

# BEYOND EFFICIENCY AND EQUITY: EXPLORING THE ROLE OF THE CORPORATION COUNSEL TO SEEK JUSTICE

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## I. INTRODUCTION

In 1869, four years after the Civil War,<sup>1</sup> the New York Times reported on a small controversy in the independent city of Brooklyn.<sup>2</sup> The dispute, stemming from the construction of a canal on Third Avenue,<sup>3</sup> involved questions about the appropriate role of the Brooklyn Corporation Counsel.<sup>4</sup> The Corporation Counsel and the Mayor of Brooklyn disagreed over the construction's legality, and the mayor sought to hire independent counsel.<sup>5</sup> In response, the Corporation Counsel claimed that “he represented the great body of the citizens, and was independent of the direction or control of the officers of the city.” The New

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<sup>1</sup> See *Civil War Facts*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/civil-war-facts> (last visited Mar. 30, 2020).

<sup>2</sup> See *The Powers of a Corporation Counsel*, N.Y. TIMES (Aug. 11, 1869), <https://timesmachine.nytimes.com/timesmachine/1869/08/11/87586415.html?pageNumber=4>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

York Times concluded that this “new view of the prerogatives of [a] Corporation Counsel in the State of New York” was a “question of no small importance.”<sup>6</sup>

In 1940, forty-two years after the independent city of Brooklyn was consolidated into the Greater City of New York (the “City”), the New York Times reported on another controversy.<sup>7</sup> This dispute, stemming from the revocation of Bertrand Russell’s appointment as a professor at City College, again involved questions about the appropriate role of the Corporation Counsel.<sup>8</sup> After a loss in the trial court,<sup>9</sup> the Corporation Counsel, an appointed official, following the Mayor’s orders, did not appeal on behalf of the City.<sup>10</sup> The Board of Higher Education, however, did appeal, hiring former United States Attorney for the Southern District Emory Buckner and future Supreme Court Justice John Marshall Harlan as counsel.<sup>11</sup> While the Appellate Division ultimately dismissed the appeal,<sup>12</sup> the conflict between the City and the Board once again raised questions about the appropriate role of the Corporation Counsel.<sup>13</sup>

Today, just as it was in 1869 and 1940, the role of the Corporation Counsel in representing the City is a question of no small import. The public’s attention to the work of the Corporation Counsel is limited to a few events. These events can range from high profile legal filings, such as the Corporation Counsel’s suit seeking \$180,000,000 from the United Parcel Services, Inc., for the alleged illegal shipment of cigarettes,<sup>14</sup> or large-scale settlements, such as the \$41,000,000 settlement of the Central Park Five lawsuit.<sup>15</sup> At times, they can also encompass a

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<sup>6</sup> *Id.*

<sup>7</sup> See *School Board Loses Appeal for Russell: Appellate Division Bars Action in Higher Court*, N.Y. TIMES (Oct. 5, 1940), <https://timesmachine.nytimes.com/timesmachine/1940/10/05/112764359.html?pageNumber=15>.

<sup>8</sup> See *Kay v. Bd. of Higher Educ. of N.Y.C.*, 20 N.Y.S.2d 898, 901 (N.Y. App. Div. 1940).

<sup>9</sup> See *Kay v. Bd. of Higher Educ. of N.Y.C.*, 18 N.Y.S.2d 821, 831 (N.Y. Sup. Ct. 1940).

<sup>10</sup> *School Board Loses Appeal for Russell: Appellate Division Bars Action in Higher Court*, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Note, *The Bertrand Russell Litigation*, 8 U. CHICAGO L. REV. 316, 318 (1941) (noting that the Appellate Division found that the Corporation Counsel had exclusive and binding authority over the City’s legal affairs).

<sup>14</sup> See *New York v. United Parcel Serv.*, 253 F. Supp. 3d 583, 597, 685 (S.D.N.Y. 2017).

<sup>15</sup> Ray Sanchez, *Judge Approves \$41M Settlement in Central Park Jogger*

sensational trial verdict, such as the \$104,700,000 verdict against ExxonMobil for contaminating the City's groundwater.<sup>16</sup>

The Corporation Counsel is also extensively involved in City governance, tasked with maintaining, defending, and establishing the rights of the City, its various subdivisions, and its inhabitants in the local, state, and federal legal systems.<sup>17</sup> Outside the ambit of their own specific needs, other City agencies may not be aware of the totality of the Corporation Counsel's legal work for the City.

Given this level of involvement in municipal affairs, questions about the Corporation Counsel's role are essential for both government actors and the people they serve. Who is the Corporation Counsel's client? How broad or narrow should the Corporation Counsel define the overall public interest? Is there any role for the Corporation Counsel to seek justice?

These are complex questions, and this article provides a preliminary context for a broader discussion. To that end, this article will discretely analyze the structures and interests that orient the Corporation Counsel to consider questions of justice.

The Corporation Counsel, like all attorneys, has a special responsibility for the quality of justice.<sup>18</sup> But the Corporation Counsel is not only an attorney but also a government official.<sup>19</sup> Thus, together with his or her general duties as an attorney, the Corporation Counsel should also appropriately consider concepts of democratic self-government and the rule of law.<sup>20</sup>

This article suggests that the Corporation Counsel pursue these concepts as both a government official and as one of the City's gatekeepers.<sup>21</sup> This paradigm provides a useful baseline

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Case, CNN (Sept. 7, 2014), <https://www.cnn.com/2014/09/05/justice/new-york-central-park-five/index.html>.

<sup>16</sup> Mireya Navarro, *City Awarded \$105 Million in Exxon Mobil Lawsuit*, N.Y. TIMES (Oct. 19, 2009), <https://www.nytimes.com/2009/10/20/science/earth/20exxon.html>.

<sup>17</sup> See *Corporation Counsel's Message*, N.Y.C. LAW DEP'T. (last visited Feb. 28, 2020), <https://www1.nyc.gov/site/law/about/corporation-counsels-message.page>.

<sup>18</sup> See N.Y. RULES OF PROFESSIONAL CONDUCT, pmb1. ¶ 1 (2009) ("A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with *special responsibility for the quality of justice.*") (emphasis added).

<sup>19</sup> See Orville H. Schell, Jr. et al., *Professional Responsibility of the Lawyer in Government Service*, in PROFESSIONAL RESPONSIBILITY OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT AND WRONG 93, 94 (1976).

<sup>20</sup> See *id.*

<sup>21</sup> For the sake of brevity, this article will mainly refer to the Corporation

from which the Corporation Counsel may consider questions of justice. As will be discussed, this framework can be adapted to different client identification models that may be used during the Corporation Counsel's litigation, counseling, or transactional work.

This article is divided into three sections. First, it generally discusses the duties and power of the Corporation Counsel. Second, it examines the municipal corporation of the City. Finally, it considers the Corporation Counsel's dual roles as a government official and organizational gatekeeper.

## II. THE CORPORATION COUNSEL OF THE CITY OF NEW YORK

Turning first to the Corporation Counsel, the City Charter charges the office with broad powers and responsibilities.<sup>22</sup> The Charter provides that "the [c]orporation [c]ounsel shall be attorney and counsel for the City and every agency thereof and shall have charge and conduct of all the law business of the City."<sup>23</sup> The Charter also states that:

The Corporation Counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines or penalties or to enforce the laws.<sup>24</sup>

Moreover, while the power to compromise, settle or adjust claims is reserved to the Comptroller, the Charter explicitly states that:

[T]his inhibition shall not operate to limit or abridge the discretion of the corporation counsel in regard to the proper conduct of the trial of any action or proceeding or to deprive such corporation counsel of the powers and privileges ordinarily exercised in the courts of litigation by attorneys-at-law when acting for private

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Counsel, but the principles discussed here can be employed by any Assistant Corporation Counsel.

<sup>22</sup> See NEW YORK CITY CHARTER ch. 17, § 394(c).

<sup>23</sup> See NEW YORK CITY CHARTER ch. 17, § 394(a).

<sup>24</sup> NEW YORK CITY CHARTER ch. 17, § 394(e).

clients.<sup>25</sup>

While appointed by the Mayor,<sup>26</sup> the Corporation Counsel ultimately serves the City.<sup>27</sup>

The City Charter charges the Corporation Counsel to be the attorney and counsel for the City.<sup>28</sup> This charge takes three primary forms.<sup>29</sup> First, the Corporation Counsel functions as an advocate in litigation.<sup>30</sup> Second, the Corporation Counsel functions as a transactional lawyer.<sup>31</sup> Finally, the Corporation Counsel functions as a counselor to proposed legislation and government decision-making.<sup>32</sup> Of course, regarding larger legal matters, these functions may overlap. These three functions position the Corporation Counsel at the crossroads of public and private values; a modulated form of counseling and vigorous advocacy with a general view toward maintaining processes of accountability and political stability.<sup>33</sup>

The specific charge, to be attorney and counsel “for the City and every agency,”<sup>34</sup> formally provides the Corporation Counsel and the New York City Law Department with some bureaucratic discretion in implementing the City’s legal policy.<sup>35</sup> Ultimately, elected officials are tasked with overall policy decisions, with the Corporation Counsel providing independent legal analysis with

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<sup>25</sup> NEW YORK CITY CHARTER ch. 17, § 394(c).

<sup>26</sup> See NEW YORK CITY CHARTER ch. 1, § 6(a) (“The mayor shall appoint the heads of administrations, departments, all commissioners and all other officers not elected by the people, except as otherwise provided by law.”).

<sup>27</sup> 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, 377 (2008) (“For all government lawyers, the [client] is always, it seems to me, the overall greater governmental entity that the lawyer serves: the United States, the state, or, for Corporation Counsels, ‘the city’.”). See also Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government’s Chief Legal Officer*, 22 PROF. LAW 4, 9 (2014) (stating the Corporation Counsel’s client is the City of New York and the Corporation Counsel’s first obligation is to the City itself); MODEL RULES OF PROF’L CONDUCT r. 1.13(a) (AM. BAR ASS’N 2013).

<sup>28</sup> See NEW YORK CITY CHARTER ch. 17, § 394(a).

<sup>29</sup> See NEW YORK CITY CHARTER ch. 17, § 394.

<sup>30</sup> See Schwarz, *supra* note 27, at 387.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 78, 79 (1999).

<sup>34</sup> See NEW YORK CITY CHARTER ch. 1, § 394(a).

<sup>35</sup> Cardozo, *supra* note 27, at 6 (“The means by which the entity pursues these objectives remains within the professional judgment of the lawyers.”).

an emphasis on advancing or defending the institutional interests of the City.<sup>36</sup> Broadly, the Corporation Counsel is tasked with pre-decisional questions about the legal implications of implementing municipal policy or post-decisional legal effects of policy.

The Corporation Counsel's grant of authority over legal affairs affords some bureaucratic discretion to consider multiple theories of justice in advocacy and counseling about the City's legal policy.<sup>37</sup> While it is impossible to simplify the operating philosophies of various Corporation Counsels to a singular theory or aspect of justice, history shows that some Corporation Counsels have emphasized varying elements of justice in their policies. Some Corporation Counsels, such as Allen Schwartz,<sup>38</sup> have promoted justice by emphasizing the wealth-maximizing resolutions of legal disputes and organizational efficiency.<sup>39</sup> Other Corporation Counsels, such as O. Peter Sherwood and Paul Windels,<sup>40</sup> have sought justice through inclusive hiring practices, seeking out groups previously excluded from participating in City

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<sup>36</sup> Jeffrey D. Friedlander, *The Independence of the Law Department*, 53 N.Y. L. SCH. L. REV. 479, 483, 484 (2009).

<sup>37</sup> See BRUCE F. BERG, *NEW YORK CITY POLITICS: GOVERNING GOTHAM*, 244, 245 (2007) (generally discussing the exercise of municipal bureaucratic discretion).

<sup>38</sup> See WILLIAM E. NELSON, *FIGHTING FOR THE CITY: A HISTORY OF THE NEW YORK CITY CORPORATION COUNSEL*, at xviii (2008) [hereinafter NELSON, *FIGHTING FOR THE CITY*] (noting that Schwartz "understood his task to be helping the Mayor to increase 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 distribution").

<sup>39</sup> See Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 254 (1998) ("Richard Posner suggests that a law and economics analysis allows decision makers to promote justice by deciding disputes with the object of the greater social good through wealth-maximizing resolutions.").

<sup>40</sup> See NELSON, *FIGHTING FOR THE CITY*, *supra* note 38, at 164 (noting that Corporation Counsels Windels and Chanler had hired an usually high percentage of female Assistant Corporation Counsels). See also O. Peter Sherwood, *Implementing a New City Charter: Thoughts on My Tenure as Corporation Counsel in a Time of Transition*, 53 N.Y.L. SCH. L. REV. 429, 434 (2008) ("Within the Law Department, I took the challenge of persuading career executives and managers of the importance and urgency of increasing diversity. In a city where African Americans and Hispanics constituted over fifty percent of the population, few members of either group could be found in the Law Department."); Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 HOW. L. J. 645, 667, 668 (2010) (detailing Paul Windel's hiring of Jane M. Bolin, the first black female Assistant Corporation Counsel).

government.<sup>41</sup> Other Corporation Counsels, such as Frederick Schwarz, Lee Rankin, and Norman Redlich,<sup>42</sup> have sought justice through the protection of minority interests.<sup>43</sup>

Whereas, different Corporation Counsels, such as John O'Brien and Paul Crotty,<sup>44</sup> have sought justice through enhancing democratic policies.<sup>45</sup> History demonstrates that the demands of democratically elected officials and the then-existing needs of the City influenced these operating philosophies.<sup>46</sup> These demands and needs consistently evolve, reflecting the changing demographics and priorities of the City. As a result, a Corporation Counsel probably will not be able to identify an overarching theory of justice that fully satisfies the complex interests of the City. But engaging in a broader discussion about varying concepts of justice does not mean that a Corporation Counsel must ignore established law.<sup>47</sup> And the Corporation

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<sup>41</sup> See, e.g., Sherwood, *supra* note 40, at 434, 435, 436. This practice of including various groups who had previously been excluded is consistent with overall 20th century trends to create a more inclusive City government, discussed in detail below.

<sup>42</sup> See Schwarz, *supra* note 27, at 379 (“A government owes a duty to all its residents—whether or not they voted for the person(s) in power, or, indeed, whether they can vote at all.”).

<sup>43</sup> The need to protect minority interests has been, and continues to be, a significant concern of the American constitutional system. See THE FEDERALIST NO. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961). “[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.” *Id.* See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry.”).

<sup>44</sup> See NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 145, 146, 147 (describing the lawsuits initiated under Corporation Counsel John P. O'Brien as an attempt to please the political majorities). See also Honorable 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, 525 (2008) (“But the Law Department is not a free agent. It did what the law requires: operate within the legal framework and enforce the law, especially laws that, on challenge, are found to be constitutional by the highest court in the land.”). See also Honorable Paul A. Crotty, *The Giuliani Years: Corporation Counsel 1994-1997*, 53 N.Y. L. SCH. L. REV. 439, 440 (2008) (detailing various litigations that advanced the mayor's agenda).

<sup>45</sup> See RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15, 17 (1996) (advocating for the majoritarian principles of democracy).

<sup>46</sup> *Id.* at 17.

<sup>47</sup> See Cardozo, *supra* note 27, at *The Conflicting Ethical, Legal, and Public*

Counsel is rarely, if ever, the final arbiter over legal outcomes. Instead, judges and policymakers mainly occupy that role.<sup>48</sup>

The Corporation Counsel's decision-making is often coordinated with various municipal entities and elected officials. Engaging in a broader discussion on the public interest and justice will tend to enhance the ability of the Corporation Counsel to counsel decision-makers as to underlying competing interests and improve the quality of judgments about the fairness of legal processes and outcomes. Yet to adequately advise policymakers, the Corporation Counsel must understand the City.

### III. THE MUNICIPAL CORPORATION OF THE CITY OF NEW YORK

The City is a municipal corporation.<sup>49</sup> This corporate status gives the City the legal capacity to own property and to sue and be sued.<sup>50</sup> It also allows the City the "unique ability to transcend [both] time and the changing composition of its membership." The corporate structure provides unity, a continual legal identity, and perpetual succession.<sup>51</sup>

According to modern legal theory, cities are "mere subdivisions of the state; their only powers are those given by state statutes, which courts construe strictly and state legislatures may modify at any time."<sup>52</sup> "When the state plays with the specific structures,

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*Policy Obligations of the Government's Chief Legal Officer*, 22 PROF. LAW. 4, 7 (2014) (advocating that the Model Rule of Professional Conduct doesn't allow government lawyers to "elevate moral concerns above sound legal analysis," but such Rule is "permissive and puts the law first[,] allowing government lawyers to engage in a broader morality judgment).

<sup>48</sup> See Cardozo, *supra* note 27, at 6 (summarizing that the government lawyer's job is to advance the objectives of those in charge of making the final decision, and "it follows that these democratically elected or duly appointed officials, after receiving appropriate legal advice, should make the key decisions"). See also Michael Cardozo, *Remarks from the Inaugural Fordham Dispute Resolution Society Symposium: "ADR as a Tool for Achieving Social Justice": The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel*, 34 FORDHAM URB. L.J. 797, 806 (2007) (arguing that judicial supervision of government agencies and programs is bad social policy; mediators and outside monitor should not run the government).

<sup>49</sup> See, e.g., David C. Hammack, *Reflections on the Creation of the Greater City of New York and Its First Charter*, 1898, 42 N.Y. L. SCH. L. REV. 693, 700 (1998) (discussing the role of the municipal corporation of the City of New York).

<sup>50</sup> Gilbert Tauber, *Corporation of the City of New York*, in THE ENCYCLOPEDIA OF NEW YORK CITY 316 (Kenneth T. Jackson ed., Yale Univ. Press 1995).

<sup>51</sup> *Id.*

<sup>52</sup> Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Chance*, 34 AM. U.L. REV. 369, 370 (1985). See also Charles S. Rhyne, THE LAW OF LOCAL GOVERNMENT OPERATIONS 50-51 (1980) (discussing

services, or practices of local government, it is not interfering with the workings of an autonomous entity.”<sup>53</sup> Generally, the preceding sentence is correct over the relationship between New York State and the City.<sup>54</sup>

The tension between the City and State shapes the City’s corporate identity,<sup>55</sup> serving as the backdrop to the City’s consistent desire for local autonomy in governance and policy-making.<sup>56</sup> Historically, local freedom in policymaking has allowed the City to be a pioneer in areas such as public health, education, parks, libraries, water supply, sanitation, street paving, lighting, and public transit. At the same time, in the pursuit of these policies, the City has had to cope with fundamental questions about government power and private personal autonomy.<sup>57</sup> This concern with local economic and social

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the power the state has over municipalities, and that municipal corporations are not sovereign, are without any inherent power of legislation, and are only free to enact ordinances authorized by the state); William R. Grace, *The Government of Cities in the State of New York*, HARPER’S NEW MONTHLY MAGAZINE, September 1883, at 609–16, <https://babel.hathitrust.org/cgi/pt?id=coo.31924079630525&view=1up&seq=619> (“[O]ur cities have no actual legal right to govern themselves free of interference, and if they have any appearance of possessing municipal liberties, it is by the grace of the Legislature, and not because they have title to it.”).

<sup>53</sup> HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 4 (1983).

<sup>54</sup> See *Demarest v. New York*, 74 N.Y. 161, 166 (1878) (“[T]he [New York City] [C]harter is always subject to amendment or alteration by the legislative power, except as restrained by some constitutional inhibition.”). See also *People ex rel. Metro. St. Ry. Co. v. State Bd. Of Tax Comm’rs*, 67 N.E. 69, 72 (1903) (explaining that the management of local political business of localities is entrusted to local officers selected by the communities where officers act, through which their jurisdiction extends).

<sup>55</sup> See HARTOG, *supra* note 53, at 24 (discussing the tension and power struggle related to property, where property was a way to resist change imposed by external authority and create an individual future).

<sup>56</sup> See *id.* at 23 (explaining that New York City’s legal identity was formed by the property which created the public and political character of boroughs). See also Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 58 (1990) (discussing the inherent need of local governments to protect and advance parochial interests).

<sup>57</sup> See HARTOG, *supra* note 53, at 9 (“The positioning of the line between freedom and necessity, public power and private autonomy, and individuality and community has changed over the past two hundred years (although not so much as some may think).”); See also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1076 (1980) (analyzing cities as vehicles used for the exercise of the coercive power of the state but also as groups of individuals who aimed to control their own lives free of state domination).

interests leads to the political economy of New York City focusing on areas such as wealth differences, public service disparities, and competition with regional governments.<sup>58</sup>

The primary interest is the City's ability to compete in the local and global economic marketplace as a conduit of labor,<sup>59</sup> commodities,<sup>60</sup> culture,<sup>61</sup> and information.<sup>62</sup> Since the Dutch arrived on the island of Manhattan, New York's role in the local and global economic marketplace has been a fundamental interest.<sup>63</sup> This has also led to political conflicts between those who have more and those who have less over the disbursement of the benefits of the City's economic success.<sup>64</sup> As an organizational gatekeeper, the Corporation Counsel must enhance the corporate

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<sup>58</sup> See Briffault, *supra* note 56, at 5 ("In a setting of interlocal and interpersonal wealth inequalities, not only does the value of local autonomy turn on the wealth of the locality, but such autonomy often tends to exacerbate the disparities between rich and poor.").

<sup>59</sup> See, e.g., ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 267, 268 (8th ed. 1920) (arguing that individuals and firms locate in cities with deep labor markets with many potential specialized workers). An example of this is the proliferation of specialized businesses in New York City. See, e.g., Lauren Weber, *The Diamond Game, Shedding Its Mystery*, N.Y. TIMES (Apr. 8, 2001), <https://www.nytimes.com/2001/04/08/business/the-diamond-game-shedding-its-mystery.html> (noting the high concentration of diamond-related businesses in New York City).

<sup>60</sup> See, e.g., Jonathan Bowles et al., *The Start of a NYC Manufacturing Revival?*, CTR. FOR AN URBAN FUTURE (Mar. 2014), <https://nycfuture.org/data/info/the-start-of-a-nyc-manufacturing-revival> (finding that manufacturing sector jobs have increased since 2010).

<sup>61</sup> See, e.g., Elizabeth Currid, *How Art and Culture Happen in New York: Implications for Urban Economic Development*, 73 J. OF THE AM. PLAN. ASS'N 454, 457 (2007) (finding that cultural production heavily depends on social mechanisms and densely agglomerated artistic and cultural producers in New York City).

<sup>62</sup> See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 148 (1961) ("[C]ities may fairly be called natural economic generators of diversity and natural economic incubators of new enterprises."). See also Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 38–39 (1988) (arguing that the high level of creation, diffusion, and adoption of ideas developed amongst various industry competitors in New York City is essential in a competitive economy. "New York City's garment district, financial district, diamond district, advertising district and many more are as much intellectual centers as is Columbia or New York University.").

<sup>63</sup> See SUNY LEVIN INST. & CTR. FOR AN URBAN FUTURE, *NEW YORK IN THE WORLD: THE IMPACT OF THE GLOBAL ECONOMY ON NEW YORK STATE AND CITY* 100 (2011), [https://nycfuture.org/pdf/New\\_York\\_in\\_the\\_World.pdf](https://nycfuture.org/pdf/New_York_in_the_World.pdf). See, e.g., Simon Middleton, *Legal Change, Economic Culture, and Imperial Authority in New Amsterdam and Early New York City*, 53 AM. J. LEGAL HIST. 89, 94–95 (2013) (noting the colony's emphasis on increased trade, as opposed to acquisition of land).

<sup>64</sup> See Middleton, *supra* note 63, at 100–101.

well-being of the City. Thus, the Corporation Counsel has a unique interest in legal matters that affect the City's ability to compete in the global economic marketplace.

This occurrence manifests itself in the Corporation Counsel's sensitivity to procedural fairness in the application of the law. It is critical to government actors and private market participants for certainty in the form of municipal law, such as the application of business permits and land use regulations.<sup>65</sup> For the City to attract foreign direct investment, and remain an attractive locality for business, there must be consistency and certainty in these processes and outcomes. As the custodian of the City's local legal landscape, the Corporation Counsel is one of the City agencies tasked with ensuring a requisite level of legal certainty.<sup>66</sup>

Legal matters that implicate this economic interest can range from simple tort case payouts to large-scale municipal public works.<sup>67</sup> For example, the Corporation Counsel may, in his or her transactional function, structure the sale of City-owned land for redevelopment for commercial purposes. As a matter of general legal practice, the Corporation Counsel can guide policymakers through the requisite transactional legal framework from the vantage point of the office's institutional knowledge of the relevant agencies.<sup>68</sup> The Corporation Counsel should also be able

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<sup>65</sup> See Chaz R. Ball, *Ethics: Representing Municipalities and Municipal Employees*, AM. BAR ASS'N (Aug. 9, 2017), [https://www.americanbar.org/groups/young\\_lawyers/publications/tyl/topics/municipal-law/ethics\\_representing\\_municipalities\\_and\\_municipal\\_employees/](https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/municipal-law/ethics_representing_municipalities_and_municipal_employees/) ("Municipal lawyers or those representing the municipality or its employees play a necessary role in providing legal protections for our nation's towns, cities, and counties.").

<sup>66</sup> See THE ASS'N OF THE BAR OF THE CITY OF N.Y., PROFESSIONAL RESPONSIBILITY OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT & WRONG 94–95 (1976).

<sup>67</sup> LORAIN KENNEDY ET AL., THE POLITICS OF LARGE-SCALE ECONOMIC AND INFRASTRUCTURE PROJECTS IN FAST-GROWING CITIES OF THE SOUTH 3 (2011), [http://chance2sustain.eu/fileadmin/Website/Dokumente/Dokumente/Publication\\_s/C2S\\_WP2\\_litRev\\_The\\_Politics\\_of\\_Large-Scale\\_Economic.pdf](http://chance2sustain.eu/fileadmin/Website/Dokumente/Dokumente/Publication_s/C2S_WP2_litRev_The_Politics_of_Large-Scale_Economic.pdf). See also OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2018 2–4 (2019), <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2018.pdf>; Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 30, 31 (2011).

<sup>68</sup> Bernadette Bulacan, *Building Blocks of Institutional Memory in the Legal Department*, THOMSON REUTERS: CORPORATE COUNSEL CONNECT COLLECTION (February 2016), <https://store.legal.thomsonreuters.com/law-products/news-view/corporate-counsel/building-blocks-of-institutional-memory-in-the-legal-department> [<https://perma.cc/TRJ4-9FXR>].

to counsel policymakers as to extralegal, moral, economic, social, and political impacts about resulting legal processes.

In his or her litigation function, the Corporation Counsel may also impact this economic interest.<sup>69</sup> For example, the Corporation Counsel may institute a policy that declines to settle any alleged personal injury cases. Because of the large volume of personal injury suits against the City, the aggregated effect of this policy would also upend this interest as well. While appearing to maximize efficiency and reduce overall payouts, such a system may have collateral consequences. For instance, this policy may deter frivolous lawsuits, but also create a backlog of meritorious cases, delaying resolutions, and damaging procedural fairness norms.

While it may be tempting to solely frame this interest as “efficiency” and “wealth maximization,”<sup>70</sup> these concepts are difficult to define,<sup>71</sup> and sometimes mask or obscure deep societal inequities.<sup>72</sup> Nor does a macro view of the City’s overall economic well-being adequately consider or address structural problems, such as segregated housing or job markets. Thus, the Corporation Counsel’s counseling and advocacy must also include considerations beyond efficiency, wealth maximization, and economic competition.

The second interest is the City’s role in promoting and maintaining its unique brand of pluralist values and policies.<sup>73</sup>

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<sup>69</sup> See NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 44.

<sup>70</sup> See *id.* at 137 (arguing for the need for economic efficiency and emphasizing policies that maximize the City’s total wealth).

<sup>71</sup> See Edward A. Purcell, Jr., *The Making of a Legal Historian: Reassessing the Work of William E. Nelson: Semi-Wonderful Town, Semi-Wonderful State: Bill Nelson’s New York*, 89 CHICAGO-KENT L. REV. 1085, 1107–08 (2014) (“To truly and honestly calculate the ‘general’ welfare, in other words, one must examine not just the ‘general’ welfare of a city or a society as a whole but also the welfare of all of the varied and unequal groups and interests in that city or society.”).

<sup>72</sup> See, e.g., JACOB RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK 2, 3 (1971) (For instance, a macro view of the City’s total wealth fails to consider the inadequacy of basic public services and inhospitable urban conditions.). See also Colin Gordon, *Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 308 (2004).

<sup>73</sup> Since its inception, the City has been a pluralist society, serving as a progressive laboratory for the nation. See, e.g., PATRICIA BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK 22, 24, 25 (1971) (arguing that diversity has always been present in New York City). See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“A state may, if its citizens

In supporting these pluralist values and policies, two themes emerge: first, the City's desire for local autonomy; and second the centralization of authority within the office of the mayor, and including borough and community-level institutions into city governance.<sup>74</sup> To be clear, the laws and policies of the City have not always efficiently or directly promoted pluralism.<sup>75</sup> Since the arrival of Sephardic Jews in 1654, however, the City has, in varying degrees, had to deal with governing a pluralist society.<sup>76</sup> Since that time, the City has had to cope with the evolving practical political effects of this increased emphasis on pluralism.<sup>77</sup> At the same time, the City has become an incubator of social and political attitudes for the rest of the country.<sup>78</sup>

When serving the overall governmental client, the Corporation Counsel should be aware of the City's inherent interest in promoting political and social pluralism. Unlike elected political officials, the Corporation Counsel's advocacy and counseling should be less directly influenced by majoritarian concepts of equity.<sup>79</sup> It is the Corporation Counsel, as the chief legal officer for the City, who can counsel policy-makers as to the interests of groups not represented by majoritarian political forces.<sup>80</sup>

For instance, prisoners' rights litigation provides a useful example of a politically disfavored group that cannot attract

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choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>74</sup> See Joseph P. Viteritti, *The Tradition of Municipal Reform: Charter Revision in Historical Context*, 37 PROC. ACAD. POL. SCI. 16, 16 (1989).

<sup>75</sup> For instance, the heavy taxation of businesses and corruption of Tammany Hall were not geared towards achieving economic efficiency, but rather, exploiting the City's market position. See NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 40.

<sup>76</sup> See RUSSELL SHORTO, THE ISLAND AT THE CENTER OF THE WORLD 275 (2005) (“In 1654, twenty-three Jews, some of whom had fled the fall of Dutch Brazil, showed up [in New Amsterdam] seeking asylum.”).

<sup>77</sup> See Michael Walzer, *Pluralism in Political Perspective*, in THE POLITICS OF ETHNICITY 13 (Stephen Thernstrom et al. eds., 1980) (“The practical meaning of ethnic pluralism . . . is still being hammered out, in the various arenas of political and social life. Little theoretical justification exists for any particular outcome.”).

<sup>78</sup> See *id.*

<sup>79</sup> Lucas Anderson, *Promoting an Effective and Responsive City Government by Retaining and Strengthening the Office of the Public Advocate*, 58 N.Y.L. SCH. L. REV. 165, 185 (2014).

<sup>80</sup> For instance, the New York Public Advocate cannot “initiate a special proceeding and sue for injunctive relief in any matter relating to its broader role as an ombudsperson and an oversight official.” *Id.* at 186.

sufficient influence to participate in the political process.<sup>81</sup> While unable to meaningfully participate in the political process, prisoners can litigate civil rights violations, which the Corporation Counsel must defend against. Because the Corporation Counsel is the sole entity tasked with representing the City in these actions, he or she can explain the relevant prisoners' rights and interests or systemic failures that may not be considered by elected public officials or agency policy-makers.<sup>82</sup>

That said, these minority interests might conflict with the Corporation Counsel's baseline responsibility to uphold and enforce existing law.<sup>83</sup> The ability of the Corporation Counsel and the Law Department to identify these situations requires an extralegal understanding of the complex interplay between law, justice, and governance. For instance, while the Corporation Counsel must counsel as the status quo, he or she should also be able to advise as to evolving societal views and interests, which in turn, may affect the development of new political or legal doctrines.

The Corporation Counsel may highlight issues ripe for a change in policy. For example, the Corporation Counsel represents the City in various class action lawsuits. In select instances, the Corporation Counsel can advocate for a change in current policies before the initiation or verdict of a class-action lawsuit. Yet while the Corporation Counsel may be able to identify and highlight these situations, his or her actions remain appropriately limited by the policy choices of elected officials. Thus, the Corporation Counsel's operating theory of justice must also include considerations beyond mere equity and fairness as discussed below.

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<sup>81</sup> See James E. Robertson, *The Jurisprudence of the PLRA: Inmates as Outsiders and the Counter Majoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 203–04 (2001) (discussing that prisoners are not a suspect class but comprise a politically vulnerable and underrepresented group which must be protected by the federal judiciary).

<sup>82</sup> See Schwarz, *supra* note 27, at 399 (discussing the politically unpopular decision not to appeal the District Court decision in *Benjamin v. Malcolm*). See also *Benjamin v. Malcolm*, 564 F. Supp. 668, 691 (S.D.N.Y. 1983) (finding that the Department of Corrections cannot implement alternative programs to deal with prison overcrowding without the support of officials in other components of the criminal justice system).

<sup>83</sup> See Schwarz, *supra* note 27, at 376 (analyzing the obligations of Corporation Counsel to uphold the laws due to their opportunity to affect public policy beyond the narrow view of "the law").

IV. THE DUAL ROLES OF THE CORPORATION COUNSEL TO SEEK  
JUSTICE AS A GOVERNMENT OFFICIAL AND AN ORGANIZATIONAL  
GATEKEEPER

While the City Charter sets out a diverse set of factors that the Corporation Counsel is obligated to consider,<sup>84</sup> the Corporation Counsel's first responsibility "is to the governmental entity itself and . . . not simply to advocate on behalf of individual members of the executive or legislative branch."<sup>85</sup> History demonstrates the City's need for a responsive local government. Structuring legal matters to efficiently provide public sector goods and services requires an understanding as to their historical context and the current needs of the general populace. The previous sections have attempted to suggest the scope of interests relevant to such an understanding. The growth of the City's population and social interdependence has required large-scale coordination of public transportation, welfare, and health systems, as well as efficient land use regulations.

This history has seen the City morph from a private corporation, controlled by private property interests, to a public municipality, sharing power amongst a diffuse amount of stakeholders. This diffusion amongst a multitude of stakeholders often makes it difficult to discern a clear consensus as to the public-sector needs of the City. Moreover, these public-sector needs have often generated a rural-urban conflict between City and State over the size and scope of government, "as well as conflicts over the degree of autonomy that city government should have."<sup>86</sup> Though not often the final decision-maker, the Corporation Counsel stands at the center of these conflicts, tasked with counseling policymakers, coordinating legal transactions, and litigating societal differences.

Throughout the office's four-hundred-year old history, the Corporation Counsel has been the chief architect of the City's municipal legal landscape, developing case law through litigation and shaping how law fulfills the public interest. Within the

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<sup>84</sup> See NEW YORK CITY CHARTER ch. 17, § 394(c).

<sup>85</sup> Cardozo, *supra* note 27, at 5.

<sup>86</sup> Robert F. Pecorella, *The Two New Yorks Revisited: The City and The State*, in GOVERNING NEW YORK STATE 7, 8 (Jeffrey M. Stonecash ed., 2001).

City's local government structure, the Corporation Counsel, as chief legal officer of the City, should consider questions of justice. Unlike elected officials, who are mainly concerned with constituent interests, the Corporation Counsel has a Charter mandate to advocate and counsel on behalf of all the inhabitants of the City. Therefore, it is incumbent upon the Corporation Counsel to consider, advocate, and counsel as to varying concepts of justice in the pursuit of the public interest.

Of course, the Corporation Counsel is not an island unto himself; rather, the Corporation Counsel and the Law Department also serves various elected and appointed officials. While the Corporation Counsel serves the larger overall governmental entity, final policy decisions are reserved for these officials.<sup>87</sup> Moreover, the Corporation Counsel is appointed by the Mayor and is subject to the Mayor's authority. In regard to democratic accountability, this structure provides a necessary check as to the Corporation Counsel's consideration and counseling as to justice. Because the Corporation Counsel does not retain final decision-making power, he or she cannot unduly usurp the power of the elected officials to make dispositive policy decisions.

The legal function that the Corporation Counsel is fulfilling creates additional informal checks. For instance, regardless of public interest or agency models of client identification, when the Corporation Counsel is engaged in the counseling or transactional function, his or her decision-making is relatively defined towards achieving discrete policy objectives. The counseling function is mainly preoccupied with interpreting law or legislation before decision-makers take action. The transactional function is also generally tasked with achieving discrete policy objectives through deal-making. Outside of determinations of ultimate legality, and nuanced analysis of underlying interests, the Corporation Counsel is structurally relieved from ultimate decision-making.

The Corporation Counsel's litigation function is also constrained by the structure of municipal governance. As mentioned above, the Corporation Counsel is the sole judge of the City's litigation. However, also mentioned above, the Corporation

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<sup>87</sup> See Peter L. Zimroth, *Reflections on My Years as Corporation Counsel*, 53 N.Y. L. SCH. L. REV. 409, 425 (2009) (“[T]he Corporation Counsel operates at the center of city government which, by its nature, is concerned with both policy and politics. . . . The line between policy and politics is not always clear.”).

Counsel is appointed by the mayor, and serves at his or her pleasure. Moreover, pursuant to the City Charter, the Corporation Counsel is not empowered to settle any claims without prior approval from the Comptroller.<sup>88</sup> As to potential injunctive relief, the Corporation Counsel also cannot act unilaterally. Rather, he or she must coordinate with affected agencies as to whatever policy changes are levied against the City. Regardless, in serving municipal entities, the Corporation Counsel and Assistant Corporation Counsels should remember their roles as government officials and gatekeepers for the City.

As a government official of the City, the Corporation Counsel, has an inherent and unique interest “to govern impartially . . . [and see] that justice shall be done.”<sup>89</sup> The Corporation Counsel, as a government official, has a responsibility to consider procedural and distributive justice norms,<sup>90</sup> a responsibility that does not similarly attach to private practitioners.<sup>91</sup> This government official role imposes two main responsibilities upon the Corporation Counsel. First, the Corporation Counsel should consider fairness and equity within legal processes and outcomes and should attempt to only engage in meritorious legal tactics or defenses.<sup>92</sup> Second, the Corporation Counsel should also seek to eliminate implicit bias and disparities in treatment in the office’s internal policies as to hiring, retention, and promotion, in order

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<sup>88</sup> See NEW YORK CITY CHARTER ch. 17, § 394(c).

<sup>89</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935). See also Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 275 (2000) (“[T]he government lawyer has an independent legal duty to faithfully carry out the law. This duty may be distinct from (and possibly, at times, paramount to) the ordinary duty of a lawyer to render zealous representation.”); Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty to Serve the Public Interest*, 42 BRANDEIS L. J. 13, 17, 18 (Fall 2003) (discussing the different boundaries that apply to representation by civil government lawyers versus private practitioners).

<sup>90</sup> See Schwarz, *supra* note 27, at 379.

<sup>91</sup> See Green, *supra* note 89, at 275.

<sup>92</sup> See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 817–18 (2000) [hereinafter Berenson, *Public Lawyers*]. This heightened standard should apply even in the context of the government as a tortfeasor. See Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 357–58 (2005). “No matter what type of activity it engages in, the government retains its obligations to pursue the public interest and to treat all of its constituents fairly; obligations that do not similarly attach to private actors.” *Id.* at 379.

to foster an inclusive City government.<sup>93</sup>

As an independent professional with a primary responsibility to protect an organizational client, namely the City, the Corporation Counsel also functions as one of the City's gatekeepers, protecting against organizational wrongdoing.<sup>94</sup> This responsibility is derived from the City Charter's explicit determination that the Corporation Counsel shall act as both the attorney and counsel for the City.<sup>95</sup> This role imposes two main responsibilities upon the Corporation Counsel. First, it imposes a risk management responsibility on the Corporation Counsel to report wrongdoing within the organizational client's hierarchy.<sup>96</sup> Second, it requires the Corporation Counsel to counsel on the competing short term and long-term institutional interests and policy factors that are presented in various legal strategies.<sup>97</sup>

The gatekeeping and government official roles both orient the Corporation Counsel to seek justice in a broader discussion of the competing facets of the public interest. As a government official, the Corporation Counsel seeks justice through the adoption and implementation of legal strategies and internal policies. As an organizational gatekeeper, the Corporation Counsel ensures that justice is done by protecting against organizational wrongdoing and counseling as how to achieve the long-term institutional interests of the City. The following section briefly describes various considerations that attach to the dual roles.

#### A. *The Corporation Counsel Seeking Justice as a Government*

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<sup>93</sup> "Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed, social scientists are convinced that we are, for the most part, unaware of them." Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

<sup>94</sup> See, e.g., JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006). See also Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 160 (1966) ("If there is wrongdoing in government, it must be exposed. The law officer has a special obligation not to permit a cover-up of illegal activity on the ground that exposure may hurt his party.").

<sup>95</sup> See NEW YORK CITY CHARTER ch. 17, § 394(a).

<sup>96</sup> See Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1415 (March 2008) (discussing the role of attorneys as organizational gatekeepers).

<sup>97</sup> See *id.* at 1417 (discussing the failure of Enron attorneys in "confus[ing] the role of advocate in litigation or adversary negotiation with the need of corporate clients for independent, objective advice").

*Official*

The Corporation Counsel and Assistant Corporation Counsels should seek justice through fairness in external legal tactics and strategies and internal operating policies. As a matter of democratic accountability, and general legal practice, the Corporation Counsel and Assistant Corporation Counsels must use existing law as their baseline for considering justice. Moreover, the actions of the Corporation Counsel and Assistant Corporation Counsels are subject to the New York Rules of Professional Conduct. Beyond these baselines, the Corporation Counsel and Assistant Corporation Counsels exercise varying degrees of discretion in making everyday interpretations of legality based on norms of legal practice. The interpretation of these legal rules and private conceptions of morality are not mutually exclusive dichotomies. Rather, the exercise of discretion inherently demands an appeal to extralegal moral principles in the application of legal rules to an uncertain factual scenario. This appeal to extralegal moral principles should be directed towards enhancing the legitimacy of local government and promoting just governance.

This results in Assistant Corporation Counsels potentially viewing their legal work, not as binary win-loss transactions, but rather, as opportunities to seek just processes and outcomes. Assistant Corporation Counsel's should engage in discussions with mid-level and senior management to consider "the relevant circumstances of the particular case [that] seem likely to promote justice."<sup>98</sup> The severity and intensity of these discussions are directly related to the existence of established law and precedent. "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility [he or] she needs to assume for substantive justice."<sup>99</sup>

In cases where there is no clear precedent or established law, this affords Assistant Corporation Counsels some degree of discretion. The limits of an Assistant Corporation Counsel's ability to exercise discretion is based on his or her respective role

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<sup>98</sup> WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138 (1998).

<sup>99</sup> *Id.* at 140.

within the Law Department. In exercising discretion, they should be aware of the City's previously discussed social and economic interests, as well as its general history. They should also be able to consider questions of procedural justice, as well as the fairness of outcomes and its impact on the City.

A potential risk of ignoring extralegal moral principles is that legal decisions may be unduly influenced by the private and implicit biases of individual Assistant Corporation Counsels. Assistant Corporation Counsels, like most lawyers, make decisions about a particular legal doctrine, often with little thought as to the rationales underlying that same doctrine. Assistant Corporation Counsels are consistently tasked with making these decisions while efficiently allocating limited resources. Simply, Assistant Corporation Counsels often have too much to do and too little time to do it in. As a result, many successful Assistant Corporation Counsels hone the ability to make quick decisions in fast-moving environments. In order to counteract the decision-making process from being unduly influenced by implicit biases, Assistant Corporation Counsels should also be cognizant of their responsibility to promote fair processes.

As government officials, the Corporation Counsel and Assistant Corporation Counsels have a unique interest in promoting fair processes by which legal decisions are made. Because it is possible that the Corporation Counsel's adversary may also be a subset of his or her overall governmental client, it is incumbent that the Law Department treat all participants in a fair manner. This results in an inherent interest in promoting procedural justice norms in the course of formulating external legal strategies. Constitutionally, the Corporation Counsel and Assistant Corporation Counsels are also oriented to consider questions of procedural justice. This is due, in part, to the fact that the Corporation Counsel is sworn to uphold the United States and New York State Constitutions, both of which contain clauses mandating equal protection under the law.

The Corporation Counsel and Assistant Corporation Counsels should also consider the outcomes and the resulting impact of legal matters. As discussed, the Corporation Counsel is in a unique position to enhance the legitimacy of institutions by counseling decision-makers with alternative paths forward that are consonant with the City's shared values. This counseling does not end once a legal matter ends; rather, the Corporation

Counsel is able to provide decision-makers with a continuous feedback loop that incorporates the resulting impact on various stakeholders in different legal matters.

The Corporation Counsel's concern for fairness as to processes and outcomes influences how he or she exercises discretion in asserting litigation tactics and strategies.<sup>100</sup> For instance, it has been observed that government attorneys face heightened standards in the following contexts: first, a heightened duty to disclose certain factual information to the court; and second, a prohibition against asserting unmeritorious, yet not technically frivolous, litigation tactics.<sup>101</sup> An exact determination as to whether these heightened standards should be imposed upon the work of the Corporation Counsel is beyond the scope of this article. However, these standards can be used to frame larger discussions as to how legal strategies and tactics implicate procedural justice norms as to the work of the Corporation Counsel.

For instance, a potential duty to disclose certain information to the court highlights a larger conversation as to the role of Assistant Corporation Counsels in representing an institutional litigant and promoting fair processes and outcomes. As an example, assume that a court *sua sponte* erroneously dismisses a meritorious lawsuit against the City on procedural grounds, and opposing counsel is unlikely to detect the error.<sup>102</sup> First, as to the plaintiff, this is an unfair outcome because he or she has a meritorious claim and has been turned away from the court due to erroneous information.<sup>103</sup> Second, as to the assigned Assistant Corporation Counsel, this not an optimal result, as the plaintiff, who generally will be a citizen of the City, has also suffered an injury through a judgment that renders his or her allegations unanswered.

Failing to bring this error to the attention of the court is premised upon the supremacy of the adversarial model. The "adversary system rests on the unproven and often erroneous assumption that each side in a lawsuit has equal representation

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<sup>100</sup> See Berenson, *Public Lawyers*, *supra* note 92, at 816.

<sup>101</sup> See *id.* at 805.

<sup>102</sup> This example is derived from the examples that Professor Catherine J. Lanctot has previously proposed. See Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 952 (1991).

<sup>103</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 1–2 (1986).

and equal resources.”<sup>104</sup> Advocates of the adversary model argue that, “[i]f limited candor is acceptable from private counsel, then there is no principled reason for requiring a greater duty of disclosure from government lawyers.”<sup>105</sup> However, few, if any, of the Law Department’s adversaries have the equal institutional knowledge or resources.

In this scenario, the Assistant Corporation Counsel has not actively brought about this unjust result but is “a passive recipient of [a] favorable judgment.”<sup>106</sup> Of course, there is also an inequality of consequences as to the parties. The Assistant Corporation Counsel, as a representative of an institutional litigant, the New York City Law Department, and generally insulated from litigation and judgment costs, suffers minimal harm from this error. The Assistant Corporation Counsel has no personal stake in the matter; generally, because of the volume of his or her practice, he or she is oriented to efficiently determine the merits of, and resolve, the matter. Simply, as to this favorable judgment, he or she will move on to the next case. However, as to the plaintiff, this is a relatively rare direct interaction with local government, with the potential to enhance the legitimacy of the civil justice system. Instead, this error has permanently deprived him or her from an ultimate determination as to the alleged government wrongdoing.

Bringing this error to the attention of the court may also be of some benefit to the Law Department, even if there is no explicit ethical duty to do so. Specifically, while the responsibility for this error lies with the court, the Law Department may benefit from enhancing its reputation for institutional candor. To paraphrase former Solicitor General Archibald Cox,

If [the Law Department is] willing to take a somewhat disinterested and wholly candid position even when it means surrendering a victory, then all [of the Law Department’s] other cases will be presented with a greater degree of restraint, with a greater degree of candor, and with a longer view, perhaps, than otherwise.<sup>107</sup>

As to the individual Assistant Corporation Counsel

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<sup>104</sup> Lanctot, *supra* note 102, at 994.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 993.

<sup>107</sup> LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 10* (1987) (quoting Archibald Cox).

highlighting this error will increase his or her reputation for presenting objectively correct factual and procedural information. While bringing this error to the court's attention may, in the short term, add another matter to the Corporation Counsel's immense docket of pending cases, it may also, in the long-term, enhance the reputation of the Law Department and the individual Assistant Corporation Counsel.

The Corporation Counsel is oriented to fulfilling the policy objectives of these elected officials for two reasons. First, as elected officials make ultimate policy decisions, to have coordinated City governance, the Corporation Counsel litigation decisions should attempt to mirror current policy choices.<sup>108</sup> Second, regardless of public interest or agency-client representation models, democratically elected officials best represent the popular will of the overall governmental client.<sup>109</sup> So, in serving the governmental client, the Corporation Counsel must heavily consider the current policy objectives of elected officials.

But to be clear, this attempt to align with current policies should not prevent the Corporation Counsel from providing independent legal advice, grounded in established law, justice, and the broader public interest. The Corporation Counsel makes the ultimate final decision over questions of legality; “[u]ltimately the mayor can fire the Corporation Counsel. But he cannot substitute his legal judgment for the Corporation Counsel’s.”<sup>110</sup> As a result, it is incumbent that the Corporation Counsel advise elected officials over a particular case's lack of merit and recommend the avoidance of unfair litigation.<sup>111</sup> It is also the responsibility of Assistant Corporation Counsels to provide the Corporation Counsel with relevant moral, economic, social, and political factors in making this decision. This structure should lead to a robust internal conversation between the Corporation

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<sup>108</sup> See Zimroth, *supra* note 87, at 410. (discussing the intersection of law and policy faced by the Corporation Counsel's office).

<sup>109</sup> See *id.* at 410–11 (discussing the consequences the City Charter faces in governing the city and the importance of resolving conflicts between several agencies and officers of city government).

<sup>110</sup> *Id.* at 411.

<sup>111</sup> See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (AM. BAR ASS'N 1980) (“A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to the lawyer should so advise his or her superiors and recommend the avoidance of unfair litigation.”).

Counsel and City officials.

Periodically, this may lead to a difference of opinion between the Corporation Counsel and City officials with the course of litigation. In these instances, the ultimate determination of whether litigation is unmeritorious should be reserved for the Corporation Counsel. Unfortunately, when there are irreconcilable differences about the course of the City's litigation, the Corporation Counsel faces two options: resignation or termination. Neither choice is ideal.

Rather, an example of how these conflicts should be resolved is the City's ultimate decision not to appeal a decision by Judge Morris Lasker in *Benjamin v. Malcolm*.<sup>112</sup> In *Benjamin*, because of its "substantial contempt of a consent decree requiring reduction of overcrowding in Rikers Island prisons,"<sup>113</sup> the City was ordered to release some prisoners.<sup>114</sup> Former Corporation Counsel F.A.O. Schwarz, Jr. recommended that the City not appeal the decision.<sup>115</sup> The City's police commissioner, Ben Ward, and its criminal justice coordinator, John Keenan, strongly opposed this recommendation.<sup>116</sup> At first, the Mayor Edward Koch also opposed the Law Department's proposal. But the consensus within the Law Department was that the City could present no winning arguments on appeal.<sup>117</sup> In Schwarz's view, an appeal "would hurt the City's general reputation in the Second Circuit by appearing simply to pass the buck to the courts for what would be an unpopular but inevitable decision."<sup>118</sup> Because of the lack of a legitimate legal argument, it would be evident to the Second Circuit that the appeal was based on political, rather than legal, reasons.<sup>119</sup> Ultimately, Mayor Koch agreed with the Law Department's assessment and the City did not appeal the decision.<sup>120</sup>

The Law Department should also hesitate to exploit the relative power disparity between parties to bring about unjust

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<sup>112</sup> See Schwarz, *supra* note 27, at 399.

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* See also NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 277 (describing how the Law Department and Mayor Koch came to an agreement not to appeal the consent decree).

<sup>115</sup> See Schwarz, *supra* note 27, at 399.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

settlement or results. This should not be construed as a restraint on Assistant Corporation Counsels in choosing strategies that reflect the litigation preferences of opposing counsels. Rather, the Law Department should not seek to delay or burden legal processes to deter or exploit the social or economic vulnerabilities of their adversaries. As referenced above, the Law Department should be concerned with procedural justice norms.

The Corporation Counsel should also seek justice through fairness in internal policies. The Corporation Counsel is subject to the City's various anti-discrimination and equal employment opportunity statutes. These statutes, as well as the recent history of City governance, mandate a more diverse and inclusive workforce. Thus, the Corporation Counsel is also inherently interested in promoting procedural justice norms in formulating internal operating policies. This orientation to seek justice through internal systems flows from the Corporation Counsel's status as a government official, unlike specific obligations imposed by the New York Rules of Professional Conduct. As a baseline, per the New York City Charter, the Corporation Counsel must ensure that the New York City Law Department "does not discriminate against employees or applicants for employment" in any way prohibited by federal, state, and local law.<sup>121</sup> Also, "the Charter requires agency heads to establish measures, programs, and annual EEO Plans that communicate each agency's efforts to provide equal employment opportunity ("EEO") to City employees and applicants for employment within City government."<sup>122</sup>

Generally, the practice of law is "one of the least racially diverse professions in the nation."<sup>123</sup> Blacks, Latinos, Asian Americans, and Native Americans "make up fewer than [seven] percent of law firm partners and [nine] percent of general counsels of large corporations. In major law firms, only [three] percent of associates and less than [two] percent of partners are

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<sup>121</sup> See NEW YORK CITY CHARTER ch. 35, § 815(h).

<sup>122</sup> CITY OF NEW YORK, EQUAL EMPLOYMENT OPPORTUNITY POLICY 1 (2014), [https://www1.nyc.gov/assets/dcass/downloads/pdf/agencies/nyc\\_eeo\\_policy.pdf](https://www1.nyc.gov/assets/dcass/downloads/pdf/agencies/nyc_eeo_policy.pdf).

<sup>123</sup> Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that>.

African Americans.”<sup>124</sup>

Because of a specific emphasis on inclusive hiring, promotion, and retention, the Law Department is relatively diverse. As to gender, the Law Department has a majority of female supervising and staff Assistant Corporation Counsels. The Law Department also outperforms private firms on racial diversity.<sup>125</sup> That said, setting diversity and inclusion benchmarks against private firms or of the legal industry, in general, should not be the Law Department’s overall goal. Instead, because the Law Department represents the City, it should be representative of the diverse variety of viewpoints.

As a result, the office’s internal policies, such as organizational culture, should be periodically evaluated to ensure against implicit bias and disparities in treatment. Ignoring internal policies subjects the Office of Corporation Counsel to these risks: first, jury verdicts inconsistent with internally developed narratives;<sup>126</sup> second, increased attrition and replacement costs for departing Assistant Corporation Counsels;<sup>127</sup> third, decreased leadership development resulting in organizational succession disruption;<sup>128</sup> and fourth, social capital erosion at one of the leading municipal law firms.<sup>129</sup> The Office of Corporation Counsel’s internal diversity norms shape litigation and internal narratives regarding the previously mentioned areas of concern.<sup>130</sup> Thus, the Corporation Counsel must oppose

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<sup>124</sup> *Id.*

<sup>125</sup> See *Diversity, Inclusion and Community*, N.Y.C. LAW DEP’T, <https://www1.nyc.gov/site/law/about/diversity-inclusion-and-community.page> (last visited Mar. 23, 2020) (stating the Law Department is one of the most diverse law offices in the country, with over sixty percent of female attorneys and twenty-nine percent minorities).

<sup>126</sup> Jessica Blakemore, *Implicit Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833, 838 (2016) (discussing the role implicit bias plays during jury selection which results in a high presence of white jurors in many courtrooms).

<sup>127</sup> Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, 15 NEV. L.J. 930, 942 (2015) (discussing the impact of race on hiring of new attorneys).

<sup>128</sup> Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945–46, 951 (2006) (stating that “[i]mplicit biases are discriminatory biases based on implicit attitudes or [] stereotypes” and can lead to men being favored for management positions).

<sup>129</sup> Charles J. Santangelo, *Why Do Law Firms Fail*, 14 LEGAL MGMT. 45, 48 (1995) (discussing the disparate impact an outdated management system has on the success of a law firm).

<sup>130</sup> See, e.g., Greenwald & Krieger, *supra* note 128, at 945; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

situational pressures, standard conventions, and managerial assessments that reinforce historical practices of discrimination and exclusion in hiring, retention, promotion, and narrative building.

*B. The Corporation Counsel Ensuring that Justice Is Done as a Gatekeeper for the City*

The Corporation Counsel ensures that justice is done by acting as one of the City's gatekeepers and protecting against organizational wrongdoing. The Corporation Counsel's gatekeeping function is achieved in four ways: first, counseling for the long-term institutional interests of the City; second, advising against organizational wrongdoing; third, reporting of internal wrongdoing within the City; and fourth, screening of claims and legal arguments made against and for the City.<sup>131</sup> The Corporation Counsel fails as a gatekeeper when he declines to advise city officials and agencies on how a short-term legal battle might affect the City's long-term interests.<sup>132</sup> Similarly, it would be a gatekeeping failure to decline to report and appropriately act in response to organizational wrongdoing. Essentially, this role refocuses the Corporation Counsel's connection to broader views of the City's public interest.<sup>133</sup>

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*Bias and the Law*, 58 UCLA L. REV. 465 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

<sup>131</sup> See Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1394–95 (2004) (discussing the imposition of sanctions such as personal civil liability, discipline, and fines for lawyers who fail to properly screen clients or bring frivolous claims).

<sup>132</sup> See, e.g., *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 186 (E.D.N.Y. 1999) (citing, in *Brooklyn Institute*, the City had withheld funds appropriated to, and was attempting to eject, the Museum due to a controversial art exhibit, whereby the museum filed a preliminary injunction.) Despite Mayor Giuliani's claims that the presiding judge had "lost all reason," the museum prevailed in attaining a preliminary injunction. David Barstow, *A Ruling Against Giuliani*, N.Y. TIMES (Nov. 7, 1999), <https://www.nytimes.com/1999/11/07/weekinreview/oct-31-nov-6-a-ruling-against-giuliani.html>. See also Alan Whyte, *New York's Mayor Giuliani and the Brooklyn Museum Reach a Settlement*, WORLD SOCIALIST WEB SITE (Mar. 31, 2000), <https://www.wsws.org/en/articles/2000/03/muse-m31.html> (stating the Law Department initially filed an appeal but, despite considerable political pressure, was ultimately able to settle the litigation. The settlement restored all City funding previously allocated, and committed an additional \$5.8 million dollars, to the Museum. Fiscally, the lawsuit was a loss for taxpayers.).

<sup>133</sup> See Schwarz, *supra* note 27, at 379 (discussing the duty the government

The Corporation Counsel, as a gatekeeper, can monitor and potentially influence the conduct of his or her corporate client, the City. This potential influence is normally conducted in the context of the Corporation Counsel's pre-decisional legal counseling about proposed policies or legislation by municipal policymakers. It can also be undertaken in response to recurring systemic trends that may lead to litigation. Generally, the Corporation Counsel is expected to accept the policy decisions of municipal policymakers, even when those decisions may not appear to be the best plan. The Corporation Counsel must be, however, candid in presenting all possible legal and non-legal considerations. These functions implicitly impose a duty to exercise independent judgment and do not allow the Corporation Counsel to favor the personal interests of an individual elected official over those of the City.<sup>134</sup>

As a gatekeeper, a Corporation Counsel should offer counsel about how best achieve the long-term institutional interests and policy objectives for the City.<sup>135</sup> History and shared societal values all shape the policy behind black letter law and expresses a richer understanding of the relevant competing rights and interests.<sup>136</sup> As a result, the Corporation Counsel must counsel as not just to the black letter law, but also on shared public values.<sup>137</sup> While these values ultimately serve the long-term interests of society, they may also conflict with existing law or the short-term interests of majorities.<sup>138</sup>

While the Corporation Counsel is bound to follow and interpret

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owes to all of its residents despite whether or not they received their vote into office).

<sup>134</sup> See JOHN H. GREENER, A HISTORY OF THE CORPORATE COUNSEL OF THE CITY OF NEW YORK 32 (2015) (discussing an example of prioritization of mayoral interest above the City's interest).

<sup>135</sup> See Schwarz, *supra* note 27, at 379 (discussing the needs of the city as a client: first, "issuing an opinion on what the law is;" second, "making policy decision in important public interest litigation," and third, "giving policy advice").

<sup>136</sup> See Schwarz, *supra* note 27, at 376 ("[T]here is no bright line distinguishing law from policy. History, values, and experience all shape the law.").

<sup>137</sup> See Schwarz, *supra* note 27, at 381 ("The Constitution casts a light far beyond its page. By values related to the Constitution, I mean attention to the interests of groups beyond those protected by the Bill of Rights, but whose interests are likely to be ignored.").

<sup>138</sup> See *id.* ("Vindication of values . . . may sometimes run counter to the interests of majorities in the short term—but will often, I believe, serve the interests of society in the long-term.").

existing law, it is incumbent that he or she ensures that justice is done by counseling on underlying short and long-term policy and institutional interests implicated in legal strategies.<sup>139</sup> The public interest, just like justice, is a shared social construction, and it is doubtful that it can be viewed in only one way.<sup>140</sup> As Professor W. Bradley Wendel has expressed:

Moral diversity should be accommodated not by leaving moral questions to a multiplicity of nonpolitical associations but by charging political institutions with the responsibility of fashioning principles of justice that speak directly to the normative concerns of these respective communities and which seek to discover the deeper moral commitments that diverse constituencies share.<sup>141</sup>

As a gatekeeper, the Corporation Counsel should use current legal norms, along with historical trends and government structures, to consider issues regarding aspects of social and distributive justice. The social meanings of the City's public-sector goods, and their distributions among the City's diverse populace, are best understood with their historical evolution.<sup>142</sup>

This role requires a nuanced understanding of the local government structure and the institutional interests of the City. This understanding provides the Corporation Counsel, and Assistant Corporation Counsels with enough background to navigate a local government position within a state-federal system and assert parochial interests on behalf of the City. As mentioned above, these interests have been characterized by the City's desire to continue to promote its particular brand of pluralist values and policies and continued ability to compete in the global economic marketplace. Understanding the City's interest in pluralism allows the Corporation Counsel to contextualize the City's disbursement of power across different

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<sup>139</sup> See *id.* at 378 (discussing the interests of the city as a "touchstone" but not all encompassing and requires a government lawyer to articulate the broader, deeper, long-term interests of the city).

<sup>140</sup> See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 5 (1983) (stating that ordinary people even if committed to impartiality cannot help but make decisions based on their current position and values).

<sup>141</sup> Wendel, *supra* note 33, at 45.

<sup>142</sup> See *id.* at 45–46 (discussing the need for lawyers to apply norms developed in nonprofessional activities because they are a rich source of moral understanding).

borough and community levels and emphasis on diversity and inclusion. Additionally, context over the historical reasons for the current increased focus on economic development provides a useful metric for determining what overall interests are implicated in a specific legal strategy or policy. Understanding history and government structure inform the Corporation Counsel's advocacy and counseling about a collective sense of justice and just governance.

Ensuring that justice is also done periodically requires a Corporation Counsel to urge government officials to change course.<sup>143</sup> Every legal strategy adopted by a Corporation Counsel is an affirmative choice to emphasize specific values over others.<sup>144</sup> Even a determination to exercise discretion in a way that preserves the status quo is an affirmative choice that advances a particular point of view about the best path forward for New York City.<sup>145</sup> The Corporation Counsel should not assume that municipal policymakers wish to maximize, or are even aware of, the varying economic or social interests of the overall City. Unlike elected officials, the Corporation Counsel can articulate and give counsel as to the rights and interests of certain disfavored groups that do not enjoy protection within the majoritarian political process. As a result, when municipal policymakers may be uninformed, the Corporation Counsel should identify and explain all the legal or non-legal ramifications of a particular strategy. In these certain instances, as a matter of gatekeeping to protect the institutional interests of the City, it may be imperative that the Corporation Counsel urge other government officials to change policy.

As to organizational wrongdoing, the Corporation Counsel has a direct and indirect role within City governance. In his or her advising position, the Corporation Counsel is directly responsible

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<sup>143</sup> See, e.g., *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 441 n.21 (1986) (citing in *Local 28*, the City filed a brief supporting civil sanctions for a construction firm that had failed to meet affirmative action quotas, but also including a statement that Mayor Koch did not personally support such quotas).

<sup>144</sup> See, e.g., *Kay v. Bd. of Higher Educ. of N.Y.C.*, 20 N.Y.S.2d 898, 901 (N.Y. App. Div. 1940) at 901 (citing despite City's Board of Higher Education formal request for an appeal, the Corporation Counsel declined to appeal the denial of Bertrand Russell's appointment as the chair of philosophy at City College due to allegations of Russell's moral impropriety).

<sup>145</sup> See Schwarz, *supra* note 27, at 403-04 (arguing to Mayor Koch that the City had a moral responsibility to divest from South Africa due to its apartheid regime).

for advising against organizational wrongdoing. As a matter of professional responsibility, the Corporation Counsel has an ethical obligation to warn against, and may not participate in, illegal conduct. Indirectly, the Corporation Counsel also has a responsibility for reporting possible organizational wrongdoing to responsible investigative agencies within the City.

The Corporation Counsel, as the leader of an institutional litigant, should screen legal claims asserted against the City to identify emerging legal trends and patterns. A quantitative and qualitative review of relevant litigation data can identify patterns of possible government misconduct. This review of relevant data provides policymakers with a greater understanding of the effects of overall policy choices, as well as highlighting opportunities for additional training or other risk management responses.

Finally, the Corporation Counsel should also act as a gatekeeper towards the legal claims and arguments asserted on behalf of the City. The New York City Law Department is an institutional litigant, and thus has a long-term institutional interest in its reputation before the courts and in front of the citizenry of the City.<sup>146</sup> At the simplest level, ACCs should not assert frivolous positions, novel legal claims or arguments should be pursued only after internal deliberations that include considerations such as cost-benefit analyses regarding underlying public values, as well as the City's finite resources and overall policy objectives.

## V. CONCLUSION

As stated above, interplay between the work of the Corporation Counsel and the role of justice is significant. The City Charter tasks the Corporation Counsel to provide the legal architecture for the policy prerogatives of the City. In this regard, the Corporation Counsel pursues the broader public interest. Implicit within the public interest are notions of justice. Thus, the Corporation Counsel necessarily considers justice within his or her work.

Considering the varied stakeholders and interests, the

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<sup>146</sup> See Schwarz, *supra* note 27 at 407 (discussing the City's decision not to seek United States Supreme Court review in *Andrews v. Koch* due to institutional reputation concerns before the Court). See also *Andrews v. Koch*, 528 F. Supp. 246, 247 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982).

Corporation Counsel can efficiently pursue justice through the dual paradigm as both a government official and a gatekeeper as described above. In doing so, the Corporation Counsel will be better able to advise municipal policymakers on the long and short-term interests of the City and litigate with a consistent emphasis on just processes and outcomes.

**PAGES 181 THROUGH 198 HAVE BEEN  
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