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I. Introduction

"The judge, even when he is free, is still not wholly free. . . . He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."[1]

Several years before the United States Supreme Court announced for the first time in *McNabb v. United States*[2] its "supervisory authority over the administration of criminal justice in the federal courts,"[3] Benjamin Cardozo, then-Chief Judge of the New York Court of Appeals, reflected, in dicta, upon the nature and scope of this power.[4] In *People ex rel. Lemon v. Supreme Court*,[5] the court affirmed an order prohibiting the judge in a murder case from requiring the district attorney to disclose to the defense written statements taken from witnesses during the investigation.[6] Cardozo went on to assay "the exist-

1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).
2. 318 U.S. 332 (1943).
3. CARDOZO, *supra* note 1, at 341.
4. The term "supervisory power" has been used by the Supreme Court, lower federal courts, and state courts, to encompass a broad judicial authority over the administration of justice. I am using the term to identify this power in the same fashion that it has been identified by the courts and commentators, notwithstanding criticism that the term is overly simplistic, occasionally misleading, and should be abandoned. *See* Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 COLUM. L. REV. 1433, 1520 (1984); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 214 (1969).

Commentary has centered almost exclusively on the exercise of supervisory power by the federal courts. *See generally* Beale, *supra*; Hill, *supra*; Murray M. Schwartz, *The Exercise of Supervisory Power by the Third Circuit Court of Appeals*, 27 VILL. L. REV. 506 (1982); Henry P. Monaghan, *The Supreme Court 1974 Term — Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); James E. Hogan & Joseph M. Snee, *The "McNabb-Mallory" Rule: Its Rise, Rationale and Rescue*, 47 GEO. L. J. 1 (1958); Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427 (1982); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963). I have been unable to find in the journals any discussion of the exercise by state courts of a supervisory power similar to that exercised by federal courts.
5. 245 N.Y. 24, 156 N.E. 84 (1927).
6. *Id.* at 28, 156 N.E. at 84.

ence of an inherent power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice."[7] Finding "glimmerings of such a doctrine" in earlier common law decisions,[8] but hesitating to "affirm or deny" its existence,[9] he left the battlefield open for some future encounter. He concluded:

> Whether apart from statute and beyond it there is a supervisory jurisdiction, as yet unplumbed and unexhausted, in respect of criminal prosecutions, is something that can best be determined at the call of particular exigencies in the setting of the concrete instance. The courts are properly reluctant to abjure the power in advance, or to confine in predetermined formulas the occasions for its exercise.[10]

Whereas the federal courts since *McNabb* applied supervisory power in hundreds of cases, and in a variety of circumstances,[11] the New York courts have been far more reticent about invoking, or even formulating, a doctrine of supervisory jurisdiction.[12] Cardozo was typically prescient in anticipating this judicial reluctance to recognize a supervisory jurisdiction over criminal prosecutions.[13] Nevertheless, the New York courts have in fact exercised a limited supervisory power over

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7. *Id.* at 32, 156 N.E. at 86.
8. *Id.*
9. *Id.*
10. *Id.*
11. *See* Beale, *supra* note 4, at 1433.
12. *See* discussion *infra* part V. "Jurisdiction is a word of elastic, diverse, and disparate meanings." Lacks v. Lacks, 41 N.Y.2d 71, 74, 359 N.E.2d 384, 388, 390 N.Y.S.2d 875, 877 (1976) (Breitel, C.J.). The term is used in connection with supervisory authority to denote judicial power in its most basic sense. That is the sense, I believe, in which Cardozo used the term in *Lemon*. In this sense, jurisdiction is determined by asking whether a court has the legal power to decide the issue, and whether the court ought to decide it. *See infra* notes 75-111 and accompanying text; *see also* THE FEDERALIST No. 82 (Alexander Hamilton) (describing jurisdiction in terms of judicial power). *But see* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 331-32 (1928) ("It is always important to bear in mind that there is a vital distinction between a Court's jurisdiction and a Court's power."). The questions of judicial power and judicial policy are the dominant themes of this Article.
13. Supervisory power has also been applied in the civil context. *See, e.g.*, Sarac v. Bertash, 148 A.D.2d 436, 538 N.Y.S.2d 588 (2d Dep't 1989) (disallowing testimony of witnesses at trial who failed to appear for depositions); Bankers Trust Co. v. Braten, 101 Misc. 2d 227, 420 N.Y.S.2d 584 (Sup. Ct. N.Y. County 1979) (assignment of single judge to supervise complex litigation); *see also* Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946).

criminal justice and have done so in a manner strikingly similar to the exercise of their traditional common law power to formulate rules of procedure, evidence, and substance.[14]

However, in contrast to the federal courts, the New York courts have never actually formulated a doctrine of supervisory jurisdiction, nor have the courts carefully analyzed the principles underlying the exercise of such power. The decisions most often are guarded, ad hoc, unreasoned, and inconsistent.

This is not surprising. For as the federal cases recognize, and the much more limited New York variants confirm, supervisory power may be perceived as lacking doctrinal stability and criticized as an illegitimate form of judicial overreaching.[15] Indeed, the nature of the doctrine itself accounts for the dearth of legal analysis.

Supervisory power involves a fundamental conflict between the proper allocation of governmental functions, on the one hand, and the achievement of justice on the other.[16] Moreover, as a sub-constitutional common law doctrine designed to enforce civilized standards of procedure and evidence, supervisory power invokes "the spirit of the Constitution,"[17] rather than the text. As such, it becomes a highly useful weapon in the arsenal of judicial power, but a highly vulnerable one as well.

This Article discusses the role of supervisory power in the judicial culture of New York. In order to place supervisory power in a context, Part II outlines the emergence and decline of supervisory power in the federal system. Part III then traces the origin of supervisory power in New York to Cardozo's dictum in *Lemon*. Part IV explains how supervisory power is an

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14. *See infra* notes 119-22 and accompanying text.

15. Much the same criticism is encountered when the Supreme Court interprets the broad language of the Fourteenth Amendment to formulate new constitutional protections. *See* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting); *see also* John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 948-49 (1973). Constitutional theorists would characterize this exercise of judicial power as "noninterpretavism," in the sense that it authorizes judges to go beyond the establishment of norms that are clearly stated or implied in the constitutional text, and seek to enforce norms that cannot be discovered within that text. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 1 (1980).

16. *See* discussion *infra* part V.

17. People v. DeBour, 40 N.Y.2d 210, 217, 352 N.E.2d 562, 567-68, 386 N.Y.S.2d 375, 381 (1976).

aspect of the much broader inherent judicial power, which finds expression in the familiar common law decision-making process. Part V discusses three principal areas in which supervisory power has been exercised by New York courts since Cardozo: formulating rules of discovery, regulating grand jury practice, and fashioning remedies for governmental misconduct. Finally, Part VI demonstrates that supervisory power is a legitimate exercise of judicial authority based on two distinct theories: as a sub-constitutional common law of justice and fair dealing, and as an integral part of the court's inherent common law power to formulate rules for the proper administration of justice.

II. Rise and Fall of Supervisory Power in the Federal Courts

In *McNabb v. United States*,[18] Justice Felix Frankfurter observed that the federal courts have "the duty of establishing and maintaining civilized standards of procedure and evidence" that are broader in scope than protections afforded by the Constitution or statutes.[19] "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts," he wrote, judges should be "guided by considerations of justice not limited to the strict canons of evidentiary relevance."[20] In *McNabb* and its companion case, *Anderson v. United States*,[21] incriminating statements were obtained by the police from suspects who were held incommunicado and interrogated for up to several days until some of them confessed.[22]

Although there was no proof of coercion, nor any suggestion that the defendants' constitutional rights were otherwise infringed, the Court held that this prolonged detention was in "flagrant disregard" of statutory requirements mandating that a person taken into custody be promptly arraigned before a judicial officer.[23] The Court reversed the convictions based on the defendants' admissions.[24] To allow a conviction to stand based

18. 318 U.S. 332 (1943).
19. *Id.* at 340-41.
20. *Id.* at 341.
21. 318 U.S. 350 (1943).
22. *McNabb*, 318 U.S. at 334-38; *Anderson*, 318 U.S. at 352-55.
23. *McNabb*, 318 U.S. at 345.
24. *Id.* at 347.

on unlawfully secured evidence would make "the courts themselves accomplices in willful disobedience of law."[25] Thus, the Court created an exclusionary rule to remedy the government's misconduct — a defendant's confession would be suppressed if it was acquired during a period of unreasonable delay between custody and arraignment.[26]

In the fifty years since *McNabb*, the Supreme Court and the lower federal courts have applied supervisory power in numerous cases.[27] Indeed, the exercise of such power has "become commonplace in every circuit . . . ."[28] Although the source of this power and the circumstances justifying judicial intervention are disputed[29] and barely articulated by the courts, its underlying rationale traditionally has been understood as twofold — to deter governmental misconduct and to preserve judicial integrity.[30] Thus, supervisory power has been invoked by the federal courts to exclude unlawfully obtained evidence,[31] to regulate discovery and disclosure of evidence,[32] to prevent abuse of grand

25. *Id.* at 345. As Professor Hill observed, *McNabb* was properly the subject of "judicial law-making in aid of the fair and efficient operation of the judicial process . . . ." Hill, *supra* note 4, at 198. The defendants were "poorly educated federal prisoners, . . . the confessions were the 'crux' of the government's case," and the conduct of the federal law enforcement officials raised significant doubts as to whether the confessions were trustworthy. *Id.* at 197 (citing *McNabb*, 318 U.S. at 338).

26. *McNabb* was reaffirmed in Mallory v. United States, 354 U.S. 449, 455 (1957) (holding that while certain "[c]ircumstances may justify a brief delay between arrest and arraignment . . . the delay must not be of a nature to give opportunity for the extraction of a confession"). The *McNabb-Mallory* rule, as it came to be known, was heavily criticized by law enforcement officials and members of Congress. Most states refused to adopt the rule. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 428-29 (7th ed. 1990).

27. *See* Burton v. United States, 483 F.2d 1182, 1187-88, *aff'd on reh'g*, 483 F.2d 1190 (9th Cir. 1973) (citing 30 such cases).

28. *See* Beale, *supra* note 4, at 1456.

29. *Compare* Beale, *supra* note 4, at 1520-22 (contending that supervisory power lacks authority in federal law and that the term should be abandoned) *with* Monaghan, *supra* note 4, at 34-38 (contending that supervisory power is an appropriate form of federal common law).

30. United States v. Payner, 447 U.S. 727, 735-36 n.8 (1980).

31. Elkins v. United States, 364 U.S. 206, 223-24 (1960); Mallory v. United States, 354 U.S. 449, 455-56 (1957); McNabb v. United States, 318 U.S. 332, 347 (1943).

32. United States v. Nobles, 422 U.S. 225, 231, 240-41 (1975); Jencks v. United States, 353 U.S. 657, 672 (1957).

jury process and authority,[33] to oversee summary contempt,[34] to require fairness in the jury selection process,[35] to mandate speedy trials,[36] to impose upon prosecutors ethical and professional standards,[37] and to devise sanctions for misconduct by government officials.[38]

However, the federal judicial effort to impose extra-constitutional standards on governmental behavior was controversial and short-lived; the rise and fall of supervisory power resembles a parabolic arc, beginning with *McNabb*, reaching its crest during the tenure of Chief Justice Warren, and then descending precipitously during the Burger and Rehnquist Courts. Several reasons account for the demise of supervisory power in the federal courts. First, supervisory power requires judges to impose on government officials their own "notions of good policy."[39] The federal judiciary has resisted this invitation.[40] Second, supervisory power increasingly has been recognized by federal courts as an unwarranted intrusion into the exclusive domain of a coordinate branch of government, and its exercise a violation of separation of powers principles.[41] Finally, once supervisory

33. United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983); United States v. Samango, 607 F.2d 877, 885 (9th Cir. 1979); *In re* Grand Jury Proceedings, 507 F.2d 963, 964 n.2 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975); United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972).

34. Offutt v. United States, 348 U.S. 11, 13-18 (1954).

35. Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976); Marshall v. United States, 360 U.S. 310, 312-13 (1959).

36. Wallace v. Kern, 499 F.2d 1345, 1349-51 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975).

37. United States v. Hale, 422 U.S. 171, 181 (1975); Mesarosh v. United States, 352 U.S. 1, 14 (1956).

38. United States v. Cortina, 630 F.2d 1207, 1214-17 (7th Cir. 1980); United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974).

39. Fay v. New York, 332 U.S. 261, 287 (1947).

40. United States v. Russell, 411 U.S. 423, 435 (1973) (holding that the decisions of lower federal courts concerning law enforcement practices "introduce[ ] an unmanageably subjective standard"); United States v. Simpson, 927 F.2d 1088, 1090, 1091 (9th Cir. 1991) ("The supervisory power simply does not give the courts the authority to make up the rules as they go, imposing limits on the executive according to whim or will.").

41. *Russell*, 411 U.S. at 435 ("The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government."); *Simpson*, 927 F.2d at 1091 ("The doctrine of separation of powers requires judicial respect for the independence of the prosecutor.").

power became subservient to harmless error analysis,[42] this power became largely irrelevant.[43]

One commentator has traced the philosophical basis for supervisory power to the dissenting opinions of Justice Brandeis in several early entrapment cases.[44] Interestingly, the decline of supervisory power can be attributed to a more recent entrapment case, *United States v. Russell*.[45] There, the Supreme Court reinstated a drug conviction that had been reversed by the court of appeals for excessive governmental involvement in the crime.[46] Undercover agents had participated in the manufacture of illegal drugs by supplying an essential chemical to the drug ring.[47] Whereas Justice Brandeis saw the judiciary as having a role to deny aid to governmental lawbreaking[48] "in order to maintain respect for law" and "to preserve the judicial process from contamination,"[49] Justice Rehnquist, in *Russell*, warned the federal judiciary against exercising a " 'chancellor's foot' veto over law enforcement practices of which it did not approve."[50] Such judicial intervention, Rehnquist commented pointedly, "unnecessarily introduces an unmanageably subjective standard," and violates the principle of separation of powers.[51] Thus, governmental investigative conduct would be immune from judicial supervision unless that conduct implicates an independent constitutional right, or "is so outrageous

42. Bank of Nova Scotia v. United States, 487 U.S. 250, 254-56 (1988); United States v. Hasting, 461 U.S. 499, 510-12 (1983).

43. The most recent application of supervisory power by the Supreme Court was Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987), holding that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order. *Id.* at 808-09. The case dealt with a blatant conflict of interest by an attorney and did not address misconduct by prosecutors generally. *Id.* at 809-14.

44. Beale, *supra* note 4, at 1443.

45. 411 U.S. 423 (1973).

46. *Id.* at 436.

47. *Id.* at 425-26.

48. Olmstead v. United States, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting); *see also* Casey v. United States, 276 U.S. 413, 423-24 (1928) (Brandeis, J., dissenting).

49. *Olmstead*, 277 U.S. at 484 (Brandeis, J., dissenting).

50. *Russell*, 411 U.S. at 435.

51. *Id.*

that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[52]

Federal supervisory power was further eroded in *United States v. Payner*,[53] where the Court exempted from judicial supervision flagrant governmental illegality that actually violates individual rights.[54] *Payner* involved an admittedly illegal police search and seizure of documents found in a third party's briefcase that incriminated the defendant.[55] The district court, invoking its supervisory power, held that society's interest in deterring governmental conduct that "knowingly and purposefully" and in "bad faith hostility" to the Constitution violated a person's rights required suppression of the resulting evidence.[56] The Supreme Court reversed.[57] Under a Brandeis rational, sanctioning such behavior "breeds contempt for law," and "declare[s] that in the administration of the criminal law the end justifies the means."[58] The modern Court, however, looked to other societal values that needed to be accommodated, particularly the interest in presenting reliable evidence of guilt to the factfinder.[59] Seen in this way, *Payner* establishes a broad limitation on supervisory power; it subordinates the interests of de-

52. *Id.* at 431-432. The Court's opinion cited Rochin v. California, 342 U.S. 165 (1952), as authority for this rule. *Rochin* is the seminal case illustrating the due process limits on law enforcement investigative tactics. In *Rochin*, the Supreme Court found that the police officers' use of a stomach pump to force two capsules of a narcotic drug from the defendant's stomach offended due process. *Id.* at 166, 174. The Court, in a classic opinion by Justice Frankfurter, reversed Rochin's state court conviction, declaring: "This is conduct that shocks the conscience." *Id.* at 172. In Hampton v. United States, 425 U.S. 484 (1976), a majority of the Court would allow a due process defense only in extreme cases of governmental misconduct. *Id.* at 489-91. The concurring opinion of Justice Powell referred to Judge Henry Friendly's statement that it would be "unthinkable . . . to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums." *Id.* at 493 n.4 (Powell, J., concurring) (quoting United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973)).

53. 447 U.S. 727 (1980).

54. *Id.* at 734-37.

55. *Id.* at 729-30.

56. United States v. Payner, 434 F. Supp. 113, 130, 133-35 (N.D. Ohio 1977), *aff'd per curiam*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980).

57. *Payner*, 447 U.S. at 736-37.

58. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

59. *Payner*, 447 U.S. at 735 ("[S]upervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.").

terring illegal conduct and preserving judicial integrity to the interest in accurate guilt-determinations.

This overriding interest in ensuring accurate judgments was reaffirmed in two subsequent supervisory power cases — *United States v. Hasting*[60] and *Bank of Nova Scotia v. United States*.[61] In *Hasting*, the Seventh Circuit reversed kidnapping convictions on the ground that the prosecutor's summation infringed upon the defendants' Fifth Amendment privileges, in direct violation of repeated and explicit admonitions by the circuit court against such misconduct.[62] The court of appeals sought to vindicate the interests that the supervisory power doctrine historically was designed to address — deterring governmental overreaching and preserving judicial integrity — by refusing to require a finding of prejudice.[63] The Supreme Court reversed, holding that supervisory power could not be used to censure governmental misconduct without first determining whether the defendant was prejudiced by that conduct.[64] Supervisory power, in other words, could not trump the harmless error rule.[65]

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60. 461 U.S. 499 (1983).

61. 487 U.S. 250 (1988).

62. United States v. Hasting, 660 F.2d 301, 303 (7th Cir. 1981).

63. *Id.*

64. *Hasting*, 461 U.S. at 505-06, 512. The "harmless-error rule . . . may not be avoided by an assertion of supervisory power . . . ." *Id.* at 505.

65. A federal appellate court following *Hasting* could not use its supervisory power prophylactically to reverse a conviction based on prosecutorial misconduct unless that misconduct was sufficiently harmful that it prejudiced the defendant's right to a fair trial. Of course, if such misconduct was harmful, there would be no need to invoke supervisory power in the first place, since the misconduct would violate the Constitution.

Hasting, however, is not applicable in state proceedings, and some state appellate courts have exercised their supervisory power to reverse convictions for prosecutorial misconduct that did not necessarily prejudice the defense. *See* State v. Fullwood, 484 A.2d 435, 442 (Conn. 1984) ("This court, nonetheless, has supervisory power to vacate a judgment of conviction and to order a new trial to deter prosecutorial misconduct which, while not so egregious as to deprive the defendant of a fair trial, is 'unduly offensive to the maintenance of a sound judicial process.' ") (citations omitted); State v. Salitros, 499 N.W.2d 815, 820 (Minn. 1993) ("This power to reverse prophylactically or in the interests of justice comes from our power to supervise the trial courts.").

The more common state court approach is expressed in State v. Valdez, 770 P.2d 313, 318 (Ariz. 1989) ("Where there has been misconduct but no error, or the error is harmless, or when a defendant has failed to object to a nonfundamental

Bank of Nova Scotia paralleled *Hasting*, but in the context of a grand jury proceeding. The district court found that the prosecutor engaged in serious misconduct that undermined the grand jury's independence.[66] Using its supervisory authority, the court dismissed the indictment.[67] Further delimiting the scope of supervisory power, the Supreme Court ruled that the lower court had exceeded its power.[68] The Court held that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry . . . ."[69] Consistent with *Hasting*, the Court asserted that prejudice to the defendant is the linchpin for invoking supervisory power, and that absent such harm, no foul would be found.[70]

Finally, and most recently, in *United States v. Williams*,[71] the Court ruled that supervisory power could not be invoked to remedy prosecutorial misconduct that involved withholding substantial exculpatory evidence from the grand jury.[72] The

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error, the proper remedy is generally not reversal but affirmance followed by appropriate sanctions against the offending actor.") (citations omitted).

The New York courts have not used their supervisory power to reverse convictions prophylactically for prosecutorial misconduct. The courts will reverse convictions based on prosecutorial misconduct only when the misconduct is harmful. *See* People v. Galloway, 54 N.Y.2d 396, 401, 430 N.E.2d 885, 887-88, 446 N.Y.S.2d 9, 12 (1981). However, the courts' articulation of the standard varies. *See* People v. Halm, 81 N.Y.2d 819, 821, 611 N.E.2d 281, 282, 595 N.Y.S.2d 380, 381 (1993) (prosecutor's remarks were not prejudicial error); People v. DeJesus, 42 N.Y.2d 519, 369 N.E.2d 752, 399 N.Y.S.2d 196 (1977) (prosecutor's remarks were prejudicial error); People v. Ashwal, 39 N.Y.2d 105, 109-11, 347 N.E.2d 564, 566-68, 383 N.Y.S.2d 204, 206-208 (1976) (prosecutor's remarks deprived defendant of right to fair trial); People v. Damon, 24 N.Y.2d 256, 260, 247 N.E.2d 651, 653, 299 N.Y.S.2d 830, 833 (1969) (prosecutor's summation "clearly improper" and prejudiced jury); People v. Lombardi, 20 N.Y.2d 266, 273, 229 N.E.2d 206, 210, 282 N.Y.S.2d 519, 523 (1967) (prosecutor's remarks exceeded fair limits of advocacy and were prejudicial to defendant as a matter of law); People v. Rosa, 108 A.D.2d 531, 489 N.Y.S.2d 722 (1st Dep't 1985) (prosecutor's egregious conduct denied defendant a fair trial).

66. United States v. Kilpatrick, 594 F. Supp. 1324, 1328, 1331, 1336, 1339, 1343 (D. Colo. 1984) (finding that the prosecutor had improperly deputized agents of the Internal Revenue Service as "agent[s] of the grand jury," flaunted secrecy provisions, misused grants of immunity, improperly introduced summaries of testimony, mistreated witnesses, and made inflammatory and prejudicial comments).

67. *Id.* at 1353.

68. *Bank of Nova Scotia*, 487 U.S. at 255.

69. *Id.* at 254.

70. *Id.* at 255-56.

71. 112 S. Ct. 1735 (1992).

72. *Id.* at 1745-46. The defendant was investigated by the grand jury for supplying banks with knowingly false financial statements of his current assets for

Court wrote: "Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such 'supervisory' judicial authority exists."[73] *Williams* broadened considerably the limitation on supervisory power with respect to the prosecutor's grand jury conduct fashioned in *Bank of Nova Scotia*. The Court in *Bank of Nova Scotia* assumed that if the prosecutor's conduct was sufficiently prejudicial, dismissal of the indictment as a matter of supervisory power would be warranted. *Williams* declared that only in those "few" instances where the prosecutor's conduct is circumscribed by specific statutes or rules do courts have any supervisory power to remedy misconduct.[74]

III. New York's Recognition of Supervisory Power

The proposition that a New York court possesses a power akin to the federal supervisory power can be traced to *People ex rel. Lemon v. Supreme Court*.[75] There, an Orange County grand jury indicted the defendant for poisoning her husband with the help of an accomplice who had furnished the arsenic.[76] Provided to the defendant in advance of trial were the transcripts of the grand jury testimony of: 1) the accomplice who claimed to have provided the defendant with the poison, 2) the physicians who had examined the contents of the stomach, and 3) the other witnesses with respect to cause of death.[77] Not satisfied with this disclosure, the defendant sought an order from the judge at Special Term requiring the District Attorney to disclose to the defense written statements made by various witnesses that

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the purpose of obtaining loans. *Id.* at 1737. The indictment was dismissed because the prosecutor had withheld from the grand jury the defendant's general ledgers and tax returns, and defendant's testimony in a contemporaneous Chapter 11 bankruptcy proceeding, which evidence purportedly would have demonstrated that the defendant had not intentionally misled the banks. *Id.* at 1737-38.

73. *Id.* at 1742.

74. *Id.* at 1741.

75. 245 N.Y. 24, 156 N.E. 84 (1927).

76. *Id.* at 26, 156 N.E. at 84.

77. *Id.* at 26-27, 156 N.E. at 84. Such disclosure would not be authorized today. *See* N.Y. CRIM. PROC. LAW § 210.30(3) (McKinney Supp. 1994); *see also In re* Jaffe v. Scheinman, 47 N.Y.2d 188, 390 N.E.2d 1165, 417 N.Y.S.2d 241 (1979).

were taken during interviews with the District Attorney or his assistants.[78]

The order was granted, and it further provided that if the prosecutor failed to disclose any of the requested items, he would be "precluded from giving proof on the trial herein of any facts referred to in any of said documents which he is hereby directed to file and does not file."[79] The District Attorney sought a writ of prohibition in the appellate division to prohibit the lower court from enforcing its discovery order. The appellate division granted the petition.[80] Permission was granted to allow the Court of Appeals to review the prohibition.[81]

Since an order of prohibition tests the exercise of official power[82] — in this case the power of a court to order the prosecutor to disclose in advance of a criminal trial written statements and reports that he had acquired during the criminal investigation — Cardozo traced the origin and scope of the judicial power to order inspection and discovery. Common law courts originally lacked any power to order discovery.[83] To correct this defect, courts of equity intervened by framing for the first time the

78. *Lemon*, 245 N.Y. at 27, 156 N.E. at 84.

79. *Id.* at 27-28, 156 N.E. at 84.

80. People *ex rel.* Lemon v. Supreme Court, 218 A.D. 852, 219 N.Y.S. 892 (2d Dep't 1926).

81. *Lemon*, 245 N.Y. at 28, 156 N.E. at 84.

82. At the time of *Lemon*, the writ was codified in section 1341 of the Civil Practice Act. The current version is contained in CPLR Article 78. The writ is a principal means to test a claim of excessive judicial power. It has been used to challenge a court's exercise of supervisory power. *See In re* Holtzman v. Goldman, 71 N.Y.2d 564, 523 N.E.2d 297, 528 N.Y.S.2d 21 (1988): *In re* State v. King, 36 N.Y.2d 59, 324 N.E.2d 351, 364 N.Y.S.2d 879 (1975); Proskin v. County Court, 30 N.Y.2d 15, 280 N.E.2d 875, 330 N.Y.S.2d 44 (1972). For useful discussions of the history and scope of the writ, see Harold W. Wolfram, *The "Ancient and Just" Writ of Prohibition in New York*, 52 COLUM. L. REV. 334 (1952), and Note, *The Writ of Prohibition in New York — Attempt to Circumscribe an Elusive Concept*, 50 ST. JOHN'S L. REV. 76 (1975).

83. Carpenter v. Winn, 221 U.S. 533, 539 (1911); McQuigan v. Delaware, L. & W. R.R., 129 N.Y. 50, 54, 29 N.E. 235, 236 (1891). The extent to which the New York courts relied on English common law is a "particularly complex" subject. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 110 (2d ed. 1985). Some early New York statutes "declared the common law in force," and "re-enacted some British laws"; other statutes declared that no British statutes should be considered as laws in New York. *Id.* The Constitution of 1821 stated that "[s]uch parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony" on Apr. 19, 1775, and the resolutions of the colonial Congress, "and of the convention of the State of New York," in force on

remedies of discovery and inspection.[84] These equitable remedies, however, involved a "separate" and "ancillary" lawsuit and were, therefore, "awkward and unwieldy."[85] Accordingly, statutes were enacted as early as 1830 authorizing, to a limited extent, discovery and inspection that the equity courts had created.[86] Despite this legislative "usurpation" of the judicial prerogative,[87] the statutory remedies were well received and indeed were expanded in successive codes of civil procedure.[88] Nevertheless, even in civil litigation, the statutory jurisdiction was limited.[89] Documents were not subject to inspection "for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered. Documents to be subject to inspection must be evidence themselves."[90]

Turning to criminal cases, Cardozo described an "even more restricted" judicial power.[91] There are opinions that deny courts any power whatever to order discovery in criminal cases,

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Apr. 20, 1777, "would continue to be law, unless altered or repealed, and unless they were 'repugnant' to the constitution." *Id.* at 111.

84. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1484 (12th ed. 1877):

> One of the defects in the administration of justice in the courts of common law arises from their want of power to compel a complete discovery of the material facts in controversy by the oaths of the parties in the suit. And hence (as we have seen), one of the most important and extensive sources of the jurisdiction of courts of equity is their power to compel parties, upon proper proceedings, to make every such discovery.

Id. at 728.

85. *Lemon*, 245 N.Y. at 28, 156 N.E. at 84-85.

86. 2 N.Y. REV. STAT. 199, Part III, ch. 1, tit. 3, §§ 21, 22.

87. *McQuigan*, 129 N.Y. at 55, 29 N.E. at 236.

88. *Lemon*, 245 N.Y. at 28, 156 N.E. at 85; *see* Code of Civil Procedure, ch. 448, §§ 342, 803, 1876 (2) N.Y. Laws 1, 152 (repealed 1920); Civil Practice Act, ch. 925, § 324, 1920 (4) N.Y. Laws 19, 124 (repealed 1962).

89. *Lemon*, 245 N.Y. at 28-29, 156 N.E. at 85.

90. *Id.* at 29, 156 N.E. at 85.

91. *Id.* Cardozo has been criticized for ignoring statutory reforms in mid-nineteenth England that broadened a defendant's access to discovery materials. *See* Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 295 (1960). Statutes allowed defendants the right to be present at preliminary hearings, to cross-examine witnesses, to call witnesses of their own, and to inspect and receive copies of depositions taken in preliminary hearings. *Id.* In addition, no witness could be called at trial unless he was examined at a preliminary hearing. *Id.* This rule, according to Wigmore, "is required by fairness to an innocent accused," and "is a question of [judicial] policy, not of [judicial] power." 6 JOHN H. WIGMORE, EVIDENCE § 1850, at 509 (Chadbourn rev. 1976).

Cardozo observed, while other decisions appear to authorize discovery of documents "that are the subject of the charge."[92] Still other courts "concede or assume a broader jurisdiction, one adequate to prevent a failure of justice, yet narrower than discovery in equity or under the statutory substitute."[93] However, even conceding this latter power to order discovery in furtherance of justice, Cardozo stated that "[n]owhere has there been a suggestion that the jurisdiction can properly be extended to notes or memoranda in the possession of the prosecutor, but inadmissible as evidence either for prosecution or for defense."[94]

Cardozo buttressed this assertion by citing *Rex v. Holland*,[95] as his "point of departure."[96] *Holland*, decided by the King's Bench in 1792, denied a defendant charged with peculation and corruption in East India the opportunity to inspect in advance of trial a report issued by a British board of inquiry after it had interviewed witnesses.[97] This report would have been inadmissible in evidence for the prosecution or defense.[98] Although inspection of the report would have enabled the defendant to better prepare his case for trial, Lord Kenyon rejected out of hand the discovery application:

> Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law. . . . And if we were to assume a discretionary power of granting this request, it would be dangerous in the extreme, and totally unfounded on precedent.[99]

Later cases allowed discovery where the document was the basis of the charge,[100] or itself would have been received in evidence.[101] Cardozo also alluded to two other United States' cases which suggested that inspection should be granted where "a

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92. *Lemon*, 245 N.Y. at 29, 156 N.E. at 85.

93. *Id.*

94. *Id. See* 8 JOHN H. WIGMORE, EVIDENCE, § 2224, at 219-20 (3d ed. McNaughton rev. 1940).

95. 100 Eng. Rep. 1248 (K.B. 1792).

96. *Lemon*, 245 N.Y. at 29, 156 N.E. at 85 (citing Rex v. Holland, 100 Eng. Rep. 1248 (K.B. 1792)).

97. *Holland*, 100 Eng. Rep. at 1250.

98. *Lemon*, 245 N.Y. at 30, 156 N.E. at 85.

99. *Holland*, 100 Eng. Rep. at 1249-50.

100. Rex v. Harrie, 172 Eng. Rep. 1165 (N.P. 1833).

101. Regina v. Dorr, 3 Cox Crim. Cas. 221 (Cent. Crim. Ct. 1848).

failure of justice may result from its suppression."[102] Both cases involved inspection of physical evidence such as body parts, weapons or other exhibits in the possession of the prosecutor.[103] Cardozo thus recognized a "kinship" between the power to compel inspection "in furtherance of justice" and the "assumption of a supervisory jurisdiction over the acts of public prosecutors."[104] However, Cardozo noted that there is a danger in reading too much into this "furtherance of justice" concept, particularly when it encroaches upon the power of a coordinate branch of government.[105] Distinguishable, Cardozo observed, are cases that suggest an inherent judicial power to permit inspection of grand jury minutes, or to compel the service of a bill of particulars.[106]

These decisions reflect remedial devices worked out at common law to correct uncertainties in pleadings; they have no relation to the power to compel the prosecutor to disclose his proof.[107] The latter common law power derives from the activities of the Chancellor, "who was careful, none the less, with all his injunctions and discoveries, to hold aloof from interference with prosecutions by the Crown."[108] Cardozo further stated: "The supervisory control, whatever it may be, that belongs to courts of common law in respect of a criminal prosecution, is an autochthonous growth, a thing evolving from within. It was not

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102. *Lemon*, 245 N.Y. at 30, 156 N.E. at 85 (citing People v. Gerold, 107 N.E. 165 (Ill. 1914) and Commonwealth v. Jordan, 93 N.E. 809 (Mass.), *aff'd*, 225 U.S. 167 (1911)).

103. *Id.*

104. *Lemon*, 245 N.Y. at 30-31, 156 N.E. at 85-86 (citing Weeks v. United States, 232 U.S. 383 (1914)). In *Weeks*, the Supreme Court fashioned an exclusionary remedy for violations of the fourth amendment committed by federal law enforcement officers. *Weeks*, 232 U.S. at 398. Cardozo may have believed that the exclusionary rule announced in *Weeks* was an exercise of supervisory authority. In a later decision, the Supreme Court ruled that the exclusionary rule of *Weeks* was constitutionally-based. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

105. *Lemon*, 245 N.Y. at 31, 156 N.E. at 86. Cardozo was probably expressing the restrictive American view of judicial power, which holds that our judges do not exercise a power traditionally exercised by English judges of constraining the executive branch by common law rules, subject to the ultimate authority of the legislature. As Professor Hill notes, "Ultimate authority here resides in written constitutions, which are thought to have settled the prerogatives of the several branches of the government." Hill, *supra* note 4, at 208.

106. *Lemon*, 245 N.Y. at 30, 156 N.E. at 85.

107. *Id.* at 30, 156 N.E. at 85.

108. *Id.* at 31-32, 156 N.E. at 86.

forced upon them from without under pressure of the Chancery."[109] Cardozo concluded his discussion of supervisory power with the passage quoted in the introduction.[110] Needless to say, the court affirmed the order of prohibition.[111]

IV. Inherent Judicial Power

As the preceding discussion suggests, supervisory power can be understood as an attribute of a much broader inherent judicial power. Defining or categorizing this inherent power has posed for the courts a "vexing problem."[112] Inherent power finds expression in a variety of areas in which the courts historically have exercised an authority not derived from any written text, such as a constitution or a statute.[113] These areas have included the power to regulate the practice of law,[114] deal with matters of court budget,[115] administer courtroom facilities and

109. *Id.* at 32, 156 N.E. at 86.

110. *See supra* note 10 and accompanying text.

111. *Lemon*, 245 N.Y. at 35, 156 N.E. at 87.

112. *In re* Kisloff v. Covington, 73 N.Y.2d 445, 450, 539 N.E.2d 565, 568, 541 N.Y.S.2d 737, 740 (1989); *see also* Gabrelian v. Gabrelian, 108 A.D.2d 445, 451, 489 N.Y.S.2d 914, 920 (2d Dep't 1985) ("[T]he inherent power, is, by its very nature, not susceptible to precise definition.") Historically, inherent power resides only in New York courts of superior jurisdiction, *i.e.*, courts of record, and not in inferior courts. *Gabrelian*, 108 A.D.2d at 448 n.1, 489 N.Y.S.2d at 918 n.1. The State Constitution specifically enumerates the courts of record, and authorizes the creation of "such other courts as the legislature may determine shall be courts of record." N.Y. CONST. art. 6, § 1(b); *see* N.Y. JUD. LAW § 2 (McKinney 1994) (courts of record are the court for the trial of impeachments, the court on the judiciary, the court of appeals, the appellate division of the supreme court, the supreme court, the court of claims, the county court, the family court, the surrogate's court, the city courts, the district courts, and the civil and criminal courts of New York City).

113. *See* sources cited *infra* notes 114-22.

114. *See* Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991); *In re* Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981); *In re* Bar Assoc. of New York, 222 A.D. 580, 227 N.Y.S. 1 (1st Dep't 1928); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2.1 (1986); Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525 (1983). *But see* A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1, 503 N.E.2d 681, 511 N.Y.S.2d 216 (1986) (court has no inherent power to impose monetary sanctions against attorney for frivilous litigation).

115. *See* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa.), *cert. denied*, 402 U.S. 974 (1971); Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994); Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972).

personnel,[116] control court records and files,[117] calendar cases and dismiss actions for nonprosecution,[118] and establish substantive,[119] evidentiary,[120] and procedural[121] rules to resolve dis-

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116. *See* State v. Davis, 68 P. 689 (Nev. 1902); *In re* Spike, 99 Misc. 2d 178, 415 N.Y.S.2d 762 (Yates County Ct. 1979); *In re* People v. Little, 89 Misc. 2d 742, 392 N.Y.S.2d 831 (Yates County Ct.), *aff'd*, 60 A.D.2d 797, 400 N.Y.S.2d 615 (4th Dep't 1977); *In re* Courtroom & Offices of Fifth Branch Circuit Court, 134 N.W. 490 (Wis. 1912); Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635 (1935).

117. *See* Nixon v. Warner Communication, Inc., 435 U.S. 589 (1978); *In re* Lockett v. Juviler, 65 N.Y.2d 182, 480 N.E.2d 378, 490 N.Y.S.2d 764 (1985); *In re* Campbell v. Pesce, 60 N.Y.2d 165, 456 N.E.2d 806, 468 N.Y.S.2d 865 (1983); Dorothy D. v. New York City Prob. Dep't, 49 N.Y.2d 212, 400 N.E.2d 1342, 424 N.Y.S.2d 890 (1980); People *ex rel.* Hirschberg v. Orange County Court, 271 N.Y. 151, 2 N.E.2d 521 (1936); People *ex rel.* Doe v. Beaudoin, 102 A.D.2d 359, 478 N.Y.S.2d 84 (3d Dep't 1984).

118. *See* Link v. Wabash R.R., 370 U.S. 626 (1962); Grisi v. Shainswit, 119 A.D.2d 418, 507 N.Y.S.2d 155 (1st Dep't 1986); Plachte v. Bancroft, 3 A.D.2d 437, 161 N.Y.S.2d 892 (1st Dep't 1957). *But see In re* Holtzman v. Goldman, 71 N.Y.2d 564, 523 N.E.2d 297, 528 N.Y.S.2d 21 (1988); Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969).

119. Bing v. Thunig, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957) (Fuld, J.):

> The rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded. To the suggestion that *stare decisis* compels us to perpetuate it until the legislature acts, a ready answer is at hand. It was intended, not to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it.

Id.; *see also* Hymowitz v. Lilly Co., 73 N.Y.2d 487, 507, 539 N.E.2d 1069, 1075, 541 N.Y.S.2d 941, 947 (1989) ("[T]he ever-evolving dictates of justice and fairness, which are at the heart of our common-law system, require formulation of a remedy for injuries caused by DES.").

120. Fleury v. Edwards, 14 N.Y.2d 334, 341, 200 N.E.2d 550, 554, 251 N.Y.S.2d 647, 653 (1964) (Fuld, J., concurring):

> The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding functions of the courts in civil cases.

Id.; *see In re* Brown v. Ristich, 36 N.Y.2d 183, 325 N.E.2d 533, 366 N.Y.S.2d 116 (1975) (allowing unsworn testimony to be received in administrative proceedings).

121. Riglander v. Star Co., 98 A.D. 101, 104-05, 90 N.Y.S. 772, 774-75 (1st Dep't 1904), *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905):

> One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions, has been the right to control its order of business and

putes between parties.[122] This latter aspect of inherent power is immediately recognizable as the dominant feature of the traditional common lawmaking process, where courts in the context of a case or controversy, mold, modify, or discard rules found to be unsatisfactory, or promulgate new rules when deemed necessary.[123] The formulation of substantive, procedural, and remedial rules is a familiar, and treacherous, judicial function.[124] The process is interpretive, interstitial, and incremental. It is admittedly "legislative,"[125] but its operation pur-

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to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs . . . The courts are not the puppets of the Legislature. They are an independent branch of the government, as necessary and powerful in their sphere as either of the other great divisions. And while the Legislature has the power to alter and regulate the proceedings in law and equity, it can only exercise such power in that respect as it has heretofore exercised; and it has never before attempted to deprive the courts of that judicial discretion which they have always been accustomed to exercise.

Id.

122. *See, e.g.*, Hanna v. Mitchell, 202 A.D. 504, 196 N.Y.S. 43 (1st Dep't 1922), *aff'd*, 235 N.Y. 534, 139 N.E. 724 (1923); Riglander v. Star Co., 98 A.D. 101, 90 N.Y.S. 772 (1st Dep't 1904), *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. L.Q. 459 (1937).

123. The early New York courts, in the absence of a state constitutional Bill of Rights, employed the common law to protect individual rights. *See, e.g.*, People v. Goodwin, 18 Johns. 187, 201 (1820) ("the principle [double jeopardy] is a sound and fundamental one of the common law"). The nature and extent of judicial lawmaking power is one of the classic subjects of legal philosophy. *See generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); CARDOZO, *supra* note 1; Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749 (1965); Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990).

124. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 533-34 (1898):

> But even without legislation, the judges have great power over the subject, direct as well as indirect. A system which mainly came into life at their hands and has been constantly moulded by them, by way of administering procedure, they can also largely reshape and recast, if they will. But no court should enter upon this task that is not sure of its ground, that does not pretty well understand the history, nature, and scope of the existing rules, and see pretty clearly where it means to come out.

Id.

125. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

portedly is circumscribed by "consecrated principles."[126] The relationship between judicial and legislative power is a timeless topic of legal discourse, and a central theme of supervisory power.[127]

It is in relation to this aspect of inherent judicial power — the common law adjudicative process — that supervisory power can be understood as an independent doctrine.[128] As the federal

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126. CARDOZO, *supra* note 1, at 141.

127. Cardozo described that relationship as "conflicted" rather than cooperative:

> Today courts and legislatures work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.

Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921).

For a much more recent commentary describing the tension over whether evidence rules should be created by judges or legislators, see Barbara C. Salken, *To Codify or Not to Codify — That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992).

Since 1881, when the New York State Legislature codified criminal procedure, there has never been any serious movement to abolish or control legislative power over criminal procedure. *See The Rule-Making Power in New York*, FIFTH ANN. REP. N.Y. JUD. COUNCIL 271, 275 (1939). However, there have been serious efforts to amend Article VI of the state constitution to limit in civil cases the legislature's authority "to alter and regulate the jurisdiction and proceedings in law and equity that it has heretofore exercised." *Id.* Although the legislature possesses the constitutional authority to regulate civil procedure, the legislature is constitutionally empowered to delegate authority to the courts to regulate practice and procedure. N.Y. CONST. art. VI, § 30. An example of such delegation is contained in N.Y. JUD. LAW § 85 (McKinney 1994) (delegation of rule-making powers to appellate divisions).

128. It is important to distinguish between inherent power as part of the common law adjudicative process, and inherent power to regulate court-related matters apart from the merits of the lawsuit. The exercise of inherent power in the latter situation raises concerns similar to the exercise of supervisory power. Thus, New York courts have invoked inherent power to protect the integrity of judgments. *See In re* Kisloff v. Covington, 73 N.Y.2d 445, 539 N.E.2d 565, 541 N.Y.S.2d 737 (1989); *In re* Lockett v. Juviler, 65 N.Y.2d 182, 480 N.E.2d 378, 490 N.Y.S.2d 764 (1985); People v. Carter, 63 N.Y.2d 530, 473 N.E.2d 6, 483 N.Y.S.2d 654 (1984). The New York courts have also invoked inherent power to protect the dig-

cases suggest,[129] supervisory power ordinarily is exercised when there are gaps in the law[130] — when neither constitutional, statutory, nor common law rules exist to cover the particular case — and where some compelling reason, typically expressed as justice, fairness, social welfare, or public policy also exists to persuade the judge to decide the case accordingly.

To be sure, policy considerations animate every judge, and, in that regard, supervisory power may be no less subjective than the common law process generally. However, when invoking supervisory power, the judge's authority does not rest upon any statute or other written declaration of popular will. Nor is

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nity of the court. *See In re* Holtzman v. Goldman, 71 N.Y.2d 564, 523 N.E.2d 297, 528 N.Y.S.2d 21 (1988); People v. Douglass, 60 N.Y.2d 194, 456 N.E.2d 1179, 469 N.Y.S.2d 56 (1983); People v. Wingard, 33 N.Y.2d 192, 306 N.E.2d 402, 351 N.Y.S.2d 385 (1973) (dismissal of information as matter of discretion when neither prosecutor nor police officer opened for trial).

As with supervisory power, these cases are themselves controversial because they offer scant analysis and produce few guiding principles. Thus, New York courts have no inherent power to dismiss an indictment where the prosecutor refuses or is unable to proceed despite admonitions from the court, *In re* Holtzman v. Goldman, 71 N.Y.2d 564, 523 N.E.2d 297, 528 N.Y.S.2d 21 (1988), to set aside a verdict of guilty following a bench trial, People v. Carter, 63 N.Y.2d 530, 473 N.E.2d 6, 483 N.Y.S.2d 654 (1984), or to vacate after sentence a guilty plea to correct a mutual mistake by all parties, *In re* Kisloff v. Covington, 73 N.Y.2d 445, 539 N.E.2d 565, 541 N.Y.S.2d 737 (1989).

Despite the absence of a statute directly covering the matter, courts in such cases are found to be exercising a power not specifically conferred by the legislature, acting in an extra-judicial capacity after the case has been terminated, or usurping the power of a co-equal branch of government. In essence, it is regarded as bad public policy to allow the inferior courts to exercise the foregoing inherent powers. *See In re* Kisloff v. Covington, 73 N.Y.2d 445, 539 N.E.2d 565, 541 N.Y.S.2d 737 (1989); *In re* Lockett v. Juviler, 65 N.Y.2d 182, 480 N.E.2d 378, 490 N.Y.S.2d 764 (1985); People v. Carter, 63 N.Y.2d 530, 473 N.E.2d 6, 483 N.Y.S.2d 483 (1984).

129. *See* cases cited *supra* notes 31-38.

130. Judicial power to fill legislative gaps is viewed either as a form of statutory interpretation or common lawmaking. *See* CARDOZO, *supra* note 1, at 70 ("In every case, without exception, it is the business of the court to supply what the statute omits, but always by means of an interpretive function."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421-22 (1989) (gap-filling is neither an embarrassment nor a usurpation but an inevitable part of interpretation); *see also* Daniel R. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375 (1992) (discussing the various and occasionally inconsistent approaches of the Supreme Court to gap-filling). The Supreme Court has expressed a general reluctance to draw inferences from Congressional silence, and fills statutory gaps based on doctrinal and policy considerations. *See* Brecht v. Abrahamson, 113 S. Ct. 1710, 1719 (1993).

the judge functioning in a distinctly interpretative mode, which routinely occurs when the judge finds that a positive rule covers the subject, and then proceeds to define and apply the rule. The judge who invokes supervisory power is creating a new rule based on considerations of justice, fundamental fairness, and civilized standards of decency.[131]

Although the common law approach also may involve fashioning a new rule, either procedural, evidentiary, or substantive,[132] the rule is formulated in the context of adjudicating the rights of the parties before the court and enables the court to decide that discrete controversy. For example, judges have formulated procedural rules governing the examination of witnesses[133] and the taking of guilty pleas;[134] evidentiary rules creating hearsay exceptions[135] and testimonial privileges;[136] and substantive rules expanding tort liability.[137] Supervisory power, by contrast, typically has been invoked in situations that

131. Inferior courts that invoke supervisory power are creating a rule for that particular case. Superior courts, such as the New York Court of Appeals, are formulating a rule for general application by inferior courts to all similar cases. The term "supervisory power" is therefore more apt when referring to the rulings of superior courts.

132. *See supra* notes 119-21.

133. People v. Sandoval, 34 N.Y.2d 371, 378, 314 N.E.2d 413, 418, 357 N.Y.S.2d 849, 856 (1974) (stating that a court ruling should be guided by "its discretion and in the interests of justice," and should be informed by "the vitality and sagacity of the common law process").

134. People v. Selikoff, 35 N.Y.2d 227, 243, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 638 (1974) (emphasizing the "role of the court in overseeing and supervising the delicate balancing of public and private interests in the process of plea bargaining").

135. People v. Brown, 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993); Fleury v. Edwards, 14 N.Y.2d 334, 200 N.E.2d 550, 251 N.Y.S.2d 647 (1964). *But see* Loschiavo v. Port Authority, 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983) (refusing to change "well-settled, albeit widely criticized" hearsay rule dealing with an agent's admissions and deferring such change to legislature).

136. People v. Ramistella, 306 N.Y. 379, 118 N.E. 566 (1954); People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936); Bacon v. Frisbie, 80 N.Y. 394 (1880).

137. Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957). There is no similar common law power with respect to criminal liability. *See* People v. Fein, 292 N.Y. 10, 14, 53 N.E.2d 374, 376 (1944) ("Long ago in this State '. . . the abolition of all common-law crimes was accomplished . . . .' No act committed within this jurisdiction is criminal except as prescribed by statute.") (citations omitted).

are independent of the actual controversy, such as pre-trial discovery,[138] grand jury proceedings,[139] and police investigations.[140]

To be sure, judicial review of such matters may have procedural and evidentiary consequences that can affect the ultimate disposition of the case. However, the impact of such review transcends the actual controversy, and imposes behavioral norms on a coordinate branch of government, in addition to directly affecting the rights of the litigants before the court. Moreover, whereas a principal purpose of the common law process is to resolve the dispute between the private litigants,[141] the dominant purpose of supervisory power is to formulate standards of proper conduct for public officials, typically prosecutors, police, and other law enforcement personnel.[142] Thus, as Professor Hill observed, judges who exercise supervisory power "seem to regard the conferring of public benefit as incidental to withholding judicial favor or protecting the judiciary from unsavory involvement."[143]

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138. *See infra* notes 145-222 and accompanying text.

139. *See infra* notes 223-336 and accompanying text.

140. *See infra* notes 337-91 and accompanying text.

141. *See* Kansas v. Colorado, 206 U.S. 46, 97 (1907) ("For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.").

Chancellor James Kent described the common law as "those principles, usages, and rules of action, applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 470 (4th ed. 1840).

There are two principal functions of the judicial decision. The first function is to decide the private controversy. The second function is to declare the law for future controversies. These functions have a reciprocal influence that recall the saying that "hard cases make bad law." *See* Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 940 (1923). When exercising supervisory power, a judge presumably is aware of this conflict, but, as a matter of justice and sound public policy, has decided that the function of deciding the particular case is outweighed by the function of articulating standards of proper governmental conduct for the future.

142. The concept of supervisory power assumes that the court has a special responsibility when one of the parties is the government. The types of harm that government can inflict on private citizens is different from the types of harm that private citizens can inflict on one another, and thus occasions the need for special prophylactic measures, which is the essence of supervisory power. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 408-09 (1971) (Harlan, J., concurring).

143. Hill, *supra* note 4, at 207-08.

V. Application of Supervisory Power in New York

Based on notions of fundamental fairness and justice, and in the absence of any constitutional or statutory mandate, the New York courts have resorted to supervisory power in a variety of contexts. The three principal areas in which supervisory power has been employed involve (1) formulating rules of discovery and inspection; (2) circumscribing prosecutorial conduct in the grand jury; and (3) fashioning remedies for governmental misconduct.[144]

A. *Formulating Rules of Discovery*

Discovery is an appropriate subject for judicial supervision. To the extent that our adversary system is capable of providing an effective mechanism for arriving at the truth about a controversy, it presupposes the ability of each party to the dispute to have access to information relevant to the case.[145] However, because of its inherently contentious character, the adversary system often resembles a game of "blind man's bluff"[146] rather than a disinterested search for the truth.[147] To function rationally and fairly in the face of built-in obstacles to truth,[148] the adversary system requires the intervention of an impartial arbiter to oversee the process by which the parties attempt to obtain, control, or withhold information relevant to the case. The problems of information acquisition and retention can become particularly troublesome in criminal litigation, where the prosecutor, because of his institutional role in the data-gathering process, has far greater access to information than the defendant, as

144. Other instances of the exercise of supervisory power include, *inter alia*, punishment for contempt, *In re* Douglas v. Adel, 269 N.Y. 144, 199 N.E. 35 (1935), closure of the courtroom, People v. Jelke, 308 N.Y. 56, 123 N.E. 769 (1954), and protecting jurors from pretrial publicity, People v. Mordino, 58 A.D.2d 197, 396 N.Y.S.2d 737 (4th Dep't 1977).

145. Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 228 (1964).

146. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).

147. *See generally* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U. L.Q. 279.

148. These obstacles include limited defense resources, statutory and doctrinal rules that restrict a defendant's ability to acquire relevant information about the case, and prosecutorial suppression of evidence favorable to the defense. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 449-50 (1992).

well as the ability and incentive to withhold evidence capable of proving a defendant's innocence.[149] Moreover, criminal discovery has never favored defendants. The traditional resistance to providing discovery to an accused stems from a fear that it would create for the accused an unfair advantage, since the prosecutor could not similarly compel production from the defendant,[150] as well as a concern that a defendant would misuse discovery by tampering with witnesses or suborning perjury.[151]

Despite strong resistance, however, criminal discovery has been marked by a liberalizing trend over the past half century. Constitutional[152] and statutory[153] rules of discovery and disclosure have made substantial inroads into the limited opportunities for criminal discovery that existed at common law.[154] Nevertheless, gaps in the discovery process remain. There often exists no constitutional or statutory rule to cover these "gaps," but a compelling argument can be made that nondisclosure will substantially affect, and possibly even distort, the accuracy and fairness of the truth-finding process.[155] It is in these

149. *See* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987).

150. 8 J. WIGMORE, EVIDENCE § 2224, at 219-20 (McNaughton Rev. 1940).

151. *See* State v. Tune, 98 A.2d 881 (N.J. 1953):

> In criminal proceedings long experience has taught the courts that . . . the criminal defendant who is informed of the names of all the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime.

Id. at 884 (Vanderbilt, C.J.); *see also* Edward S. Dennis, Jr., *The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 WASH. U. L.Q. 63 (1990).

152. *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967) (holding that compulsory process clause guarantees defendant right to summon witnesses); Brady v. Maryland, 373 U.S. 83 (1963) (stating that due process clause requires prosecutor to disclose exculpatory evidence).

153. *See, e.g.*, FED. R. CRIM. P. 16; N.Y. CRIM. PROC. LAW § 240.20 (McKinney 1993).

154. *See* People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

155. *See, e.g.*, Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (documenting that 350 innocent persons were convicted of capital murders, that 23 of those persons were executed with 22 narrowly winning reprieves, and that a significant number of these cases involved claims of prosecutorial suppression of evidence); *see also* Bennett L.

situations that the New York courts, through their supervisory power, have formulated rules of discovery based on principles of "fundamental fairness"[156] and "a right sense of justice."[157]

1. *"A Right Sense of Justice"*

As noted above, *Lemon* recognized an inherent supervisory power in New York courts to fashion rules of discovery in criminal cases.[158] The scope of this power, and the circumstances of its use, were not identified by the *Lemon* court. However, Judge Cardozo's tacit invitation to the judiciary to exercise supervisory power was explicitly accepted by the court six years later in *People v. Walsh*.[159] There, a prosecution witness in a murder case testified that he had been interviewed and had given a statement to the District Attorney.[160] Defense counsel requested the court to compel the prosecutor to produce the statement for use in cross-examination of the witness.[161] The trial court denied defense counsel's request on the ground that no rule required production.[162]

The Court of Appeals disagreed. It held that in some circumstances, fairness to the accused,[163] and "a right sense of jus-

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Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 PACE L. REV. 257 (1989) (discussing a film maker's graphic portrayal of the distorting effects of prosecutorial misconduct on the fact-finding process in a capital murder case).

156. *See* N.Y. CRIM. PROC. LAW § 240.10 commentary at 216 (McKinney 1993).

157. People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883 213 N.Y.S.2d 448, 450 (1961).

158. *Lemon*, 245 N.Y. at 32, 156 N.E. at 86; *see supra* notes 75-111 and accompanying text.

159. 262 N.Y. 140, 186 N.E. 422 (1933).

160. *Id.* at 149, 186 N.E. at 425.

161. *Id.* Plainly, the context was different than in *Lemon*; the request for the statement was made during the trial after the witness had testified, rather than pretrial, where no particular exigency would have supported disclosure. It thus could not be argued with the same force as in *Lemon* that the defense attorney was embarking on a general fishing expedition rather than seeking documents that, through impeachment by showing inconsistencies, could materially assist the fact-finder in determining the witness's credibility and thereby produce a more just result. *See supra* notes 76-79 and accompanying text.

162. *Walsh*, 262 N.Y. at 149, 186 N.E. at 425.

163. *Id.* at 150, 186 N.E. at 425. "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons." *Id.* (quoting People v. Davis, 18 N.W. 362, 363 (Mich. 1884)).

tice,"[164] require disclosure of such statements. The court thus created a new rule of discovery: "[W]here a witness in a criminal case testifies to having made such a statement, and the statement is in court and an inspection of it by the presiding judge reveals contradictory matter, its use for cross-examination on the question of credibility may and usually should be permitted."[165] The court qualified this holding by conceding to the prosecutor a limited privilege; where judicial inspection determines that publication would be "prejudicial to the public interest," the statement is protected, and disclosure is unauthorized.[166]

The *Walsh* rule, an early instance of the use of supervisory power, purported to strike a balance between according fairness to an accused and protecting the interests of the prosecutor in having to divulge confidential material. The rule represented a compromise between the principal goal of supervisory power to "further[ ] . . . justice,"[167] and a recognition, understood by the Chancellor and the common law courts, that invoking supervisory power represents a breach in the doctrine of separation of powers, through judicial intervention into the traditional prerogatives of the prosecutor to withhold confidential documents from disclosure.[168]

Although broadening a defendant's access to relevant information, the *Walsh* rule may be seen as an uneasy accommodation between promoting justice and usurping power for several reasons: it disallows inspection unless the judge concludes that a contradiction appears between the witness's testimony and the prior statement; it disallows inspection if the prosecutor can make a sufficient showing of the need for confidentiality; and it offers a confusing standard to the lower courts as to whether disclosure is mandated unless the prosecutor can establish either "strong reasons otherwise,"[169] or nondisclosure is required unless the defendant can establish that the statement is

164. *Walsh*, 262 N.Y. at 150, 186 N.E. at 425.

165. *Id.* at 149-50, 186 N.E. at 425.

166. *Id.* at 150, 186 N.E. at 425.

167. *Lemon*, 245 N.Y. at 30-31, 156 N.E. at 85-86.

168. *See supra* note 83 and accompanying text.

169. *Walsh*, 262 N.Y. at 150, 186 N.E. at 425.

"favorable to the defendant" and that "a right sense of justice demands that it should be available."[170]

In any event, despite the absence of legislation, and in a context that historically resisted the intervention of common law, the Court of Appeals in *Walsh* invoked its supervisory power to produce a rule that represented an important innovation towards more equitable criminal discovery and, ultimately, a fairer trial. Nonetheless, the decision was apparently a limited one, and in the general context of criminal discovery, seemingly an isolated deviation.[171] Indeed, it is difficult to find over the next several decades any further enunciation of the New York courts' reliance on supervisory power to formulate additional rules of discovery and inspection. Nevertheless, the New York courts were presumably aware of important changes taking place in discovery doctrine, both in the federal system and in the rules of sister states.[172]

Most significantly, in a landmark case involving the exercise of its supervisory power, the Supreme Court, in *Jencks v. United States*,[173] held that a defendant is entitled to inspect government reports of interviews with witnesses without any need to establish a preliminary showing that the witness's testimony is at variance with prior statements given to law enforcement.[174] The Court declared: "Justice requires no less."[175] It reasoned:

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170. *Id.*

171. *See* sources cited *infra* note 172.

172. Rule 16 of the Federal Rules of Criminal Procedure was passed in 1946, allowing a defendant, upon a showing of materiality, to inspect a broad array of documents in the government's possession. *See* JAMES W. MOORE, MOORE'S FEDERAL PRACTICE RULES, at 200-01 (1989). Many state court judges, in the exercise of their discretion, were allowing broad pretrial discovery. *See generally* Fletcher, *supra* note 91. Examples of such instances were: allowing defendants to inspect confessions previously given to the police, Powell v. Superior Court, 312 P.2d 698 (Cal. 1957), allowing defendants to inspect physical evidence, such as clothing taken from the victim, DiJoseph Petition, 145 A.2d 187 (Pa. 1958), or weapons or bullet fragments, State *ex rel.* Mahoney v. Superior Court, 275 P.2d 887 (Ariz. 1954), allowing defendants to analyze bloodstains or perform other scientific tests upon physical evidence in the hands of the police or prosecutor, State *ex rel.* Sadler v. Lackey, 319 P.2d 610 (Okla. Crim. App. 1957), and allowing defendants to obtain copies of reports of scientific analyses prepared by law enforcement, Walker v. Superior Court, 317 P.2d 130 (Cal. App. 1957).

173. 353 U.S. 657 (1957).

174. *Jencks*, 353 U.S. at 666.

> The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . . ."[176]

2. "Rosario" *Rule and Judicial Expansion of Discovery*

The new rule fashioned by the Supreme Court in *Jencks* was quickly codified by Congress;[177] its impact on New York's criminal procedure was dramatic. The so-called "*Jencks* rule" was adopted by the New York Court of Appeals in 1961 in its own landmark decision, *People v. Rosario*.[178] The court held that "a right sense of justice" requires a prosecutor to deliver to the defense "forthwith" any prior statements of a witness that relate to the subject matter of the witness's testimony.[179] Discarding the *Walsh* rule, the court pointed out that contradictions that can be used to discredit a witness "are certainly not as apparent to the impartial presiding judge as to single-

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175. *Id.* at 669. Writing for the Court, Justice Brennan elaborated upon the truth-finding interests that are served by allowing defense counsel unimpeded access to a witness's prior statements for whatever impeachment value the attorney deems appropriate:

> Every experienced trial judge and lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Id. at 667. The Court "disapproved" of the practice, sanctioned by cases such as *Walsh*, of directing the trial judge to inspect the documents in advance to determine variance, relevancy, and materiality. *Id.* at 669.

The Court acknowledged the prosecution's legitimate interest in safeguarding the privacy of its files, particularly when the documents were obtained in confidence. *Id.* at 670. However, citing United States v. Reynolds, 345 U.S. 1 (1953), a case in which the government also resisted disclosure by relying on the so-called military secrets privilege, the Court firmly stated that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." *Jencks*, 353 U.S. at 671 (citing *Reynolds*, 345 U.S. at 12).

176. *Id.*

177. 18 U.S.C. § 3500 (1988).

178. 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

179. *Id.* at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450.

minded counsel for the accused . . . ."[180] The court did not articulate the source of its power, nor did it refer to Cardozo's theory of an inherent judicial power to supervise criminal prosecutions.[181]

The court's failure to explain the source of its authority to formulate a rule of criminal discovery highlights the difficulty a court faces, both doctrinally and prudentially, when it goes beyond the conventional parameters of judicial review.[182] Perhaps the court simply assumed that it was functioning in the traditional common law mode and merely revising its prior *Walsh* rule. Perhaps the issue of the court's jurisdiction either never occurred to the litigants or the court, or did not seem especially important. Or perhaps the court simply decided to obscure the issue of judicial power in the shadowy rhetoric of justice and public policy.

To be sure, the court did acknowledge that its ruling "turns largely on policy considerations" and "a right sense of justice."[183] The court also elaborated on the policy considerations, thereby seeking to demonstrate that its rule was not an aberrant exercise of power but a sound innovation to ensure fair trials.[184]

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180. *Id.* at 290, 173 N.E.2d at 883, 213 N.Y.S.2d at 451.

181. *See supra* notes 91-111 and accompanying text.

182. Similar doctrinal and prudential concerns are currently dividing the Court of Appeals as it attempts to formulate appropriate standards for determining when to invoke the State Constitution to provide greater protection of individual rights than those provided by the United States Constitution. *Compare* People v. Scott, 79 N.Y.2d 474, 503, 593 N.E.2d 1328, 1346, 583 N.Y.S.2d 920, 938 (1992) (Kaye, J., concurring) ("Perhaps more than any other issue, the State constitutional law cases over the past decade have seemed to fracture the Court.") *with id.* at 515, 593 N.E.2d at 1354, 583 N.Y.S.2d at 946 (Bellacosa, J., dissenting) (deploring "calamitous consequences in economics and crimes which will be visited on New York because of the Court's indifference to the jurisprudential and practical benefits of Federal and State uniformity."). Additionally, *compare* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987) (advocating state independence in constitutional decision making) *with* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) (arguing that state constitutional law is a "vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements").

183. *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450.

184. *Id.* at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450. The court observed that pretrial statements are valuable not merely as a source of contradictions, but are useful to demonstrate the witness' bias, or provide the defense with other information to neutralize damaging testimony, stating: "Shades of meaning, stress, additions or omissions may be found which will place the witness' answers upon direct examination in an entirely different light." *Id.*

However, as an instance of the use of supervisory power to further justice, the court did not attempt to explain how the "right sense of justice" espoused by *Walsh* several years earlier could be reconciled with the more expansive "right sense of justice" announced in *Rosario*.[185]

In subsequent decisions, the court attempted to elaborate on the rationale for the *Rosario* rule. In *People v. Jackson*,[186] the court implied, but never stated as explicitly as Justice Frankfurter had for the Supreme Court in *McNabb v. United States*,[187] that it has the power to incorporate its notions of justice and fundamental fairness into a formal rule of procedure or evidence.[188] The court declared that *Rosario* "is not based on the Federal or State Constitution. It is, in essence, a discovery rule, based on a deeply held belief that simple fairness requires the defendant to be supplied with prosecution reports and statements that could conceivably aid in the defense's cross-examination of prosecution witnesses."[189]

Rosario was followed by several cases in which the New York courts, on an ad hoc basis, broadly extended criminal discovery. Some of these rulings were expressly based on the courts' exercise of discretion;[190] others were grounded on the

185. *Id.* The court probably could have done so. It could have explained that times had changed, and that the concept of justice evolves; that criminal discovery had expanded nationally, and in some contexts even been constitutionalized; that defense counsel could be trusted to use the information responsibly and not to embark on fishing expeditions; that prosecutors had become more adept at concealing exculpatory material or increasingly engaging in systematic efforts to thwart the rights of defendants. The court said none of this; it simply asserted that "upon further study and reflection," the new rule should be adopted. *Id.*

186. 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991).

187. 318 U.S. 332 (1943); *see supra* text accompanying notes 18-26.

188. *Jackson*, 78 N.Y.2d at 644, 585 N.E.2d at 799-800, 578 N.Y.S.2d at 487.

189. *Id.* at 644, 585 N.E.2d at 799, 578 N.Y.S.2d at 487. The court's supervisory authority over *Rosario* violations also includes situations in which disclosure has been delayed, or in which the material has been lost or destroyed. Delayed disclosure requires the court to determine whether the defendant has been substantially prejudiced by the delay. People v. Ranghelle, 69 N.Y.2d 56, 63, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986). The court in cases of lost or destroyed material is empowered to devise appropriate sanctions against the government to remedy the loss. People v. Martinez, 71 N.Y.2d 937, 940, 524 N.E.2d 134, 136, 528 N.Y.S.2d 813, 815 (1988).

190. People v. White, 40 N.Y.2d 797, 358 N.E.2d 1031, 390 N.Y.S.2d 405 (1976); People v. Remaley, 26 N.Y.2d 427, 259 N.E.2d 901, 311 N.Y.S.2d 473 (1970); People v. Lynch, 23 N.Y.2d 262, 244 N.E.2d 29, 296 N.Y.S.2d 327 (1968); People v. Guzman, 79 Misc. 2d 668, 361 N.Y.S.2d 238 (Sup. Ct. Kings County

courts' exercise of a supervisory authority,[191] occasionally referring to Cardozo's dictum in *Lemon*.[192] Several of these decisions predated New York's first discovery statute; the legislature did not enact a comprehensive discovery law until 1971.[193] Other decisions, notably a decision by the Court of Appeals,[194] formulated rules that enlarged the scope of discovery in detailed ways that were not provided for by the legislature. Thus, in the absence of legislation, the courts allowed the defense the right to make independent tests of physical evidence;[195] to examine the defendant's own statements;[196] to ascertain the identity and prior statements of witnesses;[197] to inspect hospital records;[198] and to inspect autopsy reports.[199] These rulings can be viewed either as legitimate expressions of an inherent supervisory

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1974); People v. Powell, 49 Misc. 2d 624, 268 N.Y.S.2d 380 (Sup. Ct. Richmond County 1965); People v. Courtney, 40 Misc. 2d 541, 243 N.Y.S.2d 457 (Sup. Ct. N.Y. County 1963); People v. Karpeles, 146 Misc. 2d 53, 549 N.Y.S.2d 903 (Crim. Ct. Richmond County 1989).

191. People v. Collins, 75 Misc. 2d 535, 348 N.Y.S.2d 99 (Nassau County Ct. 1973); People v. Innes, 69 Misc. 2d 429, 326 N.Y.S.2d 669 (Westchester County Ct. 1971); People v. Seaman, 64 Misc. 2d 684, 315 N.Y.S.2d 743 (Dist. Ct. Suffolk County 1970); People v. North, 96 Misc. 2d 637, 409 N.Y.S.2d 482 (Amherst Town Ct. 1978).

192. People v. Courtney, 40 Misc. 2d 541, 543, 243 N.Y.S.2d 457, 459 (Sup. Ct. N.Y. County 1963); People v. Utley, 77 Misc. 2d 86, 97, 353 N.Y.S.2d 301, 315 (Nassau County Ct. 1974); People v. Innes, 69 Misc. 2d 429, 430, 326 N.Y.S.2d 669, 671 (Westchester County Ct. 1971); People v. Preston, 13 Misc. 2d 802, 803-04, 176 N.Y.S.2d 542, 546 (Kings County Ct. 1958).

193. N.Y. CRIM. PROC. LAW § 240 (McKinney 1993). A court has the power to take "appropriate action" for failure to comply with an order of discovery. *Id.* § 240.70(1) (McKinney 1993). Such action could include dismissal of the charges. *See* People v. Szychwlda, 57 N.Y.2d 719, 440 N.E.2d 790, 454 N.Y.S.2d 705 (1982).

194. People v. White, 40 N.Y.2d 797, 358 N.E.2d 1031, 390 N.Y.S.2d 405 (1976) (authorizing pretrial right of defendant to conduct independent tests as to weight and composition of drugs).

195. People v. White, 40 N.Y.2d 797, 358 N.E.2d 1031, 390 N.Y.S.2d 405 (1976); People v. Karpales, 146 Misc. 2d 53, 549 N.Y.S.2d 903 (N.Y.C. Crim. Ct. Richmond County 1989).

196. People v. Remaley, 26 N.Y.2d 427, 259 N.E.2d 901, 311 N.Y.S.2d 473 (1970); People v. Utley, 77 Misc. 2d 86, 353 N.Y.S.2d 301 (Nassau County Ct. 1974).

197. People v. Lynch, 23 N.Y.2d 262, 244 N.E.2d 29, 296 N.Y.S.2d 327 (1968); *In re* Aspland v. Judges of the County Court, 42 A.D.2d 930 (2d Dep't 1973); People v. Guzman, 79 Misc. 2d 668, 361 N.Y.S.2d 238 (Sup. Ct. Kings Co. 1974).

198. People v. Preston, 13 Misc. 2d 802, 176 N.Y.S.2d 542 (Kings County Ct. 1958).

199. People v. Courtney, 40 Misc. 2d 541, 243 N.Y.S.2d 457 (Sup. Ct. N.Y. County 1963).

power described by Cardozo,[200] or as an exercise of an authority that is of questionable legitimacy. Interestingly, the cases and commentary almost always focus on the merits of the rulings, rather than on the source of the power, or the legitimacy of its exercise.[201] In short, although grounded upon supervisory power never specifically articulated, *Rosario* has been one of the most durable decisions of the Court of Appeals.[202]

3. *Mandating, and Restricting, Rule of Automatic Reversal*

In *People v. Consolazio*,[203] the Court of Appeals announced a new rule of appellate reversal for *Rosario* violations. The court ruled that harmless-error analysis was inappropriate for *Rosario* violations;[204] a *per se* rule of automatic reversal was declared.[205] *Consolazio* is a curious decision.[206] The court simply

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200. *See supra* notes 91-111 and accompanying text.

201. The courts occasionally have refused to fill legislative gaps either on the ground that the legislature intended to cover the field exclusively, or that judicial intervention would constitute an improper arrogation of judicial power. *See, e.g.*, People v. Moselle, 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982) (no power to take blood samples without court order although no statute specifically covers the subject).

202. People v. Banch, 80 N.Y.2d 610, 615, 608 N.E.2d 1069, 1071, 593 N.Y.S.2d 491, 493 (1992). *Rosario* has been codified in N.Y. CRIM. PROC. LAW § 240.45(1) (McKinney 1993). In addition to the provisions in *Rosario*, the statute also provides for reciprocal discovery by the prosecution of written or recorded statements by persons other than the defendant. N.Y. CRIM. PROC. LAW § 240.45(2) (McKinney & Supp. 1993).

203. 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976).

204. Ironically, the discovery violation in *Rosario* — the failure of the trial judge to allow the defense to inspect the prior statements of witnesses — was now considered harmless under New York's legislatively-mandated harmless error rule. Code of Criminal Procedure, ch. 442, § 542, 1881 (2) N.Y. Laws 1 (current version at N.Y. CRIM. PROC. LAW § 470.05(1) (McKinney 1993)). The judgment of conviction and sentence of death in *Rosario* were affirmed. *Rosario*, 9 N.Y.2d at 293, 173 N.E.2d at 885, 213 N.Y.S.2d at 453. Several cases decided shortly after *Rosario* also applied the statutory harmless error rule to preserve convictions despite *Rosario* violations. *See, e.g.*, People v. Hernandez, 10 N.Y.2d 774, 177 N.E.2d 56, 219 N.Y.S.2d 617 (1961).

205. *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66. "We thus reject arguments that consideration of the significance of the content or substance of a witness' prior statements can result in a finding of harmless error." *Id.*

206. The case is commonly cited for the rule that *Rosario* is not violated when the prosecutor provides the defense with statements that are the "duplicative equivalent" of the non-disclosed statements.

asserted, without analysis or explanation, that the traditional, statutory harmless error test should be abandoned with regard to *Rosario* violations.[207]

The court did not explain the source of its power to override the statutory mandate. Only in subsequent opinions did the court offer a rationale for its adoption of a rule of *per se* reversal.[208] For example, in one of these subsequent opinions, the court justified this departure from the *Rosario* rule on the ground that it is impossible to quantify, short of outright speculation, the degree of damage that is inflicted on the defendant's case when defense counsel is deprived of cross-examination material.[209] In that case, the court recognized the windfall it was giving to the defense; adopting a *per se* reversal rule "afforded the defendant's cross-examination rights even greater protection," even if the prosecutor's violation was inadvertent or the material was trivial.[210]

Apart from its merits, *Consolazio* is a remarkable example of judicial power. The court created a prophylactic *per se* reversal rule, seemingly in contravention of the statutory mandate, to protect another rule that originally was created not through the traditional operation of common law-making, but through the court's exercise of an unacknowledged and unexplained inherent power to achieve justice. Even more remarkable is the absence of any principled discussion in any of the decisions, save for a few oblique allusions, of the legitimacy of the exercise of that power. The court apparently assumed either that its exercise of power was within the bounds of legitimacy, or that even if its exercise approached the outer edges of those boundaries, the overriding soundness of the result in terms of justice and public policy would be sufficient to insulate it from attack for judicial activism and arrogation of power.

Finally, the scope of the court's supervisory power in the discovery context figured prominently, but silently, in *People v.*

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207. *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66; *see also* N.Y. CRIM. PROC. LAW § 470.05(1) (McKinney 1993), which states "[a]n appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties."

208. *See, e.g.*, People v. Jackson, 78 N.Y.2d 638, 643-45, 585 N.E.2d 795, 798-99, 578 N.Y.S.2d 483, 486-87 (1991).

209. *Id.* at 643-44, 585 N.E.2d at 798-99, 578 N.Y.S.2d at 486-87.

210. *Id.* at 644, 585 N.E.2d at 799, 578 N.Y.S.2d at 487.

Jackson.[211] There, a majority of four judges of the Court of Appeals declared that *Rosario*'s *per se* reversal rule does not apply to claims raised collaterally pursuant to section 440.10 of New York's Criminal Procedure Law after the defendant's direct appeals have been exhausted.[212] Once again, the supervisory power rhetoric of fairness, justice, and public policy permeated the opinion.[213] However, the debate between the majority and the three dissenters concerned the soundness and consistency of the new restrictive rule.[214] This debate, important as it was, largely obscured the equally fundamental question concerning the source of the court's power to formulate a discovery rule in the first place. Rather, the debate focused on the *per se* rule of reversal and resulted in the court's adopting a new rule of prejudice for claims raised collaterally after the appellate process was completed.[215]

The majority attempted to place its decision within the traditional boundaries of the common law process of statutory interpretation grounded on public policy, but it employed the rhetoric of supervisory power.[216] The majority, it seems, was trying to strike a balance between a responsible exercise of supervisory power as reflected in the *Rosario-Consolazio* rule, and an even broader supervisory ruling that could be attacked as excessive and irresponsible. It acknowledged that *Rosario* was a nonconstitutional exercise of judicial power to achieve justice, and that the *per se* reversal rule was a judicial creation to achieve the purposes of *Rosario*.[217]

Having established *Rosario* as doctrinally sound, the majority went on to observe that there are statutory as well as prudential limitations that counsel against extending *Rosario*'s per se reversal rule to collateral attacks.[218] Section 440.10 does not

211. 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991).

212. *Id.* at 641, 585 N.E.2d at 802, 578 N.Y.S.2d at 490.

213. The words "fair" or "fairness" are used 13 times; the word "policy" 30 times; and the phrase "right sense of justice" four times.

214. *Jackson*, 78 N.Y.2d at 647-48, 650-51, 585 N.E.2d at 801-04, 578 N.Y.S.2d at 489-92.

215. *Id.*

216. *Id.*

217. *Id.* at 644-45, 585 N.E.2d at 798-99, 578 N.Y.S.2d at 486-87.

218. *Id.* at 645-46, 585 N.E.2d at 799-800, 578 N.Y.S.2d at 487-89. The majority's attempt to justify its result on the basis of statutory construction is questionable. The majority asserted that "the Legislature has already spoken" in requiring

contain any language specifically dealing with *Rosario* violations. Notwithstanding the absence of this language, the court assumed that *Rosario* claims were most appropriately considered under subsection (1)(f) of section 440.10 dealing with "improper and prejudicial conduct."[219] The court then interpreted this subsection as containing an explicit legislative requirement that a petitioner demonstrate prejudice in order to prevail on a *Rosario* claim.[220]

Of course, when *Rosario* and *Consolazio* were decided, the legislature also required a showing of prejudice before judgments could be reversed on appeal. In the end, justice and policy — the driving forces behind supervisory power — dictated the result. In *Jackson*, the compelling societal interest in the finality of judgments counselled against extending the *per se* reversal rule to collateral motions.[221]

As the foregoing discussion reveals, the New York courts have in fact exercised an inherent supervisory power to formulate discovery rules in criminal cases, but have usually refrained from articulating the precise source of that authority. The language often appears vague and mysterious; the decisions seem ad hoc and inconsistent. This approach to an ex-

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defendants filing motions under section 440.10 to demonstrate prejudice. *Id.* at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485. The legislature, however, had already spoken in codifying the doctrine of harmless error, which the court overrode in *Consolazio*. Moreover, since section 440.10 does not contain any language specifically dealing with *Rosario* violations, the court could have concluded from that omission that the legislature intended to exclude *Rosario* claims from collateral attack.

Alternatively, the court could have concluded that despite its omission from the statute, *Rosario* itself was a common law creation, and therefore the rule and its *per se* reversal component would remain intact. The court could have interpreted section 440.10 to cover *Rosario* violations, but found the prejudice requirement as being inherent in any *Rosario* violation. This, in essence, is what the court did in *Consolazio*. Indeed, this is the interpretation adopted by the dissent in *Jackson*. *Id.* at 653-54, 585 N.E.2d at 798-99, 578 N.Y.S.2d at 486-87. The majority chose none of these options.

219. *Jackson*, 78 N.Y.2d at 645, 585 N.E.2d at 799, 578 N.Y.S.2d at 487.

220. *Id.* at 646, 585 N.E.2d at 800, 578 N.Y.S.2d at 488. "The statute by its very terms affords a remedy only if the defendant's trial was affected by conduct that was both improper and prejudicial." *Id.*

221. *Id.* at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490.

tremely important area of judicial authority is attributable to the nature of the power itself. To the extent that supervisory power seeks to regulate matters ancillary to the criminal trial, and without any written guidance contained in either the federal or state constitutions or statutes, it is vulnerable to claims of judicial activism, unprincipled subjectivism, and a violation of separation of powers.[222]

B. *Supervising Grand Jury Practice*

The relationship between the judiciary and the grand jury is ambiguous at best. Insofar as the grand jury is viewed as "part of the judicial process,"[223] or "an arm of the court,"[224] it would seem to be uniquely subject to the court's supervisory power to enforce proper standards of conduct. However, to the extent that the grand jury is viewed as an independent investigating agency, and closely affiliated with the executive branch as represented by the prosecutor,[225] judicial intervention would seem to violate the principle of separation of powers. Although the federal courts have lately withdrawn from the broad supervision of grand jury practice they previously exercised,[226] the New York courts have frequently intervened to supervise the integrity of the grand jury process, and to ensure that prosecutors behave fairly.[227]

The grand jury is one of the most powerful instruments in the arsenal of law enforcement.[228] Historically an independent body standing as a buffer between the citizen and the state, the grand jury today has many of the hallmarks of a "prosecutorial

222. *See supra* notes 39-43 and accompanying text.

223. Cobbledick v. United States, 309 U.S. 323, 327 (1940).

224. Levine v. United States, 362 U.S. 610, 617 (1960).

225. The grand jury has been referred to as "a prosecutorial agency." United States v. Sweig, 316 F. Supp. 1148, 1153 (S.D.N.Y.), *aff'd*, 441 F.2d 114 (2d Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); *accord* United States v. Cleary, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959) (deeming the grand jury "a law enforcement agency").

226. *See supra* notes 45-74 and accompanying text.

227. *See infra* notes 245-336 and accompanying text.

228. *See* MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (1977). Judge Learned Hand vividly described the grand jury in the following way: "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination." United States v. Remington, 208 F.2d 567, 573 (2d Cir. 1953) (Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954).

agency,"[229] possessing an awesome range of powers, and emphasizing secret interrogation and accusation as opposed to exoneration.[230] In accord with the oft-stated principle that "the public has a right to every man's evidence,"[231] the grand jury is empowered to summon any person before it and, subject to modest constitutional constraints,[232] to compel that person to disclose under oath everything he or she knows about the matter under inquiry.[233]

In New York State, the modern grand jury is hedged with broader constitutional and statutory restrictions than in the federal system. As a creature of the common law, the grand jury's pre-statutory powers in New York State have been described as "vague and unlimited."[234] The first state constitution, ratified in 1777, made no reference to the grand jury.[235] To provide "a clear and well understood definition

229. *Sweig*, 316 F. Supp. at 1153.

230. *See generally* Note, *The Grand Jury: Powers, Procedure and Problems*, 9 COLUM. J.L. & SOC. PROBS. 681 (1973); Note, *The Grand Jury an Investigating Body*, 74 HARV. L. REV. 590 (1961).

231. United States v. Nixon, 418 U.S. 683, 709 (1974).

232. The Fourth Amendment limits the scope of a grand jury subpoena for documents to information that is reasonably related to the grand jury's investigation. *See generally* See v. City of Seattle, 387 U.S. 541 (1967); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). The Fifth Amendment's guarantee against self-incrimination often figures prominently in protecting grand jury witnesses. United States v. Mandujano, 425 U.S. 564 (1976); Counselman v. Hitchcock, 142 U.S. 547 (1892). However, the privilege may properly be overridden by a grant of immunity. Kastigar v. United States, 406 U.S. 441 (1972).

233. The Supreme Court has stated: "[T]he witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." Blair v. United States, 250 U.S. 273, 282 (1919). Moreover, the Supreme Court has consistently reinforced the grand jury's broad powers, disallowing witnesses from challenging questions as incompetent or irrelevant, or from objecting that the grand jury is exceeding its authority, "for this is no concern of [the witness]." *Id.* The Court has held that a witness has no right to remain silent, United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion), nor any right to counsel inside the grand jury room, *Id.* at 581, and that the prosecutor has no duty to advise the witness that he or she may be a target of the investigation. United States v. Washington, 431 U.S. 181 (1977).

234. *In re* Wood v. Hughes, 9 N.Y.2d 144, 150, 173 N.E.2d 21, 23, 212 N.Y.S.2d 33, 36 (1961) (quoting COMMISSIONERS ON PRACTICE AND PLEADINGS ON CODE OF CRIMINAL PROCEDURE, REPORT TO N.Y. STATE LEGISLATURE, at 115 (1849)).

235. *See generally* N.Y. CONST. of 1777.

of [the grand jury's] powers,"[236] New York's legislature in 1849 enacted several provisions dealing with grand jury practice.[237]

The state constitution subsequently was amended to add provisions empowering grand jury action.[238] Moreover, to the extent that the state constitution explicitly declares that the common law is continued "subject to such alterations as the legislature shall make concerning the same,"[239] the detailed and comprehensive code subsequently enacted with respect to grand jury procedure "leave[s] no doubt that the Legislature manifested its intention to supplant the common law on the subject [of grand jury practice]."[240] However, no code can cover every contingency. Aside from their interpretive responsibilities, courts are called upon to fill procedural gaps.[241] Additionally, courts may be asked to oversee prosecutorial conduct inside the grand jury, even though the conduct is not claimed to violate specific constitutional or statutory guarantees.[242]

Accordingly, in the absence of statutes specifically covering the subject, the New York courts have formulated detailed procedural rules for grand jury practice when no specific rule exists.[243] The courts have also monitored the prosecutor's conduct in the grand jury to ensure fairness.[244] The courts predicate

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236. COMMISSIONERS ON PRACTICE AND PLEADINGS ON CODE OF CRIMINAL PROCEDURE, REPORT TO N.Y. STATE LEGISLATURE, at 115 (1849).

237. CODE CRIM. PROC. §§ 223-260.

238. N.Y. CONST. art. I, § 6 states, in relevant part, "[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury."

239. N.Y. CONST. art. I, § 14.

240. *Wood*, 9 N.Y.2d at 149, 173 N.E.2d at 23, 212 N.Y.S.2d at 36.

241. *See supra* note 130, and accompanying text. Understandably, the determination of whether a gap exists, or whether the legislature adverted to the issue being judicially examined, is itself a question of statutory interpretation. As Hart and Wechsler put it, "statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issue at hand attenuates." *See* P. BATOR ET AL., HART AND WECHSLER ON THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (2d ed. 1973). For an illustration of this issue in the context of the court's exercise of supervisory power, see generally *In re* Holtzman v. Goldman, 71 N.Y.2d 564, 523 N.E.2d 297, 528 N.Y.S.2d 21 (1988) (holding that a court has no inherent supervisory power to dismiss criminal charge for failure to prosecute even though statutory language does not preclude such power.).

242. *See* discussion *infra* part V.B.3.

243. *See* discussion *infra* part V.B.3.

244. *See* discussion *infra* part V.B.3.

this intervention on two distinct grounds: first, the existence of statutory language that contemplates some degree of judicial supervision over grand jury practice, and second, an inherent authority to ensure fairness in a setting which by its very nature can be arbitrary and oppressive. However, judicial intervention has been erratic and inconsistent, often determined by the way the particular court perceives the grand jury's role. This response is not surprising given the grand jury's hybrid role to charge guilty persons with crimes and to protect innocent persons from unfounded accusations.

1. *Overriding Legislative Will*

The New York courts' supervision of grand jury practice occasionally has produced anomalous results, particularly when the courts are required either to overlook clear statutory mandates, or fill gaps that the legislature left uncovered. An early decision of the Court of Appeals illustrates this problem. In *People v. Glen*,[245] the court declared that it had the inherent power to dismiss an indictment on grounds not provided for by statute. The defendant had moved to dismiss the indictment, claiming that improper evidence and erroneous legal instructions had been given to the grand jury.[246]

The Code of Criminal Procedure set forth only two grounds for dismissal,[247] neither of which applied, and explicitly stated that "in no other" circumstances could an indictment be dismissed.[248] Lower courts had interpreted this provision differently, some holding that it completely negatived a court's power to dismiss indictments upon any ground other than those enumerated,[249] whereas other courts held that the legislative power "could not limit or interfere with the inherent power of the courts to dismiss indictments upon other substantial grounds [than] those enumerated."[250]

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245. 173 N.Y. 395, 66 N.E. 112 (1903).

246. *Id.* at 398, 66 N.E. at 113-114.

247. Code of Criminal Procedure, ch. 442, § 313, 1881 (2) N.Y. Laws 1, *as amended by* Act of May 14, 1897, ch. 427, § 1, 1897 (1) N.Y. Laws 569, 569-70.

248. *See Glen*, 173 N.Y. at 399, 66 N.E. at 114.

249. *See, e.g.*, People v. Rutherford, 47 A.D. 209, 62 N.Y.S. 224 (3d Dep't 1899); People v. Willis, 23 Misc. 568, 52 N.Y.S. 808 (Sup. Ct. Kings County 1898); People v. Winant, 24 Misc. 361, 53 N.Y.S. 695 (Sup. Ct. Kings County 1895).

250. *Glen*, 173 N.Y. at 399, 66 N.E. at 114.

The *Glen* court acknowledged that the legislature had the "undoubted right to regulate mere matters of procedure."[251] However, courts have an inherent power "to set aside indictments whenever it has been made to appear that they have been found without evidence, or upon illegal or incompetent testimony."[252] The court stated that "[t]his power is based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives, and to prevent oppression or persecution."[253]

The court thus raised the issue, but did not decide, whether the above statute, as applied, violated the constitutional rights of the defendant.[254] It found that the acts complained of did not taint the indictment.[255] The court's assertion that "no legislative enactment can be permitted to deprive the citizen of any of his constitutional rights"[256] is a truism. The court did not explain the nature of the constitutional rights that may have been implicated, because it spoke in vague and general terms. Nonetheless, *Glen* may be viewed as one of those early "glimmerings" of the court's willingness to invoke an inherent supervisory power that is inspired by constitutional values, but not necessarily required by specific constitutional rules.

2. *Gap-Filling to Prevent Unfairness*

Glen plainly presents a more difficult occasion for judicial intervention than a case in which no statutory provision directly addresses the issue. The latter case poses less of a challenge to judicial legitimacy. The court may choose either to fill the gap itself, or refrain from intervening on the ground that this would constitute an encroachment upon the grand jury's power or the legislature's prerogative. A controversial instance of judicial intervention is *In re Wood v. Hughes*,[257] an opinion written by Judge Stanley Fuld in 1961, the same year in which he wrote the opinion in *People v. Rosario*.[258]

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251. *Id.*
252. *Id.* at 400, 63 N.E. at 114.
253. *Id.*
254. *Id.*
255. *Id.* at 403, 66 N.E. at 115.
256. *Id.* at 400, 66 N.E. at 114.
257. 9 N.Y.2d 144, 173 N.E.2d 21, 212 N.Y.S.2d 33 (1961).
258. 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

The issue in *Wood* was whether a grand jury, whose investigation of misconduct by public officials warranted no indictment, could nevertheless issue a report censuring certain officials for nonindictable misconduct, despite the fact that no power to issue such a report was authorized by constitution or statute.[259] According to the majority, the grand jury's historic function is to determine whether there is sufficient evidence to charge a crime.[260] If there is such evidence, the grand jury ought to find an indictment. If there is no evidence, the grand jury "must dismiss the charges or remain silent."[261]

The statute governing grand jury conduct contained no language supporting either interpretation. However, considerations of fairness and public policy dictated the result. A grand jury report, according to the majority, is viewed by the public as indistinguishable from a formal accusation, and it invites the same "public condemnation and opprobrium as if [the person] had been indicted."[262] That is unfair, the majority suggested, for such procedure does not afford the accused any of the protections accorded one who is indicted.[263] Thus, in the absence of any explicit constitutional or statutory language authorizing

259. Both the state constitution and the Code of Criminal Procedure explicitly authorized grand juries to conduct such inquiries. N.Y. CONST. art. I, § 6 ("The power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments or to direct the filing of information in connection with such inquiries, shall never be suspended or impaired by law."); Code of Criminal Procedure, ch. 442, § 260, 1881 (2) N.Y. Laws 1, *as amended by* Act of June 7, 1939, ch. 770, 1939 (1) N.Y. Laws 1823; Act of Mar. 29, 1954, ch. 305, § 6, 1954 N.Y. Laws 935, 956 (renumbering as section 253(2)); Act of Apr. 29, 1955, ch. 864, § 4, 1955 N.Y. Laws 2044, 2053.

However, the power to issue reports was not specifically authorized, even though grand juries had followed this practice for many years. *In re Wood*, 9 N.Y.2d at 158, 173 N.E.2d at 28-29, 212 N.Y.S.2d at 43 (Desmond, C.J., dissenting). The only previous New York appellate court decision on the subject permitted such a report, although most of the courts in other jurisdictions which considered the matter found "the grand jury report [both] legally unauthorized and morally obnoxious." *Id.*, 9 N.Y.2d at 155, 173 N.E.2d at 26, 212 N.Y.S.2d at 40.

260. *Wood*, 9 N.Y.2d at 154, 173 N.E.2d at 26, 212 N.Y.S.2d at 39.

261. *Id.*

262. *Id.*

263. *Id.*

the report, but animated by a spirit of fairness, the court outlawed such reports.[264]

The separate dissenting opinions of Chief Judge Charles Desmond and Judge Charles Froessel contended that history, tradition, and practice supported the grand jury's power to issue reports on official misconduct.[265] The dissenters pointed to another of the court's decisions, *People v. Stern*.[266] In *Stern*, the court upheld, over Fuld's strong dissent, the grand jury's "holdover power" to continue to hear cases well beyond its initial term and to consider new matters unrelated to the purpose for which it was initially impaneled.[267] *Stern* construed the court's supervisory power over grand jury matters quite narrowly: "Traditionally, our courts have afforded the Grand Jury the widest possible latitude in the exercise of these powers and insisted that in the absence of a clear constitutional or legislative expression they may not be curtailed."[268]

Invoking this recent injunction against judicial usurpation of the grand jury's power, Desmond stated that "judges sit not to enforce their subjective notions of fairness but to apply the law."[269] Froessel acknowledged that vigorous policy arguments could be made on both sides, and that there may be erring or misguided grand juries that might abuse their power,[270] and stated: "The public, too, has rights."[271] The public sits on the grand jury, and pays its expenses.[272] The public is entitled to know the results of investigations into matters of public concern.[273] When a practice has continued for so many years,

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264. Grand jury reports are presently authorized by statute subject to judicial supervision to protect the rights of individuals named in the report. *See* N.Y. CRIM. PROC. LAW § 190.85 (McKinney 1993).

265. *Wood*, 9 N.Y.2d at 156-68, 173 N.E.2d at 27-35, 212 N.Y.S.2d at 41-52.

266. 3 N.Y.2d 658, 148 N.E.2d 400, 171 N.Y.S.2d 265 (1958).

267. As a consequence of *Stern*, the legislature has curtailed the power of a grand jury to consider new matters during a period in which its existence has been extended. *See* N.Y. CRIM. PROC. LAW § 190.15 (McKinney 1993); *see also* People v. Williams, 73 N.Y.2d 84, 535 N.E.2d 275, 538 N.Y.S.2d 222 (1989).

268. *Stern*, 3 N.Y.2d at 661, 148 N.E.2d at 401, 171 N.Y.S.2d at 267 (citations omitted).

269. *Wood*, 9 N.Y.2d at 160, 173 N.E.2d at 30, 212 N.Y.S.2d at 45 (Desmond, J., dissenting).

270. *Id.* at 166, 173 N.E.2d at 34, 212 N.Y.S.2d at 50 (Froessel, J., dissenting).

271. *Id.* at 167, 173 N.E.2d at 34, 212 N.Y.S.2d at 51.

272. *Id.*

273. *Id.*

Froessel stated, courts "have no right to strike it down — that must be done by the people themselves directly, or through their duly elected representatives in the Legislature."[274]

3. *Formulating Subsidiary Rules of Grand Jury Procedure*

A conflict similar to the one in *Wood* was debated in *In re Morgenthau v. Altman*.[275] There, a majority of the Court of Appeals upheld an order directing the prosecutor to present his witnesses first, before permitting the target of the grand jury to testify.[276] The prosecutor had sought an order prohibiting the trial judge from interfering with the grand jury's traditional power to determine what order to call witnesses.[277] Prohibition was denied by the appellate division,[278] and the Court of Appeals affirmed, stating "[t]he order in which witnesses are presented before the Grand Jury is a matter of procedure, within the supervisory jurisdiction of the court . . . ."[279]

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274. *Id.* Following *Wood*, the New York courts have formulated detailed procedural requirements for grand jury practice in the absence of direct statutory authority. The following are illustrative: courts have instructed the district attorney to establish a prima facie case before calling the defendant as a witness, *In re* Morgenthau v. Altman, 58 N.Y.2d 1057, 449 N.E.2d 409, 462 N.Y.S.2d 629 (1983); directed the district attorney to re-present the case to another grand jury prior to voting an indictment, People v. Doe, 151 Misc. 2d 829, 574 N.Y.S.2d 453 (Sup. Ct. Kings County 1991); allowed a defendant's motion to amend the indictment, People v. Cirillo, 100 Misc. 2d 527, 419 N.Y.S.2d 820 (Sup. Ct. Bronx County 1979); resubmitted *sua sponte* a charge to a second grand jury, People *ex rel.* Besser v. Ruthazer, 3 A.D.2d 137, 158 N.Y.S.2d 803 (1st Dep't 1957); People v. Besser, 207 Misc. 692, 140 N.Y.S.2d 195 (Ct. Gen. Sess. 1955); and fashioned rules of procedure for the examination of witnesses and the legal instructions given to the grand jury, *see infra* notes 310-336 and accompanying text.

These decisions specifically allude to the courts' inherent power to supervise the grand jury. To the extent that these decisions recognize and apply the courts' supervisory authority, they are vulnerable to the charge that the court is arrogating a power that is not clearly judicial, but belongs instead to the grand jury and the prosecutor.

275. 58 N.Y.2d 1057, 449 N.E.2d 409, 462 N.Y.S.2d 629 (1983).

276. *Id.* at 1058, 449 N.E.2d at 409, 462 N.Y.S.2d at 629.

277. *Id.* at 1059, 449 N.E.2d at 410, 462 N.Y.S.2d at 630 (Simons, J., dissenting).

278. *In re* Morgenthau v. Altman, 89 A.D.2d 531, 453 N.Y.S.2d 371 (1st Dep't 1982).

279. *Morgenthau,* 58 N.Y.2d at 1059, 449 N.E.2d at 409, 462 N.Y.S.2d at 629. Judge Joseph Bellacosa, in his Practice Commentary to Criminal Procedure Law section 190.25, has questioned whether the court definitively addressed the merits of the controversy, or merely examined the procedural propriety of issuing the writ

Judge Richard Simons wrote a forceful dissenting opinion, accusing the majority of disregarding established law, and usurping the powers of a coordinate branch of government.[280] He pointed to *People v. Sexton*,[281] where the court ruled that a grand jury is a separate and independent body free from the court's restraint as to its methods of procedure "so far as they are not controlled by statute or immemorial usage having the force of law."[282] *Sexton* stated: "One of the attributes and powers of this independent existence is to decide when and in what order witnesses shall be called . . . ."[283]

Simons described the grand jury as performing a governmental function that is "executive in nature, not judicial."[284] He acknowledged that courts traditionally have exercised "a general and largely undefined supervisory power over the actions of the grand jury" for purposes of impaneling the jury, implementing the grand jury's contempt power, and ensuring that the power of the prosecutor is not abused.[285] However, he stated that "it has never been contended to my knowledge that the court has any general supervisory power over the procedures used by the Grand Jury to receive and evaluate evidence."[286] Simons accused the majority of "recast[ing] the very nature of that body and in the name of 'fairness' mak[ing] the inquiry a quasi-adversarial and quasi-adjudicative process, something that it is not and never was intended to be."[287]

The interplay between the court's supervisory power and an arguably inconsistent statute is evident in the cases dealing with the court's power to authorize the defendant to inspect the transcribed minutes of the grand jury.[288] This issue is closely

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of prohibition. *See* N.Y. CRIM. PROC. LAW § 190.25 commentary at 49 (McKinney Supp. 1994) (1983 supplementary practice commentary). The court's forceful statement quoted in the text would seem to refute the claim that it did not definitively rule on the merits.

280. *Morgenthau,* 58 N.Y.2d at 1060, 449 N.E.2d at 410, 462 N.Y.S.2d at 630-31.

281. 187 N.Y. 495, 80 N.E. 396 (1907).

282. *Id.* at 513, 80 N.E. at 402.

283. *Id.*

284. *Morgenthau*, 58 N.Y.2d at 1060, 449 N.E.2d at 410, 462 N.Y.S.2d at 630.

285. *Id.* at 1060-61, 449 N.E.2d at 411, 462 N.Y.S.2d at 631.

286. *Id.*

287. *Id.*

288. *See* cases cited *infra* notes 294-95.

related to discovery.[289] As Cardozo noted in *Lemon*, the common law aversion to pretrial discovery generally did not extend to the disclosure of grand jury minutes.[290] Indeed, the defendant in *Lemon* asked for and received apparently without any resistance the transcripts of the grand jury testimony.[291] Cardozo observed that courts had an inherent power to order inspection of grand jury minutes,[292] and justified this practice in the interests of accurate pleadings and to enable defendants to file dismissal motions. Although the common law rules were replaced by legislation,[293] the courts continued to interpret the practice through a patchwork of inconsistent and confusing rules.[294]

Under the Criminal Procedure Law,[295] there is no express limitation on the power of a court to order physical release of the grand jury minutes to the defendant, and some courts have exercised their supervisory power by ordering such release.[296] However, even absent legislation covering the issue directly, the Court of Appeals construed this omission as a tacit legislative declaration that physical release is unauthorized.[297] The practice therefore was invalidated as an unwarranted exercise of supervisory authority on a matter over which the legislature had clearly spoken "in unmuted strains."[298]

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289. *See* discussion *supra* part V.A.

290. People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 31, 156 N.E. 84, 86 (1927).

291. *Id.* at 27, 156 N.E. at 84.

292. *Id.* at 31, 156 N.E. at 86.

293. *See* Proskin v. County Court, 30 N.Y.2d 15, 19, 280 N.E.2d 875, 876, 330 N.Y.S.2d 44, 46 (1972).

294. Jaffe v. Scheinman, 47 N.Y.2d 188, 193, 390 N.E.2d 1165, 1167, 417 N.Y.S.2d 241, 243 (1979). Some courts examined the minutes *in camera* before rendering a decision, *Id.* (citations omitted); other courts allowed the defendant to receive the minutes, *Id.* (citations omitted). However, in either case, inspection was allowed only as an ancillary remedy to a motion to dismiss an indictment, not a discovery device to assist the defendant in preparing for trial. *In re* Proskin v. County Court, 30 N.Y.2d 15, 21, 280 N.E.2d 875, 877, 330 N.Y.S.2d 44, 47 (1972).

295. N.Y. CRIM. PROC. LAW § 210.30 (McKinney 1993).

296. *Jaffe*, 47 N.Y.2d at 194, 390 N.E.2d at 1168, 417 N.Y.S.2d at 244 (quoting Denzer, Practice Commentary, N.Y. CRIM. PROC. LAW § 210.30).

297. *Id.*

298. *Id.*

4. *Restraining Prosecutorial Overreaching*

With respect to evidence that prosecutors are required to present to the grand jury, or legal instructions that prosecutors are required to give, one would expect a court's supervisory power to be exercised infrequently. Given the traditional independence of the grand jury, the judiciary's reluctance to impede that body's investigative function, and the existence of statutes broadly covering these subjects,[299] judicial intervention would seem inappropriate. This is particularly so in the absence of any indication of prosecutorial overreaching.

However, there are occasions when the interest in affording grand juries wide latitude to investigate crime conflicts with the interest in ensuring procedural fairness and maintaining the grand jury's integrity. Courts in such cases more readily invoke their supervisory authority to monitor the process and check any unfairness. In marked contrast to the withdrawal of federal supervisory power over prosecutorial conduct in the grand jury,[300] the New York courts have shown a greater willingness to prescribe detailed rules governing the interrogation of witnesses[301] and the legal instructions given to grand juries.[302] It is difficult to reconcile these cases. Several of them appear to be ad hoc and represent a particular court's conception of the proper role of the grand jury and the prosecutor's duty to behave fairly.

A good example of the courts' supervisory power to prevent unfairness is the judicial response to claims that prosecutors occasionally summon witnesses before grand juries for the illegitimate purpose of trapping them into committing perjury rather than for the legitimate purpose of seeking the truth.[303] Several

299. *See* N.Y. CRIM. PROC. LAW § 190.25 (McKinney 1993) (proceedings and operations); *id.* § 190.30 (rules of evidence); *id* § 190.55 (authority and duties of prosecutor); *id.* § 190.40 (witnesses, compulsion of evidence, and immunity).

300. *See supra* notes 66-74 and accompanying text.

301. *See infra* notes 302-330; *see also* People v. DiFaliso, 79 N.Y.2d 836, 588 N.E.2d 80, 580 N.Y.S.2d 182 (1992) (trial court's power to participate in grand jury proceedings to determine competency of child witness); People v. Thomas, N.Y. L.J., Jan. 1, 1994, at 25, col. 6 (Crim. Ct. Queens County) (trial court's power to limit evidence that prosecutor can use in grand jury to impeach defendant's credibility).

302. *See infra* notes 332-36.

303. *See generally* Bennett L. Gershman, *The Perjury Trap*, 129 U. PA. L. REV. 624 (1981).

of these cases have involved prominent public and political figures,[304] which by itself may account for the court's interest in overseeing the proceedings. The courts in these cases have attempted to fashion coherent and meaningful standards for the interrogation of witnesses.[305]

Another instance of judicial supervision relates to the prosecutor's duty to provide the grand jury with exculpatory evidence. Prior to *United States v. Williams*,[306] it was unclear whether federal prosecutors had a duty to provide a grand jury with evidence that would negate guilt.[307] Under a fairness model, disclosure would seem to be warranted, for "if the prosecutor does not produce the evidence, no one will."[308] It is thus unfair to allow the grand jury to charge a crime without being apprised of evidence that would reveal the charge as unfounded. On the other hand, under a functional model, the grand jury is

304. People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1231, 413 N.Y.S.2d 302 (1978) (Justice of Supreme Court of New York); People v. Rao, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dep't 1980) (New York attorney); People v. Brust, N.Y. L.J., Dec. 2, 1976, at 12 (Sup. Ct. Bronx County) (Justice of Supreme Court of New York); People v. Blumenthal, N.Y. L.J., Apr. 16, 1976, at 7 (Sup. Ct. N.Y. County) (Majority Leader of the New York State Assembly); People v. Monaghan, N.Y. L.J., Nov. 14, 1975, at 8 (Sup. Ct. N.Y. County) (former New York City Police Commissioner).

305. *Compare* People v. Tyler, 46 N.Y.2d 264, 385 N.E.2d 1231, 413 N.Y.S.2d 302 (1978) (finding a perjury trap) *with* People v. Pomerantz, 46 N.Y.2d 240, 385 N.E.2d 1218, 413 N.Y.S.2d 288 (1978) (finding no perjury trap) *and* People v. Schenkman, 46 N.Y.2d 232, 385 N.E.2d 1214, 413 N.Y.S.2d 284 (1978) (finding no perjury trap).

The results are problematic for two reasons. First, the court's attempt to assess the importance or memorability of the subject matter about which the prosecutor is examining the witness often appears wholly subjective, and probably not a matter within the court's competence. Second, the court's evaluation of the vigor with which the prosecutor attempts to stimulate the witness's memory is also fraught with broad subjectivity and requires a court to divine the prosecutor's motive, not a matter easily susceptible of judicial inquiry.

To insulate his examination from being branded a "perjury trap," prosecutors apparently must probe with sufficient earnestness to demonstrate that the inquiry is being conducted in good faith and not in an effort to elicit perjury. Thus, judicial oversight in this area is well-intentioned, but extremely difficult to implement, and thus questionable as a matter of judicial policy.

306. 112 S.Ct. 1735 (1992).

307. *See* Note, *The Prosecutor's Duty to Present Exculpatory Evidence to an Investigating Grand Jury*, 75 MICH. L. REV. 1514, 1514 (1977).

308. United States v. Phillips Petroleum Co., 435 F. Supp. 610, 621 (N.D. Okla. 1977).

not designed to adjudicate guilt but to bring criminal charges.[309] The trial is the adversarial setting for determining the truth.

The Court of Appeals has addressed this issue in two cases. In *People v. Pelchat*,[310] the court invoked the fairness model to dismiss an indictment. The prosecutor presented evidence to a grand jury through a police officer's testimony that the defendant was a participant in drug activity.[311] The defendant pleaded guilty to the charge, but subsequently learned that the police officer informed the prosecutor that he had not actually observed the defendant engage in criminal activity, but had simply misunderstood the prosecutor's question in the grand jury.[312] Defendant sought to have his guilty plea vacated; the prosecutor resisted on the ground that he did not seek the indictment by the knowing use of perjured or mistaken testimony.[313]

In a unanimous opinion written by Judge Simons, the court emphasized the prosecutor's "duty of fair dealing" not only at trial but in pretrial proceedings.[314] The court did not suggest the extent of such duty, or whether it requires a prosecutor to disclose exculpatory evidence to the grand jury. The opinion alluded to cases in which courts recognized their supervisory power to dismiss indictments that are based on no evidence,[315] perjured testimony,[316] hearsay testimony,[317] or evidence obtained by a prosecutor for improper motives.[318] The "cardinal purpose" of the grand jury, said the court, "is to act as a shield against prosecutorial excesses and this protection is destroyed and the integrity of the criminal justice system impaired if a prosecution may proceed even after the District Attorney learns that jurisdiction is based upon an empty indictment."[319] Thus, the prosecutor violated his duty of fair dealing by allowing pro-

309. Bracy v. United States, 435 U.S. 1301, 1302 (1978).
310. 62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79 (1984).
311. *Id.* at 100, 464 N.E.2d at 448, 476 N.Y.S.2d at 80.
312. *Id.* at 101, 464 N.E.2d at 449, 476 N.Y.S.2d at 81.
313. *Id.* at 103, 464 N.E.2d at 450, 476 N.Y.S.2d at 82.
314. *Id.* at 104, 464 N.E.2d at 450-51, 476 N.Y.S.2d at 82-83.
315. People v. Glen, 173 N.Y. 395, 66 N.E. 112 (1903).
316. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).
317. United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).
318. *In re* Cunningham v. Nadjari, 39 N.Y.2d 314, 347 N.E.2d 915, 383 N.Y.S.2d 590 (1976).
319. *Pelchat*, 62 N.Y.2d at 108, 464 N.E.2d at 453, 476 N.Y.S.2d at 85.

ceedings to continue on an indictment that he knew rested solely on false evidence.

More recently, however, in *People v. Mitchell*,[320] the Court retreated from the broad language in *Pelchat*, and suggested that judges should be more restrained in exercising their supervisory function to dismiss indictments on grounds of prosecutorial unfairness.[321] The four-judge majority, in an opinion by Judge George Bundy Smith, framed the issue as whether a prosecutor is required to present to a grand jury exculpatory statements of a defendant in addition to the inculpatory statements which were submitted.[322] The majority ruled that there is no duty of disclosure.[323] Three judges, in a strong dissenting opinion by Judge Vito Titone, argued that the prosecutor's duty of fairness was violated by the nondisclosure.[324] The majority opinion adopted a broad functional model. Thus, the majority argued, the Criminal Procedure Law states that "in general, where appropriate" the rules of evidence applicable to trials are also applicable to grand jury proceedings.[325] The defendant's exculpatory statements were inadmissible hearsay and thus not required to be submitted.[326] Moreover, the purpose of an indictment is to bring a defendant to trial based on prima facie evidence which, if unexplained, would warrant a conviction. If the defendant desired to present exculpatory evidence to the grand jury, she had the right to do so.[327] In conclusion, the majority stated, "The People maintain broad discretion in presenting their case to the Grand Jury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused."[328]

The dissenters would have invoked a much broader supervisory authority over the proceedings. They accused the majority of ignoring the prosecutor's duty of fair dealing and candor

320. 82 N.Y.2d 509, 626 N.E.2d 630, 605 N.Y.S.2d 655 (1993).

321. *Id.* at 514, 626 N.E.2d at 633, 605 N.Y.S.2d at 657-58.

322. *Id.* at 510, 626 N.E.2d at 630, 605 N.Y.S.2d at 655.

323. *Id.* at 513, 626 N.E.2d at 633, 605 N.Y.S.2d at 657.

324. *Id.* at 515, 626 N.E.2d at 633, 605 N.Y.S.2d at 658.

325. 82 N.Y.2d 509, 626 N.E.2d 630, 605 N.Y.S.2d 655 (referring to N.Y. CRIM. PROC. LAW § 190.30(1) (McKinney 1993)).

326. *Mitchell*, 82 N.Y.2d at 513, 626 N.E.2d at 631-32, 605 N.Y.S.2d at 656-57.

327. *Id.* at 513-14, 626 N.E.2d at 632-33, 605 N.Y.S.2d at 657.

328. *Id.* at 515, 626 N.E.2d at 633, 605 N.Y.S.2d at 658.

recognized in *Pelchat*, and contended that there was no articulable reason for the prosecutor's nondisclosure.[329] Even worse, said the dissent, by presenting selective portions of defendant's statements, the prosecutor effectively eliminated from the grand jury's consideration the exculpatory defense of justification.[330] The prosecutor thus presented a "distorted" case against the defendant, thereby rendering the grand jury process "hopelessly skewed and fatally defective."[331]

Finally, in the absence of statutory guidance, the courts have formulated detailed rules of procedure governing those defenses about which prosecutors must instruct the grand jury. These decisions appear rigid and arbitrary; they are rationalized in terms of the functional role of the grand jury. Prior to *People v. Valles*,[332] several New York courts required prosecutors to submit to grand juries various legal defenses.[333] In *Valles*, the Court of Appeals adopted a bright line test, requiring prosecutors to submit only those defenses that have the "potential for eliminating a needless or unfounded prosecution."[334] Thus, defenses that result in exoneration — for example, justification, entrapment, or duress — require submission. Defenses in mitigation — for example, extreme emotional disturbance — do not require submission. The court subsequently held in *People v. Lancaster*[335] that the defense of mental disease or defect need not be submitted, because even though it may result in exoneration, it does not necessarily eliminate a needless prosecution, for the defendant may still be required to undergo further proceedings following such adjudication.[336]

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329. *Id.* at 516-19, 626 N.E.2d at 633-36, 605 N.Y.S.2d at 659-61.

330. *Id.* at 519, 626 N.E.2d at 636, 605 N.Y.S.2d at 660-61.

331. *Id.*

332. 62 N.Y.2d 36, 464 N.E.2d 418, 476 N.Y.S.2d 50 (1984).

333. *See, e.g.*, People v. Rosenbaum, 107 Misc. 2d 501, 435 N.Y.S.2d 502 (Sup. Ct. Rockland County 1981) (claim of right as to taking); People v. Karassik, 90 Misc. 2d 839, 396 N.Y.S.2d 765 (Sup. Ct. N.Y. County 1977) (entrapment); People v. McWilliams, 96 Misc. 2d 648, 409 N.Y.S.2d 610 (Nassau County Ct. 1978) (Penal Law exceptions).

334. *Valles*, 62 N.Y.2d at 38, 464 N.E.2d at 419, 476 N.Y.S.2d at 51.

335. 69 N.Y.2d 20, 503 N.E.2d 990, 511 N.Y.S.2d 559 (1986).

336. *Id.* at 27-30, 503 N.E.2d at 994-96, 511 N.Y.S.2d at 563-65.

In sum, the New York courts have shown a far greater willingness to monitor grand jury proceedings than the federal courts, and have exercised their authority to formulate detailed procedural rules to enforce fair standards of practice. The decisions are not required by constitutional doctrine, but are clearly animated by a recognition — inspired by due process concerns — that grand juries and prosecutors must conduct themselves fairly. However, with respect to the grand jury, the courts have been reticent about explaining the circumstances for invoking supervisory power, or seeking to provide a coherent rationale for its exercise. The decisions often are inconsistent, highly subjective, and do not yield clarifying principles. The courts try to balance the fairness model with the functional model. However, since both models have a legitimate claim to judicial recognition, it is virtually impossible to determine in advance which model will serve as the basis for decision.

C. *Creating Remedies for Police Misconduct*

To the extent that supervisory power could be used to bar the admission of relevant, but illegally obtained, evidence at trial, it provides courts with a formidable weapon to protect individual rights.[337] To be sure, the traditional justifications for supervisory power — deterrence and judicial integrity[338] — are the same rationales that supported the exclusionary rule of the Fourth Amendment.[339]

However, supervisory power is invoked not to safeguard rights explicitly guaranteed by the Constitution but to enforce standards of "civilized justice" that are broader in scope than those afforded by constitutional or statutory law. Moreover, the use of supervisory power to formulate rules of discovery or monitor grand jury practice is historically grounded, and ordinarily does not affect the accuracy of the truth-seeking process.

By contrast, the use of supervisory authority to create an exclusionary remedy is neither historically grounded, nor necessary to further the reliability of the adjudicatory process. In-

337. *See supra* note 25 and accompanying text.

338. *See supra* note 30 and accompanying text.

339. Mapp v. Ohio, 367 U.S. 643 (1961). The justifications are deterrence; preservation of judicial integrity; and protecting Fourth Amendment right of privacy, *id.* at 658, 659, 655-56.

deed, such a remedy clearly undermines society's interest in reliable determinations of guilt. The Supreme Court therefore has cautioned that when formulating an exclusionary remedy for governmental misconduct, supervisory power "must be sparingly exercised."[340]

1. *Fuld-Desmond Debate*

The New York courts have exercised supervisory power to provide an exclusionary remedy for governmental misconduct even less frequently than they have in the contexts of discovery and grand jury practice. In *People v. Lane*,[341] decided by the Court of Appeals only eight months after *People v. Rosario*,[342] in which the court reversed a capital conviction on the limited ground that the prosecutor made a prejudicial closing argument,[343] the majority opinion briefly noted that a delay in the defendant's arraignment had not rendered his confession inadmissible.[344]

This was the same issue that triggered the supervisory ruling in *McNabb*.[345] In *Lane*, it formed the battleground for an unusual debate between Judge Fuld, in a concurring opinion, and Chief Judge Desmond, in a dissenting opinion. Alluding to several United States Supreme Court opinions upholding the "imperative of judicial integrity,"[346] Fuld emphasized that principles of justice and fair dealing were at the core of many of New York's most important common law decisions excluding evidence because of governmental illegality.[347] Then quoting at length from *McNabb*,[348] he argued that New York should en-

340. Lopez v. United States, 373 U.S. 427, 440 (1963).

341. 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961).

342. 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

343. *Lane*, 10 N.Y.2d at 354, 179 N.E.2d at 340, 223 N.Y.S.2d at 199.

344. *Id.* at 352, 179 N.E.2d at 339-40, 223 N.Y.S.2d at 198.

345. *McNabb*, 318 U.S. at 341-42.

346. Mapp v. Ohio, 367 U.S. 643, 659 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

347. *Lane*, 10 N.Y.2d at 355-56, 179 N.E.2d at 342, 223 N.Y.S.2d at 201 (Fuld, J., concurring). Fuld cited People v. Oakley, 9 N.Y.2d 656, 173 N.E.2d 48, 212 N.Y.S.2d 72 (1961), which excluded a confession sworn before a judicial officer, People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961), which excluded post-indictment confession, and People v. Spitaleri, 9 N.Y.2d 168, 173 N.E.2d 35, 212 N.Y.S.2d 53 (1961), which excluded a withdrawn plea of guilty.

348. 318 U.S. 332, 343-344 (1943).

force its prompt arraignment statute in the same manner as the Supreme Court did in *McNabb*, namely, by suppressing any confession taken during a period of undue delay.[349]

Desmond devoted virtually his entire dissenting opinion not to support affirmance of the conviction, which he advocated in only one sentence,[350] but to respond to Fuld's opinion. He wrote, "I say that the adoption by us of such a new exclusionary rule of criminal evidence not only is not required by any known principle of constitutional law or natural law or morals but is a procedural innovation beyond our power to make."[351] Although Fuld did not dispute the point, Desmond contended that *McNabb* is neither constitutionally required, nor applicable to the states.[352]

Desmond distinguished the court's common law power "to revise a court-made rule found by experience not to work satisfactorily"[353] with the creation of a new exclusionary rule. The admissibility of confessions and the requirement of prompt arraignments are covered in New York by precise statutes;[354] their violation "does not license us to add new meanings to them."[355] Desmond concluded: "No New York court has any such supervisory power over the administration of criminal justice as is exercised by the United States Supreme Court."[356]

2. *Creation of Sub-Constitutional Right of Privacy*

There the matter rested for some fifteen years, until the decision by the Court of Appeals in *People v. De Bour*.[357] Set against the backdrop of street encounters between citizens and police — euphemistically described in *Terry v. Ohio*[358] as "stop and frisk" — *De Bour* examined whether the police had the power to approach and question a citizen when neither probable

349. *Lane*, 10 N.Y.2d at 356-57, 179 N.E.2d at 342, 223 N.Y.S.2d at 201 (Fuld, J., concurring).

350. *Id.* at 357, 179 N.E.2d at 343, 223 N.Y.S.2d at 203.

351. *Id.*

352. *Id.* at 359, 179 N.E.2d at 344, 223 N.Y.S.2d at 204.

353. *Id.* at 360, 179 N.E.2d at 344, 223 N.Y.S.2d at 205.

354. N.Y. CRIM. PROC. LAW §§ 165, 395 (McKinney 1961); N.Y. PENAL LAW § 1844 (McKinney 1961).

355. *Lane*, 10 N.Y.2d at 360, 179 N.E.2d at 344, 223 N.Y.S.2d at 205.

356. *Id.*

357. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

358. *See* Terry v. Ohio, 392 U.S. 1, 10 (1968).

cause nor reasonable suspicion existed to believe that the individual was involved in criminal activity.[359]

Judge Wachtler's opinion addressed the more fundamental question: Whether the court has the power to formulate an exclusionary remedy when the street encounter constituted an undue intrusion into the individual's security and privacy, but did not infringe on any right protected by the Fourth Amendment.[360] The majority concluded that although no constitutional right is implicated when a police officer stops a citizen on less than "founded suspicion," the "spirit of the Constitution has been violated and the aggrieved party may invoke the exclusionary rule."[361] Noting that the policing function is "highly susceptible to subconstitutional abuses,"[362] the court declared that such conduct would be "subject to the greatest scrutiny."[363]

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359. *Id.* at 8.

360. *DeBour,* 40 N.Y.2d at 216-17, 352 N.E.2d at 567-68, 386 N.Y.S.2d at 380-81.

361. *Id.* In People v. Hollman, 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992), then-Chief Judge Wachtler, elaborating on the meaning of *DeBour*, acknowledged that its decision in *DeBour* was not constitutionally compelled, *id.* at 195, 590 N.E.2d at 212, 581 N.Y.S.2d at 627, but was "largely based upon considerations of reasonableness and sound State policy." *Id.*

The court declined the People's invitation to overrule *De Bour* on the ground that the Supreme Court had firmly held that police-initiated encounters falling short of actual seizures of the individual do not implicate the Fourth Amendment. *See* Florida v. Bostick, 111 S. Ct. 2382 (1991); California v. Hodari, 499 U.S. 621 (1991). The court observed that *DeBour* has been a vital part of New York's common law for nearly 20 years and found "no reason to eliminate entirely its *oversight* of police encounters that fall below the level of Fourth Amendment seizure." *Hollman*, 79 N.Y.2d at 196, 590 N.E.2d at 212, 581 N.Y.S.2d at 627 (emphasis added).

362. *DeBour*, 40 N.Y.2d at 220, 352 N.E.2d at 569, 386 N.Y.S.2d at 382.

363. *Id.* The courts have indeed scrutinized such conduct, and have ordered the suppression of evidence when police exceeded the limitations established by *DeBour*. *See* People v. Campbell, 160 A.D.2d 363, 554 N.Y.S.2d 103 (1st Dep't 1990); People v. Stephens, 139 A.D.2d 413, 526 N.Y.S.2d 467 (1st Dep't 1988); People v. Ventura, 139 A.D.2d 196, 531 N.Y.S.2d 526 (1st Dep't 1988); People v. Bronston, 113 A.D.2d 627, 497 N.Y.S.2d 8 (1st Dep't 1986); People v. Fripp, 85 A.D.2d 547, 445 N.Y.S.2d 3 (1st Dep't 1981); People v. Branch, 54 A.D.2d 90, 387 N.Y.S.2d 581 (1st Dep't 1976); *see also* Tetreault v. State, 108 A.D.2d 1072, 485 N.Y.S.2d 864 (3d Dep't 1985) (allowing civil damage action against police based on *DeBour* violation).

3. *Remedies for Statutory Violations*

De Bour is one of a handful of cases in which the New York courts even considered invoking supervisory power to fashion an exclusionary remedy for governmental misconduct. The courts almost always have refrained from creating such a remedy. One category of cases involves, as in *McNabb*, the violation by the police of a statute which results in a defendant's arrest and the acquisition of evidence incident to that arrest.

Where the police conduct is illegal, but not violative of the defendant's constitutional rights, as in *McNabb*, the principal issue addressed by the courts is whether an exclusionary remedy should be formulated as a sanction for the violation. The courts have refused to do so unless the violation is sufficiently flagrant, is committed in bad faith, and involves circumstances where the interests of deterrence and judicial integrity require exclusion.

One such case, *People v. Dyla*,[364] provides a useful illustration. The defendant was charged with committing a murder while on parole.[365] He claimed that his confession to the police should have been excluded because it was the product of an illegal arrest, the illegality being the absence of a parole violation warrant as required under the Executive Law.[366] The appellate division held that "[a]lthough the arrest could be viewed as unauthorized under State law in that no parole violation warrant had been obtained, it does not follow that the exclusionary rule should be applied as a remedy for this non-constitutional irregularity."[367]

Acknowledging that precedent existed for the exercise of a supervisory power to exclude evidence obtained in violation of a statute but not in violation of the Fourth Amendment,[368] the court suggested that the power might be more appropriately invoked where the police conduct was undertaken in bad faith, or where the statute in question was designed to implement fourth

364. 142 A.D.2d 423, 536 N.Y.S.2d 799 (2d Dep't 1988).

365. *Id.* at 425, 536 N.Y.S.2d at 800.

366. N.Y. EXEC. LAW § 259-i(3)(a)(i) (McKinney 1993); N.Y. COMP. CODES R. & REGS. tit. 9, § 8004.2 (1993).

367. *Dyla*, 142 A.D.2d at 429-30, 536 N.Y.S.2d at 803.

368. *See* Miller v. United States, 357 U.S. 301 (1958); United States v. Di Re, 332 U.S. 581 (1948).

amendment rights. Neither condition was present, and thus the court "decline[d] to exercise whatever inherent 'supervisory power' we may have to nonetheless order suppression."[369]

Whether a court chooses to exercise its supervisory authority to exclude evidence seems to be principally a question of policy, rather than power. The courts presumably have the power to exclude evidence, but, as a matter of policy, decline to exercise it. In *People v. Dinan*,[370] in the course of a criminal investigation into illegal gambling, New York police obtained wiretap evidence, which was admitted at trial.[371] The New York State Constitution[372] and the Code of Criminal Procedure[373] authorized the introduction of such evidence, and the Supreme Court had held that no constitutional right was thereby infringed.[374] However, wiretapping violated section 605 of the Federal Communications Act,[375] and the Supreme Court had also held that evidence acquired from illegal wiretapping was inadmissible in federal courts.[376]

The issue presented to the New York Court of Appeals was whether the conceded violation of a federal law should be remedied by imposing an exclusionary rule in state trials. A majority of the court analyzed whether an exclusionary rule should be read into the federal statute, in much the same fashion that the Supreme Court read an exclusionary rule into the Fourth Amendment in *Mapp v. Ohio*[377] and *Weeks v. United States*.[378]

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369. *Dyla*, 142 A.D.2d at 442, 536 N.Y.S.2d at 811.

370. 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962).

371. *Id.* at 353, 183 N.E.2d at 689-90, 229 N.Y.S.2d at 408.

372. N.Y. CONST. art I, § 12.

373. N.Y. CRIM. PROC. LAW § 813-a (McKinney 1961).

374. Olmstead v. United States, 277 U.S. 438, 465-66 (1928).

375. 47 U.S.C. § 605 (1989) (formerly 6 U.S.C. § 605 (1934)).

376. Nardone v. United States, 302 U.S. 379, 384 (1937).

377. 367 U.S. 643, 655-56 (1961) (the exclusionary rule is "an essential part of the right to privacy"). Whether the exclusionary rule is "an essential part" of the Fourth Amendment right is a disputed question. In United States v. Calandra, 414 U.S. 338, 348 (1974), the Court stated that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." According to the court in *Dinan*, the exclusionary rule of *Mapp* was held to be binding on the states "[f]or reasons of high governmental policy" and "to aid in the enforcement of the fundamental law." *Dinan*, 11 N.Y.2d at 356, 183 N.E.2d at 691, 229 N.Y.S.2d at 410.

378. 232 U.S. 383 (1914). The language in *Weeks* most closely approximating a constitutionally guaranteed exclusionary remedy states: "[T]here was involved in

The majority concluded that no exclusionary remedy was warranted since the statute "may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure."[379] The majority also pointed to *McNabb* as a significant analogy[380] in that it formulated a non-constitutional exclusionary rule which the Court explicitly said was not binding on the states.[381]

4. *Choosing Constitutional Theory Instead of Invoking Supervisory Power*

New York courts have recognized their power to fashion an exclusionary remedy even when there is no constitutional requirement. However, when a court discovers an express constitutional basis for the remedy, then *a fortiori* it need not rely on its supervisory power. Not surprisingly, due process and supervisory power both have been advanced as alternative theories to remedy governmental misconduct that violates fundamental fairness.[382] Faced with this alternative, the Court of Appeals in

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the order refusing the application (to return the seized property to the defendant) a denial of the constitutional rights of the accused." *Id.* at 398. The court in *Dinan* interpreted *Weeks* as adopting the exclusionary rule not because it was constitutionally required, "but for the reason that the Supreme Court considered it the most effective means of enforcing the constitutional prohibition against unreasonable search and seizure." *Dinan*, 11 N.Y.2d at 356, 183 N.E.2d at 691, 229 N.Y.S.2d at 410.

379. *Dinan*, 11 N.Y.2d at 354-55, 183 N.E.2d at 690, 229 N.Y.S.2d at 409.

380. *Id.* at 356 n.*, 183 N.E.2d at 691 n.*, 229 N.Y.S.2d at 410 n.*.

381. *See* Gallegos v. Nebraska, 342 U.S. 55, 63-64 (1951). In *Dinan*, Judge Fuld wrote a dissenting opinion which was endorsed, interestingly, by Chief Judge Desmond, who had criticized Fuld's supervisory power analysis six months earlier in People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961). Fuld declared that the "imperative of judicial integrity" compels the Court to formulate an exclusionary rule as a matter of New York State law. *Dinan*, 11 N.Y.2d at 357, 183 N.E.2d at 692, 229 N.Y.S.2d at 411 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

Fuld said: "[I]t is the very introduction of the wire-tapping evidence in open court, the very disclosure of the intercepted communication to the jury, which violates the Federal statute and constitutes the Federal crime." *Id.* Quoting from his concurring opinion in *Lane*, Fuld concluded that "the court should give sanction neither to illegal enforcement of the criminal law nor to the corrosive doctrine that the end justifies the means." *Id.* (quoting People v. Lane, 10 N.Y.2d at 357, 179 N.E.2d at 342, 223 N.Y.S.2d at 202 (Fuld, J., concurring)).

382. Hampton v. United States, 425 U.S. 484, 497 (1976) (Brennan, J., dissenting).

People v. Isaacson[383] chose due process rather than supervisory power as the basis for dismissing a drug conviction because of "inexplicable" and "reprehensible" police conduct.[384]

In *Isaacson*, the police allegedly used threats of prosecution and physical force to compel a heavy drug user to entrap the defendant into selling drugs.[385] The Fourth Department affirmed the conviction, rejecting the entrapment defense because the proof showed that the defendant was predisposed to sell drugs.[386] Justice Richard Cardamone, in dissent, argued that the court's supervisory power over the administration of justice should be invoked to bar prosecution because of the egregious police behavior.[387] The Court of Appeals reversed the conviction and dismissed the indictment, but did so not under its supervisory authority, but as a matter of due process under the State Constitution. The court formulated a four-part test to determine whether the government's conduct reached a sufficient level of outrageousness as to violate due process.[388]

One can only speculate about why the court chose to base the dismissal explicitly on the due process clause of the State Constitution, rather than under its supervisory authority. In contrast to Cardamone's dissent in the appellate division, the Court of Appeals did not even refer to its supervisory power. However, since both due process and supervisory power are doctrinal means to achieve fundamental fairness, there would ap-

383. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

384. *Id.* at 514, 378 N.E.2d at 79, 406 N.Y.S.2d at 715.

385. People v. Isaacson, 56 A.D.2d 220, 226-27, 392 N.Y.S.2d 157, 162 (4th Dep't 1977).

386. *Id.* at 225, 392 N.Y.S.2d at 161.

387. *Id.* at 231, 392 N.Y.S.2d at 165 (Cardamone, J., dissenting).

388. *Isaacson*, 44 N.Y.2d at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719. The four factors are:

> (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal enterprise; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

Id. (citations omitted).

pear to be some measure of overlap, as Justice Brennan suggested in his dissent in *Hampton v. United States*.[389] However, there are significant differences between employing due process or supervisory power to limit law enforcement power.

To the extent that supervisory power authorizes judicial remedies for governmental misconduct that are not constitutionally required, the decision is conditional, and presumably can be overridden by the legislature; a constitutionally-based remedy is not subject to legislative overrule. Additionally, a constitutionally-based decision represents a much more powerful judicial condemnation of governmental conduct that violates individual rights than a ruling based on supervisory power. Further, invoking supervisory power in *Isaacson* presumably would protect the integrity of the judicial process and serve as a deterrent to official misconduct. It would not create a right that is legally enforceable under the Constitution. A constitutionally-based decision would create a constitutionally enforceable right.

Finally, courts are probably more comfortable, and less vulnerable to criticism based on separation of powers grounds, in formulating rights within the traditional parameters of constitutional interpretation than in devising new remedies outside those familiar and well-accepted boundaries.[390] The Fuld-Desmond debate in *People v. Lane* underscores this point.[391] From the standpoint of judicial legitimacy, therefore, predicating a decision such as *Isaacson* on due process rather than supervisory power may be doctrinally more acceptable, and prudentially much safer. This is not to say, however, that supervisory authority lacks legitimacy, either doctrinally or as a matter of sound judicial policy. That is the subject of the next section.

389. 425 U.S. 484, 497 (1976) (Brennan, J., dissenting).

390. This is not to say that courts are immune from criticism when they invoke the elastic protections of due process. *See* Ely, *supra* note 15, at 949 (criticizing the Court for formulating a due process principle that "lacks connection with any value the Constitution marks as special").

391. *See supra* notes 341-56 and accompanying text.

VI. Legitimacy of Supervisory Power in New York

Despite recent decisions of the Supreme Court restricting its scope, supervisory power is a familiar and accessible doctrine in the federal courts.[392] The New York courts, by contrast, have been more restrained about invoking their supervisory authority, and have been much less forthright about acknowledging that such an authority even exists.[393] Cardozo understood the potency and volatility of a supervisory authority over criminal prosecutions; he deferred for future consideration the occasions for its exercise.[394] Strong judges, particularly Fuld and Wachtler, accepted Cardozo's invitation and invoked the court's supervisory authority in notable cases. Most often, however, supervisory power has been a relatively dormant doctrine in New York.[395]

The judiciary's traditional reluctance to exercise supervisory authority is attributable in large part to a conception of our governmental structure in which the judiciary is disabled from exercising authority that is neither textually based nor within the traditional parameters of the common lawmaking process. According to this view, supervisory power is an unprincipled doctrine that affords judges a general license to roam about and invent rules in accordance with the judge's subjective evaluation of what is "good" or "beautiful."[396]

As demonstrated above, supervisory power is neither an arbitrary nor unprincipled source of power; it is an expression of an inherent judicial authority that arises from two distinct and legitimate judicial concerns. First, to the extent that supervisory power seeks to promote justice and fair dealing, it draws its inspiration and authority from constitutional principles and values.[397] Second, supervisory power is firmly rooted in the in-

392. *See* discussion *supra* part II.

393. *See* discussion *supra* part V.

394. *See supra* text accompanying note 10.

395. *See* discussion *supra* part V.

396. *See* CARDOZO, *supra* note 1, at 141.

397. American courts, both federal and state, historically have been the principal protectors of fundamental rights and liberties. Boyd v. United States, 116 U.S. 616, 636 (1886) (describing the Court's historic function "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon"); *see* Wachtler, *supra* note 123, at 7 ("There can be no doubt that today the orthodox view is that the courts, led by the Supreme Court, are the principal archi-

herent power of common law courts to mold and revise substantive, procedural, and remedial rules based on evolving considerations of justice and sound public policy.[398]

A. *Constitutional Justifications for Supervisory Power*

The process of constitutional interpretation has evolved into a well-established judicial practice. *Marbury v. Madison*[399] is the classic pronouncement that a court's constitutional interpretations are authoritative and final.[400] Chief Justice Marshall's assertion is not self-evident, however, and there is no explicit constitutional authority for the doctrine of judicial review. Indeed, there are few areas of the law as controversial as the authority of judges to develop new constitutional doctrine.[401]

Nevertheless, despite charges of undue judicial activism in discovering new rights in such vague constitutional clauses as

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tects of constitutional law and the primary protectors of fundamental human rights."); *see also* A. S. Zuckerman, *Miscarriage of Justice and Judicial Responsibility*, 1991 CRIM. L. REV. 492 (judicial function to promote fairness in the administration of justice). Majoritarian institutions such as the executive and legislative branches reflect a popular will that can be hostile, or indifferent, to individual rights. This tendency is most noticeable in criminal cases, but is also quite evident in other areas, particularly with respect to first amendment and equal protection guarantees.

Thus, in the absence of, or in opposition to, executive or legislative action that fails to protect individual rights guaranteed by the federal and state Constitutions, the courts are charged with the ultimate responsibility of interpreting constitutional and statutory rules to ensure that those protections are enforced. Moreover, judicial review has become such an integral part of our governmental order that the other branches of government routinely defer to the courts for protecting fundamental rights and liberties.

398. *See* discussion *supra* part IV.

399. 5 U.S. (1 Cranch) 137 (1803).

400. *In re* Jacobs, 98 N.Y. 98, 115 (1885) ("the power which courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution and even with reluctance"). Acts of the Legislature enjoy a strong presumption of constitutionality. People v. Scalza, 76 N.Y.2d 604, 607, 563 N.E.2d 705, 706, 562 N.Y.S.2d 14, 15 (1990). For a recent decision invalidating on constitutional grounds an act of the legislature, see State Bankers Ass'n v. Wetzler, 81 N.Y.2d 98, 612 N.E.2d 294, 595 N.Y.S.2d 936 (1993), which struck down audit fee provisions of the 1990-91 state operations bill as violative of article VII of the New York State Constitution.

401. *See supra* note 15. This process has become even more contentious in New York recently as judges are increasingly developing a body of state constitutional law that frequently is in conflict with Federal Constitutional doctrine. *See supra* note 182.

due process and equal protection, and claims of judicial usurpation of the lawmaking function entrusted to the legislative branch, constitutional interpretation to protect fundamental rights is a settled part of our legal culture.

It is in the context of interpreting constitutional guarantees that a principled basis for supervisory power can be discovered. An examination of the case law in which supervisory power has been exercised reflects the traditional common law process operating to create, in effect, a body of sub-constitutional judge-made law rooted in principles of justice and fair dealing. The cases typically draw their authority and inspiration from constitutional values, rather than from the actual constitutional text. As Judge Wachtler recognized in *People v. DeBour*, the decisions are grounded in the "spirit of the Constitution,"[402] and are legitimated based on the function that courts traditionally have served as guardians of individual rights.[403] The types of cases in which the courts have invoked their supervisory power reflect this function.

Thus, to the extent that criminal discovery protects values that inhere in the right to confrontation, the right to effective representation, and the right to a fair trial, the court's use of its supervisory authority to formulate rules to protect these rights, although not explicitly required by the Constitution, is necessary to protect these rights. This theory easily explains the *Rosario* rule.

Allowing the defense to have access to a witness's prior statements to impeach his credibility is more than a technical rule of criminal discovery. As the Supreme Court suggested in *Jencks v. United States*,[404] it is a quasi-constitutional rule to protect the defendant's right to confrontation and his due process right to a fair trial.[405] Indeed, "a right sense of justice" is a short-hand articulation of the constitutional values that inhere in our adversary system. These values require judicial oversight to ensure that the prosecutor's broad powers are not mis-

402. People v. DeBour, 40 N.Y.2d 210, 217, 352 N.E.2d 562, 567-68, 386 N.Y.S.2d 375, 381 (1976).

403. *See supra* note 397.

404. 353 U.S. 657 (1957).

405. *See* Palermo v. United States, 360 U.S. 343, 362-363 (1959) ("[I]t would be idle to say that the commands of the Constitution were not close to the surface of the [*Jencks*] decision") (Brennan, J., concurring).

used, and that the criminal process does not become skewed too strongly in favor of the government.[406] The goals of deterring prosecutorial overreaching and protecting courts from being accomplices in a miscarriage of justice — the traditional interests served by supervisory power — amply justify this exercise of judicial authority.[407]

Supervisory power is also constitutionally inspired in the context of the grand jury. The grand jury's authority derives from the constitution, and its power is constrained by very few constitutional limitations.[408] The privilege against self-incrimination and the right to a fair and unbiased grand jury are two such constitutionally-based protections. However, these protections are not self-executing. Because of the institutionalized power of the grand jury and the prosecutor, the secrecy of the proceedings, and the limited ability of witnesses to challenge excesses of power, the courts have exercised a broad oversight to ensure that prosecutors carry out their functions fairly and responsibly.[409]

Thus, notwithstanding extensive and detailed statutory rules regulating grand jury procedure, and in the face of a traditional reluctance to interfere with the grand jury's independence, the courts have formulated additional procedural rules to limit prosecutorial and grand jury excesses.[410] This power is inspired by constitutional limitations that are derived from, although not mandated by, due process, as well as the privilege against self-incrimination.[411] *People v. Pelchat*'s formulation of a prosecutorial "duty of fair dealing" is one instance of a constitutionally inspired principle that is enforced through the court's supervisory authority.[412] The perjury-trap cases are another example of this power.[413]

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406. *See* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1199 (1960) (describing the "subtle erosion of the accusatorial system").

407. *See supra* notes 18-38, 299-336 and accompanying text.

408. *See supra* notes 228-33 and accompanying text.

409. *See* discussion *supra* part V.B.

410. *See* discussion *supra* part V.B.

411. *See* discussion *supra* part V.C.2.

412. *See supra* notes 310-19 and accompanying text.

413. *See supra* notes 303-05 and accompanying text.

Moreover, although the courts claim authority in such instances, they do not necessarily claim finality. The dynamics of judicial review in a constitutional democracy is operative. In the absence of a constitutionally mandated rule, the legislature could override the court's decision and promulgate a statute changing or modifying any non-constitutional decision.

The most problematic instance of supervisory power is the creation of remedial rules for non-constitutional violations by government officials. Courts in such instances invoke their authority to oversee conduct of a coordinate branch, and formulate remedies for misconduct that are not constitutionally required. Courts are most vulnerable in these instance to claims of usurpation of authority.

Absent a constitutional basis, courts can be viewed as intruding into the sovereignty of a co-equal branch, inventing rules based on subjective feelings of outrage, and fashioning remedies that disallow evidence probative of a defendant's guilt. However, to the extent that the remedy is seen as necessary to protect constitutionally-based values such as privacy and personal integrity — the kinds of values articulated in *People v. DeBour* — the court's authority is grounded in a judicial tradition that requires a party who seeks the court's assistance to demonstrate "clean hands."[414]

B. *Inherent Judicial Power as Justification for Supervisory Power*

Apart from a constitutional basis, supervisory power is also legitimized as an integral part of the court's inherent power. The justifications for the court's inherent power provide similar support for supervisory power. As with supervisory power, the concept of inherent power is "not susceptible of precise definition."[415] As such, it "continues to be a vexing problem."[416] More-

414. Olmstead v. United States, 277 U.S. 438, 483 (1928) ("The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands.") (Brandeis, J., dissenting).

415. Gabrelian v. Gabrelian, 108 A.D.2d 445, 451, 489 N.Y.S.2d 914, 920 (2d Dep't 1985); *see* JAMES R. CARRIGAN, INHERENT POWERS OF THE COURTS 2 (1973):

> Under the inherent powers doctrine a court has all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because

over, the judiciary's uncertainty and hesitancy with respect to supervisory power is closely mirrored in the judiciary's ambivalence over the nature and scope of inherent power. Nevertheless, despite its vague and elastic boundaries, inherent power is a firmly established doctrine in the history and custom of judicial administration and lawmaking, and provides a coherent rationale for the use of supervisory power.[417]

Inherent judicial power has been recognized in a variety of contexts. Principal occasions for its use have included regulating the legal profession,[418] enforcing courtroom discipline,[419] administering housekeeping details and court schedules,[420] protecting the integrity of court records,[421] assuring adequate funding and facilities,[422] and promulgating rules "which are reasonably necessary for the administration of justice within the scope of their jurisdiction."[423] This latter aspect of inherent power is analytically similar to the common law power of courts to fashion substantive rules governing the merits of a controversy, procedural rules concerning the conduct of the lawsuit, and evidentiary rules concerning the manner in which the merits of the controversy may be proved.[424] It is this traditional common law aspect of inherent power that is closely intertwined with the concept of supervisory power.[425] To the extent that both the general common law power and the supervisory

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> the court exists; the court *is*, therefore, it has the powers reasonably required to act as an efficient court. Inherent judicial powers derive not from legislative grant or specific constitutional provision, but from the fact it is a court which has been created, and to be a court requires certain incidental powers in the nature of things.

Id.

416. *In re* Kisloff v. Covington, 73 N.Y.2d 445, 450, 539 N.E.2d 565, 568, 541 N.Y.S.2d 737, 740 (1989).

417. *See* discussion *supra* part II.

418. *See supra* note 114.

419. *See supra* notes 119-22.

420. *See supra* note 118.

421. *See supra* note 117.

422. *See supra* note 115.

423. Gabrelian v. Gabrelian, 108 A.D.2d 445, 449-50, 489 N.Y.S.2d 914, 918 (2d Dep't 1985).

424. *See* Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 181-82 (1979).

425. The courts frequently refer to inherent power when they are analyzing the appropriateness of the exercise of supervisory power. *See* United States v.

power formulate rules not required by textual sources such as a constitution or a statute, they are guided by similar considerations, and operate in the same manner. Moreover, they also share the same temporal or conditional status, in that such rules can be revised by the legislature.[426] Supervisory power is analytically distinct from the common law rule-making power, however, in that its exercise ordinarily is not indispensable to deciding the merits of the controversy; it is an attribute of the inherent judicial power to administer justice.[427]

The place of common law in today's legal topography is relevant to understanding the role of inherent power generally. Notwithstanding the continuing vitality of judge-made law, courts and commentators view lawmaking today essentially as a legislative function.[428] This, of course, was not always the case. There were courts before there were legislatures. Without the aid of statutes, the courts breathed life into the earlier legal systems by formulating rules on a case by case basis.[429] This power was understood as inherent in the judicial office. It was necessary to determine the rights between individuals concerning private controversies.

For a variety of reasons — historical, institutional, and pragmatic — codes were enacted to displace the common law.[430] The extent to which the judiciary retained the power to change, modify, or supplement law in the face of legislation used to be a much more contentious subject than it is today.[431] The modern legislature is understood as the preeminent lawmaking authority,[432] with courts retaining their classic common law power to interpret constitutional and statutory law, and in the absence of

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Nobles, 422 U.S. 225, 231 (1975) (describing federal courts' supervisory power as an "inherent power").

426. CALABRESI, *supra* note 123, at 92-93.

427. *See supra* notes 132-43 and accompanying text.

428. CALABRESI, *supra* note 123, at 2 ("What we are dealing with is the slow adaptation of our whole legal-political system to a major change: the preponderance of statutory law.").

429. *See generally* Thayer, *supra* note 124.

430. *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 391 *et seq.* (1985); CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT (1981).

431. *See supra* notes 121-143, and accompanying text.

432. CALABRESI, *supra* note 123, at 1.

a legislative scheme that addresses the subject, to fill the gaps.[433]

The extent to which a court invokes its authority to fill these gaps, particularly when necessary to protect fundamental values, epitomizes the legislative-judicial dynamic most forcefully. The court's inherent authority in such instances is clear; whether the court chooses to exercise that authority involves prudential concerns.

There are several theories that justify a court's inherent power. Under an instrumentalist theory of inherent power, a court requires those powers that are necessary to enable the court to function effectively as a court and to administer justice in the action.[434] This would include promulgating rules for courtroom order and decorum; ensuring that there are adequate facilities for litigants, witnesses, and jurors; establishing rules for the prompt and efficient disposition of cases; and formulating case-related rules so that the proceedings are conducted fairly and the merits of the controversy are resolved in accordance with justice.

A second theory of inherent power suggests that all judicial power in a democracy originally is delegated from the legislature and functions under a conditional grant from the legislature which can be revoked at will. Chief Justice Marshall put the case as follows:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.[435]

To the extent that the legislature does not itself enact positive rules to protect individual rights or the conduct of the criminal process, there is an implied grant of authority to courts to formulate rules to achieve those goals.

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433. *See supra* notes 257-74 and accompanying text.
434. *See supra* notes 114-121 and accompanying text.
435. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

A third theory posits that judges, by training, experience, and independence, are strategically and temperamentally well-suited to identify and implement social values whenever the written law does not provide an answer.[436] To be sure, this theory has a paternalistic quality; it assumes that judges are wise persons who will do what is right simply by following their instincts. However, there is no institutional mechanism save the judiciary to identify and implement values that protect the efficiency and fairness of the judicial process and constrain governmental conduct that violates individual rights.

The above theories explain the legitimacy of supervisory power in the same manner that they explain the legitimacy of inherent judicial power generally. Under an instrumentalist view, a court must have the authority to function as a court in order to inspire the respect and confidence of the public and the litigants. To perform such a role a court must have the authority to ensure that its processes are not abused, that evidence is not tainted, and that attorneys, litigants, and witnesses conduct themselves honorably and professionally.

Under a delegation theory, absent a positive legislative pronouncement, a court possesses an implied grant of power to supervise through rule-making the conduct of criminal proceedings to achieve fairness and justice. Such authority is conditional, and remains intact until the legislature chooses to displace the judge-made rule. And assuming that the legislative displacement is consistent with constitutional principles, the court would then lack power to change the rule, although it would necessarily be empowered to interpret the rule. Finally, the third approach authorizes a judge, based on her background, independence, and sensitivity, to shape the legal fabric to reflect her conception of the fundamental values that underlie criminal proceedings. This is a role inherent in judging, and historically has been assumed by common law judges.

VII. Conclusion

As an established doctrine, supervisory power is alive, but with a guarded prognosis, in the federal courts. Its existence in New York has never been clearly established. The courts occa-

436. CALABRESI, *supra* note 123, at 95-96; Wachtler, *supra* note 123, at 11-12.

sionally invoke its authority, either expressly or as an implicit expression of their inherent power to achieve justice, but the doctrine remains shadowy and mysterious. There seems little doubt that New York courts have the power to supervise in various settings the processes of criminal justice and the conduct of law enforcement officials, and occasionally have exercised that power.

Whether that power is legitimate is a matter of dispute. This Article has attempted to provide principled arguments based on constitutional, historical, institutional, and moral grounds that serve to legitimate supervisory power. In the end, as Cardozo intimated in *People ex rel. Lemon v. Supreme Court*, the issue is not one of judicial power but of judicial policy. Whether a court chooses to exercise that power depends on the character, temperment, and vision of the judges.