THE COMMON LAW POWERS OF THE NEW YORK STATE ATTORNEY GENERAL

Bennett Liebman[*]

[*] Bennett Liebman is a Government Lawyer in Residence at Albany Law School. At Albany Law School, he has served variously as the Executive Director, the Acting Director and the Interim Director of the Government Law Center. In New York State government, he has served as counsel to Lieutenant Governor Mario Cuomo, special deputy counsel to Governor Mario Cuomo, a member of the State Racing and Wagering Board and deputy secretary for racing and gaming for Governor Andrew Cuomo. He is a summa cum laude graduate of Union College and a cum laude graduate of NYU Law School.

INTRODUCTION

The modern Attorney General in New York State does not simply spend his or her time representing the State and its agencies from suits. Instead, over the course of the last half century, the attorney general's office has shifted from a largely defensive posture to one of affirmatively asserting the rights of the people of New York State.[1] As former Attorney General Robert Abrams said in 1996 "Historically, the Attorney General's office played a defensive role -- defending the state whenever the state was sued … In the modern era … it began to take the offensive lead on behalf of the public interest by bringing lawsuits."[2] "What once was largely a defensive office tasked with serving as the state's lawyer, is now known for an aggressive portfolio crafted by the personality and politics of the state's top legal officer."[3]

Yet in this brave new world of affirmative lawsuits, one potential weapon in the Attorney General's arsenal has largely been underutilized. The office likely possesses significant common law

[1] *See, e.g.*, the many multi-state affirmative actions undertaken by the New York State Attorney General in Paul Brian Nolette, Advancing National Policy in the Courts: The Use of Multistate Litigation by State Attorneys General (Aug. 2011) (unpublished Ph.D. dissertation, Boston College) (on file with Boston College University Libraries).

[2] Nick Ravo, *Louis Lefkowitz, 22-Year Attorney General, Dies at 91*, N.Y. TIMES (June 22, 1996), https://www.nytimes.com/1996/06/22/nyregion/louis-lefkowitz-22-year-attorney-general-dies-at-91.html. "He filed environmental lawsuits against dumping and other activities. He demanded that funeral homes provide itemized bills, sued manufacturers of dangerous toys and forced merchants to identify secondhand appliances being sold as new." Opinion, *Farewell to 'the General,'* N.Y. TIMES (June 25, 1996), https://www.nytimes.com/1996/06/25/opinion/farewell-to-the-general.html. Attorney General Abrams once noted that Lefkowitz "became one of the most revered and productive men to serve in the office." Robert Abrams, *The Role of Attorneys General in New York State's Constitutional History*, 61 N.Y. ST. B.J. 26, 29 (1989); *see also* Philip Weinberg, *Office of N.Y. Attorney General Sets Pace for Others Nationwide*, 76 N.Y. ST. B.A. J. 10 (2004).

[3] David Lombardo, *Office Changes with the Times*, TIMES UNION, Sept. 3, 2018, at A3, NEWSBANK, No. 16E340D297123060.

powers, and these common law powers could be used to bolster the existing statutory powers of the Attorney General.

This Article explores the constitutional development of the office of the Attorney General in New York State and the statutory history of the office. It reviews the many historical issues presented by the use of common law powers by the Attorney General in New York and compares that history with the use of common law powers by attorneys general in other states. It concludes with a perspective on how the common law powers of the Attorney General might be used to influence the actions of the New York Attorney General in the future. By doing so, this Article seeks to answer the question: Does the office of the New York Attorney General possess common law powers, and if the office does possess such powers, how might these powers be utilized by an activist Attorney General?

I.
HISTORY OF THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

A. The Advent of Affirmative Lawsuits

Beginning six decades ago when Attorney General Louis Lefkowitz[4] deemed himself the people's lawyer, successive New York Attorneys General have taken up the activist mantle. Modern Attorneys General frequently expand the scope of the office's purview in order to pursue new directions in litigation that suit the Attorney General's interests. Over time, activist attorneys general have taken on consumer protection suits, Wall Street greed, state government corruption, and even investigations implicating a sitting United States President.

Attorney General Abrams did significant, pioneering work in many multi-state affirmative action cases, especially cases taken against

[4] The attorney general's office in New York is an elective office. When there is a vacancy in the office, the vacancy is filled by the legislature – when the legislature is in session, pursuant to Section 41 of the New York Public Officers Law. Attorney General Lefkowitz was appointed by the legislature in 1957. and subsequently won election for the office in 1958, 1962, 1966, 1970 and 1974. Barbara Underwood was similarly appointed by the legislature in May of 2018 and served until the conclusion of the 2018 calendar year. An early mention of Attorney General Lefkowitz as the people's lawyer is contained in "Lefkowitz Warmly Hailed In Tour of Garment Center" *New York Herald Tribune,* August 29, 1961.

federal government agencies, and also brought numerous enforcement actions on pollution, consumer abuse, and price-fixing claims.[5]

Attorney General Dennis Vacco sued the board of Adelphi University to reduce the pay of the University's president, Peter Diamandopoulos.[6] He also focused considerable effort on increasing the law enforcement efforts of the Attorney General,[7] and his office helped finalize the Tobacco Master Settlement Agreement of 1998.[8]

Elliot Spitzer considered himself the sheriff of Wall Street.[9] He was "the first to use the Martin Act to turn the attorney general's office into 'the country's second securities regulator.'"[10] "He began with Merrill Lynch, then Salomon Smith Barney, and, eventually, he secured a $1.4 billion settlement with ten other investment-banking firms."[11] Spitzer also brought suits against Marsh, the giant insurance company,[12] and brought controversial litigation trying to force New York Stock

[5] Nolette, *supra* note 1. *See also* Henry Gilgoff, *Active Attorney General Views Vary on Abrams' Record in Office*, NEWSDAY, Oct. 23, 1992, 6. "By the mid-1980s, in fact, New York had developed a full-fledged environmental criminal enforcement apparatus, including a healthy competition between the state's attorney general and local district attorneys." James J. Periconi, *The State of Environmental Crimes Prosecutions in New York*, 23 NAT. RESOURCES & ENV'T 11, 11 (2009).

[6] Jack Sirica, *Attorney General Blasts Diamandopoulos For .... /'Lavish Lifestyle' At Adelphi Expense*, NEWSDAY, Apr. 18, 1996, 1996 WLNR 534855. See Vacco v. Diamandopoulos, 715 N.Y.S.2d 269 (N.Y. Sup. Ct. 1998).

[7] Dennis C. Vacco, *Reelect Me Based on My Record*, DAILY NEWS, Oct. 18,1998, at 775.

[8] Darlene Superville, *States Detail Terms of $206 Billion Tobacco Settlement*, BUFFALO NEWS, Nov. 16, 1998, 1998 WLNR 1313428; Tom Buckham, *Vacco Again Vows to Share Proceeds of Tobacco Pact*, BUFFALO TIMES, Aug. 25, 1998, at B4, NEWSBANK, https://infoweb.newsbank.com/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=6745D0C7EC9246F49DAE70DA1EA3845F&rft_val_format=info%3Aofi/fmt%3Akev%3Amtx%3Actx&rft_dat=document_id%3Anews%252F0EAF9B1653E27057.

[9] Harry Bruinius, *New York's One-Man Scourge of Wall Street*, CHRISTIAN SCI. MONITOR, Sept. 15, 2003, PROQUEST CENTRAL, No. 405679429.

[10] Vikas Bajaj, *Post-Spitzer, a New Breed of Reformer*, N.Y. TIMES (June 27, 2008), https://www.nytimes.com/2008/06/27/business/27cuomo.html. See also Jordan M. Marciello, *Are You Afraid of The Dark?: How the New York Attorney General is Shedding Light on Dark Pools and High Frequency Trading*, 49 SUFFOLK U. L. REV. 163, 175–76 (2016).

[11] *Id*.

[12] See Kulbir Walha & Edward E. Filusch, *Eliot Spitzer: A Crusader Against Corporate Malfeasance or a Politically Ambitious Spotlight Hound - A Case Study of Eliot Spitzer and Marsh & McLennan*, 18 GEO. J. LEGAL ETHICS 1111 (2005).

Exchange president Richard Grasso to repay much of his compensation.[13]

Andrew Cuomo "extracted settlements from credit ratings firms and student lenders and trained his sights on banks that played a crucial role in the mortgage crisis."[14] In his work in dealing with governmental corruption, he strived to be the "sheriff of State Street."[15] He focused on disreputable governmental activities that had long been tolerated in New York state politics. His probe into the state pensions fund "led to agreements with 18 firms and three individuals, more than $160 million for the state and the pension fund, and eight guilty pleas, including from former Comptroller Alan Hevesi, his chief political consultant and his chief investment officer."[16] He also found fraud perpetrated on the pension fund in the practice of private attorneys being placed on the payrolls of local school districts "so that the attorneys could receive hundreds of thousands of dollars in state pensions."[17]

More recently, Attorney General Eric Schneiderman repeatedly brought suits against the President Trump and his Administration. Schneiderman "had taken legal or administrative actions against him and the congressional GOP 100 times since Trump took office."[18] At one point it was suggested that "Schneiderman could very much become the next sheriff of Pennsylvania Avenue."[19] He won large

[13] Landon Thomas Jr., *Saying Grasso Duped Big Board, Suit Seeks Return of $100 Million*, N.Y. TIMES (May 25, 2004), https://www.nytimes.com/2004/05/25/business/saying-grasso-duped-big-board-suit-seeks-return-of-100-million.html. See New York *ex rel*. Spitzer v. Grasso, 893 N.E.2d 105 (N.Y. 2008).

[14] Bajaj, *supra* note 10.

[15] State Street in Albany is the location of the State Capitol. *See 'Sheriff of State St.' Cuomo Meets Corruption Watchdogs*, N.Y. DAILY NEWS (Jan. 3, 2007, 12:00 AM), https://www.nydailynews.com/news/sheriff-state-st-cuomo-meets-corruption-watchdogs-article-1.261660.

[16] Cara Mat, *Albany Lobbyist to Pay $500K in Pension-Fund Settlement*, ROCHESTER DEMOCRAT & CHRON., Dec. 8, 2010, PROQUEST CENTRAL, No. 816701197. See also Tom Precious, *Lobbying Firm Settles with Cuomo in Investigation of Pay-to-Play Deals*, BUFFALO NEWS (Dec. 9, 2010), https://buffalonews.com/news/lobbying-firm-settles-with-cuomo-in-investigation-of-pay-to-play-deals/article_9bba3ce6-1251-5422-b18c-c17a57f2ac78.html.

[17] Sandra Peddie & Eden Laikin, *Cuomo: Lawyer Pensions on School Payrolls are 'Fraud,'* NEWSDAY (Apr. 3, 2008, 11:54 AM), https://www.newsday.com/long-island/cuomo-lawyer-pensions-on-school-payrolls-are-fraud-1.878941.

[18] Madina Toure, *Will New York's Attorney General Still Dominate Nationally After Schneiderman's Exit?*, N.Y. OBSERVER, May 15, 2018, PROQUEST CENTRAL, No. 2039302362.

[19] David Freedlander, *Will This Man Take Down Donald Trump?*, POLITICO MAG. (Feb. 3, 2017), https://www.politico.com/magazine/story/2017/02/eric-schneiderman-donald-trump-new-york-214734.

settlements from banks involved in the mortgage scandals and also was the first attorney general to attack electronic high frequency trading on Wall Street [20]

Elected as Attorney General in 2018, Letitia James has continued in the tradition of authorizing affirmative lawsuits. She has regularly brought actions against the Trump Administration, even calling the President an "authoritarian thug"[21] after he prevented New Yorkers from enrolling or re-enrolling in Trusted Traveler Programs.

Yet, even with all of the activist litigation undertaken by Attorneys General over the past half century, attorneys general have rarely invoked the common law as a potential source of their authority. The following sections will discuss the extent to which that power survives in the modern era, and what might be done with it.

B. Constitutional History of the Office of Attorney General

Before American independence, the Attorney General in New York was appointed by the governor of the colony. Although the actual date of the first Attorney General's appointment is not known with any certainty, it likely came in 1690 when a Royal order to the Governor stated, "Whereas we conceive it very necessary for our service that there be an attorney general appointed and SETTLED, who may at all times take care of our rights and interests within our said province, YOU are with all convenient speed to nominate AND APPOINT a fit PERSON for that trust."[22]

"The apparent need of legislative counsel appears to come from a request of the assembly in May, 1691, that the governor appoint the attorney general or some other fit person to draft bills for the assembly."[23] Rather than the colonial governor selecting the Attorney General, the king, starting in 1700, began appointing the Attorney General himself.[24]

After United States independence, "[t]he first attorney general of the state, Egbert Benson, was appointed by the [New York state]

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[20] Marciello, *supra* note 10, at 164-65.

[21] Elura Nanos, *NY AG Calls Trump 'Authoritarian Thug,' Promises Lawsuit Over Suspension of Global Entry*, L. & CRIME (Feb. 7, 2020, 2:19 PM), https://lawandcrime.com/lawsuit/ag-calls-trump-authoritarian-thug-promises-lawsuit-over-suspension-of-global-entry/.

[22] Oliver W. Hammonds, *The Attorney General in the American Colonies*, 1 ANGLO-AM. LEGAL HIST. SERIES 2, 8 (1939). Weinberg, *supra* note 2, at 10, on the other hand, suggests that the first attorney general was Thomas Rudyard appointed in 1684,

[23] 1 CHARLES Z. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 453 (1906).

[24] 2 CHARLES Z. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 526 (1906).

Constitutional Convention of 1777, together with other officers deemed necessary to establish the new state government." [25] The Attorney General's office was not specifically mentioned in the 1777 Constitution, but the office was carried over from the British system.[26] While the Convention appointed the first Attorney General, the governor was given the right to appoint the future Attorneys General subject to the approval of the Council of Appointment. Under this system, Aaron Burr was appointed Attorney General by Governor George Clinton in 1789.[27]

The 1777 Constitution explicitly continued the British common law system.[28] The Constitution determined that the common law of England would be the law of New York State unless altered by the legislature.[29] With regard to the Attorney General's powers, since the powers of the Attorney General "were not conferred by statute, a grant by statute of the same or other powers would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly or by reasonable intendment, forbade the exercise of powers not thus expressly conferred."[30] In short, the office of the Attorney General would retain its common law powers unless the legislature specifically acted to restrain or limit its powers.

In addition to the office's common law powers, the legislature granted the Attorney General the authority to prosecute suits against individuals who "shall refuse or neglect to account for monies received

[25] *Id.* at 527

[26] *See* People v. Miner, 2 Lans. 396, 399 (N.Y. Gen. Term. 1868). *See also* People v. Albany & Susquehanna R.R. Co., 5 Lans. 25 (N.Y. Gen. Term 1871); N.Y. CONST. OF 1777, art. XXIII. Benson served as attorney general for 11 years and subsequently served as a United States Congressman and the chief judge of the United States Circuit Court for the Second Circuit.

[27] See 1 DEALVA STANWOOD ALEXANDER, A POLITICAL HISTORY OF THE STATE OF NEW YORK 45 (1909).

[28] Lincoln, s*upra* note 23, at 593. See THOMAS M. COOLEY WITH VICTOR H. LANE, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 49 (7th ed. 1903)

> By far the larger and more valuable portion of that body of laws consisted of the common law of England, which had been transplanted in the American wilderness, and which the colonists, now become an independent nation, had found a shelter of protection during all the long contest with the mother country brought at last to so fortunate a conclusion.

[29] N.Y. CONST. OF 1777, art. XXXV.

[30] *Miner*, 2 Lans. at 399. This language from *Miner* was quoted in *State v. Davidson*, 275 P. 373, 375 (N.M. 1929) and *State v. Finch,* 280 P. 910, 913 (Kan. 1929).

by them belonging to this State, or who shall refuse or neglect to pay any money due to this State."[31]

In two subsequent state Constitutional Conventions in 1821 and 1846,[32] the Convention explicitly endorsed the continuation of common law powers as they had existed on April 19, 1775.[33] The 1846 Convention added the provision that the powers of the attorney general were "such as now are or hereafter may be prescribed by law."[34] The Convention also added the provision, "Such parts of the common law, and of the acts of the legislature of the colony of New York … and the resolutions of the congress of the said colony, and of the convention of the state of New York, … which have not since expired, or been repealed, or altered, and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts or parts thereof as are repugnant to this Constitution, are hereby abrogated."[35] That language remains a part of New York's Constitution continuing the position that the common law, unless modified by the legislature remains in force.[36]

The 1872 Constitutional Commission considered amending the selection procedure to allow the Governor appoint the Attorney General subject to the approval of the Senate.[37] Then-Governor Hoffman had suggested that the Governor appoint the attorney general and that the attorney general should be in charge of all criminal prosecutions. Governor Hoffman wrote:

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[31] Act of Feb. 17, 1797, ch. XXI, 1797 N.Y. Laws 27. Assuming the breadth of the common law powers of the Attorney General, it can seriously be questioned whether the statute actually was needed to augment the existing power of the Attorney General.

[32] The selection process was revised at both Constitutional Conventions. In 1821, the Convention decided that the Attorney General would be appointed by the legislature, rather than the Governor. The process was revised again at the 1846 Convention, where the Convention decided that secondary statewide officers (including the Attorney General) would instead be subject to election by the people

[33] N.Y. CONST. OF 1821, art. VII, § 13.

[34] N.Y. CONST. OF 1846, art. V, § 6. See also Henry Epstein, *The Criminal Law Jurisdiction of the Attorney General*, 12 N.Y. ST. B. ASS'N BULL. 163, 165 (1940).

[35] N.Y. CONST. OF 1846, art. I, § 17.

[36] N.Y. CONST. art. I, § 14. "Neither the English nor colonial statutes are of any effect, as such, today, and the practical effect of the present Constitution is to continue in force only the unwritten rules of the common law which have not been abrogated, although our courts still apply such common law." NY STAT § 4 McKinney's Consolidated Laws of New York Annotated

[37] *Id.* at 522.

> The attorney general is the legal adviser of the governor. The chief executive officer of the state should be allowed the privilege which all men exercise, of selecting for a legal adviser such person as is, in his judgment, the most competent. The attorney general ought to have supervision over and be responsible for the conduct of all that class of officers, throughout the state, which is charged with the duty of prosecuting for crime and other violations of state laws. Prosecuting officers for offenses against the laws of the state, now erroneously called district attorneys, should not be county officers, but be the deputies of the attorney general, appointed by him or by the governor on his recommendation. In this way responsibility for the due enforcement of the laws could be brought home, as it should be, directly to the governor, upon whom the duty is devolved to see that the laws are faithfully executed.[38]

Ultimately, the 1872 Constitutional Commission took the position that the powers of the district attorneys should not be changed. It recommended that the Governor appoint the Attorney General, but the legislature did not agree with the Commission. As a result, the people never voted on the proposal to amend the state constitution to alter the selection or the powers of the Attorney General.[39] No changes were made that would have diminished the common law powers of the Attorney General.

Though discussed in the subsequent state constitutional conventions of 1894, 1915, 1938, and 1967, no convention ever recommended a change in the election of the Attorney General.[40] Since the Constitutional Convention in 1848, the Attorney General has continued to be an elective office.

The most significant constitutional changes to the office of the Attorney General came in 1925 as a result of the move to create a more organized executive branch of state government.[41] In 1919, the Reconstruction Commission established by Governor Alfred Smith offered three suggestions to reform the office. First, the Commission

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[38] New York (State). Governor. *Public Papers [of the Governors].* Messages of Governor Hoffman Annual Message, 310, January 2, 1872.

[39] N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO EXECUTIVE ADMINISTRATION AND POWERS 116–17 (1938).

[40] Robert Allan Carter, *New York State Constitution: Sources of Legislative Intent (2),* 41-42 (2001).

[41] The 1894 Constitutional provisions relating to the Attorney General, as approved by the people, were little different than the 1846 provisions. The Attorney General served a two-year term and was only elected at the same general election as the Governor and the Lieutenant Governor. The Attorney General–along with the other constitutional officers–had the powers and duties as are "now or hereafter may be prescribed by law." N.Y. CONST. OF 1894, art. V, §§ 1, 6.

again suggested that the Governor appoint the Attorney General subject to the approval of the Senate. Second, the Commission recommended that the Attorney General should have full control over all the legal work of the state, which meant that all attorneys in state departments and bureaus should work for the Attorney General. Finally, the Commission suggested that State Police should become attached to the Attorney General's office.[42] There were no proposals to change the substantive powers of the Attorney General.

While the specific recommendations of the Reconstruction Commission as to the Attorney General were not acted on, the overall movement towards a unified executive branch of state government was enacted by Constitutional amendments passed in 1925.[43] Governor Alfred Smith had championed the recommendations in his message to the legislature in 1923,[44] and the state legislature passed the reorganization amendments in both 1923 and 1925. In the 1925 vote, the people overwhelmingly supported the amendments.

In addition to reducing the number of positions subject to Statewide elections, the amendments provided that the Attorney General and the Comptroller would be elected at the general election at same time as the Governor and the Lieutenant Governor. The amendments also specified that the Comptroller would be the head of the department of audit and control and the Attorney General the head of the department of law. Although the duties of the Comptroller were prescribed in the amendments, there were no constitutional duties mentioned or specified for the Attorney General. This can be viewed as a continuation of the common law powers of the Attorney General. Finally, the 1925 amendments also repealed former Article 5 Section 6 of the Constitution under which the powers and duties of officers and boards mentioned in Article 5 "shall be such as now are or hereafter may be prescribed by law."[45] Instead, this language was replaced by a new Article 5, Section 3, under which the legislature could "assign by law new powers and functions to departments, officers, boards or

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[42] *Report of Reconstruction Commission to Governor Alfred E. Smith on Retrenchment and Reorganization in the State Government,* October 10, 1919.76-79. See 1919. Assembly. Int. No. 96, A. Pr. No. 96, which would have made the attorney general an appointed position and make the attorney general the counsel for all departments and commissions.

[43] See 1923 Senate Intro. 53, Print No. 689; A. Rec. No. 34 Assembly Print No.2191; 1925 Senate Intro. 23, Print No. 23).

[44] Alfred E. Smith, *Annual Message to the Legislature* (Jan. 3, 1923), *in* PUBLIC PAPERS OF ALFRED E. SMITH: GOVERNOR 1923, at 51-52 (J. B. Lyon Co. 1924).

[45] *See id*; *see generally* Carter, *supra* note 40, at 41-46.

commissions continued or created under this constitution, and increase, modify or diminish their powers and functions."[46] This change made it clear that the legislature had the full power to determine the powers of state officers and agencies.[47]

In explaining the constitutional changes and recommending further state legislative action on consolidation, the State Reorganization Commission, chaired by Charles Evans Hughes, emphasized that it was recommending no changes in the powers of the attorney general's office. The Commission wrote in 1926:

> The Attorney General is the chief legal officer of the State. The nature of his office and the duties incumbent upon him by virtue thereof are so well understood as to make any detailed reference thereto entirely unnecessary. The reorganization now under consideration is not intended, as we understand it, to change in any manner the line of duty naturally devolving upon the Attorney General as the chief law officer of the State, nor to abridge in any way his powers now conferred by statute, or recognized by the courts as inherent in his nature of office.[48]

Since the 1925 amendments, the only change to the state constitution regarding the Attorney General has been a minor one made by the 1938 Constitutional Convention regarding the qualifications for the office.[49] The Attorney General and the Comptroller, pursuant to the 1938 amendment, now have to meet the same minimum age (30) and minimum New York State residency (five years) qualification as the Governor and the Lieutenant Governor.[50]

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[46] Carter, *supra* note 40, at 42; *see also* N.Y. STATE CONSTITUTIONAL CONVENTION COMM., AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937, at 327 (1938).

[47] *See* Carter, *supra* note 40, at 42.

[48] STATE REORGANIZATION COMM'N, STATE OF NEW YORK, REPORT OF THE STATE REORGANIZATION COMMISSION, N.Y. Legis. Doc., No. 72 (J.B. Lyon Co. 1926); *see also Text of the Hughes Report on the Consolidation of State Departments*, N.Y. TIMES, Mar. 2, 1926 at 13.

[49] Carter *supra* note 40. *See* explanation of delegate Feinberg in 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK APRIL FIFTH TO AUGUST TWENTY-SIXTH 1938, at 2330 (J.B. Lyon Co. 1938). ("There is not anything in the Constitution which sets forth the qualifications for Attorney-General and for Comptroller, and we have made the qualifications to be the same as those for Governor and Lieutenant-Governor.")

[50] The current constitutional provisions relating to the attorney general read as follows:

> The comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term and shall possess the qualifications provided in section 2 of article IV. The legislature shall provide for filling vacancies in the office of comptroller and of attorney-

There are several other mentions of the Attorney General in the state constitution. These "are found in Article I, Section 6, which provides for suit by the Attorney General to remove from office a public officer who, under certain circumstances, refuses to testify before a grand jury in regard to official misconduct; in Article XIV, Section 4, which provides for notice to the Attorney General in a suit by a taxpayer to restrain payment of state money without audit by the Comptroller, and in Article XIX, Section 1, which provides that constitutional amendments proposed in the Legislature shall be referred to the Attorney General for an opinion as to the effect of such amendment upon other provisions of the Constitution."[51]

C. Statutory History of the Office of Attorney General

In colonial times, there were very few laws mentioning the Attorney General, and these few laws do not begin to touch on the Attorney General's common law powers and duties.[52]

After the 1777 Constitution, there were no statutes governing the Attorney General's ambit. The Attorney General continued to utilize the common law power of prosecution that had been in force during the colonial era.[53] At the time, the Attorney General had been the sole official with the power to prosecute crimes.[54] However, with the rapid

> general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor.

N.Y. CONST. art. V, § 1.

> Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, officers, boards, commissions or executive offices of the governor, and increase, modify or diminish their powers and functions.

N.Y. CONST. art. V, § 3. "The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general." N.Y. CONST. art. V, § 4.

[51] 14 TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, STATE OF N.Y., STATE GOVERNMENT 193 (1967).

[52] *See* 1 COMM'RS OF STATUTORY REVISION, COLONIAL LAWS OF THE STATE OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION, INCLUDING THE CHARTERS TO THE DUKE OF YORK, THE COMMISSIONS AND INSTRUCTIONS TO COLONIAL GOVERNORS, THE DUKE'S LAWS, THE LAWS OF THE DONGAN AND LEISLER ASSEMBLIES, THE CHARTERS OF ALBANY AND NEW YORK AND THE ACTS OF THE COLONIAL LEGISLATURES FROM 1691 TO 1775 INCLUSIVE 638–53 (Albany, James B. Lyon 1894) [hereinafter COLONIAL LAWS]; 2 COLONIAL LAWS, *supra* note 52, at 406–07; 3 COLONIAL LAWS, *supra* note 52, at 104–25; 4 COLONIAL LAWS, *supra* note 52, at 317–37; 5 COLONIAL LAWS, *supra* note 52, at 58–63.

[53] Robert Ludlow Fowler, *Constitutional and Legal History of New-York in the Eighteenth Century*, *in* 2 THE MEMORIAL HISTORY OF THE CITY OF NEW-YORK FROM ITS FIRST SETTLEMENT TO THE YEAR 1892, at 575, 624 (James Grant Wilson, ed. 1892).

[54] *Id.*

growth of the state, the Attorney General was unable to conduct all the necessary prosecutions.[55] In 1796, legislation was passed which divided the state into eight districts with an Assistant Attorney General given authority to prosecute crimes in each districts.[56] The Attorney General himself was specifically given the duty of bringing prosecutions in the City of New York.[57] This began the system of having separate local district attorneys. Nonetheless,

> [T]he attorney-general of the State [was] still regarded as the chief public prosecutor, although he also acts as solicitor-general in civil causes. The extent of the powers of the present office of attorney-general and his coadjutors, the district-attorneys, is somewhat vague, and claimed to be regulated by the common law.[58]

In 1801, legislation passed by the state legislature changed the name of the district prosecutors from Assistant Attorneys General to district attorneys.[59] The Attorney General continued to be the prosecutor for New York City.[60] It was not until 1818 that the state instituted a system of local district attorneys so that each county had a separate district attorney.[61] These local district attorneys were initially appointed by the governor subject to the approval of the council of appointment.[62]

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[55] 1 LEGAL AND JUDICIAL HISTORY OF NEW YORK 426 (Alden Chester ed., 1911).

[56] *Id*.; *see also* Robert M. Pitler, *Superseding the District Attorneys in New York City – The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517, 519 (1973).

[57] Act of Feb. 12, 1976, ch. VIII, 1976 N.Y. Laws 643. The governor selected the other assistant attorneys general.

[58] *Id.*

[59] Act of Apr. 4, 1801, ch. CXLVI, 1801 N.Y. Laws 362.

[60] *Id*. ("It shall be the duty of the attorney general to conduct all public prosecutions, at the courts of oyer and terminer and gaol delivery in the city and county of New York."); *see also* Pitler, *supra* note 56, at 519 ("As under the assistant attorney general system, the prosecution of crimes within New York City remained the exclusive province of the attorney general.").

[61] Act of Apr. 21, 1818, ch. CCLXXXIII, 1818 N.Y. Laws 306.

[62] *Id.*; Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 92 (1935) "The office of district attorney in the state of New York was created in 1801. In each of the districts as then established, which included several counties, he was charged with duties which previously had devolved upon an Assistant Attorney General. In 1815 the county of New York was made a separate district, and in 1818 provision was made for the appointment of a district attorney in each county. The power of appointment was vested in the governor and the council of appointment until the Constitution of 1821, when that power was given to the county courts. The Constitution of 1846 provided that district attorneys should be chosen by the electors of the respective counties.

The 1801 legislation also specifically authorized the Governor as well as a judge of the supreme court to order the attorney general to conduct prosecutions. The statute declared,

> *Provided nevertheless* that it shall be lawful for the person administering the government of this State, or any judge of the supreme court by writing under his hand to require the attorney general to attend the court … to be held in any county, and it shall be the duty of the attorney general to attend accordingly, and thereupon to conduct at such court all public prosecutions.[63]

The 1821 Constitutional Convention established a system with a single district attorney selected for each county where the district attorneys were appointed by the county courts. This replaced the system where the governor had selected the district attorneys; their duties were not specified.[64] In the 1846 Constitution, the selection of the district attorneys was changes so that the residents in each county vote for their district attorney.[65] That electoral system has remained unchanged to the current day.[66]

Other than the creation of the office of the district attorney, only one piece of substantive legislation concerning the office of the Attorney General was passed for the first century after New York's first Constitution in 1777.[67] In the Laws of the State of New York- 1802, there are minimal references to the office of the attorney general.[68]

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[63] Act of Apr. 4, 1801, ch. CXLVI, 1801 N.Y. Laws 362.

[64] N.Y. CONST. OF 1821, art. IV, § 9; *see also* J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 237 (2d ed. 1915).

[65] N.Y. CONST. OF 1846, art. X, § 1.

[66] N.Y. CONST. art. XIII, §13 ("In each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct.").

[67] WILLIAM H. SILVERNAIL, INDEX TO THE SESSION LAWS OF THE STATE OF NEW YORK WITH ALL CHANGES AND MODIFICATIONS NOTED UNDER A SINGLE ALPHABET FROM SESSION OF 1775 DOWN TO SESSION OF 1897, at 36 (Albany, Banks & Brothers 1897). One of the few exceptions to this was Chapter 58, L. 1790, which authorized the attorney general to "recover debts and sums of money due" the state. That legislation also empowered the Attorney General to prosecute "every sheriff, supervisor and other officer, who hath refused or neglected, or shall refuse or neglect to do his duty respecting any tax imposed since the first day of January one thousand seven hundred and eighty-four."

[68] Per the New York State Library:

> The *Laws of the State of New York* published in 1802 is a two-volume set that contains selected early statutes and is the first consolidation of local law (county, town, city and village law), banking laws, corporation (turnpikes and toll bridges) law, navigation law, etc. This set is commonly known as the 'Kent and Radcliff Revision'; James Kent and Jacob Radcliff were judges of the NYS Supreme Court at the time.

Laws of New York State, http://www.nysl.nysed.gov/scandocs/laws.htm [last viewed April 1, 2020].

The principal exception was Chapter VIII of the Revised Statutes.[69] Chapter VIII enumerated the general powers of the executive officers of the state. Title V of Chapter VIII applied to the Attorney General and set out the responsibilities of the office.

The key responsibilities were as follows:

> § 1. It shall be the duty of the attorney-general to prosecute and defend all actions, in the event of which the people of this state shall be interested.
>
> § 2. In all actions prosecuted or defended by him, in which costs are adjudged to the people of this state, or to any person in whose name such action shall be prosecuted or defended for their benefit, the attorney-general shall be entitled to such costs; and he shall pay the taxable fees of sheriffs, clerks, an(l witnesses, in all such actions.
>
> § 3. Whenever any such taxable fees so paid by the attorney-general, can not be collected by him of the opposing party, the amount so paid shall be audited by the comptroller, and paid to the attorney-general out of the treasury and if such fees are subsequently collected of the opposing party, they shall be paid into the treasury.
>
> § 4. The attorney-general, whenever requested by the comptroller or the surveyor-general, shall prepare proper drafts. drafts for contracts, obligations, and other instruments which may be wanted for the use of the state.
>
> § 5. Whenever required so to do, by the governor, or by one of the justices of the supreme court, the attorney-general shall attend the courts of oyer and terminer and jail delivery, for the purpose of managing and conducting the suits and prosecutions of the people of this state.[70]
>
> § 6. Whenever the attorney-general, in consequence of such a requisition, shall attend a court of oyer and terminer, he shall be entitled to his expenses, and a reasonable compensation for his services. The amount shall be verified by the governor and paid out of the treasury.
>
> § 7. It shall be the duty of the attorney-general, at the request of the governor, the secretary of state, the comptroller, the treasurer, or the surveyor-general, to prosecute every person who shall be charged by either of those officers with the commission of an indictable offence in violation of the laws, which such officer is specially required to execute, or in relation to matters connected with his department.

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[69] Laws of Sept. 11, 1827, ch. VIII, 1827 N.Y. Laws 31; *see also* 1 REVISED STATUTES OF THE STATE OF NEW YORK 179-81(Albany, Packard & Van Benthuysen 1829).

[70] In 1827 under the Constitution of 1821, there were only three Supreme Court justices. N.Y. CONST. OF 1821, art. V, § 4.

> § 8. He shall cause all persons who may be indicted, for corrupting or attempting to corrupt any member of the legislature, or any member elect of the senate or assembly, or any commissioners of the land-office, to be brought to trial; and to attend in person to the execution of the ditties hereby required of him.
> § 9. He shall also cause all persons who may be indicted for any offence against the laws for the prevention of duelling, to be brought to trial; and shall attend in person to the discharge of the duties hereby required of him.

Several of the original 1827 provisions have either implicitly or explicitly been codified in the present executive law governing the powers of the Attorney General.

Subdivision 1 of the current law provides that the Attorney General is to prosecute and defend all the cases in which the people are interested. The opening sentence of §63.1 of the Executive Law is nearly identical to the 1827 legislation states that the Attorney General shall, "prosecute and defend all actions and proceedings in which the state is interested."[71]

Subdivision 4 provides that the Attorney General shall prepare legal documents for the Comptroller and the Surveyor General. Similar language currently exists in §63.5 of the Executive Law.[72]

Subdivision 5 authorizes the governor or a justice of the Supreme Court to name the assign the Attorney General to prosecute a case. It is nearly identical to the language of the 1801 law which had similarly authorized the Governor and a Supreme Court justice to order the Attorney General to conduct a prosecution.[73] This is the predecessor of §63.2 of the Executive Law.

Subdivision 7 allows the statewide officers to refer cases for prosecution to the Attorney General. This is the progenitor of §63.3 of the Executive Law, which governs the issue of the Governor superseding of local district attorneys.

Finally, subdivision 8 authorizes the Attorney General to prosecute people who corrupt members or members-elect of the legislature. Currently, §63.4 of the Executive Law is nearly identical to the 1827 language.

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[71] N.Y. EXEC. LAW §63.1 (Consol. 2020).

[72] The place of the former office of the surveyor-general has been replaced by the superintendent of public works. The Commissioner of Transportation now has the duties of the superintendent of public works. *See* N.Y. TRANSP. LAW § 267 (Consol. 2020).

[73] Act of Apr. 4, 1801, ch. CXLVI, 1801 N.Y. Laws 362.

Much of the remaining nineteenth-century legislation affecting the Attorney General's office is procedural, administrative, or directed at individual cases and causes.[74] There is legislation involving the purchase of a library for the office,[75] the expenses of the office,[76] deputies in the office,[77] and mortgage and rent issues.[78] The attorney general was required to defend the State's interest in cases before the newly created board of claims in 1883.[79]

However, in the last quarter of the nineteenth century, the legislature passed a number of significant substantive enactments affecting the attorney general. In 1875, the legislature passed the Tweed Law authorizing the Attorney General to sue individuals who committed fraud against state and local governments.[80] In 1886, the legislature assigned a variety of tasks to the Attorney General in connection with the annulment and dissolution of corporations [81] and in enforcing actions against gas companies in the city of New York.[82] The legislature mandated an annual report from the Attorney General in 1889 and itemized the contents of the report.[83]

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[74] These individual cases include Ch. 280, L. 1854; Ch. 161, L. 1860; Ch. 72, L. 1884; Ch. 469, L. 1886. *See* Act of Apr. 15, 1854, ch. CCLXXX, 1854 N.Y. Laws 606; Act of Apr. 4, 1860, ch CLXI, 1860 N.Y. Laws 257; Act of Mar. 29, 1881, ch. LXXII, 1884 N.Y. Laws 72; Act of May 27, 1886, ch. CDLXIX, 1886 N.Y. Laws 705. Chapter 72, L. 1881 confirmed and ratified the actions of the late Attorney General Fairchild "fully as if the said attorney-general had certified that his official duties prevented him from attending in person in the case." Act of Mar. 29, 1881, ch. LXXII, 1881 N.Y. Laws 72.

[75] *See* Act of Apr. 5, 1850, ch. CLV, 1850 N.Y. Laws 321.

[76] *See* Act of Apr. 12, 1885, ch. CCCLXXXV, 1855 N.Y. Laws 730; Ch. 508, L. 1873; Act of Feb. 28, 1878, ch. XL, 1878 N.Y. Laws 48; Act of May 27, 1886, ch. CDLXX, 1886 N.Y. Laws 706.

[77] *See* Act of Apr. 12, 1848, ch. CCCLVII, 1848 N.Y. Laws 477; Act of Feb. 28, 1878, ch. XL, 1878 N.Y. Laws 48.

[78] *See* Ch. 135, 1805; Ch. 94, L. 1813; Act of Apr. 21, 1828, ch. CCXVCII, 1828 N.Y. Laws 386.

[79] *See* Act of Apr. 7, 1883, ch. CCV, 1883 N.Y. Laws 211-12.

[80] *See* Act of Mar. 12, 1875, ch. XLIX, 1875 N.Y. Laws 43. While the legislation is now known as the Tweed Law, it was for many decades known as the anti-Tweed law. *See Is a Rival to Tweed Scandal*, CHICAGO TRIBUNE, June 7, 1900; *Anti-Tweed Law vs. Ice Trust*, EVENING WORLD (N.Y.), May 28, 1900; "Taxpayers' Movements," *Saratoga Sentinel*, June 28, 1877.

[81] *See* Act of May 11, 1886, ch. CCCX, 1886 N.Y. Laws 402 (providing for the winding up of corporations which have been annulled and dissolved by legislative enactment). Ch. 312, L.1886 authorized the attorney general to have the charter of the New York Arcade Railway forfeited. *See* Act of May 11, 1886, ch. CCCXII, 1886 N.Y. Laws 498.

[82] *See* Act of May 12, 1886, ch. CCCXXI, § 22, 1886 N.Y. Laws 516.

[83] *See* Act of Apr. 27, 1889, ch. CC, 1889 N.Y. Laws 239. The contents of the report were changed slightly by Ch. 225, L. 1890. The limited number of affirmative actions

This began a process by which the legislature became more involved with the office of the Attorney General. These new laws began setting definitive boundaries for where Attorneys General could focus their investigations. This legislative involvement raised the issues of whether the legislature was expanding the common law powers of the attorney general, limiting such powers, or obliging the attorney general to focus on certain powers. The legislature mandated an annual report from the Attorney General in 1889 and itemized the contents of the report.[84]

The major change in the late nineteenth century was the codification of the State's Executive Law in 1892, which laid out the powers of all statewide elected officers.[85]

The provisions relating to the attorney general synthesized and organized the non-substantive provisions on salaries, deputies, the annual report, expenses, and costs, much of which had been enacted piecemeal throughout the nineteenth century. Most importantly, it contained a revision of the language from the 1827 enactment governing the general duties of the Attorney General. [86]

Section 52 of the Executive Law stated:

> The attorney-general shall:
> 1. Prosecute and defend all actions and proceedings in which the state is interested;

taken by the Attorney General are highlighted by these annual reports. The opinions of the Attorney General take up the vast bulk of the early annual reports. Many of the affirmative actions taken by the Attorney General were proceedings to dissolve corporations. New York (State). Department of Law., New York (State). Attorney General's Office. *Annual Report of the Attorney General for 1889*. In 1895, the Attorney General in his annual report wrote, "During the year thirty-five applications were made for leave to commence actions as follows: Quo warranto, 9; dissolution of corporations, 17; to compel accounting of corporation officers, 2; to annul charters, 4; to annul patents, 2; to remove obstructions in navigation, 1." 1895 ANNUAL REP. OF THE ATT'Y GEN. OF THE STATE OF N.Y., at 8.

[84] Ch. 200, L. 1889. The contents of the report were changed slightly by Ch. 225, L. 1890. The limited number of affirmative actions taken by the Attorney General are highlighted by these annual reports. The opinions of the Attorney General take up the vast bulk of the early annual reports. Many of the affirmative actions taken by the attorney general were proceedings to dissolve corporations. New York (State). Department of Law., New York (State). Attorney General's Office. *Annual Report of the Attorney General for 1889*, *supra* note 83..

[85] *See* Act of May 18, 1892, ch. DCLXXXIII, 1892 N.Y. Laws 1691.

[86] *Id*. at §5.

> 2. Whenever required by the governor or a justice of the supreme court, attend the courts of oyer and terminer for the purpose of managing and conducting a criminal action or proceeding therein;[87]
> 3. Upon the request of the governor, secretary of state, comptroller, treasurer, or state engineer and surveyor, with the commission of an indictable offense in violation of the laws, which such officer is specially required to execute, or in relation to matters connected with his department;
> 4. Cause all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or any commissioner of the land office, to be brought to trial;
> 5. When required by the comptroller or the state engineer, prepare proper drafts for contracts, obligations, and other instruments for the use of the state;
> 6. Upon receipt thereof, pay into the treasury all moneys received by him for debts due or penalties forfeited to the people of the state.[88]

All six of these subdivisions, albeit amended many times over the past century, still are with us in Section 63 of the Executive Law. The order of these subdivisions has not changed, and these subdivisions remain the core of the powers of the Attorney General.

Accordingly, Section 63.1 defines the general duties of the Attorney General as prosecuting and defending all actions and proceedings in which the State is interested.

Section 63.2 continues the provision allowing the Governor to supersede the local district attorney by appointing the Attorney General as a prosecutor.[89]

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[87] Two years later, the legislature amended this provision so that the naming of the Attorney General to conduct a criminal action would supersede the local district attorney in these cases. *See* Act of Feb. 28, 1894, ch. LXVIII, 1894 N.Y. Laws 162. In commenting on the new provision, Governor Flower noted that under the 1892 law, the district attorney could exercise concurrent jurisdiction with the Attorney General. Under the 1894 law, the district attorney was superseded. Governor Flower stated, "[i]t is therefore more important that the power which it conveys should be conservatively exercised." *Flower Refuses*, SYRACUSE DAILY J., Nov. 17, 1894.

[88] Much of the language from the 1892 codification remains in current Section 63 of the Executive Law. The 1892 law creating the Executive Law was recodified by Ch. 800, L. 1951. *See* Act of Apr. 13, 1951, ch. DCCC, 1951 N.Y. Laws 1903.

[89] Another early predecessor to the §63.2 provision, besides subdivision 5 of Title V of the 1827 Revised Statutes and Ch. 146, L. 1801 was Ch. 323, L. 1874. Included in an 1874 appropriation bill was language stating that the Attorney general or the Governor could appoint, upon an application by the local district attorney, counsel to assist the district attorney in an "important criminal action." *See also* Ch. 686, L. 1892, adding a provision to the County Law authorizing the county judge to approve applications by local district attorneys for additional counsel "in a capital or other important criminal action."

Section 63.3 allows state agencies to refer cases to the Attorney General for prosecution.

Section 63.4 is almost exactly the same as it was in 1892. The only change in this provision empowering the Attorney General to indict individuals for corrupting legislators is that it also applies to corrupting the commissioner of general services. In 1892, there was no office of general services. Instead it applied to the commissioner of the land office.

Section 63.5 authorizes the Comptroller and the commissioner of transportation to require the Attorney General to prepare contracts and legal instruments. It is also nearly identical to the 1892 language.

Section 63.6 requiring the Attorney General to pay over all moneys received by the office for debts to the State treasury is the same as it was in 1892.

Besides the 1892 provisions, current Section 63 has added a series of additional duties and powers to the attorney general.

Subdivision 8 provides that the Attorney General "with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice."[90] The legislation allowed the Governor to name the Attorney General to conduct a governmental investigation rather than appoint his own Moreland Act commission to conduct investigations.[91] A Moreland Act commission could only focus on State entities, while a

[90] Act of May 21, 1917, ch. DXCV, 1917 N.Y. Laws 1737. One issue facing the state at the time was the taking of land by the State in Rockaway Point in Queens County to be given to the federal government for fortifications. The question seemed to be whether the Governor needed to appoint a Moreland Act commission or whether the Attorney General could investigate the matter on his own.

[91] "It was a matter of speculation here today whether the investigation would be conducted by the Attorney General's office directly or whether Governor Whitman would be asked to appoint a Commissioner to take testimony." *State Will Make Rockaway Inquiry*, N.Y TIMES, Apr. 6, 17, at 22. For more on the Rockaway Point issue, *see Mayor, at Senate Bar, Qualifies Act on Mr. Wagner, and Bottom Drops Out of Promised Albany Sensation*, N.Y. HERALD, Apr. 4, 1917, at 3. The Moreland Act, which is currently Section 6 of the Executive Law, authorizes the Governor to appoint people "to examine and investigate the management and affairs of any department, board, bureau or commission of the state." The second sentence of the Moreland Act reads, "The governor and the persons so appointed by him are empowered to subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material." It is most similar to the language in Ch. 595, which reads "The attorney-general, his deputy, or other officer designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require the production of any books or papers which he deems relevant or material to the inquiry."

Section 63.8 investigation could be far broader in scope. This provision passed soon after the United States entered World War I, and with minimal opposition; Attorney General Merton Lewis in his 1917 annual report called it the "Espionage Act."[92] Its main use in 1917 was when Attorney General Lewis investigated the French spy Bolo Pasha's activities in the United States.[93]

Subdivision 9 authorizes the Attorney General to prosecute or defend civil suits necessary to enforce the civil rights laws when requested to by the labor commissioner or the division of human rights.[94]

Subdivision 10 authorizes the Attorney General to prosecute civil rights violations where the Attorney General believes that the local district attorney cannot effectively carry on the case or has erroneously failed to prosecute the case.[95]

Subdivision 11 authorizes the Attorney General to prosecute and defend actions to enforce the state's remainder interest in a Medicaid trust.[96]

Subdivision 12 allows the Attorney General to enjoin and/or seek restitution and damages for repeated fraudulent or illegal acts. It has served as the basis for the consumer protection powers of the Attorney General.[97]

Subdivision 13 authorizes the Attorney General to prosecute people who commit perjury during an investigation conducted by the Attorney General.[98]

To these Section 63 powers have been added numerous statutory functions and duties. Scarcely a remedial or regulatory enactment has been passed which lacks a mechanism for some enforcement by the

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[92] 1918 ANNUAL REP. OF THE ATT'Y GEN. OF THE STATE OF N.Y., at 8.

[93] *Id*. See also *Bolo Found Guilty of Treason; Must Face Firing Squad*, N.Y. Trib., Feb. 15, 1918, at 1; *Bolo Pasha Got Millions from Benstoff's Agent*, ITHACA J. (Ithaca, N.Y.), Oct. 4, 1917.

[94] Act of Apr. 17, 1945, ch. DCCCXIII, 1945 N.Y. Laws 1698 (amending executive law in relation to powers and duties of the attorney general).

[95] Act of Apr. 13, 1951, ch. DCCC, 1951 N.Y. Laws 1903.

[96] Act of June 9, 1994, ch. CLXX, 1994 N.Y. Laws 2387.

[97] Act of Apr. 14, 1956, ch. DXCII, 1956 N.Y. Laws 1336 ("Amend[ing] executive law, in relation to cancellation of registration of doing business under an assumed name or as partners for repeated fraudulent or illegal activities."). See Leo Egan, *Anti-Fraud Bills Hailed by Javits*, N.Y. TIMES, March 12, 1956, at 26.

[98] Act of Feb. 17, 1958, ch. XXXV, 1958 N.Y. Laws 61 ("Amend[ing] the executive law, in relation to the duty of the attorney-general to prosecute for perjury in certain cases."). This subdivision recently came into play in the case of *People v. Abelove*, 113 N.Y.S.3d 378 (App. Div. 2019).

Attorney General. Without listing all of the Attorney General's statutory duties and powers,[99] the office's wide scope includes some of the most significant problems in the state. The powers include:

Theatrical Syndications, Article 23, Arts and Cultural Affairs Law[100]

Theatre Tickets, Article 25, Arts and Cultural Affairs Law[101]

Civil Rights Enforcement, Civil Rights Law[102]

Organized Crime Task Force, Section 70-a, Executive Law[103]

Solicitations by Charities Article 7-A, Executive Law[104]

Donnelly Act, Article 22 General Business Law–antitrust enforcement[105]

Martin Act, Article 23-a General Business Law – Fraudulent Practices in Respect to Stocks, Bonds and Securities [106]

Real Estate Syndications Article 23-a General Business Law [107]

Not-for Profit Oversight, Not–for–Profit Corporation Law[108]

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[99] The Temporary State Commission on the Constitutional Convention in 1967 tried to list the statutory powers of the attorney general's office. Its list included these powers:

a) Representing the state in civil actions.
b) Administering the state securities lairs, consumer protection laws and anti-trust laws.
c) Prosecuting criminal violations of certain other statutes- namely, the Labor Law, Workmen's Compensation Law,
Unemployment Insurance Law, Conservation Law, Election Law, anti-discrimination laws and the provisions of
the Education Law relating to the medical profession and certain other professions.
d) Advising the heads of the state departments on matters of law and, in this connection, often publishing formal opinions.
e) Rendering informal opinions to municipalities on matters involving municipal and election law.
f) Advising the Governor on proposed legislation which has been passed by the Legislature and is before the Governor for executive action.
g) Preparing contracts for the Comptroller.
h) Publishing advisory opinions on the Code of Ethics for public officers.

The Attorney General, *in* 14 TEMP. STATE COMM'N ON THE CONST. CONVENTION 192, 194 (1967),

[100] Act of Aug. 8, 1983, ch. DCCCLXXVI, 1983 N.Y. Laws 2462.

[101] *Id.*

[102] Act of Apr. 5, 1947, ch. DCXXI, 1947 N.Y. Laws 1195.; Act of Jul. 30, 2010, ch. CCXXVII, 2010 N.Y. Laws 970. See also N.Y. EXEC. LAW § 63 (McKinney 2019).

[103] Act of May 20, 1970, ch. MIII, 1970 N.Y. Laws 3404.

[104] Act of Aug. 2, 1977, ch. DCLXIX, 1977 N.Y. Laws 1.

[105] Act of May 7, 1897, ch. CCCLXXXIII, 1897 N.Y. Laws 310.

[106] Act of May 7, 1921, ch. DCXLIV, 1921 N.Y. Laws 1989.

[107] Act of Apr. 29, 1960, ch. CMLXXXVII, 1960 N.Y. Laws 2434.

[108] Act of Dec. 18, 2013, ch. DXLIV, 2013 N.Y. Laws 1400.

Deputy Attorney General for Medicaid Fraud Control and the Welfare Inspector General[109]

There is also a slew of arcane powers granted to the Attorney General, including regulatory authority over trading stamp companies, under Article 29-E, General Business Law [110] and merchants of Torah scrolls, under Article 39-A, General Business Law[111]

The Attorney General's powers have evolved over time, but remain paradoxical. For the first century of the United States (and arguably the many decades of the eighteenth century when New York was a British colony), the office of the Attorney General operated and functioned with minimal legislative grants or restraints of power. For the past, 130 years, the office's powers have been regularly both limited and expanded by the legislature. The issue becomes: What were the powers that the attorney general exercised under common law, and what became of them? It reads much like a television show tagline – "The Common Law Powers of the Attorney General: Where Did they Go?"[112]

II.
COMMON LAW POWERS OF THE ATTORNEY GENERAL

A. Historic Common Law Powers of the Attorney General

At a national level, there is little doubt that attorneys general across the United States initially possessed common law powers:[113]

> Notwithstanding relatively recent constitutional and statutory enumerations of attorney general powers, traditionally recognized prerogatives of the state's chief law officer continue to shape and expand the role of the modern attorney general. Contemporary experience convincingly demonstrates that the common law is a

[109] Act of Apr. 2, 1992, ch. XLI, 1992 N.Y. Laws 83.

[110] Act of May 19, 1970, ch. CMLXXXIX,1970 N.Y. Laws 3105.

[111] Act of Jul. 29, 1982, ch. DCCCLX, 1982 N.Y. Law 2810 ("Amend[ing] the general business law, in relation to providing certain requirements for merchants of Torah scrolls.")

[112] This is akin to the HBO series, "The Leftovers" where the question is asked often of what became of the 2% of the earth's population who mysteriously disappeared. *The Leftovers*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Leftovers_(TV_series) (https://perma.cc/32JA-HGMZ) (last visited March 26, 2020).

[113] "The attorney-general has the powers belonging to that officer at common law in addition to those conferred by statute." William Mack, *Attorney-General*, *in* CYCLOPEDIA OF LAW AND PROCEDURE 1024, 1028 (Robert F. Walker ed., 1912).

> vital source of power for Attorneys General who seek to protect public interests in recently developing areas of the law.[114]

When the United States became an independent nation, "[i]n the new state constitutions[,] the duties of the Attorney General were left largely undefined. Such powers as were exercised stemmed from the common law, colonial custom and legislative act."[115] The theory has been that the "incidents of the office were so numerous and varied as to discourage the framers of the state constitutions and legislatures from setting them out in complete detail, thus permitting him to look to common law to fill in the gaps."[116]

There can be little doubt that the New York Attorney General had common law powers. In the absence of any grant of statutory or Constitutional powers, the Attorney General had to possess the powers that existed under the common law and which were continued by the first Constitution.[117] The New York Attorney General's common law powers were most apparent in criminal prosecutions. The Attorney General de facto had the power to prosecute crimes, because there was simply no other office in government that could conduct prosecutions.[118]

The common law right of prosecution was clearly supported by the state's highest court, the Supreme Court of Judicature, in the case of *People v. McLeod*.[119] In that case, the Court stated "[a]t common law the attorney general alone possessed [the power to discontinue a prosecution] … [that power] probably exists unimpaired in the attorney general to this day."[120]

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[114] James E. Mountain, Jr., *Common Law Powers*, in STATE ATTORNEYS GENERAL, POWERS AND RESPONSIBILITIES 27 (Lynne Ross ed., 1990).

[115] Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 312 (1958). "The absence of a constitutional provision for specific powers of the attorney general vests the office with all powers of the attorney general at common law." 7 AM. JUR. 2D *Attorney General* § 5 (2020).

[116] John Ben Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1, 1 (1955).

[117] *See* People v. Miner, 2 Lans. 396, 399; *see also supra*, note 31.

[118] The Yale Law Journal could even state in 1951 "[e]ven in the absence of statute, a number of courts have upheld the right of the attorney-general to investigate criminal acts, sign indictments, and institute or intervene in prosecutions. These rights, they have felt, are inherent in the office under the common law." Note, *The Common Law Power of State Attorneys-General to Supersede Local Prosecutors*, 60 YALE L.J. 599, 560 (1951).

[119] 25 Wend. 483 (N.Y. Sup. Ct. 1841).

[120] *Id.* at 572.

The Attorney General in New York also clearly had common law rights beyond prosecutorial power. Even though no court explicitly mentioned the concept of non-prosecutorial common law powers possessed by the Attorney General until the *Parker v. May* decision by Massachusetts Chief Judge Shaw in 1850,[121] the New York courts were authorizing the Attorney General to utilize common law powers.

First, the New York courts ruled that the Attorney General possessed the power to restrain nuisances. In the case of *Attorney-General v. Cohoes Co*.,[122] the Attorney General sued to enjoin the Cohoes Co., which had cut through the Erie Canal to draw water for the supply of its mills. The Chancery Court upheld the injunction obtained by the Attorney General against the Cohoes Co. The court stated, "where public officers who have charge of public works, believe that a contemplated encroachment will prove injurious to such works, private persons should not be permitted to make such encroachment contrary to law."[123] Thus, the Attorney General was authorized at an early date to restrain nuisances in equity

Similarly, the Court of Appeals in *People v. Vanderbilt*[124] found that "the remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river, is by injunction at the suit of the Attorney-General."[125] As an early English treatise stated, "[t]he remedy for this

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[121] 59 Mass 336, 338 (1850). Shaw was, according to Oliver Wendell Holmes, "the greatest magistrate which this country has produced." OLIVER WENDELL HOLMES, THE COMMON LAW 106 (1881), *quoted in* BERNARD SCHWARTZ, SOME MAKERS OF AMERICAN LAW 61 (1985).

[122] 6 Paige Ch. 133 (Chancery Court. 1836). The Court of Appeals in Davis v. City of New York, 14 N.Y. 506, 526 (1856) stated:

> It is well settled that where such an offence occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case at his suit; and also that the attorney-general, in all cases where a preventive remedy is called for by the circumstances, or the state in its own name, may apply for an injunction against the perpetrator of the wrong." The Court of Appeals in Davis had reversed a lower court decision which had required the attorney general to be named as a necessary party to a nuisance suit brought by private parties

Davis v. Mayor of New York, 2 Duer 663, 666 (N.Y. Super. 1853).

[123] *Id.*

[124] 26 N.Y. 287 (1863).

[125] *Id.* at 297. *See* People ex rel. Howell et al. v. Jessup, 160 N.Y. 249, 254 (1899). "If the invasion amounts to an interference with the common or public right to navigate the waters, it constitutes a nuisance that may be abated at the instance of the people, whether it can be shown to produce any injury or not." *See also* People v. Macy, 62 How. Pr. 65,68 (Sup. Ct. New York Cty.. 1881). In a matter involving a public pier, the court stated:

species of injury is either by information of intrusion at common law, or by in formation at the suit of the Attorney General in equity."[126]

The common law also enabled the Attorney General to bring suit to enforce a trust on behalf of a public charity.[127] Similarly, the common law authorized the Attorney General to order a writ of *quo warranto* to challenge the holding of public office or the abuse of public privilege.[128]

The most comprehensive assemblage of the common law powers of the New York State Attorney General was set out in the case of *People v. Miner*[129] in 1868. The court found nine broad powers possessed by the attorney general at common law.

> To maintain this action, it is sufficient to show that a wrong is done to the people of the state or their rights infringed; for in such case the attorney-general may, in the name of the people, bring an action for appropriate redress in virtue of the right of the prerogative incident to sovereignty.

[126] Hon. Robert Henley, *A Treatise on the Law of Injunctions* 259 (1839). *See also* 3 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 481 (David S. Garland et al. eds., 2nd ed. 1897) ("The attorney-general as the chief law officer of the state has the power to institute proceedings in equity in behalf of the people to compel the discontinuance of acts which constitute a public nuisance.")

[127] Ass'n for the Relief of Respectable Aged Indigent Females v. Beekman, 21 Barb. 565, 569 (N.Y. Sup. Ct. 1854). *See also* People v. Powers, 8 Misc. 628, 637 (N.Y. Sup. Ct. 1894). Nationwide, "there are many cases which support the general proposition that the state, or, more particularly, the attorney general, is the proper party ordinarily to maintain a suit to enforce or administer, or prevent diversion of, a charitable trust." *Who May Maintain Suit or Proceedings to Enforce or Administer Benevolent or Charitable Trusts*, 62 A.L.R. 881 § 2 (1921).

[128] *See* People v. Cook*,* 8 NY 67 (1853), *aff'g* 14 Barb. 259 (App Div. 1852); People ex rel. Attorney-General, 15 Johns 358 (Supreme Court of Judicature. 1818); Attorney-General v. Utica Insurance Co. 2 Johns Ch. 371 (Chancellor's Court. 1817); People v. Clark*,* 10 Barbour 120 (Montgomery Co. Special Term. 1850); People v. Cook*,* 14 Barbour 259 (Sup. Ct. 1852). *See also* Skelos v. Paterson, 65 A.D. 3d 339, 343 (Second Dep't 2009), *rev'd on other grounds* 13 N.Y. 3d 141 (2009) ("The common-law writ of quo warranto is now codified.").

[129] *See* People v. Miner, 2 Lans. 396 (NY Gen. Term Fifth Dep't, 1868). The Miner case is "the most frequently-cited listing of the attorney general's common law power." Craig Evan Boresman, *A Comparative-State Study of the Powers and Backgrounds of State Attorneys General, and Their Impact on Public Policy* 5 (1987). In the *Miner* case, the court found that the Attorney General did not have the authority to restrain a town board from issuing bonds. After the decision was issued, two of the three judges in the case claimed that they disagreed with this limitation on the Attorney General's powers.

> The opinion of Mr. Justice Mullin was not concurred in by either of us; on the contrary, we were both of opinion that the Attorney-General could institute such an action; but the point was not decided, as we all concurred in affirming the orders appealed from on other grounds.

Le Roy Morgan & Henry A. Foster, *Letter of May 13, 1873*, *in* PECULATION TRIUMPHANT: BEING THE RECORD OF A FOUR YEARS' CAMPAIGN AGAINST OFFICIAL MALVERSATION IN THE CITY OF NEW YORK, A.D. 1871 TO 1875 74, 75 (1875). While there is no named author for Peculation Triumphant, it is known that attorney Charles O'Conor authored and edited this work.

> 1st. To prosecute all actions, necessary for the protection and defence of the property and revenues of the crown.
> 2d. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.
> 3d. By 'scire facias,' to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.
> 4th. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown.
> 5th. By writ of quo warranto, to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.
> 6th. By writ of mandamus, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.
> 7th. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.
> 8th. By proceeding in rem, to recover property to which the crown may be entitled, by forfeiture for treason, and property, for which there is no other legal owner, such as wrecks, treasure trove, &c. . . .
> 9th And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the crown.[130]

The court added, "[t]his enumeration, probably does not embrace all the powers of the attorney-general at common law."[131] It concluded its summary of powers by stating:

> As the powers of the attorney-general, were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intendment, forbade the exercise of powers not thus expressly conferred. He must be held, therefore, to have the powers belonging

[130] *Id*. at 398-399. See generally, Earl H. DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecutions*, 25 AM. INST. CRIM. L. AND CRIMINOLOGY 358, 362-63 (1934). *Miner*'s "attempt to delineate these powers and the extent to which the enumeration has been accepted as authoritative in other states make it necessary to quote at some length from the opinion."

[131] *Id.* at 399.

> to the office at common law, and such additional powers as the legislature has seen fit to confer upon him.[132]

Based on this line of cases, the treatise *Practice at Law, in Equity, and in Special Proceedings, in All the Courts of Record in the State of New York; with Appropriate Forms* could say in 1875:

> There is nothing in the [New York] Code which manifests the intention to take from the attorney-general any of his common-law powers, which under our institutions and laws he could properly exercise; and it may be stated generally, that he now has the power of that officer at common law, and such additional powers as the legislature has conferred upon him. As the representative of the people, he is charged with the duty of interfering, in all cases where private persons are held incompetent to sue, and when the rights of the whole people, or any considerable portion of them, are in danger from the unlawful acts of persons acting, or assuming to not, under color of lawful authority, or otherwise.[133]

This impressive array of common law powers was soon put to the test in a case involving massive corruption in local government. This test came as New York State tried to punish the leadership of New York City in the early 1870s.[134] The leaders of the city (known collectively

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[132] *Id.* An even more expansive notion of the common law power of the attorney general can be found in *Com. ex rel. Minerd v. Margiotti*, 188 A. 524, 529-530 (Pa. 1936):

> We conclude from the review of decided cases and historical and other authorities that the Attorney General of Pennsylvania is clothed with the powers and attributes which enveloped Attorneys General at common law, including the right to investigate criminal acts, to institute proceedings in the several counties of the Commonwealth, to sign indictments, to appear before the grand jury and submit testimony, to appear in court and to try criminal cases on the Commonwealth's behalf, and, in any and all these activities to supersede and set aside the district attorney when in the Attorney General's judgment such action may be necessary.

See National Association of Attorneys General. Committee on the Office of Attorney General, *Report on the Office of Attorney General (*1971) [hereinafter 1971 National AG's Report].

[133] William Wait, PRACTICE AT LAW, IN EQUITY, AND IN SPECIAL PROCEEDINGS, IN ALL THE COURTS OF RECORD IN THE STATE OF NEW YORK; WITH APPROPRIATE FORMS 364 (1875).

[134] In one of the arguments during the course of the Tweed Ring cases, the counsel for the Attorney General in summarizing the powers of the office to recover the funds from the Ring stated:

> To whom does the right belong? Why, to the State through its representative, the Attorney-General. Indictments for crimes and misdemeanors constitute one large class of illustrations. Bills to restrain and prevent public measures afforded another. Actions against public officers and public corporations for breach of trust or neglect of duty another. Instances might be adduced ad infinitum.

as the Tweed Ring after William Magear Tweed, who served as the leader of Tammany Hall) looted the city of millions of dollars. One of the questions to be resolved was how to recover the money from the Tweed Ring.

B. The Tweed Ring and the Attorney General

While municipal corruption has often been an unfortunate fact of life in the United States, the Tweed Ring's activities in New York City in the late 1860's and early 1870's may have constituted the most outrageous plundering in the City's history. The "ring" was composed of Tammany Hall boss, and president of the Board of Supervisors and Commissioner of Public Works William Magear Tweed, Mayor A. Oakey Hall, City Chamberlain Peter Sweeny, and City Comptroller Richard Connolly. Estimates of their extortion at the time range from $20 million to $200 million.[135] In October of 1871, the leaders of the reform movement in New York City implored Governor Hoffman[136] and Attorney General Champlin to take disciplinary action against the Tweed Ring. They stated, "for the past two years and nine months, the City has been ruled by a set of conspirators who have plundered the City most egregiously and have devoted its revenues to their own uses. They tried to cover up the traces of their frauds, but the times came when all was discovered."[137]

Governor Hoffman agreed in part to reformers' request, and worked with Attorney General Champlin to install famed attorney Charles O'Conor as chief prosecutor.[138] With O'Conor supported by

Tammany Thieves in Court, N.Y. TIMES, July 18, 1872 at 1. *See also Tammany Offenders: The Right of the Attorney-General to Sue New York City Officials*, N.Y. TRIBUNE, July 18, 1872, at 3.

[135] Denis Lynch, *Boss Tweed: The Story of a Grim Generation*, 1927 Dennis Hale Introduction to Transaction Edition at xiii (2002). Note that the consumer price index in 2020 is nearly 20 times what it was in 1870. In current dollars, the Tweed Ring stole somewhere between $400 million to $4 billion. *See* CPI Inflation Calculator, OFFICIAL DATA FOUNDATION, https://www.officialdata.org/us/inflation/1800?amount=1 [https://perma.cc/UN6L-3Q3F] (last visited Nov. 1, 2020).

[136] John Hoffman, a former Mayor of New York City, had been elected Governor with significant support from the Tweed Ring. Tweed was known for his "virtuosity in creating voters upon demand." Mark D. Hirsch, *More Light on Boss Tweed*, 60 n.2 POL. SCI. QUARTERLY 267, 271 (1945). The Special Committee of the New York City Board of Alderman wrote that the Ring "did not even hesitate to change the will of the people expressed at elections, whenever such change seemed to them desirable." BD. OF ALDERMAN, REPORT OF THE SPECIAL COMM. OF THE BD. OF ALDERMAN APPOINTED TO INVESTIGATE THE "RING" FRAUDS n.8 at 24 (1878).

[137] *Gov. Hoffman Speaks*, N.Y. TIMES, Oct. 18, 1871, at 1.

[138] *Id.*

future New York State governor and presidential candidate Samuel Tilden and future failed Supreme Court nominee Wheeler Peckham, and the Tweed Ring represented by renowned attorney David Dudley Filed and future U.S. Senator Elihu Root, thus began a sustained legal battle between the legal titans of the day. [139]

O'Conor brought criminal charges against Tweed, and also a civil fraud suit against Tweed and the other Ring participants.[140] Tweed was ultimately convicted on 204 of 220 misdemeanor criminal charges and sentenced to a maximum of one year in prison.[141]

The civil case revolved around the question of whether the Attorney General was the proper plaintiff to bring the claim, or if only New York County as the injured party could be the proper plaintiff.[142]

The first decision in the Tweed case supported the power of the attorney general to maintain the action. Relying primarily on English common law cases, the New York Supreme Court for the Third Department stated,

> Where a public right is infringed upon, the State, by the attorney-general, may bring an action for the benefit of the people at large, or of a portion of the public. Such a rule cannot be confined merely to public nuisances. Many wrongs may exist without a remedy, except through the intervention of the State, and it seems to me that there is nothing inconsistent with the principles upon which our

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[139] *See Charles O'Conor*, 19 ENCYCLOPEDIA BRITANNICA 992 (11th ed. 1911).; *The War on Tammany*, N.Y. TRIBUNE, Oct. 19, 1871, at 4. PECULATION TRIUMPHANT, *supra* note 129, at 39 (1875) ("There was immediately established in the city a branch of the Attorney -General's office."); *David Dudley Field*, ENCYCLOPEDIA BRITANNICA (2020), https://www.britannica.com/biography/David-Dudley-Field.

[140] *Tweed Arrested*, N.Y. TRIBUNE, Oct. 28, 1871, at 1.; *Tweed's Arrest*, N.Y. TIMES, Oct. 28, 1871, at 6.

[141] People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 593 (1875). The criminal case against Tweed was technically brought by the New York County District Attorney. Complicating the civil side, the New York City corporation counsel brought civil fraud charges against Ring members. Since the city government was arguably under Tweed control, O'Conor viewed the corporation counsel's charges as akin to a collusive suit. *See The Papers in The Case*, N.Y. TIMES, Oct. 28, 1871, at 3.; PECULATION TRIUMPHANT, *supra* note 129 at 42

> [New York City Mayor Hall] wrongfully and unjustly, with purpose and intent to defeat any suits , actions , or proceedings which might be instituted in behalf of the people , and thereby to enable the said defendant Tweed and his confederates to evade and escape from the pursuit of justice, did , in collusion with Tweed, and without the consent or knowledge of the Attorney - General , direct the Counsel for the Corporation to commence six actions in the First Department of the Supreme Court.

[142] *See Attorney-General's Statement of the Case in People v. Ingersoll, impleaded with Tweed*, in PECULATION TRIUMPHANT, s*upra* note 129, at 11. People v. Tweed, 13 Abb. Pr. (n.s.) 25, 41 (N.Y. Gen. Term. 1872).

> government is founded and administered, to allow the chosen officer of the people in their own name to prosecute an action of this character, having in view the protection of the interests of the public against those acting as trustees on the behalf of a municipal corporation.[143]

The actual substantive hearing on the case was held in Supreme Court in New York City. The court ruled that only the New York County board of supervisors had the authority to sue the Tweed Ring.[144] The court believed that the county was the real party in interest, and it was influenced in part by a decision finding that the county board of supervisors did have the authority to recover funds from the Tweed Ring.[145]

On appeal to the Court of Appeals, the Attorney General's office also was unsuccessful. The court, with two judges dissenting, found that only the board of supervisors of New York County could sue the Tweed Ring.[146] The court held that because the State had no claim to the stolen money, it did not have standing to bring the action.[147] While acknowledging that the common law in England would have authorized the action, the court determined that the laws of New York had vested ownership of the money in the county. The many bills passed over the decades establishing local governments, and specifically a form of government embracing the city and county of New York,[148] established a system where the funds of New York City were not the property of the State. Also, this was not a case where nobody other than the Attorney General could bring the action.[149] There was a remedy. The board of supervisors could sue to obtain the ill-gotten gains.

The failure of the Attorney General's office to force the Tweed Ring to return its fraudulent earnings did not end the issue. In 1875, when Samuel Tilden had become Governor, the legislature passed a law

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[143] *Id.,* at 54-55.

[144] People v. Ingersoll, 67 Barb. 472, 481 (N.Y. Sup. Ct. 1873).

[145] *See* Supervisors of New York v. Tweed, 13 Abb. Pr. (n.s.) 152, 158 (N.Y. Gen. Term. 1872).

[146] People v. Ingersoll, 58 N.Y. 1, 34,37-381 (1874).

[147] *See* Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 HARV. L. REV. 369, 387-388 (1936) (summarizing *Ingersoll*).

[148] Act of Apr. 26, 1870, ch. 382, 1870 N.Y. Laws 875. According to the court, this act "distinctly recognizes the existence of a county, with every element of power and circumstance that can be claimed as necessarily incident to any other like organization." *Ingersoll*, 58 N.Y. at 25.

[149] *Id.* at 36 ("Were it believed that the remedy by and in behalf of the county was not plain, palpable and free from all doubt, we might hesitate in giving the judgment to which our examination has led us, lest a flagrant wrong might go unpunished.").

allowing the Attorney General to prosecute suits on behalf of the people against individuals who converted funds belonging to state and local governments.[150] The action could be commenced ten years after the cause of action accrued. Thus, it still could be applied to the Tweed Ring, and Attorneys General soon relied on the new law to bring renewed charges against them. Efforts to block the renewed Tweed Ring inquiry were unsuccessful,[151] and the Court of Appeals strongly intimated that the new law was constitutional.[152]

The so-called "Tweed Law" remains on the books as 63-c of the Executive Law. However, the Tweed Law's passage did not signal an end to Attorneys General asserting common law authority. Rather, it showed that the legislature could grant additional powers to the Attorney General.

C. Common Law Prosecutorial Powers of the Attorney General

The most litigated issue concerning the common law powers of the Attorney General has been the question of the extent to which the Attorney General has retained the ability to conduct criminal prosecutions. The attorney general did have this power in the eighteenth and nineteenth centuries.[153] There was no legislation that directly prevented the Attorney General's office from exercising this power.

However, there was legislation – starting in 1801[154] and 1827[155] and culminating in 1892[156] with the Executive Law – which empowered the Governor to appoint the Attorney General to conduct a prosecution. Those acts similarly allowed certain state agency heads to refer cases to the Attorney General for prosecution. With these acts and with the growth of the office of the district attorney in each county, the Attorney General's office began to distance itself from self-initiated prosecutions. In fact, the criminal prosecutions of the Tweed Ring were

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[150] Act of Mar. 12, 1870, ch. 49, 1870 N.Y. Laws 43. Background on the legislation can be found in PECULATION TRIUMPHANT, *supra* note 129, at 320-29. A short discussion of the legislative history is also found in *State v. Grecco*, 800 N.Y.S.2d 214, 220-21 (N.Y. App. Div. 2005).The *New York Times* in an editorial wrote that per the legislation that "the sovereign state possesses a right of civil action for the recovery of money misappropriated by local officers." The legislation passed by the state legislature in 1875 "supply the most formidable weapons against delinquent public officials yet known to our jurisprudence" *Editorial*, N.Y. TIMES, Mar. 13, 1875, at 6.

[151] *See* People v. Tweed, 63 N.Y. 194, 207 (1875).

[152] *Id.* at 206-07.

[153] *See supra* notes 57-60.

[154] Act of Apr. 4, 1801, ch. CXLVI, 1801 N.Y. Laws 362.; *see also supra* note 60.

[155] *See supra* note 70.

[156] Act of May 18, ch. DCLXXXIII, §5, 1892 N.Y. Laws 1691; *see also supra* note 86.

conducted out of the New York County District Attorney's office, though the personnel assigned to handle the prosecutions were associated with the Attorney General.

As early as 1893, Attorney General Simon Rosendale doubted the authority of the Attorney General to originate a prosecution. Responding to allegations of electoral misfeasance in Kings County, Rosendale said:

> I suspect that the Attorney-General has no power to intervene in Kings County, or in any other county, where election frauds have been committed. Formerly, the Attorney-General of the State was concerned in murder trials and other criminal cases, but latterly all the legislation of the State has been in the direction of confining him to the management of the State's civil actions … Such criminal prosecutions apparently are put in the hands of local officers.[157]

Even so, there were times when Attorneys General began prosecutions without the direction of the Governor or other officials. In the 1900 case of *People v. Kramer*,[158] the Attorney General prosecuted a criminal case based on a provision added to the Executive Law in 1900 authorizing the Attorney General to appear in electoral cases. The defendant argued that the Attorney General had no authority to appear before a grand jury, and claimed that the Attorney General's presence deprived the district attorney's office of its constitutional powers. The judge reviewed the full history of the relationship between the Attorney General and the district attorney and found that the Attorney General was authorized to appear.[159] The judge ruled, in short, that "the district attorney, by statute and by a long-continued practice, has succeeded to some of the powers of the Attorney-General within the respective counties, but he has not supplanted him."[160]

The ruling in the *Kramer* case was followed in *People v. Brennan*.[161] There, the judge in an election law prosecution stated:

> [I]t would seem clear that the Attorney-General had ample power to act for the people under the Primary Election Law, to present matters to the grand jury himself or by deputy Attorney-General

[157] *The Governor May Act*, N.Y. TRIBUNE, Nov. 13, 1893. Subsequently, Governor Flower asked the attorney general to intervene in the matter. *The Governor Acts*, N.Y. TRIBUNE, Nov. 18, 1893.

[158] People v. Kramer, 68 N.Y.S. 383, 385 (N.Y. Ct. Gen. Sess. 1900).

[159] *Id*. at 385-86, 391.

[160] *Id.* at 390.

[161] 127 N.Y.S. 958, 959 (Kings Cty. Ct. 1910).

> without any designation by the Governor, and to try cases wherein persons are accused of violations of the said law.[162]

Similarly, in *People v. Glasser*, the court upheld an indictment by the Attorney General.[163] In supporting this position, the Attorney General's office wrote in a 1917 opinion

> While section 62 of the Executive Law does not expressly provide that [the attorney general] may conduct criminal prosecutions in the absence of special statutory direction, it leaves it to be inferred that such a power still exists and may be assumed from the general wording "the Attorney-General shall prosecute and defend all actions and proceedings in which the State is interested."[164]

This understanding of the power of the Attorney General did not last long. The *Ward Baking* case in 1923 questioned the Attorney General's power to prosecute criminal cases.[165] In *Ward Baking*, the Governor, utilizing a prior version of §63.8 of the Executive Law authorizing the Attorney General to inquire into matters concerning public peace, safety, and justice, called upon the attorney general to investigate the case of an individual murdered in Westchester County. The Westchester County district attorney had indicted a defendant, but the indictment had been dismissed. The purpose of the governor's authorization, according to the court, was "sole[ly]" to revive the indictment.[166]

The court found that an investigation under the "peace, safety and justice" provision could not be directed against an individual and that the governor's authorization was improper. The court reasoned that, since the "peace, safety, and justice" provision was "fundamentally a war measure"[167] passed soon after the Unites States entered World War I in 1917, the investigation called for by the Governor did not meet the statutory standard because it did not relate to any war. Finally, the court found that clothing the Attorney General with broad subpoena powers improperly impinged on the functions of the judiciary. Given the broad basis of the decision,–that the Governor's authorization could not relate to a single individual, that the authorization had to be a war measure, and that the Attorney General lacked subpoena powers–it was clear that

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[162] *Id.*

[163] 112 N.Y.S. 321, 322 (Sup. Ct. 1908).

[164] N.Y. OFFICE OF THE ATT'Y GEN., 1917 NEW YORK ATTORNEY GENERAL REPORTS & OPINIONS (1917).

[165] Ward Baking Co. v. Western Union Tel. Co., 200 N.Y.S. 865, 868 (App. Div. 1923).

[166] *Id.*

[167] *Id*. at 871. *See also* N.Y. TIMES and N.Y. HERALD, *supra* note 91, and ATT'Y GEN. OF THE STATE OF N.Y, *supra* note 92.

the court did not believe that the Attorney General had any prosecutorial common law powers.[168]

The holding in *Ward Baking* has not aged well. While it has not been formally overruled, its limitations on the Attorney General's "peace, safety, and justice" investigations have been rejected by the Court of Appeals. Both in *Sigety v. Hynes*[169] and *In re Di Brizzi*,[170] the court found that the wartime origins of the statute did not limit the "peace, safety, and justice" investigations. Instead, the court interpreted the words of the clause in their "usual and ordinary sense" rather than a "narrow technical meaning."[171] Additionally, the notion that an Attorney General's investigation improperly assumed judicial functions has been regularly rejected by the Court of Appeals.[172] If any part of *Ward Baking* survives, it is arguably the notion that a "peace, safety, and justice" investigation cannot be directed at a single individual.[173]

Further distancing from *Ward Baking*, in *People v. Tru-Sport Pub Co*.,[174] a court found that the Attorney General's office explicitly retained its common law prosecutorial powers. In *Tru-Sport* the defendant (a racetrack tout) placed fraudulent advertisements in the racing publications. The Secretary of State, who supervised thoroughbred race meetings through the State Racing Commission, referred the case to the Attorney General for prosecution. The Attorney General, in cooperation with the local district attorney, presented the case to the grand jury. The court, however, found that violations of the State's Penal Law were not within the Purview of the Secretary of State.

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[168] *See* Epstein, *supra* note34, at 167-68.

[169] 342 N.E.2d 518, 521 (N.Y. 1976).

[170] 101 N.E.2d 464, 467-68 (N.Y. 1951).

[171] *Id.,* at 467. *Sigerty*, 342 N.E.2d at 521.

[172] *See Sigerty*, 342 N.E.2d at 522-23 and the cases cited therein.

[173] *Id*., at 522. Nonetheless, in January of 1976, Governor Carey issued an executive order, pursuant to §63.8, calling on Attorney General Lefkowitz to investigate the charges that Special Prosecutor Maurice Nadjari had levelled at Governor Carey. The Governor wrote:

> I find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to the charges made by Special State Prosecutor Maurice H. Nadjari that my decision to replace him as the Special Deputy Attorney General assigned to investigate corruption in the criminal justice system in New York City was the result of improper influences exerted upon me by unnamed persons

N.Y. COMP. CODES R. & REGS. tit. 9, § 3.29 (2020). Thus, on this occasion, a §63.8 investigation was aimed at a single individual. Moreover, the Bolo Pasha investigation was aimed at a single individual. *See* Act of Apr. 17, 1945, ch. DCCCXIII, 1945 N.Y. Laws 1698.

[174] 291 N.Y.S. 449, 461 (Sup. Ct. 1936).

Authority for the Attorney General to assist in the prosecution would need to come from another source. Solving this problem, the court found that the common law granted the Attorney General's powers. These common law powers, while dormant, could still be utilized by the Attorney General. The court wrote, "this [common law] power of the Attorney General was rendered dormant for want of employment … it is my opinion, the power itself was not destroyed."[175]

Nevertheless, the debate in the courts continued when two lower court cases in the early 1940's found little basis for the concept that the Attorney General retained common law prosecutorial powers. In the first case, a Supreme Court case in Kings County, the court found that the Attorney General could utilize the superseder issued by the Governor to prosecute a case, the court eschewed the idea of any common law power. The court wrote "[t]he denial … is not predicated on any assumed common law power in the attorney general to issue subpoenas for and to attend grand jury sessions."[176] The court took the position that the Attorney General did not have the power to initiate "at will" prosecution. It found that "the claim of power in the attorney general to assume at will the prosecution of all crime in a county can not be sustained."[177]

The more significant rebuke of common law powers in the attorney general came in *People v. Dorsey* in County Court in Queens County.[178] In Dorsey, the court–after finding that statutory enactments did not justify a prosecution by the Attorney General–determined that the 1925 Constitutional amendment establishing a reorganization of the executive branch of government ended the Attorney General's common law powers. The court found:

> The conclusion is inevitable that the powers of the Attorney General are only those which are granted by our State Constitution and by

[175] *Id.*

[176] *In re* Cranford Material Corp., 174 Misc. 154, 154 (Sup. Ct. 1940). See also *In re* B. Turecamo Contracting Co., 21 N.Y.S.2d 270, 275 (App. Div. 1940)

> The power exercised by the respondents in the present instance is one of the historic functions of the Attorney General, running back to the very beginnings of the constitutional history of the State, and even antedating the creation of the office of district attorney. The attempt to read into the Constitution a provision that district attorneys shall be the exclusive prosecuting officers within their respective counties must therefore fail

People v. Hopkins, 182 Misc. 313, 317 (N.Y. Ct. Gen. Sess. 1944) (acknowledging Attorney General's common law power but finding the Governor unconstitutionally extended it).

[177] *Id.* at 155.

[178] People v. Dorsey, 26 N.Y.S.2d 637 (Queens Cty. Ct. 1941).

> enactments of our legislature. The Constitutional amendment of 1925 eliminated the previous reference to the powers of the Attorney General and established a new system of *civil* State Departments, including a Law Department, and by Article V section 3 authorized the legislature to assign the particular functions of each department. The Legislature assigned to the Attorney General as the head of the Law Department, 'all the powers and duties conferred or imposed on him by law,' State Departments Law, § 181, which means of course statutory powers but not common law powers.[179]

It ought to be understood that the *Dorsey* holding is manifestly incorrect. "Powers and duties conferred … on him by law" do include common law, and the State Constitution has always contained a provision calling for the continuation of the common law.[180] It "is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law."[181] There was clearly no intent in 1925 to alter the common law powers of the Attorney General.[182] The Reorganization Commission stated "[t]he reorganization now under consideration is not intended, as we understand it, to change in any manner the line of duty naturally devolving upon the Attorney General as the chief law officer of the State."[183] Additionally, the 1925 amendments are not significantly different than their predecessor language, under which "the powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as now are or hereafter may be prescribed by law."[184]

The upshot of all of this is that, by the middle of the nineteenth century, judicial acknowledgement of the common law prosecutorial powers of the New York State Attorney General remained unresolved. The state had at least three branches of argument, with cases opposed to the common law prosecutorial power of the Attorney General,[185]

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[179] *Id.* at 938.

[180] N.Y. Const. art I, § 14 (McKinney's, Westlaw through L.2019, chapter 758 and L.2020, chapters 1 to 199).

[181] Hechter v. New York Life Ins. Co., 46 N.Y.2d 34, 39 (1978).

[182] *See supra* note 49.

[183] *Id.*

[184] N.Y. Const. of 1894, Article 5, § 6 (1895).

[185] Ward Baking Co. v. Western Union Tel. Co., 200 N.Y.S. 865 (App. Div. 1923).; People v. Dorsey, 26 N.Y.S.2d 637 (Queens Cty. Ct. 1941)..

supporting that power,[186] and citing the common law in support of the statutory powers of the Attorney General.[187]

More recent cases have apparently resolved the superseder issue. Cases under § 63.2, of the Executive Law (while rarely mentioning the common law) have upheld the statutory powers of the attorney general and the governor's ability to supersede the local district attorney against claims that such powers improperly infringe on the powers of local district attorneys.

In *Mulroy v. Carey*,[188] the county executive in Onondaga County brought suit to enjoin the Governor from superseding the county district attorney. The Court of Appeals, relying on the opinion of the Fourth Department, Appellate Division[189] upheld the Governor's superseder. The Appellate Division found that the governor had the Constitutional duty to "take care that the laws are faithfully executed."[190] The Governor could implement that duty by superseding the district attorney under the Executive Law. Ruling in the Governor's favor, the court said "while it has become the practice for the district attorney in each county to prosecute the crimes committed therein, the latent power[191] of the attorney-general to prosecute them has continued."[192] The court did not believe that it was proper to question the discretion of the Governor in superseding the district attorney.[193]

Twenty years later, the Court of Appeals built on its *Mulroy* decision in *Johnson v. Pataki*.[194] The Governor superseded the Bronx

[186] People v. Tru-Sport Co., 291 N.Y.S. 449, 461 (Sup. Ct. 1936).

[187] People v. Kramer, 68 N.Y.S. 383, 385 (N.Y. Ct. Gen. Sess. 1900); People v. Brennan, 127 N.Y.S. 958, 959 (Kings Cty. Ct. 1910).

[188] 43 N.Y.2d 819 (1977) *aff'd*, 127 N.Y.S. 958 (N.Y. 1977).

[189] 127 N.Y.S. 958 (N.Y. 1977), *aff'g* 43 N.Y.2d 819 (1977).

[190] N.Y. Const. art I, § 14 (McKinney's, Westlaw through L.2019, chapter 758 and L.2020, chapters 1 to 199).

[191] The notion of any need for a "latent" or a dormant power seems most questionable. The legislature can and is regularly adding to the power of the Attorney General. There should be no reason why only a latent power can be brought to life. It turns the Attorney General's power into a caricature of a witch themed movie, such as Hocus Pocus (1993) where a child's actions revive the dormant power of a group of witches. The concept of latency was also mentioned in *Landau v. Hynes*, 49 N.Y.2d 128, 136 (1979), *People v. Young,* 157 Misc.2d 501, 503 (Sup Ct. Monroe Cty. 1993) *People v. Zara,* 44 Misc.2d 698, 701 (Sup. Ct. Suffolk Cty. 1964).

[192] *Id*. at 212.

[193] *Id.* at 214-15. The Court of Appeals in *Mulroy* , however, placed a small caveat on the Appellate Division's decision noting, "[n]o view is expressed whether in any or all circumstances the exercise of the executive power to supersede an elected District Attorney would be beyond judicial review or correction." 43 N.Y.2d 819 at 821.

[194] 691 N.E.2d 1002, 226 (N.Y. 1997). *See generally* John A. Horowitz, "Prosecutorial Discretion and the Death Penalty," 65 *Fordham L. Rev.* 2571 (1997).

County District Attorney in a case where the District Attorney refused to seek capital punishment. The court found that the Governor's discretionary authority was basically not subject to judicial review. It also rejected the argument of the District Attorney that his office was entitled to a "zone of independence."[195] Rather, the court found,

> While prosecutorial authority over the decades has in fact passed from the Attorney–General to the District Attorneys, the Legislature has recognized for more than 150 years the authority of the Attorney–General to prosecute crimes, even at the local level, when properly directed to do so by the Governor.[196]

The cases under §63.3 of the Executive Law (referring criminal cases by agency heads to the Attorney General) and other referral cases are much more explicit in denying the Attorney General any common law prosecutorial powers. The Court of Appeals in *People v. DiFalco* stated, "The Special Prosecutor, as an arm of the Attorney-General, requires specific authority to appear before the Grand Jury."[197] In *Pietra v. State,* the Court of Appeals added "[T]he Attorney-General … is given no general prosecutorial authority … except where specifically permitted by statute."[198]

The reasoning behind this position was explained by Judge Rosenthal writing for a unanimous court in *People v. Gilmour*. He wrote:

> We note at the outset that since 1796 the Legislature has never accorded general prosecutorial power to the Attorney General (*see People v. Di Falco,* 44 N.Y.2d 482, 486, 406 N.Y.S.2d 279, 377 N.E.2d 732 [1978] [per curiam]). Indeed, this Court has pointed out that "the Attorney–General has no * * * general authority [to conduct prosecutions] and is '*without any prosecutorial power* except when specifically authorized by statute'" (*People v. Romero,* 91 N.Y.2d 750, 754, 675 N.Y.S.2d 588, 698 N.E.2d 424 [1998], quoting *Della Pietra v. State of New York*,71 N.Y.2d 792, 797, 530 N.Y.S.2d 510, 526 N.E.2d 1 [1988]).
>
> In 1892, the Legislature first crafted a statute authorizing the Attorney General to prosecute at the behest of certain officials. It was a two-fold grant. First, Executive Law § 52(2) authorized the Attorney General to prosecute specific cases when so required by the Governor or a Justice of the Supreme Court (Ch. 683, L. 1892). In essence, this involved filling the shoes of the District Attorney in

[195] *Id.* at 224.
[196] *Id.* at 225. *See also* Abelove v. Cuomo, 61 N.Y.S.3d 837, 842 (Sup. Ct. 2017). ("Thus, the authority to supersede is within the Governor's sound discretion.")
[197] 377 N.E.2d 732, 735 (N.Y. 1978).
[198] 526 N.E.2d 1, 3 (N.Y. 1988).

> a particular case. Second, Executive Law § 52(3) provided a broader grant by which certain officials could ask the Attorney General to prosecute "*every* person charged [by the requesting official] with the commission of an indictable offense in violation of the laws" that fall under the official's dominion (*id.* [emphasis added]).[199]

In addition to the courts, leadership in the modern Attorney General's office also does not believe that it has inherent common law power to initiate prosecutions. The chief of the Public Integrity Bureau of the Attorney General's Office said in 2017:

> We, meaning the New York State Attorney General's Office, have very limited original criminal jurisdiction. All of our power to prosecute criminal cases is statutorily derived, as opposed to the constitutionally derived jurisdiction that district attorneys have to prosecute. The AG's Office has statutory authority to prosecute the Donnelly act (the state antitrust act). We can prosecute the Martin act by statute, that's the securities act. We can prosecute certain crimes under the Labor Law, but generally that's it, unless we get an Executive Law section 63(3) referral from the governor, the comptroller, or a state agency.[200]

The Chief of Staff to former Attorney General Andrew Cuomo echoed these remarks, saying:

> The elected Attorney General of the State of New York now has to go to the executive and they either are going to refer something to them or you got to say, "Hey, can you give me a referral?" … Somebody long ago decided that there needed to be some kind of check on the power of the Attorney General.[201]

Today, there is a consensus between the courts and the Attorney General's office that the Attorney General only has statutory prosecutorial powers, and that the office does not possess any common law prosecutorial powers.[202]

Yet no case law provides any specific guidance on exactly when and how the common law prosecutorial powers vanished. It would have

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[199] 773 N.E.2d 479, 482 (N.Y. 2002).

[200] Dan Cort, in Special Problems for Prosecutors in Public Corruption Prosecutions, 38 Pace L. Rev 766, (2018) at 772. Courts have at times found that the submissions from state agencies to the attorney general were insufficient to serve as proper referrals under §63.3 of the Executive Law. *See* People v. Gilmour*,* 98 N.Y.2d 126 (2002); People v Wassell*, 171* A.D.3d 1499 (App. Div. 2019); People v. Codina*,* 297 A.D.2d 539 (App. Div. 2002); People v. Stuart, 263 A.D.2d 347 (App. Div. 2000); and People v. Fox, 253 A.D. 2d 192 (App. Div. 1999).

[201] Cort, *supra* note 200 at 775-76 (quoting Steve Cohen).

[202] People v. Gilmour, 773 N.E.2d 479, 482 (N.Y. 2002).

been helpful had the courts employed a classic view of how the common law is nullified. In this view, common law powers are retained unless there is evidence that the legislature has acted to abrogate the law. Additionally, principles of statutory interpretation would show that "[i]f the statute and the common law rule can stand together, the statute should not be so construed as to abolish the common-law rule,"[203] and that "[t]he common law is never abrogated by implication."[204] Then, the courts could perform an analysis showing the particular statutes that abrogated the common law and how the common law and the statutory enactments could not be reconciled. So far, this analysis has not been performed by the courts.

The closest we have to an explanation is offered in *People v. Gilmour*,[205] and that explanation is perplexing. It never notes the common law power of prosecution. The decision seems to take the position that 1892 - when the Executive Law was codified – was the year when the abrogation likely happened, citing the evolution of Section 63 of the Executive Law.[206] Yet, the timeline suggested by the

[203] *In re* Wilson Sullivan Co., 44 N.E.2d 387, 389 (N.Y. 1942). *See* Transit Commission v. Long Island R. Co.,253 N.Y. 345, 354 (1930). ("Rules of the common law are to be no further abrogated than the clear import of the language used in the statute absolutely requires.") *See also* J. G. Sutherland. *Statutes and Statutory Construction including a Discussion of Legislative Powers, Constitutional Regulations Relative to the Forms of Legislation and to Legislative Procedure* 183 (1891). "The presumption is that no such change is intended unless the statute is explicit and clear in that direction." (citing *People v. Palmer,* 109 N. Y. 110 (1888)).

[204] N.Y. Stat. Law § 301 (McKinney 2020).

[205] *Gilmour,* 98 N.Y.2d at 126 .

[206] I*d.* at 132. Professor Phillip Weinberg suggests that the *Ward Baking* case in 1923 is the defining date for this abrogation, writing "[t]he New York attorney general's original common-law power to prosecute crimes, upheld in 19th-century decisions, was firmly rejected by the courts in 1923." Weinberg, *supra* note 2, at 10. Since *Ward Baking*'s holdings have clearly been repudiated by the courts, would that mean that the "latent" common law powers have returned? In *People v. Zara,* 44 Misc.2d 698, 701 (Sup. Ct. Suffolk Cty. 1964), the date of the somnolence of the common law was given as 1801 when "the office of district attorney was created." There is no mention in *Zara* of the authorization in that law for the Governor to require the Attorney General to prosecute a case. Moreover, if the Attorney General continued to serve as the frontline prosecutor for the County and City of New York (the largest county and city in the state) until 1818, wouldn't the Attorney General have had common law prosecutorial powers until at least 1818? In one of the Tweed Ring cases, the counsel for Tweed suggested that the 1827 revision was the date that the common law powers had been abrogated:

> The defendants maintained that even if the right of action be in the state that the phraseology adopted in the revision … in codifying the common law as to the duties of the attorney general, has so restricted the powers of that officer that he cannot prosecute for such grievances.

decision is inaccurate. The power of the Governor to refer cases to the Attorney General, as well as the power of certain agencies to refer cases to the Attorney General, did not originate in 1892. It originated in Ch. 146, L. 180[207] and in Chapter VIII of the Revised Statutes of 1827,[208] authorizing referrals. The power of the Governor to refer cases to the attorney general continued with Ch. 323, L. 1874.[209] The timeline offered by the court for the abrogation of powers is simply untidy.

Even if the *Gilmour* opinion did have an accurate timeline, it is still incomplete. The opinion never acknowledges the powers of the attorney general listed in decision in *People v. Miner*.[210] It never explains why the office's common law powers could not coexist with its statutory powers, a formulation which is especially off-putting since the decision acknowledges that "some overlap existed, with the Attorney General continuing to retain a measure of prosecutorial power."[211] It never explains why the attorney general would still have common law powers, other than prosecutorial powers.

While courts in the nineteenth and early twentieth centuries seemed conflicted on the issue, by the end of the twentieth century and the early twenty-first century, they had concluded that the Attorney General did not have common law prosecutorial powers. The rationales offered for the decisions is questionable, but the existence of a consensus on common law prosecutorial powers is not.

D. Non-Criminal Common Law Powers

Even if one can assume that the common law prosecutorial powers of the Attorney General have been abrogated, that does not mean that the Attorney General has no remaining common law powers. New York's Attorneys General have at times stressed that they retained a series of common law powers. Attorney General Louis Lefkowitz said in 1970 that he had "begun many legal actions using the Attorney General's common law powers to stop air and water pollution where it constitutes a public nuisance or is endangering the public, peace, health

"Tweed and Connolly," *Albany Daily Evening Times*, July 17, 1872. See also "The Tammany Trials," *New York Herald*, July 17, 1872.

[207] Act of Apr. 4, 1801, ch. CXLVI, 1801 N.Y. Laws 362; *see also supra*, note 60

[208] Laws of Sept. 11, 1827, ch. VIII, 1827 N.Y. Laws 31; *see also supra*, note 70.

[209] *See also supra,* note 90.

[210] People v. Miner, 2 Lans. 396, 398 (N.Y. Gen. Term. 1868).

[211] People v. Gilmour*,* 98 N.Y.2d 126, 130 (2002).

and safety."[212] In 1972, Lefkowitz brought an anti-noise law suit against Bridgehampton Racetrack "based on the common law theory of public nuisance."[213] Lefkowitz's 1977 annual report states, "We are continuing to use both statutory remedies and the Attorney General's common-law power to seek abatement of public nuisances to enjoin serious acts of air and water pollution, including noise."[214]

Lefkowitz's successor, Attorney General Robert Abrams, in his preface to his 1981 opinions noted, "[t]he Attorney General also serves as the state's and the people's advocate in affirmative actions under statutory and common law authority."[215] He argued that Executive Law and "the office's "inherent common law powers"[216] authorized the Attorney General to determine any hiring of private lawyers by the State in litigation matters. Similarly, he took the position that the Attorney General had the "well-established common-law power to institute actions to abate public nuisances."[217]

The courts have found that the Attorney General does have common law power to bring environmental and nuisance suits.[218] In a memorandum opinion, not specifically addressing the issue of common law powers, the Court of Appeals in 1975 affirmed a decision upholding a judgment obtained by the Attorney General that that the defendants needed to take corrective action to abate unhealthy sewage conditions on their property.[219] With the Attorney General asserting no specific statutory powers, the decision seemed to be based on the common law.

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[212] "Lefkowitz Successful in Fighting Big Urban Industrial Polluter," *Olean Times Herald*, September 3, 1970 and "Lefkowitz Takes Action to Abate Pollution in State," *Liberty Evening News,* August 27, 1970. *See also* Monte Lorell, "State Investigating Waterloo Noise Case," *Geneva Times,* January 26, 1977.

[213] Ron Grotke, Checkered Flag: From Indy to Pocono, *Binghamton Evening Press*, May 19, 1972.

[214] Philip Weinberg, N.Y. Office of the Att'y Gen., 1977 New York Attorney General, *Reports & Opinions*, at 66 (1977).

[215] N.Y. Office of the Att'y Gen., *Table of Contents of 1981* New York Attorney General Reports & Opinions, at [iii] (1981).

[216] Angel Castillo, *Abrams's Fight to Cut State Use of Law Firms*, N.Y. Times, Oct. 17, 1980.

[217] *Toxin-Dumps Fight Will Cost $1 Million*, Binghamton Evening Press, April 24, 1979.

[218] Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 Env't L. Rep. News & Analysis, 10292, (1986). ("The state, in the exercise of the police power … may act in the public interest and place liability for costs of abatement upon the party responsible for the nuisance.").

[219] State v. Ole Olsen, Ltd., 324 N.E.2d 886, 886 (N.Y. 1975). In an earlier New York Supreme Court decision, it was stated "[t]hat the People of this State have a real interest in preventing pollution of our State's property, be it air, water or land, cannot be

The Appellate Division, Third Department ruled in 1982 that the Attorney General's power was not preempted by the New York Environmental Conservation law. Instead, it found that the law's savings clause preserved the ability of the state to "abate any pollution" and "suppress nuisances.[220] Two years later, the same court in *State v. Schenectady Chemicals Inc*., found that the "contention that common-law nuisance actions have been preempted by recent environmental statutory procedures for abating waste pollution is without merit."[221]

Relying on both *Monarch* and *Schenectady Chemicals*, the federal Court of Appeals was able to conclude that, "the State has standing to bring suit to abate such a nuisance in its role as guardian of the environment."[222]

Currently, the Environmental Conservation Law has been amended in a manner to make certain that the Attorney General's office retains its common law powers to protect the environment. For example, §17-1101 of the Environmental Conservation Law, dealing with pollution, declares "[i]t is the purpose of titles 1 to 11, inclusive, and title 19 of this article to provide additional and cumulative remedies to abate the pollution of the waters of the state and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing."[223] The purpose of the section was explicitly to "preserv[e] common law and other legal remedies."

Importantly, the Attorney General's office itself has both recognized and asserted its common law power to abate nuisance.

> Neither the enactment of CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] at the federal level nor a state statute dealing with remediation of inactive hazardous waste sites has obviated the need for resort to common-law public nuisance claims in cases involving the unpermitted

questioned." People v. Port of N.Y. Auth., 315 N.Y.S.2d 9, 9-11 (Sup. Ct. 1970). *See also* State v. Waterloo Stock Car Raceway, 409 N.Y.S.2d 40, 45-46 (Sup. Ct. 1978) (upholding a common law nuisance suit brought by the attorney general).

[220] State v. Monarch Chems., Inc., 456 N.Y.S.2d 867, 869 (App. Div. 1982).

[221] State v. Schenectady Chems., Inc., 479 N.Y.S.2d 1010, 1014 (App. Div. 1984).

[222] New York. v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985) (quoting *State v. Schenectady Chems*., 459 N.Y.S.2d 971, 974 (Sup. Ct. 1983)).

[223] N.Y. ENV'T. CONSERV. LAW §17 - 1101 (McKinney 1997 & Supp. 1998). *See* James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes*, 5 NAT. RESOURCES & ENV'T. 29, 31 (1990) ("It specifically preserves common-law remedies and provides that persons responsible for inactive hazardous waste sites under the statute are those liable under common law.").

> release of hazardous substances or remediation of hazardous waste sites.[224]

Besides the common law power to abate nuisances, the other common law power utilized by the New York Attorney General is the *parens patriae* power. In short, the *parens patriae* power boils down to the issue of when an Attorney General can sue on behalf of the state's citizens.[225]

> Under the common law, where a trust existed for public purposes, the attorney general, as the representative of the crown, had the privilege to intervene on behalf of the public generally. In America, this authority, also called parens patriae at common law, resides in the state, but is exercised through the attorney general.[226]

Further, "[t]he doctrine of parens patriae allows a state to bring an action on behalf of its citizens in order to protect its quasi-sovereign interests in the health, comfort, and welfare of its citizens. Typically, this authority is used in the context of environmental and antitrust law enforcement."[227]

"American courts uniformly recognize a state's authority to sue, as parens patriae, to vindicate the state's and its citizens' interests."[228] In New York, "the state has the inherent authority to act in a parens patriae capacity when it suffers an injury to a quasi-sovereign interest apart from the interests of particular private parties."[229]

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[224] ENVTL. LAW AND REG. IN N.Y. § 1:3 (William R. Ginsberg & Philip Weinberg eds., West's N.Y Prac. Ser. No. 9, 1996, ed. 2019)

[225] *See* State's standing to sue on behalf of its citizens Romualdo P. Eclavea, Annotation, *State's Standing to Sue on Behalf of its Citizens*, 42 A.L.R. Fed. 23, § 1[a] (1979).

[226] Jennifer Katz, *Blumenthal v. Barnes: Civil Common Law Powers of the State Attorney General in the Charitable Sector*, 17 QUINNIPIAC PROB. L. J. 383, 403 (2004).

[227] Jack Ratliff, Parens Patriae: *An Overview*, 74 TUL. L. REV. 1847, 1847 (2000).

[228] Richard P. Leyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1864 (2000). *See* Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 110 (2005) ("While many states lack case law directly addressing parens patriae authority to sue, there are no states in which the principle of parens patriae has been deemed not a part of the state's law.") *See also In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 386 (D.D.C. 2002) (finding "a group of forty-three states that have specific authority to represent consumers and to settle and release their claims pursuant to their respective parens patriae (or equitable equivalent) authority."). *Cf. In re* Cardizem CD Antitrust Litig., 218 F.R.D. 508 (E.D. Mich. 2003).

[229] ROBERT F. KOETS & AMANDA B. LAWRENCE, *Action in Behalf of People of State; Right to Sue as "Parens Patriae"*, 21 Carmody-Wait 2d New York Practice with Forms § 126:10 (2020). *See generally* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592 (1982).

A series of federal court decisions have given the New York attorney general's office significant leeway in using *parens patriae* powers in civil rights cases. For example, the Attorney General had standing to sue in *parens patriae* for violations of 42 U.S.C. § 1985, conspiracy to interfere with civil rights, on behalf of the mentally disabled,[230] on behalf of persons with AIDS under the Fair Housing Act,[231] for claims of racial discrimination,[232] for enforcement of the Americans with Disabilities Act,[233] and for eradication of discrimination in educational opportunities.[234]

Federal courts have also found that the attorney general has the power to ensure market fairness. In *State of New York, ex rel. Abrams, v. General Motors Corp.*, the Attorney General was authorized to file a *parens patriae* action in a case involving alleged defects in automatic transmissions) based "on the theory that the state has an interest in securing an honest marketplace."[235] Similarly, in *State of New York by Abrams v. Brown*, a federal district court in New Jersey found that New York had *parens patriae* standing to challenge New Jersey's milk pricing law.[236]

On the other hand, there have been instances where the Attorney General's *parents patriae* suits have not succeeded. Where the Attorney General sought to recover money damages for RICO-related injuries suffered by individuals, the court found that the state did not have sufficient interest and thus the state as *parens patriae* lacked standing to prosecute such a suit.[237]

The most significant case limiting the *parens patriae* power of the attorney general is the Court of Appeals decision in *People ex rel.*

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[230] New York v. 11 Cornwell Co., 695 F.2d 34, 38 (2d Cir. 1982), *modified en banc on other grounds* 718 F.2d 22, 22 (2d Cir. 1983).

[231] Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford, 799 F. Supp. 272, 280-81 (N.D.N.Y. 1992).

[232] New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 811-14 (N.D.N.Y. 1996).

[233] New York *ex rel*. Vacco v. Mid Hudson Med. Grp., P.C., 877 F. Supp. 143, 146-49 (S.D.N.Y. 1995).

[234] New York *ex rel*. Schneiderman v. Utica City Sch. Dist., 177 F. Supp. 3d 739, 747-49 (N.D.N.Y, 2016). *See e.g.* New York *ex rel*. Underwood v. Griepp, No. 17-CV-3706 (CBA), 2018 WL 3518527 at *25 (E.D.N.Y. 2018).

[235] Ratliff, *supra* note 227, at 1856 (citing New York *ex rel*. Abrams v. General Motors Corp., 547 F. Supp. 703, 705-07 (S.D.N.Y. 1982)). Other honest marketplace cases include People *ex rel*. Cuomo v. H & R Block, Inc., 870 N.Y.S.2d 315, 316 (App. Div. 2009) People ex *rel*. Cuomo v. Merkin, 907 N.Y.S.2d 439 (Table), 9 (Sup. Ct. 2010).

[236] 721 F.Supp. 629, 636 (D.N.J. 1989).

[237] New York *ex rel*. Abrams v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987).

Spitzer v. Grasso.[238] In the *Grasso* case, Attorney General Spitzer challenged the salary paid to Richard Grasso, the former chairman of the New York Stock Exchange. The Stock Exchange, which was a not-for-profit corporation, paid Grasso a hefty amount of compensation, which included a lump sum payment in 2003 of $139.5 million as part of a $187.5 million package. The Attorney General challenged the package both on statutory and on non-statutory grounds. The non-statutory basis for the claims was that Grasso's compensation violated common law based on a theory of unjust enrichment and violated the Not-for-Profit Corporation Law. The Attorney General's position was that he had standing under the *parens patriae* doctrine to attack Grasso's compensation in order to "vindicate the public's interest in an honest marketplace."[239]

The Court of Appeals, in a unanimous decision authored by Chief Judge Kaye, found that the comprehensive nature of the Not-for-Profit Law's enforcement scheme negated the *parens patriae* claim.[240] There were 18 provisions in the statute dealing with the Attorney General's powers, and those predicated liability on corporate fault. However, the common law claims made by Attorney General Spitzer were premised on unjust enrichment, not on fault. Accordingly, Attorney General Spitzer's claims would have constituted an end-run around the legislator's express intent requiring a showing of corporate fault.[241]

The court concluded

> [E]ach of the challenged causes of action against Grasso seeks to ascribe liability based on the size of his compensation package. The Legislature, however, enacted a statute requiring more. The Attorney General may not circumvent that scheme, however unreasonable that compensation may seem on its face. To do so would tread on the Legislature's policy-making authority.[242]

The *parens patriae* powers asserted by Attorney General Spitzer in the *Grasso* case had been preempted by the provisions of the Not-for-Profit Corporation Law. To express this conclusion in a traditional

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[238] *See generally* People v. Grasso, 893 N.E.2d 105 (N.Y. 2008).

[239] *Id.* at 108.

[240] *Id*. at 108-09.

[241] *Id at* 110.

[242] *Id*. "Eliot Spitzer's attempts to recoup bonuses paid to New York Stock Exchange Chairman and CEO Richard Grasso were deemed to be in excess of his authority to protect the public interest, and incompatible with legislative intent by attempting to create a remedial device incompatible with the statute at hand." Sarah H. Burgart, "Overcompensating Much? The Impact of Preemption on Emerging Federal and State Efforts to Limit Executive Compensation," 2009 *Colum. Bus. L. Rev.* 669 note 102 (2009).

common law authority case, the court could well have said that in this instance, the common law had been abrogated by the statutes enacted by the legislature.

Even with the limitations of *Grasso*, case law shows that the Attorney General in New York does have common law powers power to abate public nuisances and bring some *parens patriae* claims. While to a large extent the common law nuisance power has been commingled in the law with the Attorney General's environmental protection responsibilities, it remains vibrant.

The *parens patriae* powers are also considerable. Even in *Grasso*, where the Court of Appeals found that the legislature abrogated these powers, the court certainly recognized the *parens patriae* power.

The Attorney General's office has not ventured much beyond these two fields of common law powers. Yet, if the Attorney General in New York believes that the office retains some common law powers, it should follow that the Attorney General would retain all its common law powers, except in those instances where the legislature has acted to restrict such powers.

III.
COMMON LAW POWERS IN OTHER STATES

One way to assess the remaining common law powers of the New York Attorney General is to compare them to the common law powers of attorneys general in other states. This section reviews the scope of common law powers wielded by other attorneys general, and discusses how those powers are exercised. In doing so, this analysis sheds light on the powers that the New York Attorney General may retain.

The majority rule in the country is very clear: The vast bulk of state attorneys general possess common law powers.[243] Furthermore, those powers have been recognized by court decisions for decades.[244] More than a century ago, a leading legal encyclopedia stated:

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[243] Shepperd, *supra* note 116. *See* 7 AM. JUR. 2d Attorney General § 5 (2020)

> Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. In addition, the absence of a constitutional provision for specific powers of the attorney general vests the office with all powers of the attorney general at common law.

[244]

> Yet the clear weight of authority is to the effect that in addition to the statutory or constitutional powers given to an attorney general in the several

> Although in a few jurisdictions the attorney-general has only such powers as are expressly conferred upon him by law, it is generally held that he is clothed and charged with all the common law powers and duties pertaining to his office, as well, except in so far as they have been limited by statute. This latter view is favored by the great weight of authority, for the duties of the office are so numerous and varied that it has not been the policy of the state legislatures to attempt specifically to enumerate them.[245]

A 1971 survey of state attorneys general showed that only eight states and territories (including Puerto Rico) claimed not to have common law powers. In 11 states and territories (including Guam and Samoa), the issue was undecided, and 35 states and territories (including the Virgin Islands) had common law powers.[246]

A subsequent survey of state attorneys general in 1977 concluded that in seven states, attorneys general lacked common law powers. [247] In six states, the issue was undecided, and attorneys general had common law power in 36 states.[248]

Of the seven states which had not recognized the common law powers of the attorney general, three do not recognize the common law as a whole. These include the Napoleonic Code state of Louisiana, and the states of Arizona[249] and New Mexico.[250] In other states, their state constitutions have been interpreted to mean that the legislature controls the jurisdiction of the attorney general's office in totality.[251]

At the other extreme,[252] some states have made the common law powers unalterable by legislative modification. In Illinois, the common

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> states in this country, the attorney general has and possesses all of the common law powers possessed by that officer in England.

Hon. George Cosson, Attorney General of Iowa, "President's Annual Address," *Annual Meeting of the National Association of Attorneys General* 8 (1913). "American jurisdictions have generally accepted the broad common law powers of the office." Joseph W. Burdett, "California: A Positive Role in Civil Rights Enforcement: Attorneys-General. Civil Rights," 16 *Stanford L. Rev*. 1088, 1089 (1964).

[245] William M. McKinney and Burdett A. Rich, Editors. 2 *Ruling Case Law §5 916-917* (1914-1921).

[246] 1971 National AG's Report *supra* note 132, at 39. These surveys can be very subjective, but they strongly support the view that most states grant common law powers to their attorneys general.

[247] National Association of Attorneys General, *Common Law Powers of State Attorneys General*, 22-23 (1977) [hereinafter 1977 report].

[248] *Id.*

[249] Arizona State Land Dept. v. McFate, 348 P.2d 912, 914-16 (Ariz. 1960). *See also* Shute v. Frohmiller, 90 P.2d 998, 1001 (Ariz. 1939).

[250] State v. Davidson, 275 P. 373, 375 (N.M. 1929).

[251] 1971 National AG's Report, *supra* note 132, at 40-41.

[252] I*d.* at 42.

law powers of the Attorney General cannot be diminished by statute. The Illinois Supreme Court in *People ex rel. Barrett v. Finnegan* held:

> In this State the constitution, by creating the office of Attorney General … ingrafted upon the office all the powers and duties of an Attorney General as known at the common law, and gave the General Assembly power to confer additional powers and impose additional duties upon him. The legislature cannot, however, strip him of any of his common law powers and duties as the legal representative of the State.[253]

The same basic situation holds in Maryland and Rhode Island. The Maryland Court of Appeals has held that "[t]he General Assembly may not abrogate the common law powers of the Attorney General of Maryland since his powers were the powers of a common law Attorney General."[254] In response to a proposed legislation that would transfer prosecutorial authority away from the Attorney General to a judicially appointed special prosecutor, the Rhode Island Supreme Court has written "[i[t is our opinion that this transfer of power … severely infringes upon the fundamental powers of the Attorney General."[255]

Similarly, West Virginia has found that the essential elements of the attorney general's powers and duties cannot be altered by statute. The West Virginia Supreme Court of Appeals has held that, "no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing its inherent constitutional functions."[256]

Currently, a large preponderance of states continues to support at least some common law authority for attorneys general.[257] However, in recent years, a few additional states have rejected common law rights for the attorney general, including Washington and Connecticut.[258]

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[253] People *ex rel*. Barrett v. Finnegan, 38 N.E.2d 715, 716-18 (Ill. 1941). See also EPA v. Pollution Control Bd., 372 N.E.2d 50, (Ill. 1977).

[254] Murphy v. Yates, 348 A.2d 837, 847 (Md. 1975).

[255] *In re* House of Representatives, 575 A.2d 176, 180 (R.I. 1990). *See also* Suitor v. Nugent, 199 A.2d 722 (R.I. 1964).

[256] State *ex rel*. McGraw v. Burton, 569 S.E.2d 99, 117 (W. Va. 2002).

[257] See Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 393 (2005). See also Robert Stewart, *The Common Law Powers of the Nevada Attorney General:* Ryan v. Eighth Judicial District Court, 14 NEV. L.J. 1023, 1023-24 (2014).

[258] Davids*, supra* note 257*,* at 372. The Davids commentary indicates that New York is one of the states where the attorney general lacks common law powers. As indicated in this Article, the Attorney General in New York does have common law powers.

The Attorney General's office in Connecticut was not created until 1897, and the Connecticut Supreme Court eventually determined in 2002 that the common law civil powers of the state's attorneys for the counties did not transfer to the Attorney General when the office was created.[259] "There is no indication that any other common-law powers of the state's attorneys concerning civil matters devolved to the office of the attorney general."[260]

In Washington, the Attorney General, who had declined to appeal a decision against a state agency, was ordered to file the appeal, because the office lacked common law powers.[261]

Thus, with over two-thirds of the states granting common law powers to their attorneys general, there are numerous occasions when these non-New York attorneys general have expounded on their powers and a plethora of court decisions reviewing the exercise of these asserted powers. These common law powers from other states are far more extensive than the nuisance abatement and *parens patriae* powers traditionally utilized by the New York State Attorneys General. Assuming that the New York State Attorney General possesses non-criminal common law powers, what would result if the New York State Attorney General claimed the full gamut of common law powers used in other states?

IV.
WHAT IF THE ATTORNEY GENERAL IN NEW YORK ASSERTED ALL POSSIBLE COMMON LAW POWERS?

The common law powers asserted by attorneys general in other jurisdictions can be broken down into three broad categories: (1) Representation of the state interest, (2) representation of the public interest, and (3) service as an "intra-branch check on the governor."[262] The "state interest" category largely involves procedural actions taken by Attorneys General, the "public interest" category involves substantive actions taken by Attorneys General, and the "intra-branch check" deals with specific New York State related actions that an Attorney General might wish to take.

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[259] Blumenthal v. Barnes, 804 A.2d 152, 161 (Conn. 2002).

[260] *Id.* at 160. For a critique of the Blumenthal decision, *see* Katz, *supra* note 226.

[261] Goldmark v. McKenna, 259 P.3d 1095, 1103 (Wash. 2011).

[262] *See* John Goodwin, *Legally Present, But Not Yet Legal: The State Attorney General's Role in Securing Public Benefits for Childhood Arrivals*, 46 COLUM. HUM. RTS. L. REV. 340, 365 (2014). The concept of an "intrabranch check" is also utilized in William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

These categories are not mutually exclusive. For example, whenever the Attorney General is acting as an intra-branch check on the Governor, they are doing this because it is in the interest of the public. Similarly, there is considerable potential for overlap between representation of the state and representation of the public. Importantly, literature on "intra-branch check" tends to be somewhat cynical. There are regular references to the belief that "AG" really is short for "aspiring governor."[263] This is certainly true in New York State, which has seen its Attorneys General frequently run for higher office, and actions that serve as "intra-branch checks" will invariably be seen in the light of the political motivations of the Attorney General.[264]

A. Representation of the State Interest

One of the issues facing any Attorney General's office is who the office represents. Does the office represent the Governor, executive branch agencies, or the laws and the rules promulgated by the State agencies? Are these representations consistent with the view that the Attorney General's role is to represent the public interest? Who is the client, State government agencies and employees, or the general public?

May the Attorney General, utilizing common law powers, choose to represent the public interest against the government bureaucracy? Is it within the power of the Attorney General to appeal or refuse to appeal from a decision adverse to the state agency which the Attorney General's office has represented? Conversely, can the Attorney General's office appeal from a decision when the agency it has represented does not wish to appeal? Can the Attorney General assert that a law or rule is unconstitutional? Can the Attorney General refuse to defend a law? Can the Attorney General sue the Governor or a representative of the Governor directly?

1. Representing the People Rather Than the Executive Client in

[263] Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597 (2009). See also Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100 (2015). *Volatile Times Demand Persistent Messages*, 28 No. 1 OF COUNS. 13 (2009); Opinion, *AGs Gone Wild*, WALL ST. J., Nov. 13, 2007.

[264] In New York, the Attorneys General who sought higher office include Jacob Javits, who was successfully elected a United States Senator; Louis Lefkowitz, who ran unsuccessfully for the New York City mayoralty; Robert Abrams, who ran unsuccessfully for the United State Senate; Eliot Spitzer, who was elected governor; and Andrew Cuomo, who was also elected governor.

Litigation

While cases across the states are hardly uniform, attorneys general's offices have frequently cited common law power to take a legal position in opposition to the executive leadership of the state. The Attorney General in New York could advance similar legal oppositions against the New York state executive.

Professor William P. Marshall has stated:

> The first and most common category of cases addresses the right of the Attorney General to refuse to take the Governor's (or other executive officer's or agency's) position in court. Must the Attorney General represent the position of the Governor on a disputed legal issue, or is she free to substitute her own independent legal judgment as to the best interests of the state? The majority rule favors attorney general independence. Her primary duty, as the state's chief law officer, is to represent the public interest and not simply "the machinery of government."[265]

The case law in other states supports the broad authority of the independence of the attorney general. In *Secretary of Admin. & Finance v. Attorney General*, [266] the Massachusetts Supreme Court held that the Attorney General can refuse to appeal an adverse decision despite the contrary wishes of his executive agency client.[267]Two years later, the same court allowed the Attorney General to file an appeal from a federal district court to the United States Supreme Court, even where the state officers represented by the attorney general objected to the appeal.[268]

In *Memorial Hospital Ass'n v. Knutson,*[269] the Attorney General of Kansas was permitted to appeal an open meetings law case even when the county attorney (who had previously represented the government in the case) declined to appeal. There, the court found that the Attorney General was the chief law officer, subject to only the direction of the Governor and the legislature."[270]

There are cases nationally which require that the attorney general's office represent the state officer in a traditional attorney-client relationship, but even those are subject to qualification by the courts. In *Manchin v. Browning*–where the West Virginia Attorney General was

[265] Marshall, *supra* note 262, at 2455-56 (quoting Commonwealth *ex rel.* Hancock v. Paxton*,* 516 S.W. 2d 865, 867 (Ky. 1974)).
[266] Sec'y of Admin. & Fin. v. Att'y Gen., 326 N.E.2d 334 (Mass. 1975).
[267] *Id.* at 338-40
[268] Feeney v. Commonwealth, 366 N.E.2d 1262, 1262 (Mass. 1977).
[269] Mem'l Hosp. Ass'n v. Knutson, 722 P.2d 1093, 1098 (Kan. 1986).
[270] *Id.* at 1097.

required to represent the West Virginia Secretary of State–the court recognized that this was a minority point of view.[271] The *Manchin* court noted:

> We are aware of the many decisions from other jurisdictions cited by the respondent for the proposition that the Attorney General has exclusive control of litigation. We find the majority of them inapplicable to the case at bar. In some of these jurisdictions, the Attorney General retains the common law powers of his office.[272]

2. Challenging the Constitutionality of Legislative Action and Refusing to Defend Legislative Action

Across the United States, the majority rule "vests power in the Attorney General" to bring cases challenging the constitutionality of state legislation.[273] That power was further recognized as stemming from the common law in a 1977 report of the National Association of Attorneys General.[274]

Perhaps the most illustrative case on this issue is *People ex rel. Salazar v. Davidson.*[275] In *Davidson*, the Colorado Attorney General sued to block a redistricting plan adopted by the legislature. The Colorado Supreme Court found that the Attorney General had the power to initiate the lawsuit. There, the court indicated its support of the Attorney General's common law power by recognizing the Attorney General's jurisdiction "in matters of great public importance" and finding it "irrelevant that no statute authorize[d]" the Attorney General to challenge the redistricting plan.[276]

Over the past two decades, attorneys general have also begun to refuse to defend the constitutionality of laws on behalf of the legislature. This has happened frequently in the realm of same sex marriage.[277]

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[271] Manchin v. Browning, 296 S.E.2d 909, 915-16 (W. Va. 1982). In support of the proposition that the attorney general was required to represent state officers, the *Manchin* court cited *Estate of Sharp v. State*, 217 N.W.2d 258 (Wis. 1974); *State v. O'Connell*, 523 P.2d 872 (Wash. 1974); and *Shute v. Frohmiller*, 90 P.2d 998 (Ariz. 1939).

[272] *Manchin*, 296 S.E.2d at 921 n.6. The *Manchin* court found that the Attorney General in West Virginia did not possess common law powers.

[273] Marshall, *supra* note 262, at 2458.

[274] 1977 Report, *supra* note 247, at 35.

[275] People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003). For other cases on this issue, *see* 1977 Report, *supra* note 247at 35-36.

[276] *Salazar* 79 P.3d at 1229-30.

[277] *See* Rena M. Lindevaldsen, *The Erosion of the Rule of Law When a State Attorney General Refuses to Defend the Constitutionality of Controversial Laws*, 21 BARRY L.

Former New Jersey Governor Chris Christie initially ordered his attorney general, whom he selected, to defend the state's same sex marriage law while standing down on defending New Jersey's gun control legislation. The New Jersey Attorney General eventually defended neither law, fighting the legalization of same sex marriage and not defending the state's gun law.[278] State laws are generally silent on the duty to defend, and there is no consensus on whether there is a duty to litigate.[279] Nonetheless, the refusal to defend a controversial law might be another weapon to be used by an activist New York Attorney General under the common law.

3. Challenging the Governor

Similar to the question of whether an attorney general can attack the constitutionality of a law is whether the attorney general can sue the governor in his or her state. This issue was recently presented in the Kentucky Supreme Court case of *Commonwealth ex rel. Beshear v. Bevin*.[280] In this case, the Attorney General in Kentucky sued the Governor, alleging that he had made unconstitutional reductions in the budget allotments for the state university system. The Governor questioned the standing of the Attorney General.

The court found little trouble in finding that the Attorney General had proper standing.[281] It stated that the Attorney General had a legal interest in "fulfilling his common-law obligation to protect public rights and interests by ensuring that our government acts legally and

REV. 1 (2015) (describing the different approaches state attorneys general have taken when confronted with the duty to defend marriage laws); *see also* Devins & Prakash, *supra* note 263, at 2102; Juliet Eilperin, *State Officials Balk at Defending Laws They Deem Unconstitutional*, WASH. POST (Jan. 18, 2013), https://www.washingtonpost.com/politics/state-officials-balk-at-defending-laws-they-deem-unconstitutional/2013/07/18/14cf86ce-ee2b-11e2-9008-61e94a7ea20d_story.html.

[278] Devins & Prakash, *supra* note 263, at 2142. *See* Matt Friedman, "N.J. Attorney General's Autonomy Questioned," *Newark Star-Ledger,* March 11, 2014; Michael Phillis & Michael Linhorst, *State Declines Case on Gun Law*, N.J. REC., Jan. 3, 2014. *See also* the gun control case of *In re Wheeler*, where the intermediate appellate court in New Jersey stated "[t]he Attorney General participated in the Law Division but, regrettably, declined to participate here." 81 A.3d 728, 735 n.2 (N.J. Super. Ct. App. Div. 2013).

[279] *See generally* Devins & Prakash, *supra* note 263(describing the different approaches states take on the duty to litigate).

[280] Commonwealth *ex rel.* Beshear v. Commonwealth *ex rel.* Bevin, 498 S.W.3d 355 (Ky. 2016).

[281] *Id.* at 361-66.

constitutionally."[282] The court added, "[b]ecause the Attorney General is the chief law officer of the Commonwealth, he is uniquely suited to challenge the legality and constitutionality of an executive or legislative action as a check on an allegedly unauthorized exercise of power."[283]

The court in *Beshear* cited a host of decisions from other states in support of its position standing,[284] but it specifically took note of the language of the South Carolina case of *State* ex rel. *Condon v. Hodges*.[285] The court stated:

> Furthermore, the Attorney General, …has a dual role of serving the sovereign of the State and the general public. Thus, the Attorney General is not violating the ethical rule against conflicts of interest by bringing an action against the Governor.
>
> While the Attorney General is required by the Constitution to "assist and represent" the Governor, the Attorney General also had other duties given to him by the General Assembly, and elaborated on by the Court, which indicate the Attorney General can bring an action against the Governor.
>
> Accordingly, we find the Attorney General is not prohibited from bringing an action against the Governor.[286]

There is ample authority in other states granting the attorney general the right to sue the governor. In New York, the Attorney General's office could potentially utilize common law powers to bring actions against the Governor. No statute has taken away any common law rights that the Attorney General might have to represent the people rather than the state's executive. Absent any legislative action, the Attorney General could likely bring suit against the Governor.

B. Representation of the Public Interest

Dating back as far as the 1920s, numerous jurisdictions have authorized state attorneys general to act in the public interest.[287] While

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[282] *Id*. at 363.

[283] *Id.* at 365.

[284] *Id. See also*, "[t]he notion of an attorney general being able to gain standing concerning matters in which no one citizen has any special interest other than which is common to citizens in general has been the basis for several state court decisions which have permitted an attorney general to challenge legislation." Comment, *An Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 624, 631 n.38 (1959).

[285] State *ex rel.* Condon v. Hodges, 562 S.E.2d 623 (S.C. 2002).

[286] *Id.* at 629.

[287] *See* 1977 Report *supra* note 247, at 31-34. *See also* Mountain *supra* note 114, at 29. "The law may not be so clear in all jurisdictions or with respect to every claim of common law authority. Cases recognizing the Attorney General's common law powers, however, are legion."

the Attorney General in New York may have significant *parens patriae* powers, the common law power to bring suits in the public interest grants attorneys general a nearly universal guarantee of standing.

The "public interest" issue can be best summed up as follows:

> Importantly, the state attorney general also retains the common-law power and duty to bring litigation in the public interest, even when the state is not otherwise a party. This power is broad and deferential … And the attorney general has wide discretion in making the determination as to the public interest. The attorney general's common-law powers and independence from gubernatorial control allow her to bring litigation disfavored by the governor and even refuse to defend gubernatorial policies and state legislation she finds to be against the public interest.[288]

Examples of attorneys general bringing cases in the public interest is hardly a recent phenomenon. In the second decade of the twentieth century, Ruling Case Law could write:

> Accordingly, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time, require; and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.[289]

Most especially at common law, the attorney general "exercised the right of enforcing public charities, possessed supervisory powers over the estates of lunatics, and could institute equitable proceedings for the abatement of public nuisances, which affected or endangered the public safety or convenience, and required immediate judicial interposition."[290]

In short, while the source of litigation authority varies among the states, "litigation as a method to advance policy interests is a tool that rests almost exclusively in the hands of the attorney general."[291]

Two particular cases from Florida and Michigan illustrate the extent of the public interest powers of the attorney general. In *Florida ex rel. Shevin v. Exxon Corp.*,[292] the Fifth Circuit was called upon to

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[288] Goodwin, *supra* note 262, at 347.

[289] McKinney and Burdett A. Rich, *supra* note 245 at 917.

[290] *Id.* at 916.

[291] Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 890 (2007).

[292] 526 F.2d 266 (5th Cir. 1976).

rule whether the Florida Attorney General could bring a federal antitrust claim. No statute authorized the Attorney General to bring such a suit, but citing the broad powers of the Attorney General, the court found that the Attorney General could bring the case. It reasoned that "in the absence of [] legislative action [depriving the attorney general of specific powers], he may typically exert all such authority as the public interest requires," and that the Attorney General had "wide discretion" in exercising that authority.[293]

Similarly, in *Michigan ex rel. Kelley v. C.R. Equipment Sales*,[294] the Michigan Attorney General brought federal and state antitrust charges against a number of school bus companies. The companies questioned the standing of the Attorney General, but the court ruled against them by finding that the Attorney General was acting in the public interest. Going one step further, the court wrote that it, "should only prohibit the Attorney General from intervening or bringing an action when to do so is clearly inimical to the public interest," indicating an even broader jurisdictional reach.[295]

Some older New York Court of Appeals cases speak of the broad public interest powers of the Attorney General and the fact that the courts will not second-guess the judgment of the Attorney General. This again should support the belief that the attorney general's office retains broad common law powers.

In *In re Co-operative Law Co*., the New York Court of Appeals had to respond to whether it was proper for the Appellate Division to serve a notice on the Attorney General to appear in a proceeding concerning the practice of law by a corporation.[296] The court found that the Attorney General's forced appearance "was entirely proper, for his ancient common-law duty to represent the People called upon him to take part in a controversy in which the People are vitally concerned."[297]

Moreover, in New York, case law indicates that the Attorney General's determination of what is in the public interest should generally not be questioned by a court. The Court of Appeals has said that the issue is "committed to the absolute discretion of the attorney-

[293] *Id.* at 268-69.
[294] 898 F. Supp. 509 (W.D. Mich. 1995).
[295] *Id.* at 514 (citing *In re* Intervention of Att'y Gen., 40 N.W.2d 124, 126 (Mich. 1949)).
[296] *In re* Co-operative Law Co., 92 N.E. 15, 17 (N.Y. 1910).
[297] *Id.*

general" and that abuse of that broad discretionary power could be remedied only by removing them from office.[298]

An Attorney General in New York, looking to bring additional affirmative cases, could resort to the common law and bring cases relying simply on the public interest. The Attorney General could bring an assortment of issues predicated on environmental justice issues. For example, the Attorney General might challenge actions at a local government level on restrictive zoning, on restricting wind or solar power, construction permits, on power line placements and authorizing sewage or wastewater treatment facilities. Pursuing the "public interest" would allow an Attorney General to pursue a litigation-based Green New Deal.

C. Intra-Branch Check

There are many ways that an attorney general can use the office's powers other than suing the governor directly - to check the governor. Most of these actions would be in line with the New York common law power recognized in *People v. Miner* to "prosecute all actions, necessary for the protection and defence of the property and revenues of the crown,"[299] and are further supported by the Executive Law §63.1 grant of power to "prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state."[300] While these actions have been brought in New York, they have largely been in one-off situations. Again, the legislature has not acted to restrict these powers in any manner. An Attorney General aggressively using the common law powers of the office could arguably apply these measures to place a significant check on the powers of the Governor.

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[298] People v. Ballard, 32 N.E. 54, 59 (N.Y. 1892). *But see* People v. Lowe, 22 N.E. 1016, 1020 (N.Y. 1889) (finding that an action by the Attorney General questioning the distribution of funds after the dissolution of a building and loan society was not in the public interest). This was a private action, unlike actions against "municipal, charitable, religious, and eleemosynary, which are public, and discharge functions which might otherwise devolve upon the government" 117 N.Y. at 190.

[299] People v. Miner, 2 Lans. 396, 398 (NY Gen. Term Fifth Dep't, 1868).

[300] As earlier noted, the "prosecute and defend" language dates from 1827 and was not viewed by the New York courts in the nineteenth century as affecting the common law powers of the attorney general. *See* N.Y. CONST. of 1821, art. V, § 4. The "charge and control" language in Section 63.1 was added to the Executive Law by Act of Apr. 27, 1935, ch. DXXIII, 1935 N.Y. Laws 1111. This law was not a general grant of power to the Attorney General but was an effort to establish a mechanism to distribute legal representational powers between the Attorney General and other state departments, bureaus and agencies.

1. Naming the Special Prosecutor under Executive Law §63.8

The Attorney General could insist that the Governor would play no role in the naming of specific special prosecutors. While it has become customary for the Governor to name a Special Deputy Attorney General (generally considered the Special Prosecutor) to conduct "public peace, public safety, and public justice" investigations, it is not technically the Governor's appointment. Executive Law §63.8 provides that the power to appoint a special prosecutor is vested in the Attorney General. In 1975, this became a dispute when Governor Carey tried to dismiss Special Prosecutor Nadjari and replace him with New York County District Attorney Robert Morgenthau.[301] Attorney General Lefkowitz defied the Governor by allowing Nadjari to stay on for six months after Carey tried to dismiss him.[302] Additionally, Carey had requested Lefkowitz to appoint a special prosecutor to investigate Nadjari's charge of corruption in the Carey administration.[303] This guarantees that the attorney general remains in control of the legal business of the state and could prevent the governor from engaging in any partisan prosecutorial activities.

2. Ignoring Governor's Superseder or Request for an Investigation

The Attorney General–citing the common law–could argue that the office had full control of the legal business of the State and that there was no basis for the Governor to issue a superseder or request an investigation. In the Nadjari-Carey controversy of 1975-1976, Attorney General Lefkowitz felt bound to act favorably on Governor Carey's request to name a special prosecutor to investigate Nadjari's charges against Carey.[304] What would have happened if Lefkowitz had simply rejected the Carey request? What would the end game have been in 1996 during Governor Pataki's attempt to supersede the Bronx District Attorney for his failure to seek the death penalty? What would have happened if the Attorney General instead of taking over the prosecution

[301] Tom Goldstein, *Doubts Develop About New Role for Morgenthau*, N.Y. TIMES, Dec. 25, 1975, at 1.

[302] Marcia Chambers, *Lefkowitz Rebuffs Carey on Plea to Oust Nadjari; Extends Term 6 Months*, N.Y. TIMES, Dec. 30, 1975, at 1.

[303] Edward Hershey, *Judge to Probe Charges by Nadjari*, NEWSDAY, Jan. 23, 1976, at 17.

[304] Owen Moritz, *Lefkowitz Confirms His OK of a Carey-Nadjari Inquiry*, DAILY NEWS, Jan. 6, 1976; Marcia Chambers, *Carey May Win Point on Nadjari*, N.Y. TIMES, Jan. 5, 1976.

had refused to prosecute and had stated that the fact that the Bronx District Attorney would not seek the death penalty was insufficient justification for Governor Pataki to supersede the District Attorney?[305]

3. Issuing Advisory Opinions

Attorneys General in New York have been issuing advisory opinions for centuries.[306] Typically though, these opinions have only been issued in response to requests from state and local agencies.[307] In 1889, the legislature even required that these advisory opinions be included in the annual report of the attorney general.[308]

Attorneys General issue advisory opinions *sua sponte* very rarely. One instance came in early 1984 when Attorney General Abrams advised that a sports betting lottery would be unconstitutional. Governor Mario Cuomo reacted by saying, "[w]e didn't ask him for an opinion … I don't know why he gave it. There's no place in the law that requires him to give opinions. He's supposed to be my lawyer."[309]Additionally, while not technically an advisory opinion, Attorney General Schneiderman in 2015 ruled that fantasy sports constituted illegal gambling under state law.[310]

If challenged, the Attorney General's office could argue that it can issue advisory opinions through its common law powers even if no agency had requested the opinion. The Attorney General could opine on voting rights, motor vehicle licenses, and rights of the undocumented. For example, the Attorney General could opine on what would be legitimate reasons that would enable a voter to cast an absentee ballot. By issuing opinions on its own initiative, the office of the Attorney General can serve as an effective check on the state executive. This would help resolve major public controversies–such as fantasy sports wagering and sports lotteries. It would provide helpful

[305] N.Y. COMP. CODES R. & REGS. tit. 9, § 5.27 (2020) (revoked).

[306] *See generally* HIRAM E. SICKELS. OPS. OF THE ATT'YS-GEN. OF THE STATE OF N.Y. (1872).

[307] *Id.*

[308] Act of Apr. 27, 1889, chap. 200, 1889 N.Y. Laws 239, 240. The annual report was to contain "copies of all official opinions rendered by the Attorney-General during the year preceding the date of his annual report, and deemed by him to be of general public interest."

[309] Alison Mitchell, *Abrams Says Sports Lottery Illegal; Cuomo Says Butt Out*, NEWSDAY, Jan. 27, 1984.

[310] Walt Bogdanich, Joe Drape & Jacqueline Williams, *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), https://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html.

guidance to the legislature in determining what actions they are legally authorized to take.

4. Controlling the State's Legal Business

Attorney General Abrams contended in 1980[311] that the Attorney General should have control over the full spectrum of the State's legal business. He argued, at the time, that the common law authorized his involvement in the full hiring of outside lawyers for the State. He argued that a study showed that the hiring of outside counsel had cost the State more than $2.5 million over the past two years, which was considered an outrageously high expenditure at that date. He believed that his office could legitimately handle much of the work handled by the outside attorneys.[312]

The issue has only gained more significance over the past four decades. In the multi-state tobacco settlement case, a panel determined that full, reasonable compensation for private New York attorneys was $625 million.[313] The hiring of outside counsel allows the executive a lucrative source of patronage. The executive branch can hire its friends and political cronies to handle specific cases. This also raises an assortment of quid pro quo issues, as large law firms provide campaign contributions to candidates favored by the executive, and the executive can pressure the lawyers it hires not to pursue cases that are considered harmful to the executive.[314] Wielding this common law power would permit the Attorney General to hire outside lawyers based on merit, and not on political connections.

This issue is clouded by §67 of the Executive Law which provides that "the governor or attorney-general may designate and employ such additional attorneys or counsel as may be necessary to assist in the transaction of any of the legal business mentioned in section sixty-three of this chapter."[315] While this appears to give the Governor significant rights to hire private counsel, it is limited to those cases arising under

311 Castillo, *supra* note 216.

312 *Id.*

313 *Tobacco Fee Arbitration Panel Announces New York Decision*, PR NEWSWIRE, Oct. 23, 2001.

314 *See generally* Gary Fineout & Matt Dixon, *DeSantis Twists Arm of Miami Herald Attorney*, POLITICO (Apr. 13, 2020, 7:00 AM), https://www.politico.com/newsletters/florida-playbook/2020/04/13/desantis-twists-arm-of-miami-herald-attorney-floridas-fuzzy-coronavirus-math-ethics-panel-no-politicians-in-covid-19-psas-rip-rep-jacobs-488875.

315 N.Y. EXEC. LAW § 67 (McKinney through L.2019, chapter 758 and L.2020, chapters 1 to 198).

§63 of the Executive Law. Numerous private lawyers are hired by the Attorney General's office to represent the state on environmental matters, public power issues, and gambling issues. Perhaps the Attorney General's office could advocate–citing the common law–for legal control over all non-§63 issues, in order to prevent the Governor from attempting to assume additional powers away from the Attorney General.

5. Allocating Settlement Funds from Remedial Actions

One ongoing controversy is how to dispose of moneys received by the Attorney General as the result of large monetary settlements and restitutions. The $5 billion in negotiated settlements that Attorney General Schneiderman secured in the wake of the 2008 financial crisis–especially the settlements by the banking and mortgage industry–were often used to provide assistance to homeowners and blighted communities.[316] However, Governor Andrew Cuomo believed that these settlement funds should be allocated through the overall state legislative budget process. He also raised the fear that these settlements could serve as a slush fund for the Attorney General.[317]

Over the years, the Attorney General and the Governor have negotiated agreements on how to divvy up the proceeds of the settlements. Yet, if under the common law the Attorney General's role is to manage and control the state's legal business, why is there any need to share the proceeds with the executive and the legislature? If the Attorney General utilizes the common law powers of the office, there is nary a reason to share the negotiated settlement funds with anyone.

Despite these possibilities, the concept of utilizing the office of the Attorney General to check the powers of the executive may be somewhat impractical. There are reasons why these situations are one-offs. No matter how large their egos and how lofty their ambitions, Governors and Attorneys General do not often go to the mattresses. First of all, the nature of their offices requires them to work together.

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[316] Ben Jurney, *Massive Bank Settlements Fueled Spending Spree by Electeds*, GOTHAM GAZETTE (Dec. 23, 2016), https://www.gothamgazette.com/state/6686-massive-bank-settlements-fueled-spending-spree-by-electeds. *See generally* Jon Campbell, *A.G. Eric Schneiderman Hailed as Tough on Banks*, J. NEWS (N.Y.), Dec. 26, 2011.

[317] Editorial, *Dividing the Bank Settlement*, N.Y. TIMES (Jan. 24, 2014), https://www.nytimes.com/2014/01/25/opinion/dividing-the-bank-settlement.html; Susanne Craig, *With $613 Million at Stake, an Albany Rivalry Is Said to Escalate*, N.Y. TIMES (Jan. 16, 2014), https://www.nytimes.com/2014/01/16/nyregion/cuomo-and-schneiderman-prepare-to-fight-over-jpmorgan-settlement.html.

The Governor has to rely on the Attorney General to defend the executive branch. The attorney general's office needs to work with executive branch agencies to do its job. They are frequently co-dependent. Moreover, there are significant balance of power dynamics between the Governor and the Attorney General. In a dispute, each side has the ability to make the other side look bad. The Governor has the power of the agencies and greater budgetary authority. The Attorney General has the ability to pick and choose popular issues that could make the Governor look bad. Disputes between the offices can be no-win situations. There are theoretical flash points, but the flash points in New York history have been kept to a minimum.

CONCLUSION

This Article has sought to review and assess the common law powers of the New York State Attorney General. In an era where the Attorney General's office has brought an increasing number of affirmative cases, the office has rarely asserted these common law powers. It has reviewed the history of the office in New York, the office's previous use of common law powers, and the common law powers of attorneys general in other states.

The full scope of the history of the office shows that the Attorney General's office once possessed these common law powers, and only in the field of criminal prosecutions can it be stated conclusively that these common law powers have been usurped by legislative action.

Certainly, in the environmental and *parens patriae* fields, the common law powers of the Attorney General have been in regular use, and a review of the actions of attorneys general in other states suggest areas where the New York Attorney General could go farther. If the Attorney General still retains these common law powers in New York, there are a multitude of other ways in which the Attorney General's office can use its powers. The Attorney General can use common law powers to challenge the constitutionality of legislation or to refuse to defend a state policy or law. The Attorney General can sue the Governor. The Attorney General can bring lawsuits in the public interest, and the Attorney General can use his or her powers to check the activities of the Governor.

The challenge in New York State will come if and when an Attorney General chooses to assert these common law powers.