting program held on January 28, 2016 at the New York Hilton Midtown. Many thanks to all of the efforts of the program co-chairs, Lisa Cobb and Les Steinman, for creating such a wide-ranging and substantive program. Paul F. Ackermann, of the law firm of Wallace & Wallace, LLP and Corporation Counsel of the City of Poughkeepsie, opened the morning session by providing an insightful analysis and summary of key cases in tax certiorari litigation, focusing upon how profit-making activities impact the tax-exempt status of non-profit entities and how environmental issues affect assessed valuation. Daniel Pozin, partner of the law firm of McCarthy Fingar LLP, offered sage and pragmatic advice regarding the use of *in rem* tax foreclosures as a means of recapturing lost municipal revenues. Adam L. Wekstein of the law firm of Hocherman, Tortorella & Wekstein, LLP, and Jennifer L. Van Tuyl, of the law firm of Cuddy & Feder LLP, concluded the morning's program with a well-received and comprehensive overview of significant developments in land use and municipal law.

The afternoon session opened with an interesting and lively presentation by Sharon N. Berlin and Richard K. Zuckerman, partners of the law firm of Lamb & Barnosky, LLP, covering such topics as electronic surveillance in the workplace and related best practices. Former NYSBA President A. Thomas Levin,

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partner, and Deanne M. Braveman, associate, of the law firm of Meyer, Suozzi, English & Klein P.C., and Martin L. Levine, director of Lobbying & Financial Disclosure Compliance and Senior Counsel to the New York State Joint Commission on Public Ethics (JCOPE), closed the program with an eye-opening and riveting account of the many provisions and nuances of New York's Lobbying Law and ethical issues at the state and local government levels, engendering much discussion and questions from attendees.

During the business portion of the Annual Meeting program, the following individuals were reappointed as members of our Section's Executive Committee for two-year terms commencing June 1, 2016: Lisa Cobb, Michael Kenneally, Steven Leventhal, Natasha Phillip and Daniel Spitzer. Jeannette Koster, former Corporation Counsel of the Town of Yorktown, and Spencer Fisher, Senior Counsel for the New York City Law Department and a former Committee on Attorneys in Public Service (CAPS) Executive Committee member, were appointed to fill vacancies on the Section's Executive Committee for two-year terms commencing June 1, 2016. Congratulations to our two new members and reappointed members of the Executive Committee.

Please save the date and join us for the Section's Fall Meeting to held on October 21-22 at the Embassy Suites in beautiful downtown Saratoga Springs. Bernis Nelson, Natasha Phillip and new Executive Committee member Spencer Fisher are serving as co-chairs and are already in the process of developing a dynamic program agenda. If any member would like to propose any topic of interest for future programs, please let me know. Your suggestions are always welcome.

I am very excited to declare at the time of writing this column that our Section has gained 134 new members since October 1, 2015! A special thanks to NYSBA President David Miranda and staff members Pat Wood and Beth Gould for all of their time and ideas in promoting the great benefits our Section has to offer all attorneys involved in the practice of government law. An article about our Section, which I was invited by the *New York Law Journal* to submit, entitled "Section Embarks on a New Venture," was also featured in the *Law Journal*'s January 25, 2016 edition highlighting the NYSBA's Annual Meeting. Please continue to spread the word to other members of the NYSBA to join us so that they will not miss out on all the adventures in store for our newly heightened Section. I am also thrilled to announce plans to re-institute the blog originally designed by CAPS and to have the former CAPS member Jackie Gross, Esq. lend her unique talents for the blog and urge members of our Section to participate when the blog is up and running. I also encourage all members of the Section to check out and contribute to the Online Community, a very useful tool for networking and for gaining knowledge about the law and for breaking news items in the field of municipal law.

Government Ethics Quiz

Sponsored by the Section's Ethics and Professionalism Committee

Q *Hypothetical*: Three members of the Village Planning Board sign a petition in support of a developer's project and application for rezoning. In addition, the Planning Board's chairperson writes a letter to the Mayor in support of the project and application for rezoning, stating that she would really like to see new housing available to her should she decide to sell her home and move into something that would not require maintenance. Would (should) a court annul the Planning Board's site plan approval?

Answer and analysis on page 15

The NYSBA is proposing that our Section consider the possibility of developing a model Pro-Bono Policy for local government lawyers. Many thorny issues regarding such a policy are presented given the restrictions placed on local governmental entities by the New York State Constitution, ethics codes, and other state law provisions on the use of public property for private uses, coupled with the scarce resources allocated to municipal counsel offices and the heavy workloads of the attorneys in those government offices. Michael Kenneally, Mark Davies, Jeannette Koster and I have been involved in some of the preliminary discussions held on this matter with NYSBA officials and members. More volunteers from the Section, particularly those working as local government attorneys, are invited to join us in dealing with this important matter. Please let me know if you are interested and would like to participate in the endeavor of crafting such a policy.

Have a great Spring and Summer and see you at the Fall meeting in October!

Carol L. Van Scoyoc

Letter from the Editors

It is spring time as we write this. In that spirit, we are doing our best to let as many flowers as possible bloom in this issue. The articles run the gamut in terms of both form and substance—offering, we believe, something of interest for everyone.

First, and indeed foremost, **Stephen Leventhal** provides us with an interview of former Section Chair Mark Davies, who has retired after 22 years as Executive Director of the New York City Conflicts of Interest Board. Mark was instrumental in developing a coherent set of principles for local government officials to use in drafting codes of ethics, implementing ethics programs, and in providing ethics guidance and education to municipal officers and employees. Mark's prolific bibliography and frequent lectures have earned him an international reputation as an insightful, pragmatic and generous expert. Never one to sit idle, Mark has grand plans for the next chapter of his life. Wondering what? Check out the interview.

Next up, **Phil Weitzman's** article fills a gap in the ethics literature by focusing on ethics training. Citing Mark Davies, Weitzman begins his piece by noting that "ethics laws are primarily concerned with providing guidance to well-intentioned public servants with legitimate outside interests, rather than catching crooks." Given this context, he stresses the importance of incorporating dialogue into ethics training and gives practical tips on how to do so.

Addressing what is surely a sticky wicket for many municipal attorneys, **Charles Malcomb** analyzes the law and provides best practices for how to gather evidence of local code violations without running afoul of the Fourth Amendment. As Malcomb notes, building and zoning code violations are offenses subject to criminal prosecution in local justice courts. However, where a violation is not easily observable from the public thoroughfare, compiling sufficient evidence to mount a successful prosecution may require an inspection of the alleged violator's property. Recognizing that such inspections are searches under the Fourth Amendment that require the property owner's consent or a warrant, Malcomb's article explains how the law treats searches to investigate alleged code violations, the administrative warrant requirement, and how such warrants are properly obtained.

In a timely article, **Laura Wong-Pan** discusses two recent decisions of the New York State Public Employment Relations Board (PERB) that affect public employers' decisions to replace and discipline public employees. In these decisions, PERB was asked to determine the merits of improper practice charges filed by public employees and their unions against public employers.

In another timely article, **Daniel Lehmann** alerts readers to a potentially significant change in the law of regulatory takings. As he notes, the Supreme Court recently granted certiorari in *Murr v. State of Wisconsin*, a case that turns on whether the property owners were deprived of their ability to use part of a large parcel or at least one of two separate parcels. Lehmann's article examines the *Murr* case in the context of the Supreme Court's rulings in *Penn Central Transportation Company v. City of New York* and its progeny, asking whether the Court in *Murr* will change the law on, or provide clarity with respect to, the "parcel as a whole" concept.

This issue's Land Use Law Update by **Sarah Adams-Schoen** asks whether the tide (pun intended) is turning toward municipal liability for failure to adapt to climate-change related risks like sea level rise and more frequent and intense coastal storms. She concludes that the answer is "not yet," but cautions that the current state of the law creates uncertainty about whether municipalities have a duty to mitigate foreseeable climate-related hazards.

Frequent *Municipal Lawyer* contributor **Karen Richards** has teamed up with **Brian Jacobson** to examine, of all things, death, reminding us that it is "unlike aught else in its certainty and its incidents." Richards and Jacobson discuss the recent New York Court of Appeals case *Shipley v. City of New York*, which addressed the issue of whether a medical examiner is required to notify a decedent's next of kin that, although a decedent's body is available for burial, organs or tissues have been retained for further examination and testing as part of an authorized autopsy.

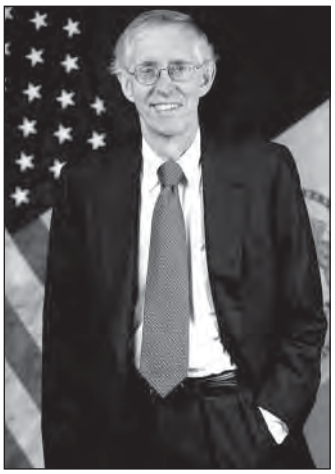
We conclude this issue with a reprint of the recent **NYSBA Committee on the NYS Constitution Report on Home Rule**. In this report, the committee analyzes constitutional home rule—that is, the authority of local governments to exercise self-government. The report provides an overview of constitutional home rule and the legal doctrines and laws that restrict home rule, concluding that, while the New York State Constitution and statutes demonstrate a clear intent to protect local autonomy, the balance between state and local powers has tipped away from local autonomy. The report recommends that, if a preparatory constitutional commission is established, home rule should be a topic of significant attention for the commission.

Sarah Adams-Schoen and Rodger Citron

Professor Mark Davies Reflects on a Career in Government Ethics

By Steven G. Leventhal

Professor Mark Davies, preeminent scholar in the field of local government ethics, has retired after 22 years as Executive Director of the New York City Conflicts of Interest Board. From that platform, and in his previous service as Executive Director of the New York State Temporary Commission on Local Government Ethics, Mark was instrumental in developing a coherent set of principles for use by local government officials in drafting codes of ethics, implementing ethics programs, and in providing ethics guidance and education to municipal officers and employees. Mark's prolific bibliography of books and articles, and his frequent lectures to bar groups, municipal associations and local governments, have earned him an international reputation as an insightful, pragmatic and generous expert.



Mark Davies

I recently asked Mark to reflect on his career in government ethics. Here is what he had to say:

Q WHAT PATH LED YOU TO THE FIELD OF GOVERNMENT ETHICS?

A A rather circuitous path. Dean John Feerick of Fordham Law School, where I was a visiting professor, knew I practiced municipal law and asked me in 1987 to join the Commission on Government Integrity heading up the non-NYC municipal unit. In 1989, Henry Miller asked me to head up the Temporary State Commission on Local Government Ethics. And in 1993, the members of the NYC Conflicts of Interest Board asked me to head up that agency.

Q WHAT HAVE YOU FOUND TO BE THE MOST COMMON MISCONCEPTIONS ABOUT LOCAL GOVERNMENT ETHICS?

A That ethics laws will stop corruption or catch crooks. Their purpose is to guide honest public officials and prevent conflicts of interest violations from occurring in the first place, not to catch crooks.

Q WHY NOT HAVE A SINGLE CODE OF CONDUCT THAT APPLIES TO BOTH BUSINESS AND GOVERNMENT?

A Government ethics laws seek to promote both the reality and perception of integrity in government by preventing unethical conduct (conflicts of interest violations) from occurring. But for-profit entities seek to maximize the profit of the shareholders or other owners; conflicts of interest are relevant only to the extent they detract from profits. The purposes are different, and therefore the codes must be different.

Q ARE THERE COMMON TRAPS FOR THE HONEST BUT UNWARY GOVERNMENT OFFICIAL?

A Certainly at the municipal level in NYS, section 801 of the General Municipal Law (GML) presents a substantial trap even for wary officials because it makes little sense, especially in rural municipalities, and is extremely complex. Who would think that bringing an Article 78 proceeding against your municipality to seek to overturn the ZBA's denial of a zoning variance would constitute a prohibited contract with the municipality? That's crazy—but true. And the gifts provision provides no guidance at all. And the prohibited conduct provision (GML § 805-a) is so full of holes that it sets up unwary officials to be pilloried in the press for doing something that is not prohibited by Article 18 of the GML at all.

Q OVER THE COURSE OF 30 YEARS, WHAT CHANGES HAVE YOU SEEN IN THE FIELD OF GOVERNMENT ETHICS?

A In NYS, virtually none, except increasingly onerous and nonsensical annual disclosure provisions that blow a lot of smoke but offer virtually no improvement in the ethics scheme.

Q WHAT HAVE BEEN THE GREATEST OBSTACLES TO ACHIEVING MORE EFFECTIVE ETHICS PROGRAMS ON THE LOCAL GOVERNMENT LEVEL?

A The NYS Legislature.

Q WHAT CHANGES WOULD YOU LIKE TO SEE?

A A complete revision of Article 18, as proposed for over two decades by the former Temporary State Commission on Local Government Ethics and the State Bar and its Local and State Government Law Section.

Q WHY IS ETHICS REFORM SO DIFFICULT?

A For at least two reasons. First, these laws regulate the very officials who must enact them; and who wishes to clip his or her own wings? Second, and more significantly, neither the regulated nor the regulators nor journalists nor civic groups nor the public understand the purpose, principles, and structure of an effective government ethics law; and absent that understanding, they just stumble around in the dark, blowing smoke, erecting mirrors, and passing bad laws.

Q WHAT ROLE HAS POLITICS PLAYED?

A Government ethics reform is not a Democrat-Republican thing. It is an insider-outsider thing. Outsiders are all in favor of it. Insiders far less so. Also, revising a bad law is much harder than enacting a new law because of the political pressure brought to bear on officials to add ever more requirements and never repeal any that exist, even when they make no sense. For example, the COIB (Conflicts of Interest Board) obtained an amendment to state law permitting NYC to revise its financial disclosure law to target it to the City's ethics law, thereby revealing potential conflicts of interest. That change would have meant adding a couple additional provisions and deleting a number of provisions that made no sense, gummed up the regulatory works, and created unnecessary problems for filers. A win-win solution. But the Mayor's Office and City Council caved in to political pressure from NYS Common Cause and refused to move forward with the amendments, resulting in NYC continuing to be afflicted with the atrocious financial disclosure law that's been in place for 25 years. Civic groups can be a major stumbling block to serious ethics reform.

Q SHOULD GOVERNMENT ETHICS BE REGULATED AT THE STATE OR LOCAL LEVEL?

A Both. A minimum statewide ethics law should apply to every municipal official in the state. That law should also authorize any municipality to create its own ethics board, provided that the board is given full interpretative and enforcement authority—or to contract out its ethics board or establish joint ethics boards with other municipalities. A NYS Local Government Ethics Commission would act as the ethics board for any municipality without a local ethics board, would accept referrals from local ethics boards, and would act as a resource for local ethics boards and municipalities. Any municipality with a local ethics board could also enact a local ethics code supplementing the NYS law.

Q IN YOUR INTERNATIONAL WORK, HAVE YOU FOUND GOVERNMENT ETHICS TO HAVE AN OVERALL ECONOMIC IMPACT?

A Studies conducted by the World Bank Institute and other intergovernmental organizations have demonstrated that corruption has a major impact on the economic health of nations. Money going to crooked officials is money that is not going to alleviate poverty and support the economy. Ethics laws, in contrast to anti-corruption laws, have a lesser impact, but a significant impact nonetheless. When an official takes an improper gift from a bidder and then, understandably, favors that bidder over another, better company, the public suffers economically. And, of course, the poor suffer most because they have the fewest resources to start with and the least political clout.

Q RECENT CHARGES OF PUBLIC CORRUPTION HAVE BEEN WIDELY REPORTED. IN GENERAL, HAVE YOU WITNESSED A DETERIORATION OF ETHICS IN GOVERNMENT?

A In New York City, no. In New York State, yes. As I wrote in an article in the NYSBA *Government, Law and Policy Journal*, the structure of the state ethics law for state officials, particularly for state legislative officials, is a joke. JCOPE was deliberately designed to fail. And it has. That is not the cause of the endless indictments in Albany, but the two do go hand in hand. Every indictment is just another nail in the coffin of government ethics.

Q HAVE YOU OBSERVED A DETERIORATION OF PUBLIC CONFIDENCE IN GOVERNMENT?

A In New York City, no. In Albany? I assume that question is rhetorical.

Q IS THERE CAUSE FOR HOPE?

A In Albany? Very little, if any, barring either the decapitation of state government with the indictment of the legislative leaders and the governor or a democratically selected state constitutional convention. The former is certainly more likely than the latter.

Q HOW HAS YOUR PERSONAL FAITH INFORMED YOUR WORK IN THE FIELD OF ETHICS?

A My former minister once told me I was blessed that my job is my mission. And it is true. I used to say that ethics laws are no different than an agency's rule against eating in the conference room. Then a few years ago, when I was invited to speak at the U.S. Office of Government Ethics annual conference, I heard a

speech by the OGE Director in which he said that the job of government ethics officers is to speak truth to power. And it struck me: speaking truth to power is the very definition of a prophet. Now, we're not exactly Nathan speaking truth to King David's power after he sent Uriah to his death in order to cover up getting Bathsheba pregnant (2 Samuel 11-12). But the job of every member and every staff member of an ethics board requires that every day they speak truth to the power of government. So, yes, my faith has informed my work as a government ethics officer.

Q WHAT ADVICE WOULD YOU GIVE TO NEWLY ADMITTED LAWYERS?

A At the end of each exam for my New York Practice class at Fordham, I write: "Do Good and Have Fun." To me that is what the practice of law is all about—doing good and having fun. Otherwise, there's little point. And the ABA surveys on attorney satisfaction overwhelmingly demonstrate that the attorneys who are most satisfied with their careers work for government.

Q HOW HAVE YOU BENEFITED FROM ACTIVE PARTICIPATION IN THE BAR ASSOCIATION?

A Since I work for government, my three decades of participation in the State Bar has never put a dime in my pocket. But it has introduced me to an incredible bunch of dedicated professionals, has improved my legal skills and expanded my legal horizons, has enabled me to get the government ethics message out there in a way that would otherwise have been impossible, and has offered me an unparalleled opportunity to give back. Also, it's been a lot of fun.

Q HOW CAN BAR ASSOCATIONS ENCOURAGE PARTICIPATION BY GOVERNMENT LAWYERS?

A If you build it, they will come. The only way of encouraging their participation is to make it worthwhile. Their pathways to the profession differ from those of private/non-profit sector attorneys. And somehow we need to focus on that. For one thing, we need to create a real community, a real network, of government attorneys, to provide expert advice on the staggering array of issues that arise in government practice—and mentor those junior government attorneys.

Q WHAT ARE YOUR PLANS FOR THE FUTURE?

A Funny that you asked about faith earlier. I hope to change careers, at age 67, and become a local pastor, including going to seminary next fall. I'm slowly (very slowly) writing an e-book on theology, aimed at the under-40 crowd, most of whom are fleeing traditional faith communities, for good reasons. We'll see if I've got the guts to go through with all this.

With gratitude for Mark's outstanding public service and his leadership in the Association, we wish Mark and his family all the best.

Enhancing Training Through Dialogue

By Phil Weitzman

"This rule is unfair!"
"Your agency doesn't do anything!"

Ah, the heckler—anyone who speaks in public regularly has encountered a few. As a full-time ethics law trainer for the New York City Conflicts of Interest Board, I must respond to comments like these from my training audiences nearly every day. While such seemingly disruptive statements can pose challenges, I've found that they pose even greater opportunities for my audience to learn from me, and for me to learn from them. Embracing dialogue with an audience is the single most powerful technique for the topic of this essay: providing quality ethics training.

In many ethics jurisdictions, training can be an afterthought. Most ethics agencies, dealing with limited resources, must balance training needs with many other mandates, and few ethics agencies can afford to prioritize hiring full-time trainers. As a result, the special characteristics of ethics training receive relatively little attention. Yet, as a trainer for the New York City Conflicts of Interest Board, I've observed firsthand that the *way* ethics rules are communicated can profoundly impact the audience's understanding of and support for a regime of ethics laws. If we fail to consider our approach to training, we will lose crucial opportunities to truly embed the values of an ethics law within the public servants under our agency's jurisdiction.

As the ethics agency for the largest municipal workforce in the U.S., the NYC Conflicts of Interest Board has the relative luxury of maintaining a distinct Training Unit with a staff of four full-time professional trainers, including myself, who are tasked with conducting training for City employees of every rank and at every agency. Our experience indicates that many of the most useful techniques for ethics training leverage the unique *intermediary* role of the trainer in order to create *dialogue*. With the right approach, comments like those at the top of this page can provide a springboard for a truly engaging, informative training session.

What do I mean by an *intermediary* role? When we conduct a training, we have a specific mandate, distinct from the agency's other functions: to prevent violations by providing training *before* someone breaks the rules. Where advice and enforcement functions involve *imposing* the agency's policies directly, a trainer *explains* the agency's policies to the audience. This separate role gives us freedom to impart a wider variety of perspectives during a training than if we were explaining the agency's enforcement process to a complaint respondent, or providing binding legal advice regarding a public servant's actual proposed activities. As trainers, we can become intermediaries by taking one step outside the circle of formal authority, to meet the audience halfway by drawing on the whole variety of perspectives they, and each of us, bring to bear in seeking to understand government ethics laws: employee, regulator, voter, taxpayer, recipient of government services, and so on.

Training-as-dialogue is particularly appropriate in educating public servants in ethics law, as opposed to criminal law. As Mark Davies, former Executive Director of the New York City Conflicts of Interest Board, has observed, ethics laws are primarily concerned with providing guidance to well-intentioned public servants with legitimate outside interests, rather than catching crooks. Where no one could reasonably debate the purpose or legitimacy of laws prohibiting bribery, embezzlement, or other egregious behavior, ethics laws intervene in morally contended areas where reasonable people often disagree.

Generally, complaints like those of our "hecklers" arise from a particular perspective. By acknowledging the commenter's concerns, while sharing different perspectives and new information, we can deepen the learning experience. Further, when we engage in a robust dialogue with our training audience, we can *demonstrate*, through our own open-mindedness, flexibility, and consideration, our fundamental message: that our agency interprets the ethics law wisely, judiciously, and fairly, balancing deeply held principles and practical concerns. Even better, by creating a comfortable atmosphere for dialogue *we* may learn important information from our training audiences.

What exactly does dialogue-based training mean in practice? The list below presents some principles and tactics for incorporating dialogue into an ethics training.

1. Set the Tone

Setting a friendly, open tone is key to creating an atmosphere conducive to dialogue in the training room. While public-speaking techniques such as project-

ing one's voice and incorporating humor are part of creating a friendly tone, the key ingredient lies not in specific techniques but in attitude: approaching training audiences from the default perspective of a fellow municipal employee, rather than that of an authority figure or regulator.

In my trainings, I try to avoid the scolding, "scared-straight" approach of emphasizing the grievous consequences of breaking the rules. Instead, I emphasize that I am conducting training because the Board wants to help well-intentioned public servants navigate the city's conflicts of interest system. While I do describe the agency's enforcement process in some detail, I emphasize that conflicts of interest questions come up for almost everyone, that the purpose of the training is to *prevent* accidental violations by teaching people when to contact my agency's Legal Advice unit, and that, even during the enforcement process, our Board has a sense of fairness and perspective, which includes, where appropriate, issuing warning letters rather than more severe penalties. My tone is based on the presumption that the vast majority of public servants are honest people with legitimate outside interests, rather than bad apples.

There are many ways to embed this approach within a training presentation. One of the best is simply to adjust pronouns: for example, an audience feels less threatened while being told what could happen to "someone" if "they" break the rules, than while being told what could happen to "you," even though the actual information is exactly the same. But again, the mindset of approaching an audience as peer coworkers is more important than any particular choice of words or other technique.

2. Acknowledge the Audience's Perspective

Once we create a tone of openness, our participants will begin to share their perspectives and questions. Quite often, this will be to agree with us, but the most challenging part of hearing from the audience is when they express criticism or disagreement.

As challenging as criticism may be, it provides a great springboard for discussion. Audience comments allow us to identify "sticking points"—issues an audience member becomes "stuck on" that prevent him or her from trusting or understanding the training content. The most important sticking points come when audience members begin to grapple with the mission and structure of an ethics law, and attempt to reconcile new information presented in the training with their own beliefs and knowledge.

But before we begin addressing sticking points with an audience, we must recognize a necessary first step: *acknowledging* the commenter's perspective. Again, the trainer's special *intermediary* role allows for greater flexibility in this regard. Note that *acknowledging* does not have to mean *agreeing*; rather, it means recognizing that the audience member is bringing a legitimate perspective to the table. Phrases such as, "That's an interesting point. I often hear this concern from my training audience," "I see what you're saying," or "Great question—in fact the Board has considered that question and looked at this issue in [advisory opinion X]" can be very helpful in recognizing a perspective without expressing agreement. Even simply repeating the commenter's question back in one's own words before answering can do the trick. If we do not acknowledge the commenter's perspective, they are much more likely to become defensive when we attempt to foster dialogue around their comment. (Similarly, just as we need not agree with a comment in order to acknowledge it, we need not overtly disagree either when presenting contrary perspectives; instead, we can frame our responses as neutral presentations of a different perspective, with which an audience member should feel free to disagree.)

Second, when engaging in dialogue with an audience member, it is crucial to make every effort to address what the commenter is *actually trying to say*. Not every audience member is articulate in expressing his or her concerns, and, even assuming a perfectly articulated question, all of us are occasionally guilty of hearing only what we *expected to hear*. Being sensitive to the possible different meanings of a question, and clarifying with audience members before answering, is therefore important. For instance, an audience member who describes a particular scenario and then asks whether it is "legal" could be describing a completely hypothetical situation, something she read about in the newspaper, or something she believes is happening in her own workplace. Each possibility implies a certain style of answer—for example, if the audience member is describing a *specific situation,* the trainer should probably start by offering a disclaimer that whatever is said during a training does not constitute a definitive ruling on the legality of any real-life scenario. Miscommunications are an inevitable part of any training, but asking clarifying questions and being ready to change course when necessary helps ensure that audience members don't become increasingly frustrated at a long reply based on a misunderstanding of their question.

3. Share Alternatives

Now, with these provisos out of the way, let's look at a few examples of sticking points, calling back to our examples of heckles from the beginning of this article.

Statement A: "This rule is unfair!"

Given that conflicts-of-interest rules intervene in morally gray areas, audience members will often become upset at ethics rules that prohibit behaviors

they see as innocuous. In my trainings, for instance, I've been surprised to hear from supervisors offended that they cannot hire their highly qualified family members, and from subordinates who are actually chagrined that they cannot pick up their well-liked boss' dry cleaning as a personal favor. These audience members are not being cynical; instead, it is precisely their own integrity (only wanting to hire a qualified family member, only wanting to do favors for the boss as a gesture of genuine friendship) that makes it difficult for them to imagine how permitting these behaviors *for all City employees* would open the door to abuse.

In cases like these, I have been able to address audience members' concerns by broadening their perspective: asking them to imagine workplaces less functional than their own, where management might become compromised by nepotism, and subordinates might feel forced to spend their free time doing personal errands for their boss. I may also ask them to consider how they might feel as a taxpayer, rather than as a City employee, to see government officials hiring family members or asking subordinates to do errands for them. Finally, I might discuss different considerations in designing an ethics rule, pointing out how an easy-to-understand rule that simply prohibits a behavior has advantages over a more complicated rule that contains various exceptions but is consequently difficult to understand. Some audience members may still maintain that a particular rule is too strict, but, after discussion, they are generally able to acknowledge that these rules represent valid approaches to addressing real problems, rather than completely arbitrary restrictions of their freedom. Ultimately, comments from upset audience members thus become a great springboard for establishing key teaching concepts: that good intentions are not a valid defense when someone violates the Conflicts of Interest Law and that it is important for even well-meaning City employees to consider whether their actions could inadvertently create the *appearance* of impropriety.

Statement B: "Your agency doesn't do anything!"

This statement may seem like unproductive heckling, but it's worth unpacking. If we pause to reflect, our audiences' skepticism of our agencies' effectiveness should not be surprising. Despite the great work ethics agencies are doing at every level of government, public cynicism of government in our country is quite high. To name just one example, a 2014 Gallup poll found that a staggering 75% of respondents believed government corruption was widespread throughout the United States.[1] On an anecdotal level, the belief that moneyed interests wield outsize influence over government seems so common as to be unremarkable. To put it simply, as trainers we are representing government "ethics" agencies, and our training audiences are likely to believe, as most Americans do, that government has a serious ethics problem. A good portion of our audiences therefore will assume that our agencies, whether through impotence or complicity, are a part of that problem.

While there is no need to begrudge a training audience its cynicism, that cynicism often leads to a misconception: that our agency is not just *unable to prevent political corruption in its entirety*, but *literally failing to enforce clear violations of existing statutes*. For instance, my own agency, the NYC Conflicts of Interest Board, has in fact shown independence by pursuing enforcement cases against high-ranking officials, yet as a trainer I frequently encounter the assumption that our Board overlooks misconduct by such officials.

However, if we foster dialogue around the belief that our agency "doesn't do anything," a potentially disruptive comment again becomes a springboard for great teaching moments. Audience members with a generalized belief that government is corrupt often fail to differentiate between all the very different sets of laws, regulations, and jurisdictions that apply to ethics concerns. They also tend to assume that behavior they believe is unethical also violates the law, where this may not always be the case. Helping them recognize these distinctions not only casts our agency in a better light, but allows us to focus on the specific design of the rules we need to teach.

For instance, when asked why she thinks our agency "does nothing," an audience member might point toward a seeming violation that has gone unpunished in a different jurisdiction, which provides an opportunity, for starters, to clarify our own agency's jurisdiction. Another audience member might point towards news coverage of elected officials "accepting money from an industry they also favor" and ask how our agency could allow such a thing, which can provide an opportunity to distinguish between the rules for personal gifts and the completely separate set of regulations for campaign finance. Yet another audience member might accuse our agency of overlooking the "cronyism" of a high-ranking official who hired a team of favored staff members; such a comment could allow for a discussion of the tradeoffs involved in an anti-favoritism regulation, which must balance preventing the most blatant forms of favoritism with allowing public officials to draw on their personal connections in order to attract good candidates and opportunities to their agency.

Again, each of these audience members is likely to incorrectly assume that my agency is simply *ignoring clear violations*. Discussing all of these points serves to refocus the audience's attention on the *specific rules* and the *way the rules operate*. For instance, New York City's Conflicts of Interest Law would prohibit a City employee from hiring a member of his or her imme-

diate family or a financial associate but would not prohibit the hiring of a friend or favored colleague. Consequently, in our audience member's example from above, the high-ranking official who hires a team of favored staff members likely is not violating the ethics *law* (although other regulations may play a role in some instances, and we are of course free to draw our own conclusions about this official's personal ethics). These discussions not only correct the false assumption that our agency is overlooking violations of the law, but also keep the audience interested in the details of the rules by addressing their real concerns throughout the teaching process.

Obviously, a certain amount of tact is required in this approach. First, it is important to reframe these discussions to avoid accidentally casting aspersions on actual public servants or appearing to confirm the existence of or comment on what may well be an ongoing investigation. I will generally start a discussion with an emphatic disclaimer that I am not familiar with, or cannot comment on, the details of the case the audience member brings up, but can discuss some general trends and issues relating to that *type* of situation, using public enforcement dispositions and other public information to illustrate my points. Second, all of our skill in "acknowledging without agreeing" will be necessary to make sure the audience member feels "heard" and not attacked when we present different perspectives—this is where the *intermediary* role of the trainer comes into play, allowing us to express some sympathy with the audience's views without endorsing them. And finally, to create a real discussion, we should be open to the audience member's perspective and avoid being too quick to redirect a discussion toward the teaching point we already want to make. Not every critique from the audience is based on misconceptions, and, if we listen with an open mind, we may even find ourselves agreeing with the audience member's view! The point is not to debate and justify every detail of our agency's conduct, or convince the audience that our jurisdiction has a perfect ethics law, but to stay focused on using the discussion to highlight the specific features of the rules, expand the audience's understanding of the many different concerns our jurisdiction's ethics law must balance, and correct clear misconceptions about our agency's role in our jurisdiction's anti-corruption efforts.

4. Tailor the Presentation to Common Questions and Concerns

Eventually, after consistently encouraging dialogue with training audiences, an instructor can proactively incorporate explanations for very common questions into the training itself, without waiting to be asked. In order to address some of the sticking points mentioned above, I have found it helpful to begin my presentation by introducing the concept that our conflicts rules address the *appearance* as well as the *reality* of impropriety, even in cases where public servants may feel they are acting ethically. Similarly, I find it helpful to pre-emptively distinguish my jurisdiction's ethics law from criminal law and campaign finance law.

Just as fostering dialogue helps us tailor our presentation to address bigger picture issues with ethics laws, the approach is also very helpful for teaching the nuts-and-bolts of the rules. For example, in the New York City Conflicts of Interest Law there are completely separate legal concerns relating to gifts, depending on the identity of the giver. There is a $50 limit on gifts to City employees from *companies doing business with the City,* but there is no limit on gifts *from one City employee to another* (with the important proviso that supervisors must still avoid misusing their positions by accepting gifts over minimal value from subordinates). After noticing that audiences frequently conflate the two categories, I've learned to pre-emptively emphasize this distinction between different kinds of givers under the law.

Similarly, the New York Conflicts of Interest Law has a surprisingly broad rule about outside employment: a waiver is required for a City employee to accept any position with *any* company that does *any* City business, even if that business is far removed from the City employee's own job responsibilities. Because the rule prompts many questions, I have learned to repeat the rule several times for emphasis to give my audience a chance to process the information. In these instances, dialogue simply provides useful feedback for refining our presentation.

5. Gather Valuable Information from the Audience

It is not just the audience who benefits from dialogue in the training room. In fact, allowing for audience participation can be a valuable source of informal feedback for the agency conducting or hosting a training. For instance, I have often done pre-training consultations with hosts who insist that gifts are not an issue in their workplace, only to find myself bombarded with audience questions about gifts situations when I conduct the training. In these situations, the atmosphere of dialogue I foster in the training room elicits valuable information about workplace concerns from employees who might never have thought to raise the issues on their own, giving the host agency the opportunity to refine its policies and guidance. Through my trainings, I have helped alert agency management to numerous internal compliance issues, from confusion about the proper way to complete outside-employment disclosure forms, to concerns around holiday gifts from private consultants who work side by side in the same office with City employees, to agency-wide policies that staff are still widely unaware of because of a breakdown in communication.

Given the opportunity, training audiences will frequently provide a valuable service by alerting the trainer to areas where they are unsure how to apply the rules, common ethics issues in their workplace, and all manner of other problems that may be slipping through the cracks. This information can be used to help improve not just the training, but the agency's internal messaging and written materials, and even ethics policies themselves. But without a comfortable atmosphere where their feedback is encouraged and acknowledged, the vast majority of audience members will sit through the training in silence instead of share their valuable perspectives.

Conclusion: We Don't Know What They Don't Know

Ultimately, the theme of dialogue-based training is that we must *know* our audience in order to be effective as trainers. And we can only know them by letting them speak, and listening thoughtfully to what they say.

All too often our training strategies are focused *only* on providing complete, accurate instructions to our audiences—in other words, treating them like computers. Members of our diverse municipal workforces, however, have a wide range of idiosyncratic backgrounds, assumptions, and concerns, and rely not just on accurate explication, but also on emphasis and context, in order to process unfamiliar information. If we want training audiences to truly *retain* what they learn, simply reeling off a list of the rules is not enough.

Because we rarely understand our audience's particular concerns and perspectives at the outset, allowing for dialogue is the best, and possibly the *only,* way for us to unearth these concerns in order to target our training effectively. Fortunately, when we act as trainers, our *intermediary* role gives us the flexibility to create such a dialogue. And in facilitating a dialogue, we not only provide a superior learning experience, we *embody* our agency's principled yet dynamic stewardship of the ethics law, providing a powerful *demonstration* of our agency's core values.

I once conducted a training with an attorney colleague who confided afterwards that she felt discouraged by the very basic questions one audience member had asked. Although we had already taken care to highlight a particular distinction under the law (the distinction between coworker gifts and gifts from outside parties mentioned above), this attendee nevertheless asked a question that conflated the two categories. My colleague felt that the attendee's failure to initially grasp this distinction indicated that our training had failed. My reply was that those questions were what made the training a success. Even with the best of trainers, most audiences will have trouble retaining all of the new information they receive in a training. The audience member's question, however, meant that we had piqued his interest enough to prompt him to engage with the material and ask. And because he asked a question, we were able to provide a crucial clarification of the rules. In all likelihood, we only had the chance to do so because of an atmosphere of spirited dialogue in the training room.

And that mention of "spirited dialogue" brings me to a final secret benefit of structuring an ethics training as a dialogue: it's fun!

Endnote

1. *75% in U.S. See Widespread Government Corruption*, GALLUP (Sept. 19, 2015), available at http://www.gallup.com/poll/185759/widespread-government-corruption.aspx.

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Administrative Search Warrants in New York: How to Gather Evidence of Code Violations Without Running Afoul of the Fourth Amendment

By Charles W. Malcomb

Introduction

By statute, building and zoning code violations are offenses, subject to criminal prosecution in the local justice court.[1] Successful enforcement by way of criminal proceedings requires the local prosecutor to establish the violation beyond a reasonable doubt.[2] Meeting this burden demands a thorough investigation to gather evidentiary support for the charges. Where a violation is not easily observable from the public thoroughfare,[3] compiling sufficient evidence to mount a successful prosecution may require entry onto the alleged violator's property—or into buildings—to conduct an inspection. Such inspections are searches under the Fourth Amendment and require the property owner's consent or a warrant.[4] This article will explain how the law treats searches to investigate alleged code violations, the administrative warrant requirement, and how such warrants are properly obtained.

Inspections for Code Violations Require a Warrant

Courts have long distinguished between traditional criminal searches and property inspections to evaluate compliance with building and zoning codes, classifying the latter as mere "administrative" searches that are subject to relaxed requirements.[5] In fact, as late as 1959, the Supreme Court in *Frank v. Maryland* held that "administrative" searches—searches to ensure compliance with an administrative health or safety code—did not implicate the Fourth Amendment's protections.[6] Less than a decade later, the Court reversed itself, but it still distinguished between administrative and criminal searches.[7] "Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property."[8] Therefore, "[i]n determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement."[9] The Court affirmed that a lesser showing of probable cause is required to obtain a warrant for an administrative search.[10] The New York Court of Appeals has acknowledged this distinction, as have the various departments of the Appellate Division.[11]

Procedures for Obtaining an Administrative Search Warrant

Even though the Fourth Amendment requires a search warrant for administrative searches, New York lacks a statewide set of procedures for them. Such procedures were proposed as additions to the New York General Municipal Law, but they were never adopted.[12] Instead, state courts have fashioned their own processes and procedures following the New York Criminal Procedure Law ("CPL") standards for criminal search warrants, and some municipalities have adopted their own by local law.[13] Both of these approaches have been sanctioned by reviewing courts.[14]

In *Matter of Kun*,[15] a town attorney applied to the local criminal court for an administrative search warrant to investigate alleged violations of the zoning ordinance. The court recognized the applicability of the Fourth Amendment to the proposed search, but noted that there were no applicable state procedures for the issuance of administrative search warrants. Thus, the court fashioned a "substitute process" out of the procedures governing the criminal search warrant under Article 690 of the CPL.[16] The application for the warrant may be made by a town attorney or building inspector.[17] The search warrant may issue for the purpose of inspecting property or buildings.[18] Only "police officers" may execute the warrants, but code enforcement officials may accompany the officers to document the violations, pursuant to their particularized expertise in matters of code enforcement.[19]

An example of a municipality fashioning its own procedures for administrative search warrants is found in *Matter of City of Rochester*.[20] There, the City of Rochester adopted a local law, which amended the City Charter to establish a procedure for issuing inspection warrants where the City was unable to obtain permission from the owner. The property owners claimed that the inspection warrants issued under the local law were invalid because they did not comply with Article 690 of the CPL.[21] They further argued that the CPL preempts the law of search and seizure, thus precluding the City from authorizing administrative inspection warrants.[22]

The Fourth Department rejected those arguments and held that CPL Article 690 did not preempt local governments from enacting laws governing administrative inspection warrants, validating local efforts to fill in the gaps for such procedures.[23]

Applying for an Administrative Search Warrant

Assuming there is no local law governing the procedures to be followed for administrative search warrants, municipal officials should follow Article 690 of the CPL and the substitute process fashioned by the courts. An application may be made by a code enforcement officer, building inspector, or municipal attorney.[24] The application shall be made to the local criminal court[25] and must contain (1) the "name of the court and the name and title of the applicant"; (2) a statement that there is "reasonable cause to believe" a violation exists; (3) sworn allegations of fact supporting such statement, based upon personal knowledge of the applicant or other sworn statements supporting the application; and (4) a request that the court issue the warrant directing the inspection of the property.[26] The application should also contain a request that video and/or photographs be used to document the search and a request that a code enforcement officer/building inspector accompany the police when executing the warrant.[27] As set forth above, the standard for probable/reasonable cause is lessened for administrative searches. However, at least one court has held that where criminal charges for zoning violations are contemplated, the higher, criminal standard applies.[28] Thus, as a matter of caution, the application for the search warrant should be drafted to meet the higher standard by containing as much detail as possible demonstrating probable cause/reasonable cause that code violations are present at the property. Based on the experience of the author, the applicant should allege facts, not conclusions. Photographs should be attached if they are available. If the applicant does not have personal knowledge, the application should be accompanied by an affidavit of one who does. Forms for an administrative search warrant application are available on the New York State Department of State website, as well as in respected treatises on New York Zoning Law.[29]

Issuance and Execution of the Administrative Search Warrant

A search warrant must direct a search of "[a] designated or described place or premises," which must be described in the application.[30] The warrant "must be addressed to a police officer whose geographical area of employment embraces or is embraced or partially embraced by the county of issuance."[31] The search warrant must include the contents set forth in CPL §690.45. And it must be executed by a police officer[32] "not more than ten days after the date of issuance…on any day of the week…only between the hours of 6:00 A.M. and 9:00 P.M."[33] Code enforcement officers and/or building inspectors may accompany the police officer to document property violations.[34] The code enforcement officer/building inspector should complete an inspection report, take photographs and/or videos, and document any violations observed. The warrant and the results of the search "must…be returned to the court without unnecessary delay" after execution.[35]

Best Practices and Summary

As a first matter, the code enforcement officer/building inspector should attempt to obtain consent from the property owner before applying for a search warrant. Only upon the property owner's refusal should an application be made. In the absence of state procedures governing the issuance of administrative search warrants, a prudent step for municipalities would be to adopt a local law to set forth a clear procedure to be followed. Any such local law should generally follow the procedural safeguards set forth in Article 690 of the CPL, as adopted by the courts. Absent such a local law, an application should be made under Article 690 of the CPL. It is critical that the requirements for the warrant's application, issuance, and execution be strictly followed. Despite the relaxed probable cause standard, an applicant should proceed as if the criminal standard applies. Moreover, any application must specify that the code enforcement officer/building inspector will accompany the police officer upon the warrant's execution for the purpose of documenting alleged violations. Finally, the results of the inspection must be returned to the court that issued the warrant. Although New York law lacks clarity on this subject, following these guidelines will ensure that administrative property inspections may be carried out within constitutional bounds, thus providing communities with evidence necessary to successfully enforce their building and zoning codes.

Endnotes

1. N.Y. Town Law § 268(1); N.Y. Exec. Law § 382(2). Local governments may impose different penalties for violations pursuant to their supersession power under the New York Municipal Home Rule Law. 2005 N.Y. Op. Att'y Gen. (Inf.) 1083, WL 2054436 (2005). The severity of the penalties determines the level of procedural protections that must be afforded to the accused (e.g., assigned counsel and a jury trial). See N.Y. Penal Law § 55.10(2)(c) (specified offenses with a potential sentence in excess of fifteen days, but less than one year, are misdemeanors); N.Y. Penal Law § 55.10(3)(a) (offenses with a sentence of fifteen days or less are violations); N.Y. Crim. Proc. Law § 340.40(2) (providing that a jury trial is required in a local criminal court where the information charges a misdemeanor, except as specified therein); N.Y. Crim. Proc. Law § 340.40(1) (For a violation, "trial of an information in a

local criminal court must be a single judge trial."); N.Y. CRIM. PROC. LAW § 170.10 (a defendant has the right to have counsel assigned by the court if he/she is financially unable to obtain one, except where the accusatory instrument charges traffic infractions only).

2. *See People v. St. Agatha Home for Children*, 47 N.Y.2d 46, 48 (1979) ("Having elected to litigate this novel question of zoning law in the context of a criminal proceeding, the People must of course meet all burdens placed upon the People in a criminal proceeding, including the burden of proving all elements of the offense beyond a reasonable doubt.").

3. *California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.").

4. *People v. Sikorsky*, 195 Misc. 2d 534, 536-37 (App. Term 2d 2002) ("It is well settled that administrative searches fall within the purview of the Fourth Amendment. When no exigent circumstances exist, a code inspector may only enter onto, and make a visual search of, private property upon first obtaining consent or warrant pursuant to CPL article 690.") (internal citations omitted); *Wisoff v. City of Schenectady*, 116 A.D.3d 1187, 1188 (3d Dep't 2014) ("It is well established that the 4th Amendment protection against unreasonable searches and seizures extends to administrative inspections of private commercial premises.") (internal quotation, citation omitted).

5. *In re Lacatena*, 173 A.D.2d 952, 953 (3d Dep't 1991) ("We note here that the strict standards attending the issuance of a warrant in criminal cases are not applicable to the issuance of a warrant authorizing an administrative inspection.") (internal citations omitted); *R&L Distributors, Inc. v. Wickham*, 36 A.D.2d 884, 885 (3d Dep't 1971).

6. *Frank v. Maryland*, 359 U.S. 360 (1959).

7. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534 (1967) ("[W]e hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual.").

8. *Id.* at 535.

9. *Id.*

10. *Id.* at 538.

11. *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 348 (1981) ("In addition, and of compelling significance, the Camara opinion expressly provided that the strict standards attending the issuance of a warrant in criminal cases are not applicable to the issuance of a warrant authorizing an administrative inspection."); *see also Cohn Chemung Props., Inc. v. Town of Southport*, 108 A.D.3d 928, 930 (3d Dep't 2013) ("[The] Supreme Court did not err in determining that a separate hearing was not necessary regarding the issuing and executing of the administrative inspection warrant, which is not held to as strict a standard as a warrant in a criminal case.").

12. New York (State) Assembly. An act to amend the general municipal law, in relation to procedures for the issuance of administrative search warrants to municipal officials. A 1859 (S 2396). 2001-2002 Reg. Sess. (January 16, 2001), New York State Assembly.

13. *See, e.g.*, TOWN CODE OF THE TOWN OF HUNTINGTON, NEW YORK, Chapter 71, Administrative Search Warrants (2002), available at http://ecode360.com/7221386.

14. *Matter of Inspection of Property under the Control of John Kun*, 190 Misc. 2d 470 (N.Y. County Ct. 2002); *Matter of City of Rochester*, 90 A.D.3d 1480 (4th Dep't 2011).

15. *Matter of Kun*, 190 Misc. 2d at 471-72.

16. The power of the court to fashion procedures that are not set forth by law arises pursuant to Section 2-b(3) of the New York Judiciary Law, which provides that a "court of record" may "devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." While local justice courts are not "court[s] of record" pursuant to Section 2 of the Judiciary Law, Section 212 of the Uniform Justice Court Act provides that "in the exercise of its jurisdiction the [justice] court shall have all the powers that the supreme court would have in like actions and proceedings." This has been interpreted not to expand the jurisdiction of the justice court, but to convey "the incidental powers of the Supreme Court." 1987 N.Y. Op. Att'y Gen. (Inf.) 92 (1987), 1987 WL 273417 (citing Siegel, McKinney's Practice Commentaries, UCJA § 212, 1987 Supp.). Thus, the justice courts have the power to devise and make new process and forms of proceedings necessary to effectuate the application for and issuance of administrative search warrants.

17. N.Y. CRIM. PROC. LAW § 690.05(1) (providing that an application for a warrant may be made by a "public servant acting in the course of his official duties").

18. *People v. Katz*, 112 Misc. 2d 59 (N.Y. App. Term 2d Dep't 1980).

19. *Matter of Kun*, 190 Misc. 2d at 473 (citing 1985 N.Y. Op. Att'y Gen. (Inf.) 71, 1985 WL193981.

20. *Matter of City of Rochester*, 90 A.D.3d 1480 (4th Dep't 2011).

21. *Id.* at 1481-82.

22. *Id.* at 1482.

23. *Id.*

24. N.Y. CRIM. PROC. LAW § 690.05(1).

25. N.Y. CRIM. PROC. LAW § 690.35(2).

26. N.Y. CRIM. PROC. LAW § 690.35(3).

27. *In re City of Rochester*, 4 Misc. 3d 310, 316-318 (N.Y. City Ct. 2003) ("[T]he requested warrant also fails to set forth any information as to how intangible evidence will be collected; for example, whether photographs will be taken, whether videos will be taken, or whether the evidence will be based solely upon the inspectors' visual inspection and note taking. An administrative search warrant that does not provide for the seizure of tangible items should nonetheless provide sufficient information describing how the intangible evidence obtained in the course of the inspection is to be collected. The requested warrant in this matter does not adequately do so."); *see Kun*, 190 Misc. 2d at 473 ("[T]he warrant shall issue to any police officer having jurisdiction…who may be accompanied during its execution by any of the officers and employees requested to be designated.") (emphasis added).

28. *Town of East Hampton v. Omabuild USA No. 1, Inc.*, 215 A.D.2d 746, 747 (2d Dep't 1995) ("The Town contends that its conduct in this case was more akin to a mere administrative inspection than a true criminal search, and that it should accordingly be judged pursuant to the more relaxed standards applicable to such inspections. We disagree. It is clear that the search was criminal in nature, inasmuch as the application for the warrant was made pursuant to CPL article 690, the Town has repeatedly stated that the purpose of the search was to investigate alleged criminal conduct, and the evidence recovered has twice been

used as the basis for criminal charges.") (internal citation omitted).

29. Zoning Enforcement, James A. Coon Local Government Technical Series (2012), available at http://www.dos.ny.gov/lg/publications/zoning_enforcement.pdf; Patricia E. SALKIN, 4 N.Y. ZONING LAW & PRAC. § 42:5.
30. N.Y. CRIM. PROC. LAW § 690.15(1)(a).
31. N.Y. CRIM. PROC. LAW § 690.25(1).
32. N.Y. CRIM. PROC. LAW § 690.25(2); *Matter of Kun*, 190 Misc. 2d at 473.
33. N.Y. CRIM. PROC. LAW § 690.30.
34. *Matter of Kun* at 473.
35. N.Y. CRIM. PROC. LAW § 690.30(1); § 690.50(6).

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Answer to Government Ethics Quiz

A Yes. The court is likely to annul the Planning Board's site plan approval.

Analysis: The Planning Board's vote to approve the developer's site plan did not violate Article 18 of the New York General Municipal Law. The vote did not violate § 801 because there was no contract with the Village. Nor did the vote violate § 809 because the Planning Board members did not have an interest in the applicant as defined in that section. Furthermore, nothing in § 805-a would prohibit the vote. Nonetheless, the court will likely annul the vote based on common law principles. In *Schweichler v. Vill. of Caledonia*, 845 N.Y.S.2d 901 (4th Dep't 2007), the court held that the appearance of bias arising from the signatures of the three Planning Board members on the petition in support of the project and application, and the actual bias of the Chairperson manifested by her letter to the Mayor expressing a personal interest in the project, justified annulment of the Planning Board's site plan approval.

New York State Public Employment Relations Board Roundup

By Laura Wong-Pan

Recently, the New York State Public Employment Relations Board (PERB) handed down two decisions that affect public employers' decisions to (1) replace and (2) discipline certain public employees. Created pursuant to New York's Taylor Law,[1] PERB was established by the legislature *inter alia* to adopt procedures "for the prevention of improper employer and employee organization practices."[2] In these decisions, PERB was asked to determine the merits of improper practice charges filed by public employees and their unions against public employers. First we will discuss *Matter of State of New York (Division of State Police)* where security personnel were replaced with state police. Next we will discuss picketing protection afforded public school teachers when that picketing interferes with traffic and PERB's deferral policy.

I. Replacing Security Personnel With Police Under The Taylor Law

The concern for safety of employees and others while on public property is leading municipalities to replace security staff with armed and trained police officers, ensuring adequate protection at the entrance and exits of heavily trafficked municipal buildings.

This article will discuss the New York State Public Employment Relations Board's (PERB) recent decision in *Matter of State of New York (Division of State Police)*,[3] when the State enhanced the requirements for employees at security checkpoints at Empire State Plaza, and reassigned security functions to uniformed police officers. In its decision, PERB addressed the scope of a public employer's duty to negotiate with the union representing security officers, before subcontracting aspects of its security assignments to police officers.

Procedural History

The matter was brought to PERB's attention when the New York State Correctional Officers and Police Benevolent Association, Inc. ("NYSCOPBA") filed an improper practice charge, alleging that the State of New York failed to negotiate in good faith before unilaterally replacing employees in its bargaining unit with police officers, in violation of Section 209-a.1(d) of the Public Employees Fair Employment Act ("the Act").[4]

Background Facts

After September 11, 2001, New York State troopers and corrections officers had been assigned to several security checkpoints at Empire State Plaza in Albany, near the Capitol building.[5] The State installed security equipment at these check points, including x-ray machines that showed the contents of bags and boxes, hand-held wands to detect metals, and a magnetometer.[6]

Beginning in 2004, the State created a security unit, lower paid than corrections officers and troopers, and staffed the checkpoints with a combination of Security Screening Technicians ("SSTs"), represented by NYSCOPBA, and State troopers.[7] Both SSTs and troopers were trained to use the x-rays and magnetometers. At some checkpoints, troopers operated the hand-held wands and magnetometers, while at other checkpoints the SSTs operated the equipment and called for assistance from a trooper when weapons were located and when the exercise of general police powers, which included arrests, was necessary.[8]

Beginning in September 2007 until the end of 2010, the State reduced the number of troopers regularly present at these checkpoints. However, troopers continued to operate the equipment and machines with the SSTs during major events, such as the Governor's budget presentation, when the New York State Legislature was in session, and during other high-volume periods.[9]

Towards the end of 2010, the State again stepped up security at Empire State Plaza, while also ordering mass layoffs across many different agencies. More troopers were stationed at the checkpoints, and with increased frequency. The State laid off more than 60% of the SSTs, reducing their numbers from 72 to 28 over a six-month period. Troopers were reassigned to handle the x-ray machines, moving the remaining SSTs to other tasks involved in screening visitors.[10]

Discussion

PERB has long held in cases alleging that a public employer failed to negotiate in good faith that "the initial essential questions are whether the work has been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those previously performed by unit employees."[11] If the an-

swer is "yes" to both of these questions, negotiation is required unless the qualifications for the position have significantly changed, and the interests of the public employer outweigh the interests of unit employees.[12]

Following a trial at which evidence was presented regarding the specific duties of the SSTs over a lengthy time period, the Administrative Law Judge ("ALJ") determined that the work specifically related to the screening of visitors to Empire State Plaza through the use of electronic monitoring equipment had been exclusively performed by the SSTs for a sufficient period of time as to constitute a binding past practice.[13] The ALJ also determined that the new job duties reassigned or subcontracted to non-unit State troopers were substantially similar to the duties performed by SSTs when screening visitors.[14]

The ALJ concluded that she was unable to consider whether there had been a significant change to the job qualifications because the State did not raise this argument, even though the defense, if proven, would have exempted the State from negotiating with NYSCOPBA if the State's interest outweighed the interests of bargaining unit employees.[15]

Pursuant to PERB's appeal procedures, exceptions were filed. In its September 10, 2015 decision, PERB reversed in part the ALJ's decision.[16] PERB agreed that the specific duties that were reassigned to troopers had been exclusively performed by the SSTs for a sufficient period of time prior to the reassignment. However, PERB concluded that this was not the end of the analysis.[17] The ALJ should have recognized that there was a *de facto* significant change in job qualifications, regardless of the fact that the State did not raise this defense, because police officers possess different and unique qualifications than civilians and are "fundamentally different from everyone else."[18]

In a prior decision, PERB had concluded that the transfer of duties from uniformed police officers to non-unit civilians ("civilianization") constituted a change in job qualifications.[19] PERB noted that the reverse is true in this case:

> Consistent with precedent, and as a logical and predictable corollary to this proposition, when an employer has determined that the skills of a civilian employee are ***not*** necessary to perform a given set of tasks but that different qualifications are better suited for such tasks, especially tasks that are also performed by uniformed personnel and were so performed before being assigned to civilians, there has been a *de facto* change in qualifications for performing those tasks. (emphasis in original).[20]

In the opinion of the author, it should go without saying that the qualifications of police officers are distinct due to their law enforcement training, and ability to make arrests; therefore it was logical to conclude that civilians replaced by police officers reflect a decision to heighten the job qualifications for the position.

As to the State's failure to raise the defense, PERB concluded that "it is beyond cavil that the better pleading practice would have been for the State to have pleaded" that there was a significant change in job qualifications, but the defense was not forfeited.[21] Instead, the ALJ should have recognized there was a *de facto* change in job qualifications by the mere fact that civilian work was reassigned to police officers.[22]

PERB remanded the case back to the ALJ to weigh the required factors, and to make further findings of fact "on the issues necessary to conduct the balancing mandated by law."[23] On remand, the ALJ must consider the "interests of the public employer and the unit employees, both individually and collectively, weighed against each other."[24] Notably, once a municipality presents a reasoned justification for the heightened job requirements, PERB decisions reflect deference to municipal judgment.[25]

Conclusion

The takeaway lesson from this case is that security duties may be reassigned to police officers without prior negotiations, provided that the interests of the public employer in making the reassignment decision outweigh the interests of non-unit employees. Municipal attorneys should raise as an affirmative defense that there has been a significant increase in job qualifications, and present evidence in support of that the defense, but the failure to do so does not necessarily result in a waiver of the defense. As in this decision, even if not raised to the ALJ, PERB may still consider the defense on appeal.

II. Picketing Protection Lost Due to Interference With Traffic Flow at Entrance and Exit Roads

In *East Meadow Union Free School District,* PERB revisited its deferral policy and limits on the protection of picketing that interferes with traffic and creates a hazardous situation.[26]

Procedural History

Four improper practice charges filed by New York State United Teachers ("NYSUT") were consolidated, all alleging retaliation by the East Meadow Union Free

School District ("School District') against public school teachers, in violation of §209-a.1(a) of the Public Employees Fair Employment Act ("Act") after the School District brought disciplinary charges against those teachers based on their conduct while picketing and leafleting outside school entrances and exits on various dates.[27] PERB's decision was issued just over one year after *Santer v. Board of Education of East Meadow Union Free School District*, in which the Court of Appeals held that two teachers, David Santer and Barbara Lucia, lost the protection of the First Amendment when their parked cars interfered with traffic flow into and out of the Woodland Middle School, and blocked curbs where parents dropped off students.[28]

Discussion

During a period of negotiations for a successor contract, Mr. Santer, Ms. Lucia and others had engaged in informational picketing in front of Woodland Middle School on March 2, 2007, displaying signs from their parked cars due to inclement weather. Several teachers blocked a student drop-off point with their cars, causing traffic to become congested and requiring students to be dropped off in the middle of the street in the rain, during a time of heavy traffic near the school building, and causing a dangerous condition that put the safety of students at risk.

Mr. Santer, Ms. Lucia and two other teachers were charged with misconduct. Following disciplinary proceedings pursuant to Education Law §3020-a, the charges were upheld. Special proceedings pursuant to CPLR Article 75 were commenced to vacate the awards, which culminated in the Court of Appeals' decision.[29]

In the instant PERB decision, exceptions filed by NYSUT in Case U-27735 alleged that the disciplinary action against Mr. Santer was in retaliation for his participation in the March 2, 2007 picketing.[30] These exceptions were withdrawn following the Court of Appeals decision in *Santer*.[31]

The PERB decision also consolidated the exceptions challenging an ALJ decision sustaining an improper practice charge in Case No. U-27398, filed on behalf of teacher Ryan Malone.[32] The charge alleged that the School District violated the Act by disciplining him in retaliation for distributing leaflets at East Meadow High School, under circumstances that were arguably less dangerous than those created by the picketers at the Middle School on March 2, 2007.[33]

On October 19, 2006, Mr. Malone stationed himself at the exit road on the school property, with informational leaflets regarding an ongoing labor dispute.[34]

When cars slowed and lowered their windows, he approached to talk to the drivers and hand them a leaflet.[35] A parent called Principal Mark Scher on October 18, 2006, to complain about the dangerous situation at the school due to a teacher handing out a leaflet. On October 19, 2006, Principal Scher observed four or five cars lined up on the school property when Mr. Malone was handing out leaflets. He concluded that the leafleting created a hazardous situation because there were two recent accidents near that exit, and Mr. Malone was causing traffic to back up, interfering with drivers' ability to concentrate on road conditions. Mr. Malone was charged with misconduct for obstructing vehicle traffic exiting the school property, creating a hazardous condition, and with insubordination for refusing to comply with the Principal's direction to stop leafleting at that location.[36]

After the School District initiated disciplinary proceedings pursuant to Education Law §3020-a against Mr. Malone, the New York State United Teachers ("NYSUT") filed the PERB improper practice charge, alleging that the disciplinary charges were in retaliation for his protected activities, in violation of the Act.

On March 24, 2010, the §3020-a Hearing Officer issued a decision, finding Mr. Malone culpable of the disciplinary charges and fining him one day's pay.[37] The Hearing Officer specifically concluded that the disciplinary fine was warranted because Mr. Malone momentarily obstructed traffic by causing drivers to slow down and take a leaflet, causing traffic exiting the school's parking lot to be backed up, and because Mr. Malone admittedly refused to stop distributing leaflets on the exit road when directed to do so by the High School Principal.[38]

Mr. Malone commenced a special proceeding under CPLR Article 75, challenging the §3020-a decision. The Article 75 Petition was dismissed by the Nassau County Supreme Court and that decision was affirmed by the Appellate Division, Second Department.[39] In its decision, the Second Department noted that its role was to determine "only whether the award had evidentiary support and whether the award was arbitrary and capricious."[40]

On April 20, 2010, the School District's attorney sent a copy of the Hearing Officer's March 24, 2010 decision on the §3020-a proceeding to the PERB ALJ, requesting that the record from the PERB hearing be reopened and the Hearing Officer's decision be admitted into evidence.[41]

However, also on April 20, 2010, before receiving the request, the ALJ issued a decision determining that the School District violated the Act.[42] The ALJ concluded that Mr. Malone's leafleting constituted protected union activities under the Act, and that the charges were improperly motivated by his protected activities.[43] Faced with inconsistent decisions by two different arbiters, the School District's attorney sent another letter to the ALJ, requesting that he reconsider

his decision in light of the contradictory decision of the §3020-a Hearing Officer.[44] That request was denied.[45]

Exceptions were filed with PERB who issued a decision on June 5, 2015, in which it deferred to the arbitral findings from the §3020-a proceeding, and reversed the ALJ's decision. As an initial matter, PERB rejected the School District's argument that Mr. Malone's activities lost the protection of the Act based on the holding in *Santer*.[46] Instead, PERB concluded that the provisions of the Act which protected the rights of employees to organize and engage in union activities afforded greater protection than the First Amendment. Therefore, while *Santer* may be dispositive as to Malone's rights under the First Amendment of the United States Constitution, it does not address the question of whether or not the School District violated his rights under the Public Employment Relations Act.

However, in this unusual decision, PERB agreed that, based on the record, the ALJ did not err in concluding that the teacher's leafleting was legally protected and that the discipline may have been improperly motivated—but PERB nevertheless overturned the ALJ's conclusion that the School District violated the Act.

PERB held that the ALJ should have deferred to an arbitral finding of the 3020-a Hearing Officer, who concluded that Mr. Malone engaged in misconduct warranting the imposition of discipline. In so doing, PERB revisited its policy of deferring to an arbitration decision if:

> the issues raised by the improper practice charge were fully litigated in the arbitration proceeding, that the arbitral proceedings were not tainted by unfairness or serious procedural irregularities[,] and that the determination of the arbitrator was not clearly repugnant to the purposes and policies of the Act.[47]

Based on this policy, PERB concluded that the ALJ should have deferred to the §3020-a proceeding because the issues were already fully litigated, and the Hearing Officer's decision had been affirmed by two courts, including Nassau County Supreme Court and the Appellate Division, Second Department.[48] There was no evidence of unfairness or procedural irregularities during the §3020-a proceedings. As a practical matter, PERB noted that the Hearing Officer's decision had been in place and followed by the School District for five years before PERB even heard the appeal and thus there was a five-year long *status quo* "governing their now-settled expectations."[49]

Although the ultimate issues presented in a §3020-a proceeding were different from those in an improper practice charge, PERB concluded that the Hearing Officer's conclusions did not contradict the Act because there is PERB precedent that leafleting or picketing loses the protection of the Act when it is found to be "impulsive, overzealous, confrontational or disruptive."[50] Here, there was evidence that the leafleting was disruptive because it interfered with traffic flow leaving the school.[51]

PERB also dismissed NYSUT's exceptions to the ALJ's decision dismissing Case No. U-27741, alleging that teacher David Santer was transferred from Woodland Middle School to Bowling Green Elementary School in retaliation for his protected activity, including his reelection as Association building president.[52] The ALJ had concluded that the School District established a legitimate business justification for the transfer based on testimony of witnesses concerning the transfer decision.[53] There was insufficient evidence that the ALJ's determination was "manifestly incorrect" and PERB therefore affirmed the ALJ's decision, dismissing the NYSUT's exceptions.[54]

PERB did not definitively decide whether Mr. Malone lost the protection of the Act, as its reasoning was based on the deferral policy and the interest in avoiding inconsistent conclusions.[55] However, PERB concluded that the §3020-a Hearing Officer's conclusions were consistent with PERB precedent. In prior cases, PERB has held that the protection of the Act may be lost if, under the totality of the circumstances, picketing is found to be "impulsive, overzealous, confrontational or disruptive."[56]

Conclusion

As the School District's attorneys did in this action, once a disciplinary hearing has commenced concerning the same set of facts that are at issue in the PERB proceeding, the municipality should request that PERB defer to a related arbitration or disciplinary hearing, even if the issues are not identical, to avoid multiple adverse decisions regarding the same set of facts.

Endnotes

1. N.Y. Civ. Serv. Law § 205 (McKinney).
2. N.Y. Civ. Serv. Law § 200(5)(d) (McKinney).
3. In the Matter of New York State Correctional Officers and Police Benevolent Association, Inc., Charging Party, and State of New York (Division of State Police), Respondent, and Police Benevolent Association of the New York State Troopers, Inc., Intervenor, 48 PERB ¶3012 (2015).
4. 48 PERB ¶3012, 3039.
5. *Id*.
6. *Id.*
7. *Id.*

8. 48 PERB ¶3012, 3040.
9. *Id.* at 3039-40.
10. *Id.* at 3040.
11. *Niagara Frontier Transportation Authority*, 18 PERB ¶3180, 3182 (1985); *see also Town of Riverhead*, 42 PERB ¶3032 (2009).
12. *Id.*
13. 48 PERB ¶3012, 3041.
14. *Id.* at 3042.
15. *Id.*
16. *Id.* at 3043.
17. *Id.* at 3042.
18. *Id.*
19. *See Fairview Fire District,* 29 PERB ¶3042, 3098 (1996); *County of Suffolk,* 12 PERB ¶3123 (1979).
20. 48 PERB ¶3012, 3042.
21. *Id.*
22. *Id.*
23. *Id.* at 3043. (PERB also noted that, even if there were no significant changes in qualifications, it would have overturned the ALJ's remedial order because it was overbroad, and effectively barred troopers from ever operating x-ray machines and magnetometers, even during the busy time periods before the reassignment when they used to handle such equipment rather than restoring the *status quo ante.* 48 PERB ¶3012, 3042).
24. *Niagara Frontier Transportation Authority*, 18 PERB at ¶3183.
25. *See, e.g.*, *City of Rochester*, 43 PERB ¶4550 (2010) (balancing test weighed in favor of City, based on its reconfiguration of the special operations division); West *Irondequoit Central School District*, 41 PERB ¶4581 (2008) ("the employer's interests in changing its management structure to accommodate its increased focus and responsibility in security related matters [ ] outweigh the unit's loss of those supervisory duties which had been performed by the security supervisor"); *Town of Riverhead*, 41 PERB ¶4534 (2008) (balancing test weighed in favor of Town which reassigned duties to police and a veterinarian and "the only resultant detriment to the Association is the loss of unit work"); *County of Suffolk*, 38 PERB ¶4575 (2005) (balancing test weighed in favor of County, which reassigned police duties to non-police officers, and noting that there is no "record evidence that any police officer has been laid off or lost any benefit due to the transfer of work").
26. 48 PERB ¶3006 (2015).
27. *Id.* at 3014. (The improper practice charges which were consolidated included Case No. U-27735 ad 27741 (David Santer); U-27783 (Frank Fortney and Neil Golden); and U-27398 (Ryan Malone)).
28. 23 N.Y.3d 251 (2014).
29. *See Santer*, 23 N.Y.3d at 251.
30. 48 PERB ¶3006, 3015.
31. Exceptions filed on behalf of teachers Frank Fortney and Neil Golden in U-27783 were dismissed as moot because they both retired, the School District withdrew its discipline as to Mr. Golden, and due to the lack of any decision as to Mr. Fortney. PERB vacated the ALJ's Order rather than leave it unreviewable, to avoid "spawning any legal consequences or precedent." 48 PERB 3006 (*quoting Civ. Serv. Tech Guild v. City of New York*, 58 A.D.3d 581 (1st Dep't 2009) and *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 718 (1980).
32. 48 PERB ¶3006, 3016.
33. *Id.*
34. *Malone v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 93 A.D.3d 849, 849 (2d Dep't 2012).
35. 48 PERB ¶3006, 3016.
36. *Id.*
37. *Id.*
38. *Id.*
39. *See Malone v. Board of Education of East Meadow Union Free School District*, 2010 WL 9049448 (Nassau Cty. December 1, 2010), *aff'd*, 93 A.D.3d 849 (2d Dep't 2012), *lv denied,* 19 N.Y.3d 807 (2012).
40. 93 A.D.3d at 849.
41. 48 PERB ¶3006, 3017
42. *Id.* at 3019.
43. *Id.* at 3017.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id*. at 3020 (*citing Matter of New York Tr. Auth*., 4 PERB ¶3031 at 3670 (1971).
48. *Id.*
49. *Id*.
50. *Id.* (*quoting State of New York (Division of Parole)*, 41 PERB ¶3033, 3146 (2008).
51. *Id.* at 3020.
52. *Id.* at 3018
53. *Id.*
54. *Id.*
55. *Id.* at 3017-18.
56. *State of New York (Division of Parole)*, 41 PERB ¶3033, at 3146 (2008) ("an otherwise protected activity may be found to be unprotected under the Act when, under the totality of the circumstances, the conduct is found to be impulsive, overzealous, confrontational or disruptive") (citing *State of New York (ben Aaman*), 11 PERB ¶3084 (1978); *Kings Park Cent. Sch. Dist.*, 24 PERB ¶3026 (1991); *Erie County Water Auth.*, 24 PERB ¶3046 (1991); *Greenburgh No. 11 Union Free Sch. Dist.*, 30 PERB ¶ 3052 (1997), *confd as modified sub nom, Greenburgh No. 11 Union Free Sch. Dist. v. Kinsella*, 253 AD2d 46, 32 PERB ¶7004 (3d Dep't 1999) *lv denied*, 93 N.Y.2d 810, 32 PERB ¶7014 (1999).

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United States Supreme Court to Review "Parcel as a Whole" Concept

By Daniel M. Lehmann

On January 15, 2016, the Supreme Court of the United States granted certiorari from *Murr v. State of Wisconsin*.[1] As a result, the Court will be considering whether the "parcel as a whole" concept of *Penn Central Transportation Company v. City of New York*[2] establishes a rule in regulatory takings cases that two legally distinct, but commonly owned, contiguous parcels must be combined for takings analysis purposes.

Penn Central

In *Penn Central*, the United States Supreme Court considered "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.'"[3]

There, New York City, under its Landmarks Preservation Law, designated Grand Central Terminal, which was owned by plaintiff Penn Central, a landmark and the city tax block Grand Central occupied a landmark site.[4] Penn Central subsequently applied to the Landmarks Preservation Commission for permission to construct a 55-story office building to be cantilevered above the existing façade and to rest on the roof of Grand Central.[5] Penn Central also applied for permission to construct a 53-story office building on a portion of the Grand Central site.[6]

The Commission rejected both applications. Penn Central sued, arguing that the application of the Landmarks Preservation Law had taken its property without just compensation in violation of the Fifth Amendment. The trial court held for Penn Central, the Appellate Division reversed,[7] and the Court of Appeals affirmed.[8] The United States Supreme Court affirmed.

The Court's decision is well known for clarifying the test for how far is "too far"[9] for a regulation's restrictions. As the Court explained in *Penn Central*, the test requires an "ad hoc" factual inquiry considering factors of the economic impact of the regulation, its interference with distinct investment-backed expectations, and the character of the government action.

In considering Penn Central's argument that the Landmarks Law deprived Penn Central of any gainful use of its air rights above Grand Central, the Court stated that to agree would mean that it erred, not only in previously upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels.[10]

The Court dismissed Penn Central's argument and reasoned that, amongst other things, the Court must consider the nature and extent of the interference with rights in the parcel as a whole, explaining that

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site.[11]

No Clear Guidance or Definition on What Is the Parcel as a Whole

In *Keystone Bituminous Coal Association v. DeBenedictis*,[12] Pennsylvania passed an act to prevent coal mine subsidence caused by the extraction of underground coal. The act contained a section that required 50% of the coal beneath applicable structures to be kept in place in order to provide surface support.[13]

The petitioners stated that Pennsylvania law recognized a "support estate" in land, in addition to the "mineral estate" and "surface estate," and argued that the 50% rule of the act constituted a taking of their property (the physical coal and the entire destruction of the property's support estate) without compensation in violation of the Fifth Amendment.

The United States Supreme Court disagreed. It stated,

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.[14]

The Court quoted *Penn Central*'s "parcel as a whole" reasoning and also reasoned, "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking because the aggregate must be viewed in its entirety."[15] Though these reasons did not solve all of the definitional issues that may arise in defining the relevant mass of property, these reasons underpinned the Court's rejection of the petitioners' arguments that the taking of its physical coal constituted a compensable taking. The Court held that, under the investment-backed expectation prong of *Penn Central*, there was "no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."[16]

The Court also rejected the petitioners' support estate argument. The Court stated that

> the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.[17]

Five years later, in *Lucas v. South Carolina Coastal Council*,[18] the Court again avoided the difficult issue of determining what is the "denominator of the fraction," although the Court observed that "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."[19]

The Court again confronted this issue in *Palazzolo v. Rhode Island*,[20] but ultimately did not decide it. In *Palazzolo*, Rhode Island effectively regulated the petitioner Palazzolo's undeveloped beachfront properties as coastal wetlands, which greatly limited development. The petitioner brought an inverse condemnation action, arguing that the wetlands regulations had taken his property without compensation in violation of the Fifth Amendment.[21]

To revive the *Penn Central* economic impact prong of his claim by reframing it, the petitioner argued for the first time that the upland parcel of his property was distinct from the wetlands portions, so he should be permitted to assert a taking limited to the wetlands portions of his property. Addressing this argument, and referring to *Penn Central*, the Court stated,

> This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole,[22] but we have at times expressed discomfort with the logic of this rule,[23] a sentiment echoed by some commentators.[24]

However, the Court did not decide the issue because the petitioner did not make the argument in the state courts and did not present the issue in the petition for *certiorari*. Instead, "The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails."[25]

The Court last mentioned "the parcel as a whole" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[26] The Tahoe Regional Planning Agency issued two moratoria that virtually prohibited all development on Lake Tahoe for a period of 32 months. The petitioners claimed that the moratoria constituted a *per se* taking of property without compensation under the Fifth Amendment.[27]

Specifically, the petitioners sought to frame the case under the *per se* taking rule by arguing that the Court could "effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria."[28] The Court rejected the petitioners' argument. The Court began by noting that it must focus on *Penn Central*'s "the parcel as a whole" and on *Andrus v. Allard*'s[29] "full bundle of property rights."[30] The Court then concluded that "Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.' We have consistently rejected such an approach to the 'denominator' question."[31] Thus, the Court found that the property could not be disaggregated into temporal segments corresponding to the moratoria and then analyzed to determine whether

the petitioners were deprived of all economically viable use during each period.[32] Justice Thomas, in the footnote in his dissent, noted his puzzlement at the majority's decision to embrace the "parcel as a whole" doctrine as settled.[33]

Murr v. State of Wisconsin

The Murrs' parents purchased Lot F, a parcel of land on the St. Croix River, in 1960. They built a cabin on it. In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which was left undeveloped. The Murrs' parents transferred Lot F to the Murrs in 1994 and Lot E in 1995. This brought the lots under common ownership and resulted in a merger of the two lots under a mid-1970s local ordinance, which prohibited individual development or sale of adjacent lots under common ownership unless an individual lot has at least one acre of net project area. But, if abutting commonly owned lots do not contain one acre, the ordinance provides that the abutting lots together suffice as a single, buildable lot. Combined, Lots E and F contain approximately .98 acres of net project area.

The Murrs sought a variance to separately use or sell their two contiguous lots. The zoning board denied their application, the Wisconsin trial court affirmed, the Wisconsin appellate court affirmed, and the Wisconsin Supreme Court denied the petition for review.

Subsequently, the Murrs filed a complaint arguing that the local ordinance effected a taking without compensation. Specifically, they argued that the ordinance deprived them of practically all of the use of Lot E because it could not be sold or developed as a separate lot. They did not include any claim for the taking of Lot F. The Wisconsin trial court rejected the Murrs' complaint. The Murrs argued to the Wisconsin appellate court that the trial court erred by examining the beneficial uses of Lots E and F in combination and that "there [wa]s a genuine issue of material fact as to whether Lots E and F were used together such that they may be considered as one for purposes of the regulatory takings analysis."

The Wisconsin appellate court, citing the Wisconsin Supreme Court, stated that "the issue of whether contiguous property is analytically divisible for purposes of a regulatory takings claim was settled[.]"[34] "[B]efore considering whether a regulatory taking has occurred, 'a court must first determine what, precisely, is the property at issue[.]'"[35]

The Murrs argued that the Wisconsin Supreme Court case was distinguishable "because that case turned on the owner's ability to use one large parcel, whereas the Murrs assert[ed] they have been wholly deprived of the use of at least one of their two separate parcels."[36]

Quoting *Penn Central*'s "parcel as a whole," the appellate court rejected this argument. "There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguousness is the key fact[.]"[37] It is well-established in the state that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."[38] As there was no dispute that the Murrs' property sufficed as a single, buildable lot under the local ordinance, the appellate court held that the Murrs' were not deprived of all economic use and there was no taking.[39] The Wisconsin Supreme Court denied the petition to review.

Conclusion

The United States Supreme Court has its work cut out for it in determining whether Lots E and F, two separate parcels, created, purchased, and taxed as legally separate lots, purchased for different reasons and never developed together, should be considered as "the parcel as a whole" when anyone else other than the Murrs would be permitted to develop Lot E because of the separate, and not common, ownership exception under the local ordinance.

Endnotes

1. 859 N.W.2d 628, 359 Wis. 2d 675 (2014), *rev. den'd*, 366 Wis. 2d 59, 862 N.W.2d 899, *cert. granted*, 136 S. Ct. 890 (2016).
2. 438 U.S. 104, 130-131 (1978).
3. *Id.* at 107.
4. *Id.* at 104.
5. *Id.* at 116.
6. *Id.* at 117.
7. 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975).
8. 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977).
9. *Pennsylvania Coal Company v. Mahon* expanded the protection of the Fifth Amendment Takings Clause, holding that just compensation was also required for a regulatory taking, a restriction on the use of property that went "too far." 260 U.S. 393, 415 (1922).
10. 438 U.S. at 130, citing *Welch v. Swasey*, 214 U.S. 91 (1909), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Gorieb v. Fox*, 274 U.S. 603 (1927).
11. *Id.* Justice Stevens, in his dissent of *Dolan v. City of Tigard*, called this the nondivisibility principle. 512 U.S. 374, 401 (1994).
12. 480 U.S. 470 (1987).
13. *Id.* at 470.
14. *Id.* at 497 (internal quotation marks and citation omitted).
15. *Id.*, quoting *Andrus v. Allard*, 444 U.S. 51 (1979).
16. *Id.* at 471.
17. *See also Concrete Pipe and Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993) (citations omitted).
18. 505 U.S. 1003 (1992).

19. *Id.* at 1054; *See also id.* at 1016-17, n. 7 (comparing *Pennsylvania Coal Company v. Mahon*, holding law restricting subsurface extraction of coal effected a taking, to *Keystone Bituminous Coal Association v. DeBenedictis*, holding nearly identical law did not effect a taking). *Lucas* created the rule that where a regulation deprives land of all economically beneficial use, it is a *per se* taking requiring just compensation.
20. 533 U.S. 606 (2001).
21. *Id.* at 606.
22. *Id.* at 631, citing *Keystone*, 480 U.S. at 497.
23. *Id.*, citing *Lucas*, 505 U.S. at 1054.
24. *Id.*, citing Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994).
25. *Id.* at 609.
26. 535 U.S. 302, 326-27, 331 (2002).
27. *Id.* at 302.
28. *Id.* at 303.
29. 444 U.S. 51 (1979).
30. *Tahoe-Sierra*, 535 U.S. at 326-27.
31. *Id.*
32. *Id.* Instead, the Court's analysis should start by asking whether there was a total taking of the entire parcel, and if not, then use the *Penn Central* framework.
33. *Id.* at 355 (Thomas, J., dissenting).
34. *Murr v. State*, 859 N.W.2d 628, 359 Wis. 2d 675 (2014), citing *Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996).
35. *Id.* at 628.
36. *Id.*
37. *Id.* at 630.
38. *Id.*
39. *Id. But see*, *e.g.*, *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006) (conflicting with Wisconsin); *City of Coeur D'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (conflicting with Wisconsin); *Dep't of Transp., Div. of Admin. v. Jirik*, 498 So. 2d 1253 (Fla. 1986) (conflicting with Wisconsin); *Palm Beach Isles Ass'n v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (conflicting with Wisconsin); *Am. Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (conflicting with Wisconsin).

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Land Use Law Update: Is the Tide Turning Toward Municipal Liability for Failure to Adapt to Climate Change?

By Sarah J. Adams-Schoen

Local governments are often referred to as "on the front line" of climate change adaptation. This characterization makes sense given that "[l]and use patterns are determined, infrastructure is designed and provided, and many other development issues are decided at the local level, where natural hazards are experienced and losses are suffered most directly."[1] Furthermore, local governments have an array of tools in their toolbox that can help adapt their communities to climate change-related conditions including building codes; land use, zoning, and subdivision regulations; comprehensive, capital improvement, transportation, floodplain management, storm-water management, and open space plans; facilities needs studies; population growth and future development studies; and economic development plans. Municipal regulation of the form and placement of building stock in particular offers an opportunity to create more resilient infrastructure and patterns of development; whereas, failure to proactively plan for rising seas, higher storm surges and more frequent and intense storms will result in further investment in infrastructure and patterns of development that, at best, fail to adapt to hazards, and, at worst, exacerbate hazards.[2]

The current state of the law, however, creates uncertainty about whether municipalities have a duty to mitigate foreseeable climate related hazards. The International Panel on Climate Change's most recent projections suggest that failure to promptly and aggressively mitigate and adapt to climate change will significantly diminish the ability of coastal communities to moderate harms like flooding and foreclose some opportunities to do so in the future.[3] Given the clear role for local governments in adaptation planning and implementation, some question whether local governments will soon face liability for failure to plan for and implement hazard mitigation measures.[4] Because the consequences of destructive storms are foreseeable and at least in part attributable to failures in the legal system, Professor Maxine Burkett argues that local governments could face tort liability for failure to adapt to climate change.[5]

So far, in the United States, plaintiffs' claims against local governments have not extended to negligent failure to adapt to climate change. Rather, typical claims have involved plaintiffs injured by flooding alleging that the municipalities' negligent design, construction, or operation of flood control structures caused the plaintiffs' injuries.[6] Liability in these cases has tended to hinge on whether the municipality's conduct was statutorily immune,[7] and, if it was not, whether the plaintiffs proffered sufficient proof of negligence and causation.[8] In at least one instance, plaintiffs injured by flooding brought an action against a county government claiming that the county's negligent regulation of development *on an adjacent property* caused plaintiffs' damages.[9] The court in this case held that the county owed no duty to homeowners to ensure that development of an adjoining subdivision would not create a risk of flooding the homeowners' property.

The Fifth Circuit ultimately rejected tort theories of liability in the Katrina litigation as violative of governmental immunity under the Flood Control Act and discretionary-function exception to the Federal Tort Claims Act.[10] But, in the U.S. Court of Federal Claims case *St. Bernard Parish Government v. United States*, the court essentially expanded Takings Clause liability to encompass governmental negligence that exacerbates weather-related damage to property.[11] Relying in large part on the U.S. Supreme Court's 2012 decision in *Arkansas Game & Fish Commission*,[12] the court ruled in *St. Bernard Parish* that the U.S. Army Corps of Engineers' failure to properly maintain the Mississippi River–Gulf Outlet ("MR-GO"), a seventy-six mile long navigational channel constructed, expanded and operated by the Corps, resulted in a taking of private property without just compensation in violation of the Takings Clause because it exacerbated flood damage from Hurricane Katrina and several subsequent storms, and, although only temporarily, wrongfully deprived landowners of the use of their property. Because *St. Bernard Parish* involved affirmative governmental actions (i.e., negligent expansion and maintenance of the navigational channel), the case leaves open the question of whether a government entity could be liable for failing to prepare for sea level rise, storm surges and other climate-related risks.[13]

Notwithstanding the lack of clarity in the law, some municipalities have proactively begun to plan for and implement hazard mitigation measures. Steps

that coastal municipalities can and are taking include: (1) reviewing waterfront development plans and related regulations to assess whether development and rebuilding is being allowed or even encouraged in areas that are currently vulnerable or will become vulnerable within the lifespan of the development, and whether the development is increasing the vulnerability of adjacent areas; (2) amending structure elevation requirements to reduce the vulnerability of the structure throughout its entire useful life, not just for the next five, ten or twenty years; (3) assessing zoning and building codes to determine whether they impose requirements on the construction of elevated structures that increase local flood risk by, for example, increasing the impermeable surface areas; and (4) educating constituents on scientific projections regarding future flood and other related risks so that they can make prudent building and buying decisions. Because we can anticipate the addition of substantial new building stock and infrastructure over the next few decades,[14] local governments that regulate the placement and, in some respects, design aspects of building stock have an opportunity—if not a duty—to avoid locking in infrastructure that increases flood and other related risks.

Endnotes

1. Patricia Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 Envt'l L.R. 10158, 10159 (2008).
2. *See* Reid Ewing et al., Growing Cooler: Evidence on Urban Development and Climate Change 8 (2008) (reporting that U.S. population is expected to grow to 420 million by 2050, resulting in projected construction between 2007 and 2050 of 89 million new or replaced homes and 190 billion square feet of new offices, institutions, stores, and other nonresidential buildings); *see also* Salkin, *supra* note 1, at 10162-69; John R. Nolon, *Disaster Mitigation Through Land Use Strategies*, 23 Pace Envtl. L. Rev. 959, 976–77 (2006).
3. *See* International Panel on Climate Change (IPCC), Climate Change 2014: Impacts, Adaptation, and Vulnerability: Summary for Policymakers 23 (2014), *available at* http://ipcc-wg2.gov/AR5/images/uploads/WG2AR5_SPM_FINAL.pdf (table depicting projection that even highly adapted North American communities will face medium to high risks under scenarios of global mean temperature increases at 2°C and 4°C above preindustrial levels); *see also* Sarah J. Adams-Schoen, *Sink or Swim: In Search of a Model for Coastal City Climate Resilience*, 40 Columbia J. Envtl. L. 433 (2015) (concluding that "failure to promptly and aggressively mitigate climate change will likely significantly diminish the ability of coastal communities to moderate harms like flooding and foreclose opportunities to do so in the future" and citing sources (footnotes omitted)).
4. *See, e.g.*, Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 Geo. Mason L. Rev. 775, 780–81 (2013).
5. *Id.*
6. *See, e.g., Vermef v. City of Boulder City*, 80 P.3d 445, 445 (Nev. 2003), *abrogated by ASAP Storage, Inc. v. City of Sparks*, 173 P.3d 734 (Nev. 2007); *Walter Legge Co. v. City of Peekskill*, 619 N.Y.S.2d 771, 771–72 (N.Y. App. Div. 1994).
7. *See, e.g., Vermef*, 80 P.3d at 553 (ruling on appeal of summary judgment that city was not entitled to immunity for damages occurring during flood under statute immunizing government entities from liability arising out of emergency management activities where damage was due to pre-emergency installation of the drainage channel), *abrogated by ASAP Storage*, 80 P.3d at 744-45 (ruling that statute immunizing government from liability relating to emergency management activities creates immunity for emergency responses and emergency preparation activities); *see also In re Katrina Canal Breaches Consol. Litig.*, 577 F. Supp. 2d 802, 807 (E.D. La. 2008) (ruling that genuine issues of material fact existed as to whether damage from flooding was caused by governmental negligence in design, construction, maintenance, and operation of a navigational channel, including resulting destruction of flood-mitigating wetlands, as opposed to negligence with regard to federal flood control project, which would be subject to statutory governmental immunity); *In re Katrina Canal Breaches Consol. Litig.*, 696 F.3d 436 (5th Cir. 2012) (holding that the government was immunized against claims for flooding damage).
8. *Walter Legge Co.*, 210 A.D.2d at 317 (affirming order granting judgment as matter of law for city where there was insufficient proof of causation and negligence in action against city for damage to property allegedly caused by flooding when natural waterway used as part of municipal drainage system overflowed).
9. *See Cootey v. Sun Inv., Inc.*, 718 P.2d 1086, 1088–89 (Haw. 1986).
10. 696 F.3d at 444 (immunity under FCA extends to claims stemming from levee breaches caused by dredging of canal); *id.* at 449-52 (discretionary function exception to FTCA extends to remaining claims).
11. No. 05-1119L, 2015 WL 2058969 (Fed. Cl. May 1, 2015).
12. 133 S. Ct. 511, 515 (2012).
13. *See generally* Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 Mich. L. Rev. 345 (2014); John Echeverria, *Ruling in MR-GO Takings Lawsuit*, Takings Litigation: A Blog About Takings Law, May 2, 2015, http://takingslitigation.com/2015/05/02/ruling-in-mr-go-takings-lawsuit/ ("the decision would appear to convert the Federal Tort Claims Act and its carefully crafted governmental immunities into a dead letter, at least in the flooding context").
14. *See* Ewing et al., *supra* note 2, at 8.

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Shrouded in Controversy: Evolution of the Right of Sepulcher and a Medical Examiner's Obligations Under the Right of Sepulcher and the Public Health Law

By Karen M. Richards and Brian M. Jacobson

I. Introduction

> Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought, and walked among us has passed. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew.*** And the law—that rule of action which touches all human things—must touch also upon this thing of death.[1]

The Court of Appeals recently touched "upon this thing of death." In *Shipley v. City of New York*, the issue was whether a medical examiner has a mandated obligation, pursuant to the common-law right of sepulcher and the Public Health Law, to notify a decedent's next of kin that, although a decedent's body is available for burial, organs and/or tissues have been retained for further examination and testing as part of an authorized autopsy.[2] *Shipley* is reviewed later in this article, but first this article summarizes the right of sepulcher and provides a brief history of the evolution of this ancient right and of the ownership of the dead.

II. The Right of Sepulcher: "An Indignity to the Dead Is an Offense to the Living"[3]

It is well-settled that "[t]he common-law right of sepulcher gives the surviving next of kin an absolute right to the immediate possession of the decedent's body for preservation and burial."[4] Next of kin "are entitled to such right of possession as a solace and comfort in their time of distress."[5] Damages have been awarded for interfering with the surviving kin's immediate right to possession of the body and also for desecrating or mishandling the body, inappropriately dealing with the body, mistakenly identifying the remains, failing to notify the surviving kin of the decedent's death, or performing an unauthorized autopsy.[6]

The right of sepulcher compensates the next of kin for the emotional suffering, mental anguish, psychological injuries, and physical consequences they experience from the interference with their ability to properly bury their decedent.[7] The likelihood of mental anguish in right of sepulcher actions is considered inherently genuine and is therefore generally presumed.[8] Thus, violation of the right is one of the "narrow category of [negligence causes of action] that requires no physical harm, no fear of harm, and no zone of danger" in order for the plaintiff to recover for purely emotional damages.[9]

III. Evolution of the Ownership of the Dead and of the Right of Sepulcher

The ownership of the dead has held a unique, if not odd, status in New York law. Early New York courts adhered to the common-law doctrine, derived from the dictum of a 17th century Englishman, that there is no property right in a corpse, but societal changes in the late 18th and early 19th centuries led to a modification of the doctrine.

A. Ecclesiastical Law in England

Before the Norman Conquest, there were no separate ecclesiastical courts in England.[10] "[T]he power of the clergy over the dead was kept in check by uniting the lay with the clerical order in the ecclesiastical tribunals."[11] Around 1072, soon after the Norman Conquest, temporal courts and Courts Christian were separated by an ordinance of William the Conqueror.[12]

Ecclesiastical cognizance, the exclusive power of the ecclesiastics, over the remains of the dead was both executive and judicial.[13] It was executive in taking the body into its actual, corporeal possession, and "guarding its repose in consecrated ground," and it was judicial in deciding all controversies involving interment, including who should be allowed to lie in consecrated earth and who should be allowed to be interred at all.[14] The Courts Christian virtually monopolized judicial power over burials, while "[s]ecular courts, stripped of all authority over the dead, were left to confine themselves to matters involving the protection of monuments, and other external emblems of grief, erected by the living."[15]

"[D]uties with respect to corpses were excluded from actions at common law because burials were matters of ecclesiastical cognizance."[16] The heirs and next of kin "were not permitted to have any choice or to give directions as to the ceremonies attending the funeral, or the place of burial, or to have control in any manner over the bodies of their deceased relatives."[17] They were only permitted to erect monuments and embellish the graves of their deceased kin.[18]

In addition, the heirs and next of kin could not maintain a civil action "for indecently, or even impi-

ously, disturbing the remains of his buried ancestor."[19] Yet, the parson, who had the freehold of the soil, could maintain a trespass action against the person who disturbed the remains.[20]

In the 17th century, Sir Edward Coke, a prominent English barrister, judge, and politician, commented on the church's exclusive jurisdiction over the dead:

> It is to be observed, that in every sepulcher, that hath a monument, two things are to be considered, viz., the monument, and the sepulture or buriall of the dead. The buriall of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis* [among the property of no man], and belongs to ecclesiasticall cognizance; but as to the monument, action is given (as hath been said) at the common law for the defacing thereof.[21]

The rejection by Lord Coke and his contemporaries of a property right in a dead body formulated the common-law doctrine in the ownership of the dead.[22] As the Court of Appeals stated, "Coke's classic edict is of more than historical interest; it has been a staple of the common law."[23]

B. Rejection of Ecclesiastical Law and Lord Coke's Dictum

The United States "adopted many of the laws and institutions of England in the formation of our government, [but it] persistently, constantly, and successfully…resisted all attempts on the part of ecclesiastical authorities or churches to usurp or control the powers and rights of the legislative or judicial departments of this country."[24]

> The English emigration to America—the most momentous event in political history—commenced in the very age when Chief-Justice Coke was proclaiming, as a legal dogma, the exclusive authority of the Church over the dead. The liberty-loving, God-fearing Englishmen who founded these American States, had seen enough of 'ecclesiastical cognizance,' and they crossed a broad and stormy ocean to a new and untrodden continent, to escape from it forever.[25]

However, Lord Coke's "classic edict" became part of Anglo-American law, but criticism of his dictum by the referee in *In re Widening of Beekman Street* changed the view courts held on the ownership of the dead.[26]

In *Beekman Street*, the subject of the right of burial and the protection of corpses arose when New York City condemned land in an 18th century church cemetery in order to widen a street. Considered "the premier American case on the right to burial of a dead body,"[27] it was referred to Samuel B. Ruggles to determine the rights respecting reburial of disinterred bodies.[28] In 1856, he issued a "learned and elaborate" report, which the court confirmed in all aspects.[29]

Ruggles questioned "both the wisdom and the etymology [of Coke's] verbal deceit...[that] "[t]he burial of a cadaver, this is, caro data vermibus (flesh given to worms) is nullius in bonis and belongs to ecclesiastical cognizance."[30] He contended that Coke's dictum did not preclude an individual's legal interest in a corpse, but rather:

> only that the burial was "nullius in bonis"; and this assertion was legally true in England, where it was made, for the peculiar reason…that the temporal office of burial had been brought within the exclusive legal cognizance of the Church, who could and would enforce all necessary rules for the proper sepulture and custody of the body, thus rendering any individual action in that respect unnecessary.[31]

He asserted that the right to protect the dead was not eradicated by the Norman Conquest, although the ecclesiastics, "who poured into England with the Conqueror exerted themselves actively and indefatigably to monopolize for the Church the temporal authority over the dead."[32] Instead, the right to protect the dead "was a concentration in the ecclesiastical body, of every right which any individual had previously possessed to secure their repose. The individual right was not extinguished; it was only absorbed by the Church."[33]

Ruggles found that much of the difficulty regarding the subject of whether a body was entitled to protection arose from the "false and needless assumption…that nothing is property that has not a pecuniary value."[34] The real question was not "the disposable, market value of a corpse or its remains as an article of traffic [but rather it was] the sacred and inherent right to its custody in order decently to bury it and to secure its undisturbed repose."[35] Thus, he opined that adopting English ecclesiastical law "would be an eternal disgrace to American jurisprudence [because its dogma that] a child has no claim, no such exclusive power, no peculiar interest in the dead body of its parent [was] utterly inconsistent with every enlightened perception of personal right [and] inexpressibly repulsive to every proper moral sense."[36]

After a "quite full and interesting discussion" of the history of burial and the disposition of the body after death in the report,[37] Ruggles determined that "no ecclesiastical element exists in the jurisprudence of [New

York] State, or in the framework of its government" and should have no influence on the rights inherent in, and related to, the dead and their resting place.[38] Accordingly, he submitted the following conclusions:

1. That neither the corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognizance nor to sacerdotal power of any kind.
2. That the right to bury the corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect.
3. That such right, in the absence of any testamentary disposition, belongs to the next of kin.
4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.
5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reinterring their remains.[39]

Ruggles was aware that his answers to the questions of "Who is legally and primarily entitled to the custody of a dead body? and as a necessary result, Who is legally bound to bury it? and further, if a body be ejected from its place of burial, Who then is legally and primarily entitled to its custody, and who is bound to rebury it?" would be important, not just for the *Beekman Street* case, but also for furnishing a rule in other cases.[40] Indeed, Ruggles' report, cited with approval in nearly all subsequent cases involving rights in the dead, "has exerted more influence on American decisions in this field than any other piece of literature, judicial or otherwise."[41]

C. New York Courts Recognize a Quasi-Property Right to a Corpse and Recovery for "Mental Suffering and Injury to the Feelings" for Violation of the Right of Sepulcher

In the 19th century, the combination of conflict between family members over control of the deceased's body for burial, unauthorized autopsies, and body-snatching from graveyards by thieves and medical students,[42] and the growing use of cremation as an alternative to burial led to an "outpouring" of cases regarding the dead.[43] This flood of cases led to judicial recognition of the exclusive right of the next of kin to possess and control the disposition of the bodies of their loved ones, the violation of which was actionable at law.[44]

During this period, New York courts were guided by decisions in other jurisdictions. In particular, they looked to *Pierce v. Proprietors of Swan Point Cemetery* for precedent in recognizing a quasi-property right to a body, and to *Larson v. Chase* for precedent in allowing recovery for emotional injury in right of sepulcher actions.[45]

In *Pierce*, the Rhode Island court expressly stated that there is no property right in a corpse, "using the word in the ordinary sense…[, but it understood that] the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property."[46] The court considered the body "as a sort of *quasi* property, to which certain persons may have rights as they have duties to perform towards it arising out of our common humanity," such as the duties to bury the dead and to protect the corpse from violation.[47] Nevertheless, the person having charge of the body was not "the owner of it in any sense whatever [; rather, this person held it] only as a sacred trust for the benefit of all who may from family or friendship have an interest in it…"[48]

In the seminal case of *Larson*, which "appears to have been the first case in the United States recognizing a cause of action for unlawful autopsy,"[49] the Minnesota court that held the widow could recover for "mental suffering and injury to the feelings" for the unlawful mutilation and dissection of her husband's corpse, even though she could not claim pecuniary damages from the dissection itself.[50] *Larson* rejected the conclusion that trespass was the only action that could be brought for mutilating or disturbing remains, as common sense dictated that the real and substantial wrong was an indignity to the dead, not a trespass on the land.[51]

In 1896, in *Foley v. Phelps*, a case of first impression in New York, the issue was whether the defendant was civilly liable to Mrs. Foley for the unauthorized autopsy performed on her late husband's remains.[52] The court found "a sort of *quasi* property right" in the "duty imposed by the universal feelings of mankind to be discharged by some one [sic] toward the dead" and a duty and also a right "to protect [the dead] from violation, and a duty on the part of others to abstain from violation."[53]

Nonetheless, the court was not "disposed to put the right of the plaintiff to maintain this action on the ground of a property right in the remains of her husband."[54] Instead, "[i]rrespective of any claim of property," the court determined that Mrs. Foley, as the decedent's nearest relative, had a clear legal right to the possession of her husband's corpse for the purpose of burial.[55]

> That right of possession is a clear legal right, and to use the language of Mr. Ruggles in his valuable report, adopted by the court, in the Brick Church Case, 4 Bradf. (Sur.) 532, 'The right to bury a corpse, and to preserve its remains, is a legal right, which the courts of law will recognize and protect.' The right is

> to the possession of the corpse in the same condition it was in when death supervened.[56]

Violating Mrs. Foley's "right to what remains when the breath leaves the body [not] to a hacked, hewed, and mutilated corpse…" furnished a ground for a civil action for damages.[57] While the court considered *Larson's* opinion in allowing recovery for mental injury "well-considered and well-reasoned," it declined "to express any opinion with respect to the measure of damages in a case of this kind [but the court was] satisfied that the action [would] lie, and [would] lie in favor of the widow."[58]

Recovery for emotional injury in right of sepulcher actions was recognized in New York in 1911, when the Court of Appeals decided *Darcy v. Presbyterian Hospital in the City of New York*.[59] Jane Darcy sought to recover damages from the defendant for interfering with her right to possess her deceased son's body and for performing an autopsy on his body without her authorization.[60] The Court approved of the rule adopted in *Larson* and held that Mrs. Darcy, being the mother and the nearest surviving kin to the decedent, was entitled to "recover damages for her wounded feelings and mental distress" resulting from the unauthorized autopsy.[61]

Although New York courts accept the concept of a quasi-property right in a corpse,[62] they nonetheless carefully point out that a quasi-property right in a dead body is "clearly distinguishable from the right of ownership."[63] They have consistently stated that there is no property right in the ordinary, proprietary, commercial sense of the term in a dead body;[64] rather, the body was only "regarded as property so far as it is necessary to entitle the next of kin to legal protection from violation or invasion of its place of burial."[65]

However, the concept of a quasi-property right has been criticized as a "legal fiction" created by courts as a means of awarding damages to the deceased's next of kin.[66] As stated by Prosser in The Law of Torts, "[i]t seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer."[67]

D. The Right of Sepulcher in the 21st Century

New York courts in the 21st century have reviewed the rights inherent in, and relating to, a dead body or its parts, but they have not modified the common-law right of sepculcher. *Colavito v. New York Organ Donor Network, Inc.*[68] and *WTC Families for a Proper Burial, Inc. v. City of New York*[69] are two cases decided by modern courts.

In *Colavito*, when the Court of Appeals heard the issue of whether a specified donee of an anatomical gift could sustain a claim for conversion, it reviewed the right in a deceased human body and its parts.[70] After Robert Colavito's longtime friend died, his friend's widow directed a donation of both kidneys to Colavito, who was on a waiting list for a kidney transplant.[71] After Colavito had been fully prepped for surgery, an aneurysm was found in the kidney, rendering it unfit for transplant.[72] His surgeon contacted the New York Organ Donor Network and asked for the other kidney but was informed that it had been allocated to someone else, contrary to the wishes of the donor's widow.[73] Subsequent tests indicated that both kidneys were histoincompatible with Colavito's antibodies, and therefore, even if the other kidney had been available, it would not have been of use to Colavito.[74]

Colavito argued that upon the widow's directed organ donation, the kidneys, unconditionally and irrevocably, became his property, and that the defendants' actions constituted conversion because they intentionally and wrongfully acquired the other kidney when they misdirected it to another transplant recipient.[75] He maintained that the incompatibility of the kidneys had no bearing on the fact that the defendants misappropriated the other kidney.[76]

The district court granted the defendants' motion for summary judgment, concluding "that it would be against public policy to engage in a valuation of Mr. Colavito's kidneys, which are not property" and "inappropriate to expand the limited right that courts recognize in a deceased's body, which only belongs to the next of kin to ensure proper burial."[77] Colavito appealed.

Determining that the case raised novel and important questions of New York law, the Second Circuit reserved judgment on the conversion claim and certified several questions to the New York Court of Appeals, including:

> Do the applicable provisions of the New York Public Health Law vest the intended recipient of a directed organ donation with rights that can be vindicated in a private party's lawsuit sounding in the common law tort of conversion or through a private right of action inferred from the New York Public Health Law?[78]

The Court of Appeals answered in the negative, basing its answer on the fact that the kidney was an incompatible match to Colavito: "as a specified donee of an incompatible kidney, [Colavito] had no common-law right to the organ. For that reason, his cause of action of conversion must fail, as it is necessarily based on his claimed right to possess the kidney in question."[79]

Colavito's private cause of action under the New York Public Health Law also failed because the statute

is available only to those who fall within the statutory term "donee."[80] The Court construed "donee" as "someone who needs the donated organ" and because the kidney was medically incompatible with Colavito, he did not "need" the organ.[81]

In light of the Court of Appeals' answer to its certified question, the Second Circuit concluded that Colavito had no cause of action under either the common law of conversion or the Public Health Law.[82] The defendants, therefore, were entitled to summary judgment.[83]

WTC Families resulted from the September 11, 2001 terrorist attacks on the World Trade Center. In this case, the plaintiffs contended that commingling the remains of their deceased with other debris from the World Trade Center site, and permanently leaving those commingled remains at a landfill, violated their right to possess and bury the bodies of their next of kin.[84]

In addressing the plaintiffs' allegations, federal courts relied on the doctrine of a quasi-property right in a dead body, noting that:

> New York law recognizes a quasi-property right of the next of kin in the remains of a deceased person for the purposes of ensuring a proper disposal of the remains. The right is not a property right in the ordinary sense of the term; rather the right extends only as far as necessary to entitle the next of kin to protection from violation or invasion of the place of burial, and to protect the next of kin's right to ensure a proper burial.[85]

Although acknowledging that a "'quasi-property right' has been extended to identifiable, recoverable bodies of the next of kin," the court found that this right did not extend to "an undifferentiated mass of dirt that may or may not contain undetectable traces of human remains not identifiable to any particular human being."[86] "Without something tangible or identifiable, there is no property right."[87]

Thus, "a total and complete absence of identifiable remains of any identifiable person" was fatal to the plaintiffs' Constitutional claims.[88] It was also fatal to their claims under New York's conversion, burial, and/or public health laws "because without identified remains of an identifiable deceased, there is no person, or part of a person, and there can be no right, to bury."[89]

IV. *Shipley v. City of New York*

In *Shipley v. City of New York*, the Court of Appeals held that a medical examiner does not have a mandated obligation—pursuant to the New York Public Health Law and the common-law right of sepulcher—to notify a decedent's next of kin that, although a decedent's body is available for burial, organs and/or tissues have been retained for further examination and testing as part of an authorized autopsy.[90] Judge Pigott wrote the majority opinion, with Judges Read, Abdus-Salaam, Stein, and Fahey concurring. Judge Rivera dissented in an opinion in which Chief Judge Lippman concurred.

Jesse Shipley, a 17-year-old high school senior, died in an automobile accident on January 9, 2005.[91] The day following the accident, with the consent of Jesse's father,[92] Dr. Stephen de Roux, a forensic pathologist and a medical examiner employed by the Office of the New York City Medical Examiner, conducted an autopsy at the Richmond County Mortuary. Mr. Shipley asked the medical examiner to make his son's body "as presentable as possible" for the funeral.[93]

During the autopsy, the medical examiner removed the decedent's brain and took tissue samples from other organs for further examination.[94] The brain was placed in a jar "fixed in formalin for [subsequent] neuropathologic examination and reporting" and was placed in a cabinet in the autopsy room of the Richmond County Mortuary.[95]

The autopsy was completed within 24 hours of Jesse's death, and his body was released to a funeral home for burial.[96] A wake and funeral were held, and Jesse's remains were interred on January 13, 2005.[97]

In March 2005, forensic science students and a teacher from Jesse's high school participated in a field trip to the Richmond County Mortuary.[98] During a tour of the autopsy room, the students observed a jar containing a brain and labeled with Jesse's name.[99] This information was relayed to Jesse's sister, who informed her parents.[100]

The Shipley's priest informed them that, under Catholic dogma, their son's burial was not proper without the remaining body parts.[101] In response to the Shipleys' request, the Medical Examiner's Office returned the brain and the retained samples from other organs. They were placed in a "little casket"[102] and a second funeral and burial service was held.[103]

On March 31, 2006, Jesse's parents and sister commenced an action against the City of New York and the Medical Examiner's Office (collectively, the "City"), alleging negligent infliction of emotional distress resulting from the public display and alleged mishandling and withholding of their son's brain.[104] A lengthy court battle ensued.[105]

A bifurcated trial was held, and on the issue of liability, the trial court granted the Shipleys' motion for a directed verdict.[106] Following a trial on damages, the jury awarded $1 million for the Shipleys.[107] The City's motion to set aside the verdict, on the basis that the award exceeded reasonable compensation, was de-

nied.[108] The Appellate Division affirmed the judgment entered upon the Shipleys stipulating to a reduced award of $300,000 to each individual plaintiff.[109]

The Court of Appeals granted the City leave to appeal. Oral arguments were held on January 5, 2015, but as two vacancies existed on the Court, only five judges heard the arguments. Realizing they were unlikely to reach a four-judge majority, the five judges decided to hold rearguments.[110] After Judges Stein and Fahey were appointed to the Court, oral arguments were heard again on May 7, 2015.

The pertinent issue on appeal was "whether, in the exercise of his statutory duties and obligations, the medical examiner nevertheless had a common-law and statutory duty to notify the Shipleys of his retention of certain organs and tissues, and therefore violated the Shipleys' common-law right of sepulcher and the Public Health Law when he failed to do so."[111] The Court dismissed the complaint in its entirety, finding:

> there is simply no legal directive that requires a medical examiner to return organs or tissue samples derived from a lawful autopsy and retained by the medical examiner after such autopsy. The medical examiner's obligations under both the common-law right of sepulcher and Public Health Law § 4215(1) are fulfilled upon returning the deceased's body to the next of kin after a lawful autopsy has been conducted.[112]

In reaching this conclusion, the Court first recognized that "the right of sepulcher is premised on the next of kin's right to possess the body for preservation and burial (or other proper disposition), and is geared toward affording the next of kin solace and comfort in the ritual of burying or otherwise properly disposing of the body."[113] Therefore, "it is the *act of depriving the next of kin of the body*, and not the deprivation of organ or tissue samples within the body, that constitutes a violation of the right of sepulcher."[114] The Shipleys were not deprived of their son's body; it was returned to them once the authorized autopsy had been conducted and was thus available for preservation and burial.[115]

The Shipleys' right of sepulcher could be violated only if the common law directed the medical director to return to the next of kin, once the authorized autopsy was conducted, their decedent's body and the organs and tissue samples as well.[116] However, New York's "right of sepulcher jurisprudence does not mandate that a medical examiner return [a] decedent's organs and tissue samples."[117]

The issue of whether the medical examiner had a ministerial duty pursuant to Public Health Law § 4215(1) boiled down to whether the statutory language "'remains of the body' refers to what is left of the body *after* an autopsy is conducted (as the City argue[d]) or whether it requires the medical examiner to turn over not only the body but also any organs or tissue samples that have been removed during the autopsy (as the Shipleys contend[ed])."[118] Section 4215(1) provides:

> [i]n all cases in which a dissection has been made, the provisions of this article [42, entitled "Cadavers"], requiring the burial or other lawful disposition of a body of a deceased person, and the provisions of law providing for the punishment of interference with or injuries to it, *apply equally to the remains of the body after dissection as soon as the lawful purposes of such dissection have been accomplished*.[119]

After reviewing language in other sections of the Public Health Law, the Court interpreted the statute as excluding organs removed during an autopsy, reasoning that "[h]ad the Legislature so intended, rather than utilizing the phrase 'remains of the body,' it could have utilized the specific words 'tissue, organ or part thereof' as it has done in other sections of article 42 of the Public Health Law."[120] Since the Legislature did not do so, the Court found "there is no language that would cause a medical examiner to divine from section 4215(1) that he or she is required to return not only decedent's body, but the organs and tissue samples that the medical examiner is legally permitted to remove."[121]

> Thus, because there was no governing rule or statutory command requiring a medical examiner to turn over organs and tissue samples, it could not be said that he or she has a ministerial duty to do so. At most, a medical examiner's determination to return only the body without notice that organs and tissue samples are being retained is discretionary, and, therefore, no tort liability can be imposed for either the violation of the common-law right of sepulcher or Public Health Law § 4215(1).***Absent a duty to turn over organs and tissue samples, it cannot be said that the medical examiner has a legal duty to inform the next of kin that organs and tissue samples have been retained.[122]

V. Conclusion

Since the earliest pre-Christian civilizations, virtually every faith and society has provided the dead with a proper burial.[123] "The ancient concept that every person is entitled to a proper burial…provides the ori-

gins of American jurisprudence concerning the right of sepulcher."[124]

Neither the right of sepulcher nor the Public Health Law requires a medical examiner to notify the next of kin that organs, tissues, and other specimens were removed from the body or to return them to the next of kin prior to burial or other disposition of the body. Whether a medical examiner's obligations will be broadened depends on the state Legislature. As Judge Pigott, writing for the majority in *Shipley*, stated, "it is the Legislature that is in the best position to examine the issue and craft legislation that will consider the rights of families and the next of kin while concomitantly taking into account the medical examiner's statutory obligations to conduct autopsies."[125]

Endnotes

1. *Louisville & Nashville Railroad Co.*, 123 Ga. 62, 51 S.E. 24, 25 (1905).
2. *Shipley*, 25 N.Y.3d 645, 648, 37 N.E. 58 (2015).
3. *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 258, 115 N.E. 715, 718 (J. Pound, concurring).
4. *Shipley*, 25 N.Y.3d at 653, 37 N.E.3d at 58 (stating it "is less a quasi-property right and more the legal right of the surviving next of kin to find 'solace and comfort' in the ritual of burial") (citations omitted).
5. *Stahl v. William Necker, Inc.*, 184 A.D. 85, 90-90, 171 N.Y.S. 728, 732 (1st Dep't 1918); *see also Shipley*, 25 N.Y.3d at 653, 37 N.E.3d at 58 (stating it "is less a quasi-property right and more the legal right of the surviving next of kin to find 'solace and comfort' in the ritual of burial") (citations omitted).

   Even if interference with immediate possession of the decedent's body was only for a matter of minutes, liability may be triggered. *Gratton v. Baldwinsville Academy and Central School*, 49 Misc.2d 329, 330, 267 N.Y.S.2d 552, 553 (Sup. Ct., Onondaga Co. 1966). In *Gratton*, the court allowed recovery where the defendant deprived the mother for some three or four minutes of the right to view and take possession of her daughter's body after she drowned in the defendant's swimming pool. "[B]rief though the period of deprivation may have been [the court found] it still would be sufficient for a Court to grant damages for such denial. The cause of action for emotional upsetness and disturbance certainly does exist in this State." *Id*. at 330, 267 N.Y.S.2d at 553 (citations omitted).
6. *See, e.g*, *Shipley*, 25 N.Y.3d 645, 37 N.E.3d at 58 (noting that an unauthorized autopsy is deemed an unlawful mutilation by the courts in New York); *Lubin v. Sydenham Hosp.*, 181 Misc. 870, 42 N.Y.S. 654 (Sup. Ct., N.Y. Co. 1943) (where the hospital refused to hand over to the mother for burial the body of her child, who had been born in a calcified condition, also known as a stone baby); *Drever v. State of New York*, 45 Misc.3d 224, 984 N.Y.S.2d 550 (Ct. Cl. N.Y. 2014) (where harvesting of the decedent's eyes, without the decedent's consent to being an organ donor, constituted an unauthorized interference with the claimant's immediate possession of her mother's intact body); *Emeagwali v. Brooklyn Hosp. Ctr.*, 11 Misc.3d 1055(A), 815 N.Y.S.2d 494 (Sup. Ct., Kings Co. 2006) (where the hospital did not have permission to dispose of the plaintiffs' stillborn child's body, which was never recovered); *Correa v. Maimonides Med. Ctr.*, 165 Misc.2d 614, 629 N.Y.S.2d 673 (Sup. Ct., Kings Co. 1995) (where the hospital lost the corpse of the plaintiffs' stillborn child); *Lott v. State of New York*, 32 Misc.2d 296, 225 N.Y.S.2d 434 (Ct. Cl., N.Y. 1962) (where the hospital provided the undertaker with the wrong body, and the undertaker physically mishandled the body by means of unauthorized embalming and application of cosmetics, and consequently, the decedent was not prepared for burial according to the requirements of her faith); *Massaro v. Charles J. O'Shea Funeral Home, Inc.*, 292 A.D.2d 349, 738 N.Y.S.2d 384 (2d Dep't 2002) (where the casket was cracked and leaked, causing a noxious odor to emanate from the mausoleum, there was an improper dealing with the body); *Wainwright v. N.Y.C. Health and Hosp. Corp.*, 61 A.D.3d 851, 877 N.Y.S.2d 201 (2d Dep't 2009) (where the decedent's body became badly decomposed after being placed in a malfunctioning refrigerated unit in the defendant's mortuary for five days); *Schwartz v. State of New York*, 162 Misc.2d 313, 616 N.Y.S.2d 921 (Ct. Cl., N.Y. 1994) (where there was an unauthorized autopsy performed on an inmate); *Rotondo v. Reeves*, 153 Misc.2d 769, 583 N.Y.S.2d 739 (Sup. Ct., Wayne Co. 1992), *rev'd in part on other grounds*, 192 A.D.2d 1086, 596 N.Y.S.2d 272 (4th Dep't 1993) (where the coroner misidentified the remains of the pet rabbit as those of the child, who died in a fire, and later, when the child's father was looking through the debris of the premises where the fire had occurred, he came upon the remains of his child, which had been mangled and disemboweled by animals); *Weingast v. State*, 44 Misc.2d 824, 254 N.Y.S.2d 952 (Ct. Cl., N.Y. 1964) (where the claimants were awarded damages for mental suffering as a result of a reversal of identity which occurred between two patients at a state hospital and their decedent was buried without notice to the claimants); *Coto v. Mary Immaculate Hosp.*, 26 Misc.3d 1205(A), 906 N.Y.S.2d 778 (Sup. Ct., Queens Co. 2006) (where the hospital did not make attempts to notify the decedent's next of kin for months following his death); *Melfi v. Mt. Sinai Hosp.*, 64 A.D.3d 26, 877 N.Y.S.2d 300 (1st Dep't 2009) (where the morgue made no effort to identify or locate the next of kin).
7. *Shipley* 25 N.Y.3d at 653, 37 N.E.3d at 58 (*citing Melfi*, 64 A.D.3d at 32, 36-37, 877 N.Y.S.2d at 305).

   Punitive damages have been awarded in a loss of sepulcher claim. *See, e.g., Melfi*, 64 A.D.3d at 41-42, 877 N.Y.S.2d at 310 (recognizing that punitive damages may be awarded if the conduct was willful and in conscious disregard of others); *Liberman v. Riverside Mem. Chapel*, 225 A.D.2d 283, 289-291, 650 N.Y.S.2d 19, 199-200 (1st Dep't 1996) (upholding the jury award for punitive damages against the defendant, although not the precise amount, based on evidence that the defendant "advertised itself as adhering to the highest standards of Jewish funerary practices with a special understanding of the needs of Jewish families" but acted "consciously and deliberately in complete disregard of both civil and religious law in its actions...").

   In *Bernstein*, the plaintiff attempted to add "a new twist" to the right of sepulcher by claiming such a right in her own body. 2012 WL 3887228 at *7. She sought recovery for emotional damages from her inability to be buried next to her husband because other family members had been mistakenly buried in the plot next to her husband. The court disagreed as the plaintiff proffered "neither a convincing argument, nor authority for this Court to recognize the extraordinary right to possess a present solace and comfort on one's own future burial." *Id*.

   To establish a cause of action and recover damages for emotional injury for violation of the right of sepulcher, the plaintiff must establish that: (1) the plaintiff is the decedent's next of kin; (2) the plaintiff had the right to possess the decedent's body; (3) the defendant interfered with the plaintiff's right of sepulcher; (4) the interference was unauthorized; (5) the plaintiff was aware of the interference; and (6) the interference caused the plaintiff mental anguish. *Shepherd v. Whitestar Dev. Corp.*, 113 A.D.3d 1078, 1080, 977 N.Y.S.2d 844, 846 (4th Dep't 2014) (citation omitted). A cause of action does not accrue until interference causes mental anguish for the next of kin. *Melfi*, 64 A.D.3d at 32, 877 N.Y.S.2d at 304 (stating "Further, because the injury is emotional or mental, it is axiomatic that a plaintiff must be aware of the interference giving rise to his/her distress before he/she can actually experience distress."); *accord Tinney v. City*

of New York, 94 A.D.3d 417,418, 941 N.Y.S.2d 571, 572 (1st Dep't 2012).

8. *Shipley*, 80 A.D.3d 171, 177, 908 N.Y.S.2d 425, 431(2d Dep't 2010), *lv. to appeal granted*, 22 N.Y.3d 857 (2013*), on remand to*, 24 N.Y.3d 1116 (2015), *rev'd by*, 25 N.Y.3d 645,37 N.E.3d 58 (2015) (recognizing the likelihood of emotional injury in right of sepulcher actions "is deemed so inherently genuine in such cases that neither proof of the plaintiffs' accompanying physical harm nor of a specific medical diagnosis and course of treatment is essential to a successful prosecution of the claim," and therefore, emotional injury is generally presumed); *Correa v. Maimonides Med. Ctr.*, 165 Misc.2d at 620, 629 N.Y.S.2d at 677 (where the hospital lost the corpse of the plaintiffs' stillborn child, there was "'an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious'") (citation omitted); *Plunkett v. NYU Downtown Hosp.*, 21 A.D.3d 1022, 801 N.Y.S.2d 354 (2d Dep't 2005) (stating "While evidence of a specific medical diagnosis or course of treatment may be relevant to the issue of damages, it is not essential to the prosecution of such an inherently genuine claim.").

9. 14 N.Y. Practice, New York Law Of Torts, §§ 6:28, 21.23 (August 2014); *see also Johnson v. State of New York*, 37 N.Y.2d 378, 381-382, 372 N.Y.S.2d 638, 641 (1975) (stating "In the absence of contemporaneous or consequential physical injury, courts have been reluctant to permit recovery for negligently caused psychological trauma, with ensuing emotional harm alone… There have developed, however, two exceptions. The first is the minority rule permitting recovery for emotional harm resulting from negligent transmission by a telegraph company of a message announcing death. The second exception permits recovery for emotional harm to a close relative resulting from negligent mishandling of a corpse."); *Bernstein*, 2012 WL 3887228 at *6 (recognizing that the ancient right of sepulcher is one of the well-established exceptions recognized by New York courts where damages for emotional harm can be awarded even if not accompanied by physical injury); *Whack v. St. Mary's Hosp.*, 2003 WL 230702 at *3 (Civ. Ct., N.Y.C. 2003) (stating "While New York courts have consistently held that negligent conduct causing injury is not actionable by those who witness it unless they are both immediate family and in the zone of danger, it can be understood that the courts view matters involving the mishandling of corpses differently.").

   "In New York, right of sepulcher cases are a subset of negligence causes of action." *Matter of Human Tissue Litigation*, 38 Misc.3d 184, 199, 955 N.Y.S.2d 721, 732 (Sup. Ct., Richmond Co. 2012) (noting American courts use tort law rather than property law to award damages and stating "the editors of the New York Practice Series-New York Law of Torts placed this cause of action in a section entitled 'Duty not to inflict emotional distress—Special circumstances and special duty cases.'"); *accord Drever*, 45 Misc.3d at 231, 984 N.Y.S.2d at 556.

10. *In re Widening of Beekman Street*, 4 Bradf. Sur. 503, 518 (N.Y. 1856).

11. *Id.*

12. *Id.* (stating the separation of the lay and clerical order had a "plainly discernible" effect upon the dead).

13. *Id.* at 518-519.

14. *Id.*

15. *Id.* at 519 (stating "But these they guarded with singular solicitude. The tombstone, the armorial escutcheons, even the coat and pennons, and ensigns of honor, whether attached to the church edifice or elsewhere, were raised as 'heirlooms' to the dignity of inheritable estates, and descended from heir to heir, who could hold even the parson liable for taking them down or defacing them.").

16. *Colavito v. New York Organ Donor Network, Inc.*, 438 F.3d 214, 223 (2d Cir.2006) (citation omitted), *certified question answered by*, 8 N.Y.3d 43, 827 N.Y.S.2d 96 (2006), *answer to certified question conformed to and aff'd*, 486 F.3d 78 (2d Cir. 2007) (citation omitted); *see also Beekman Street*, 4 Bradf. Sur. at 521 (stating "that the temporal office of burial had been brought within the exclusive, legal cognizance of the Church, who could and would enforce all necessary rules for the proper sepulture and custody of the body, thus rendering any individual action in that respect unnecessary"); *Griffith v. Charlotte, Columbia & Augusta R. R. Co.*, 23 S.C.25, 41, 55 Am.Rep.1 (S.C. 1885) (stating "We have looked diligently through the common law reports of England, and have found no case in which the civil courts have been appealed to in matters connected with the bodies of the dead. On the contrary, their burial, the graveyards and cemeteries in which they are interred, and the religious ceremonies observed, have been left exclusively to ecclesiastical cognizance, the civil courts universally holding, in the language of Lord Coke, that the burial of the cadaver is *nullius in bonis*.").

17. *In re Donn*, 14 N.Y.S. 189, 190 (Sup. Ct., Erie Co. 1891); *see also Cohen*, 85 A.D. at 67, 82 N.Y.S. at 919 (acknowledging the common law did not confer upon an heir a property right in the body of an ancestor, even though an heir possessed rights in monuments and escutcheons); *Melfi*, 64 A.D.3d at 34 (stating "The church enforced all the necessary rules for proper sepulture, that is, for the burial and the custody of the buried remains, rendering any individual action in that respect unnecessary.") (citation omitted).

18. *Donn*, 14 N.Y.S. at 190; *Cohen*, 85 A.D.at 67, 82 N.Y.S. at 919.

19. *Beekman Street*, 4 Bradf. Sur. at 519; *Kellogg*, 189 Misc.3d at 761, 735 N.Y.S.2d 350 (stating "The prevailing principle, as expressed in the ecclesiastical law of England, was that the law did not recognize a property right in a dead body, and thus a wrong to the body itself was not actionable.").

20. *Beekman Street*, 4 Bradf. Sur. at 519; *see also Johnston v. Marinus*, 18 Abb. N. Cas. 72, 80 (Sup. Ct., N.Y. Co. 1886) (stating "A suit for trespass could be maintained by the owner of the land or person having charge or custody of it, against any person disturbing a grave, and the party who had caused the burial, or next of kin, could bring an action for any injury done to the monuments, erected by them over the grave, or for carrying off the coffin and habiliments furnished by them, and could even maintain a bill in equity to prevent such injury or removal.") (citation omitted).

21. Edward Coke, "The Third Part of The Institutes of the Law of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes," at 203 (1644)); *see also Beekman Street*, 4 Bradf. Sur. at 520.

22. *Melfi*, 64 A.D.3d at 35, 877 N.Y.S.2d at 306 (stating "Coke's statement was interpreted by many contemporaries as rejecting a property right in corpses. Unfortunately, this interpretation was imported into Anglo-American law and ultimately led to the conflation of the common-law right of sepulcher with the common-law right of interment or sepulture."); *In re Johnson's Estate*, 169 Misc. 215, 217-218, 7 N.Y.S. 81,83-84 (Sur. Ct., N.Y. Co. 1938) (stating "The body was the temple of the Holy Ghost from which man at his death was temporarily to be separated. That this sacred object should be property was unthinkable to Lord Coke and his contemporaries."); *Larson v. Chase*, 47 Minn. 307, 310 50 N.W. 238, 239 (Minn. 1891) (stating "The doctrine that a corpse is not property seems to have had its origin in the dictum of Lord Coke, 3 Inst. 203, where, in asserting the authority of the church, he [stated his classic edict].").

   Sir William Blackstone, an English jurist and judge, reiterated the common law doctrine that there is no property right in a corpse: "But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can [an heir] bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried." 2 William Blackstone, Commentaries on the Law of England at 429 (1811); *see Newman*, 287 F.3d at 791 (stating "Many early American courts adopted

Blackstone's description of the common law, holding that 'a dead body is not the subject of property right.'") (citation omitted).

23. *Colavito*, 8 N.Y.3d 43, 50, 827 N.Y.S.2d 96, 100 (2006).

24. *Donn*, 14 N.Y.S. at 190; *see also Darcy v. Presbyterian Hosp. in City of New York*, 202 N.Y. 259, 262, 95 N.E. 695 (1911) (stating "While we adopted the common law in organizing our state governments, we have never considered ourselves bound by the ecclesiastical decisions, many of which were inapplicable for our form of government."); *A.F. Hutchinson*, 127 Misc. at 562, 217 N.Y.S. at 418 (stating "The maxims, doctrines, and practices of the ecclesiastical law of England have never become a part of our system of jurisprudence.").

25. *Beekman Street*, 4 Bradf. Sur. at 526.

26. *Larson*, 47 Minn. at 309, 50 N.W. at 239; *see also Griffith*, 23 S.C. at 39, 55 Am.Rep.1 (stating "[T]o make such venerated remains the absolute property of any one, in the sense of objective appropriation, would be abhorrent to every impulse and feeling of our natures."); *Melfi*, 64 A.D.3d at 34-35, 877 N.Y.S.2d at 306 (where the court considered the importation of Coke's pronouncement into American jurisprudence as unfortunate because it "ultimately led to the conflation of the common law right of sepulcher with the common law right of interment or sepulture").

27. Walter F. Kyzenski, *Property in Dead Bodies*, Marquette Law Review, Vol. 9 Art. 3, Issue I, December 1924, at 17; *see also* R.P. Taylor, *Right of Sepulture*, 53 Am. L. Rev. 362 (1919) (stating Ruggles' report "has been said to be the most accurate and elaborate collection and statement upon the subject of burial yet").

28. The City made an award to the owners, proprietors, and parties interested in the land taken to widen the street. The court held the award until their respective interests in the award could be determined. The Brick Presbyterian Church claimed the whole amount awarded, subject to the rights of persons claiming rights to vaults and graves. Ruggles was directed by the court to investigate the facts and report the amount due from the fund.

    Of the 80 or more graves within the strip of land taken by the City, only a small number were identified. The remains of Moses Sherwood were identified by his daughter, Maria Smith, who, acting for her brothers and sisters and their descendants, claimed that her father's remains should be reinterred in a separate grave, in a suitable locality selected by her; that the existing monument be erected over the separate grave; and that the necessary expenses be defrayed out of the fund in the court.

29. 2 The American Ruling Cases, National Law Book Company, at 1112 (1914); *Renihan v. Wright*, 125 Ind. 536, 542, 25 N.E. 822, 824 (1890) (stating "Mr. Ruggles filed his report and the case coming on for hearing at the special term of the Supreme Court, in April, 1856, the report, as the law of the case, was affirmed.").

30. *Beekman Street*, 4 Bradf. Sur. at 520 (stating "With all proper respect for the legal learning of this celebrated judge, we may possibly question both the wisdom and the etymology of this verbal deceit, this fantastic and imaginary gift, or outstanding grant to the worms. In the English jurisprudence, a corpse was not given or granted to the worms, but it was taken and appropriated by the Church***The learned lexicographers and philologists, Martinius and elder Vossius, both of them contemporaries of Coke, wholly dissent from his whimsical derivation.").

31. *Id.* at 521.

32. *Id*. at 525-526.

33. *Id*. at 526.

34. *Id.* at 529.

    One of the anomalies in England's body of law was that the secular tribunals protected the monument and the grave-clothes, but the Church guarded the skull and bones. 2 William Blackstone, Commentaries on the Law Of England, at 429 (1811) (noting that stealing the shroud or other apparel of a corpse was a felony, but stealing the body itself was a misdemeanor); 4 William Blackstone, Commentaries on the Law of England, at 236 (stating "Notwithstanding, however, that no larceny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie, for the goods of a person unknown. This is the case of stealing a shroud out of a grave; which is the property of those, whoever *** they were, that buried the deceased; but stealing the corpse itself, which has no owner (though a matter of great indecency) is no felony, unless some of the grave-clothes be stole with it."); *Pierce*, 10 R.I. at 238 n.1, 14 Am.Rep. 667 (stating "[U]nder the English law, the only protection of a grave, independent of ecclesiastical authority, was by indictment. It was an offense at common law to remove a body. And it was a felony to steal the shroud or apparel."). Ruggles questioned this oddity, "which of these relics best deserve the legal protection of the Supreme Court of law and equity of the State of New York? Does not every dictate of common sense and common decency demand a protection of the grave and all of its contents and appendages?" *Beekman Street*, 4 Bradf. Sur. at 522.

35. *Beekman Street*, 4 Bradf. Sur. at 529.

36. *Id.*; *see also Renihan*, 125 Ind. 536, 25 N.E. at 824 (referring to Ruggles as "the learned" referee and stating his report was "the most accurate and elaborate collection and statement of the law [of burial] yet published").

37. *Larson*, 47 Minn. at 308, 50 N.W. at 239 (stating "A quite full and interesting discussion" ["of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death"] could be found in the report of referee Ruggles).

38. *Beekman Street*, 4 Bradf. Sur. at 532; *see also* 2 The American Ruling Cases, National Law Book Company, 1142 (1914) (noting "the English cases rest on a system of ecclesiastical law unknown in the United States and accordingly are said to be of slight authority"); *Larson*, 47 Minn. at 308, 50 N.W. at 239 (stating "Upon the questions who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common-law authorities are not very helpful or particularly in point for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters.").

39. *Id.* at 532 (where the court directed the petitioner to re-inter separately such remains as were found in other graves, if any, when identified by the next of kin).

40. *Id*. at 515-516.

41. R.P. Taylor, *Right of Sepulture*, 53 Am. L. Rev. 362 (1919); *see also* 2 The American Ruling Cases at 1143; R.F. Martin, *Removal And Reinterment of Remains*, 21 A.L.R. 472, § 4[b] (originally published in 1852) (stating "The quick seizure of his report by the courts, who were not impressed by his learned critics emancipated them from inappropriate English strictures, and with a minimum of legislation made possible the development of an ingenious, useful, and workable body of American law, the internal contradictions and unsoundness of its theory notwithstanding.") (citation omitted); *Pettigrew v. Pettigrew*, 207 Pa.St. 313, 316, 56 A. 878 (Pa. 1904) (stating the report was "said to be the most accurate and elaborate collection and statement upon the subject of burial yet"); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 233 n. 1, 14 Am.Rep. 667 (R.I. 1872) (stating "[Ruggles' report] is a very learned and exhaustive treatise on the law of burial, and will prove of great value to members of the profession interested in this subject."); *Cohen*, 85 A.D. at 67, 82 N.Y.S. 918 (stating "In the report of RUGGLES, Referee, confirmed in all respects (citation omitted), the learned referee, *inter alia*, concluded that the right to protect the remains includes the right to preserve them by separate burial, to select

the place of sepulture, and to change it at pleasure."); *Renihan*, 125 Ind. 536, 25 N.E. at 824 (referring to Ruggles as "the learned" referee and stating his report was "the most accurate and elaborate collection and statement of the law [of burial] yet published"); *Louisville & Nashville Railroad Co*., 123 Ga. 62, 63-64, 51 S.E. 24, 25 (1905) (stating "The subject of the right of burial, and the protection of the bodies of the dead arose in the matter of the widening of Beekman street (sic) in the city of New York, and was referred to Hon. Samuel B. Ruggles, as referee. He made a learned and elaborate report, which was confirmed by the court.").

42. *Johnson's Estate*, 169 Misc. at 220, 7 N.Y.S.2d at 85 (stating "The rise of medical schools, the increase in the number of doctors, and the recognition in medical circles of the need for knowledge of the human body based on the art of dissection resulted in unauthorized autopsies, and body-snatching from graveyards."); Dorothy Nelkin and Lori Andrews, "Do the Dead Have Interests? Policy Issues for Research After Life," 24 Am. J.L. & Med. 261, 263 (1998) (stating "Body snatching from black and almhouse graveyards was rampant in nineteenth century America.").

    Body snatching was so prevalent in Edinburgh, Scotland, that walls and watchtowers were erected around and in cemeteries to protect bodies from being taken from their graves. "William Burke & William Hare, 'The Resurrectionists'," http://scotshistoryonline.co.uk/burke.html. "[O]beying the law of supply and demand," William Burke and William Hare, provided Scottish doctors with corpses of people they had murdered. *Johnson's Estate*, 169 Misc. at 220, 7 N.Y.S.2d at 85 (stating these men provided doctors "what they greatly needed but could not legally obtain in sufficient quantity" by "the development of a business in homicide"). "It was thus that the verb 'to burke'—meaning to kill by suffocation—entered our language." *Id*.

43. *Johnson's Estate*, 169 Misc. at 220, 7 N.Y.S.2d at 85 (noting the use of cremation led to the next of kin contesting the decision of the decedent's testator to cremate the corpse); *see also Colavito*, 8 N.Y.3d at 50, 827 N.Y.S.2d at 100 (stating "A good deal of the [common] law [regarding property rights in the body of a deceased person] arose out of religious and cultural sensibilities involving grave robbery, desecration of corpses and, later on, unauthorized autopsies.").

44. *Id*., 169 Misc. at 220, 7 N.Y.S.2d at 85; *Colavito*, 438 F.3d at 223 (citation omitted).

45. *Pierce*, 10 R.I. 227, 237-238, 14 Am.Rep. 667 (R.I. 1872); *Larson*, 47 Minn. 307, 50 N.W. 238 (Minn. 1891).

46. *Pierce*, 10 R.I. at 237-238, 14 Am.Rep. 667.

47. *Id.* at 242-243, 14 Am.Rep. 667 (stating a court of equity could "regulate it as such, and change the custody if improperly managed"); *see Louisville & Nashville Railroad Co*., 123 Ga. 62, 65, 51 S.E. 24, 26 (1905) (stating "Potter,J., delivered an able opinion in that case [*Pierce*], reviewing the matter both from the standpoint of history and of authority.").

48. *Id.* at 243, 14 Am.Rep. 667.

49. *Kellogg v. Office of Chief Medical Examiner of City of New York*, 189 Misc.2d 756, 762, 735 N.Y.S.2d 350, 357 (Sup. Ct. Bronx Co. 2001)(stating "Surprisingly, despite the long cultural tradition pertaining to decent burial, a private cause of action for unlawful dissection was not recognized at common law. The prevailing principle, as expressed in ecclesiastical law of England, was that the law did not recognize a property right in a dead body, and thus a wrong to the body itself was not actionable.").

50. *Larson*, 47 Minn. at 308, 50 N.W. at 233, 239 (stating "Time will not permit, and the occasion does not require, us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. A quite full and interesting discussion of the subject will be found in the report of the referee (Hon. S.B. RUGGLES) (citation omitted).").

    The *Larson* court also rejected Lord Coke's famous dictum because from a very early date in England, "the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts." *Id*. at 309-310, 50 N.W. at 238-239. Instead, "all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect." *Id*. at 309, 50 N.W. at 238-239. "[T]he mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control." *Id*. at 310, 50 N.W. at 239. Whether a corpse was property in the ordinary or commercial sense or whether it had any value as "an article of traffic" was unimportant to the *Larson* court. *Id*.

    "[T]he important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong." *Id*.

51. *Id*., 47 Minn. at 312, 50 N.W. at 240 (stating "[I]t would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises."); *see also Melfi*, 64 A.D.3d at 34-35, 877 N.Y.S.2d at 306 (stating "Toward the end of the nineteenth century, when mutilation and theft of cadavers rose in proportion to the increasing needs of medical science, the courts purportedly constrained by Lord Coke's dictum, often fashioned remedies by, for example, finding a cause of action in trespass."); *Foley v. Phelps*, 1 A.D. 551, 554, 37 N.Y.S. 471, 473 (1st Dep't 1896) (stating "courts of equity have frequently interfered to protect the remains of the dead, and courts of law have also afforded remedies, through formal legal actions, wherever any element of trespass, real or personal, was associated with the molestation of the remains of the dead."); *Meagher v. Driscoll*, 99 Mass. 281, 284, 60 Am. Dec. 759 (Mass. 1868) (where the court announced that a dead body was not the subject of property and that after burial it became a part of the ground to which it had been committed and concluded that the only action that could be brought for disinterring a body was "trespass *quare clausum*").

52. *Foley*, 1 A.D. at 552, 37 N.Y.S. 471 at 471.

53. *Id*. at 555, 37 N.Y.S. at 473.

54. *Id*., 37 N.Y.S. at 473.

55. *Id*., 37 N.Y.S. at 473 (stating "In more recent times the obdurate common-law rule has been very much relaxed, and changed conditions of society, and the necessity for enforcing that protection which is due to the dead, have induced courts to re-examine the grounds upon which the common-law rule reposed, and have led to modifications of its stringency [and stating that old case law in England did not need to be followed because it was] decided when matters of burial and the care of the dead were within the jurisdiction of the ecclesiastical courts.").

56. *Id*., 37 N.Y.S. at 474.

    Since *Foley*, "[t]he law is clear that the next-of-kin have the right of possession of the corpse in the same condition as it was in when death occurred." *Whack v. St. Mary's Hosp*., 2003 WL 230702 (Civ. Ct., N.Y.C. 2003) (where the body decomposed due to lack of proper refrigeration while it was held in the defendant's morgue and due to the decomposition it could not be embalmed and a proper funeral could not be held).

57. *Foley*, 1 A.D. at 555, 37 N.Y.S. at 474 (acknowledging that *Larson* held, "[t]he right to the possession of a dead body for the purposes of preservation and burial" is a legal right—"one

which the law recognizes and protects, and for any infraction of it,—such as an unlawful mutilation of the remains—an action for damages will lie").

58. *Id*. at 556, 37 N.Y.S. at 474 (also considering *Larson's* opinion "that the right to the possession of a dead body for the purposes of preservation and burial is a legal right—one which the law recognizes and protects" was well-considered and well-reasoned).

59. *Darcy*, 202 N.Y. 259, 95 N.E. 695 (stating "But even in England, in more recent periods, the courts have recognized the right of possession of a dead body in those nearest in relation for the purpose of burial or other lawful disposition of it.") (citation omitted).

60. *Id.* at 261, 95 N.E. at 696.

61. *Id.* at 263, 95 N.E. at 696 (stating it did not need to further discuss whether a cause of action for damages existed from an unauthorized autopsy).

    After *Darcy*, the concept that emotional damages could be recovered for violating the right to sepulcher quickly gained acceptance in New York. *See, e.g., Hasselbach v. Mt. Sinai Hosp*., 173 A.D. 89, 159 N.Y.S. 376 (1st Dep't 1916) (where a widow sought damages for emotional distress from an unauthorized autopsy performed on her husband's body after he died in the defendant's hospital).

62. *Cohen*, 85 A.D. at 67, 82 N.Y.S. at 919 (stating "the more modern and the current judgment of many courts recognize a *quasi*-property right in the body of the dead in the nature of a sacred trust that a court of equity will sometimes recognize in order to afford control of the body to the next of kin") (emphasis in original).

63. *Gostkowski*, 237 A.D. at 642, 262 N.Y.S. at 105 (stating "[The] right of protecting the remains of the dead and saving them from desecration, which can be enforced by appropriate legal remedies,…is a right clearly distinguishable from the right of ownership."); *see also Danahy v. Kellogg*, 70 Misc. 25, 29, 126 N.Y.S. 444, 447-448 (Sup. Ct., Erie Co. 1910) (stating "[The right of protecting the remains of the dead] is a right clearly distinguishable from the right of ownership."); *Donn*, 14 N.Y.S at 191 (stating "[W]hile a dead body is not property, in the strict sense of the common law, it is a *quasi* property, over which the relatives of the deceased have rights which the court will protect; but the person having charge of it cannot be considered as the owner of it, in any sense whatever. He holds it only as a sacred trust, for the benefit of all who may, from family or friendship, have an interest in it, and a court of equity may regulate it as such, and change the custody, if improperly managed.") (emphasis in original); *Hasselbach*, 173 A.D. at 92, 159 N.Y.S. at 379 (stating "It is well settled, however, that there are no property rights, in the ordinary commercial sense, in a dead body, and the damages allowed to be recovered for its mutilation are never awarded as a recompense for the injury done to the body as a piece of property.").

64. *See, e.g*., *Louisville & Nashville Railroad Co*., 123 Ga. 62, 64, 51 S.E. 25 (1905) (stating "It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber, and pig-iron."); *Danahy*, 70 Misc. at 29, 126 N.Y.S. at 447 (stating there was no property right in a dead body "strictly speaking"); *Donn*, 14 N.Y.S. at 190 (stating there was no property right in a dead body "in the sense that it is a subject of barter and sale"); *Hasselbach*, 173 A.D at 92, 159 N.Y.S. at 379 (stating there is no property right in a dead body in a "commercial sense"); *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 255, 115 N.E. 715, 717 (1st Dep't 1907) (stating "That there is no right of property in a dead body in the ordinary acceptation of the term is undoubtedly true when limited to a property right as understood in the commercial sense.").

65. *A.F. Hutchinson*, 127 Misc. at 562, 217 N.Y.S. at 418 (stating "While there is no right of property in a dead body in the ordinary sense of the term, it is regarded as property so far as it is necessary to entitle the next of kin to legal protection from violation or invasion of its place of burial.") (citation omitted).

66. *See, e.g., Johnson*, 37 N.Y.2d at 382, 372 N.Y.S.2d at 642 (stating "It has been noted […] that […] such a property right is little more than a fiction; in reality the personal feelings of the survivors are being protected."); *Melfi*, 64 A.D.3d at 38, 877 N.Y.S.2d at 309 (stating "Courts in other jurisdictions also recognized that a 'quasi-property' right was a legal fiction to enable recovery of damages for injury to the feelings of the next of kin."); *Colavito*, 8 N.Y.3d at 52 n.8, 827 N.Y.S.2d at 719 n.8 (noting Prosser referred to a property right in a body as a fiction).

67. Prosser, The Law of Torts, at 58-59 (4th ed. 1971) (stating "In most [cases involving the mishandling of dead bodies], the courts have talked of a somewhat dubious 'property right' to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses.").

68. *Colavito v. New York Organ Donor Network, Inc*., 356 F.Supp.2d 237 (E.D.N.Y.2005), *aff'd in part, question certified by*, 438 F.3d 214 (2d Cir. 2006), *certified question accepted by*, 6 N.Y.3d 820 (2006), *certified question answered by*, 8 N.Y.3d 43, 827 N.Y.S.2d 96 (2006), *answer to certified question conformed to and aff'd*, 486 F.3d 78 (2d Cir. 2007).

69. *WTC Families for a Proper Burial v. City of New York*, 567 F.Supp.2d 529 (S.D.N.Y.2008), *aff'd*, 359 Fed.Appx. 177, 179 (2d Cir. 2009), *cert.denied*, 562 U.S. 855 (2010).

70. *Colavito v. New York Organ Donor Network, Inc*., 356 F.Supp.2d 237, 242 (E.D.N.Y.2005) (stating it "found no cases involving similar facts in either this or any other federal circuit or state court"), *aff'd in part, question certified by*, 438 F.3d 214 (2d Cir. 2006), *certified question accepted by*, 6 N.Y.3d 820 (2006), *certified question answered by*, 8 N.Y.3d 43, 827 N.Y.S.2d 96 (2006), *answer to certified question conformed to and aff'd*, 486 F.3d 78 (2d Cir. 2007).

71. *Id*., 356 F.Supp.2d at 238-239.

72. *Id*. at 240.

73. *Id*.

74. *Id*.

75. *Id*. at 241-242.

    This article does not address Colavito's claims under New York Public Health Law Article 43, the state's codification of the Uniform Anatomical Gift Act, or Article 43-A, which delineates the duties of hospital administrators, organ procurement organizations, and eye and tissue banks.

76. *Id*. at 240-242; *Colavito*, 8 N.Y.3d at 48, 827 N.Y.S.2d at 99.

77. *Id*. at 244.

78. *Colavito*, 438 F.Supp.2d at 233.

    This article does not discuss the other questions certified to the Court of Appeals.

79. *Colavito*, 8 N.Y.3d at 53, 827 N.Y.S.2d at 102.

80. *Id*., 8 N.Y.3d at 57, 827 N.Y.S.2d at 105.

81. *Id*., 827 N.Y.S.2d at 105.

82. *Id*.

83. *Id*.

84. *WTC Families for a Proper Burial v. City of New York*, 567 F.Supp.2d 529, 541 (where the plaintiffs also argued that the defendants' failure to re-search through the debris moved to the landfill violated their due process rights) (S.D.N.Y.2008), *aff'd*, 359 Fed. Appx. 177, 179 (2d Cir. 2009), *cert. denied*, 562 U.S. 855 (2010); *see Lewis v. Lloyd*, 40 Misc.3d 1223(A), 975 N.Y.S.2d 710 at *3 (Sup. Ct., Kings Co. 2013)) (stating "Prior to the passage of Public Health Law § 4201, which was prompted by the events

of September 11, 2001 and its aftermath, the right to dispose of deceased persons' remains was established and governed—and to a great extent still is—by a complex of common law, statutes, and regulations, including the common law right of sepulcher.") (*citing* Public Health Law §§ 4200, 4210; 24 RCNY Public Health Code Reg. §§ 205.01, 205.19, 205.379 (case citations omitted)).

The plaintiffs alleged that the defendants violated their Constitutional rights and New York State law when finely sifted material ("fines"), which may have contained undetectable particles of human remains, was left in a landfill with other debris from the World Trade Center site. *WTC*, 567 F.Supp.2d at 537-542 (also alleging violation of their right to free exercise of their religious beliefs guaranteed by the First and Fourteenth Amendments of the United States Constitution). An action was commenced to force the City to remove the fines to a more suitable location and to create a cemetery for the 1,100 victims who perished without identifiable remains. *WTC*, 359 Fed. Appx. at 179.

Of the 2,749 people murdered that tragic day, full bodies were recovered for only 292 victims, partial remains were found for 1,357 people, and 1,100 people perished without leaving a trace. *WTC*, 567 F.Supp.2d at 531.

85. *WTC*, 567 F.Supp.2d at 537 (citations omitted).
86. *Id.* (citations omitted).
87. *Id.*; *see WTC*, 359 Fed.Appx. at 180 (finding no error in the district court's "thorough analysis of plaintiffs' constitutional and state law claims [and affirming the district court's holding], that, under New York law, plaintiffs do not have a cognizable property right in unidentifiable human remains").

    The district court held, and the Second Circuit affirmed, that the city's procedures relating to the recovery effort after September 11 "'did not target religious beliefs,' and that '[t]he governmental interest in clearing the debris of the World Trade Center efficiently and economically' was compelling." *WTC*, 359 Fed.Appx. at 181 (*citing* 567 F.Supp.2d at 540-541).
88. *WTC*, 567 F.Supp.2d at 541.
89. *Id.*
90. *Shipley*, 25 N.Y.3d at 648, 37 N.E.3d at 58.

    "To a great degree, [Article 42 of the Public Health Law] codifies the common law right of sepulcher." *Jackson v. Jackson*, 42 Misc.3d 931, 934 n.2, 979 N.Y.S.2d 477, 480 n.2 (Sup. Ct., Albany Co. 2013).
91. *Shipley*, 25 N.Y.3d at 648, 37 N.E.3d at 58.

    Jesse's sister was injured in the accident but survived. *Shipley*, 80 A.D.3d at 173, 908 N.Y.S.2d 425.
92. *Shipley*, 25 N.Y.3d at 648, 37 N.E.3d at 58 (where the majority noted that Mr. Shipley's consent to an autopsy was not needed).
93. *Id.*, 37 N.E.3d at 58; *see also Shipley*, 80 A.D.3d at 173, 908 N.Y.S.2d 425(noting that according to Mr. Shipley, he asked Dr. de Roux to make the autopsy "nice and clean because I wanted the boy to look good for his funeral and stuff.").
94. *Id.* at 649, 37 N.E.3d at 58.
95. *Id.* at 648-649, 37 N.E.3d at 58.
96. *Id.* at 649, 37 N.E.3d at 58.
97. *Id.*, 37 N.E.3d at 58.
98. *Id.*, 37 N.E.3d at 58.
99. *Id.*, 37 N.E.3d at 58.

    "The students had an emotional reaction to seeing the jar and its contents, and as a result the teacher immediately cancelled the trip and left with the students." *Id*. at 662 (in dissent).
100. *Id*. at 649, 37 N.E.3d at 58.
101. *Id*. at 662, 37 N.E.3d at 58.
102. Defendants-Appellants' Brief at 5, APL-2013-00345, Feb. 27, 2014 (*citing* R. B184, B228).
103. *Shipley*, 25 N.Y.3d at 662, 37 N.E.3d at 58.
104. *Id*. at 649, 37 N.E.3d at 58.

    New York courts have made clear that each member of the family cannot maintain a separate action to recover for mental pain and anguish. Instead, they must join together in a single action. *See*, *e.g.*, *Bernstein v. Mt. Ararat Cemetery, Inc.*, 2012 WL 3887228 at *8 (E.D.N.Y.), *reconsideration denied*, 2013 WL 1820911 (E.D.N.Y.) (citations omitted); *Gostkowski v. Roman Catholic Church*, 262 N.Y. 320, 326, 186 N.E. 798 (1933); *Weingast v. State*, 44 Misc.2d 824, 254 N.Y.S.2d 952 (Ct. Cl., N.Y. 1964). The complaint of Jesse's sister was dismissed on the ground that she lacked standing to sue because she did not qualify as "next of kin" as that term was defined in the New York City Health Code. *Shipley*, 80 A.D.3d at 174, 908 N.Y.S.2d at 428 (citation omitted).
105. *See Shipley*, 2009 WL 7401469 (Sup. Ct., Richmond Co. 2009); *Shipley*, 80 A.D.3d 171, 908 N.Y.S.2d 425 (2d Dep't 2010); *Shipley*, 2011 WL 8908185 (Sup. Ct., Richmond Co. Nov. 25, 2011); *Shipley*, 2011 WL 8908184 (Sup. Ct., Richmond Co. Dec. 16, 2011); *Shipley*, 3 Misc.3d 1239(A), 950 N.Y.S.2d 726 (Sup. Ct., Richmond Co. 2012); *Shipley*, 105 A.D.3d 936, 963 N.Y.S.2d 692 (2d Dep't 2013); *Shipley*, 22 N.Y.3d 857 (2013); *Shipley*, 24 N.Y.3d 1116 (2015).
106. *Shipley*, 105 A.D.3d at 936, 963 N.Y.S.2d at 693.
107. *Shipley*, 950 N.Y.S.3d at *4 (where the questions presented to the jury on the issue of damages "were whether the plaintiffs suffered an exacerbation of their emotional injuries as a result of defendants' actions and if so, what was the value of that injury").
108. *Id.* (where the court did not disturb the jury's verdict, stating that the jury's decision "was rational based on the facts at issue, and the amount was reasonable, if low").
109. *Shipley*, 105 A.D.3d 936, 908 N.Y.S.2d 425 (2d Dep't 2013).
110. *Shipley*, 24 N.Y.3d 1116, 26 N.E.3d 780 (2015).
111. *Shipley*, 25 N.Y.3d at 653, 37 N.E.3d at 58.
112. *Id*. at 660, 37 N.E.3d at 58.
113. *Id*. at 654, 37 N.E.3d at 58.
114. *Id.*, 37 N.E.3d at 58 (emphasis in the original).
115. *Id*. at 653, 37 N.E.3d at 58.

    Mr. Shipley consented to the autopsy, but the medical examiner had the authority to conduct the autopsy without his permission pursuant to Public Health Law § 4215(1) and New York City Charter § 557(f)(1). *Id*. at 652, 37 N.E.3d at 58.
116. *Id*. at 654, 37 N.E.3d at 58.
117. *Id.*, 37 N.E.3d at 58.
118. *Id*. at 655, 37 N.E.3d at 58.

    The majority found that the Appellate Division's determination that a medical examiner had a "mandatory obligation" and "ministerial" duty pursuant to both the common-law right of sepulcher and Public Health Law § 4215(1) to turn over the decedent's retained organs once the dissection had been completed and the legitimate purposes for retaining those remains had been fulfilled "was error that broadly expanded the medical examiner's obligations under common law and statute." *Id*. at 655, 37 N.E.3d at 58 (noting "section 4215(1) contains a 'governing rule' or 'statutory command' to the extent that the medical examiner, once he or she is finished with the unauthorized dissection, must turn the 'remains of the body after dissection' over for 'burial or other lawful disposition").

    After the Appellate Division's decision, the Office of the Medical Examiner followed the court's "'notification rule'***(not out of its belief that it is appropriate but rather because it felt compelled by the Appellate Division to do so). *Id*. The Court found "the claimed ease of that rule's application is irrelevant

in the context of these matters because practical and policy considerations exist beyond merely providing next of kin with notification." *Id*.

119. Public Health Law § 4215(1) (emphasis supplied by the Court).

120. *Shipley*, 25 N.Y.3d at 656, 37 N.E.3d at 58 (referring to Public Health Law §§ 4216, 4217, 4218, 1389-aa[1](b)).

121. *Id*. at 657-658, 37 N.E.3d at 58.

122. *Id*. at 658, 37 N.E.3d at 58 (stating "Once a medical examiner returns a decedent's body sans the organs and tissue samples, the medical examiner for all intents and purposes has complied with the ministerial duty under section 4215(1).").

123. *Melfi v. Mt. Sinai Hosp*., 64 A.D.3d 26, 32-34, 877 N.Y.S.2d 300, 305 (1st Dep't 2009) (stating "The right of sepulcher, evoking the mystery and sorrow of death and the hope for an afterlife, has been ritualized since the earliest pre-Christian civilizations."); *Liberman v. Riverside Mem. Chapel*, 225 A.D.2d 283, 284, 650 N.Y.S.2d 194, 196 (1st Dep't 1996) (stating "Many forms of honoring and respecting the mysteries of life and death are found among the religious and nonreligious alike" and "most persons, believers or nonbelievers, will not countenance disrespectful treatment of the body."); *Kellogg v. Office of the Chief Medical Examiner of the City of New York*, 189 Misc.2d 756, 761, 735 N.Y.S.2d 350 (Sup. Ct., Bronx Co. 2001) (stating "From the time of Sophocles' 'Antigone' in 442 B.C., there has existed a long cultural history concerning the treatment of the dead, which incorporates the concept that a wrong committed to the dead constitutes an affront to the living; and 'disrespectful treatment of the body' will not be countenanced (citations omitted). This concern for the treatment of the dead is reflected in Public Health Law § 4200(1), which provides, 'Except in the cases in which a right to dissect it is expressly conferred by law, every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death.'") (citation omitted).

124. *Melfi*, 64 A.D.3d at 34, 877 N.Y.S.2d at 306; *see also Shipley v. City of New York*, 25 N.Y.3d 645, 37 N.E.3d 58 (2015) (Judge Rivera, dissenting, stated, "The concept of a family's right to burial, recognized by diverse cultures and religious faiths, is age-old and serves an important role in the complexity of human existence."); *Newman v. L. Sathyavaglswaran, M.D*., 287 F.3d 786, 790 (9th Cir. 2002) (stating "Duties to protect the dignity of the human body after its death are deeply rooted in our national history."), *cert. denied*, 537 U.S. 1029 (2002).

125. *Shipley*, 25 N.Y.3d at 660, 37 N.E.3d at 58.

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New York State Bar Association
Report and Recommendations Concerning Constitutional Home Rule

Adopted by the Committee on the New York State Constitution

The following is a reprint of the recent NYSBA Committee on the NYS Constitution Report on Home Rule. The report provides an overview of constitutional home rule and the legal doctrines and laws that restrict home rule, concluding that, while the New York State Constitution and statutes demonstrate a clear intent to protect local autonomy, the balance between state and local powers has tipped away from local autonomy. The report recommends that, if a preparatory constitutional commission is established, home rule should be a topic of significant attention for the commission.

Introduction and Executive Summary

The New York State Constitution mandates that every 20 years voters are asked the following question: "Shall there be a convention to revise the constitution and amend the same?"[1] The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association's ("State Bar") Committee on the New York State Constitution ("the Committee") concerning Constitutional Home Rule.

In New York State, local government has a greater impact on the day-to-day lives of the public than any tier of government. Our thousands of towns, villages, counties, cities, boroughs, school districts, special districts, authorities, commissions and the like play a vital governance role. They are responsible for drinking water, social services, sewerage, zoning, schools, roads, parks, police, courts, jails, trash disposal—and more. Without local government, public services often taken for granted would not be delivered.

Befitting its stature and importance, local government is a longstanding constitutional concern.[2] Indeed, since the 19th Century, "Home Rule"—the authority of local governments to exercise self-government—has been a matter of constitutional principle in New York.[3] The continuing dilemma has been to strike the right balance of furthering strong local governments but leaving the State strong enough to meet the problems that transcend local boundaries.[4] The competing considerations were aptly summarized by the commission tasked with preparing for the last Constitutional Convention held in New York in 1967:

> On the one hand, there is the question of how to leave a legislature free to cope with possible problems of state-wide concern and to intervene in local affairs when, in the judgment of the legislature, they reach a point of state-wide concern. On the other, is the question of how to determine the

> responsibilities appropriate for local governments, the powers needed for carrying out those responsibilities and the kind of protection from state legislative intervention that should be provided to permit and sustain responsive and responsible local self-government.[5]

Article IX, the so-called "Home Rule" article, contains protections for local government that are more extensive than those in many other states.[6] Constitutional Home Rule is established by granting local governments affirmative lawmaking powers, while carving out a sphere of local autonomy free from State interference.

Despite Article IX's intent to expand the authority of local governments, Home Rule in practice has produced only a modest degree of local autonomy. The powers of local governments have been significantly restricted by two legal doctrines developed through decades of litigation ("preemption" and "State concern"). Local governments must also follow mandates enacted by the State Legislature.

The preemption doctrine is a fundamental limitation on the power of local governments to adopt local laws. Under the preemption doctrine, a local law is unenforceable when it collides with a State statute; that is, the local law prohibits what a State statute allows, or the State statute prohibits what the local law allows. But even in the absence of an outright conflict between State and local law, a local government may not act where the State has acted comprehensively in the same area.

The State concern doctrine represents an exception to the constitutional limitations on the State Legislature's authority to enact special laws targeted at one or more, but not all local governments. Under this doctrine, the State Legislature is empowered to regulate local matters, yet which also relate to State concerns, such as waste disposal on Long Island, sewers in Buffalo, and taxicabs in New York City.

Home Rule is further limited by the State Legislature's imposition of mandates that compel local governments to provide specific services and meet minimum State standards, often without providing fully supporting funds necessary to comply with such mandates. New York imposes more unfunded mandates on localities than any other state in the nation.[7]

Blue ribbon panels and local government scholars have called for revisions to Article IX's Home Rule provisions. Nevertheless, a half-century has passed since the State has had a serious discussion on this subject. The time to do so again is long overdue. This is especially so, given the myriad challenges facing local government today.

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides an overview of Constitutional Home Rule. Part III describes legal doctrines and laws that restrict the ambit of Home Rule. Part IV concludes that New Yorkers would benefit from a thorough consideration of Constitutional Home Rule and potential reforms that would strengthen and clarify it.

I. Background of the Report

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

On October 8, 2015, the Committee issued its first report and recommendations, entitled *The Establishment of a Preparatory State Commission on a Constitutional Convention.*[8] The Committee recommended that, in advance of the 2017 referendum on a Constitutional Convention, the State should establish a non-partisan preparatory commission, as it has done in the past. The commission's duties should include: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

On November 7, 2015, the State Bar's House of Delegates unanimously adopted the Committee's report and recommendations.[9] Two months later, during his State of the State Address, Governor Andrew M. Cuomo proposed as part of his Executive Budget the creation of a preparatory commission on a Constitutional Convention. The Governor proposed investing $1 million to create the commission to develop a blueprint for a convention. The commission would also be authorized to recommend fixes to the current Convention delegate selection process.[10]

The Committee has now turned its attention to the subject of Constitutional Home Rule. At its meeting on December 17, 2015, the Committee heard a presentation from Professor Richard Briffault, the Joseph P. Chamberlin Professor of Legislation at Columbia Law School,

and a nationally respected authority on local government. At its next meeting, on January 27, 2016, the Committee heard from another eminent authority on local government, Michael A. Cardozo, a partner at the law firm of Proskauer Rose and the former Corporation Counsel for the City of New York from 2002 through 2013. As the City's 77th and longest serving Corporation Counsel, Mr. Cardozo was the City's chief legal officer, headed the City's Law Department of more than 700 lawyers, and served as legal counsel to Mayor Michael Bloomberg, elected officials, the City and its agencies.

After further discussion and review, the Committee concluded that the public and legal profession would be well served to have a serious conversation about, and debate over, whether the Home Rule provisions in Article IX of the State Constitution should be clarified and strengthened. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on March 10, 2016.

II. Constitutional Home Rule—Generally

Home rule—the right of localities to exercise control over matters of local concern[11]—has long "been a matter of constitutional principle"[12] in New York State. Beginning in the 19th Century, the home rule movement represented a determined effort to provide local governments with autonomy over local affairs and freedom from State legislative interference.[13] The path of home rule has been "unsettled and tortuous" through the years, reflecting "the difficult problem of furthering strong local governments but leaving the State just as strong to meet the problems that transcend local boundaries, interests and motivations."[14]

New York's basic system of local governance is set forth in Article IX of the State Constitution. Adopted in 1963 with high hopes,[15] Article IX was intended to expand and secure the powers enjoyed by local governments.[16] Governor Nelson A. Rockefeller predicted at the time that Article IX and its implementing legislation would "strengthen the governments closest to the people so that they may meet the present and emerging needs of our times."[17]

Article IX declares "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state";[18] creates a "Bill of Rights" for local governments to secure certain enumerated "rights, powers, privileges and immunities";[19] and vests in the State Legislature the power to create and organize local governments.[20]

Constitutional home rule is established through two assertions of local government power in Article IX.[21] One is affirmative grants of power to local governments to manage their affairs through the adoption of local laws. The other restricts the State Legislature from intruding upon matters of local, rather than State, concern, except as provided in the Constitution.[22] Each is described more fully in turn.

A. Grants of Lawmaking Authority

Section 1 of Article IX declares that "[e]very local government shall have power to adopt local laws as provided by this article."[23] Section 2(c)—the "center of home rule powers"[24]—elaborates on the lawmaking power, by providing that local governments "shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."[25]

Section 2 also confers on local governments the power to adopt local laws regarding ten specified areas, regardless of whether or not they relate to the local government's property, affairs or government.[26] These ten areas include: membership and composition of the local legislative body;[27] powers, duties, qualifications, number, mode of selection, and removal of officers and employees;[28] transaction of the local government's business;[29] the incurring of obligations;[30] presentation, ascertainment and discharge of claims against the local government;[31] acquisition, care, management and use of highways, roads, streets, avenues and property;[32] acquisition of transit facilities and the ownership and operation thereof;[33] levying and collecting local taxes;[34] wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for the local government;[35] and the government, protection, order, conduct, safety, health and well-being of persons or property therein.[36]

Outside of the ten enumerated subjects, the State government retains all power otherwise delegated to it by law.[37] Unlike the State government, local governments are not sovereigns in their own right.[38] Accordingly, local governments have only the lawmaking powers delegated by the State Constitution and Legislature.[39]

Article IX requires the State Legislature to enact a "statute of local governments" granting local governments additional powers "including but not limited to" matters of local legislation and administration.[40] A power granted in such statute has quasi-constitutional protection against challenge, because it can be "repealed, diminished, impaired or suspended" only by a law passed and approved by the Governor in each of two successive calendar years.[41] In 1964, the Legislature complied with the constitutional directive and enacted a Statute of Local Government,[42] as well as the Municipal Home Rule Law,[43] both of which are to be liberally construed.[44]

The Legislature may confer on local governments powers not relating to their property, affairs or government and not limited to local legislation and administration "in addition to those otherwise granted by or pursuant to this article" and may withdraw or restrict such additional powers.[45]

Other constitutional provisions authorize the Legislature to grant additional powers to local governments.[46] For example, the Legislature may grant the power to apportion the cost of a government service or function upon any portion of the area within the local government's jurisdiction and exercise of eminent domain outside local boundaries.[47] The Legislature is also authorized to grant various powers to cities, towns and villages for the financing of low-rent housing and nursing home accommodations for persons of low income.[48]

Article IX, Section 3(c) provides that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."[49]

B. Immunity from Legislative Interference

At the same time that Article IX authorizes local governments to adopt local laws in a wide range of fields, it also sets procedural limits on the ability of the State Legislature to impinge on local authority. Specifically, Section 2(b)(2) of Article IX—the so called "Home Rule clause"—limits the State Legislature's power to enact laws regulating matters that fall within the purview of local government. The Home Rule clause states as follows:

> [T]he legislature…[s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.[50]

Under this provision, the State Legislature may freely regulate the property, affairs or government of local governments through the enactment of a "general law" that "in its terms and in effect applies to all counties . . .[,] all cities, all towns or all villages."[51] However, if the Legislature seeks to enact a special law that would apply to one or more, but not all local governments,[52] it must follow one of two procedures intended to protect the Home Rule powers of the affected localities.[53] The State Legislature must receive either (1) a request of two-thirds of the total membership of the local legislative body or of the local chief executive officer concurred in by a majority of the membership of the local legislature; or (2) a certificate of necessity from the Governor reciting facts that constitute an emergency requiring enactment of such law and the concurrence of two-thirds of each house of the State legislature.[54] The first option's directives are commonly referred to as the "Home Rule message" requirement "because whenever a special law is enacted it should be at the locality's request."[55] "The second option—the Governor's emergency message and legislative super-majority—is unavailable for special laws concerning New York City."[56]

A particularly striking example of special laws enacted pursuant to either Home Rule message or Gubernatorial message of necessity are State legislative enactments establishing emergency financial control boards for distressed municipalities, which effectively allow the State government to temporarily assume control of these municipalities' finances and daily operations.[57]

III. Restrictions on Home Rule

While Home Rule is provided for in Article IX, it has been left to the State's judiciary to interpret the constitutional Home Rule provisions. Drawing lines between what is properly the domain of local government under Home Rule and the State's ability to legislate has been a recurring role for the courts.[58] Home rule "reflects a far-flung effort over more than a century's time" to find meaning in the ambiguous phrases "property, affairs or government" and "matters of state concern."[59] "The result of these efforts has been a highly developed, and still developing, case law…."[60]

Indeed, the current status of Home Rule in New York has been largely shaped by the judicial development of two legal doctrines: (1) the State preemption doctrine and (2) the State concern doctrine. The former represents a fundamental limitation on local government's lawmaking powers; the latter carves out an exception to the constitutional limitations on the State Legislature's authority to enact special laws. The impact of each on the relationship between the State and local governments cannot be overstated. The same can be said for the stresses placed on local governments by unfunded State mandates.

A. The Preemption Doctrine

As noted, the State preemption doctrine is a "fundamental limitation on home rule powers."[61] Although Article IX vests local governments with substantial lawmaking powers by affirmative grant, "the overriding limitation" of the preemption doctrine embodies "the

untrammeled primacy of the Legislature to act with respect to matters of State concern."[62]

In general, preemption occurs in one of two ways; first, when a local government adopts a law that directly conflicts with a State statute; and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility.[63] Conflict preemption represents an outright conflict or "head-on collision" between a local law and State statute.[64] A local law is unenforceable if it prohibits what a State statute explicitly allows, or if the State statute prohibits what the local law explicitly allows.[65]

But even in the absence of an outright conflict, a local law is preempted if the State Legislature "has evidenced its intent to occupy the field."[66] Field preemption occurs when "a local law regulating the same subject matter as a state law is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a Statewide statute."[67] "Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns."[68]

Field preemption may be express or implied. Express field preemption occurs when a State statute explicitly provides that it preempts all local laws on the subject.[69] Field preemption is implied when "either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative intent to preempt, even in the absence of an express statement of preemption."[70]

Examples of local laws that have been found to be impliedly preempted include the following activities:

- Residency restrictions for sex offenders;[71]
- Minimum wage laws;[72]
- Regulating local taxation for roadway construction;[73]
- Hours of operations of taverns and bars;[74]
- Regulating where abortions may be performed;[75] and,
- Power plant siting.[76]

Implied preemption has provided a fertile ground for litigation. By no means are all challenges to local laws based on implied preemption successful.[77] However, because the dispositive inquiry turns on interpreting the State Legislature's intent, it is often difficult to predict whether a given local law will or will not withstand judicial scrutiny. As one commentator has explained:

> The Legislature rarely makes a clear declaration of policy. The courts therefore have no clear standard for determining whether the extent and nature of state regulation of an area is "comprehensive," and therefore preemptive, or "piecemeal," and therefore not preemptive. The result is ad hoc judicial decision making and considerable uncertainty as to when state legislation will be considered preemptive of local action.[78]

The implied preemption doctrine has drawn its share of critics. Local government scholars have cautioned that the ever-present, seemingly inchoate possibility that a court may find implied preemption "casts a shadow over local autonomy, often leading local governments to question whether they have the authority to act,"[79] and, therefore, imposing "severe constraints on local policy innovation and choice."[80]

In 2008, the New York State Commission on Local Government Efficiency and Competiveness, chaired by former Lieutenant Governor Stanley N. Lundine, noted that the implied preemption doctrine does not appear in the State Constitution,[81] and has created "confusion and uncertainty" for local governments when exercising their home rule powers.[82] The Lundine Commission called for a constitutional amendment prohibiting the judicial application of implied preemption.[83] Such an amendment, the Lundine Commission explained, "would allow local governments to act except where state law has expressly declared state authority in the area to be exclusive or has specifically limited local governments' ability to act in that area or field."[84]

In a similar vein, one local government scholar has called for the establishment in New York of a judicial presumption against preemption.[85] And, a court of last resort in another state has adopted a default rule that the state legislature has not occupied the field unless it has said so explicitly.[86]

Whatever one may think of such proposals, the fact remains that implied preemption is a significant constraint on local authority, even when a local government acts well within the sphere of specific Home Rule powers.[87] It has also generated considerable litigation, with often unpredictable results, creating confusion and uncertainty for local governments.

B. The State Concern Doctrine

Article IX's Home Rule clause carves out a sphere of autonomy for local governments over their "property, affairs or government" by limiting the State Legislature's power to act with respect to such local matters through special legislation. However, the Home Rule clause is subject to a significant limitation—the "State

concern" doctrine—derived from the case of *Adler v. Deegan*[88] in 1929.

In *Adler,* the New York Court of Appeals addressed the power of the Legislature to enact the Multiple Dwelling Law,[89] which required housing to comply with minimum standards for fire-prevention, light, air and sanitation.[90] This salutary act applied, in effect, only to New York City, but did not conform to the Home Rule requirements for special legislation.[91] Nevertheless, the Court found the subject matter of the Multiple Dwelling Law addressed a "state concern" and on that ground upheld its enactment as a valid exercise of State legislative power.[92]

In a seminal concurring opinion, then-Chief Judge Benjamin Cardozo argued that, if a subject, like slum clearance, "be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality."[93] Thus, even if legislation relates to the property, affairs, or government of a local government, if the legislation is also a matter of substantial state concern, the Home Rule clause is inoperative and the Legislature may act through ordinary legislative processes.[94]

Although *Adler* predated the adoption of Article IX by over 30 years, the Court of Appeals has continuously and expansively interpreted the "state concern" doctrine.[95] Time and again, the Court has upheld legislation relating to local property, affairs, or governments, yet which also related to a State concern, despite the failure of those laws to conform to Home Rule requirements.

For example, the Court has found the following local matters to also be matters of state concern sufficient to sustain the Legislature's power to address them by special law, without either a Home Rule or Gubernatorial message or legislative supermajority:

- Waste disposal in Nassau and Suffolk Counties;[96]
- Municipal sewers in Buffalo;[97]
- Protection of the Adirondack Park's resources;[98]
- Salaries of District Attorneys in certain counties;[99]
- Local taxation;[100]
- Housing projects exempt from zoning laws;[101]
- Rent controls;[102]
- Serial bonds issued to cover pension and retirement liabilities;[103]
- Dispute-resolution mechanisms for local public employees;[104]
- Cultural institutions;[105]
- Bidding requirements on public contracts;[106]
- Exempting firefighters from local residency requirements.[107]
- Taxes on New York City commuters' incomes;[108] and,
- Regulation of taxicabs in New York City.[109]

The State concern doctrine has narrowed the Home Rule clause's guarantee of a modicum of local legislative autonomy.[110] Today, the line between matters of State concern and matters of local concern is increasingly indistinct.[111] Few constraints exist on the Legislature's ability to interfere in local affairs by special law.[112] The Court of Appeals said as much in 2013 when it observed:

> there must be an area of overlap, indeed a very sizable one, in which the state legislature acting by special law and local governments have concurrent powers. …A great deal of legislation relates *both* to the property, affairs or government of a local government and to [m]atters other than the property, affairs or government of a local government—i.e., to matters of substantial state concern.[113]

As things now stand, the State Legislature decides whether a home rule message is necessary with respect to a given piece of special legislation. And, this legislative judgment has been treated as "effectively unreviewable."[114]

Proponents of home rule despair over the relative ease with which the State Legislature can overcome constitutional limitations on special legislation.[115] They argue that Article IX's protections of the rights of localities have been "undermined…by the many exceptions for 'matters of state concern' with respect to which the Legislature is held free to act without the consent of the local body."[116] "The Legislature is not better suited, and indeed, may be less well-suited," goes the argument, "than the local government to deal with essentially local matters such as providing government services, administering the police department and developing new strategies for providing for the homeless."[117]

On the other hand, advocates for the status quo can point to decades of precedent and a system that, on the whole, has arguably served the State well. Home rule is but one of a number of values encompassed by the Constitution, and "the State's commitment to minimal statewide standards of welfare, safety, health, and the like has taken precedence over the goal of local autonomy."[118] No less eminent an authority than Benjamin Cardozo was a staunch guardian of State sovereignty, recognizing, at least in close cases, the need for a dominant State, which represents all, over the power of local

governments, which represent only a portion of the State.[119]

C. Unfunded Mandates

Another restriction on Home Rule is State mandates that require local governments to perform certain actions. These can be particularly controversial when unfunded.[120] State mandates cover a wide range of fields, including health care, education and social services. New York imposes more unfunded mandates than any state.[121]

Numerous other states[122] have attempted to resolve the tension between state mandates and Home Rule by adopting constitutional provisions prohibiting or limiting unfunded mandates.[123] Notably, too, in 2011 a "Mandate Relief Redesign Team" established by Governor Cuomo recommended the adoption of a constitutional ban in New York on unfunded mandates on local governments.[124]

IV. Conclusion

New York's constitutional and statutory provisions regarding home rule are extensive, evincing a clear intent to protect local autonomy.[125] However, the balance between State and local powers has tipped "away from the preservation of local authority toward a presumption of state concern."[126] Some commentators have even observed that Constitutional Home Rule is a "ghost,"[127] "merely a pleasant myth"[128] and "a near total failure."[129]

Not since the 1967 Constitutional Convention has the body politic engaged in a serious discussion about Constitutional Home Rule.[130] Intense debates were then waged on this subject, resulting in proposals by the Convention that held the promise for greater local government initiative.[131] But those proposals, along with all others made by the 1967 Convention, failed at the polls.[132]

Today, nearly fifty years later, numerous proposals have been made for constitutional reform in this area. To be sure, "[t]here is no ready solution to the problem of state interference in local government actions."[133] Home Rule "doctrine has reflected in its structure the inherently difficult nature" of drawing lines between what is properly the domain of local government and the State Legislature's ability to legislate.[134] That said, many believe "that the home rule provisions of Article IX are clearly in need of revision, and given the current state of home rule there is little risk of adverse change."[135]

In sum, Constitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity. At a minimum, if and when the State establishes a preparatory constitutional commission, Constitutional Home Rule should be a subject to which it devotes significant time and attention.

Endnotes

1. N.Y. Const. art. XIX, § 2 ("At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question 'Shall there be a convention to revise the constitution and amend the same?' shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed.….").
2. Richard Briffault, *Local Government and the New York State Constitution*, 1 Hofstra L. & Pol'y Symp. 79, 79 (1996) ("A longstanding constitutional concern in New York is local government and the relations between local governments and the State.").
3. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428, 548 N.Y.S.2d 144, 146, 547 N.E.2d 346, 348 (1989) (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").
4. *Id.* at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348.
5. N.Y. State Temp. State Comm'n on Const. Conven., Local Government 11 (Mar. 31, 1967) [hereinafter Local Government].
6. *See* Robert B. Ward, New York State Government 545 (2d ed. 2006) ("New York's constitutional and statutory provisions regarding home rule are more extensive than those in many states.").
7. Peter J. Galie & Christopher Bopst, The New York State Constitution 279 (2d ed. 2012) [hereinafter The New York State Constitution].
8. N.Y. State Bar Assn. Comm. On The N.Y. State Const., Report and Recommendations Concerning the Establishment of a Preparatory State Comm'n on a Constitutional Convention (2015), *available at* http://www.nysba.org/nysconstitutionreport/ (last visited on Mar. 6, 2016).
9. Press Release, N.Y. State Bar Assn., *New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017* (Nov. 13, 2015), *available at* http://www.nysba.org/NYSConstitutionVote/ (last visited on Mar. 6, 2016).
10. Press Release, N.Y. State Div. of Budget, *Governor Cuomo Outlines 2016 Agenda: Signature Proposals Ensuring That New York Is—and Will Continue to Be Built to Lead* (Jan. 13, 2016), *available at* http://www.budget.ny.gov/pubs/press/2016/pressRelease16_eBudget.html (last visited on Mar. 6, 2016).
11. *See People ex. rel. Metropolitan St. Ry. Co. v. State Board of Tax Comm'rs*, 174 N.Y. 417, 431, 67 N.E. 69, 70 (1903), *aff'd*, 199 U.S. 1 (1905) ("The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution."); *see also* John R. Nolon, *The Erosion of Home Rule Through The Emergence of State-Interests in Land Use Control*, 10 Pace Envtl. Law Rev. 497, 505 (1993) ("[Home Rule's] purpose is to permit local control over matters that are best handled locally and without state interference."); James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 St. John's L. Rev. 713, 713 n.1 (1985) ("'home rule' can be described as a method by which a state government can transfer a portion of its governmental power to a local government") [hereinafter *Ghost of Home Rule*].

12. *See Kamhi,* 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (declaring that "[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century").

13. Note, *Home Rule and the New York Constitution,* 66 COLUM. L. REV. 1145, 1145 (1966).

14. *Kamhi,* 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (internal quotation marks & citations omitted).

15. *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 266 (Article IX was "meant to embody a new concept in state-local relationships by constitutionally recognizing that the 'expansion of powers for effective local self-government' is a purpose of the people of the state.") (citation omitted).

16. *See Wambat Realty Corp. v. State of New York,* 41 N.Y.2d 490, 496, 393 N.Y.S.2d 949, 953, 362 N.E.2d 581, 585 (1977) ("Undoubtedly the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments."); *Matter of Town of E. Hampton v. State of New York,* 263 A.D.2d 94, 96, 699 N.Y.S.2d 838, 839 (3d Dep't 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments.") (internal quotation marks omitted); James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Government*, N.Y. ST. B.J., Jan. 2001, at 52, 53 (the Home Rule Amendments to the State Constitution were "presented as 'a significant new contribution to the principle that local problems can best be solved by those familiar with them and most concerned with them'") (quoting N.Y. STATE OFFICE FOR LOCAL GOVERNMENT, NEWSLETTER, No. 15, Sept. 18, 1963).

17. WARD, THE NEW YORK STATE GOVERNMENT, *supra* note 6, at 547 (quoting Governor Rockefeller's memorandum of approval of Article IX's implementing legislation, the Municipal Home Rule Law (L. 1963, ch. 843 & 844), upon its adoption on Apr. 30, 1963).

18. N.Y. CONST. art. IX, § 1. "Local government" is defined in Article IX to consist of counties, cities, towns, and villages. *Id.* § 3(d)(2).

19. *Id.* § 1. The local government Bill of Rights sought to lay the groundwork for stronger and more effective local government. *See Town of Black Brook v. State of New York,* 41 N.Y.2d 486, 488-89, 393 N.Y.S.2d 946, 362 N.E.2d 579, 581 (1977). It lists various rights, amongst which are: the right to have an elective body with authority to adopt local laws; the right to elect and appoint local residents or officers; the power to agree, as authorized by the Legislature, with the federal government, a State or other government to provide cooperatively governmental services and facilities; the power of eminent domain; the power to make a fair return on the value or property used in the operation of certain utility services, and the right to use the profits therefrom for refunds or any other lawful purpose; and the power to apportion costs of governmental services of functions upon portions of local areas as authorized by the Legislature. N.Y. CONST. art. IX, §§ (1)(a)-(b), (c), (e)-(g).

20. *Id.* § 2(a) ("The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.").

21. *See* James D. Cole, *Local Authority to Supersede State Statutes,* N.Y. ST. B.J., Oct. 1991, 34, 34 ("Under Article IX of the State Constitution, home rule in New York has two basic components.").

22. *See City of New York v. Patrolmen's Benevolent Assn. of City of New York,* 89 N.Y.2d 380, 385-86, 654 N.Y.S.2d 85, 87, 88, 676 N.E.2d 847, 849 (1996) ("Article IX, § 2 of the State Constitution grants significant autonomy to local governments to act with respect to local matters. Correspondingly, it limits the authority of the State Legislature to intrude in local affairs. . . ."); *Kamhi*, 74 N.Y.2d at 428-29, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 ("two-part model for home rule: limitations on State intrusion into matters of local concern and affirmative grants of power to local governments").

23. N.Y. CONST. art. IX, § 1(a).

24. PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 290 (1996) [hereinafter ORDERED LIBERTY].

25. N.Y. CONST. art. IX, § 2(c)(i). The phrase "property, affairs or government" was first codified in the 1894 State Constitution, and has been at the center of the Home Rule dialogue ever since. "Although, literally construed, it might cover an extremely broad area, it has never been accorded its literal significance but has been treated as excluding all matters of state concern." N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67. *See also Adler v. Deegan,* 251 N.Y. 467, 473, 167 N.E. 705, 707 (1929) ("When the people put these words in…the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary.").

26. RICHARD BRIFFAULT, *Intergovernmental Relations* [hereinafter *Intergovernmental Relations*], *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 156-57 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

27. N.Y. CONST. art. IX, § 2(c)(ii)(2).

28. *Id.* §§ 2(c)(ii)(1).

29. *Id.* § 2(c)(ii)(3).

30. *Id.* § 2(c)(ii)(4).

31. *Id.* § 2(c)(ii)(5).

32. *Id.* § 2(c)(ii)(6).

33. *Id.* § 2(c)(ii)(7).

34. *Id.* § 2(c)(ii)(8).

35. *Id.* § 2(c)(ii)(9).

36. *Id.* § 2(c)(ii)(10).

37. *See id.* § 3(a)(3) ("Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to:…[m]atters other than the property, affairs or government of a local government.").

38. *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 265 ("In American constitutional theory, there is no inherent right of local self-government. Local Government units are creatures of the state.").

39. *See Kamhi,* 74 N.Y.2d at 427, 548 N.Y.S.2d at 145, 547 N.E.2d at 347 ("In general, towns have only the lawmaking powers the Legislature confers on them…. Without legislative grant, an attempt to exercise such authority is ultra vires and void.").

40. *See* N.Y. CONST. art. IX, § 2(b)(1) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:…(l) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article.").

41. *Id.* § 2(b)(1) ("A power granted in such statute [of local governments] may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."); *see also Wambat Realty Corp.*, 41 N.Y.2d at 496, 393 N.Y.S.2d at 953-54, 362 N.E.2d at 586 ("In particular, the direction to enact a Statute of Local Government, including the innovative double enactment procedure to impede encroachment on the granted local powers, was expressly aimed at 'proving a reservoir of selected significant powers.'") (citations omitted); GALIE, ORDERED LIBERTY, *supra* note 24, at 290 ("although it was not feasible to grant the home rule powers contained in the statute constitutional status, the statute provided quasi-constitutional protection for these powers").

42. *Wambat Realty Corp.*, 41 N.Y.2d at 490, 393 N.Y.S.2d at 951, 362 N.E.2d at 583. The powers in the Statute of Local Governments include the ability to acquire real and personal property, adopt, amend, and repeal ordinances, resolutions, etc., acquire, construct, and operate recreational facilities, and levy, impose, collect, and administer rents, charges and fees. N.Y. STAT. LOCAL GOV. § 10. The Legislature also made certain reservations, and if State legislation which impinged on a power granted to local governments by the statute is within the ambit created by those reservations, the change can be achieved by ordinary legislative process. *Id.* § 11. In the view of an eminent constitutional scholar, the powers granted local governments by the Legislature in the Statute of Local Governments are not significant. GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

43. *See DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 94, 725 N.Y.S.2d 622, 625, 749 N.E.2d 186, 189 (2001) ("To implement Article IX, the Legislature enacted the Municipal Home Rule Law."). The Municipal Home Rule Law put in one place and organized, for the first time, the statutory provisions relating to Home Rule for various types of local government. This replaced Home Rule provisions previously contained in the City Home Rule Law, the Village Home Rule Law, the Town Law, the County Law and a number of other laws. N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68; *see also* N.Y. MUN. HOME RULE LAW § 10 (describing general powers of local governments to adopt and amend local laws).

44. *See* N.Y. MUN. HOME RULE LAW § 51 (providing that home rule powers "shall be liberally construed"); N.Y. STAT. LOCAL GOV. § 20(5) (same).

45. N.Y. CONST. art. IX, § 2(b)(3) ("Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:…(3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.").

46. Briffault, *Intergovernmental Relations, supra* note 26, at 158.

47. *See* N.Y. CONST. art. IX, §§ 1(e) ("The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries."), (g) ("A local government shall have power to apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.").

48. BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (citing N.Y. CONST. art. XVIII).

49. N.Y. CONST. art. IX, § 3(c).

50. CONST. art. IX, § 2(b)(2).

51. *See id.* § 3(d)(1) ("'General law.' A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.").

52. *See id.* § 3(d)(4) ("'Special law.' A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.").

53. *Id.* § 2(b)(2).

54. BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158 (construing Home Rule clause).

55. *Greater N.Y. Taxi Assn. v. State of New York,* 21 N.Y.3d 289, 301, 993 N.E.2d 970 N.Y.S.2d 907, 914, 993 N.E.2d 393, 400 (2013).

56. BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 158-59 (citing N.Y. CONST. art. IX, § 2(b)(2)).

57. *See, e.g.*, City of Yonkers Financial Emergency Act, L. 1975, ch. 871, § 5 (legislation passed on both message of necessity and Home Rule message establishing emergency financial control board for City of Yonkers).

58. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny,* 86 DENVER L. REV. 1337, 1338 (2009) [hereinafter *Constitutional Home Rule*]; *see also* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67 ("The duty of determining whether particular matters pertain to the property, affairs or government of local governments or are matters of state concern has devolved upon the judiciary with, at least to many persons, unsatisfactory results.").

59. Baker & Rodriguez, *Constitutional Home Rule, supra* note 58, at 1338.

60. *Id.*

61. *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d. 627, 629 546 N.E.2d 920, 922 (1989).

62. *Id.*; *see also Jancyn Mfg. Corp. v. County of Suffolk,* 71 N.Y.2d 91, 96, 524 N.Y.S.2d 8, 10, 518 N.E.2d 903, 905 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); BRIFFAULT, *Intergovernmental Relations, supra* note 26, at 171 ("The sources of home rule authority generally provide that local enactments must not be inconsistent with the Constitution or genera laws. In other words, although a subject may fall within the grant of home rule authority, local action may be preempted by state law.").

63. *DJL Rest. Corp.*, 96 N.Y.2d at 95, 725 N.Y.S.2d at 625, 749 N.E.2d at 190 (internal quotations omitted).

64. *See Lansdown Entertainment Corp. v. N.Y.C. Dep't of Cons. Affairs*, 74 N.Y.2d 761, 764, 545 N.Y.S.2d 82, 83, 543 N.E. 2d 725, 726 (1989).

65. *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d 126, 134, 933 N.Y.S.2d 388, 395 (2d Dep't 2011) (internal quotation marks and citations omitted).

66. *Albany Area Builders Assn.*, 74 N.Y.2d at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

67. *Id.* (internal quotation marks, alteration, and citations omitted).

68. *Id.* at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922..

69. *See Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 599 456 N.E.2d 487, 490 (1983).

70. Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level,* 65 BROOKLYN L. REV. 321, 349 (1999) (citations omitted).

71. *See People v. Diack,* 24 N.Y.3d 674, 681, 3 N.Y.S.3d 296, 26 N.E.3d 1151 (2015) (holding that design and purpose of State laws regulating registered sex offenders evidenced intent to preempt subject of sex offender residency restriction legislation and to "occupy the entire field" so as to prohibit local governments from doing so).

72. *See Wholesale Laundry Bd. of Trade, Inc. v. City of New York,* 17 A.D.2d 327, 329, 234 N.Y.S.2d 862, 865 (1st Dep't 1962), *aff'd,* 12 N.Y.2d 998, 239 N.Y.S.2d 128, 189 N.E.2d 623 (1963) (invaliding New York City minimum wage law which set a rate higher than that set in the State minimum wage law; "it is entirely clear that the state law indicates a purpose to occupy the entire field").

73. *Albany Area Builders Assn.,* 74 N.Y.2d at 377-78, 547 N.Y.S.2d at 629, 546 N.E.2d at 922 (invalidating local law regulating taxation for roadway construction, where State's "elaborate budget system" provided for how towns were to budget for roadway improvements and repairs, and the State explicitly regulated at local level amount of taxes collectible for roadway improvements and the expenditure of such funds).

74. *People v. DeJesus*, 54 N.Y.2d 465, 468-70, 446 N.Y.S.2d 207, 210, 430 N.E.2d 1260, 1263 (1981) (holding that State's Alcohol Beverage Control Act was "exclusive and statewide in scope, thus, no local government could legislate in field of regulation of establishments which sell alcoholic beverages"). *Cf., Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 650, 612 N.Y.S.2d 357, 359, 634 N.E.2d 958, 960 (1994) (upholding City of New York's ability to regulate the location of tobacco vending machines, including within taverns).

75. *See Robin v. Village of Hempstead*, 30 N.Y.2d 347, 350-351 285 N.E.2d 285, 287, 334 N.Y.S.2d 129, 132 (1972) (holding that State law preempted local law regulating where abortions may be performed because of the scope and detail of State medical and hospital regulation).

76. *See Consolidated Edison Co.*, 60 N.Y.2d at 105, 468 N.Y.S.2d at 599, 456 N.E.2d at 490 (holding that a local zoning ordinance was preempted partially based on State law's establishment of a Siting Board that "is required to determine whether any municipal laws or regulations governing the construction or operation of a proposed generating facility are unreasonably restrictive, and has the power to waive compliance with such municipal regulations").

77. *See, e.g., Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 691-92, 16 N.Y.S.3d 25, 30, 37 N.E.3d 82, 87 (2015) (finding "no express conflict between the broad authority accorded to [New York] courts to regulate attorneys under the [New York] Judiciary Law and the licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law," and further finding that the "authority to regulate attorney conduct does not evince an intent to preempt the field of regulating non-legal services rendered by attorneys"); *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.2d 1188 (2014) (holding that State Oil and Gas Law did not preempt town zoning ordinances banning hydrofracking); *New York State Club Assn. v. New York*, 69 N.Y.2d 211, 221-22, 513 N.Y.S.2d 349, 354, 505 N.E.2d 915, 920 (1987) (upholding New York City law prohibiting discrimination in private clubs; State's Human Rights Law's failure to define "distinctly private" suggested "an intent to allow local government to act"); *People v. Judiz*, 38 N.Y.2d 529, 531-32, 381 N.Y.S.2d 467, 469, 344 N.E.2d 399, 401 (1976) (upholding a local ordinance prohibiting possession of an "imitation pistol" despite a State statute covering the same subject area).

78. Briffault, *Intergovernmental Relations, supra* note 26, at 173.

79. *See* Briffault, *Local Government and the New York State Constitution, supra* note 2, at 90. *See also* Paul Diller, *Intrastate Preemption*, 87 Boston Univ. L. Rev. 1113, 1133 (2007) (arguing that field preemption can be a "tool of interest groups," through which particular focused groups "seek relief from the local laws they dislike by turning to the courts, rather than—or in addition to—pursuing other options to further their interests.").

80. *See* Daniel B. Rodriguez, *Localism and Lawmaking*, 32 Rutgers L.J. 627, 639-40 (2001).

81. N.Y. State Comm'n on Local Govt. Efficiency & Competitiveness, 21st Century Local Government 36 (Apr. 2008), *available at* http://www.greaterohio.org/files/policy-research/new-york-final-report.pdf.

82. *Id.* at 37.

83. *Id.* at 3, 36-37.

84. *Id.* at 36. The State of Illinois is an example of a State that has followed this approach. The Home Rule provision in the Illinois State Constitution allows for preemption only when the Legislature expressly so provides in legislation. *See* Ill. Const. 1970, art. VII, § 6(i) ("Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."). *See also* Alaska Const. art X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.").

85. *See* Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 Alb. L. Rev. 647, 648 (2014) ("Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be 'liberally construed.' Such liberal construction, this article suggests, requires a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws. This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore.").

86. *See Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) ("In general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, if the legislature wishes to preempt an entire field, it must so state.') (internal quotation marks, citation & brackets omitted). *See also, e.g., City of Ocala v. Nye*, 608 So.2d 15, 17 (Fla. 1992) (implying in dicta that Florida does not recognize field preemption); *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212, 218 (Ohio 1998) ("(T)here is no constitutional basis that supports the continued application of the doctrine of implied preemption.").

87. *See Jancyn Mfg. Corp.*, 71 N.Y.2d at 97, 524 N.Y.S.2d at 11, 518 N.E.2d at 905.

88. 251 N.Y. 467, 167 N.E. 705 (1929).

89. L. 1929, ch. 713, § 3.

90. *Adler*, 251 N.Y. at 491-92, 167 N.E. at 714 (Lehman, J., dissenting).

91. *Adler*, 251 N.Y. at 470, 167 N.E. at 706-08 (Pound, J. concurring).

92. *Id.* at 473-78, 167 N.E. at 706-09.

93. *Id.* at 491, 167 N.E. at 714 (Cardozo, Ch. J., concurring). *See Patrolmen's Benevolent Assn. of City of New York*, 97 N.Y.2d at 386, 740 N.Y.S.2d at 663, 767 N.E.2d at 120 ("A recognized exception to the home rule message requirement exists when a special law serves a substantial State concern.").

94. Eliot J. Kirshnitz, *Recent Developments: City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule*, 74 St. John's L. Rev. 935, 947 (2000) [hereinafter *Strikes Another Blow*]. *See also Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 970 N.Y.S.2d 724, 726, 992 N.E.2d 1067, 1069 (2013) (holding that "where the Legislature has enacted a law of state-wide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination of the reasonableness of the distinctions the Legislature has made"). *See also Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 52, 484 N.Y.S.2d 528, 529, 473 N.E.2d 756, 757 (1984) (Article's IX limitations on special laws "applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State government"). *See, e.g., Osborn v. Cohen*, 272 N.Y. 55, 59-60, 4 N.E.2d 289, 290 (1936) (striking down a statute that provided for submission of issue of firemen's hours to referendum in cities of one million or more inhabitants; no "foundation in the record" that the establishment and control of fire departments are matters of state concern).

95. *See Wambat Realty Corp.*, 41 N.Y.2d at 494, 393 N.Y.S.2d at 952, 362 N.E.2d at 584 (terming *Adler* a "decisively enlightening case"); Cole, *Ghost of Home Rule, supra* note 11, at 718 ("In virtually every subsequent judicial decision dealing with these matters, *Adler* has been cited for the proposition that as to matters of state concern, the legislature may act through the ordinary legislative process, unrestricted by the home rule provisions of the constitution."); Galie, Ordered Liberty, *supra* note 24, at 291 ("In general, the Court of Appeals has followed

decisions made prior to the adoption of the article, giving 'matters of state concern' an expansive reading.") (citation omitted).

96. *See Matter of Town of Islip,* 64 N.Y.2d at 56-58, 484 N.Y.S.2d at 531-33, 473 N.E.2d at 759-61 (upholding special law regulating waste disposal in Nassau and Suffolk counties; state interest in pollution protection).

97. *See Robertson v. Zimmerman,* 268 N.Y. 52, 61, 196 N.E. 740, 743 (1935) (upholding special law establishing a sewage authority for the City of Buffalo through an act which imposed restrictions and obligations on one particular municipality; state concern for the life and health of communities taking water supply from Lake Erie, the Niagara River and Lake Ontario).

98. *See Wambat Realty Corp.,* 41 N.Y.2d at 494-95, 393 N.Y.S.2d at 952-53, 362 N.E.2d at 584-85 (upholding special law, the Adirondack Park Agency Act, in which State set up a zoning and planning program for all public and private lands within the park despite the zoning and planning powers of local government; statute addressed subject of state concern).

99. *See Matter of Kelley v. McGee,* 57 N.Y.2d 522, 536-39, 457 N.Y.S.2d 434, 439-41, 443 N.E.2d 908 913-15 (1992) (holding that section in Judiciary Law which required district attorneys in counties with a certain population to be paid the same salary as county court judges did not conflict with Home Rule provisions of State Constitution; statutory classification was reasonable and related to an area of state concern).

100. *See New York Steam Corp. v. City of New York,* 268 N.Y. 137, 143, 197 N.E. 172, 173 (1935) (upholding statute authorizing cities with a population over one million to pass local tax laws for unemployment relief; state concern given law was designed to combat high unemployment during an unstable time period).

101. *See Floyd v. New York State Urban Dev. Corp.,* 33 N.Y.2d 1, 7, 347 N.Y.S.2d 161, 164, 300 N.E.2d 704, 706 (1973) (upholding statute under which New York State Urban Development Corporation ("UDC") could acquire land in urban core areas by purchase or condemnation and undertake the development of projects, exempt from local restrictions; State interest in allowing UDC to solve housing problems).

102. *See City of New York v State of New York,* 31 N.Y.2d 804, 805, 339 N.Y.S.2d 459, 459, 291 N.E.2d 583, 583 (1972) (affirming lower court ruling decision which held that rent control was a matter of State concern and not within New York City's "property, affairs and government" powers).

103. *See Bugeja v. City of New York,* 24 A.D.2d 151, 152, 266 N.Y.S.2d 80, 81, *aff'd,* 17 N.Y.2d 606, 268 N.Y.S.2d 564, 215 N.E.2d 684 (finding no Home Rule impediment to State Legislature's authorization for the issuance of serial bonds to cover New York City's pension and retirement liabilities; continuance of sound civil service system matter of State concern).

104. *See Patrolmen's Benevolent Assn. of City of New York v. City of New York,* 97 N.Y.2d at 381-389, 740 N.Y.S.2d at 660-65, 767 N.E.2d at 117-22 (2001) (upholding special law implementing dispute resolution mechanisms for disputes between New York City policemen and New York City; law addressed "substantial State concern").

105. *See Hotel Dorset Co. v. Trust for Cultural Resources,* 46 N.Y.2d 358, 368-69, 413 N.Y.S.2d 357, 361-62, 383 N.E.2d 1284, 1288 (1978) (upholding statute that had specifications resulting in it being applied to only one museum, the Museum of Modern Art).

106. *See Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 318-19, 970 N.Y.S.2d 724, 726, 729-31, 992 N.E.2d 1067, 1069, 1072-73 (2013) (upholding amended Wicks law for public contracting that included differing threshold requirements; statute bears "a reasonable relationship to a substantial statewide concern which concern falls within the State Legislature's purview and must be accorded great deference by this court").

107. *See Uniformed Firefighters Assn. v. City of New York,* 50 N.Y.2d 85, 90, 428, N.Y.S.2d 197, 198-99, 405 N.E.2d 679, 680 (1980) (upholding State law that eliminated a local requirement that New York City firefighters live in New York City; residency of employees a matter of State concern).

108. *See City of New York v. State of New York,* 94 N.Y.2d 577, 591–92, 709 N.Y.S.2d 122, 128–29, 730 N.E.2d 920, 926–27 (2000) (upholding special law that repealed New York City's commuter tax; State had a substantial interest in easing burden on non-City residents who work in New York City).

109. *See Greater N.Y. Taxi Assn.,* 21 N.Y.3d at 302-308, 970 N.Y.S.2d at 914-19, 993 N.E.2d at 400-405 (upholding special law that allowed livery cabs to accept passengers in the outer boroughs of New York City and outside Manhattan's central business district who hail the livery cabs from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities, notwithstanding that it had always been assumed previously that laws regulating New York City taxicabs required a Home Rule message; statute "addresses a matter of substantial state concern" and was "not a purely local issue").

110. *See Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at 319, 970 N.Y.S.2d at 730, 992 N.E.2d at 1073 ("Home Rule provisions of the Constitution were never intended to apply to legislation" affecting matters of state concern and instead aimed at preventing "unjustifiable state interference in matters of purely local concern"). *See also* Gerald Benjamin & Charles Brecher, *Introduction*, *in* THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM 11 (Gerald Benjamin & Charles Brecher eds., 1988) ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

111. *See* N.Y. STATE TEMP. STATE COMM'N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 ("The line between matters of state concern and matters of local concern remains indistinct[.]"); Cole, *Local Authority to Supersede State Statutes*, *supra* note 21, at 34 ("The areas carved out by Article IX of the State Constitution for control by local governments, free from State interference, except by general law—"property, affairs or government"—has been significantly narrowed and lacks identity.").

112. *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("as long as the state is able to make a colorable case that it is acting within respect to a matter of state concern, the Home Rule clause provides little restriction on the legislature's ability to act by special law").

113. *Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at, 316-17, 970 N.Y.S.2d at 728, 992 N.E.2d at 1070 (internal quotation marks & citations omitted; emphasis in original).

114. Report of the Task Force on the New York Constitutional Convention, 52 RECORD OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 522, 619 (1997) [hereinafter "CITY BAR 1997 TASK FORCE REPORT"].

115. *See, e.g.,* Cole, *Ghost of Home Rule*, *supra* note 11, at 749 ("With the extension of the state concern doctrine into areas that logically should be subject to local determination, there is reason only for gloom."); Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What Is Left of the State Constitution's Home Rule Clause After the Court of Appeals Decision in the Hail Act Case,* 77 ALB. L. REV. 113, 118 (2014) (the "highly deferential" approach the Court of Appeals has taken to claims of state concern "cast[s] a long dark shadow on the future of local government autonomy in New York State"), *id.* (the Court's jurisprudence "raises red flags about how much (if any) of the constitution's home rule clause remains in force going forward, making it difficult (if not impossible) for local governments in New York to delineate the appropriate boundaries of autonomous self-rule").

116. CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 618 (citations omitted).

117. *Id.* at 619.

118. Galie, Ordered Liberty, *supra* note 24, at 292-93.

119. Andrew L. Kaufman, Cardozo 378-79 (1998).

120. *See generally,* Robert M. Shaffer, Unfunded State Mandates and Local Governments, 64 U. Cinn. L. Rev. 1057 (1996).

121. Galie & Bopst, The New York State Constitution, *supra* note 7, at 278.

122. *See* Briffault, *Intergovernmental Relations, supra* note 26, at 179-80 ("Prior to and since [the 1967 Constitutional Convention] fourteen states have adopted constitutional provisions limiting or barring some or all unfunded mandates."); City Bar 1997 Task Force Report, *supra* note 114, at 620 ("There also is support for a constitutional amendment to restrict unfunded mandates by the legislature on New York's local governments. We view the debate over unfunded mandates as an extension of the home rule question. Again, New York lags behind other states that have considered and resolved this issue."); Deborah F. Buckman, *Construction and Application of State Prohibitions of Unfunded Mandates,* 76 A.L.R.6th 543 (2012) (collecting state court cases that construe and apply state prohibitions of unfunded mandates).

123. *See, e.g.*, Cal. Const. art. 13B, § 6(a) ("Subject to certain exceptions, [w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."); Fla. Const. art. VII, § 18(a) ("No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure."); Haw. Const. art. VIII, § 5 ("If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost."); La. Const. art. VI, § 14(a)(1) ("No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue."); Mich. Const. art. IX, § 29 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs."); MO. Const. art. X, § 21 ("A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs."); N.H. Const. pt. I, art. 28-a ("The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision."); N.J. Const. art. VIII, § 2, ¶ 5 ("[A]ny provision of…law, or of…rule or regulation issued pursuant to a law, which is determined…to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire."); N.M. Const. art. X, § 8 ("A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed."); Tenn. Const. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.").

124. *See* New York State Mandate Relief Redesign Team, Mandate Relief, Final Report 14 (Dec. 2011), *available at* http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/FInal_Mandate_Relief_Report.pdf (last visited on Mar. 4, 2016).

125. *See* Ward, The New York State Constitution, *supra* note 6, at 545 (New York's constitutional and statutory provisions are more extensive than those in many states.).

126. Cole, *Ghost of Home Rule, supra* note 11, at 715 (1985); *see also* Benjamin & Brecher, *Introduction, supra* note 110, at 11 ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

127. Cole, *Ghost of Home Rule, supra* note 11, at 715 (1985).

128. W. Bernard Richland, *Constitutional City Home Rule in New York,* 54 Colum. L. Rev. 311, 326 (1954).

129. Kirshnitz, *Strikes Another Blow, supra* note 94, at 943.

130. Gerald Benjamin & Charles Brecher, *The Political Relationship* 118 *in* The Two New Yorks: State-City Relations in the Changing Federal System (Gerald Benjamin & Charles Brecher eds., 1988).

131. *See* Henrik N. Dullea, Charter Revision in the Empire State: The Politics of New York's 1967 Constitutional Convention 273 (1997) ("Coupled with repeal of the existing constitutional provision allowing the state to enact legislation related to the 'property, affairs, or government' of local municipalities—a phrase which over the years had been narrowly construed by the courts to limit local flexibility—and its replacement by new language referring to 'matters of local concern and the local aspects of matters of state concern,' the proposed article offered considerable hope for greater local government initiative.").

132. *Id.* at 339-41.

133. Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 99.

134. Baker & Rodriguez, *Constitutional Home Rule and Judicial Scrutiny, supra* note 58, at 1342.

135. City Bar, 1997 Task Force Report, *supra* note 114, at 620; *see also* N.Y. State Temp. State Comm'n on Const. Conven., Local Government, *supra* note 5, at 68 ("Although the recent constitutional and statutory amendments undoubtedly represent great strides forward…much work remains to be done.").

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