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# Preservation: What Is It Good for?

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# PRESERVATION: WHAT IS IT GOOD FOR?

Yuval Simchi-Levi<sup>1</sup>

In the United States of America, appellate courts must balance efficiency with justice when dealing with criminal cases. In order to make the system more efficient, certain procedural constraints have been put into place. For instance, in a criminal appeal in many American jurisdictions, an appellate court is often limited to considering issues properly raised before that court by a rule referred to as the “preservation doctrine.”<sup>2</sup> This doctrine is a source of tension for American appellate courts in dealing with criminal cases because it has the potential to conflict with their ability to achieve justice.<sup>3</sup>

In New York, intermediate appellate courts are permitted to review factual issues in criminal cases.<sup>4</sup> However, the Court of Appeals, which is New York’s highest court, is not permitted to do so.<sup>5</sup> The Court of Appeals is restricted, to a great extent, to decide only legal issues properly raised at trial.<sup>6</sup> In other words, the Court of Appeals can review, for the most part, only legal claims that were properly preserved at trial.<sup>7</sup> As this

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2. Richard J. Montes & David A. Beatty, *The Preservation Rule in the New York Court of Appeals: How Recent Decisions and Characterizations of the Rule Inform Advocacy*, 78 ALB. L. REV. 119, 120-22 (2015).

3. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1263 (2002).

4. N.Y. ST. UNIFIED CT. SYS., THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE, <http://nycourts.gov/reports/ctstrct99.pdf>.

5. *About the Court*, N.Y. ST. UNIFIED CT. SYS., <https://www.nycourts.gov/courts/ad2/aboutthecourt.shtml> (last visited Nov. 28, 2016).

6. *Id.*

7. *Appealability and Reviewability*, N.Y. ST. UNIFIED CT. SYS.,

paper will demonstrate, over the past few years, the Court of Appeals has broadened its interpretation of the preservation doctrine at the cost of efficiently reviewing cases.

The tension that the New York Court of Appeals faces as a court of law is emblematic of a challenge that many appellate courts face in the United States. Courts have to grapple with the following questions: Should an appellate court be restricted by technical rules from examining a legal issue that could lead to the right result for the sake of efficiency? Likewise, should a person suffer due to his trial attorney's failure to interpose arguments at trial? The American appellate system has struggled with how best to deal with these questions.

How a state's criminal justice system deals with these issues matters. For instance, as has been well-documented, the New York City criminal courts are struggling to deal with a backlog of criminal cases due to pre-trial delays.<sup>8</sup> Consequently, many individuals are "languishing" in prison as they await an ultimate disposition in their cases.<sup>9</sup> As this paper will show, how the New York Court of Appeals deals with procedural constraints on its scope of review similarly has a direct impact on the backlog of criminal cases awaiting review by that court.

The Article proceeds as follows: in Part A, the preservation doctrine is defined. In Part B, the history of the preservation doctrine is described. In Part C, there is an explanation as to the purpose of preservation. In Part D, there is a description of the appellate process in New York. In Part E, the statutory rules of the New York Court of Appeals are described. In Part F, there is a description of how the rules of preservation have loosened in New York since 2009. In Part G, there is a statistical analysis of the consequences of loosening the rules of

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[https://www.nycourts.gov/ctapps/forms/civil5\\_05.htm](https://www.nycourts.gov/ctapps/forms/civil5_05.htm) (last visited Nov. 28, 2016).

8. William Glaberson, *Even for Minor Crimes in Bronx, No Guarantee of Getting a Trial*, N.Y. TIMES, May 1, 2013, at A1; William Glaberson, *For 3 Years After Killing, Evidence Fades as a Suspect Sits in Jail*, N.Y. TIMES, Apr. 16, 2013, at A1; William Glaberson, *Courts in Slow Motion, Aided by the Defense*, N.Y. TIMES, Apr. 15, 2013, at A1; William Glaberson, *Waiting Years for Day in Court*, N.Y. TIMES, Apr. 14, 2013, at A1.

9. Michael Sfcswirtz & Michael Winerip, *Push to Reduce Total at Rikers Aims at Courts*, N.Y. TIMES, Apr. 14, 2015, at A1.

preservation in New York. Finally, Part H shows how loosening the rules of preservation impacts the efficiency of appellate courts.

### I. What is the Preservation Doctrine?

To preserve a claim for appellate review, three general prerequisites must be satisfied.<sup>10</sup> First, there must actually be a specific ruling made by a trial judge.<sup>11</sup> Second, a party must have suggested to the trial judge that the ruling was wrong.<sup>12</sup> Third, if the trial court did not correct its ruling, the aggrieved party can appeal the ruling to an appellate court.<sup>13</sup> In other words, in order for an attorney to argue on appeal that the judge erred during the trial, the attorney must object to the court's decision at trial and state why the attorney disagrees with the judge's ruling.

### II. Historical Analysis of Preservation

The tension in American appellate law as to whether appellate courts should be constrained to review certain developed issues or should adopt a more flexible notion of appeal is a byproduct of having adopted the American legal system from England, where there were courts of law and equity with their own separate appellate processes.<sup>14</sup> During the Roman Empire, parties could re-litigate claims with new evidence.<sup>15</sup> In England, by the end of the twelfth century, the appeal would go from a local court, to a court of the archbishops, "and then to the courts of the Pope."<sup>16</sup> However, because in this appellate system there were few procedural requirements, there was an "almost unlimited right of appeal

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10. *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523 (1983).

11. *Id.*

12. *Id.*

13. *Id.*; see Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1029 (1987).

14. Mary Sarah Bilder, *The Origin of Appeal in America*, 48 HASTINGS L.J. 913, 915 (1997).

15. *Id.* at 928.

16. *Id.* at 929. See generally MARTIN INGRAM, *CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640*, 35-37 (1987).

to the Pope.”<sup>17</sup>

The American understanding of appellate law evolved from the eighteenth century English common law. The notion of preservation specifically developed from the English writ of error model, which governed criminal proceedings.<sup>18</sup> Under that legal system, a trial judge’s authority was limited to questions of law, while the jury served as the fact-finder.<sup>19</sup> To appeal a judgment, a writ of error was required, in which the party appealing the judgment alleged that the trial judge made an error.<sup>20</sup>

Preservation of legal issues was significant under the writ of error.<sup>21</sup> The only way to determine if a trial judge had made an error was to review the record, which consisted “only of formal documents filed in court and the official record of the actions of the jury and the judge.”<sup>22</sup> And, because what occurred at trial could not be recorded verbatim, a procedure — the bill of exceptions — developed, where a party who disagreed with a court’s ruling could challenge it and request that a third party record, in writing, the judge’s ruling and the aggrieved party’s exception to the ruling.<sup>23</sup> That written record would then be sent to the appellate court as part of the appeal.<sup>24</sup>

At the same time, in England, there were courts of equity where judges would dispense justice as they saw appropriate based on the facts of the cases before them.<sup>25</sup> An appellate

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17. Bilder, *supra* note 14, at 929 (quoting 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 213-14 (7th ed. 1956)).

18. Sean Arthurs, Comment and Casenote, *A Foolish Consistency: How Refusing to Review Ford v. Garcia’s Invited Error Demonstrates the Eleventh Circuit’s Prioritization of Procedure Over Justice*, 72 U. CIN. L. REV. 1707, 1710 (2004); Nora Meltzer, Note, *Dismissing the Foster Children, The Eleventh Circuit’s Misapplication and Improper Expansion of The Younger Abstention Doctrine in Bonnie L. v. Bush*, 70 BROOK. L. REV. 635, 642 (2004). *See also* Younger v. Harris, 401 U.S. 37, 45 (1971).

19. Arthurs, *supra* note 18, at 1710-11.

20. Martineau, *supra* note 13, at 1026.

21. *Id.* at 1026-27; *see generally* ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 38-71 (1941).

22. *Id.*

23. *Id.*

24. *Id.*

25. Miller, *supra* note 3, at 1263.

court in equity could consider any issue on appeal regardless of whether it was preserved or not.<sup>26</sup> As a result, the appellate court reviewed the entire case regardless of whether an issue had previously been raised to the trial court.<sup>27</sup>

In the United States, the appellate courts have decided to follow the writ of error model, rather than the equity courts' model.<sup>28</sup> Indeed, although initially eight colonies in the United States adopted the more liberal appellate system, in which the appellate court could consider any legal or factual issue regardless of whether it was preserved, many of those colonies "replace[d] or combine[d]" their appellate systems with preservation requirements, such as writ of error or writ of certiorari.<sup>29</sup> And, by the eighteenth and nineteenth centuries, American courts only allowed appeals for errors of law that could be found in the "written record of the case."<sup>30</sup>

The emphasis on procedure in early American criminal law can be traced to the significance of the adversarial system in American law, which was far more advanced than the adversarial system under English law. For instance, as to whether defendants should receive the full assistance of defense counsel, American criminal law actually "preceded" England by guaranteeing that right by the 1780s, while England only accepted that concept by the mid-nineteenth century.<sup>31</sup> America embraced the adversary system because it was consistent with the "new American" concepts of crime,

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26. *Id.*

27. Martineau, *supra* note 13, at 1027.

28. *Id.* at 1027-28.

29. Bilder, *supra* note 14, at 914-915; *see also* 1 JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 119-26 (2009); PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 35-36 (1992); ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 23 (1990).

30. Bilder, *supra* note 14, at 915; *see generally* POUND, *supra* note 21, at 72-73, 80-81.

31. Randolph N. Jonakait, Symposium, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 327 (2009) [hereinafter *American Adversary System*]; *see also* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 95-96 (1995) [hereinafter *Origins of the Confrontation Clause*].

checks and balances, and societal order.<sup>32</sup> The appellate courts in the United States were criticized for focusing on procedure instead of justice.<sup>33</sup> Consequently, American appellate system reforms between 1900 and World War II directed the appellate courts to examine the merits of a claim instead of procedural errors.<sup>34</sup> For instance, in New York during this time period (as will be discussed in further depth, *infra*), the legislature broadened the review power of the appellate courts such that the intermediate appellate courts in New York could review issues of fact.<sup>35</sup>

### III. Preservation: What is it Good For?

Preservation serves several important purposes, such as promoting efficiency, reducing gamesmanship, and reducing the caseload for appellate courts. Preservation encourages efficiency by requiring parties to raise objections as soon as possible at the trial level.<sup>36</sup> After all, if a party objects to a court's ruling, the party has given the trial court an opportunity to correct or explain its decision.<sup>37</sup> And, if the trial court disagrees with the objecting party and makes an erroneous ruling, the appellate court benefits from a fully-developed record.<sup>38</sup>

Further, preservation discourages gamesmanship because it prevents a party from saving a critical argument until appeal.<sup>39</sup> In other words, requiring preservation of an issue before it can be raised on appeal requires attorneys to fully litigate a case and create a record for appellate review. Thus, a trial attorney cannot simply hope that, on appeal, an issue will be discovered that will undermine the trial verdict.<sup>40</sup>

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32. *Origins of the Confrontation Clause*, *supra* note 31, at 108.

33. Martineau, *supra* note 13, at 1028.

34. *Id.*

35. See N.Y. CRIM. PROC. LAW § 470.15(6) (1970).

36. Larry Cunningham, *Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the "Interest of Justice,"* 11 J. APP. PRAC. & PROCESS 285, 293 (2010).

37. See generally *Dilliplaine v. Lehigh Valley Tr. Co.*, 322 A.2d 114, 116 (Pa. 1973); see Cunningham, *supra* note 36, at 293.

38. Cunningham, *supra* note 36, at 293.

39. *Id.* at 285-86.

40. See generally *Dilliplaine*, 322 A.2d at 116.

Appellate courts in the United States are overwhelmed with too many cases and not enough judges and staff to review them in a timely manner.<sup>41</sup> The preservation requirement reduces the caseload for appellate courts because it limits the claims that appellate courts can review.<sup>42</sup> Of course, any more time spent by an appellate court on a case delays the consideration of other cases by that court.<sup>43</sup> Even more significantly, while an appellate court reviews an unpreserved claim, a litigant, who has raised a preserved meritorious claim, may be waiting for that same court to review his claim.

Ultimately, requiring litigants to preserve their appellate claims ensures that appellate courts review the issues that litigants raised at trial and “about which there was some disagreement.”<sup>44</sup> The preservation doctrine “thus encourages truth-seeking, the efficient resolution of the case, and the conservation of appellate resources.”<sup>45</sup>

#### IV. New York’s Appellate Process

New York’s appellate system has two-tiers: an intermediate appellate court, referred to as the Appellate Division, and the highest appellate court, the Court of Appeals.<sup>46</sup> In New York, defendants in criminal cases have an

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41. Cunningham, *supra* note 36, at 293; *see generally* Dione Christopher Greene, Note, *The Federal Courts of Appeals, Unpublished Decisions, and the “No-Citation Rule,”* 81 IND. L.J. 1503, 1505-07 (2006) (explaining five factors that contribute to the overburdening of federal courts of appeals: (1) caseload expansion caused by population growth; (2) “new statutory rights[;]” (3) “retention of diversity jurisdiction[;]” (4) crime; and (5) “miscellaneous factors” such as free legal services and more lawyers in general, and noting, in addition, that consequences include an expansion in judicial staff). *See also* Developments and Practice Notes, *Expedited Appeals in Selected State Appellate Courts*, 4 J. APP. PRAC. & PROCESS 191 (2002) (detailing approaches used to combat the “caseload crisis” in appellate courts and characterizing crisis as equally significant in state and federal appellate courts).

42. *See generally In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 360 (3d Cir. 2010) (Weis, J., dissenting); *see* Cunningham, *supra* note 36, at 293.

43. Martineau, *supra* note 13, at 1032.

44. Cunningham, *supra* note 36, at 293; *see* Martineau, *supra* note 13, at 1029-30.

45. Cunningham, *supra* note 36, at 286; *see also* ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* 77 (Thompson/West 3d ed. rev. 2005).

46. Cunningham, *supra* note 36, at 305.



“automatic right to an appeal” to the intermediate appellate courts.<sup>47</sup> However, there is no automatic right to appeal to the Court of Appeals in criminal cases, except in death penalty cases.<sup>48</sup> An appeal to the Court of Appeals is available by permission of a Judge of the Court of Appeals or a Justice of the Appellate Division.<sup>49</sup>

There is another key difference between New York’s intermediate appellate courts and the Court of Appeals. The intermediate appellate courts can review both issues of law and fact, and are permitted to set aside a conviction as “a matter of discretion in the interest of justice.”<sup>50</sup> In contrast, the Court of Appeals cannot review factual questions or set aside a conviction by exercising its discretion; instead, the Court of Appeals can only review questions of law.<sup>51</sup> The New York Court of Appeals is therefore a court of law.<sup>52</sup>

It bears noting that New York allows defendants to raise certain post-conviction claims initially in a trial court; for instance, in New York, if a defendant believes his trial attorney did not provide him with meaningful representation, he can initiate post-conviction proceedings to set aside his conviction by filing a motion to a trial court.<sup>53</sup> In a similar vein, if a defendant learns of newly discovered evidence that exonerates him, he can move to set aside his conviction via a post-conviction proceeding.<sup>54</sup>

## V. New York’s Court of Law

The Court of Appeals became a court of law because of “the clogged calendars and inordinate delays” that the Court had to deal with during its earlier periods when it did not have the same limitations as it does now.<sup>55</sup> “From the time of its

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47. *Id.*

48. KARGER, *supra* note 45, at 5.

49. *Id.* at 5-6.

50. See N.Y. CRIM. PROC. LAW § 470.15(4)-(6) (1970); see also *People v. Michael*, 394 N.E.2d 1134, 1135 (N.Y. 1979); KARGER, *supra* note 45, at 5; Cunningham, *supra* note 36, at 305-06.

51. KARGER, *supra* note 45, at 704-05.

52. *Id.*

53. See N.Y. CRIM. PROC. LAW § 440.10(1)(f) (2015).

54. § 440.10(1)(g).

55. KARGER, *supra* note 45, at 4.

inception in 1847 until comparatively recently, the history of the jurisdiction of the Court of Appeals revolved around its struggle to cope with the demands of a volume of business exceeding its capacity.”<sup>56</sup> In fact, at its inception, the Court of Appeals received a backlog of 1500 pending appeals from its predecessor, the Court for the Correction of Errors.<sup>57</sup> Legislation was enacted in 1848 to limit appeals to the Court of Appeals, but a series of subsequent amendments broadened the scope of the cases that the Court of Appeals could review.<sup>58</sup> Because the Court of Appeals scope of review was broadened, allowing it to review more cases, “the Court was gradually overwhelmed by the volume of appeals.”<sup>59</sup>

Although New York’s Constitution of 1894 rigidly limited the Court to the review of questions of law, it created an exception for criminal capital cases.<sup>60</sup> By the end of the nineteenth century, cases could pend for as long as four years before the Court of Appeals.<sup>61</sup> By 1915, it took two years for a case to be resolved in the Court of Appeals.<sup>62</sup> In 1917, many of the “jurisdictional limitations in effect today” were formulated and put into the Judiciary Article of the State Constitution that was adopted in 1925.<sup>63</sup> Restrictions put in place at that time, as well as “subsequent amendments and statutory changes,” have allowed the Court of Appeals to reduce its backlog of cases.<sup>64</sup> Indeed, during the early part of the twentieth century, the Court of Appeals applied the preservation doctrine strictly; for instance, in *People v. Pindar*,<sup>65</sup> the Court of Appeals went as

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56. *Id.* at 19.

57. *Id.* at 19-20.

58. *Id.* at 20. “The finality requirement is a standard limitation on appealability imposed by many jurisdictions. The doctrine, which is found in civil law, provides that “no appeal as of right or motion for leave to appeal in a civil matter may be entertained . . . unless the judgment or order sought to be appealed from is final determination.” *Id.* at 33-34. The concept of finality was added to the New York State Constitution in 1894, and subsequently codified in CPLR 5611. *Id.* at 36-37.

59. *Id.* at 20.

60. KARGER, *supra* note 45, at 5.

61. *Id.* at 4.

62. *Id.*

63. *Id.*

64. *Id.*

65. *People v. Pindar*, 104 N.E. 133 (N.Y. 1914).

far as to state that defense counsel's objections to a prosecutor's summation did not preserve the claim for appeal because "[t]he law does not contemplate exceptions to the conduct of counsel . . . ." <sup>66</sup>

By 1946, the Code of Criminal Procedure Law 420-a relaxed the state's preservation rules. Specifically, the statute noted that an

exception shall be deemed to have been taken by the party adversely affected to every ruling either before or after the cause is finally submitted, when such party, at the time when the ruling is sought or made, makes known to the court or judge his position thereon by objection or otherwise.<sup>67</sup>

In 1970, and subsequently in 1986, the preservation rule was amended to its current form.<sup>68</sup> Currently, New York defines questions of law in criminal cases as those "preserved for appellate review by appropriate motion, objection or protest in the court of first instance."<sup>69</sup> Specifically, a question of law in criminal cases is "presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity" to change its ruling.<sup>70</sup> Such a protest has been sufficiently raised when the party made its position known to the court "with respect to a [particular] ruling or instruction," or "if in response to a protest by a party, the court expressly decided the question raised on appeal."<sup>71</sup> For the most part, for an error "to present a question of law reviewable by the Court of Appeals . . . the claim . . . [must] have been preserved for appellate review by an appropriate motion,

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66. *Id.* at 135.

67. N.Y. CODE CRIM. PROC. § 420-a (1946) (current version at N.Y. CRIM. PROC. LAW § 470.05(2) (1986)).

68. *See* N.Y. CRIM. PROC. LAW § 470.05 (1986) (original version at ch. 996, § 1 (1970)).

69. KARGER, *supra* note 45, at 704-05.

70. § 470.05(2).

71. *Id.*

objection, protest or other action in the court of first instance.”<sup>72</sup> Over the past 100 years in New York, the statutory definition of preservation has evolved from a hyper-technical definition to a looser, more flexible definition.

The modern Court of Appeals has made clear that an aim of New York’s preservation rule is to emphasize to the parties in a criminal proceeding their responsibility in “calling the attention of the court to errors of law which adversely affect a client [*a*]t a time when such errors are correctible.”<sup>73</sup> Otherwise, the Court of Appeals has explained that, if the lawyers could “sit idly by” as an error was committed and claim that error on appeal, “the State’s fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant.”<sup>74</sup> Thus, in dealing with criminal cases, the Court of Appeals must balance achieving justice in criminal cases while, at the same time, not interpreting the rule of preservation or the Court’s power in such a way that yields inefficiency within the criminal justice system.

## VI. Loosening the Rules of Preservation in New York

Since 2009, the clash between procedural rules and the appellate court’s obligation to do justice has become even more profound in New York. A number of decisions from the Court of Appeals in the past few years indicates that the Court is seeking to loosen the rules of preservation, permitting it to address more cases. Indeed, one judge on the Court of Appeals even went so far as to state that preservation is a mere technicality invoked by prosecutors who have a “well-established tendency to pounce on every arguable imperfection in a defense lawyer’s argument as a barrier to deciding a case on the merits.”<sup>75</sup> In such cases, some judges urge that the “specific objection requirement” of New York’s preservation

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72. KARGER, *supra* note 45, at 746.

73. *People v. Robinson*, 326 N.E.2d 784, 789 (N.Y. 1975) (emphasis added).

74. *People v. Patterson*, 347 N.E.2d 898, 902 (N.Y. 1976).

75. *People v. Beasley*, 946 N.E.2d 166, 169 (N.Y. 2011) (Smith, J., concurring).

doctrine need “not be applied in the overly technical way . . . .”<sup>76</sup>

Recently, in *People v. Finch*, the Court dealt with a defendant who had been arrested on three separate dates within one month, and had successfully appealed to the Court of Appeals his conviction stemming from his third arrest.<sup>77</sup> The majority of the Court of Appeals held that the defendant had preserved an argument for appellate review, even though he made that argument to a judge during his second arrest *before* even committing the crime that was the subject of the appeal.<sup>78</sup>

Two judges dissented in *Finch*. Judge Abdus-Salaam pointed out that the majority’s interpretation of the preservation rule was inconsistent with its previous interpretations of the preservation rule, since the majority appeared to find that defendant had made an objection, despite the fact that he had yet to even commit the disputed crime.<sup>79</sup> Indeed, Judge Abdus-Salaam pointed out that the case illustrated one of the “primary rationales for the preservation doctrine, namely the complete development of the defendant’s claim and the swift determination of guilt or non-guilt,” which “would be undermined were appellate review permitted under such circumstances.”<sup>80</sup> Since the defendant did not make his objection during the proceedings arising from his third arrest, the trial court was “deprived of the opportunity to ‘advanc[e] both the truth-seeking purpose of the trial and the goal of swift and final determination of guilt or nonguilt of . . . defendant.’”<sup>81</sup> Judge Read also dissented, writing that she hoped that the majority’s interpretation of the preservation doctrine was an “adventure in result-oriented decision making,” which “will be looked upon in retrospect as an aberration, not a harbinger.”<sup>82</sup>

In *People v. Albergotti*, the Court of Appeals found that a claim had been preserved by the defense attorney even though the “defendant did not specifically complain to the court” about

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76. *People v. Chestnut*, 973 N.E.2d 697, 700 n.2 (N.Y. 2010).

77. *People v. Finch*, 15 N.E.3d 307, 308-09 (N.Y. 2014).

78. *Id.* at 310-11.

79. *Id.* at 314-15 (Abdus-Salaam, J., dissenting).

80. *Id.* at 320.

81. *Id.* (citing *People v. Hawkins*, 900 N.E.2d 946, 950 (N.Y. 2008)).

82. *Id.* at 328 (Read, J., dissenting).

the grievance that he was arguing at the Court of Appeals.<sup>83</sup> Similarly, in *People v. Chestnut*, the Court of Appeals found a defense argument preserved even though, as the dissent pointed out, the defense's argument to the trial court was based on a different ground than what it argued on appeal.<sup>84</sup>

Still, further evidence indicates that the Court of Appeals has increasingly abandoned procedural restrictions to review the merits of more criminal cases. As noted, in New York, for a defendant to claim that his attorney was ineffective at trial, he generally has to file a post-conviction motion pursuant to CPL 440.10 to a trial court to expand the record so that the trial court can make findings of fact as to whether the trial attorney was ineffective.<sup>85</sup> However, where it is apparent from the record that a trial attorney has been ineffective, such a post-conviction motion is not required for an appellate court to determine whether an attorney was ineffective at trial.<sup>86</sup> From 2009 to 2014, the Court of Appeals dispensed with the CPL 440.10 requirement four times in reversing convictions.<sup>87</sup> From 1999 until 2008, the Court of Appeals dispensed with that requirement only twice.<sup>88</sup>

## VII. Consequences of Loosening Preservation Rules

As noted, a critical argument in favor of the preservation rule is that it promotes efficiency in the appellate system. Indeed, as discussed earlier, in the nineteenth century, the Court of Appeals had a significant backlog of cases.<sup>89</sup> To help reduce the backlog, restrictions were imposed on what the Court of Appeals could review.<sup>90</sup> Further restrictions were imposed by 1925, such as the enactment of a preservation rule,

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83. *People v. Albergotti*, 952 N.E.2d 1010, 1010 (N.Y. 2011).

84. *Chestnut*, 973 N.E.2d at 702-03 (Read, J., dissenting).

85. N.Y. CRIM. PROC. LAW § 440.10 (2012).

86. See *People v. Satterfield*, 488 N.E.2d 834, 836 (N.Y. 1985).

87. See *People v. Clermont*, 999 N.E.2d 1149 (N.Y. 2013); *People v. Oathout*, 989 N.E.2d 936 (N.Y. 2013); *People v. Nesbitt*, 988 N.E.2d 478 (N.Y. 2013); *People v. Fisher*, 967 N.E.2d 676 (N.Y. 2012).

88. *People v. Lewis*, 809 N.E.2d 1106 (N.Y. 2004); *People v. Berroa*, 782 N.E.2d 1148 (N.Y. 2002).

89. KARGER, *supra* note 45, at 20.

90. *Id.* at 4.

since around that time, the Court of Appeals had a two-year backlog of cases.<sup>91</sup>

Unsurprisingly, as the Court of Appeals has loosened its interpretation of the preservation rule, the Court has had to deal with a larger caseload, has taken longer to decide cases, and has issued more decisions. To be sure, it is possible that in the vast majority of cases that the Court of Appeals has recently reviewed, there is a clear question of law. But, as the history of the Court of Appeals has shown, whenever the rules of preservation are relaxed or not strictly enforced, the number of cases that the court deals with sharply increases.

As discussed earlier, prior to the twentieth century, when the Court did not have a strict preservation doctrine, it had an unmanageable caseload and took as long as four years to resolve cases.<sup>92</sup> By 1915, the Court of Appeals had a two-year lag time, and as a result, in 1917, the legislature took action and crafted a strict preservation law to limit the number of criminal cases that the Court of Appeals could review.<sup>93</sup> Thus, the Court should be cautious as to how it interprets the preservation doctrine to avoid repeating the inefficiencies of the past.

Indeed, over the past six years, the Court of Appeals has dealt with a dramatic increase in the number of criminal cases that it deals with, and it takes appreciably longer to decide them. This is especially clear when comparing the period of time from 1998-2003 to 2009-2014.

Year	Average number of days from filing to disposition	Filed Criminal Cases	Decided Criminal Cases
1998 <sup>94</sup>	220	82	74
1999 <sup>95</sup>	230	63	62
2000 <sup>96</sup>	217	68	68
2001 <sup>97</sup>	193	68	42

91. *Id.*

92. *Id.* at 4.

93. *Id.*

94. 1998 N.Y. CT. APP. ANN. REP. at § A(1)-(3).

95. 1999 N.Y. CT. APP. ANN. REP. at § I(B)(1)-(3).

96. 2000 N.Y. CT. APP. ANN. REP. at § I(B)(1)-(3).

2002 <sup>98</sup>	229	60	67
2003 <sup>99</sup>	259	55	46

Between 1998 and 2003, the Court of Appeals, on average, took about 225 days from the filing of a case before deciding it.<sup>100</sup> In that same period, an average of sixty-six cases were submitted to the Court, and on average, about sixty cases were decided by the Court.<sup>101</sup>

The six-year period from 2009 to 2014 stands in stark contrast to the previous six-year period between 1998 and 2003:

Year	Average time from filing to disposition of criminal cases	Filed Criminal Cases	Decided Criminal Cases
2009 <sup>102</sup>	275	102	66
2010 <sup>103</sup>	317	120	99
2011 <sup>104</sup>	375	87	112
2012 <sup>105</sup>	368	105	91
2013 <sup>106</sup>	375	89	111
2014 <sup>107</sup>	403	91	91

During the period from 2009 to 2014, 352 days on average would pass from the date a case was filed until the Court of Appeals decided the case, a difference of 127 days more than from the period from 1998 to 2003.<sup>108</sup> From 2009 to 2014, an average of ninety-nine cases were filed in the Court of Appeals

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97. 2001 N.Y. CT. APP. ANN. REP. at § I(B)(1)-(3).  
98. 2002 N.Y. CT. APP. ANN. REP. at § I(B)(1)-(3).  
99. 2003 N.Y. CT. APP. ANN. REP. at § I(B)(1)-(3).  
100. *See supra* notes 87-92.  
101. *Id.*  
102. 2009 N.Y. CT. APP. ANN. REP. at §§ I(A)(4) and I(B)(1)-(2).  
103. 2010 N.Y. CT. APP. ANN. REP. at §§ I(A)(4) and I(B)(1)-(2).  
104. 2011 N.Y. CT. APP. ANN. REP. at §§ I(A)(4) and I(B)(1)-(2).  
105. 2012 N.Y. CT. APP. ANN. REP. at §§ I(1)(A)(4) and I(B)(1)-(2).  
106. 2013 N.Y. CT. APP. ANN. REP. at §§ I(A)(4) and I(B)(1)-(2).  
107. 2014 N.Y. CT. APP. ANN. REP. at §§ I(A)(4) and I(B)(1)-(2).  
108. *See supra* notes 87-92, 95-107.



each year, an increase of 50 percent from the 1998 to 2003 period.<sup>109</sup> And, from 2009 to 2014, an average of ninety-five criminal cases were decided each year, an increase of 58 percent from the period from 1998 to 2003.<sup>110</sup>

### Conclusion

The New York Court of Appeals' experience demonstrates how difficult it is to place procedural rules on a court handling a criminal matter. Indeed, as this paper illustrates, the New York Court of Appeals, like many other appellate courts that deal with criminal cases, is still struggling to balance justice with efficiency.

In New York, the legislature has made clear that it wants the Court of Appeals to be a court of law and has placed procedural constraints on the legal issues it can review in criminal cases, such as permitting it to review preserved claims.<sup>111</sup> However, the legislature's directive to review only preserved issues of law is at odds with Court of Appeals' decisions in which it corrects errors that are not preserved. Indeed, pure error correction, in the absence of preservation, is the power of the Appellate Division.

Consequently, to circumvent the statutory preservation doctrine in New York, the Court of Appeals has relaxed its interpretation of the rule of preservation so that it can decide the merits of certain cases. Unsurprisingly, the cost of relaxing the preservation doctrine in New York has been that the Court of Appeals now has a heavier caseload and takes longer to decide cases. Not only is the Court less efficient in resolving cases, but those individuals whose attorneys fully litigated a claim, which was incorrectly decided by a judge, have to wait longer to achieve a just result in their cases. As a result, the New York criminal justice system is not as efficient it could be.

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109. *Id.*

110. *Id.*

111. KARGER, *supra* note 45, at 746; see N.Y. CRIM. PROC. LAW § 470.05(2)