


January 2008

## The History of the New York City Law Department: Fighting for the City by William E. Nelson

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### Recommended Citation

Ross Sandler, *The History of the New York City Law Department: Fighting for the City by William E. Nelson*, 53 N.Y.L. SCH. L. REV. 541 (2008-2009).

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ROSS SANDLER

The History of the  
New York City Law Department:  
*Fighting for the City* by William E. Nelson

ABOUT THE AUTHOR: Ross Sandler is professor of law at New York Law School and director of the Center for New York City Law. By way of disclosure, Professor Sandler was a New York University Law School classmate of Professor Nelson, class of 1965, and has maintained a professional relationship and friendship with him over the years.

Professor William E. Nelson's book, *Fighting for the City: A History of the New York City Corporation Counsel*, offers an insightful and full-blooded history of the New York City Law Department and of the people who served as the city's chief lawyer, the Corporation Counsel. Readers of Professor Nelson's book, particularly those who actively participated in the work of the Law Department over the last forty years may be surprised by his treatment. Many anticipated a recitation of litigations won and lost and a catalog of mostly laudatory events, as is often typical of commissioned histories. Professor Nelson's book does not follow that pattern. It is a thorough history, academically grounded, and deals with many of the major questions that arose as part of the professional duties of the Corporation Counsel and the lawyers who worked at the Law Department. Most importantly, Professor Nelson offers an analysis and standard for making judgments as to the Corporation Counsel's success or lack of success. This standard involves how well the Corporation Counsel defined the mission of the office of Corporation Counsel during his tenure, and how successfully the occupant of that office fulfilled that mission. In developing his analytical framework, Professor Nelson makes a significant contribution to the literature about New York City and about government lawyers generally. Not everyone is or will be happy with the judgments offered by Professor Nelson. Indeed, his book has engendered adverse comment from a significant number of readers, some of whose detailed attacks are included in the articles in this issue of the *Law Review*.<sup>1</sup> The specific criticism set out by these writers mostly concerns one era—the period following World War II when the Law Department supported the firing of city employees who were members of the Communist Party or were suspected of being members or sympathizers of the party. The critics, challenging the factual basis underlying Professor Nelson's interpretation of the period, attack his association of the firings with the Catholic Church and its political, religious, and international concerns.

The involvement of the Catholic Church in New York City politics during the post-World War II period may be debatable, but that debate does not undermine the conceptual bases underlying Professor Nelson's analysis of that period and, indeed, his entire book. Professor Nelson, in his introduction, makes clear that two competing and overarching realities deeply affected the Corporation Counsel and the Law Department throughout its three-hundred year history.

The first was New York City's economic strength relative to other cities in the nation and in the world. New York City is many things, but one thing it consistently has been is an economic player. Like any economic player, the resources available to the city greatly determined policies and outcomes. Professor Nelson characterizes the economic factors that governed New York City as polar opposites: competition versus monopoly. For part of its history, Professor Nelson states, New York City struggled against other strong, competing cities: Philadelphia in the colonial era, for example, and international world cities in our own era. During other periods New York City benefited from near monopoly power, as when the Erie Canal opened and New York City overcame Philadelphia as the nation's leading port, and, later, when

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1. See, e.g., Paul A. Crotty, *A Response: Why William Nelson's Analysis of the Law Department 1946–1965 is Wrong*, 53 N.Y.L. Sch. L. Rev. 519 (2009).

New York City's wealth allowed it to come close to monopolizing the nation's capital markets.

The different eras where either competition or monopoly was in the ascendancy directly relate to the second major theme of Professor Nelson's book: distributive justice versus efficiency. By distributive justice, Professor Nelson emphasizes a democratic conception of justice, meaning that the law be administered in the interest of a majority of the people, or at least the interests identified by the elected officials chosen by a majority of the electorate. For the Corporation Counsel, a concern for distributive justice often warranted the Law Department's hiring of attorneys who were members of large, ethnic voting blocks, such as the Irish immigrant classes. It also, at other times, justified the Law Department's pursuit of affirmative litigation designed to advantage a majority of voters favored for one reason or another.

Efficiency, on the other hand, involves maximizing the well-being of the lawyer's client. With a client like the city of New York, this meant attention to both the fiscal health of the city and its residents, as well as a faithful devotion to the legal order on which the city and its residents depended. Examples of legal policies based on efficiency include the city's strict enforcement during the colonial period of the economic terms under which the city had leased its valuable waterfront land,<sup>2</sup> or the Law Department's vigorous defense of the public treasury against excessively expensive service demands, whether those demands emanated from well-heeled real estate developers or indigent welfare recipients.<sup>3</sup>

Professor Nelson uses these concepts to develop standards by which to measure how each Corporation Counsel approached his job and to make judgments about that Corporation Counsel's choices and successes. In so doing, Professor Nelson takes on one of the most difficult question that confounds every governmental lawyer: who is the client? Lawyers, even Corporation Counsels, are not free actors able to accept or reject policies according to their own agendas. They have clients. But just who is that client? To whom does the Corporation Counsel owe his professional loyalty: The mayor who appointed the Corporation Counsel? The entity known as the "Corporation of the City of New York"? Or the people making up the population of the city? Such a debate becomes particularly complex in New York City with its eight million residents, perhaps another three million or more who work in the city but live elsewhere, and a multiplicity of municipal agencies that provide every conceivable service, from intensive hospital stays and home care, to paving interstate highways and educating students from pre-K to Ph.D. status.

Professor Nelson acknowledges that his conceptual polar opposites are never perfectly fulfilled.<sup>4</sup> Nevertheless, he states that

[w]hatever [their] complexities . . . it seems clear that every Corporation Counsel has had two intertwined but separate roles—as lawyer for the

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2. WILLIAM E. NELSON, *FIGHTING FOR THE CITY: A HISTORY OF THE NEW YORK CITY CORPORATION COUNSEL 19–20* (2008).

3. *See id.* at 264–67.

4. *See id.* at xii.

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government of New York City and as advisor to the Mayor or other democratic master who placed him in office; and every Corporation Counsel has had to determine how much emphasis to give each role.<sup>5</sup>

Professor Nelson's book is thus a history with a thesis; it is that thesis that holds the narrative together as he moves through three hundred years of Law Department history. Professor Nelson returns repeatedly to this thesis as a way of making sense of the choices made by individual Corporation Counsels and as a way to judge the adequacy and success of the leadership provided by that person. It is that consistency of Professor Nelson's analytical construct, and the flare with which he uses it, that makes *Fighting for the City* such an interesting and stimulating book.

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The heart of Professor Nelson's book is a chronological discussion of the functioning of the Corporation Counsel and of the Law Department during ten different periods. During the first era discussed, 1686-1801,<sup>6</sup> the legal business of the city of New York was performed by an official bearing the ancient English title of "recorder." The recorder, generally a member of the colonial elite, had two main duties. He was a judge of the leading court, the mayor's court, where he was most likely to be the judge most conversant with the law. At the same time, the recorder was the legal advisor to the city's legislative body, the common council, where he drafted ordinances, advised on the legalities of proposed actions, and interpreted English law. He occasionally also represented the city in litigation.

Although legal records and biographies are scant for some recorders, others are well known. David Horsmanden, who served as recorder from 1735 through 1747, was, like most of the others, tied tightly to the governing elite. Horsmanden simultaneously held high-level appointments in the city, its courts, and in the governor's council. It was Horsmanden who was in office during the Slave Rebellion of 1741. The Slave Rebellion related to a series of fires, thought to be arson, that threatened the physical survival of the city. Recorder Horsmanden supported following full English criminal procedures in the prosecution of the alleged rebels. He also supported stiff punishment for those convicted: burning at the stake and hanging. Professor Nelson cites Horsmanden as an example of a recorder whose awesomeness provided the power to enforce law in a colony that lacked today's police powers with which to enforce regulations and ordinances.<sup>7</sup>

With the city in competition with other ports, the recorders of the period relentlessly protected the city's ownership of and rights to its valuable land holdings by drafting and enforcing leases that encouraged economically important development. This need brought to the office men who possessed strong transactional and political

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5. *Id.*

6. *See id.* at 1-28.

7. For Professor Nelson's discussion of Horsmanden, see NELSON, *supra* note 2, at 6-12.

skills needed to build the economy of the growing city. One such man was Richard Varick, who served as recorder from 1784 through 1789, and later became mayor.<sup>8</sup>

Varick was one of the judges who decided the case *Rutgers v. Waddington*, a case that protected property and encouraged business.<sup>9</sup> The case involved a claim for rent and ownership of real property that had been abandoned by the owner when the British occupied New York City during the Revolutionary War. The owner returned when the British departed, and demanded recovery of the property and rents from the people who had used the property under British authority during the occupation. The court's decision resulted in a compromise that gave rents to the returning owner, but only for the period after the British had left. In doing so, it upheld the commercial law of nations which protected individuals acting under the command of occupying military force. The decision in *Rutgers v. Waddington*, in Professor Nelson's view, "reflected the internationalist views of the city's emerging mercantile elite, who were relying on the law of nations in an effort to rebuild economic ties with Britain and without whose cooperation and assistance the mayor, recorder, and Council could not govern the city."<sup>10</sup>

Professor Nelson summarized the qualities of the recorder at the beginning of the nineteenth century as fitting more with the competitive/efficiency side of his comparisons, stating that

[b]y the end of the eighteenth century, . . . mental acumen and legal knowledge, together with hard work, were the most important traits a man needed to become Recorder and counsel for the City of New York. By 1800, the office had shed the profile built on inspiring awe that it had inherited from the Middle Ages. It also had begun to assume a modern style of professionalism that remains one of the leading characteristics of the Law Department today. But a key competing characteristic—a democratic obligation to heed the voice of the people—had only begun to emerge.<sup>11</sup>

The period from 1801 through 1875 was a period of growth for the city and democratization of the government.<sup>12</sup> After the opening of the Erie Canal, New York City emerged as the strongest economic competitor among the nation's ports. Professor Nelson states that the city's "oscillation between corruption and reform during" the period after 1850 "reflected a distributional contest over who would

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8. *Id.* at 16.

9. *See id.* at 23 (discussing *Rutgers v. Waddington*, an unpublished 1784 mayor's court decision). For the opinion and documents associated with the case, see 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 282–419 (Julius Goebel, Jr., ed., 1964); *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674–1784*, 57–59, at 302–07 (Richard B. Morris ed., 1935); *see also* NELSON, *supra* note 2, at 23 n.49.

10. NELSON, *supra* note 2, at 27.

11. *Id.* at 27–28.

12. *See id.* at 29–63.

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retain the monopoly profits that the city's commerce generated—the merchants, the politicians, or the common voters.”<sup>13</sup>

Growth fueled demand for professionalism in the office of Corporation Counsel, while democracy tended to politicize the office. The last recorder of the eighteenth century, feeling the pressure of increased demand for legal services, began to hire assistants, which led to political considerations in their appointments. Both the common council and the state legislature during this period were involved in the evolution of the office, with the common council in 1812 reconstituting the position and making the recorder dependent on it. Later, the state legislature in 1849 made the Corporation Counsel an elected position as part of a new charter for the city of New York.

This was also the period of the growth of Tammany Hall with its popular mandate and legacy of corruption. Corporation Counsel Lorenzo B. Shephard, a reformer, and an elected Corporation Counsel from 1855 to 1856, fought with Mayor Fernando Wood, a regular Tammany Democrat, over management of the construction of Central Park. Mayor Wood sought to build a Central Park that was more of a playland rather than the verdant green ward sought by the elite. Professor Nelson characterized Shephard as the first Corporation Counsel who proclaimed that his client was the city as an entity, not the particular elected official whom the majority had placed in office.<sup>14</sup>

During the period of the Tweed Ring,<sup>15</sup> Richard O’Gorman was Corporation Counsel. O’Gorman had been nominated by Tammany Hall in 1865 when Tammany sensed that the mood of the electorate called for a reformer of stature, a Corporation Counsel who would maintain some independence. O’Gorman proved to be capable, and managed to navigate between the reformers and the Tweed Ring during his tenure. He was not tarred with the corruption scandal that brought down the Ring in 1871.<sup>16</sup>

Professor Nelson observed that by the 1870s, it was generally understood that the city required a strong Corporation Counsel, like O’Gorman, who was nonetheless nourished by politics. The Corporation Counsel, Professor Nelson writes,

needed a political base, either his own or the Mayor’s, to which he could turn to ingest the power that the office itself did not possess, to impose the law on recalcitrant officials, and to force them to act on behalf of the city rather than the political forces that had elected them. Corporation Counsels who lacked

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13. *Id.* at 41.

14. *Id.* at 43.

15. William Tweed, through his leadership of the Tammany Hall Democrats, controlled the political life of New York City following the Civil War until his overthrow in 1871. Tweed held many appointed and elected offices, but was never mayor. He was ultimately convicted of looting the city treasury and died in a New York City jail in 1878. For a sweeping and readable history of Boss Tweed, see KENNETH D. ACKERMAN, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK* (2005).

16. NELSON, *supra* note 2, at 60–62.

such a power base were ineffective and, when their power was drained away by corruption, even worse.<sup>17</sup>

Between 1875 and 1898,<sup>18</sup> the Corporation Counsel was modernized, and a recognizable Law Department was established under the leadership of William C. Whitney, Corporation Counsel from 1875 to 1882. This was a period where control seesawed between reformers and Tammany Hall, and where the competition for the distribution of the city's resources continued.

Whitney came into office following the Tweed Ring scandals. He introduced non-political hiring as well as the retention of seasoned attorneys who performed at a high-level of professionalism. His particular innovation was to hire young attorneys from prestigious law schools, much in the manner that large law firms today recruit associates. This innovation actually preceded the development of a similar hiring scheme established at Cravath, Swaine & Moore LLP, which has been generally credited with starting the now widely-copied hiring practice.<sup>19</sup> Whitney, like other Corporation Counsels, also acted with deference to the city's majority when he resisted state-sponsored legislation aimed at protecting Sunday from liquor and gambling. He, for example, directed the police to make no arrests in absence of a warrant issued by a magistrate.<sup>20</sup>

Professor Nelson emphasized that Whitney's legacy was the creation and maintenance of a bureaucratic Law Department that protected the city's fiscal well-being and facilitated the delivery of public services far better than the ad hoc structures of the mid-nineteenth century political establishment. Even after Tammany Hall had regained city hall in 1888, the Corporation Counsel was able to hold onto the reforms that were needed to provide the legal work necessary to build the infrastructure of the modern city.<sup>21</sup>

The period following the 1898 consolidation of the city lasted until 1917, during which the political battles between Tammany Hall and reformers continued. The first mayor after consolidation, Robert A. Van Wyck, brought back a traditional Tammany Hall outlook, but he was replaced by reformer Seth Low in 1901, and the Tammany Hall mayors that followed proved to be relatively independent. The result was that the Law Department was generally able to maintain its professional status throughout the period.<sup>22</sup>

The Law Department of the period, with seventy attorneys, emerged as the largest law office in the nation. With its hiring practices fluctuating under the

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17. *Id.* at 62.

18. *Id.* at 65–93.

19. See, e.g., David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1628–29 (1998) (referring to ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 4–5 (1988)).

20. NELSON, *supra* note 2, at 89.

21. See *id.* at 92.

22. *Id.* at 95–124.



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different mayors, the Law Department boasted attorneys from both prestigious law schools and from the ranks of the more recent immigrant groups on which Tammany Hall depended. Over time, Professor Nelson reports, the Law Department built up a cadre of professional “attorneys from diverse backgrounds capable of enriching and improving each other’s work.”<sup>23</sup>

Professor Nelson observed that during the period from 1898 to 1917 the Law Department fulfilled its mission of monitoring city officials, supporting construction of municipal infrastructure, and upholding the city’s tax powers and regulatory authority. It also continued to reflect the electorate’s democratic desires by restrictively interpreting unpopular state laws aimed at improving morals. Outside of hiring staff, which was balanced between civil service and political appointments, the Corporation Counsel “successfully resisted most of the pressures to which interest groups were subjecting him.”<sup>24</sup>

Tammany Hall held city hall between 1918 and 1933 and re-invoked its full political prerogatives.<sup>25</sup> Appointees to the Law Department did not come from the elite, but from those with less “fancy backgrounds.”<sup>26</sup> Professor Nelson does not disparage the quality of many of these appointees. This was a time when elite law schools, by their admission policies, discriminated against highly-capable immigrants or their children. Professor Nelson suggests, however, that Tammany Hall’s use of appointments to the Law Department was not merely patronage to keep the Tammany machine well-oiled. It was also a political strategy to populate “the Law Department with attorneys who valued the central role that ordinary people should play in formulating government policy and shaping the law.”<sup>27</sup> This was a time when Tammany Hall built its election success by responding to New York City’s immigrant populations, which had become the majority of the voters.<sup>28</sup>

The Law Department’s politicized and democratic policies included not only resistance to Prohibition, but resistance to governmentally imposed restrictions on other popular social activities as well. One example was a ruling by the Corporation Counsel regarding playing football on Sunday. While playing baseball on Sunday was legal under state law, playing football, the Corporation Counsel ruled, was not. The explanation: professional baseball had gained the loyalty of the city’s immigrant communities, while football was at that time primarily an Ivy League activity.<sup>29</sup> Other areas where the Corporation Counsel pursued policies or litigation favoring the city’s population involved the financing of subways, the regulation of transit fares, and opposition to high rates for gas and electricity.

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23. *Id.* at 111.

24. *Id.* at 124.

25. *Id.* at 125–54.

26. *Id.* at 130–31.

27. *Id.* at 151.

28. *Id.*

29. *Id.* at 145.

The end of this period came with the resignation of Mayor James J. Walker in 1932 following the revelations of widespread corruption unearthed by the Seabury Investigations. The Law Department did not escape being tarred by the scandal, although Walker's resignation short-circuited the investigations. Corruption was nevertheless found to have occurred in the handling and settling of worker compensation cases and in the monetary awards granted property owners subject to eminent domain. The Law Department at this time was part of the Tammany Hall machine and, as Professor Nelson concluded, the Law Department "participated in at least some and overlooked more of the corrupt practices of that machine."<sup>30</sup>

The late 1920s brought another trend to a conclusion. New York City was no longer dominant economically. The nation's rail network allowed other cities to compete with New York City, and the demands for social services, brought on in part by Tammany Hall's policies to serve the urban immigrant community, greatly expanded the costs of government just when the city's relative capacity to fund those services had declined. The city was entering a new economic period in which the Law Department would need to respond more to the demands for efficiency.<sup>31</sup>

Fiorello LaGuardia, mayor from 1934 to 1945,<sup>32</sup> defeated the Tammany candidate, and returned the city to a reform administration imbued with a scientific management style. LaGuardia's first Corporation Counsel, Paul Windels, cleaned house, firing sixty-six assistant Corporation Counsels. He replaced them with the best attorneys he could find regardless of politics. They were, however, heavily recruited from elite law schools, a pattern that rejected the prior Tammany view that Law Department attorneys should come from, and be part of, the community. Many of those recruited during this period performed superbly and remained with the Law Department for a substantial portion of their careers.<sup>33</sup>

While the Law Department provided the city with exceptional representation, it also followed the democratic needs of the mayor, as Professor Nelson shows in his discussion of the Bertrand Russell matter. Mayor LaGuardia opposed the appointment of Bertrand Russell as a visiting professor at City College of New York on moral grounds. Russell had become controversial among many of New York City's voters because of his liberal views on marriage and sex. LaGuardia had the appointment revoked and, when the case reached the court, the Law Department defended the revocation and won.<sup>34</sup> This case and others led Professor Nelson to conclude that the LaGuardia Law Department "was neither fully professional nor fully democratic: its staffing policies were professional, but many of its programmatic policies were democratic."<sup>35</sup> Professor Nelson characterized the LaGuardia

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30. *Id.* at 137.

31. *See id.* at 153.

32. *Id.* at 155–82.

33. *See id.* at 160–71.

34. *See id.* at 172–74.

35. *Id.* at 182.

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administration as one of transition, during which the city had to compete for resources, while at the same time respond to the democratic demands of a population that expected much more from government than government could provide.<sup>36</sup>

Tammany Hall regained and held city hall from 1946 through 1965,<sup>37</sup> although Mayor Robert Wagner broke with Tammany Hall in 1961 when he ran for a third term. Hiring, though political, nonetheless continued to bring to the Law Department many outstanding lawyers. Among them was Milton Mollen, who came to the Law Department after coming to the attention of Denis Hurley, Corporation Counsel under Mayor Vincent R. Impellitteri.<sup>38</sup>

Because the period is so recent, for the first time in his book Professor Nelson begins to have access to people who could give personal accounts of their experiences. Among the people interviewed were Milton Mollen, John Hogrogian, Judah Gribetz, and Edith Spivak. Their availability provided significant detail and insight, but also complicated the history with personal and perhaps one-sided recollections. Mollen and Gribetz, both of whom served in the Law Department, questioned some of Professor Nelson's conclusions on a number of topics. They both thought that many of the lawyers who came into the office through the political process performed well, and that Professor Nelson's description of that process understated the quality of the hires.<sup>39</sup> Professor Nelson does not disagree that many of the hires were of high quality, but he does make the larger point that such a political hiring process tends to undermine the professionalism of the Department.<sup>40</sup> Mollen and Gribetz also feel that Professor Nelson slighted the difficulty and complexity of the work performed by the Law Department following World War II, especially the revisions of administrative and regulatory rules, including the modernization of the complex and critically important zoning ordinance and building code.<sup>41</sup>

By far, the most controversy occasioned by *Fighting for the City* concerned Professor Nelson's discussion of the Law Department's support of the city's removal of Communists from municipal employment. Professor Nelson saw these events as similar to earlier politically motivated efforts by the Law Department to advance issues popular with a majority of voters. He cites, as earlier examples of politically motivated policies, the obstruction of Prohibition, challenges to utility rate adjustments, and the Bertrand Russell matter. Professor Nelson denounces such uses of the resources of the Law Department as "legal demagoguery" of a type that "remains familiar in American politics today."<sup>42</sup> Prior to the middle of the twentieth

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36. *Id.*

37. *Id.* at 183–218.

38. *Id.* at 189.

39. Milton Mollen & Judah Gribetz, Remarks at the New York Law School Law Review Symposium: The History of the New York City Law Department (Feb. 6, 2008).

40. William E. Nelson, Remarks at the New York Law School Law Review Symposium: The History of the New York City Law Department (Feb. 6, 2008).

41. Mollen & Gribetz, *supra* note 39.

42. NELSON, *supra* note 2, at 196.

century, he writes, most socio-economic and cultural conflicts had been resolved mainly by elected officials, not lawyers:

Tammany's purge of Communists from city government marked one of the first sustained occasions in American history on which political leaders relinquished control over a divisive issue and turned to government lawyers to realize a cultural agenda. Sadly the lawyers, in thrall to a majoritarian democratic ethos and hence oblivious to their obligation to comply with laws adopted by government for the defense of all citizens, did the majority's bidding.<sup>43</sup>

The majority of voters to which Professor Nelson refers were Catholic voters in New York City for whom anti-Communism was an important and highly emotional issue. Professor Nelson builds his case by pointing out that, of the seven men who held the position of Corporation Counsel in the twenty years following World War II, five had Fordham law degrees and a sixth had a Fordham undergraduate degree.<sup>44</sup> He also describes at length the international events that helped trigger concern among New York City's Catholic voters, particularly the arrests of Aloysius Stepinac, the Archbishop of Zagreb, and the arrest of Joseph Cardinal Mindszenty, the patriarch of Hungary.<sup>45</sup> Judge Paul Crotty's letter in this issue of the *Law Review* responds to Professor Nelson's assertions about the Catholic Church and its influence on New York City voters.<sup>46</sup> Professor Nelson, in turn, has amplified his views in response.<sup>47</sup>

I would suggest that there were additional forces at work besides responding to Catholic voters. Lawyers elsewhere, both in and out of government, were in the process of establishing in the United States an entirely new legal culture that would shortly bring into the nation's courtrooms socio-economic issues similar to those that the Law Department found itself engaged in. Thurgood Marshall and the NAACP Legal Defense Fund were, most prominently, litigating through the federal courts the issue of segregation—a fundamental social claim demanded by a large number of citizens. The Supreme Court in its 1954 *Brown v. Board of Education* opinion<sup>48</sup> not only declared segregation unconstitutional; it sent a signal that the courts were ready to become deeply involved in such issues. Lawyers everywhere began to bring an avalanche of socio-economic and environmental claims to the courts. Following the lead of the Supreme Court, federal and state judges moved into an era where the judiciary accepted for judicial determination such issues as conditions in prisons and

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43. *Id.*

44. Fordham University is a Jesuit University located in Manhattan. See Fordham University, <http://www.fordham.edu> (last visited Feb. 17, 2009).

45. NELSON, *supra* note 2, at 198–99.

46. See Crotty, *supra* note 1.

47. See William E. Nelson, *Defending the Historian's Art: A Response to Paul A. Crotty's Attack on Fighting for the City*, 53 N.Y.L. SCH. L. REV. 533 (2009).

48. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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mental institutions, housing standards for homeless people, and procedural and substantive rights of those on welfare.

Professor Nelson accurately sees such advocacy litigation when pursued by the Law Department as an adjunct to election politics, describing it as an “alternate method of governing, [by] currying popular favor by using Corporation Counsel to bring litigation or otherwise take legal positions popular with major groups of voters.”<sup>49</sup> It may seem excessive to fault the Law Department of that era when lawyers today of all political persuasions routinely bring every conceivable socio-economic claim to the courts on behalf of both large and small groups. The Law Department itself has recently brought affirmative claims that are popular with New York City voters. These claims include demands that Midwestern states stop sending their pollution to the East,<sup>50</sup> that gun shops in the South stop selling Saturday night specials,<sup>51</sup> and that foreign countries with embassies in New York City stop defaulting on their city taxes and fees.<sup>52</sup>

Professor Nelson’s purpose in developing the facts concerning the Catholic Church and the wishes of New York City voters, however, was not a commentary on the legal profession or the Catholic Church, but an example, in Professor Nelson’s view, of the Law Department’s misunderstanding of its mission. Popular litigation, even when unsuccessful, may help succeed at the ballots, but may ultimately be at odds with the economic reality demanding a conservation of resources, not an expansion of popular rights. Post-World War II New York City no longer commanded monopoly resources. Popular litigation, even when successful, could neither supply sufficient funds nor restore the level of support that the federal government had provided the city during the Depression. “The Law Department that William Whitney had created and that his politically motivated successors had made into an effective tool of party government,” Professor Nelson writes, “had come to the end of the line.”<sup>53</sup> The final chapter of this era of declining resources fell to the administration of John V. Lindsay who became mayor on January 1, 1966.<sup>54</sup>

Mayor Lindsay’s two Corporation Counsels, J. Lee Rankin and Norman Redlich, were superb lawyers who restored non-political hiring to the Law Department, created an honors program, and recruited top law school graduates, many of whom remain at the Law Department in senior positions to this day.

Lindsay came into office with the goals of ending discrimination, broadening and making fairer the city’s social programs, and engaging the federal government in

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49. NELSON, *supra* note 2, at 216.

50. *See* Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *rev’d*, 549 U.S. 497 (2007); Press Release, N.Y. City Law Dep’t, New York City Files Suit Challenging the EPA’s Clean Air Act Rules (Mar. 3, 2003), *available at* <http://home2.nyc.gov/html/law/downloads/pdf/pr030303.pdf>.

51. *See, e.g.*, City of New York v. Bob Moates’ Sport Shop, No. 06-CV-6504, 2008 U.S. Dist. LEXIS 11699 (E.D.N.Y. Feb. 15, 2008).

52. *See* Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007).

53. NELSON, *supra* note 2, at 218.

54. *See id.* at 219–50.

solving the growing problems of urban America. He relied heavily on his Corporation Counsels and the Law Department to advance his political agenda. Professor Nelson writes:

Thus Lindsay's lawyers were advocates for an ideological agenda, not for the city as a whole. Their advocacy reflected a new and noble conception of the role of the Law Department as defender of equality and individualism . . . . Unfortunately, however, a majority of New Yorkers were not committed either to truly full equality or to genuinely individualistic values.<sup>55</sup>

Even more to the point, the economy of the city was in steep decline, ultimately culminating in the fiscal crisis of 1975 during the mayoralty of Abraham D. Beame.

The Law Department under Mayor Beame fell to 300 attorneys, half the number of attorneys needed to handle the city's workload. The Law Department, like the city, was at sea for lack of resources. People left the Law Department and were not replaced. Bernard Richland, Mayor Beame's second Corporation Counsel, wrote of the doleful and inadequate conditions of the Law Department in his transition brief, dated November 1, 1977, for the incoming Koch administration.<sup>56</sup> Richland cited the inadequate number of attorneys, a failure to staff important cases, low salaries, a high rate of attrition of attorneys, a failure to hire replacements, cramped and stifling working conditions in the Municipal Building, and lack of storage space.<sup>57</sup> The Law Department plainly needed new leadership. This it got with the inauguration of Mayor Edward I. Koch on January 1, 1978 and the appointment of Allen G. Schwartz as Corporation Counsel.<sup>58</sup>

Allen G. Schwartz, to whom *Fighting for the City* is dedicated, took all of the challenges listed by Richland, his predecessor, and, with Mayor Koch, solved them. He did this by rebuilding a professional Law Department that saw as its client the well-being of the city's people. It is hard to overstate the magnitude of reforms that Schwartz brought to the Law Department. He ended part-time private practices by Law Department attorneys. He ended civil service hiring in favor of strict merit hiring. He attracted to the office young stars from the best law schools. He moved the entire staff to a modern office building, installed each attorney in a private office, and provided adequate office support. He secured a budget increase that permitted the hiring of 116 additional attorneys. He promoted younger, talented attorneys. He inspired excellent work. He stayed out of politics and out of the press.<sup>59</sup>

As effective as Allen Schwartz surely was, the story begins with Mayor Koch who, as he writes in this issue, knew that the success of a Koch administration

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55. *Id.* at 239–40.

56. W. Bernard Richland, Mayoral Transition Materials (Nov. 1, 1977), in *A HISTORY OF THE NEW YORK CITY LAW DEPARTMENT* tab 10 (Center for New York City Law & New York Law School Law Review eds., 2007) (on file with the New York Law School Law Review).

57. *Id.* at 5–8.

58. NELSON, *supra* note 2, at 250, 252.

59. *See id.* at 256–62, 266.

depended on a strong Corporation Counsel and Law Department that could defend the city against the many groups who were, in his view, selfishly seeking to enlarge their share of the municipal pie at the expense of the greater city.<sup>60</sup> Mayor Koch selected Allen Schwartz, his former law partner and close friend, and then backed him with resources, deference, and independence. Professor Nelson and others agree that the key ingredient that made Schwarz's reforms possible was the governing style of Mayor Koch. Frederick A. O. Schwarz, Jr. and Peter Zimroth, Mayor Koch's other two Corporation Counsels, confirm in their articles in this issue of the *Law Review* Mayor Koch's capacity to separate his political life from the legal needs of the city.<sup>61</sup> Two incidents from Professor Nelson's book reflect just how much of the Law Department's independence reflected the rare style of governmental decision-making permitted by Mayor Koch.

In 1986 the city filed a brief in the United States Supreme Court supporting the imposition of civil sanctions on a private construction union that had failed to meet affirmative action quotas ordered by an earlier court order.<sup>62</sup> Mayor Koch adamantly opposed hiring quotas but, after much discussion, allowed Corporation Counsel Frederick A. O. Schwarz, Jr. to file a brief in the Supreme Court on behalf of the city that supported quotas and sanctions for failing to meet them, but also included the novel statement that, while the city supported the court-ordered quotas, Mayor Koch personally did not.<sup>63</sup>

As another example, the city lost a claim at trial that the city's housing code applied to Covenant House, a facility for homeless youth run by the Catholic Church.<sup>64</sup> The city wished to appeal. Mayor Koch was a close friend of John Cardinal O'Connor, who was also an important political supporter. In addition, the Catholic vote was one of Mayor's Koch's most dependable voting blocs. The legal issue in the housing code case was close and could have gone either way. When the Law Department brought the question to city hall of whether to appeal, Mayor Koch, after hearing the issue, instructed Corporation Counsel Peter Zimroth to take whatever position he believed to be correct. Zimroth was astonished at the independence that he was given on a matter that so immediately impinged on the Mayor's personal and political interests.<sup>65</sup>

Professor Nelson summarized the philosophy that Schwartz and Koch brought to the Law Department as having three characteristics.<sup>66</sup> These three elements

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60. See Edward I. Koch, *Reflections on the New York City Law Department*, 53 N.Y.L. SCH. L. REV. 369, 370 (2009).

61. See Frederick A. O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y.L. SCH. L. REV. 375 (2009); Peter L. Zimroth, *Reflections of My Years as Corporation Counsel*, 53 N.Y.L. SCH. L. REV. 409 (2009).

62. See *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

63. NELSON, *supra* note 2, at 279–80.

64. See *Seawall Assocs. v. City of New York*, 523 N.Y.S.2d 353 (Sup. Ct. N.Y. County 1987).

65. NELSON, *supra* note 2, at 277–78.

66. *Id.* at 275–76.

remain today as benchmarks against which to measure the Law Department as well as other governmental law offices.

First, hiring and promotion must be on the basis of merit.

Second, the Law Department must act as a lawyer zealously representing its client, the city of New York, in the same manner in which a law firm represents a business entity. By adhering to this standard, the Law Department can withstand the various demands pressed by other officials or the public when those demands are not in the interest of the corporate client.

Third, there must be an independence of judgment sufficient to permit the Law Department to reach sound conclusions and offer useful advice to its client.

Behind these policies was Allen Schwartz and Mayor Koch's accurate vision of the needs of the city at the end of the twentieth century. Professor Nelson summarizes that vision:

From LaGuardia to Lindsay, in short, New York politics was about ethnicity, and [the] Corporation Counsel was a major participant in the ethnic conflicts that politics generated. Allen Schwartz put an end to the old politics in the Law Department. He brought an unselfconscious perspective of a microeconomist to his office: he understood his task to be increasing the size of the city's economic pie, not worrying about what share different groups should get or what power they should have to affect its distribution. Schwartz understood his client to be a business, not a polity, and he understood his duty was fiscal responsibility. He had returned, that is, to an eighteenth-century understanding of the function of the Counsel to the Corporation of the City of New York: in a world of municipal competition for business and jobs, his responsibility was to assist his client to do the best it could in the competitive race and to use his professional skills to facilitate and monitor that client's growth.<sup>67</sup>

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The reforms of Allen Schwartz survived through the administrations of Mayors David N. Dinkins, Rudolph W. Giuliani, and Michael R. Bloomberg, although not perfectly.<sup>68</sup>

Hiring remains on the merits. The Law Department has continued to conduct a hiring process that involves a formal application process, fall interviews and visits to prestigious national law schools and local law schools, and an internal interviewing and "weeding-out" process that is designed to produce the best possible candidates. Nonetheless, Peter Sherwood, who served as Mayor Dinkins's Corporation Counsel for his last two years, stated at the Law Review symposium on the Law Department that, on his appointment in 1992, he found an office with few African Americans,

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67. *Id.* at 266.

68. *See id.* at 289–332.



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and a hiring program that was not producing acceptable black candidates.<sup>69</sup> He instituted renewed efforts at recruiting African Americans, stating that the absence of African Americans at the Law Department not only deprived the Department of the richness of diversity, but had a more subtle effect: many alumni of the Law Department left to become high level administrators in government, positions of power which they might not have earned without their initial work at the Law Department. Sherwood insisted that this loss of career opportunity for African Americans was a hidden result of the failure to hire African Americans at the Law Department.<sup>70</sup>

Sherwood's comments could equally have been addressed to the nation's law schools, which have failed to attract and graduate a proportionate number of African American attorneys, as was pointed out by Eric Lane at the symposium.<sup>71</sup> The Law Department continues to encourage diversity, reporting in 2006 that eighteen percent of its attorneys were black, Hispanic, or Asian.<sup>72</sup> The policy of seeking a diverse workforce is consistent with a merit-hiring policy, but might still be criticized as reflecting a philosophy similar to that adopted by Tammany Hall when it supported patronage hiring because of its belief that law and policies should be developed and enforced by people from the community, and that those attorneys would thereby gain social stature and power in the performance of those duties. There is a tremendous difference, however, between hiring on a patronage basis exclusively, as indulged in by Tammany Hall, and hiring on a merit basis that engrafts an element to support diversity within a merit program.

Representation of the city as an economic entity remains a central tenet of the Law Department. In this, the Department has been supported by mayors who have for the most part followed economic and political policies similar to those established by Mayor Koch. Each of the succeeding administrations faced its own severe budget shortfall, which no doubt produced a painful incentive to prevent departures from sound fiscal policies. Nonetheless, these policies were not always followed.

For example, Mayor Dinkins reversed a Law Department litigation position opposing the granting of city health benefits to the partners of gay and lesbian city workers. The city council refused to pass such benefits because it could not agree on how to provide similar benefits to the partners of heterosexual city workers. Mayor Dinkins, frustrated by the council and seeking to win gay and lesbian votes during his close re-election campaign in 1993, directed the Law Department to reverse the city's litigation position; he had the Law Department consent to a court order that provided the benefits. In this way Dinkins sought to advance his election prospects

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69. Peter Sherwood, Address at the New York Law School Law Review Symposium: The History of the New York City Law Department (Feb. 6, 2008); see also Peter Sherwood, *Remarks for Conference on the New York City Law Department*, 53 N.Y.L. SCH. L. REV. 429 (2009) [hereinafter Sherwood, *Remarks*].

70. See Sherwood, *Remarks*, *supra* note 69, at 434–36.

71. Professor Eric Lane, Hofstra Univ. Sch. of Law, Remarks at the New York Law School Law Review Symposium: The History of the New York City Law Department (Feb. 6, 2008).

72. N.Y. CITY LAW DEP'T, 2006 ANNUAL REPORT, available at [http://www.nyc.gov/html/law/downloads/pdf/annual\\_report-2006.pdf](http://www.nyc.gov/html/law/downloads/pdf/annual_report-2006.pdf).

by using the Law Department to grant costly rights rather than having the rights litigated or provided through the competitive budget and legislative process.<sup>73</sup>

By contrast, the Giuliani administration's 1996 refusal to consent to a court order on the management of the city's foster care system shows the advantage of taking a litigation position protective of the city. In the wake of several children's deaths, advocates of children's rights asked the federal court to take over the city's foster care system. The city refused to consent, declaring it would reform the child welfare system on its own. It argued that management by the court would be disastrously costly, would produce worse results for the children, and would ultimately be unsuccessful. The Law Department's tough negotiation position, plus its willingness to go to trial, forced the plaintiffs to agree to allow the city to manage its own program. When, three years later, the city's successful reform of the foster care system was certified by the court's outside monitors, the judge terminated the case in its entirety.<sup>74</sup>

The city has not been so successful with other consent decrees. It finds itself still battling plaintiffs over such public programs as prison conditions, special education, and services for homeless families.<sup>75</sup> It falls to the Law Department to draw the line between providing what is legally required, while still defending the fiscal soundness of the city. It is here that Professor Nelson's analytical framework is most helpful. Each of the plaintiff groups can, and do, make powerful arguments on behalf of their interests. The Law Department, by adhering to a standard that looks to the welfare of the entire city, can develop independent and reasonable positions responding to the various claims. In some situations, a consent decree providing additional resources is appropriate; in other cases it is not. A Law Department that adheres to the interests of its primary client can best develop a professional and fair legal response.

Demands for increased services have not been the only democratic challenges faced by the Law Department. Following the 1990 charter revision, the Law Department was drawn into litigation that pitted the mayor against other elected officials. Prior to the 1990 charter changes, the Board of Estimate was the city's major political forum. The Board of Estimate controlled land use, contracts, franchises, and the budget. The voting members were the mayor, city council president, comptroller, and the five borough presidents. Following the Supreme Court's decision declaring that the voting scheme of the Board of Estimate violated the one-person, one-vote rule,<sup>76</sup> a charter revision commission opted to abolish the Board of Estimate. In doing so, the new charter weakened the city council president,

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73. See ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE* 169–70 (2003).

74. See *id.* at 146–49, 193–94 (referring to *Marisol A. v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1999)).

75. The Law Department successfully ended court supervision of the homeless family litigation on September 17, 2008. The settlement with Legal Aid ended twenty-five years of supervision by the state court. Under the settlement the court will step aside and allow the city's Department of Homeless Services to take full control of the city's programs for homeless families. See Daniel Wise, *City, Legal Aid Agree to Settle 25-Year-Old Homeless Suits*, N.Y. L.J., Sep. 18, 2008, at 1.

76. *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688 (1989).

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the comptroller, and the five borough presidents, enhanced the already great powers of the mayor, and significantly enlarged and strengthened the city council. Powers that had once resided exclusively with the Board of Estimate were redistributed. Sorting out the new power realignments after 1990 generated significant amounts of litigation. It also required the Law Department under Victor Kovner, Mayor Dinkins' first Corporation Counsel, to write a complicated and lengthy opinion setting out various agency powers under the new charter. That opinion remains the governing authority for the city.

The Law Department represents all of the competing officials. As a result, when the officials sue each other seeking to obtain favorable rulings about charter powers, it complicates the issue of the Law Department's client. Such litigations have involved some of the most basic issues of local governance. The council and mayor have litigated the authority of the mayor to sell a public hospital,<sup>77</sup> the authority of the council to modify the budget,<sup>78</sup> the power of the council to establish a police review board,<sup>79</sup> and the authority of the council to pass a living wage bill for employees of private businesses contracting with the city.<sup>80</sup> The public advocate challenged the Mayor's refusal to provide him information on police discipline.<sup>81</sup> The comptroller litigated the mayor's authority to change the ownership of upstate reservoir lands<sup>82</sup> and the mayor's power to register contracts allegedly tainted by violation of the city's procurement rules.<sup>83</sup>

When the mayor has been challenged by a fellow elected official, the Law Department has represented the mayor's position, opting to permit the opposing elected official to hire his or her own lawyer. Such cases do not easily fit within the conceptual scheme set out by Professor Nelson since it is not obvious which official's position most clearly supports the economic well-being of the city. Perhaps more to the point, these instances testify more to the need for a professional and competent Law Department, which can advise the mayor in ways that avoid unnecessary litigation between elected officials.

What is most remarkable is that the independence and professionalism established during the Koch administration have remained a hallmark of the Law Department. The culture established by Allen Schwartz has continued, guarded by the succeeding Corporation Counsels and by the cadre of long-time Law Department attorneys who came into maturity with that culture of independence and professionalism.

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77. *Council of N.Y. v. Giuliani*, 664 N.Y.S.2d 197 (Sup. Ct. Queens County 1997).

78. *Council of N.Y. v. Giuliani*, 621 N.Y.S.2d 832 (Sup. Ct. N.Y. County 1994).

79. *Mayor of N.Y. v. Council of N.Y.*, Nos. 402354, 95-001, 95-003, 1995 WL 478872 (Sup. Ct. N.Y. County June 28, 1995).

80. *Council of N.Y. v. Bloomberg*, 6 N.Y.3d 380 (2006).

81. *Mayor of N.Y. v. Council of N.Y.*, 651 N.Y.S.2d 531 (1st Dep't 1997).

82. *Giuliani v. Hevesi*, 90 N.Y.2d 27 (1997).

83. *Council of N.Y. v. Bloomberg*, 6 N.Y.3d 380 (2006).

Michael Cardozo, Mayor Michael R. Bloomberg's Corporation Counsel, has been dogged in his determination to maintain the professionalism and independence of the Law Department. During his tenure, the Law Department enforced fines against a striking transit union,<sup>84</sup> defended a court decision not to allow gay marriage,<sup>85</sup> and successfully lobbied for legislation that reduced damage awards against the city for slip and falls on public sidewalks.<sup>86</sup> It was Cardozo who commissioned Professor Nelson to write a history of the Law Department as a way to reinforce and sustain the culture of professionalism and independence.

Professor Nelson, as he concludes his book, questions just how strong that culture is, citing the Giuliani administration's attempt to revoke the lease of the Brooklyn Museum following an exhibition which Mayor Giuliani deemed to be anti-Catholic and in violation of the city's lease with the museum trustees. Mayor Giuliani's second Corporation Counsel, Michael Hess, defended the action and ultimately negotiated a settlement.<sup>87</sup>

In Professor Nelson's view, the Brooklyn Museum case represented the use of the Law Department to advance the mayor's personal political agenda rather than the city's interests.<sup>88</sup> He concluded that reforms brought to life by Allen Schwartz and Ed Koch remain tentative and incomplete, dependent on the policies of the mayor and the mayor's acceptance of an independent and professional Law Department. This conclusion seems itself tentative and cautious. What Professor Nelson's *Fighting for the City* has shown is that it is possible to have a professional and independent Law Department and, even more importantly, how to define those qualities. For this reason alone, his book should remain required reading for all future Law Department attorneys, in particular the future Corporation Counsels, for the mayors who will appoint them, and for all students of city government who love and want to know our city.

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84. N.Y. City Transit Auth. v. Transp. Workers Union of Am., AFL CIO, 822 N.Y.S.2d 579 (2nd Dep't 2006).

85. Hernandez v. Robles, 7 N.Y.3d 338 (2006); see also Michael A. Cardozo, *The New York City Corporation Counsel: The Best Legal Job in America*, 53 N.Y.L. SCH. L. REV. 459, 464–65 (2009).

86. See N.Y. CITY ADMIN CODE § 7-210 (2007); see also Cardozo, *supra* note 85, at 469.

87. NELSON, *supra* note 2, at 321–23 (discussing Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999)).

88. NELSON, *supra* note 2, at 324–25.