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## Court of Appeals - State Constitutional Law Review, 1991

Vincent Martin Bonventre

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# Court of Appeals — State Constitutional Law Review, 1991

Vincent Martin Bonventre\*

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## I. Introduction

This was the last full year of the Wachtler era.<sup>1</sup> During Chief Judge Wachtler's tenure at the helm of the state's highest

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\* Associate Professor, Albany Law School, Union University. The author is indebted to his research assistants, John D. Powell and Mitchell Tacy, whose diligence, loyalty, and good ears were invaluable in compiling the data, calculating the figures, and preparing the tables and graphs; to research assistants Christine L. Kenefick, Katheryn L. Clune, and Bridgette Burrowes, who also helped with this, as well as other pieces; to Michelle Sasso, who typed this manuscript, and others, with extraordinary speed and meticulousness; and to his wife Karen and children, whose support and patience are essential to every writing.

Finally, this *Review* is again—and always—for Raffaella Bonventre, his mother.

1. On November 10, 1992, then-Chief Judge Sol Wachtler resigned from the Court. See Josh Barbanel, *Chief Judge of New York State is Arrested in Extortion Scheme*, N.Y. TIMES, Nov. 8, 1992, at 1; Josh Barbanel, *Chief Judge Quits Post in*

tribunal he left an unmistakable mark on the Court, its philosophical direction, and thus the fundamental law of New York.<sup>2</sup> This *Review*, covering 1991, especially when combined with the inaugural *Review*,<sup>3</sup> which studied the state constitutional decisions of 1990, affords a revealing look at the Court of Appeals' treatment of fundamental rights and liberties in the latter part of Wachtler's chief judgeship.<sup>4</sup>

The inaugural *Review* triggered considerable reaction. Some in high places, including current and former members of the Court,<sup>5</sup> were quite upset. They apparently took offense at the author's observations that the Court under Wachtler was retrenching on rights and liberties,<sup>6</sup> that voting records of the individual judges revealed a distinct ideological spectrum,<sup>7</sup> and that the Court was deciding many significant constitutional issues in superficial unsigned opinions.<sup>8</sup> Others in high places—far outnumbering those who were upset—and many others in the bar, academia and the media approved and offered encouragement and support.<sup>9</sup>

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*New York in Extortion Case*, N.Y. TIMES, Nov. 11, 1992, at A1. Judge Judith S. Kaye was subsequently elevated to fill the resulting vacancy in the Court's center seat. See Gary Spencer, *Kaye Is Selected Chief Judge by Governor*, N.Y. L.J., Feb. 23, 1993, at 1; Gary Spencer, *Unanimous Vote for Kaye as State's New Chief Judge*, N.Y. L.J., Mar. 18, 1993, at 1.

2. See generally Vincent M. Bonventre, *State Constitutional Adjudication at the Court of Appeals, 1990 and 1991: Retrenchment is the Rule*, 56 ALB. L. REV. 119 (1992); Peter Galie, *Modes of Constitutional Interpretation: The New York Court of Appeals' Search for a Role*, 4 EMERGING ISSUES ST. CONST. L. 225 (1991).

3. Vincent M. Bonventre, *Court of Appeals — State Constitutional Law Review, 1990*, 12 PACE L. REV. 1 (1992).

4. For related discussions, see Bonventre, *supra* note 2, at 121 (claiming that after a few years into Sol Wachtler's tenure as Chief Judge, the New York Court of Appeals began back-pedaling on rights and liberties); Vincent M. Bonventre, *Tilting the Scales of Justice*, EMPIRE ST. REP., June 1992, at 21, 24 (stating that the Court of Appeals had become "increasingly unsympathetic to rights and liberties" during the latter part of Wachtler's tenure as Chief Judge).

5. See, e.g., John Caher, *Albany Law Faculty Defends Right to Write: Colleagues Rally for Untenured Professor*, TIMES UNION (Albany), June 12, 1991, at A-1; John Caher, *Court Critique Prompts Controversy Over Academic Freedom*, SUN-DAY TIMES UNION (Albany), Aug. 18, 1991, at B-6; *Thought Police at Albany Law*, TIMES UNION (Albany), June 13, 1991, at A-10; see also Joseph Bellacosa, *A Letter of Appeals*, EMPIRE ST. REP., Aug. 1992, at 8 (reacting to a related magazine piece).

6. See Bonventre, *supra* note 3, at 52-53.

7. *Id.* at 50-52.

8. *Id.* at 53-54.

9. Many current and former members of the Court of Appeals personally communicated their approval to the author and expressed dismay at the hostility

Moreover, the *Review*—and no doubt the hostile reaction as well—seemed to generate substantial interest in the Court's constitutional decisionmaking and direction. The author was deluged with requests for related articles, follow-up studies, and personal presentations.<sup>10</sup> And general circulation newspapers,<sup>11</sup> as well as legal ones,<sup>12</sup> have been reporting the findings of studies originally undertaken for the *Review* or for related subsequent pieces.

During the past two years, whatever else the author has written about the Court has been tied to the first *Review*, substantively and in the minds of readers. Indeed, as though everything else has been a footnote to that initial article, the most frequently asked question seems to have been: "*Are You Writing Another Pace Law Review Piece?*" This second *Review* is the author's response. Hopefully, it will help sustain the interest apparently sparked by the first, i.e., interest in state constitutional decisionmaking at New York's highest court, and how that decisionmaking affects the fundamental freedoms of those who live in this state.

With that in mind, the purpose here, much like before, is to focus on issues pertinent to state constitutional *adjudication*.

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others were directing against a critical analysis of the Court's work. The author's own colleagues at Albany Law School, members of law and political science faculties around the country, members of the bar throughout the state, and journalists and other commentators were, almost uniformly, very supportive of the author's work and were aghast at the animosity to academic freedom displayed by some who are, or were, responsible for enforcing freedom of expression.

10. See, e.g., Vincent M. Bonventre, *The New York Court of Appeals: An Old Tradition Struggles with Current Issues*, 22 PERSP. ON POL. SCI. 149 (1993); Bonventre, *supra* note 2; Vincent M. Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, 4 EMERGING ISSUES ST. CONST. L. 1 (1991); Bonventre, *supra* note 4; Vincent M. Bonventre & John D. Powell, *Changing Course at the High Court*, EMPIRE ST. REP., Mar. 1994, at 55.

11. See, e.g., John Caher, *Cuomo's High Court is Steering Rightward, Study Concludes*, SUNDAY TIMES UNION (Albany), June 2, 1991, at B-2; John Caher, *Kaye Leading Top Court to Left, Study Says*, TIMES UNION (Albany), Oct. 31, 1993, at A-1; William House, *Court Tilt is in Cuomo's Hands: Nomination Deadline Nears; Experts Eager to See Effect on Civil-Liberties Cases*, REPORTER DISPATCH (Gannett Suburban Newspapers, White Plains, N.Y.), May 11, 1992, at A-1; Kevin Sack, *Cuomo's Choice to Head the Court of Appeals: A Judge's Judge — Judith Smith Kaye*, N.Y. TIMES, Feb. 23, 1993, at B2.

12. See, e.g., Gary Spencer, *Dust Settles After a Year of Turmoil: As Court Recovers from Last Term Experts Assess Its Future Direction*, N.Y. L.J., Nov. 1, 1993, at S2; Daniel Wise, *Study Finds Court of Appeals Becoming More Conservative*, N.Y. L.J., June 3, 1991, at 1.

There are surveys of New York cases in other publications: some are limited to the Court of Appeals, others not; some are devoted to state constitutional issues, others review the judicial output of New York State generally.<sup>13</sup> There is no need to duplicate those efforts, and that is not the objective here. Rather, while this *Review* does take account of every Court of Appeals ruling that involves a substantial question of state constitutional right, its particular aim is to examine the Court's *decisionmaking* in those cases and, in that way, to better understand the Court itself, its constitutional jurisprudence, and that of its members.

Discussion of the cases thus focuses on matters especially pertinent to adjudication of state constitutional claims. These include the Court's methodological approach(es) to state constitutional issues,<sup>14</sup> its jurisprudence(s) of state authority and individual rights, its view(s) of federalism and the role of a state high Court in the federal system, the dynamics and philosophical differences between New York's high tribunal and the Supreme Court of the United States, and the dynamics and differences within the Court of Appeals itself. Accordingly, the decisions which underscore or provide insight into these sorts of considerations are highlighted.

Part II of this Article examines the state constitutional rights and liberties decisions rendered by the Court of Appeals in 1991. First the decisions involving rights of the accused will be discussed, then those dealing with civil liberties and equality. Part III explores the voting statistics of the individual judges and the Court itself for 1991, and compares these figures with those for 1990 (the focus of the previous *Review*). Observations are then drawn from the numerical tallies, the Court's decisions, and the individual judges' opinions.

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13. For example, the *New York Law Journal* publishes a special annual report on the Court of Appeals which includes summaries of Court of Appeals opinions in all areas of the law; *Touro Law Review* publishes an annual issue on New York State constitutional law covering decisions from all New York courts; the *Syracuse Law Review* publishes an annual survey of New York law which reviews developments in virtually every area of the law and includes decisions from all New York courts.

14. See Galie, *supra* note 2.

## II. The Cases — 1991

A. *Criminal Justice*

The criminal cases decided by the Court in 1991 raised a host of state constitutional issues, including warrantless arrests, probable cause, show-up identifications, fair trial, the right to be present, the critical stages of trial, the right to counsel, and pro se defense. Perhaps the most significant cases for state constitutional adjudication were *People v. Harris*<sup>15</sup> and *People v. Jackson*.<sup>16</sup> Each involved the interplay of various policies and interests, and each provided insights into the Wachtler Court.

*Harris* involved the relation between a warrantless arrest, a subsequent confession, a ruling by the United States Supreme Court,<sup>17</sup> and New York's right to counsel.<sup>18</sup> *Jackson* examined New York's *Rosario* rule,<sup>19</sup> its progeny, requiring automatic reversal for violations,<sup>20</sup> the constitutional or quasi-constitutional underpinnings of both, and the statute governing postjudgment motions.<sup>21</sup> The judges' disagreements in these two cases are particularly telling. They reveal much about the Court's internal divisions over independent state constitutional decision-making, including its very legitimacy,<sup>22</sup> as well as the Court's general treatment of rights-protective precedents in the latter years of the Wachtler era. The discussion of 1991 criminal

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15. 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991).

16. 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991).

17. See *New York v. Harris*, 495 U.S. 14 (1990) (reversing the prior Court of Appeals ruling in *People v. Harris*, 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988) (suppressing a confession on the basis of the Fourth Amendment to the United States Constitution)).

18. *Harris*, 77 N.Y.2d at 435, 570 N.E.2d at 1051, 568 N.Y.S.2d at 702.

19. See *People v. Rosario*, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450 (1961) (holding that a criminal defendant is entitled to examine the prior statements of prosecution witnesses).

20. See, e.g., *People v. Consolazio*, 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976).

21. See N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1983) (authorizing vacatur of a prior conviction on the basis of improper prosecutorial conduct that prejudices the defendant's case).

22. Divisions over the legitimacy of independent state constitutional decision-making culminated publicly the following year in *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992); see *infra* note 602 and accompanying text.

cases involving pretrial safeguards begins with the Court's decision in *Harris*.

### 1. *Pre-Trial Safeguards*

On remand from the United States Supreme Court,<sup>23</sup> which reversed the Court of Appeals' earlier decision,<sup>24</sup> the New York Court in *People v. Harris (Harris II)*<sup>25</sup> again ruled that the confession in question must be suppressed<sup>26</sup>—this time basing its decision on the state constitution.<sup>27</sup> In its first consideration of the case, the Court of Appeals, applying federal law only, held that the defendant's station house confession, given subsequent to his arrest by police officers who unlawfully entered his apartment without a warrant, must be suppressed as the product of a *Payton* violation.<sup>28</sup> A narrow five to four majority at the Supreme Court disagreed.<sup>29</sup> Although the entire Court did agree that the entry and arrest violated the Fourth Amendment-based *Payton* rule,<sup>30</sup> the majority held that the ensuing confession at the precinct did not have to be suppressed.<sup>31</sup>

The Supreme Court's rationale was twofold. One, the confession was deemed not the result of the *Payton* violation, apparently on the ground that any causal connection between the two was broken when the police and the defendant left the defendant's apartment.<sup>32</sup> Two, exclusion of the confession would have little or no deterrent value because the police had probable

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23. *New York v. Harris*, 495 U.S. 14 (1990).

24. *People v. Harris*, 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988) (*Harris I*).

25. 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991).

26. Defendant had given three statements. The first was made in his apartment following the arrest; the second at the police station an hour later; the third on videotape, also at the police station. The first statement was suppressed as the fruit of the poisonous arrest; the third was suppressed as involuntary. These rulings were not challenged. Only the second statement, therefore, was at issue in *Harris II*. *Id.* at 436, 570 N.E.2d at 1052, 568 N.Y.S.2d at 703.

27. *Id.* at 435, 570 N.E.2d at 1051, 568 N.Y.S.2d at 702.

28. In *Payton v. New York*, 445 U.S. 573 (1980), the United States Supreme Court ruled that the Fourth Amendment's proscription against unreasonable searches and seizures prohibited warrantless, nonconsensual entries into a felony suspect's home to arrest him. *Id.* at 589-90.

29. *New York v. Harris*, 495 U.S. at 14.

30. *Id.* at 21-23.

31. *Id.* at 21.

32. *Id.* at 14.

cause to arrest the defendant, and thus, they did not need to enter his home illegally—in violation of *Payton*—to interrogate him.<sup>33</sup> In short, according to the Supreme Court, “[i]t is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate police to violate *Payton*.”<sup>34</sup> Of course, as the four member dissent at the Supreme Court emphasized, that is precisely what the police did do.<sup>35</sup>

Notwithstanding the federal ruling, however, the Court of Appeals’ majority in *Harris II* concluded, as a matter of state constitutional law, that the special interplay between search and seizure protections and New York’s right to counsel rules required that the statement be suppressed.<sup>36</sup>

In an opinion authored by Judge Richard D. Simons, the Court explained that the right to counsel attaches in New York when an arrest warrant is issued.<sup>37</sup> Criminal proceedings must be commenced to obtain a warrant, and under New York’s “indelible” right to counsel rule,<sup>38</sup> a suspect may not thereafter be questioned in the absence of an attorney.<sup>39</sup> Hence, because police may not question an uncounseled suspect arrested *with* a warrant, “they have every reason to violate *Payton*”—i.e., to arrest him *without* a warrant—and thereby attempt to “circumvent the accused’s indelible right to counsel.”<sup>40</sup>

If the police in *Harris* had obtained a warrant, as they should have, they would not have been permitted, under New York’s right to counsel rules, to question the defendant without

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33. *Id.* at 20.

34. *Id.* at 21.

35. *Id.* at 22 (Marshall, J., dissenting) (stating that the police’s conduct constituted a “knowing and intentional constitutional violation”).

36. *Harris II*, 77 N.Y.2d at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

37. *Id.* at 440, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705; *People v. Blake*, 35 N.Y.2d 331, 339-40, 320 N.E.2d 625, 631-32, 361 N.Y.S.2d 881, 890-91 (1974)).

38. Under the so-called “indelible” rule, the state constitutional right to counsel, once attached, cannot be waived in the absence of counsel, regardless of how voluntary, knowing, understanding, or deliberate the suspect’s attempted waiver might be. See *People v. Settles*, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978). The term “indelible” was adopted by the Court in the opinion by then-Judge Lawrence H. Cook. *Id.*

39. *Harris II*, 77 N.Y.2d at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706 (citing *People v. Samuels*, 49 N.Y.2d 218, 221-22, 440 N.E.2d 1344, 1346, 424 N.Y.S.2d 892, 894 (1980)).

40. *Id.* at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 705.



an attorney being present.<sup>41</sup> Surely the police "should not enjoy greater latitude,"<sup>42</sup> argued Judge Simons, simply because they violated *Payton* and illegally fetched the defendant without a warrant.<sup>43</sup> Hence, the *Harris II* majority deemed it necessary to suppress statements elicited incident to *Payton* violations in order to discourage unlawful warrantless entries and arrests and, in turn to preserve the integrity of New York's right to counsel rules.<sup>44</sup>

The dissenters in *Harris II* questioned the "New York right to counsel angle . . . [claimed by the majority] to be needed to serve some newly perceived special deterrent objective."<sup>45</sup> Judge Joseph W. Bellacosa, joined by Chief Judge Sol Wachtler,<sup>46</sup> saw no basis for suppressing the confession.<sup>47</sup> In the dissenters' view, suppression would not deter *Payton* violations: it was only speculative that the police intended to violate defendant's *Payton* rights or his New York right to counsel, the police were under no obligation to obtain a warrant at any particular time, and the evidence showed that the police only intended to locate the defendant and then obtain the necessary arrest warrant.<sup>48</sup>

The majority responded to those observations by reminding the dissenters of the facts:

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41. *Id.* at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

42. *Id.*

43. *Id.*

44. *Id.* In concurrence, Judge Vito J. Titone recalled his concurring opinion in *Harris I*, 72 N.Y.2d at 625-26, 532 N.E.2d at 1235-36, 536 N.Y.S.2d at 7-8 (Titone, J., concurring), in which he disagreed that federal law required suppression, but nevertheless voted with the majority to suppress the confession on the basis of the Court of Appeals' decision in *People v. Conyers*, 68 N.Y.2d 982, 503 N.E.2d 108, 510 N.Y.S.2d 552 (1986) (holding that statements following an illegal arrest must be excluded unless sufficient attenuation breaks the causal connection between the arrest and the statements); he agreed "wholeheartedly" with the majority's analysis in *Harris II* based on the New York right to counsel rules. *Harris II*, 77 N.Y.2d at 441, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Titone, J., concurring).

45. *Harris II*, 77 N.Y.2d at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

46. The same two judges dissented in *Harris I*, 72 N.Y.2d at 626, 532 N.E.2d at 1236, 536 N.Y.S.2d at 8 (Wachtler, C.J., dissenting).

47. *Harris II*, 77 N.Y.2d at 445, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

48. *Id.* (Bellacosa, J., dissenting).

The trial court found as a fact that the three officers went to the apartment to take defendant into custody, that with guns drawn they blocked the exits from the apartment, knocked on the door and, when defendant answered the knock, entered the apartment and arrested him. It concluded on this evidence that "no more clear violation" of *Payton* could be established. Three reviewing courts have accepted that finding: the Appellate Division, which left [the trial court's] factual findings undisturbed; this Court and the United States Supreme Court.<sup>49</sup>

Regarding the appropriate remedy for a *Payton* violation, the dissenters' reliance on the Supreme Court's "common sense analysis"<sup>50</sup> missed the majority's point. The dissent's own excerpt from the Supreme Court's opinion makes this clear. "Suppressing a station house statement obtained after a *Payton* violation will have little effect on the officers' action," the Supreme Court majority had opined, because police "need not violate *Payton* in order to interrogate the suspect."<sup>51</sup> But, while that might be true under federal law, it is not true under New York law.

As the Court of Appeals majority explained, compliance with *Payton* does preclude police questioning under New York law: the state right to counsel is attached when an arrest warrant is obtained, and thus, under the "indelible" rule, the arrestee may not be interrogated even if he consents, at least until an attorney is at his side.<sup>52</sup> There is, therefore, considerable incentive for police investigators to violate *Payton*, i.e., to forego obtaining a warrant, in order to prevent New York's right to counsel from attaching with its restrictions on interrogation.<sup>53</sup> Hence, some countervailing disincentive is necessary in New York—lest New York's right to counsel be circumventable with

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49. *Harris II*, 77 N.Y.2d at 436 n.1, 570 N.E.2d at 1052 n.1, 568 N.Y.S.2d at 703 n.1 (citations omitted). The majority continued: "Indeed, the statement obtained in the apartment, although voluntary for Fifth Amendment purposes, was suppressed because the entry was unlawful and the parties no longer challenge that ruling." *Id.*

50. *Id.* at 446, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting).

51. *Id.* at 445, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting) (quoting *New York v. Harris*, 495 U.S. at 20).

52. *Harris II*, 77 N.Y.2d at 439-40, 570 N.E.2d at 1054-55, 568 N.Y.S.2d at 705-06.

53. *Id.* at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

impunity, indeed circumventable by unconstitutional warrantless intrusions.

The dissenters' protest, that the police questioning at issue was permissible because New York's right to counsel had not attached in the absence of an arrest warrant,<sup>54</sup> proved the majority's point. With the required arrest warrant, questioning would be prohibited; surely then, without the required warrant, questioning could not be tolerated. But validating the defendant's station house statement would be doing just that. More than that, it would be rewarding noncompliance with the constitutional warrant requirement and approving the successful avoidance of the New York right to counsel rules.

Significantly, the majority noted that "the police were [apparently] motivated by just such considerations."<sup>55</sup> The police had probable cause to arrest the defendant early on, but they chose not to secure a warrant.<sup>56</sup> Instead, they knowingly violated department rules by entering the defendant's apartment and arresting him without a warrant, and then they proceeded to question him without an attorney.<sup>57</sup>

Perhaps the dissenters were more on target with their contention, borrowed from the Appellate Division, that the *Payton* violation did not, in fact, induce the defendant's station house statement.<sup>58</sup> The intermediate appeals court had denied suppression of the statement on the ground that "any taint resulting from an illegal arrest was removed by the lapse of time . . . and the rereading of *Miranda* warnings."<sup>59</sup> Judge Bellacosa elaborated: "The record evidence supports and confirms this key chain of attenuating events: the change of scene from a 'protected' dwelling to 'unprotected' precinct; intervening passage of about one hour's time; and renewed warnings by the police authorities and new waivers by defendant."<sup>60</sup>

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54. *Id.* at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

55. *Id.* at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

56. *Id.*

57. *Id.*

58. *Id.* at 446, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting) (citing *People v. Harris*, 124 A.D.2d 472, 507 N.Y.S.2d 823 (1st Dep't 1986)).

59. *Harris*, 124 A.D.2d at 475, 507 N.Y.S.2d at 825.

60. *Harris II*, 77 N.Y.2d at 446, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting).

Judge Bellacosa protested that there was “no justification for conclusorily sweeping aside these facts. . . .” The dissenters could not, he added, “comprehend the majority’s determination apparently made as a matter of law and ‘sound policy, justice and fundamental fairness.’”<sup>61</sup> It is certainly debatable whether the majority’s ruling was as unjustified and incomprehensible as Bellacosa claimed. But he was undoubtedly correct that the majority’s conclusion, that the *Payton* violation fatally tainted the defendant’s statement, was not simply a determination of fact. The majority itself was clear on this point. Its ruling was not a *factual* finding of “taint,” but a *legal* determination.<sup>62</sup>

According to the majority, the break in causal connection between the *Payton* violation and the defendant’s statement, i.e., the “attenuation,” was “insufficient as a matter of law.”<sup>63</sup> The explanation given was revealing:

Based on the facts found by the courts below, we determine that the causal connection between the illegal arrest and defendant’s statement in the police station was not sufficiently attenuated from the *Payton* wrong because of the temporal proximity of the arrest and the statement, the absence of intervening circumstances and the *purpose and flagrancy of the police misconduct*.<sup>64</sup>

That last factor, the “purpose and flagrancy of the police misconduct,” has nothing to do, of course, with the *fact* of taint or attenuation. But it *is* critical to the consideration of “sound policy, justice, and fundamental fairness.” The brazenness of the police misconduct—the clear violation of *Payton* and department rules; the deliberate decision to forego a warrant, to sidestep the right to counsel rules, and to question the defendant; and the coercive entry into the apartment with guns drawn and exits blocked to effect the defendant’s arrest—could not go unanswered in the majority’s view.<sup>65</sup> To deter such misconduct,

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61. *Id.* (Bellacosa, J., dissenting) (quoting *People v. P.J. Video*, 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) (a majority opinion that was also authored by Judge Simons), *cert. denied*, 479 U.S. 1091 (1987)).

62. *Harris II*, 77 N.Y.2d at 441 n.3, 570 N.E.2d at 1058 n.3, 568 N.Y.S.2d at 706 n.3.

63. *Id.* at 441, 570 N.E.2d at 1058, 568 N.Y.S.2d at 706.

64. *Id.* at 440-41, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706 (emphasis added).

65. This intolerance of official misconduct and insistence on accountability is characteristic of Judge Simons. See, e.g., *People v. Ohrenstein*, 77 N.Y.2d 38, 54, 565 N.E.2d 493, 501, 563 N.Y.S.2d 744, 752 (1990) (Simons, J., dissenting); *In re*

and to protect the search and seizure and counsel rights of New York citizens, statements obtained as a consequence of *Payton* violations would have to be suppressed.<sup>66</sup>

Apparently then, according to the majority, the more willful the misconduct, the more compelling is the need to suppress. Police incentives and motivations were, for that reason, important considerations in the majority's opinion.<sup>67</sup> And the "flagrancy" of the unconstitutional conduct was thus a crucial component in determining attenuation and taint.<sup>68</sup>

However strong the disagreements over the merits in *Harris II*, the Court was even more deeply and profoundly divided over the very concept of state constitutional decisionmaking. The majority insisted that there were "sufficient reasons" to apply the state constitution "unconstrained by a contrary Supreme Court interpretation of the federal counterpart."<sup>69</sup> But the dissenters denounced the majority's "affront" to the "United States Supreme Court's opinion declaring the law of the land."<sup>70</sup> The majority determined that "the Supreme Court's rule is not adequate to protect New York citizens from *Payton* violations because of our right to counsel rule."<sup>71</sup> But the dissenters derided the notion that some "relevant 'local' or 'paro-

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Greenfield, 76 N.Y.2d 293, 300, 557 N.E.2d 1177, 1180, 558 N.Y.S.2d 881, 885 (1990) (Simons, J., dissenting); *In re Fuchsberg*, 426 N.Y.S.2d 639, 658 (N.Y. Ct. Jud. 1978) (Simons, J., dissenting).

66. *Harris II*, 77 N.Y.2d at 439, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705.

67. *Id.* at 436 n.1, 438, 440, 570 N.E.2d at 1052 n.1, 1053-54, 568 N.Y.S.2d at 703 n.1, 704-05.

68. *Id.* at 441, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706. The majority's treatment of flagrant misconduct is reminiscent of the Court's decision in *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978). In *Isaacson*, then-Judge Lawrence H. Cooke, writing for the majority, reasoned that the "reprehensible police action," though not amounting to entrapment of the defendant, violated "traditional notions of justice and fair play" and thus mandated dismissal of the charges. *Id.* at 514, 522, 378 N.E.2d at 79, 84, 406 N.Y.S.2d at 715, 720.

69. *Harris II*, 77 N.Y.2d at 437-38; 570 N.E.2d at 1053, 568 N.Y.S.2d at 704; see also *id.* at 441, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Titone, J., concurring) (stating that the New York right to counsel rules "justify applying our own state attenuation analysis").

70. *Id.* at 443, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

71. *Harris II*, 77 N.Y.2d at 439, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705.

chial' interest of New York justifi[ed]" a state rule different than the federal.<sup>72</sup>

Regardless of the merits of the Court's substantive decision in *Harris II*, the heated argument over the very legitimacy of rendering an independent state-based decision is startling. Independent state constitutionalism is a venerable tradition at the New York Court of Appeals.<sup>73</sup> Moreover, it is axiomatic in our federal system of government that the Court of Appeals, like other state high courts, "is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting" the protection of individual rights.<sup>74</sup> In fact, New York has historically been a national leader in enforcing individual rights under the state constitution regardless of the trends in federal law.<sup>75</sup>

To be sure, the Court of Appeals during the latter years of the Wachtler era moved in a direction similar to that of the Supreme Court; it was generally retrenching on rights and liberties.<sup>76</sup> But until *Harris II*, every member of the high tribunal seemed at least to recognize that the Court of Appeals was not bound to follow the Supreme Court's lead. No member had argued that it was somehow improper or illicit for the New York

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72. *Id.* at 443, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting); see also discussion *infra* notes 593-602 and accompanying text.

73. See generally Vincent M. Bonventure, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 31 (1989); Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFF. L. REV. 157, 192-94 (1979); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987).

74. See *People v. Barber*, 289 N.Y. 378, 384, 46 N.E.2d 329, 331 (1943). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Stewart F. Hancock, Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271 (1993).

75. See William J. Brennan, Jr., *A Tribute to Chief Judge Charles S. Desmond*, 36 BUFF. L. REV. 1, 3 (1987); Peter J. Galie, *State Supreme Courts, Judicial Federalism and Other Constitutions*, 71 JUDICATURE 100, 103 (1987). See generally William Wiecek, *State Protection of Personal Liberty: Remembering the Future*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 371 (Paul Finkelman & Stephen E. Gottlieb eds., 1991); Edward S. Corwin, *The Extension of Judicial Review in New York: 1783-1905*, 15 MICH. L. REV. 281 (1917).

76. See Bonventure, *supra* note 2; Bonventure, *State Constitutional Recession: The New York Court of Appeals Retrenches*, *supra* note 10; see also Carl Swidorski, *The New York Court of Appeals and Civil Liberties: An Assessment of Recent Decisions*, 3 ST. CONST. COMMENTARIES AND NOTES 1 (1991).

court to exercise *independent state* constitutional judgment, and thereby, reach a different result than that reached by the Supreme Court in the exercise of its *federal* constitutional judgment.<sup>77</sup>

But in *Harris II*, the dissenters did just that. They seemed to be arguing, in fact, that the Court of Appeals had no choice but to reach exactly the same result as the Supreme Court. Referring to "the standard mandate from the United States Supreme Court for 'proceedings . . . in conformity with [its] judgment' [and] 'not inconsistent with [its] opinion,'" the dissenters complained that "the majority today proceeds 'inconsistently' and not 'in conformity' with" the Supreme Court's decision.<sup>78</sup>

Of course, a state court does not run afoul of a federal constitutional decision when it protects individual rights more than the Supreme Court requires; federal constitutional law simply establishes standards *below* which no state can fall in safeguarding individual liberties.<sup>79</sup> That is rudimentary.<sup>80</sup>

Lest it be thought that the dissenters were merely overstating their position, other passages in the dissenting opinion confirm their discomfort with independent state decisionmaking. "It is the epitome of institutional egocentricity, a kind of Copernican view of the judicial universe," the dissenters fumed, for the majority "to reject the United States Supreme Court's anal-

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77. Indeed, both dissenters in *Harris II* had previously written approvingly of the Court of Appeals' exercise of independent state constitutional judgment to protect rights left unprotected, or less protected, by Supreme Court decisions. See, e.g., Joseph W. Bellacosa, *The New York Constitution: A Touch of Class*, N.Y. ST. B.J., Apr. 1987, at 14; Sol Wachtler, *Our Constitutions — Alive and Well*, 61 ST. JOHN'S L. REV. 381 (1987); Sol Wachtler, *Constitutional Rights: Resuming the States' Role*, INTERGOVERNMENTAL PERSP., Summer 1989, at 23. See also *Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986) (Wachtler, C.J.).

78. *Harris II*, 77 N.Y.2d at 443, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J., dissenting).

79. See *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *People v. P.J. Video*, 68 N.Y.2d 296, 304, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 913 (1986), *on remand from* 475 U.S. 868 (1986); *Arcara v. Cloud Books Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986), *on remand from* 478 U.S. 697 (1986). See generally *Cooper v. California*, 386 U.S. 58 (1967).

80. See *People v. Scott*, 79 N.Y.2d 474, 504-06, 593 N.E.2d 1328, 1347-48, 583 N.Y.S.2d 920, 938-40 (1992) (Kaye, J., concurring).

ysis" of the rule against warrantless entries, and to reject as well the "Supreme Court's latest interpretation of the deterrence and application breadth of that rule [sic]."<sup>81</sup> The majority "rejects the analysis, wisdom and experience" of the United States Supreme Court,<sup>82</sup> complained the dissenters, and "relegates that Supreme Court's work to an academic judicial exercise."<sup>83</sup>

To the dissenters, the decisions of the United States Supreme Court under the Federal Constitution are, at the least, presumptively accurate as interpretations of the state constitution—even though the latter is a different charter, serving a different purpose, governing a different sovereignty and populace, and reflecting different influences, customs, traditions, and policies.<sup>84</sup> This notion of presumptive accuracy or validity has been so thoroughly debunked in the literature and in the courts, including the Supreme Court itself,<sup>85</sup> that one wonders how and

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81. *Harris II*, 77 N.Y.2d at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting); see also *infra* note 599.

82. *Id.* at 442, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J., dissenting).

83. *Id.* at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting). Judge Bellacosa is certainly correct that the Supreme Court's decision was relegated to an "academic judicial exercise." But that is not an argument against independent state adjudication. Rather it is one of the strongest arguments for independent adjudication the first time around, i.e., for the state court to decide the case in the first instance on adequate and independent state grounds and thereby obviate Supreme Court review and the attendant waste of judicial resources at the Supreme Court, as well as at the Court of Appeals on remand. The "reactive" use of state constitutional law—on the rebound after reversal and remand by the Supreme Court—was a prevailing approach to independent adjudication in the Wachtler era. See Galie, *supra* note 2, at 236; Bonventre, *supra* note 73, at 51-54. For criticisms of the reactive approach see Ronald K. L. Collins, *Reliance on State Constitutions: Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); see also *Massachusetts v. Upton*, 466 U.S. 727, 735-39 (1984) (Stevens, J., concurring); see also *infra* notes 586-87 and accompanying text.

84. See Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 17 (1988); Hans A. Linde, *Does The "New Federalism" Have a Future?*, 4 EMERGING ISSUES ST. CONST. L. 251 (1991). See generally Hans A. Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143 (1986-87).

85. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Cooper v. California*, 386 U.S. 58 (1967); *People v. Scott*, 79 N.Y.2d 474, 505, 593 N.E.2d 1328, 1347, 583 N.Y.S.2d 920, 939 (1992) (Kaye, J., concurring); *State v. Kennedy*,



why the dissenters could actually embrace it. That, they do not explain. The dissenting opinion seems simply to assume that the Supreme Court's decision somehow preordains the state constitutional result.

In any event, a close reading of the dissenting opinion suggests another driving force behind its position. There is a not too subtle anger and frustration in the dissent that law enforcement is being unreasonably hampered; that arbitrarily imposed technicalities are interfering with crime control.<sup>86</sup> This view of the dissenters is reflected quite vividly in the voting records of both Judge Bellacosa and Chief Judge Wachtler which, for the last few years of the Wachtler era, were heavily pro-prosecution and rather unsympathetic to criminal defense claims.<sup>87</sup> In *Harris II*, Judge Bellacosa clearly expressed their shared position about law enforcement and the rights of the accused at issue when he wrote:

This case is not about the police invading the defendant's dwelling. They had legal and constitutional probable cause to believe that defendant had committed a heinous murder and *they did what society expects its law enforcement officials to do*: they set out to locate and apprehend the suspected murderer. . . .

. . . .

. . . Why should law enforcement officials be "deterred" by a court ruling that unfairly brands them in belated hindsight as flagrant wrongdoers and circumventers of the law . . . ?<sup>88</sup>

At issue then in *Harris II* were two fundamental questions that philosophically, and emotionally, divided the Court. How much deference, if any, should the Court of Appeals give to a

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66 P.2d 1316, 1322 (Or. 1983) (Linde, J.); *Nomination of Justice William Hubbs Rehnquist: Hearings on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 141 (1986) (testimony of William H. Rehnquist); Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973-76 (1985); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 389-97 (1984).

86. See generally HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153-73, 227-38 (1968) (delineating the "crime control" and "due process" models of criminal justice).

87. See *infra* notes 534-41 and accompanying text.

88. *Harris II*, 77 N.Y.2d at 443, 447, 570 N.E.2d at 1056, 1059, 568 N.Y.S.2d at 707, 710 (Bellacosa, J., dissenting) (emphasis added).

ruling of the United States Supreme Court when deciding an issue of state constitutional rights and liberties? And how are the needs of law enforcement to be balanced against the rights of the accused, especially when those rights are willfully violated by law enforcers? For the majority, deference to the Supreme Court's decision was unwarranted because it would leave fundamental state constitutional rights too vulnerable to violation. For the dissenters, the Supreme Court's wisdom and experience struck the correct balance in favor of law enforcement where the intrusion on the accused's liberties was inconsequential.

These are perennial questions. They were bitterly argued in *Harris II*, but they are present, one or both, in most state constitutional criminal cases. Often times these questions lie below the surface, but they are nevertheless present.<sup>89</sup>

In another decision adjudging the validity of warrantless police action, a divided Court of Appeals in *People v. Rosario*<sup>90</sup> extended the so-called "fellow officer" rule to auxiliary police. Under the rule, a police officer with no firsthand knowledge is entitled to make a warrantless arrest on the strength of probable cause information transmitted to him on the basis of a fel-

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89. Other 1991 decisions placing limits on warrantless detentions were: *People v. Felton*, 78 N.Y.2d 1063, 1065, 581 N.E.2d 1344, 1345, 576 N.Y.S.2d 89, 90 (1991) (upholding, in a unanimous memorandum, an Appellate Division finding that the defendant's unlawful striking of an officer who attempted to restrain him physically without constitutional justification did not attenuate the illegality of the stop sufficiently to render the ensuing arrest and incidental search lawful); *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 426-27, 570 N.E.2d 223, 224-25, 568 N.Y.S.2d 575, 576-77 (1991) (upholding, in a unanimous per curiam decision, as a purely factual finding, the determination of the Appellate Division, in turn affirming two trial court determinations, that pre-arraignment detention in New York County beyond 24 hours is unjustified in the absence of an acceptable explanation on the ground that the steps leading to arraignment can generally be accomplished well within 24 hours after a warrantless arrest). In *Maxian*, the Court of Appeals and the Appellate Division both avoided a constitutional ruling as unnecessary. See *id.* at 427, 570 N.E.2d at 225, 568 N.Y.S.2d at 577; *People ex rel. Maxian v. Brown*, 164 A.D.2d 56, 66-67, 561 N.Y.S.2d 418, 424 (1st Dep't 1990). Compare *Maxian* with *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670 (1991) (holding as a matter of federal constitutional law that warrantless detention is presumptively valid under the Fourth Amendment if judicial determination of probable cause is made within 48 hours of arrest) and *Jenkins v. Chief Justice*, 619 N.E.2d 324, 334-35 (Mass. 1993) (holding that, under the Massachusetts constitution, warrantless arrest must usually be followed by judicial determination of probable cause within 24 hours).

90. 78 N.Y.2d 583, 585 N.E.2d 766, 578 N.Y.S.2d 454 (1991).

low officer's observations.<sup>91</sup> The status of the fellow officer, as a police officer, is deemed under the rule to justify the arresting officer's reliance on the relayed information.<sup>92</sup> The *Rosario* majority, in an opinion by Judge Fritz Alexander, held that auxiliary police, such as those trained in the New York City Auxiliary Police Program to "assist the police in crime deterrence by their uniformed presence,"<sup>93</sup> qualify as fellow officers whose information may be relied upon under the rule.

The majority's rationale was one of cautious practicality and law enforcement efficiency:

Applying the rule to [auxiliary police] is consistent with the underlying rationale of the "fellow officer" rule and furthers the objective of aiding the police in law enforcement.

....

We recognize that the training of auxiliary officers is not as extensive as that required of police officers. However, the training they receive and the purposes they serve in aiding law enforcement provide *sound policy reasons* for applying the "fellow officer" rule to auxiliary officers and militate against denying the police the benefit of their aid and assistance. . . .<sup>94</sup>

In lone dissent, Judge Vito J. Titone seized upon the acknowledged disparity in the qualifications, experience, and training of auxiliary officers as contrasted with that of members of the regular police force.<sup>95</sup> Eligibility requirements for participation in the auxiliary police program are minimal; auxiliary officers receive a small fraction of the instruction given to police; and unlike police, their regular duties do not include making arrests and their judgments are rarely tested in court.<sup>96</sup> In short, according to Judge Titone, "there is simply no basis for inferring that the 'special skills' possessed by police officers that

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91. See *United States v. Ventresca*, 380 U.S. 102 (1965); *People v. Lypka*, 36 N.Y.2d 210, 213, 326 N.E.2d 294, 296, 366 N.Y.S.2d 622, 623 (1975).

92. See *People v. Petralia*, 62 N.Y.2d 47, 51-52, 464 N.E.2d 424, 426, 476 N.Y.S.2d 56, 58 (1984); *People v. Horowitz*, 21 N.Y.2d 55, 60, 233 N.E.2d 453, 455, 286 N.Y.S.2d 473, 476-77 (1967).

93. *Rosario*, 78 N.Y.2d at 587, 585 N.E.2d at 768, 578 N.Y.S.2d at 456.

94. *Id.* at 588, 589, 585 N.E.2d at 768, 769, 578 N.Y.S.2d at 456, 457 (emphasis added).

95. *Id.* at 593, 585 N.E.2d at 771-72, 578 N.Y.S.2d at 459-60 (Titone, J., dissenting).

96. *Id.* at 592-93, 585 N.E.2d at 771-72, 578 N.Y.S.2d at 459-60 (Titone, J., dissenting).

enable them to make a fair probable cause assessment in light of the known facts are also possessed by auxiliary police officers.<sup>97</sup>

In expanding the "fellow officer" rule, the majority in *Rosario* emphasized the goal of "better enabling law enforcement to do its job."<sup>98</sup> But in the view of the dissenter, the majority had given insufficient consideration "to the countervailing goal of protecting citizens from unfounded or unwanted intrusions."<sup>99</sup> These, again, are the competing concerns omnipresent in constitutional criminal cases.<sup>100</sup>

In *People v. Duuvon*,<sup>101</sup> the Court addressed the admissibility of "showup" identifications. The identification in question was made minutes after a robbery when the police returned the defendant to the scene of the crime—arrested, handcuffed, and

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97. *Id.* at 591, 585 N.E.2d at 771, 578 N.Y.S.2d at 459 (Titone, J., dissenting).

98. *Id.* at 589, 585 N.E.2d at 769, 578 N.Y.S.2d at 457.

99. *Id.* at 591, 585 N.E.2d at 770, 578 N.Y.S.2d at 458 (Titone, J., dissenting).

100. Other less significant decisions upholding warrantless searches were: *People v. Coutin*, 78 N.Y.2d 930, 931-32, 578 N.E.2d 431, 431, 573 N.Y.S.2d 633, 634 (1991) (affirming, in a unanimous memorandum, determinations of reasonable suspicion to stop the car in which defendant was a passenger and subsequent probable cause to search the car's interior where the underlying factual findings of the trial court were undisturbed by the Appellate Division); *People v. Smith*, 78 N.Y.2d 897, 577 N.E.2d 1050, 573 N.Y.S.2d 458 (1991) (affirming, in a unanimous memorandum, a mixed legal/factual determination that the police were justified for safety reasons in patting down the defendant who happened to be present in an apartment which was entered pursuant to a warrant authorizing a search of the apartment and its renters for illegal drugs and handguns).

In *People v. Offen*, 78 N.Y.2d 1089, 1091, 585 N.E.2d 370, 372, 578 N.Y.S.2d 121, 123 (1989), the Court, in a unanimous memorandum, sidestepped the issue of whether a canine sniff of something other than a residence constitutes a search under the state constitution, since there was the requisite reasonable suspicion for a canine search where officials confirmed that defendant was receiving shipments from Florida which two informants said contained cocaine. *Id.* at 1090-91, 585 N.E.2d at 371-72, 578 N.Y.S.2d at 122-23. The Court also held that the subsequent canine alert upon sniffing the package in question constituted probable cause to support a search warrant. *Id.* at 1091, 585 N.E.2d at 372, 578 N.Y.S.2d at 123; *cf.* *People v. Dunn*, 77 N.Y.2d 19, 25-26, 564 N.E.2d 1054, 1058, 563 N.Y.S.2d 388, 392 (1990) (holding that a canine sniff of the air emanating from the defendant's apartment constituted a "search" under the state constitution).

In *People v. Cloud*, 79 N.Y.2d 786, 587 N.E.2d 270, 579 N.Y.S.2d 632 (1991), the Court, in a unanimous memorandum, affirmed a mixed factual/legal determination of exigency justifying a warrantless entry and arrest where police received "direct and reliable information" that the defendant was armed, had previously killed in the course of a robbery, and was holding hostages in a hotel room. *Id.* at 786-77, 587 N.E.2d at 270-71, 579 N.Y.S.2d at 632-33.

101. 77 N.Y.2d 541, 571 N.E.2d 654, 569 N.Y.S.2d 346 (1991).

seated in the back of the patrol car—to show him to an eyewitness.<sup>102</sup> The witness, who was likely aware that at least one other witness had just identified the defendant, made a positive identification himself.<sup>103</sup>

The majority, speaking through Judge Bellacosa, held that the identification fell “within the permissible boundaries of the governing legal principles.”<sup>104</sup> Those “principles” were apparently confined to the “temporal and spatial considerations”<sup>105</sup> upon which the majority rested its decision. Acknowledging that showup, i.e., one-on-one, identifications are normally disfavored because their suggestiveness undermines their reliability,<sup>106</sup> the majority nevertheless noted that “at-the-crime-scene civilian showup identifications” are not necessarily invalid.<sup>107</sup> Explaining how these broad parameters applied to the facts of the case, Judge Bellacosa stated:

[S]howup identification evidence should not be routinely admissible either. It must be scrutinized very carefully for unacceptable suggestiveness and unreliability. The admission or suppression of these street showup protocols thus turns on specific and varying circumstances in individual cases. The apprehension of this perpetrator very *near the crime scene coupled with the temporal proximity* to the commission of the crime, withstands this scrutiny.<sup>108</sup>

The fact that the showup in question occurred immediately following another witness’s at-the-scene identification admittedly “add[ed] another factor of concern and heightened scrutiny.”<sup>109</sup> And the fact that the defendant was handcuffed in the back seat of a police car during the showup was “suggestive and not preferred.”<sup>110</sup> But, insisted the majority, the “exigent circumstances” of the case<sup>111</sup>—everything happened “within min-

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102. *Id.* at 543-44, 571 N.E.2d at 656, 569 N.Y.S.2d at 348.

103. *Id.* at 545, 571 N.E.2d at 657, 569 N.Y.S.2d at 349.

104. *Id.* at 544, 571 N.E.2d at 656, 569 N.Y.S.2d at 348.

105. *Id.* at 545, 571 N.E.2d at 657, 569 N.Y.S.2d at 349.

106. *Id.* at 543, 571 N.E.2d at 655, 569 N.Y.S.2d at 347.

107. *Id.* at 543, 571 N.E.2d at 655, 569 N.Y.S.2d at 348.

108. *Id.* at 543, 571 N.E.2d at 655, 569 N.Y.S.2d at 347 (emphasis added) (citing *People v. Wharton*, 74 N.Y.2d 921, 923, 549 N.E.2d 462, 463, 550 N.Y.S.2d 260, 261 (1989)).

109. *Id.* at 545, 571 N.E.2d at 657, 569 N.Y.S.2d at 349.

110. *Id.*

111. *Id.*

utes and within a New York City block and a half"<sup>112</sup>—justified the fact findings of the lower courts that the identification was not unduly suggestive.<sup>113</sup>

Ultimately, in the majority's view, the "probing, . . . skeptical fact finding" by lower courts will check against identification abuse.<sup>114</sup> In Judge Bellacosa's concluding words: "Law enforcement officials, faced with rigorous review by the appropriate courts will thus be made to understand that their evidence-gathering work will not be tolerated whenever routinized, unduly suggestive identification modalities taint or rob the evidence of reliability."<sup>115</sup>

Concurring in the Court's result, Judge Titone, joined by Judges Simons and Hancock, objected that the majority was equating temporal and geographic proximity to exigency.<sup>116</sup> "The majority's holding," Judge Titone wrote, "leads to the conclusion that, absent extraordinary circumstances, all 'prompt-on-the-scene' showups are permissible precisely because they are prompt and conducted at or near the crime scene."<sup>117</sup> As the concurrence noted, such reasoning necessarily renders "prompt-on-the-scene" showups, by definition, per se or presumptively admissible.<sup>118</sup>

The concurring judges agreed that there should be an affirmation because the "virtually air tight proof" against the defendant rendered the identification evidence harmless.<sup>119</sup> But they protested the majority's disregard of the due process analysis traditionally used to test the validity of showups.<sup>120</sup> As noted by the concurrences, the Court of Appeals and the Supreme Court have both recognized that showing a suspect singly to a

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112. *Id.* at 545, 571 N.E.2d at 656, 569 N.Y.S.2d at 348.

113. *Id.* at 545, 571 N.E.2d at 657, 569 N.Y.S.2d at 349.

114. *Id.* at 546, 571 N.E.2d at 657, 569 N.Y.S.2d at 349.

115. *Id.* (citing *People v. Riley*, 70 N.Y.2d 523, 530-31, 517 N.E.2d 520, 524, 522 N.Y.S.2d 842, 846 (1987)).

116. *Id.* at 546, 571 N.E.2d at 658, 569 N.Y.S.2d at 350 (Titone, J., concurring).

117. *Id.* (Titone, J., concurring).

118. *Id.* (Titone, J., concurring).

119. *Id.* at 546, 571 N.E.2d at 657, 569 N.Y.S.2d at 349 (Titone, J., concurring).

120. *Id.* at 547, 571 N.E.2d at 658, 569 N.Y.S.2d at 350 (Titone, J., concurring).

witness is "inherently suggestive."<sup>121</sup> Showups are nevertheless tolerated, the concurring opinion clarified, when the need for a speedy identification or some other exigency justifies the less than ideal procedure.<sup>122</sup> Because there was no need in this case for another on-the-scene identification—there had already been two<sup>123</sup>—nor any other exigency present to justify the suggestive showup,<sup>124</sup> the due process standards applied in a long line of Court of Appeals decisions were simply not met.<sup>125</sup>

As Judge Titone explained in conclusion:

[T]he majority's holding in this case makes it difficult to foresee when, if ever, a "prompt-on-the-scene showup" would be suppressed as unnecessarily suggestive. Despite their inherent suggestiveness, such procedures would all be deemed "necessary" under the majority's analysis, precisely because they are "prompt" and conducted near the scene of the crime. And, even such additionally suggestive procedures as displaying the suspect in handcuffs and seated in the back of a patrol car would not be sufficient to render the procedure "unnecessarily suggestive" . . . . Given the majority's tolerance for such practices in a case where the police were already sure that they had the "right man," one is left to wonder what the "rigorous review" that the majority mandates really means.<sup>126</sup>

To be sure, there is little due process analysis in the majority opinion. Rather, there is a deference to police "involv[ed] in fast-paced street episodes and encounters"<sup>127</sup> and to the "skeptical factfinding of lower courts."<sup>128</sup> By contrast, the concurring

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121. *Id.* (Titone, J., concurring) (citing *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *People v. Riley*, 70 N.Y.2d 523, 529, 517 N.E.2d 520, 523, 522 N.Y.S.2d 842, 845 (1990)).

122. *Id.* (Titone, J., concurring) (citing *People v. Love*, 57 N.Y.2d 1023, 1024, 443 N.E.2d 948, 949, 457 N.Y.S.2d 474, 475 (1982); *People v. Adams*, 53 N.Y.2d 241, 249, 423 N.E.2d 379, 382, 440 N.Y.S.2d 902, 905 (1981); *People v. Rivera*, 22 N.Y.2d 453, 239 N.E.2d 873, 293 N.Y.S.2d 271 (1968)).

123. *Id.* at 548-49 n.1, 571 N.E.2d at 659 n.1, 569 N.Y.S.2d at 351 n.1 (Titone, J., concurring).

124. *Id.* at 549, 571 N.E.2d at 659, 569 N.Y.S.2d at 351 (Titone, J., concurring).

125. *Id.* at 547-48, 571 N.E.2d at 658, 569 N.Y.S.2d at 350 (Titone, J., concurring). See, e.g., *supra* notes 121-22.

126. *Id.* at 550, 571 N.E.2d at 660, 569 N.Y.S.2d at 352 (Titone, J., concurring).

127. *Id.* at 545, 571 N.E.2d at 657, 569 N.Y.S.2d at 349.

128. *Id.* at 546, 571 N.E.2d at 657, 569 N.Y.S.2d at 349.

opinion was more concerned with adherence to due process safeguards because "the circumstances which surround these one-on-one procedures . . . involve a high degree of suggestiveness, which gives rise in turn to a substantial risk of error."<sup>129</sup> The risk of error was apparently irrelevant in *Duuvon* itself because of the overwhelming evidence. But the concerns raised by the concurrence will likely prove more critical in subsequent cases where the evidence is not so strong and the showup identifications cannot so readily be deemed harmless. In such cases, the majority's reasoning will be put to the test.<sup>130</sup>

## 2. Fair Trial, Sentencing, and Appeal

In *People v. Jackson*,<sup>131</sup> a four to three majority of the Court of Appeals diluted<sup>132</sup> the fair trial protection of New York's *Rosario* rule.<sup>133</sup> Under that rule, adopted in the 1961 decision in *People v. Rosario*,<sup>134</sup> which was authored by then-Judge Stanley H. Fuld, the prosecution must provide the defense with all prior statements of prosecution witnesses that relate to the subject matter of their testimony.<sup>135</sup> Thirty years later in *Jackson*, the

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129. *Id.* at 549, 571 N.E.2d at 659, 569 N.Y.S.2d at 351 (Titone, J., concurring).

130. Additional identification cases decided in 1991 were: *People v. Burts*, 78 N.Y.2d 20, 23-25, 574 N.E.2d 1024, 1026-27, 571 N.Y.S.2d 418, 420-21 (1991) (holding, in a unanimous opinion by Judge Bellacosa, that the Appellate Division could not remit the case for a post-trial hearing to determine the existence of an independent source for the already admitted suggestive identification evidence because the error in permitting the jury to hear the flawed identification cannot be cured after the evidence has been considered in rendering a guilty verdict; a reversal, new *Wade* hearing, and trial were ordered); *People v. Williamson*, 79 N.Y.2d 799, 800-01, 588 N.E.2d 68, 69, 580 N.Y.S.2d 170, 171 (1991) (holding, in a unanimous memorandum, that restricting the defendant's right to cross-examine the complainant at the pre-*Wade* hearing was reversible error requiring a new pre-*Wade* hearing where the central issue, the complainant's prior familiarity with the defendant, was crucial to determining whether the photo identification was merely confirmatory and therefore not suggestive).

131. 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991).

132. See Sidney H. Stein, *Dilution of the Rosario Ruling*, N.Y. L.J., Feb. 13, 1992, at 3, 8.

133. See *supra* note 19.

134. 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 866 (1961).

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



Court both weakened the enforcement of that rule,<sup>136</sup> and stripped the rule of its constitutional underpinnings.<sup>137</sup> The first the Court did as part and parcel of the resolution of the issue presented in the case; the second, as a seemingly gratuitous undermining of a rule with sometimes disagreeable consequences.<sup>138</sup>

A long line of decisions applying the *Rosario* rule held that the prosecution's failure to turn over witness statements was not subject to harmless error analysis.<sup>139</sup> As the Court explained in its 1987 decision in *People v. Jones*:<sup>140</sup>

When, as a result of the prosecutor's violation of the *Rosario* rule, defense counsel has been deprived of material of which he or she is unaware or cannot otherwise obtain, there is no way, short of speculation, of determining how it might have been used or how its denial to counsel might have damaged defendant's case.<sup>141</sup>

The automatic reversal requirement was thus deemed a logical imperative of the *Rosario* decision itself. In *Rosario*, the Court had reasoned that "omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes."<sup>142</sup>

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136. This the majority did by creating an exception to the per se reversal rule for *Rosario* violations. *People v. Jackson*, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483; see discussion *infra* notes 180-92 and accompanying text.

137. This the majority did by insisting that the *Rosario* rule was merely a policy decision, and not based on the federal or state constitution. *Jackson*, 78 N.Y.2d at 643-44, 585 N.E.2d at 799, 578 N.Y.S.2d at 487; see discussion *infra* notes 193-99 and accompanying text.

138. *Jackson*, 78 N.Y.2d at 643-44, 585 N.E.2d at 799, 578 N.Y.S.2d at 487.

139. See, e.g., *People v. Jones*, 70 N.Y.2d 547, 552-53, 517 N.E.2d 865, 868-69, 523 N.Y.S.2d 53, 56-57 (1987); *People v. Novoa*, 70 N.Y.2d 490, 498-500, 517 N.E.2d 219, 224-25, 522 N.Y.S.2d 504, 509-10 (1987); *People v. Ranghelle*, 69 N.Y.2d 56, 63-64, 503 N.E.2d 1011, 1015-17, 511 N.Y.S.2d 580, 584-86 (1986); *People v. Perez*, 65 N.Y.2d 154, 160, 480 N.E.2d 361, 364, 490 N.Y.S.2d 747, 750 (1985); *People v. Mattiace Indus.*, 52 N.Y.2d 739, 741, 417 N.E.2d 563, 564, 436 N.Y.S.2d 269, 270 (1980); *People v. Consolazio*, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 805, 387 N.Y.S.2d 62, 66 (1976).

140. 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987).

141. *Id.* at 552, 517 N.E.2d at 868, 523 N.Y.S.2d at 56.

142. *Rosario*, 9 N.Y.2d at 290, 173 N.E.2d at 883, 213 N.Y.S.2d at 451.

The Court in *Rosario* actually did apply a harmless error analysis.<sup>143</sup> The conviction there was affirmed on the ground that there was no "rational possibility" that the *Rosario* violation had any effect on the defendant's case because there was "no possible question" of guilt.<sup>144</sup> But fifteen years later in *People v. Consolazio*,<sup>145</sup> the Court held that *Rosario* violations were per se reversible error, largely for the very reasons given in *Rosario* for the rule itself.<sup>146</sup> As then-Judge Wachtler re-emphasized in his 1985 opinion for the Court in *People v. Perez*:<sup>147</sup> "[t]he essence of the *Rosario* requirement . . . is that a judge's [or appellate court's] impartial determination . . . is no substitute for the single-minded devotion of counsel for the accused" in determining the value of the witness' prior statement.<sup>148</sup> Hence in *Perez*, as in *Consolazio* and every Court of Appeals decision thereafter, a judicial assessment of the withheld statement's possible use to the defense—i.e., judicial determination of the possible harm of the *Rosario* violation—has been considered inappropriate, purely speculative, and even impossible.<sup>149</sup>

But six years after *Perez*, in *Jackson*, in another opinion by then-Chief Judge Wachtler, the Court's bare majority ordered just such a judicial assessment.<sup>150</sup> The high court reversed the decisions of the lower tribunals that had applied the precedent-dictated per se reversal rule and had thus declined to engage in the theretofore considered "impossible" appraisal of prejudice.<sup>151</sup>

After exhausting direct appeals,<sup>152</sup> the defendant in *Jackson* brought a postjudgment motion to vacate his conviction be-

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143. *Id.* at 290-91, 173 N.E.2d at 884, 213 N.Y.S.2d at 451.

144. *Id.* at 291, 173 N.E.2d at 884, 213 N.Y.S.2d at 451.

145. 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976).

146. *Id.* at 454-55, 354 N.E.2d at 805-06, 387 N.Y.S.2d at 66-67.

147. 65 N.Y.2d 154, 480 N.E.2d 361, 490 N.Y.S.2d 747 (1985).

148. *Id.* at 160, 480 N.E.2d at 364, 490 N.Y.S.2d at 750-51 (emphasis added).

149. *See, e.g., Jones*, 70 N.Y.2d at 551-52, 517 N.E.2d at 868, 523 N.Y.S.2d at 56; *Novoa*, 70 N.Y.2d at 498-99, 517 N.E.2d at 224, 522 N.Y.S.2d at 509; *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 805, 387 N.Y.S.2d at 66.

150. *Jackson*, 78 N.Y.2d at 647-48, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

151. *Id.* at 642, 585 N.E.2d at 797, 578 N.Y.S.2d at 486.

152. *See People v. Jackson*, 65 N.Y.2d 265, 480 N.E.2d 727, 491 N.Y.S.2d 138 (1985).

cause of a conceded *Rosario* violation.<sup>153</sup> The prosecution had failed to provide the defendant with a written synopsis of its pretrial interview with an important prosecution witness.<sup>154</sup> The trial judge, relying on Court of Appeals precedent that harmless error analysis was inapplicable to *Rosario* violations, vacated the convictions; the Appellate Division, relying on the same, affirmed.<sup>155</sup> But the Court of Appeals, insisting that postjudgment motions should be treated differently than direct appeals, held that harmless error analysis was appropriate in the former.<sup>156</sup>

Of course, it is difficult to fathom how judicial assessment of *Rosario* prejudice becomes less "impossible" or less "speculative" on postjudgment motions than it is on direct appeals.<sup>157</sup> The majority did not even pretend to explain that.<sup>158</sup> Rather, it said that its decision was dictated by the state legislature.<sup>159</sup>

The statute governing postjudgment motions authorizes a vacatur of an otherwise final conviction if the prosecution engaged in "[i]mproper and *prejudicial* conduct."<sup>160</sup> According to the majority, the statute thus "compels an inquiry into the presence or absence of prejudice."<sup>161</sup> The majority ruled that a defendant seeking to vacate a conviction in a postjudgment proceeding "must demonstrate a reasonable possibility" that the *Rosario* violation "contributed to the verdict."<sup>162</sup> Judge Wachtler insisted that the "per se error rule is still the law in this State" on direct appeals.<sup>163</sup> But cases where appeals have been exhausted must be treated differently, he said:

The existence of the Judge-made per se error rule does not permit us to subvert the language of [the statute] with impunity. Ulti-

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153. *Jackson*, 78 N.Y.2d at 640, 642, 585 N.E.2d at 796, 797, 578 N.Y.S.2d at 484, 486.

154. *Id.* at 642, 585 N.E.2d at 796, 578 N.Y.S.2d at 485.

155. *Id.* at 642, 585 N.E.2d at 797-98, 578 N.Y.S.2d at 486; *see* *People v. Jackson*, 162 A.D.2d 470, 556 N.Y.S.2d 165 (2d Dep't 1990).

156. *Jackson*, 78 N.Y.2d at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

157. *See id.* at 656, 585 N.E.2d at 806, 578 N.Y.S.2d at 494 (Titone, J., dissenting).

158. *Id.*

159. *Id.* at 641, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

160. N.Y. CRIM. PROC. LAW § 440.10(1)(f) (McKinney 1983) (emphasis added).

161. *Jackson*, 78 N.Y.2d at 646, 585 N.E.2d at 800, 578 N.Y.S.2d at 488.

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

163. *Id.*

mately, it is our responsibility as Judges to harmonize the common-law rule and the statutory remedy as far as practicable. This is what we seek to do today.<sup>164</sup>

Judge Titone, whose strongly worded dissent was joined by Judges Alexander and Hancock, responded that the majority "cannot seriously suggest" that the statutory language actually dictated the abandonment of the per se reversal rule for postjudgment motions.<sup>165</sup> The term "prejudice" in the governing statute, explained the dissent, is surely satisfied by the "impairment of the 'substantial rights' of the accused" involved whenever *Rosario* is violated.<sup>166</sup> Such violations are "intrinsically prejudicial."<sup>167</sup> Judge Titone elaborated:

When a prosecutor fails to disclose *Rosario* material during trial, the defense is deprived of the opportunity to make the necessary strategic judgments and do "the careful preparation required for planning and executing an effective cross-examination." Further, the defense has been prevented from exploring potential areas of weakness in the prosecution's evidence. *This deprivation goes to the heart of counsel's ability to provide a meaningful defense*  
...<sup>168</sup>

According to the dissenters, that is precisely why the Court has been applying the per se reversal rule to *Rosario* violations.<sup>169</sup> As they further explained: "The use of the term 'per se' in this context does not denote a complete absence of prejudice; rather, it represents a short-hand way of saying that errors

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164. *Id.* at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

165. *Id.* at 654, 585 N.E.2d at 805, 578 N.Y.S.2d at 493 (Titone, J., dissenting).

166. *Id.* (quoting N.Y. CRIM. PROC. LAW § 470.05(1) (McKinney 1983)). Section 470.05(1) governs direct appeals generally and requires that they be determined "without regard to technical errors or defects which do not affect the *substantial rights* of the parties." § 470.05(1) (emphasis added). As explained by the dissent, the Court had been applying the per se reversal rule to direct appeals because *Rosario* violations necessarily affect the "substantial rights" of defendants. *Jackson*, 78 N.Y.2d at 654, 585 N.E.2d at 805, 578 N.Y.S.2d at 493 (Titone, J., dissenting).

167. *Jackson*, 78 N.Y.2d at 654, 585 N.E.2d at 805, 578 N.Y.S.2d at 493 (Titone, J., dissenting).

168. *Id.* (Titone, J., dissenting) (emphasis added) (citing *People v. Jones*, 70 N.Y.2d 547, 552, 517 N.E.2d 865, 868, 523 N.Y.S.2d 53, 56 (1987); *People v. O'Rama*, 78 N.Y.2d 270, 279-80, 579 N.E. 2d 189, 193-94, 574 N.Y.S.2d 159, 163-64 (1991)).

169. *Id.* (Titone, J., dissenting).

within that class are prejudicial by their very nature and that, accordingly, nothing further need be shown to compel reversal."<sup>170</sup>

As Judge Titone argued, "the majority's *choice* to reach a different result" could not, therefore, really be attributed to the use of the term "prejudice" in a statute.<sup>171</sup> Indeed, laced throughout the majority opinion is recognition that the result reached was not in fact dictated by statutory language; that it was instead a policy judgment preferring finality of convictions to the values underlying *Rosario* and the per se rule. In the majority's own concluding words:

*[O]ur decision to treat [postjudgment] motions differently [where] the defendant has exhausted direct review is not a product of whim or caprice. Rather, it is a reflection of our ongoing effort to accommodate both society's interest in finality and the defendant's right to examine impeachment evidence. We have endeavored to fashion a rule that addressed our concerns regarding the infinite duration of the [postjudgment] remedy without undermining the fairness concerns that are at the core of Rosario.*<sup>172</sup>

The dissent's point was not only that the majority's result was the majority's own choice—rather than a result actually compelled by statutory language—but that the majority's choice was the wrong one. It contravened the line of decisions applying the per se rule to *Rosario* violations, including a recent precedent where the violation was in fact raised on a postjudgment motion.<sup>173</sup> And it compromised the fundamental fair trial

170. *Id.* (Titone, J., dissenting).

171. *Id.* (Titone, J., dissenting) (emphasis added).

172. *Id.* at 650, 585 N.E.2d at 802, 578 N.Y.S.2d at 490 (emphasis added); see also *id.* at 647, 585 N.E.2d at 800, 578 N.Y.S.2d at 489 ("*[i]t is for us . . . to look at the statutory requirement of prejudice and to determine the reading that this language should be given*") (emphasis added); *id.* at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 488-89 ("*[u]ltimately, it is our responsibility as Judges to harmonize the common-law [per se] rule and the statutory remedy as far as practicable*") (emphasis added); *id.* at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490 ("*[t]he interest in finality implicated by [postjudgment] motions has led us to conclude that defendants must be prepared to show . . . actual, ascertainable prejudice*") (emphasis added).

173. *Id.* at 656-57, 585 N.E.2d at 807, 578 N.Y.S.2d at 495 (Titone, J., dissenting) (discussing *People v. Novoa*, 70 N.Y.2d 490, 517 N.E.2d 219, 522 N.Y.S.2d 504 (1987)).

values underlying *Rosario* in order to insure the repose of judgments of conviction. As Judge Titone put it:

[O]ur responsibility in the judiciary is to apply reasoning and precedent with a view toward fairness, both to society *and* the accused. While society's interest in the finality of criminal convictions is, no doubt, an important value, so too is society's interest in the "fundamental objective" of providing the accused with a fair opportunity to test the People's witnesses through the crucible of cross-examination—the value that informs the *Rosario* rule. To the extent that we remain committed to that value, we are also duty bound to uphold it even in contexts where the consequences may be viewed by some as undesirable.<sup>174</sup>

The merits of the per se reversal rule are certainly debatable.<sup>175</sup> But the majority opinion's professed fidelity to the rule,<sup>176</sup> even as it carved out a questionably explained exception, seems dubious.<sup>177</sup> More forthright was Judge Bellacosa's categorical criticism of the per se rule in his recent concurrence in *People v. Jones*.<sup>178</sup> There, calling the rule an "errant footstep[ ]" in the application of *Rosario*, he called for its outright repeal by the state legislature.<sup>179</sup>

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174. *Jackson*, 78 N.Y.2d at 660, 585 N.E.2d at 809, 578 N.Y.S.2d at 497 (Titone, J., dissenting) (citing *People v. Jones*, 70 N.Y.2d 547, 550, 517 N.E.2d 865, 867, 523 N.Y.S.2d 53, 55 (1987) (quoting *People v. Perez*, 65 N.Y.2d 154, 158, 480 N.E.2d 361, 363, 490 N.Y.S.2d 747, 749 (1985))).

175. See, e.g., *Jones*, 70 N.Y.2d at 553, 517 N.E.2d at 869, 523 N.Y.S.2d at 57 (Bellacosa, J., concurring); Stephen J. Bogacz, *Appellate Conflict Over 'Rosario/Ranghelle' Rule*, N.Y. L.J., Aug. 24, 1992, at 1, 4-5; see also *People v. Young*, 172 A.D.2d 790, 569 N.Y.S.2d 162 (2d Dep't 1991) (carving a "common senses" exception to the per se rule), *rev'd*, 79 N.Y.2d 365, 591 N.E.2d 1163, 582 N.Y.S.2d 977 (1992); N.Y. CRIM. PROC. LAW § 240.45 commentary at 288 (McKinney 1993) (stating that in some cases, courts have confined the scope of *Rosario* in order to avoid seemingly absurd results from application of the per se rule).

176. See *Jackson*, 78 N.Y.2d at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489 ("[t]his holding does not represent a de facto elimination of the per se error rule"); *id.* at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490 ("we would like to emphasize that the per se error rule is still the law in this State when a *Rosario* claim is the subject of a direct appeal . . . . We continue to believe that defense counsel is in a far better position than the trial judge to determine the impeachment value of *Rosario* material.").

177. See *infra* notes 190-99 and accompanying text.

178. 70 N.Y.2d 547, 553, 517 N.E.2d 865, 869, 523 N.Y.S.2d 53, 57 (1987) (Bellacosa, J., concurring).

179. *Id.* at 557, 517 N.E.2d at 871, 523 N.Y.S.2d at 59 (Bellacosa, J., concurring).

The *Jackson* majority, by contrast, "balanc[ing]" and "harmoniz[ing]" policy considerations with *Rosario* values,<sup>180</sup> insisted that its determination against the per se rule was limited to postjudgment motions where the statutory language required "prejudice."<sup>181</sup> But the dissenters made a strong case that "the . . . majority's rationale [was] nothing more than an exercise in result-directed statutory construction that simply does not withstand scrutiny."<sup>182</sup>

It may well be that the per se reversal rule exacts too high a cost in unsettling judgments that are otherwise final and in reversing convictions that are in fact untainted by a *Rosario* violation. It may well be that convictions should be left undisturbed where there is no *rational* connection between the *Rosario* violation and the outcome of the criminal trial. This is the test actually applied in *People v. Rosario*.<sup>183</sup> Under such a standard, a conviction would stand—whether challenged on direct appeal or on postjudgment motions—where the evidence was "air-tight"<sup>184</sup> and there was "no possible question" that the *Rosario* violation was inconsequential.<sup>185</sup>

But having one rule for direct appeals and then another for postjudgment proceedings is perhaps the most unsatisfactory

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180. *Jackson*, 78 N.Y.2d at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

181. *Id.* at 648-50, 585 N.E.2d at 801-03, 578 N.Y.S.2d at 489-91.

182. *Id.* at 652, 585 N.E.2d at 804, 578 N.Y.S.2d at 491 (Titone, J., dissenting).

183. 9 N.Y.2d 286, 291, 173 N.E.2d 881, 884, 213 N.Y.S.2d 448, 451 (1961). In *Rosario*, the Court weighed "whether . . . there was a *rational* possibility that the jury would have reached a different verdict . . ." *Id.* There, the Court found that there was "no possible question of the appellant's guilt, even apart from the testimony of the witnesses whose statements had been requested and refused." *Id.* (emphasis added). This *rationality* standard would seem to require the reversal of a conviction unless the claim of prejudice from the *Rosario* violation is *utterly* without merit, senseless or illogical; this is somewhat more protective than the "reasonable possibility" standard of *Jackson*, which would seem to require a reversal only where the defendant could show some particularized substantial, or distinct chance of harm. See *Jackson*, 78 N.Y.2d at 649, 585 N.E.2d at 802, 578 N.Y.S.2d at 490 (stating that "defendants must be prepared to show that *actual, ascertainable prejudice resulted*") (emphasis added).

184. See *People v. Duuvon*, 77 N.Y.2d 541, 546, 571 N.E.2d 654, 657, 578 N.Y.S.2d 346, 349 (1991) (Titone, J., concurring).

185. *Rosario*, 9 N.Y.2d at 291, 173 N.E.2d at 884, 213 N.Y.S.2d at 451. The Court in *Rosario* concluded that "we are as convinced as judges may ever be, in view of the overwhelming proof of guilt and the absence of any real inconsistency between prior statement and trial testimony, that the jury would not have decided the case differently." *Id.*

resolution of all. Its ramifications are particularly arbitrary and counterproductive to the purposes of *Rosario*. So for example, after *Jackson*, the application of the per se rule is contingent upon the fortuity of when the *Rosario* violation is discovered;<sup>186</sup> only those discovered prior to final appeal are unconditionally vindicated. Moreover, because the government's position under *Jackson* is strengthened on postjudgment motions, the prosecution has a strong disincentive against acknowledging any *Rosario* failure until after appeals have been exhausted.<sup>187</sup> As the dissenters elaborated:

[T]he rule the majority adopts will lead to an unacceptable disparity in the administration of the *Rosario* rule. On the one hand, defendants who are able to demonstrate [a *Rosario* violation] on direct appeal . . . will be entitled to a new trial without further inquiry. In contrast, defendants who have equally meritorious *Rosario* claims but are relegated to [postjudgment] challenges will be required to make a particularized showing of actual prejudice. . . . This disparity is especially troubling because it makes the outcome depend largely upon the timing of disclosure, a matter that is solely within the People's control.<sup>188</sup>

The dissenting judges continued:

[B]ecause the timing of disclosure will now be all but dispositive, the rule the majority adopts creates a strong incentive for prosecutors who belatedly discover potential *Rosario* material to postpone disclosure until . . . the only remedy the defendant has is to seek [Criminal Procedure Law section] 440.10 postjudgment relief. Such a result is objectionable because it rewards prosecutorial gamesmanship and runs directly counter to the underlying *Rosario* policy of encouraging prompt and full disclosure.<sup>189</sup>

It is unlikely that the *Jackson* majority was unaware of such evident discrepancies. It is, perhaps, more likely that there was sentiment within the majority for "harmonizing" the treatment of direct appeals and postjudgment motions by elimi-

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186. See *Jackson*, 78 N.Y.2d at 657, 585 N.E.2d at 807, 578 N.Y.S.2d at 495 (Titone, J., dissenting).

187. *Id.* at 659, 585 N.E.2d at 808, 578 N.Y.S.2d at 496 (Titone, J., dissenting).

188. *Id.*

189. *Id.*



nating the per se rule for both.<sup>190</sup> Indeed, the dissenting opinion expressed "a degree of skepticism" about the majority's support for the per se rule under any circumstance.<sup>191</sup> As the dissenters noted, the majority's "demotion" of the per se rule "certainly opens the way for its further curtailment—or even its reversal."<sup>192</sup>

The dissent further observed that the majority, by characterizing the per se rule as a mere "policy decision,"<sup>193</sup> had rendered the rule "susceptible to attack by a court that wishes to emphasize other values or policy considerations."<sup>194</sup> But the majority did more than that. It "demoted" not only the per se rule, but *Rosario* itself. Like the per se rule, and like the exception to that rule carved out for postjudgment proceedings, the *Rosario* requirement itself was, according to the *Jackson* majority, merely a *judicial policy choice* among competing considerations.<sup>195</sup> The majority argued that *Rosario* was not dictated by<sup>196</sup> or even predicated on<sup>197</sup> constitutional mandates.

"*Rosario* is not based on the State or Federal Constitution," claimed the majority.<sup>198</sup> Instead, according to the Wachtler-written opinion, it is a mere "discovery rule, based" on the Court's belief in "simple fairness."<sup>199</sup> These assertions, however, are difficult to reconcile with a fair reading of the Court's prior decisions delineating and enforcing the *Rosario* rule.

190. See, e.g., *People v. Jones*, 70 N.Y.2d 547, 553, 517 N.E.2d 865, 869, 523 N.Y.S.2d 53, 57 (Bellacosa, J., concurring); see also *supra* notes 178-79 and accompanying text.

191. *Jackson*, 78 N.Y.2d at 660 n.6, 585 N.E.2d at 809 n.6, 578 N.Y.S.2d at 497 n.6 (Titone, J., dissenting).

192. *Id.* at 660, 585 N.E.2d at 809, 578 N.Y.S.2d at 497 (Titone, J., dissenting).

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

194. *Id.* at 660, 585 N.E.2d at 809, 578 N.Y.S.2d at 497 (Titone, J., dissenting) (referring to the majority's argument that "[a]pplying a per se error rule in the *Rosario* cases that reached this Court on direct appeal was thus a policy decision").

195. See *Jackson*, 78 N.Y.2d at 644, 585 N.E.2d at 798, 578 N.Y.S.2d at 486 ("It is, in essence, a discovery rule"); *id.* at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489 ("in *Rosario* . . . and the other per se error reversal cases [that followed] we struck a balance").

196. *Id.* at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489.

197. *Id.* at 644, 585 N.E.2d at 798, 578 N.Y.S.2d at 487.

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

199. *Id.*

The Court's use of the per se reversal rule over the years rested, in fact, on the determination that *Rosario's* protection was crucial to a fair trial. *Rosario* violations were treated as "inherently prejudicial"<sup>200</sup> because they "damaged [a] defendant's case" by depriving counsel of the opportunity to do "the careful preparation required for planning and executing an effective cross-examination."<sup>201</sup> Indeed, *Rosario* was predicated on "a right sense of justice" and "substantial right."<sup>202</sup> Further, that seminal decision and its progeny have left no room for doubt that the purpose of the *Rosario* rule is to protect the rights to confront adverse witnesses and to present an effective defense.<sup>203</sup>

But the *Jackson* majority made a point of denuding the *Rosario* rule of any constitutional foundation. "In *Rosario*," as well as the decisions establishing the per se rule, "[w]e were not impelled by constitutional mandates to make the choices that we did,"<sup>204</sup> the majority insisted. "Rather," the Wachtler-authored opinion continued, "we were motivated by a desire to treat defendants fairly . . . [, but] today [we are] striking a different balance."<sup>205</sup> As Judge Titone responded for the dissenters: "after reading the majority's opinion, one is left with the impression that rules of law are merely matters of policy preferences to be

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200. See *People v. O'Rama*, 78 N.Y.2d 270, 279-80, 579 N.E.2d 189, 193-94, 574 N.Y.S.2d 159, 163-64 (1991) (referring to *People v. Jones*, 70 N.Y.2d 547, 517 N.E.2d 865, 523 N.Y.S.2d 53 (1987) and *People v. Perez*, 65 N.Y.2d 154, 480 N.E.2d 361, 490 N.Y.S.2d 747 (1985)).

201. *Jones*, 70 N.Y.2d at 552, 517 N.E.2d at 868, 523 N.Y.S.2d at 56.

202. *Rosario*, 9 N.Y.2d at 289, 291, 173 N.E.2d at 883, 884, 213 N.Y.S.2d at 450, 452.

203. See *People v. Gissendanner*, 48 N.Y.2d 543, 551, 399 N.E.2d 924, 929, 423 N.Y.S.2d 893, 898 (1979) (stating that "the right to cross-examine witnesses subsumes the right to obtain disclosure of their prior statements") (citing *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450); *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450 (stating that witness' statements "will prove helpful on cross-examination"); *Rosario*, 9 N.Y.2d at 290, 173 N.E.2d at 883, 213 N.Y.S.2d at 451 (stating that defendants should have "the benefit" of any "information that can legitimately tend to overthrow the case made for the prosecution . . .") (quoting *People v. Davis*, 18 N.W. 362, 363-64 (Mich. 1884)); see also *Jones*, 70 N.Y.2d at 552, 517 N.E.2d at 868, 523 N.Y.S.2d at 56; *Perez*, 65 N.Y.2d at 158, 480 N.E.2d at 363, 490 N.Y.S.2d at 749; *People v. Walsh*, 262 N.Y. 140, 150, 186 N.E. 422, 425 (1933).

204. *Jackson*, 78 N.Y.2d at 648, 585 N.E.2d at 801, 578 N.Y.S.2d at 489 (emphasis added).

205. *Id.* (emphasis added).

invoked, modified, or simply ignored when their consequences are, in the eyes of four members of this Court, inconvenient or undesirable."<sup>206</sup>

Though the dissenting opinion was particularly addressing the abandonment of the *per se* rule, its observation was a *fortiori* apropos for the majority's recasting of the *Rosario* rule itself. *Rosario* may not be an explicit dictate of a specific state constitutional provision. But, contrary to the *Jackson* majority's assertions, it is unquestionably "based" on constitutional values which, in turn, unquestionably "impel" appropriate safeguards. The *Rosario* rule is just such a safeguard; its overriding purpose has always been to help safeguard a criminal defendant's fundamental right to a fair trial.

The majority's recharacterization of *Rosario* as a mere "discovery rule" and "policy choice" is, of course, more than academic. By denying the *Rosario* rule's constitutional underpinnings, the majority "render[ed] the law susceptible to sudden directional changes based upon nothing more than a change in the prevailing judicial sentiment . . ."<sup>207</sup> The majority thus also exposed the "nonconstitutionally based" *Rosario* rule to modification—including substantial alteration and even outright overruling—by legislative action, as well as by judicial decisionmaking. These possibilities, not lost on the dissenters,<sup>208</sup> were surely appreciated by the majority that created

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206. *Id.* at 650, 585 N.E.2d at 803, 578 N.Y.S.2d at 491 (Titone, J., dissenting).

207. *Id.* at 659, 585 N.E.2d at 808, 578 N.Y.S.2d at 497 (Titone, J., dissenting).

208. *Id.* at 659-60, 585 N.E.2d at 808-09, 578 N.Y.S.2d at 496-97 (Titone, J., dissenting).

Curiously, the Court took an unusually long seven months to decide *Jackson*. Oral arguments were held in May, but the decision was held over summer recess and not rendered until December. See *id.* at 638, 585 N.E.2d at 795, 578 N.Y.S.2d at 483. The case was apparently the source of protracted debate and considerable dissension within the Court.

Shortly after Chief Judge Wachtler's resignation, the Court in *People v. Banch*, 80 N.Y.2d 610, 608 N.E.2d 1069, 593 N.Y.S.2d 491 (1992), re fortified the *Rosario* rule. It became again a "fundamental precept of this state's criminal jurisprudence," in the words of then-Judge Kaye who wrote for the majority. *Id.* at 615, 608 N.E.2d at 1071, 593 N.Y.S.2d at 493. In dissent, Judge Bellacosa claimed that the Court was applying the *per se* reversal rule contrary to the teaching of *Jackson*. *Id.* at 622, 608 N.E.2d at 1076, 593 N.Y.S.2d at 498 (Bellacosa, J., dissenting). Prior to *Banch*, however, the Court rendered other decisions less favorable to the *Rosario* rule. See, e.g., *People v. Rogelio*, 79 N.Y.2d 843, 844, 588 N.E.2d 83, 84,

them.<sup>209</sup>

The Court, in 1991, revisited the confusing and confused related issues of the defendant's right to be present, the trial judge's nondelegable duties, and the critical stages of a trial. In the several cases specifically posing questions about the scope of the right to be present, the Court's decisions seemed somewhat ad hoc, and thus, did little to clear an increasingly muddled area of the law.

The right of a defendant to be personally present at all material stages of his criminal trial has long been recognized as a constitutional imperative by the Court of Appeals,<sup>210</sup> as well as by the United States Supreme Court, whose seminal decision on the subject under federal law was authored by New York's revered former chief judge.<sup>211</sup> But in recent years, it has been difficult to divine some consistency in the application of that right or coherence in its delineation by the Court of Appeals. A pair of cases decided by the Court in the year immediately preceding the one under review is illustrative.

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580 N.Y.S.2d 185, 186 (1992) (holding that the defendant failed to preserve the prosecution's alleged *Rosario* violation for review).

209. On the same day *Jackson* was decided, the Court issued a decision in *People v. Bin Wahad*, 79 N.Y.2d 787, 587 N.E.2d 274, 579 N.Y.S.2d 636 (1991). There, the majority, applying *Jackson* and reversing the Appellate Division which had applied the per se reversal rule on a postjudgment motion, *People v. Bin Wahad*, 172 A.D.2d 403, 568 N.Y.S.2d 784 (1st Dep't 1991), remitted the case for a hearing to determine whether the defendant could prove a reasonable possibility of prejudice from the *Rosario* violation. *Bin Wahad*, 79 N.Y.2d at 789, 587 N.E.2d at 275, 579 N.Y.S.2d at 637. The three *Jackson* dissenters dissented again, arguing once more that "no further showing need be made" than that *Rosario* was in fact violated. *Id.* (Titone, J., dissenting).

Other 1991 decisions implicating a criminal defendant's right of confrontation were: *People v. Charles*, 78 N.Y.2d 1044, 1046, 581 N.E.2d 1336, 1337-38, 576 N.Y.S.2d 81, 82-83 (1991) (holding, in a unanimous memorandum, that it was error to permit the prosecution to use against the defendant testimony about a joint statement of the defendant and his co-defendant, where the prosecution was unable to ascertain which admissions were attributable to whom); *People v. Cardwell*, 78 N.Y.2d 996, 998, 580 N.E.2d 753, 754, 575 N.Y.S.2d 267, 268 (1991) (holding, in a unanimous memorandum, that a severance should have been granted where the separate defenses of the co-defendants were irreconcilably conflicting, one co-defendant, in effect, becoming a second prosecutor offering damaging evidence beyond that elicited by the prosecution).

210. See, e.g., *People v. Thorn*, 156 N.Y. 286, 50 N.E. 947 (1898).

211. See *Snyder v. Mass.*, 291 U.S. 97 (1934) (Cardozo, J.).

In *People v. Cain*,<sup>212</sup> the Court held that it was per se reversible error for the trial judge, at a post verdict conference attended by counsel and the prosecutor but in the defendant's absence, to discuss his instructions with a juror who had initially indicated some reservations during a poll on the verdict.<sup>213</sup> Judge Bellacosa, alone in dissent, complained that the post verdict discussion and the defendant's absence therefrom "had absolutely nothing to do with the integrity of the verdict"; he argued that automatic reversal of the conviction was therefore "unwarranted."<sup>214</sup>

Several weeks thereafter, in *People v. Harris*,<sup>215</sup> the Court reached the opposite result where the trial judge, in the presence of counsel and prosecution but not the defendant, spoke with the deliberating jury to clarify its request for a read back of trial testimony.<sup>216</sup> Judge Titone, the author of the *Cain* majority, was now in dissent with Judge Kaye, challenging the Court's characterization of the judge's colloquy with the jury as merely "ministerial."<sup>217</sup> The dissent also noted that a personally present defendant might well have had views about the jury's inquiry and about an appropriate response.<sup>218</sup> Moreover, as Judge Titone pointed out,<sup>219</sup> the Court had recently held in *People v. Torres*<sup>220</sup> that a single sentence communication to a jury to continue deliberating could *not* be treated as "ministerial."<sup>221</sup>

In 1991, there was less disagreement within the Court on those issues, but no less confusion as to the import of prior decisions or on the current reach of the right to be present. In *Peo-*

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212. 76 N.Y.2d 119, 556 N.E.2d 141, 556 N.Y.S.2d 848 (1990).

213. *Id.* at 123-24, 556 N.E.2d at 142-43, 556 N.Y.S.2d at 849-50.

214. *Id.* at 127, 556 N.E.2d at 145, 556 N.Y.S.2d at 852 (Bellacosa, J., dissenting).

215. 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990).

216. *Id.* at 811, 559 N.E.2d at 661, 559 N.Y.S.2d at 967.

217. *Id.* at 813, 559 N.E.2d at 662, 559 N.Y.S.2d at 968 (Titone, J., dissenting).

218. *Id.* at 814, 559 N.E.2d at 663, 559 N.Y.S.2d at 969 (Titone, J., dissenting).

219. *Id.* at 813, 559 N.E.2d at 662, 559 N.Y.S.2d at 968 (Titone, J., dissenting).

220. 72 N.Y.2d 1007, 531 N.E.2d 635, 534 N.Y.S.2d 914 (1988).

221. *Id.* at 1009, 531 N.E.2d at 636, 534 N.Y.S.2d at 915.

*ple v. Velasco*,<sup>222</sup> each of the defendant's multiple claims was rejected in a unanimous unsigned opinion. Though the Court reaffirmed the constitutional due process foundation for a defendant's right to be present at all material stages of a trial,<sup>223</sup> it dismissed in short order all of the defendant's arguments that his right was in various ways violated.<sup>224</sup> According to the Court, the defendant's presence was not required at a precharge conference where, among other things, the attorneys for both sides discussed a stipulation about evidence and the trial court's instructions to the jury, and the judge entertained motions to dismiss some of the charges.<sup>225</sup> The Court of Appeals' unelaborated rationale was that the "conference involved only questions of law or procedure."<sup>226</sup>

But that would seem to fly in the face of the previous year's reasoning in the aforementioned *Harris* decision.<sup>227</sup> There, in another unsigned opinion, the majority had rejected the right to be present claim for the very reason that the discussion in question was "*unrelated to the substantive legal or factual issues of the trial.*"<sup>228</sup> In short, both the involvement and the noninvolvement of legal issues has been used by the Court to deny the right to be present. It would thus appear that something other than the Court's expressed rationale was driving its decision in *Velasco*.

The Court in *Velasco* also rejected the defendant's contention that he had a right to be present at the "side-bar voir dire."<sup>229</sup> The trial judge had directed all prospective jurors wishing to respond to his questions about juror disqualification to approach the bench. Several jurors did, and the judge en-

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222. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).

223. *Id.* at 472, 570 N.E.2d at 1070, 568 N.Y.S.2d at 221 (citing *People v. Mullen*, 44 N.Y.2d 1, 4-5, 374 N.E.2d 369, 370-71, 403 N.Y.S.2d 470, 471-72 (1977)). The Court failed, however, to distinguish the state from the federal protection; instead it spoke in *Velasco* generally of "due process" and the "constitutional right." *Id.* at 472-73, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

224. *Id.* at 472-73, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

225. *Id.* at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

226. *Id.* (emphasis added).

227. *People v. Harris*, 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990); see also *supra* notes 215-21 and accompanying text.

228. *Harris*, 76 N.Y.2d at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968 (emphasis added).

229. *Velasco*, 77 N.Y.2d at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

gaged in side-bar discussions with them in the presence of the prosecutor and counsel but, again, not the defendant himself. Following these discussions, some jurors were excused and others retained.<sup>230</sup>

The Court of Appeals held that the defendant had no right to be present at these side-bar discussions. It offered as reasons that juror disqualification is "a matter for the [trial] court," that the defendant "was present during the initial questioning," and that he was "represented by counsel . . . at the bench."<sup>231</sup> The Court did not explain how these factors fit within standards established in previous decisions—i.e., how these factors determined that the side-bars were not "material stages" of the trial.

Surely, for example, the fact that the defendant was "represented by counsel at the bench" is not an answer. Rather, whether such representation obviates a defendant's presence—and if so why—is the question. So too, neither the fact that juror disqualification was to be decided by the judge nor that the defendant was present at an earlier part of the proceeding answers the question of whether the defendant should have been present at the ensuing side-bar which ultimately led to the judge's decisions.

The Court's conclusion that the defendant's presence would, "under the circumstances, . . . have been useless,"<sup>232</sup> while possibly accurate as a practical proposition, was not really shown to be true as a factual matter; nor was it shown to be the governing legal standard applied in prior Court of Appeals cases. Indeed, the Court of Appeals was relying on the 1934 Supreme Court decision in *Snyder v. Massachusetts*<sup>233</sup> for the "would have been useless" test.<sup>234</sup> But that test made sense in *Snyder* where harmless error analysis was applied.<sup>235</sup> It did not make nearly as much sense in *Velasco* where, presumably, the Court of Appeals' own absolute right/per se reversal rule was

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230. *Id.* at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

231. *Id.*

232. *Id.* at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1934)).

233. 291 U.S. 97 (1934).

234. *Velasco*, 77 N.Y.2d at 473, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23 (citing *Snyder*, 291 U.S. at 108).

235. 291 U.S. at 122.

applicable—as the Court has repeatedly insisted in right to be present cases.<sup>236</sup>

Finally, in *Velasco*, the Court also rejected the defendant's contention that his right to be present was violated when he was absent from a robing room conference in which the attorneys advised the court of their preemptory challenges and argued for challenges for cause.<sup>237</sup> The Court said it was enough that the defendant “had an opportunity to consult with his attorney” on these matters and that the challenges were “later effectuated in open court” in the defendant's presence.<sup>238</sup> For these reasons, according to the Court, the in-chambers discussions and arguments “did not constitute a material part of the trial.”<sup>239</sup>

Again, it is not clear how the Court's conclusion follows, nor how its reasoning conforms to prior right to be present decisions. Surely, the Court could not seriously be suggesting—as it seemed to be—that a defendant could be absented from trial proceedings solely because he previously consulted with counsel and was subsequently present for the ensuing decisions in the courtroom. The question remains: which trial proceedings are “material” and thus trigger a defendant's purportedly “absolute” right to be present?

The conclusory determinations in *Velasco* shed little light on that question. Instead, they suggest that the court's decisions were more ad hoc than faithful to any theretofore asserted standards. Very possibly, the rigid absolute right/per se reversal rule was operating as a powerful disincentive against the Court's finding any violation of the right to be present—unless

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236. See, e.g., *People v. Cain*, 76 N.Y.2d 119, 124, 556 N.E.2d 141, 143, 556 N.Y.S.2d 848, 850 (1990) (stating that a defendant's right to be present is “absolute,” hence, lack of prejudice is irrelevant where defendant was absent during judge's post verdict discussion of jury instructions with reluctant juror); *People v. Brooks*, 75 N.Y.2d 898, 899, 553 N.E.2d 1328, 1329, 554 N.Y.S.2d 818, 819 (1990) (holding that when a defendant is absent during summations and jury instructions, and a judge has failed to inquire as to the reasons behind his absence, it is reversible error for the court to proceed with the trial without the defendant being present); *People v. Mehmedi*, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1986) (stating that a defendant's right to be present during jury instructions is absolute).

237. *Velasco*, 77 N.Y.2d at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

238. *Id.*

239. *Id.*



the trial proceeding at issue was truly critical and integral to a defendant's right to participate in his own defense.

Such a proceeding was at issue, for example, in *People v. Turaine*,<sup>240</sup> decided several weeks later. There, the defendant had been excluded, over counsel's objection, from a hearing conducted by the trial judge to examine a prospective prosecution witness, who would testify that the defendant had threatened him.<sup>241</sup> In a unanimous memorandum, the New York Court ruled generally that "[p]roceedings where testimony is received are material stages of the trial."<sup>242</sup> In particular, the Court held that the "[d]efendant was entitled to confront the witness against him" and to "advise counsel of any errors or falsities in the witnesses' testimony."<sup>243</sup>

The Court then specifically rejected the Appellate Division's ruling that the defendant's rights were sufficiently protected when he was present during the witness's subsequent testimony in open court before the jury.<sup>244</sup> "At that stage of the trial," the Court of Appeals reasoned, the trial judge "had already decided the evidence had probative value and would be received."<sup>245</sup>

But such reasoning was absent from *Velasco*. There, the Court deemed it acceptable for the defendant to be excluded from the decisionmaking proceedings as long as he had the opportunity to consult with counsel beforehand and to be present afterward when the judge's decisions were announced or carried out in open court.<sup>246</sup>

Evidently, considerations other than those asserted by the Court as dispositive were guiding these decisions. Whatever is a "material" stage at which a defendant's "absolute" right to be

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240. 78 N.Y.2d 871, 577 N.E.2d 55, 573 N.Y.S.2d 64 (1991).

241. *Id.* at 872, 577 N.E.2d at 56, 573 N.Y.S.2d at 65.

242. *Id.*

243. *Id.*

244. *Id.*; see *People v. Turaine*, 162 A.D.2d 262, 556 N.Y.S.2d 620 (1st Dep't 1990).

245. *Turaine*, 78 N.Y.2d at 872, 577 N.E.2d at 56, 573 N.Y.S.2d at 65.

246. *Velasco*, 77 N.Y.2d at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722; see also *supra* notes 237-39 and accompanying text.

present attaches is hardly clearer as a result of the Court's rulings in these cases.<sup>247</sup>

In *People v. Bonaparte*,<sup>248</sup> the defendant's right to be present claim was rejected on the ground that the function carried out by the court officer in the absence of the defendant and his attorney was merely ministerial.<sup>249</sup> The court officer, at the direction of the trial judge, informed the deliberating jurors to cease their deliberations for the evening; he also told them that they would be taken to dinner and sequestered until the morning.<sup>250</sup> No instructions were given, by the court officer or any-

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247. Related 1991 decisions were: *People v. Ortega*, 78 N.Y.2d 1101, 1102, 585 N.E.2d 372, 373, 578 N.Y.S.2d 123, 124 (1991) (holding, in a unanimous memorandum, that the trial judge's private conference with a prosecution witness to induce disclosure of a confidential informant's identity "violated defendant's rights") (citing *Turaine*, 78 N.Y.2d at 872, 577 N.E.2d at 56, 573 N.Y.S.2d at 65); *People v. Richards*, 77 N.Y.2d 969, 969, 575 N.E.2d 391, 391, 571 N.Y.S.2d 905, 905 (1991). In *Richards*, the Court, in a unanimous entry, adopted the Appellate Division's ruling in *People v. Richards*, 157 A.D.2d 753, 551 N.Y.S.2d 790 (2d Dep't 1990), which upheld the trial judge's closure of the courtroom during the testimony of an undercover officer, reasoning that closure was necessary to protect the officer's safety and the integrity of ongoing operations. 157 A.D.2d at 753, 551 N.Y.S.2d at 790. The Appellate Division had relied on the state's open trial/fair trial analysis in *People v. Jones*, 47 N.Y.2d 409, 391 N.E.2d 1335, 418 N.Y.S.2d 359 (1979). *Richards*, 157 A.D.2d at 753, 551 N.Y.S.2d at 790.

In *People v. O'Rama*, 78 N.Y.2d 270, 579 N.E.2d 189, 574 N.Y.S.2d 163 (1991), the Court, in a unanimous opinion by Judge Titone, held that it was a per se reversible denial of the meaningful participation of counsel in a critical stage of trial where the trial judge, who in open court urged the stalemated jury to continue deliberating, refused to disclose to the defendant and his counsel the contents of a juror's note which had requested the judge's help in resolving the jury's difficulties in reaching agreement. *Id.* at 292, 579 N.E.2d at 193, 584 N.Y.S.2d at 163.

Other right to counsel cases were: *People v. Slaughter*, 78 N.Y.2d 485, 492, 583 N.E.2d 919, 923, 577 N.Y.S.2d 206, 210 (1991) (holding, in a unanimous opinion by Judge Hancock, that the defendant's waiver of right to counsel was ineffective and that it was prejudicial error for the trial judge to permit the defendant to proceed pro se without first conducting an inquiry to ensure that the defendant understood the benefits of counsel he was foregoing); *People v. Blount*, 77 N.Y.2d 888, 888, 571 N.E.2d 78, 78, 568 N.Y.S.2d 908, 908 (1991) (adopting, in a unanimous entry, the Appellate Division's ruling in *People v. Blount*, 159 A.D.2d 579, 580, 552 N.Y.S.2d 441, 442 (2d Dep't 1990), that it was a reversible violation of the defendant's right to counsel where the trial judge forbade the defendant's attorney to discuss the defendant's testimony with him during an overnight recess called in the course of cross-examination).

248. 78 N.Y.2d 26, 574 N.E.2d 1027, 571 N.Y.S.2d 421 (1991).

249. *Id.* at 30-31, 574 N.E.2d at 1030, 571 N.Y.S.2d at 423.

250. *Id.* at 29, 574 N.E.2d at 1029, 571 N.Y.S.2d at 423.

one else, that the jurors should not discuss the case until deliberations resumed.<sup>251</sup>

The Appellate Division reversed the ensuing conviction on the grounds that the trial judge had improperly delegated a judicial function to the court officer and, thus, violated the defendant's right to be present at the communication with the deliberating jurors.<sup>252</sup> The Court of Appeals, in a unanimous decision by then-Chief Judge Wachtler, reversed. "[N]ot every communication with a deliberating jury," said the Court, "requires the participation of the [trial judge] or the presence of the defendant."<sup>253</sup> According to the Court, the communication here was among those ministerial functions that a trial judge might delegate.<sup>254</sup>

The Court actually expressed its disapproval of the trial judge's procedure, and indeed, prescribed the "better practice" of the judge herself communicating with the jurors and directing them not to discuss the case during sequestration.<sup>255</sup> Nevertheless, the Court held that the trial judge had not improperly delegated any judicial authority and that defendant's presence was not required during the communications with the jury because "the court officer did not deliver any instructions to the jury concerning the mode or subject of their deliberations."<sup>256</sup>

The Court contended that this case was "easily distinguished"<sup>257</sup> from *People v. Torres*.<sup>258</sup> In *Torres*, according to the Court of Appeals, the court officer handled a "particularly sensitive matter" when he told a deadlocked jury to continue deliberating.<sup>259</sup> Actually, the court officer in *Torres* did no more than relay, without embellishment, the trial judge's one sentence directive to the jury; there were no questions, no answers, no dis-

251. *Id.* at 28, 274 N.E.2d at 1028, 571 N.Y.S.2d at 422.

252. *See People v. Bonaparte*, 161 A.D.2d 774, 774-75, 556 N.Y.S.2d 363, 364 (2d Dep't 1990).

253. *Bonaparte*, 78 N.Y.2d at 30, 574 N.E.2d at 1029, 571 N.Y.S.2d at 423.

254. *Id.* at 30-31, 574 N.E.2d at 1029-30, 571 N.Y.S.2d at 423-24.

255. *Id.* at 32, 574 N.E.2d at 1031, 571 N.Y.S.2d at 425.

256. *Id.* at 31, 574 N.E.2d at 1030, 571 N.Y.S.2d at 424.

257. *Id.* at 31, 574 N.E.2d at 1030, 571 N.Y.S.2d at 424.

258. 72 N.Y.2d 1007, 531 N.E.2d 635, 534 N.Y.S.2d 914 (1988); *see supra* notes 220-21 and accompanying text.

259. *Bonaparte*, 78 N.Y.2d at 31, 574 N.E.2d at 1030, 571 N.Y.S.2d at 424 (citing *Torres*, 72 N.Y.2d at 1008, 531 N.E.2d at 636, 534 N.Y.S.2d at 915).

cussions whatsoever.<sup>260</sup> The Court of Appeals in *Torres* nevertheless characterized the simple straightforward message to the jury as a per se reversible delegation of a non-ministerial judicial function.<sup>261</sup> Now in *Bonaparte*, the Court seemed clearly to be trimming whatever standard it had applied to reach the result it did in *Torres*.<sup>262</sup>

Finally, it is also curious that the Court based its decision in *Bonaparte* on the fact that the court officer did not advise the jurors about anything legally significant. In fact, they should have been told, by the court officer or the trial court itself, about their duty to refrain from discussing the case until deliberations resumed.<sup>263</sup> Stated otherwise, the trial judge's delegation was permissible, according to the Court of Appeals, on the ground that no information of substance was communicated to the jury by the court officer, even though this meant that the trial judge had thus wholly failed to inform the jurors of their duties and obligations during sequestration.

But the Court refused to address that failure. Instead, the Court insisted that the defendant's complaint—that the trial judge had a duty to speak with the jury personally in the defendant's presence—did not sufficiently raise an issue about the trial judge's failure to advise the jurors adequately.<sup>264</sup>

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260. *Torres*, 72 N.Y.2d at 1008, 531 N.E.2d at 635, 534 N.Y.S.2d at 915.

261. *Torres*, 72 N.Y.2d at 1008-09, 531 N.E.2d at 636, 534 N.Y.S.2d at 915.

262. See also *People v. Harris*, 76 N.Y.2d 810, 813, 559 N.E.2d 660, 662, 559 N.Y.S.2d 966, 968 (1990) (Titone, J., dissenting); see *supra* notes 215-21 and accompanying text.

263. *Bonaparte*, 78 N.Y.2d at 31-32, 574 N.E.2d at 1030-31, 571 N.Y.S.2d at 424-25.

264. *Id.* at 31-32, 574 N.E.2d at 1030-31, 571 N.Y.S.2d at 424-25.

Related 1991 decisions were: *People v. Ford*, 78 N.Y.2d 878, 880, 577 N.E.2d 1034, 1035, 573 N.Y.S.2d 442, 443 (1991) (holding, in a unanimous memorandum, that the trial judge did not improperly delegate judicial authority in directing the court officer to take the jury to dinner and then to a hotel; the failure of the defendant specifically to request a sequestration instruction to the jury precluded its review); *People v. Nacey*, 78 N.Y.2d 990, 991, 580 N.E.2d 751, 752, 575 N.Y.S.2d 265, 266 (1991) (holding, in a unanimous memorandum, that the court officer performed a mere ministerial function in telling the jurors to stop deliberating until they returned in the morning. [Does this not implicate the rules governing deliberations? See *Bonaparte*, 78 N.Y.2d at 31, 574 N.E.2d at 1030, 571 N.Y.S.2d at 424.]); *People v. Bayes*, 78 N.Y.2d 546, 551, 584 N.E.2d 643, 645, 577 N.Y.S.2d 585, 587 (1991) (finding, in a unanimous opinion by then-Judge Kaye, an improper delegation of judicial responsibility, where the attorneys were permitted to explain the judge's instructions to the jury; the improper delegation was held to violate the

defendant's rights to a jury trial and to a fair trial).

Other 1991 decisions involving state constitutional jury trial, fair trial, and other procedural due process rights were: *People v. Webb*, 78 N.Y.2d 335, 339, 581 N.E.2d 509, 511, 575 N.Y.S.2d 656, 658 (1991) (holding, in a unanimous opinion by Judge Hancock, that the statutory requirement of N.Y. CRIM. PROC. LAW § 310.10, does not implicate a fundamental right, integral to a fair trial, that cannot be waived).

In *People v. Tucker*, 77 N.Y.2d 861, 569 N.E.2d 1021, 568 N.Y.S.2d 342 (1991), the majority, in an unsigned memorandum, over the dissenting opinion of Judge Titone, held that it was not reversible error for the trial judge, over counsel's objection, to permit a juror to take his notes on supplemental instructions into deliberations where the judge had cautioned the jury against undue reliance on the notes. *Id.* at 863, 569 N.E.2d at 1022, 568 N.Y.S.2d at 343. Judge Titone argued that the error was per se reversible, relying on state constitutional fair trial case law unconditionally prohibiting jurors, absent counsel's consent, from taking a written copy of the judge's instructions into deliberations. *Id.* (Titone, J., dissenting). See, e.g., *People v. Brooks*, 70 N.Y.2d 896, 519 N.E.2d 293, 524 N.Y.S.2d 382 (1989).

In *People v. Patterson*, 78 N.Y.2d 711, 587 N.E.2d 255, 579 N.Y.S.2d 617 (1991), the Court, in an opinion by Judge Alexander, held that the concededly illegal use of a photograph, taken from a file on a dismissed unrelated charge, in order to obtain an identification, did not require suppression of the identification evidence or reversal of the ensuing conviction. *Id.* at 713-14, 587 N.E.2d at 255-56, 579 N.Y.S.2d at 617-18. Judge Titone, joined by Judge Kaye (Judge Hancock took no part), argued in dissent that the constitutional presumption of innocence underlying the statutory requirement of N.Y. CRIM. PROC. LAW § 160.50, which provides that records and evidence of dismissed charges be sealed, dictated the sanction of suppression. *Id.* at 727, 587 N.E.2d at 264, 579 N.Y.S.2d at 626 (Titone, J., dissenting). Note the majority's insistence that the statutory protection "does not implicate the fundamental constitutional interests or considerations." *Id.* at 717, 587 N.E.2d at 258, 579 N.Y.S.2d at 620; see also discussion of *Jackson*, *supra* notes 131-209 and accompanying text.

In *People v. Colon*, 78 N.Y.2d 998, 580 N.E.2d 754, 575 N.Y.S.2d 268 (1991), the majority, in an unsigned memorandum, upheld the prosecution's cross-examination of defense witnesses which elicited testimony linking the defendant to drug trafficking that was not charged. *Id.* at 1000, 580 N.E.2d at 754, 575 N.Y.S.2d at 268. Judge Titone, in lone dissent, argued that the highly prejudicial evidence of an uncharged large scale drug selling enterprise deprived the defendant of a fair trial. *Id.* at 1000, 580 N.E.2d at 755, 575 N.Y.S.2d at 269 (Titone, J., dissenting).

In *People v. Hunt*, 78 N.Y.2d 932, 579 N.E.2d 208, 574 N.Y.S.2d 178 (1991), the majority, in an entry, adopted the Appellate Division's ruling that neither state nor federal double jeopardy precluded the prosecution from trying to prove a different predicate felony at a second felony offender resentencing proceeding. *Id.* at 933, 579 N.E.2d at 208, 574 N.Y.S.2d at 178. Then-Judge Kaye, in lone dissent, argued that the enhanced sentencing procedure required beyond-a-reasonable-doubt proof, thereby resembling a trial, and thus precluding a second try by the prosecution after its failure to prove a predicate conviction at the first sentencing proceeding. *Id.* at 933, 579 N.E.2d at 208, 574 N.Y.S.2d at 178 (Kaye, J., dissenting).

In *People v. Moquin*, 77 N.Y.2d 449, 570 N.E.2d 1059, 568 N.Y.S.2d 710 (1991), the Court, in an opinion by Judge Titone, held that (federal) double jeopardy barred prosecution of a charge dismissed at trial but reinstated on appeal,

## B. *Civil Liberties and Equality*

The 1991 decisions adjudicating claims of civil liberty and equal protection involved a host of various issues including the visitation rights of a nonbiological lesbian "parent,"<sup>265</sup> the rights of developmentally disabled children to a free public education,<sup>266</sup> the vested property rights of insurance companies,<sup>267</sup> and the limits on gubernatorial power.<sup>268</sup>

But the highlight of the year was a trio of free expression decisions.<sup>269</sup> The trio reveals a great deal about the Court's

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where the defendant had already pleaded guilty and was serving a sentence on the remaining charges. *Id.* at 455, 570 N.E.2d at 1063, 568 N.Y.S.2d at 714. In dissent, Judge Bellacosa, joined by Judge Simons, argued that double jeopardy principles (in state as well as federal decisions) did not bar the prosecution where the prosecutor had not consented to the defendant's original plea. *Id.* at 458, 570 N.E.2d at 1065, 568 N.Y.S.2d at 716 (Bellacosa, J., dissenting). Under New York decisional law, state constitutional double jeopardy renders a second prosecution a nullity, double jeopardy may be raised at any time, and it is always an issue. *See, e.g.,* *People v. Michael*, 48 N.Y.2d 1, 349 N.E.2d 1134, 420 N.Y.S.2d 371 (1979). Hence, the dissenters in *Moquin* would seem necessarily to have rejected state, as well as federal, constitutional double jeopardy claims.

*See also* *People v. Zanghi*, 79 N.Y.2d 815, 818, 588 N.E.2d 77, 79, 580 N.Y.S.2d 179, 181 (1991) (vacating, in a unanimous memorandum, a guilty plea on the ground that the information on which the defendant was prosecuted was jurisdictionally defective because an accusatory instrument may not contain an offense greater than that charged in the felony complaint where the defendant waives his state constitutional right to indictment); *People v. Smith*, 79 N.Y.2d 779, 780, 587 N.E.2d 286, 286, 579 N.Y.S.2d 648, 648 (1991) (adopting, in a unanimous entry, the Appellate Division's ruling, 166 A.D.2d 385, 385, 561 N.Y.S.2d 189, 190 (1st Dep't 1990), that the defendant was not deprived of a fair trial where, in a departure from the normal order of trial, the trial judge directed the defendant, who had already chosen to testify, to do so before the prosecution rested); *People ex rel. Strachan v. Colon*, 77 N.Y.2d 499, 504, 571 N.E.2d 65, 68, 568 N.Y.S.2d 895, 898 (1991) (holding, in a unanimous opinion by Judge Bellacosa, that due process did not require the governor to conduct a hearing prior to extraditing the petitioner to the demanding state solely because the offense charged there was a capital one; *cf. People ex rel. Neufeld*, 71 N.Y.2d 881, 885, 552 N.E.2d 1060, 1061, 527 N.Y.S.2d 762, 763 (1988) (Bellacosa, J., concurring)).

265. *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991); *see infra* notes 444-68 and accompanying text.

266. *Catlin v. Sobol*, 77 N.Y.2d 552, 571 N.E.2d 661, 569 N.Y.S.2d 353 (1991); *see discussion infra* notes 469-95 and accompanying text.

267. *Alliance of Am. Insurers v. Chu*, 77 N.Y.2d 573, 571 N.E.2d 672, 569 N.Y.S.2d 364 (1991); *see infra* notes 496-527 and accompanying text.

268. *Citizens for an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 582 N.E.2d 568, 576 N.Y.S.2d 185 (1991); *see infra* note 527.

269. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991); *see infra* notes 271-316 and accompanying text; *Children of Bedford, Inc. v. Petromelis*, 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453

state constitutional jurisprudence in 1991. The three cases find the Court of Appeals unsettled about its basic approach to state constitutional law, reversed by the United States Supreme Court for giving too little protection to expressive freedom, and harshly unsympathetic to attorney speech critical of judges. To these cases we now turn.<sup>270</sup>

### 1. *Civil and Political Freedoms*

In *Immuno A.G. v. Moor-Jankowski (Immuno II)*,<sup>271</sup> on remand from the United States Supreme Court,<sup>272</sup> the Court of Appeals adhered to its original decision dismissing a defamation action.<sup>273</sup> This time, in a second opinion by then-Judge Kaye, the Court based its decision on a "separate [state] ground,"<sup>274</sup> "independent"<sup>275</sup> of the federal analysis it also applied.<sup>276</sup>

The plaintiff, a manufacturer of biologic products, brought a libel action against the defendant, the co-founder and editor of a scientific journal, for publishing a letter by an animal rights advocate who was highly critical of the plaintiff's proposed project for conducting research with chimpanzees.<sup>277</sup> The Court of Appeals originally dismissed the suit on the ground that the statements of opinion were absolutely protected under the Federal First Amendment.<sup>278</sup>

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(1991), *vacated*, 112 S. Ct. 859 (1992); *see infra* notes 317-50 and accompanying text; *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 112 S. Ct. 648 (1991); *see infra* notes 351-412 and accompanying text.

270. The author has discussed each of these decisions elsewhere. *See Bonventre, The New York Court of Appeals: An Old Tradition Struggles with Current Issues*, *supra* note 10, at 150-51; Bonventre, *supra* note 2, at 135-40; Vincent M. Bonventre, *Professional Responsibility, 1991 Survey of N.Y. Law*, 43 SYRACUSE L. REV. 505, 511-14 (1992).

271. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991).

272. *Immuno A.G. v. Moor-Jankowski*, 497 U.S. 1021 (1990), *vacating* 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989).

273. *See Immuno A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989).

274. *Immuno II*, 77 N.Y.2d at 248, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912.

275. *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

276. *See id.* at 242-48, 567 N.E.2d at 1273-77, 566 N.Y.S.2d at 909-13.

277. *Id.* at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

278. *See Immuno*, 74 N.Y.2d at 555, 549 N.E.2d at 132, 549 N.Y.S.2d at 941. Dictum in prior Supreme Court case law implied that the Federal First Amendment's guarantee of free speech cloaked statements of opinion, as opposed to state-

Subsequently, however, the Supreme Court vacated that judgment and remanded the case for reconsideration<sup>279</sup> in light of its recent decision in *Milkovich v. Lorain Journal Co.*<sup>280</sup> In *Milkovich*, the Supreme Court rejected the notion that the First Amendment created a "wholesale defamation exemption" for statements labeled "opinion."<sup>281</sup> According to the nation's high Court, any statement containing "provably false factual connotations" might be actionable.<sup>282</sup>

On remand from the Supreme Court, the Court of Appeals held that the defamation action should still be dismissed under federal constitutional law,<sup>283</sup> and in any event, that the action was barred for wholly separate and independent reasons by the free speech protections of the state constitution.<sup>284</sup> In its federal analysis of the case, the Court of Appeals determined that the letter in question did contain some provably false assertions of fact.<sup>285</sup> The Court held that the libel complaint must, nonetheless, be dismissed because the plaintiff had failed to prove that the assertions were in fact false.<sup>286</sup>

The Court then turned to state law.<sup>287</sup> It adopted an independent state constitutional test derived from its 1986 decision in *Steinhilber v. Alphonse*.<sup>288</sup> Under that test—"whether the reasonable reader would have believed that the challenged statements [, viewed as a whole and in context,] were conveying facts about the libel plaintiff"<sup>289</sup>—the Court concluded that the letter "would not have been viewed by the average reader of the *Journal* as conveying actual facts about plaintiff," but rather, as "voicing no more than a highly partisan point of view."<sup>290</sup>

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ments of fact, with absolute immunity from defamation liability. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

279. 497 U.S. 1021 (1990).

280. 497 U.S. 1 (1990).

281. *Id.* at 17.

282. *Id.* at 20.

283. *Immuno II*, 77 N.Y.2d at 248, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912.

284. *Id.*

285. *Id.* at 246, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911.

286. *Id.* at 245-47, 567 N.E.2d at 1275-76, 566 N.Y.S.2d at 911-12.

287. *Id.* at 248, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912.

288. 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986); see *Immuno II*, 77 N.Y.2d at 252, 254, 567 N.E.2d at 1280-81, 566 N.Y.S.2d at 916-17.

289. *Immuno II*, 77 N.Y.2d at 254, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916; see also *Steinhilber*, 68 N.Y.2d at 293, 501 N.E.2d at 554, 508 N.Y.S.2d at 906.

290. *Immuno II*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.



Hence, the letter was held by the Court to be a state constitutionally protected expression of individual opinion.<sup>291</sup>

The Court, speaking through Judge Kaye, explained its preference for the state standard:

[W]e believe that an analysis that begins by looking at the content of the whole communication, its tone and apparent purpose better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances.<sup>292</sup>

The state test, according to the Court, avoids the “fine parsing” of statements, the “isolating” and “extracting” of “expressed and implied factual statements” that might well result in identifying more provably false assertions than a reasonable person would in reading the communication as a whole and in context.<sup>293</sup> The state constitutional standard, continued the Court, “takes into account the full content of [the] challenged speech,” and that, continued the Court, better assures the “full and vigorous exposition and expression of opinion on matters of public interest.”<sup>294</sup>

Judge Simons, separately concurring, argued that the Court’s application of the state constitution was unnecessary.<sup>295</sup> Inasmuch as the complaint had to be dismissed under federal law, it was “unnecessary,” according to Judge Simons, for the Court to resort to the state constitution.<sup>296</sup> Clearly, Simons had a point.

The majority decided the case under both federal and state law. It actually issued two full opinions—the first applying fed-

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291. *Id.*

292. *Id.* at 254, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917 (citing *Steinhilber*, 68 N.Y.2d at 293, 501 N.E.2d at 550, 508 N.Y.S.2d at 901; Rodney W. Ott, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761 (1990)).

293. *Id.* at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

294. *Id.* (quoting *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 384, 366 N.E.2d 1299, 1309, 397 N.Y.S.2d 943, 953 (Jasen, J.), *cert. denied*, 434 U.S. 969 (1977)).

295. *Id.* at 257, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918 (Simons, J., concurring). Judge Hancock agreed with Judge Simons in his own separate concurring opinion. *Id.* at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 926 (Hancock, J., concurring).

296. *Id.* at 261, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921.

eral analysis,<sup>297</sup> the second state.<sup>298</sup> Either the federal or state opinion was advisory; either the federal or state analysis was wholly unnecessary dictum.<sup>299</sup>

Moreover, as Judge Simons noted, this so-called "dual reliance" approach<sup>300</sup> to constitutional adjudication precludes any review of the state court's interpretation and application of federal law.<sup>301</sup> As he explained, "Supreme Court jurisdiction to review a Federal question fails if the decision of the State Court is [also] based on adequate and independent State grounds."<sup>302</sup>

Judge Simons, who has adhered to a set of guidelines in applying the state constitution,<sup>303</sup> set forth his position for advocating a "federal law first approach"—one which initially calls for the application of federal law alone and welcomes Supreme Court review. As he explained in *Immuno II*:

When Federal questions are presented, [the Court of Appeals'] institutional functions are subordinated to the Supreme Court and it acts, in effect, as an intermediate court. . . . Inasmuch as the Supreme Court is charged with the ultimate responsibility for pronouncing Federal law, . . . it should be given the opportunity to accept, modify or reject a State court's determination of what the Federal Constitution requires.<sup>304</sup>

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297. See *id.* at 241-48, 567 N.E.2d at 1273-77, 566 N.Y.S.2d at 909-13.

298. *Id.* at 248-56, 567 N.E.2d at 1277-82, 566 N.Y.S.2d at 913-18.

299. See *id.* at 262-63, 567 N.E.2d at 1285-86, 566 N.Y.S.2d at 921-22 (Simons, J., concurring).

300. See Linda Matarese, *Other Voices: The Role of Justices Durham, Kaye, and Abrahamson in Shaping the "New Judicial Federalism"*, 2 EMERGING ISSUES ST. CONST. L. 239, 250-51 (1989); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983 (1985); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1029 (1985).

301. *Immuno II*, 77 N.Y.2d at 261, 567 N.E.2d at 1284, 566 N.Y.S.2d at 920 (Simons, J., concurring).

302. *Id.* (Simons, J., concurring).

303. See, e.g., *People v. Harris*, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991); *People v. P.J. Video*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986). See also *People v. Vilardi*, 76 N.Y.2d 67, 78, 555 N.E.2d 915, 921, 556 N.Y.S.2d 518, 524 (1990) (Simons, J., concurring).

304. *Immuno II*, 77 N.Y.2d at 260-61, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921 (Simons, J., concurring) (citing *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972); *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932)).

A different jurisprudential view, but one resulting in similar practical effect, was that apparently adopted by Chief Judge Wachtler. He regarded state consti-

By contrast, Judge Titone, also concurring separately, argued that the case should have been decided solely on the basis of state law.<sup>305</sup> The Court's "first obligation," as Judge Titone explained, "is to determine whether the dismissal of this plaintiff's complaint is consistent with our State's common-law and constitutional defamation rules. Resolution of this question is, in my view, a necessary and logically *prior step* that must be taken before any federal constitutional issue is considered."<sup>306</sup> Because the letter in question in *Immuno II* was not actionable under state law, "[t]hat conclusion," said Judge Titone, "ends the inquiry."<sup>307</sup>

An identical view has, in fact, been advocated on prior occasions by Judge Kaye.<sup>308</sup> But in *Immuno II*, noting that the "proper approach may vary" from case to case,<sup>309</sup> she justified

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tutional law as a means of supplementing or correcting federal decisions. See, e.g., *Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986), *on remand from* 478 U.S. 697 (1986), *rev'g* 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985). But such an "instrumentalist" view effectively treats the state's fundamental law as a "grab bag" of principles to be "exploited in order to circumvent disfavored United States Supreme Court decisions," or to "insulate a controversial [state court] decision from Supreme Court review." See Collins, *supra* note 83, at 2-3, 13-14. In practice, approaches such as Chief Judge Wachtler's and Judge Simons' both operate such that, as Chief Judge Wachtler once remarked, "[i]n those instances where [the Court of Appeals' judges] think the Supreme Court Justices are dead wrong, we go back to our own constitution." See Joel Stashenko, *Depew Raid Spotlights a Rights Dilemma*, BUFFALO NEWS, June 9, 1986, at A7. "The effect [of such approaches] is to make independent state grounds appear not as original state law," as Hans Linde has noted, "but as a kind of supplemental rights that require an explanation." Hans A. Linde, *E. Pluribus - Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 177 (1984). Worse than that, when a state court adopts the "instrumentalist" position taken by Wachtler, "the sovereign law of the state constitution becomes little more than a plaything." Collins, *supra* note 83, at 14; see also Bonventure, *The New York Court of Appeals: An Old Tradition Struggles with Current Issues*, *supra* note 10, at 151.

305. *Immuno II*, 77 N.Y.2d at 263, 567 N.E.2d at 1286, 566 N.Y.S.2d at 922 (Titone, J., concurring).

306. *Id.* at 264, 567 N.E.2d at 1287, 566 N.Y.S.2d at 923 (Titone, J., concurring) (emphasis added).

307. *Id.* at 268, 567 N.E.2d at 1289, 566 N.Y.S.2d at 925. Specifically, Judge Titone would simply have applied the state's "common law defamation precepts." *Id.* at 265, 567 N.E.2d at 1288, 566 N.Y.S.2d at 924 (Titone, J., concurring) (emphasis omitted).

308. See, e.g., *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 530, 523 N.E.2d 277, 281, 528 N.Y.S.2d 1, 5 (1988) (Kaye, J., concurring); Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 56 (1988).

309. *Immuno II*, 77 N.Y.2d at 251, 567 N.E.2d at 1279, 566 N.Y.S.2d at 915.

“dual reliance” on the basis of the “unusual procedural posture of the case”<sup>310</sup>—i.e., that the case was on remand from the Supreme Court.<sup>311</sup>

It is not at all clear how that “posture” counseled a purely advisory federal analysis in addition to the fully independent and adequate state constitutional disposition of the case. Indeed, considering Judge Kaye’s repeated advocacy of the “primacy” or state-law-only approach,<sup>312</sup> and considering also the Court’s sharp divisions over state constitutional decisionmaking evident here and elsewhere,<sup>313</sup> it is likely that other, institutional realities led her to “dual reliance.” The compromises necessary to accommodate colleagues, and thereby, to forge and maintain a majority in the face of pronounced differences of opinion, might well explain Judge Kaye’s approach in *Immuno II* more than anything she could acknowledge in writing the opinion for the Court.

Free speech did not fare so well in the other two major expressive rights cases decided by the Court in 1991. In one, the Court of Appeals declined to safeguard expression to the extent subsequently mandated by the Supreme Court under the First Amendment.<sup>314</sup> In the other, the New York court refused to protect attorney criticism of judges to the same extent the Supreme Court has immunized defamation of public officials generally under the Federal Constitution.<sup>315</sup> In neither decision of the Court of Appeals was there much evidence of the “exceptional history and rich tradition” of expressive freedom proudly touted earlier that year in *Immuno II*.<sup>316</sup>

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310. *Id.*

311. *Id.* at 251-52, 567 N.E.2d at 1279-80, 566 N.Y.S.2d at 915-16.

312. See Matarese, *supra* note 300, at 264; Galie, *supra* note 2, at 242-43.

313. See, e.g., *People v. Harris*, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991); *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992); see also *infra* notes 592-602 and accompanying text.

314. *Children of Bedford, Inc. v. Petromelis*, 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991), *vacated*, 112 S. Ct. 859 (1992); see *infra* notes 317-50 and accompanying text.

315. See *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 570 N.Y.S.2d 37, *cert. denied*, 112 S. Ct. 648 (1991); cf. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

316. See *Immuno II*, 77 N.Y.2d at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913 (stating that New York State, as “a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas”) (citing *Beach v.*

In *Children of Bedford, Inc. v. Petromelis*,<sup>317</sup> the Court upheld the so-called "Son of Sam" law<sup>318</sup> against a challenge that it violated state, as well as federal, freedom of speech.<sup>319</sup> The statute had been enacted in the wake of the notorious "Son of Sam" murders to address the prospect of criminals profiting from their crimes by writing books about them.<sup>320</sup> It targeted all profits derived from expressive works discussing the author's "thoughts, feelings, opinions, or emotions" about any crime he was "accused or convicted of" committing in New York; it required that such profits be deposited in escrow to be available to compensate the crime victims or their representatives.<sup>321</sup>

The Court, in an unanimous opinion by Judge Simons,<sup>322</sup> acknowledged that the statute was content-based and that it

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Shanley, 62 N.Y.2d 241, 255-56, 465 N.E.2d 304, 311-12, 476 N.Y.S.2d 765, 772-73 (1984) (Wachtler, J., concurring)).

317. 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991), *vacated*, 112 S. Ct. 859 (1992).

318. N.Y. EXEC. LAW § 632-a (McKinney 1982) (amended by Act of July 24, 1992, ch. 618, § 10, 1992 N.Y. Laws 1671-73 (McKinney) (codified as amended at N.Y. EXEC. LAW § 632-a (McKinney Supp. 1994))). The previous version of the statute was invalidated in *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991). As paraphrased by the Court, the statute provided:

[T]hose contracting with "any person or the representative or assignee" of any person accused or convicted of a crime in New York, "with respect to the reenactment of such crime" or for "the expression of such . . . person's thoughts, feelings, opinions or emotions regarding such crime" shall submit a copy of the contract to the Crime Victims Board. If the Board determines that the criminal's work comes within the statute, any moneys owing under the contract must be paid to the Board. The funds are deposited in escrow for the benefit of the victims or legal representatives of the victims of the crime.

N.Y. EXEC. LAW § 632-a, *quoted in Children of Bedford*, 77 N.Y.2d at 719-20, 573 N.E.2d at 544, 570 N.Y.S.2d at 456.

319. *Children of Bedford*, 77 N.Y.2d at 718, 573 N.E.2d at 543, 570 N.Y.S.2d at 455.

320. See Assembly Bill Memorandum regarding A. 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws ch. 823; see also Memorandum from Robert Schlanger, Division of Criminal Justice Services, to Judah Gribetz regarding S. 6923, Aug. 3, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws ch. 823.

321. See *Children of Bedford*, 77 N.Y.2d at 720, 570 N.E.2d at 544, 570 N.Y.S.2d at 456.

322. Neither Judge Kaye nor Judge Titone participated in the case.

imposed a direct burden on speech.<sup>323</sup> The statute applied only to expressive works dealing with an author's criminal activity, and it placed special restrictions on the financial earnings otherwise gained from such works.<sup>324</sup> Nonetheless, the Court upheld the statute on the ground that it served compelling government interests and that it did so by narrowly tailored means.<sup>325</sup>

Among the compelling interests served by the statute were the compensation and rehabilitation of crime victims<sup>326</sup> and the prevention of criminals' benefiting from their crimes.<sup>327</sup> As Judge Simons put it: "[T]he statute is a codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs and also an expression of the penological concept which provides that victims expect and are entitled to 'retributive satisfaction' from our criminal justice system."<sup>328</sup>

Moreover, according to the Court, the statute was narrowly tailored to serve those interests. Judge Simons explained:

The statute regulates only the criminal's receipt of money, not the right to speak about the crime and it does not impose a forfeiture of all profits—it merely delays payment . . . . [I]t direct[s] payment of the balance remaining to the criminal after other authorized claims are satisfied. Moreover the statute does not prohibit anyone else from telling or publishing the criminal's story. . . . [And t]he statute is not designed to compensate all victims, only those who possess claims to the proceeds earned by the criminal as a result of their victimization.<sup>329</sup>

In concluding, the Court addressed the issue of whether the state constitutional guarantee of free speech demanded more

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323. See *Children of Bedford*, 77 N.Y.2d at 724, 573 N.E.2d at 546, 570 N.Y.S.2d at 458.

324. *Id.* at 724-25, 573 N.E.2d at 546-47, 570 N.Y.S.2d at 458-59.

325. *Id.* at 725-30, 573 N.E.2d at 547-50, 570 N.Y.S.2d at 459-62.

326. *Id.* at 725, 573 N.E.2d at 547, 570 N.Y.S.2d at 459.

327. *Id.* at 726-27, 573 N.E.2d at 547-48, 570 N.Y.S.2d at 459-60.

328. *Id.* at 727, 573 N.E.2d at 548, 570 N.Y.S.2d at 460 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Petrie v. Chase Manhattan Bank*, 33 N.Y.2d 846, 307 N.E.2d 253, 352 N.Y.S.2d 194 (1973); *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889); Stephen Schafer, *Restitution to Victims of Crime — An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 244 (1965)).

329. *Id.* at 730, 732, 573 N.E.2d at 550, 551, 570 N.Y.S.2d at 462, 463 (citations omitted).

protection than was provided by the foregoing standard, which was based on Federal First Amendment case law.<sup>330</sup> The Court said that whatever the state constitutional test might be, it "is no more burdensome than requiring that the statute be narrowly tailored to meet its objective"<sup>331</sup>—a test the Court had already determined the statute satisfied.<sup>332</sup> Hence, the "reach of the law [being] limited to its [compelling] purpose,"<sup>333</sup> it did "not violate petitioners' rights to free speech under either the Federal or State Constitution,"<sup>334</sup> according to the Court of Appeals.

Several months thereafter, a unanimous Supreme Court<sup>335</sup> reached the opposite result and invalidated the statute.<sup>336</sup> In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Supreme Court agreed that New York has compelling interests "in ensuring that victims of crime are compensated by those who harm them"<sup>337</sup> and "that criminals do not profit from their crimes."<sup>338</sup> But the high Court, finding the statute to be poorly tailored to its purpose, and thus unnecessarily burdensome on free speech, concluded without a dissenting vote that it violated the Federal Constitution.<sup>339</sup>

The Supreme Court ruled explicitly that the statute was "significantly overinclusive,"<sup>340</sup> and at least implicitly, that it was "underinclusive as well."<sup>341</sup> Regarding the latter, although the Court refrained from attaching the "underinclusive" label, it

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330. *Id.* at 731, 573 N.E.2d at 551, 570 N.Y.S.2d at 463.

331. *Id.* at 732, 573 N.E.2d at 551, 570 N.Y.S.2d at 463.

332. *Id.*

333. *Id.* at 730, 573 N.E.2d at 550, 570 N.Y.S.2d at 462.

334. *Id.* at 732, 573 N.E.2d at 551, 570 N.Y.S.2d at 463.

335. Justice Clarence Thomas, however, took no part.

336. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991).

337. *Id.* at 509.

338. *Id.* at 510. The Court cited and quoted then-Judge Robert Earl's seminal opinion for the New York Court of Appeals a century earlier in *Riggs v. Palmer*, 115 N.Y. 506, 511-12, 22 N.E. 188, 189-90 (1889) (stating that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime").

339. *Simon & Schuster*, 112 S.Ct. at 512.

340. *Id.* at 511.

341. *Id.* at 512 n.\*\* (declining to decide whether the statute was underinclusive as Justice Blackmun had urged, *see id.* at 512 (Blackmun, J., concurring), despite having already explained that the statute was inappropriately limited to "expressive activity," *id.* at 510); *see discussion infra* note 350 and accompanying text.

emphatically objected to the statute's focus on speech alone. Speaking through Justice Sandra Day O'Connor, the Court said that there was no good reason for New York to "compensat[e] victims from the proceeds of . . . 'story telling' [rather] than from any of the criminal's other assets."<sup>342</sup> In the Court's view, there was

[no] justification for a distinction between this expressive activity and any other activity in connection with [New York's] interest in transferring the fruits of crime from criminals to their victims. . . . The distinction drawn by the Son of Sam law has nothing to do with the state's interest . . . . In short, the state has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime.<sup>343</sup>

Regarding overinclusiveness, the Supreme Court noted that the statute applied not only to expressive works about the author's criminal activity, but "to works on *any* subject" that happened to mention, "however tangentially or incidentally," the author's thoughts or recollections about a crime he committed.<sup>344</sup> Hence, according to the Court, the Son of Sam law would have covered

such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which [Henry David] Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments "my past foulness and the carnal corruptions of my soul," one instance of which involved the theft of pears from a neighboring vineyard.<sup>345</sup>

The Court, suggesting that it would be easy to create a long list of prominent figures whose autobiographies would be covered by a statute such as the Son of Sam law,<sup>346</sup> added the names of Sir Walter Raleigh, who was dubiously convicted of treason, Jessie Jackson, who was arrested for seeking service at a whites-only lunch counter, and Bertram Russell, who was

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342. *Id.* at 510.

343. *Id.* at 510-11.

344. *Id.* at 511 (emphasis added).

345. *Id.* at 511 (alterations added) (citations omitted).

346. *Id.*



jailed for his sit-down protest against nuclear weapons.<sup>347</sup> Finally, the Court noted that the Son of Sam law would even control the profits of "a prominent figure [who] wr[o]te his autobiography at the end of his career, and include[d] in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank."<sup>348</sup>

The fact that the Son of Sam law could actually produce such results, the Court concluded, "indicates that the statute is, to say the least, not narrowly tailored to achieve the State's objective of compensating crime victims from the profits of crime."<sup>349</sup>

The Supreme Court's opinion revealed how very intrusive the Son of Sam law was to free speech interests. It is difficult to read that Court's opinion without being struck by how plainly unnecessary and unjustified were the burdens imposed by the statute on a wide range of expression—and on expression alone. Perhaps the particular overinclusiveness and underinclusiveness that proved fatal for the statute at the Supreme Court would have been addressed at the Court of Appeals had there been a dissenting voice at the tribunal to advance them.<sup>350</sup> In any event, in its failure to address these concerns, the Court of Appeals failed adequately to safeguard expressive rights under both the federal and state constitutions.

Though the Court of Appeals' decision in *Children of Bedford* was eventually overruled by the Supreme Court and its shortcomings thus made evident, Judge Simons' opinion for the New York Court was clear, well reasoned, and at least on the specific questions it addressed, persuasive. Whatever the mer-

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347. *Id.*

348. *Id.* at 512.

349. *Id.*

350. Notably in this regard, Judges Kaye and Titone, authors of the dissenting opinions in another recent expression-restrictive decision, did not participate. See *Town of Islip v. Cavitlia*, 73 N.Y.2d 544, 578-79, 540 N.E.2d 215, 235-36, 542 N.Y.S.2d 139, 159-60 (1989) (Kaye, J., dissenting); 73 N.Y.2d at 565-78, 540 N.E.2d at 226-35, 542 N.Y.S.2d at 150-59 (Titone, J., dissenting).

At the Second Circuit Court of Appeals, then-Judge Jon O. Newman, of the Second Circuit Court of Appeals (now Chief Judge of the Second Circuit Court of Appeals), did raise such objections to the Son of Sam law in his dissent to that tribunal's decision upholding the statute; the Supreme Court directly reversed in *Simon & Schuster*. See *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 784-87, (1990), *rev'd*, 112 S. Ct. 501 (1991).

its of the Court of Appeal's ultimate conclusion to uphold the Son of Sam law, the opinion in *Children of Bedford* confronted the presented issues carefully, comprehensively, and candidly. The same can hardly be said for the unsigned opinion of the Court in the important case of *In re Holtzman*.<sup>351</sup>

In an unanimous per curiam opinion, notable for its superficial treatment of the factual and legal issues involved, as well as its perfunctory disregard of vital free speech interests, the Court in *Holtzman* upheld a disciplinary sanction against an attorney for her public criticism of a judge which, allegedly, turned out to be false.<sup>352</sup> Elizabeth Holtzman, while District Attorney of Kings County, publicly released a letter in which she complained that an identified judge, presiding over a sexual misconduct trial, had

asked the victim to get down on the floor and show the position she was in when she was being sexually assaulted. . . . [T]he victim reluctantly got down on her hands and knees as everyone stood and watched. In making the victim assume the position she was forced to take when she was sexually assaulted, [the trial judge] profoundly degraded, humiliated and demeaned her.<sup>353</sup>

When a judicial misconduct investigation concluded that the complaint was not supported by the evidence, the matter was referred to an attorney grievance committee to investigate Holtzman's actions.<sup>354</sup> Following preliminary inquiries, the committee voted to send Holtzman a private letter of admonition.<sup>355</sup> The committee had concluded that Holtzman violated disciplinary rules that prohibit "knowingly mak[ing] false accusations against a judge,"<sup>356</sup> "engag[ing] in conduct that is prejudicial to the administration of justice,"<sup>357</sup> and "engag[ing] in

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351. 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 112 S. Ct. 648 (1991).

352. *Id.* at 193, 577 N.E.2d at 34, 573 N.Y.S.2d at 43. Then-Chief Judge Wachtler did not vote in *Holtzman*.

353. *Id.* at 188-89, 577 N.E.2d at 31, 573 N.Y.S.2d at 40.

354. *Id.* at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

355. *Id.*

356. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(B) (McKinney 1992).

357. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (McKinney 1992).

conduct that adversely reflects on the lawyer's fitness to practice law."<sup>358</sup>

When Holtzman exercised her option for formal charges and proceedings, the committee conducted further hearings and voted to issue her a letter of reprimand.<sup>359</sup> The committee found Holtzman guilty of two of the charges; it made no determination about the charge regarding "false accusations."<sup>360</sup> Indeed, although that charge was presented to the committee, its determination made no mention of the charge whatsoever.<sup>361</sup> In an unreported decision,<sup>362</sup> the Appellate Division upheld the reprimand on limited grounds.<sup>363</sup> That tribunal unanimously found that:

[P]etitioner Holtzman is guilty only of Charge one in the Statement of Charges, which alleged, *inter alia*, that Ms. Holtzman, as District Attorney of Kings County, made public accusations of misconduct against a judge without first determining the certainty of the merits of the accusations in violation of DR 8-102 and DR 1-102(A)(6).<sup>364</sup>

Charge one, as more fully stated by the Appellate Division earlier in its decision, alleged "professional misconduct" for "releasing a copy of a letter to the public, written by Ms. Holtzman as District Attorney to Judge Katheryn McDonald [the Chair of the Committee to Implement Recommendations of the New York State Task Force on Women in the Courts], accusing [the named trial judge], of misconduct without first determining the

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358. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (McKinney 1992).

359. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

360. *Id.*

361. *Id.*; see also *In re Holtzman*, Motion No. 571 Atty. (2d Dep't July 17, 1990) (unpublished opinion) [hereinafter *Appellate Division opinion*] ("The Committee sustained only two charges") (attached as Appendix B in Holtzman's Petition for a Writ for Certiorari, *Holtzman v. Grievance Comm.*, 60 U.S.L.W. 3189 (U.S. Sept. 24, 1991) (No. 91-401)).

362. The *Appellate Division opinion*, though unpublished, was attached as Appendix B to Holtzman's Petition to the Supreme Court for a Writ of Certiorari. *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991), *petition for cert. filed sub nom. Holtzman v. Grievance Comm.*, 60 U.S.L.W. 3189 (U.S. Sept. 24, 1991) (No. 91-401).

363. See *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 33, 573 N.Y.S.2d at 42; see also *Appellate Division opinion* at 3.

364. *Appellate Division opinion* at 3.

certainty of the merit of the accusations.”<sup>365</sup> That charge would seem to be reflected in the Appellate Division’s finding of guilt for violation of DR 1-102(A)(6)—“conduct that adversely reflects on the lawyer’s fitness.” But the Appellate Division’s citation to DR 8-102—“knowingly making false accusations”—is, at the least, more ambiguous.

Nowhere in its decision did the Appellate Division state that Holtzman’s complaint was false, let alone that she knew it to be. Moreover, the grievance committee, whose reprimand the Appellate Division upheld,<sup>366</sup> neither sustained the charge of violating DR 8-102 nor otherwise made any finding that Holtzman knowingly made a false accusation.<sup>367</sup> Indeed, the letter of reprimand, both as issued by the committee and as upheld in part by the Appellate Division, never even referred to DR 8-102.<sup>368</sup> Nor did the letter of reprimand assert that Holtzman’s accusation against the trial judge was false—or that she knew it was false.<sup>369</sup>

The most likely explanation for the Appellate Division’s citation to DR 8-102, without any mention of falsity or knowing falsity, would seem to be related commentary contained in Ethical Consideration [EC] 8-6.<sup>370</sup> Counsel for the grievance committee took the position that “DR 8-102(B) must be read along with the ECs included within Canon 8 [particularly] EC 8-6.”<sup>371</sup>

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365. *Id.* at 2.

366. In fact, as already noted, the Appellate Division sustained the reprimand only with regard to charge one. See *Appellate Division opinion* at 3; *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

367. See discussion *supra* notes 360-61 and accompanying text.

368. *Id.*

369. See *Appellate Division opinion* at 2-3; see also Brief for Petitioner-Appellant at 23-24, 34-35, *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991) (No. 123) [hereinafter *Brief for Petitioner-Appellant*].

370. N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6 (McKinney 1994), states in pertinent part:

While a lawyer as a citizen has a right to criticize [adjudicatory officials] publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

*Id.*

371. See Brief for Respondent-Respondent at 31, *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991) (No. 123) [hereinafter *Brief for Respondent-Respondent*]; see also *id.* at 32.

The committee's initial letter of admonition, rejected by Holtzman, included a violation of EC 8-6 among its stated findings.<sup>372</sup> Additionally, and perhaps most significantly, the single charge that the Appellate Division upheld, as it was stated in the committee's letter of reprimand and subsequently paraphrased in the Appellate Division's decision,<sup>373</sup> tracked the language of EC 8-6. That charge, that Holtzman accused a judge of misconduct "without first determining the certainty of the merit of the accusation," is clearly adopted from the wording of EC 8-6 that a lawyer "should be certain of the merit of his complaint" against a judge.

It would thus seem quite evident that the Appellate Division actually found Holtzman guilty of violating DR 8-102 only in the sense of violating EC 8-6. There is no indication that the Appellate Division intended to refer to DR 8-102 literally, i.e., referring to "knowingly false accusations." Such a literal reference would have been inconsistent with the committee's determination not to sustain the DR 8-102 charge, as well as with the absence of any mention of DR 8-102 by title or text in the letter of reprimand, and with the omission in the Appellate Division decision of any reference whatsoever to "false accusations" or "knowingly" false ones.

Nevertheless, the Court of Appeals, in affirming the Appellate Division's ruling and thus upholding the reprimand, simply accepted as established fact that Holtzman's accusation was false.<sup>374</sup> The Court summarily adopted the "finding of falsity" that it claimed was rendered by both the grievance committee and the Appellate Division.<sup>375</sup> The Court's entire treatment of the factual issue was as follows: "The factual basis of charge one is that petitioner made false accusations against the Judge. This charge was sustained by the Committee and upheld by the Appellate Division, and the factual finding of falsity (which is supported by the record) is therefore binding on us."<sup>376</sup>

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372. See *Holtzman*, 78 N.Y.2d at 189, 577 N.E.2d at 31, 573 N.Y.S.2d at 40; *Appellate Division opinion* at 2.

373. See *Appellate Division opinion* at 2, 3.

374. See *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

375. *Id.*

376. *Id.* at 190, 577 N.E.2d at 32-33, 573 N.Y.S.2d at 41-42.

An examination of the evidence and evaluation of the parties' arguments on this critical threshold issue would surely have been more appropriate. The falsity or not of Holtzman's complaint was central to the case. It was debated vigorously at the Court of Appeals by the parties,<sup>377</sup> and as already discussed, was in fact not clearly determined—if even addressed at all—in the Appellate Division's decision or in the grievance committee's letter of reprimand.<sup>378</sup> But the Court of Appeals simply did not address these concerns.

Moreover, despite the Court's claim that it was bound by the supposed findings of falsity below, the Court in fact does not always treat factual determinations of lower tribunals as binding. The Court has been especially willing to reject factual findings where, as in *Holtzman*, fundamental constitutional rights have been at stake, and even where, unlike in *Holtzman*, factual findings were clearly made.<sup>379</sup>

With regard to the legal issues—and the additional facts relied upon to resolve them—the Court's opinion was equally unsatisfactory. Though it upheld the "finding" of falsity below, the Court actually declined to render any decision specifically addressing "knowingly false accusations" under DR 8-102.<sup>380</sup> Instead, the Court merely "agree[d] with both the Grievance Committee and the Appellate Division that petitioner's conduct violated DR 1-102(A)(6), . . . provid[ing] that a lawyer shall not '[e]ngage in any other conduct that adversely reflects on [the lawyer's] fitness to practice law.'"<sup>381</sup> Rejecting arguments that Holtzman's conduct could not be deemed violative of such a

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377. See *Brief for Petitioner-Appellant* at 2-3, 32; *Brief for Respondent-Respondent* at 5-33.

378. See discussion *supra* notes 359-74 and accompanying text; see also *Brief for Petitioner-Appellant* at 3, 34-35; *Brief for Respondent-Respondent* at 2, 35.

379. See, e.g., *People v. Hollman*, 79 N.Y.2d 181, 194, 590 N.E.2d 204, 211, 581 N.Y.S.2d 619, 626 (1992) (rejecting a factual finding of consent); *People v. Class*, 63 N.Y.2d 491, 495, 472 N.E.2d 1009, 1012, 483 N.Y.S.2d 181, 183 (1984) (rejecting a factual finding of reasonable suspicion); *People v. DeBour*, 40 N.Y.2d 210, 221-25, 352 N.E.2d 562, 571-74, 386 N.Y.S.2d 375, 383-87 (1976) (rejecting a finding of reasonable suspicion); *People v. Gonzalez*, 39 N.Y.2d 122, 127-31, 347 N.E.2d 575, 580-82, 383 N.Y.S.2d 215, 219-21 (1976) (rejecting a finding of voluntary consent).

380. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

381. *Id.* at 190, 577 N.E.2d at 33, 573 N.Y.S.2d at 42 (quoting N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (McKinney 1992)).

vague provision,<sup>382</sup> the Court held that “petitioner was plainly on notice that her conduct in this case, involving public dissemination of a specific accusation of improper judicial conduct under the circumstances described, could be held to reflect adversely on her fitness to practice law.”<sup>383</sup>

The Court relied on the fact that Holtzman’s accusation was “made without any support other than the interoffice memoranda of a newly admitted trial assistant.”<sup>384</sup> The Court also emphasized that Holtzman’s “staff, including the person assigned the task of looking into the ethical implications of release to the press, counseled her to delay” until the trial minutes were reviewed.<sup>385</sup>

What the Court failed to mention, however, was that the “newly admitted trial assistant” was the very prosecutor in Holtzman’s office who had personally handled the underlying trial and who personally observed the victim’s reenactment of the sexual assault in the judge’s robing room.<sup>386</sup> Nor did the Court of Appeals explain that this prosecuting attorney had reported the robing room incident on several occasions, to several members of the district attorney’s staff, both formally and informally, both orally and in writing, including in several memoranda and a sworn affirmation which were prepared at the direction of his bureau chief.<sup>387</sup> Nor did the Court say that the contents of all these reports were relayed to Holtzman or read by her personally prior to the release of the letter.<sup>388</sup>

Furthermore, regarding Holtzman’s staff, the Court failed to note that her senior assistants—including those most familiar with the prosecutor and his reports—did share Holtzman’s belief that the reports were true.<sup>389</sup> Finally, the Court omitted a most significant fact when it stated that members of Holtzman’s staff, including her ethics advisor, counseled her to delay release of her letter. In fact, just prior to the letter’s release, the

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382. *Id.*

383. *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

384. *Id.*

385. *Id.*

386. See *Brief for Petitioner-Appellant* at 6-8; *Brief for Respondent-Respondent* at 10.

387. *Brief for Petitioner-Appellant* at 8-13, 36-37.

388. See *id.*

389. *Id.* at 37.

ethical advisor, the Special Counsel to the district attorney, had advised both Holtzman and Holtzman's chief assistant that, based on her research undertaken at Holtzman's own direction, it was both legal and ethical to go public.<sup>390</sup>

If Holtzman's conduct was as reckless as portrayed by the Court, then the final critical issue did not need to be addressed—i.e., whether the “actual malice” standard of *New York Times Co. v. Sullivan* applied.<sup>391</sup> If Holtzman's public accusation was in fact false, if her support for it was so inadequate, if her ethics advisor warned against publication (impliedly for ethical reasons, if it was so imperative that she await more reliable corroboration, and if her conduct was so obviously unwarranted), then even the enhanced constitutional protection of *Sullivan* would not have afforded immunity to Holtzman. A fair reading of the Court of Appeals decision suggests that Holtzman released her complaint against the trial judge “with reckless disregard of whether it was false or not.”<sup>392</sup> If so, Holtzman's expressive conduct was subject to discipline

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390. See *Brief for Petitioner-Appellant* at 14-15; *Brief for Respondent-Respondent* at 16.

Regarding generally the lack of judicial candor, a problem raised by the treatment of facts in *Holtzman*, but one that is rarely discussed by lawyers or judges publicly, see Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 MICH. L. REV. 609, 610, 619, 622 n.49 (1990) (“[O]ne of the most significant areas of judicial misconduct [is] lack of candor in judicial opinions . . . . One of the worst things a judge can do is to ignore or misstate the critical facts or critical legal issues in a case . . . . [T]hundering silence is not due to a general lack of awareness of the problem, but rather reflects a deeply imbedded fear that such a matter is the dirtiest of linen that should not be displayed in public. . . . [Attorneys] invariably add that they are themselves in no position to blow the whistle for fear of retaliation.”); see also Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 CARDOZO L. REV. 1323 (1990) (federal appeals court omitted mention of critical uncontroverted evidence exculpating criminal defendant in an opinion upholding conviction); Monroe Freedman, Speech to the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), in 128 F.R.D. 409, 439 (1989) (“Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts, [etc.]”).

391. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 279-80 (1964) (where the Supreme Court ruled that, in order to ensure that debate on public issues is “uninhibited, robust, and wide-open,” a defamatory falsehood relating to a public official is actionable only if made with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

392. *Id.* at 280.



even if Sullivan's protective standard applied. The Court did not, however, render such a decision.<sup>393</sup>

Instead, the Court specifically addressed the applicability of *Sullivan* and, moreover, chose to strip *Sullivan's* protection from attorney criticism of judges. The Court categorically rejected any suggestion that the expressive freedom under the New York Constitution, or the federal,<sup>394</sup> required application of *Sullivan* to attorney discipline for speech about judges. "Neither this Court nor the Supreme Court," declared the Court of Appeals, "has ever extended the *Sullivan* standard to lawyer discipline and we decline to do so here."<sup>395</sup>

According to the Court, the *Sullivan* standard is "wholly at odds with the policy underlying the rules governing professional responsibility, . . . [which are intended to set] a 'minimum level of conduct' " for lawyers.<sup>396</sup> Attorney discipline, continued the Court, is concerned with whether the conduct in question "adversely affects the administration of justice and adversely reflects on the attorney's judgment and, consequentially, her ability to practice law."<sup>397</sup> Applying *Sullivan*, reasoned the Court, "would immunize all accusations, however reckless or irresponsible, for censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth."<sup>398</sup>

But, a false accusation that is truly "reckless"—e.g., where the speaker did have some good reason to doubt its truth<sup>399</sup>—would not, in fact, be immunized by *Sullivan*. Moreover, it is not at all clear that the *Sullivan* "reckless disregard" standard is as inappropriate as the Court asserted.

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393. Without any explanation, the Court simply stated that, "petitioner's course of conduct satisfies any standard other than 'constitutional malice.'" *Holtzman*, 78 N.Y.2d at 193, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

394. Both state and federal constitutional claims were raised by Holtzman. See *Brief for Petitioner-Appellant* at 28-32.

395. *Holtzman*, 78 N.Y.2d at 192, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

396. *Id.* at 192, 577 N.E.2d at 34, 573 N.Y.S.2d at 43 (quoting N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (McKinney 1992)).

397. *Id.* (citing *In re Graham*, 453 N.W.2d 313, 332 (Minn.), cert. denied, 498 U.S. 820 (1990)).

398. *Id.*

399. See *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Trails West, Inc. v. Wolff*, 32 N.Y.2d 207, 219, 298 N.E.2d 52, 58-59, 344 N.Y.S.2d 863, 871-72 (1973).

The Court invoked the public's general interest in the "administration of justice" and the "integrity of the judicial system."<sup>400</sup> Not once, however, did the Court even mention the public's special interest in the expressive rights involved in the case. It said nothing, for example, about free speech about public officials and, particularly, attorney speech about judges; nothing about the public's right to know and, specifically, to know about the workings of courts and judicial officers; and nothing about the responsibility of lawyers to help improve the legal system and, particularly, to help expose those who are unsuited to the bench.<sup>401</sup> Perhaps only by disregarding these interests, rights, and responsibilities could the Court reject the *Sullivan* standard so readily and adamantly.<sup>402</sup>

To be sure, other courts that have considered the issue have varied in their conclusions. Some have held that the *Sullivan* standard should apply to protect attorney criticism of judges.<sup>403</sup>

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400. *Holtzman*, 78 N.Y.2d at 192-93, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

401. See generally N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (McKinney 1992 & Supp. 1994) (stating that "a lawyer should assist in improving the legal system"); N.Y. JUD. LAW app., CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6, (McKinney Supp. 1994) (stating that "lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench"); see also *Kentucky State Bar Ass'n v. Lewis*, 282 S.W.2d 321, 326 (Ky. 1955).

402. See Stacy Berg, *In re Westfall and Rule 18.2: Silence by Sanction*, 6 GEO. J. LEGAL ETHICS, 343, 382 (1992) (stating that "the [*Holtzman*] court never balanced the interests involved . . . . The court failed to mention the attorney's free speech rights, the public's right to know or the encouragement of attorneys to improve the judicial system.").

403. See, e.g., *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325, 332 (W. Va. 1988); *Ramirez v. State Bar of California*, 619 P.2d 399, 404 (Cal. 1980); *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. Civ. App. 1974); *Eisenberg v. Boardman*, 302 F. Supp. 1360, 1364-65 (W.D. Wis. 1969); see also *In re Hinds*, 449 A.2d 483, 491 (N.J. 1982) (clear and present danger standard); *In re Cannon*, 240 N.W. 441, 455 (Wis. 1932) (stating that "[i]t best conforms to the spirit of our institutions to permit everyone to say what he will about courts . . .").

Indeed, the New York Court of Appeals itself seems previously to have adopted and applied the *Sullivan* standard to attorney discipline. See *In re Baker*, 28 N.Y.2d 977, 978, 272 N.E.2d 337, 337, 323 N.Y.S.2d 837, 837 (1971), *aff'g* 34 A.D.2d 229, 311 N.Y.S.2d 70 (4th Dep't 1970).

The weight of scholarly commentary seems clearly to support application of the *Sullivan* standard, or a standard even more protective of attorney speech. See, e.g., Berg, *supra* note 402; Jay Carlisle, *The Legal Profession*, N.Y. L.J., Oct. 15, 1991, at S-9, S-30; GEOFFREY HAZARD & WILLIAM HODES, *THE LAW OF LAWYERING* § 8.2:101, at 933 (2d ed. Supp. 1993); Alan M. Dershowitz, *Lawyers Lips are Sealed*, *NEWSDAY*, Feb. 19, 1991, at 34, 36 (nationally syndicated column); Jeanne

Some have rejected that speech-protective standard in order to protect, instead, the public's confidence in the courts.<sup>404</sup> In view of the Court of Appeals' self-proclaimed exceptional history and rich tradition of safeguarding expressive freedom,<sup>405</sup> one might have expected the Court to side with those tribunals favoring free speech. At the least, the critical importance of the expressive interests involved demanded more than the Court's cursory dismissal of arguments in favor of the *Sullivan* standard.

As stated at its inception, the purpose of the *Sullivan* rule—i.e., immunizing defamatory speech against public officials except where shown to be made with “actual malice”<sup>406</sup>—is to ensure that discussion of public issues be “uninhibited, robust, and wide-open,” even though such discussion “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>407</sup> But in *Holtzman*, there was not so much as an allusion to that purpose, or to the vital interests it represents. Instead, the Court of Appeals simply recited, as though in a vacuum, its own objective: “to adequately protect the public interest and maintain the integrity of the judicial system.”<sup>408</sup>

The “public interest” relied upon by the Court of Appeals surely ought to have included the “profound national commitment” to free speech on public issues, as the Supreme Court in *Sullivan* called it.<sup>409</sup> But the New York court in *Holtzman* never even referred to that.

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Dodd, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. KY. L. REV. 129 (1988); Saundry Molley, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 NOTRE DAME L. REV. 489, 500 (1981).

404. See, e.g., *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1990), cert. denied, 112 S. Ct. 648 (1991); *Louisiana St. Bar Ass'n v. Karst*, 428 So. 2d 406, 409 (La. 1983); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 168 (Ky. 1980); see also *In re Graham*, 453 N.W.2d 313, 324-25 (Minn.), cert. denied, 498 U.S. 820 (1990) (applying an “objective” version of *Sullivan*).

405. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991).

406. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (stating that “actual malice” means “with knowledge that it was false or with reckless disregard of whether it was false or not”).

407. *Id.* at 270.

408. *In re Holtzman*, 78 N.Y.2d 184, 192-93, 577 N.E.2d 30, 34, 573 N.Y.S.2d at 39, 43 (1991).

409. *Sullivan*, 376 U.S. at 270.

The Supreme Court in *Sullivan* was well aware of the need to protect our public institutions, including the judiciary. Quoting at length from Justice Brandeis' concurring opinion in *Whitney v. California*,<sup>410</sup> the *Sullivan* court reaffirmed the "classic formulation" of the "principle" of free public speech:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction [and] . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . .<sup>411</sup>

But the Court of Appeals in *Holtzman* gave not the slightest indication of considering Brandeis' admonition. Rather, the Court seemed merely to assume, without examination, that maintaining respect for the judiciary required stringent control of attorney criticism of judges. As the Supreme Court, speaking through Justice Black, recognized more than two decades before it mandated the *Sullivan* standard:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.<sup>412</sup>

The Supreme Court has never specifically decided whether the Federal Constitution requires application of the *Sullivan* standard to attorney discipline for criticism of judges. But in

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410. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

411. *Sullivan*, 376 U.S. at 270 (quoting *Whitney v. California*, 274 U.S. at 375-76 (Brandeis, J., concurring)).

412. *Bridges v. California*, 314 U.S. 252, 270-71 (1941) (applying a "clear and present danger" standard and vacating contempt citations imposed on a union leader and newspaper publisher for extrajudicial criticism of judges); see also *State v. Cannon*, 240 N.W. 441, 455 (Wis. 1932) (stating that "[i]t best conforms to the spirit of our institutions to permit every one to say what he will about courts, and leave the destiny of the courts to the good judgment of the people. They may err occasionally, but the combined sober judgment of the voters can be relied upon in the long run to protect the courts from calumny, abuse, and unfounded criticism.").

the same year it decided *Sullivan*, that Court did apply the "actual malice" standard to an attorney's public accusations of judicial misconduct.<sup>413</sup> The Court, in *Garrison v. Louisiana*<sup>414</sup> made clear its belief that the *Sullivan* standard was critical to ensure free speech on public affairs. It held that the *Sullivan* standard was intended to apply to all civil and criminal proceedings, and it made no exception where the public official is a judge or where the critic or accuser is an attorney.<sup>415</sup>

Invalidating an attempt to hold a district attorney criminally liable for his defamatory statements to the press about several judges, the Court in *Garrison* explained:

[S]ince . . . erroneous statement is inevitable in free debate, and . . . it must be protected if the *freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'* . . . only those false statements made with the high degree of awareness of their probable falsity demanded by [*Sullivan*] may be the subject of either civil or criminal sanctions. For *speech concerning public affairs is more than self expression; it is the essence of self-government.*<sup>416</sup>

In the past, the Court of Appeals itself seemed fully mindful that "speech concerning public affairs" must have "breathing space." So, for example, in its 1974 decision in *Justices of the Appellate Division v. Erdmann*,<sup>417</sup> the Court dismissed disciplinary proceedings against an attorney who publicly called New York's intermediate appeals court judges "the whores who became madams."<sup>418</sup> In a brief per curiam decision, the Court of Appeals summarily disposed of the matter. It ruled that "without more, isolated incidences of disrespect for the law, judges, and the courts expressed by vulgar and insulting words or other incivilities, uttered, written or committed outside the precincts of the court are not subject to professional discipline."<sup>419</sup>

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413. See *Garrison v. Louisiana*, 379 U.S. 64 (1964). The attorney had held a press conference railing against the "inefficiency, laziness, and excessive vacations of the judges" and raising "interesting questions about the racketeer influences on our eight vacation-minded judges." *Id.* at 66.

414. 379 U.S. 64, 66 (1964).

415. *Id.* at 74-75.

416. *Id.* (alterations and emphasis added) (quoting *Sullivan*, 376 U.S. at 270-71).

417. 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973).

418. *Id.* at 560, 301 N.E.2d at 427, 347 N.Y.S.2d at 442 (Burke, J., dissenting).

419. *Id.* (Burke, J., dissenting).

A few years later, the Court of Appeals specifically addressed the propriety of the *Sullivan* standard to defamatory criticism of judges. The critic in *Rinaldi v. Holt, Rinehart & Winston, Inc.*<sup>420</sup> was not a lawyer, and the proceeding involved was not for professional discipline. But the Court's affirmation of *Sullivan* to protect both free speech and the public's right to know—and specifically about judges—was emphatic. Its recognition that the work and character of judges are important public issues that should be subject to uninhibited public discussion was unequivocal. Speaking through Judge Matthew J. Jasen, the Court declared that:

Especially in a state in which judges are elected to office, comments and opinions on judicial performance are a matter of public interest and concern. The rule of the [*Sullivan*] case was designed to protect the free flow of information to the people concerning the performance of their public officials. . . . The public, clearly, has a vital interest in the performance and integrity of its judiciary.<sup>421</sup>

*Rinaldi* is completely absent from the *Holtzman* decision. It was not discussed, not distinguished, not even cited. Indeed, in the curt disposition of vital issues in the anonymous *Holtzman* opinion, not even casual reference was made to those principles and interests previously recognized as nothing less than critical to a free democratic society. There is nothing in the *Holtzman* decision that even suggests the Court's consideration of the principles of free speech or the interests of an informed public that prevailed in *Rinaldi*, as well as in the Supreme Court's decisions in *Sullivan*, *Bridges* and *Garrison*. To be sure, there is nothing in the per curiam *Holtzman* opinion derived from the New York Court's professed "long," "rich," and "exceptional" tradition of safeguarding expressive liberty.<sup>422</sup>

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420. 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977).

421. *Id.* at 380 (citations omitted); see also *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. Civ. App. 1974) (stating that "[t]he right of a lawyer as a citizen to publicly criticize adjudicatory officials . . . is particularly meaningful where, as in Texas, [they] are selected through the elective system").

422. See, e.g., *Immuno II*, 77 N.Y.2d at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913; *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494-95, 510 N.Y.S.2d 844, 846 (1986). But see *Bonventre*, *supra* note 2, at 129-41 (stating that the Court's protection of free expression changed from "fetish to fizzle" during the latter years of the Wachtler era).

Instead, ignoring that tradition and summarily rejecting the *Sullivan* standard, the Court of Appeals adopted a speech-stifling test. Previously applied by a few other state supreme courts,<sup>423</sup> the test exposes to discipline any lawyer whose criticism of a judge would not have been voiced by some undefined, objectively reasonable attorney. "In order to adequately protect the public interest and maintain the integrity of the judicial system," the Court of Appeals held, "there must be an objective standard of what a reasonable attorney would do in similar circumstances."<sup>424</sup> Other than a citation to a Louisiana decision,<sup>425</sup> the Court offered only this elaboration: "It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative."<sup>426</sup>

A facile turn of phrase hardly suffices for thoughtful analysis. But as with so much else in *Holtzman*, the Court offered precious little of substance to buttress or explain its position. This is particularly disturbing because of the "vital interest[s]" involved—as the Court in *Rinaldi* had recognized them to be.<sup>427</sup> Speech about the "performance and integrity" of judges,<sup>428</sup> as much as about other power-wielding public servants, is the "essence of self-government."<sup>429</sup> Speech about judges, as much as about other government officials, stands on the "highest rung of the hierarchy of [free speech] values and is entitled to special protection."<sup>430</sup> Distressingly, the *Holtzman* opinion is utterly indifferent to such free speech values, and indeed, the standard adopted by the Court of Appeals is hostile to them.

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423. See *Holtzman*, 78 N.Y.2d at 192-93, 557 N.E.2d at 34, 573 N.Y.S.2d at 43 (citing *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990); *Louisiana St. Bar Ass'n v. Karst*, 428 So. 2d 406 (La. 1983)).

424. *Holtzman*, 78 N.Y.2d at 192-93, 577 N.E.2d at 34, 573 N.Y.S.2d at 43 (citations omitted).

425. *Louisiana St. Bar Ass'n v. Karst*, 428 So. 2d 406, 409 (La. 1983), cited in *Holtzman*, 78 N.Y.2d at 193, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

426. *Holtzman*, 78 N.Y.2d at 193, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

427. *Rinaldi*, 42 N.Y.2d at 380, 366 N.E.2d at 1306, 397 N.Y.S.2d at 950.

428. *Id.*

429. *Garrison*, 379 U.S. at 75.

430. See *Connick v. Myers*, 461 U.S. 138, 145 (1983); see also *Koningsberg v. State Bar of California*, 353 U.S. 252, 269 (1957) (stating that "[c]itizens have a right under our constitutional system to criticize government officials and agencies. Courts are not, and should not be, immune to such criticism.").

Attorneys are especially qualified by education and experience to comment on judges and their work.<sup>431</sup> Moreover, as an integral part of their ethical obligation to help improve the legal system,<sup>432</sup> "one of the most important societal duties of lawyers is the duty to criticize the courts."<sup>433</sup> But the *Holtzman* standard potentially discourages candid attorney speech about judges. The flattery of judicial sycophants is not at risk, nor is other favorable commentary or even neutral description. But attorneys who speak critically of judges—and particularly if they do so forthrightly—now speak at their peril in New York.

Under *Holtzman*, an attorney is subject to discipline regardless of how sincere she is in her criticism, regardless of how confident she is in its truth, and regardless of how benevolent are her motives. "[S]tate of mind," according to the Court of Appeals, is not the issue when an attorney faces discipline for speaking critically about a judge.<sup>434</sup> Rather, the relevant question is the "objective" "reasonableness of the belief."<sup>435</sup> Hence, even if an attorney has good reason to believe her criticism, even if she has no real doubts about its accuracy,<sup>436</sup> and even if her purpose is to improve the legal system, she is still subject to

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431. See Berg, *supra* note 402, at 357-58, 379-80; Roger Miner, *Should Lawyers Be More Critical of the Courts?*, 71 JUDICATURE 134, 134 (1987); Dodd, *supra* note 403, at 144; Molley, *supra* note 403, at 505; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1981) ("By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein."); EC 8-6 ("Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of [such] persons.").

432. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1993) Canon 8 ("A Lawyer Should Assist in Improving the Legal System"); MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1981) ("A lawyer is . . . an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

433. Miner, *supra* note 431, at 134; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 cmt. 1 (1983) ("Expressing honest and candid opinions on such matters contributes to improving the administration of justice."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-9 (1981) ("[L]awyers should encourage, and should aid in making, needed changes and improvements."); Berg, *supra* note 402, at 356, 381-82; Molley, *supra* note 403, at 501, 505; HENRY S. DRINKER, *LEGAL ETHICS* 59-62 (1953).

434. *Holtzman*, 78 N.Y.2d at 193, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

435. *Id.*

436. *Id.* at 192, 577 N.E.2d at 34, 573 N.Y.S.2d at 43 (rejecting a subjective argument which would take into account whether "the attorney uttering [accusations] did not actually entertain serious doubts as to their truth").



discipline if speaking her mind is not "what a reasonable attorney would do."<sup>437</sup>

Of course, a "reasonable attorney" concerned about the values of free speech and the public's right to know might do one thing; a "reasonable attorney" worried about a notion of professionalism that penalizes attorneys for speaking frankly would likely do something else. After *Holtzman*, a "reasonable" New York attorney speaking or writing publicly about judges has good cause to be reluctant to share her candid critical assessments. The attorney's comments—however honest and seemingly accurate—might later be deemed harmful to the "integrity of the judicial system"<sup>438</sup> and, therefore, not the kind that would have been uttered by some "objective," more "reasonable" lawyer.<sup>439</sup>

The *Holtzman* decision is antithetical to a commitment to "robust" speech about public affairs<sup>440</sup> and the "free flow of information" about public officials.<sup>441</sup> The *Holtzman* rule stands *Sullivan* and *Rinaldi* on their heads. It shields public servants at the expense of public speech, and it elevates cautious restraint over "uninhibited" discussion.<sup>442</sup> The unfortunate, but almost certain, effect of the *Holtzman* decision will be to inhibit candid commentary about judges and to silence much criticism.<sup>443</sup>

One would hope that the Court of Appeals did not intend such chilling results. As deficient as the opinion is in *Holtzman* and as lamentable as its rule is, the decision will hopefully prove to be an aberration that the Court revisits and revises at first opportunity.

## 2. *Equal Justice and Government Regularity*

In yet another unsigned opinion, again superficially resolving weighty issues of rights and interests, the Court in *Alison D. v. Virginia M.*<sup>444</sup> denied standing to a lesbian nonbiological

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437. *Id.* at 193, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

438. *Id.*

439. *Id.*

440. *Sullivan*, 376 U.S. at 270.

441. *Rinaldi*, 42 N.Y.2d at 380, 366 N.E.2d at 1306, 397 N.Y.S.2d at 950.

442. *Sullivan*, 376 U.S. at 270.

443. See Berg, *supra* note 402, at 369-71, 382; Carlisle, *supra* note 403, at S-9.

444. 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

“parent” who claimed visitation rights with a child she nurtured and supported as her own for six years.

Petitioner and her partner planned the conception and birth of the child and agreed to share all parental rights and obligations; the partner was artificially inseminated and gave birth, and the two did in fact share all child rearing expenses and responsibilities.<sup>445</sup> During the child’s third year, petitioner and her partner ended their relationship and petitioner left the household; as the parties agreed however, petitioner visited the child regularly and continued to share expenses—the child continuing to consider both parties “Mommy.”<sup>446</sup> This arrangement lasted for three years; thereafter, the partner restricted petitioner’s contact with the child.<sup>447</sup>

Petitioner commenced a proceeding under state Domestic Relations Law section 70, which authorizes “either parent” to apply for a determination of a child’s care and custody.<sup>448</sup> While conceding that she was neither a biological nor adoptive parent, petitioner claimed that she was a “de facto” parent with a legally cognizable interest in the well being of the child and expectation of continued contact.<sup>449</sup> In a somewhat curt three page opinion, the Court majority held that petitioner “has no right under Domestic Relations Law section 70 to seek visitation [because s]he is not a ‘parent’ within the meaning” of the statute.<sup>450</sup>

Without acknowledging any legal and constitutional issues surrounding the concepts of parenthood and parent-child relationship, the Court simply stated:

Section 70 gives *parents* the right to bring proceedings to ensure their proper exercise of their care, custody and control . . . . We decline petitioners invitation to read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or have had prior relationships with a child’s parents and who wish to continue visitation with a child.<sup>451</sup>

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445. *Id.* at 655, 572 N.E.2d at 28, 569 N.Y.S.2d at 587.

446. *Id.*

447. *Id.*

448. *See* N.Y. DOM. REL. LAW § 70 (McKinney 1977).

449. *Alison D.*, 77 N.Y.2d at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

450. *Id.*

451. *Id.* at 657, 572 N.E.2d at 29, 569 N.Y.S.2d at 588 (emphasis added) (citations omitted).

The explanation offered by the Court was that “the Legislature did not in section 70 give such nonparent the opportunity” to seek visitation;<sup>452</sup> by contrast, “other categories of persons” were given such opportunity in other statutory provisions “[w]here the Legislature deemed it appropriate.”<sup>453</sup>

But that was no answer to the question actually presented, and no explanation for the Court’s response. Whatever the merits of the bottom-line decision in *Alison D.*, the Court’s reliance on the statute’s failure specifically to include “de facto” or functional parents ignores the fact that the statute does not specifically exclude them, nor does it specify “biological” parent or any other kind. The Court did not answer the critical question of whether the unadorned statutory term “parent” *should* be construed in light of all the rights and interests involved to include a “de facto” or functional parent. Instead, the Court simply refused to do so by pointing to the unadorned term itself, as though that were explanation enough.

In a thoughtful and heartfelt dissent, Judge Kaye refused to join the Court’s “retreat” from its “proper role” of considering the interests involved and relationships affected in visitation cases, where the “bonds that may be crucial to [a child’s] development” are at stake.<sup>454</sup> The majority did acknowledge a “parent-child relationship” existing for the first six years of the child’s life. But it adopted an inflexibly limited reading of the term “parent” that erected an “absolute barrier” to considering “how close or deep the emotional ties might be between petitioner and child, or how devastating isolation might be to the child.”<sup>455</sup>

As Judge Kaye noted, nothing in the statute itself dictated the Court’s limited reading:

Significantly, the Domestic Relations Law contains no such limitation. Indeed, it does not define the term “parent” at all. That remains for the courts to do, as often happens when statutory terms are undefined.

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452. *Id.*

453. *Id.*

454. *Id.* at 658, 572 N.E.2d at 30, 569 N.Y.S.2d at 589 (Kaye, J., dissenting).

455. *Id.* at 658-59, 572 N.E.2d at 30, 569 N.Y.S.2d at 589 (Kaye, J., dissenting).

The majority insists, however, that the word "parent" in this case can only be read to mean biological parent [and thus] forecloses all inquiry into the child's best interest, even in visitation proceedings. We have not previously taken such a hard line in these matters . . . .<sup>456</sup>

Instead of taking a "hard line," explained Judge Kaye, the Court has traditionally "attempted to read otherwise undefined words of the statute so as to effectuate the legislative purposes."<sup>457</sup> In determining visitation rights, "the best interests of the child" and the child's 'welfare and happiness,' purposes explicit in the very text of section 70, "should not be ignored . . . ."<sup>458</sup> "It is indeed regrettable," Kaye lamented, that the Court in *Alison D.* did just that.<sup>459</sup>

Finally, Judge Kaye suggested that the ramifications of the Court's decision were as far ranging as they were "regrettable." In giving meaning to undefined or ambiguous statutory concepts, the Court in the past has "look[ed] to modern-day realities."<sup>460</sup> So for example, the Court in recent years defined "death" for homicide prosecutions as "brain death" in accordance with modern medical science,<sup>461</sup> and it defined "family" for rent stabilization as including gay partnerships that resemble marital relationships.<sup>462</sup> But by strictly confining the concept of parenthood, and thereby disregarding a great deal of modern reality, the Court may well have jeopardized the interests of a great many parental relationships falling outside its cramped biological definition.

As Judge Kaye opened her dissent:

The Court's decision, fixing biology as the key to visitation rights, has impact far beyond this particular controversy, one that may affect a wide spectrum of relationships—including those of long-time heterosexual stepparents, 'common-law' and nonheterosex-

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456. *Id.* at 659, 572 N.E.2d at 31, 569 N.Y.S.2d at 590 (Kaye, J., dissenting).

457. *Id.* (Kaye, J., dissenting).

458. *Id.* (Kaye, J., dissenting) (quoting N.Y. DOM. REL. LAW § 70 (McKinney 1977)).

459. *Id.* at 662, 572 N.E.2d at 33, 569 N.Y.S.2d at 592 (Kaye, J., dissenting).

460. *Id.* at 661, 572 N.E.2d at 32, 569 N.Y.S.2d at 591 (Kaye, J., dissenting).

461. See *People v. Eulo*, 63 N.Y.2d 341, 354 n.27, 472 N.E.2d 286, 294 n.27, 482 N.Y.S.2d 436, 444 n.27 (1984).

462. See *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211-13, 543 N.E.2d 49, 53-55, 544 N.Y.S.2d 784, 788-90 (1989).

ual [sic] partners such as involved here, and even participants in scientific reproduction procedures. Estimates that more than 15.5 million children do not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent, suggest just how widespread the impact may be.<sup>463</sup>

But there was as little recognition by the majority of this potential impact, in the majority opinion, as there was consideration of the child's interests or the lesbian "de facto" parent's rights. The *Alison D.* decision thus contrasts sharply with those aforementioned statutory decisions adopting enlightened definitions of "death"<sup>464</sup> and "family."<sup>465</sup> It also suffers by comparison with recent state constitutional decisions where the Court invalidated narrow definitions of "family" in local ordinances in order to protect the equal protection and due process rights of bona fide, yet nontraditional, familial households.<sup>466</sup> Those decisions, like so much else raised by Judge Kaye's dissent and the briefs supporting petitioner's position,<sup>467</sup> were ignored by the majority.<sup>468</sup>

In *Catlin v. Sobol*,<sup>469</sup> the meaning of "residence" for the purpose of statutorily mandated tuition-free education for handi-

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463. *Allison D.*, 77 N.Y.2d at 657-58, 572 N.E.2d at 30, 569 N.Y.S.2d at 589 (Kaye, J., dissenting).

464. See *supra* note 461 and accompanying text.

465. See *supra* note 462 and accompanying text.

466. See *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985); *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989).

467. The amicus briefs submitted to the Court in support of the state constitutional rights of nontraditional parents generally, and of petitioner specifically, included those of the American Civil Liberties Union, the Association of the Bar of the City of New York, and the National Organization of Women Legal Defense and Education Fund. See *Alison D.*, 77 N.Y.2d at 653-54, 572 N.E.2d at 28, 569 N.Y.S.2d at 587.

468. As is evident in *Alison D.*, as well as in *Holtzman*, see discussion *supra* notes 351-443 and accompanying text, the hallmark of the Court of Appeals' unsigned opinions is certainly not insight, perspective, rigorous analysis, meticulous attention to precedent, or any other characteristic of distinguished judicial decisionmaking. *Alison D.*, like *Holtzman*, is weakly reasoned and short-sighted, and it disguises the critical issues rather than address them forthrightly. If the result reached in *Alison D.*, or *Holtzman*, was the right one, then the Court's unsigned opinion did more to conceal than reveal the supporting reasons. See also Bonventre, *supra* note 3, at 53-54; discussion *infra* notes 543-53.

469. 77 N.Y.2d 552, 571 N.E.2d 661, 569 N.Y.S.2d 353 (1991).

capped children<sup>470</sup> was at issue. The majority, in an opinion by Judge Stewart F. Hancock, Jr., upheld a determination of the State Commissioner of Education that the plaintiff child's residence was that of his parents, who resided in Massachusetts and, therefore, that the school district in New York State where he actually lived was not required to furnish his education tuition free.<sup>471</sup>

Shortly after birth, plaintiff, afflicted with Down's syndrome, was placed by his parents, then residents of New York, in a "family home at board" in Edmeston, where he continued to live. At five years old, plaintiff entered the educational program for handicapped children in the Edmeston school district. Several years later, when the child's parents moved to Massachusetts, they requested continued free education for the child under Education Law section 3202(4)(b). Their request was denied by the school district and, on appeal, by the Commissioner of Education, on the ground that the child's residence was the same as his parents, not the district in which he lived and went to school.<sup>472</sup>

In upholding the commissioner's determination, the Court rejected the contention that a child's "actual and only residence," within the meaning of the statute, should be construed synonymously with his "physical presence."<sup>473</sup> The majority adopted the view that a child's "residence" should be determined in accordance with the traditional common law presumption: a child's residence is deemed to be the same as the parents' unless rebutted by proof showing that parental control has been surrendered and been assumed by another.<sup>474</sup>

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470. *Id.* at 552, 571 N.E.2d at 661, 569 N.Y.S.2d at 353. New York State Education Law section 3202(4)(b) provides in pertinent part:

Children cared for in free family homes and children cared for in family homes at board, when such family homes shall be the *actual and only residence* of such children and when such children are not supported and maintained at the expense of a social services district or of a state department or agency, shall be deemed residence of the school district in which such family home is located.

N.Y. EDUC. LAW § 3202(4)(b) (McKinney 1985) (emphasis added).

471. *Catlin*, 77 N.Y.2d at 556, 571 N.E.2d at 662-63, 569 N.Y.S.2d at 354-55.

472. *Id.* at 556, 571 N.E.2d at 663, 569 N.Y.S.2d at 355.

473. *Id.* at 559, 571 N.E.2d at 664, 569 N.Y.S.2d at 356.

474. *Id.* at 559 n.1, 571 N.E.2d at 664 n.1, 569 N.Y.S.2d at 356 n.1.

According to the majority, both the overall plan of the statute and the legislative history of the specific section at issue confirmed such an interpretation of "residence":

This construction is consistent with the general scheme of the free education statute and furthers its purpose: mandating the provision of free education by a school district for its resident children but assuring that nonresident parents who have children within the district must pay tuition for them unless the presumption is overcome and it is established that their children's actual and only residence is within the district.<sup>475</sup>

As for section 3202(4)(b) specifically, the Court concluded that: "[t]here is no reason why a different rule should apply."<sup>476</sup> Rejecting the plaintiff's argument for a less demanding standard of eligibility, the majority elaborated:

The interpretation urged by plaintiff—that a child's 'physical presence' in the district, standing alone . . . obligates a school district to provide free education—imposes a far heavier financial responsibility on districts in cases where the child is staying in a family home and comes under section 3202(4)(b) than in other circumstances involving children of nonresident parents. There appears to be no plausible reason for imposing these additional and unnecessary burdens . . .<sup>477</sup>

Finally, the Court upheld the factual determination that the parental residence presumption had not been overcome.<sup>478</sup> The parents had continued financial responsibility for the child, had retained legal authority over him, and could alter or undo

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475. *Id.* at 560, 571 N.E.2d at 665, 569 N.Y.S.2d at 357.

476. *Id.*

477. *Id.* at 561, 571 N.E.2d at 665-66, 569 N.Y.S.2d at 357-58 (footnote omitted). The majority also cited legislative history in support of its position:

Indeed, the legislative history of this section demonstrates . . . that a district's responsibility to provide free education would be limited to cases where the presumption is overcome and the child has established a permanent domicile in the home of the family providing the care . . . : "This bill . . . enacts a new subdivision [of Education Law § 3202] which provides . . . [that] non resident children cared for in family homes and not supported by a social services district may be required to pay tuition. . . . The principal purpose of the bill is to relieve school districts of the obligation . . . to bear the financial burden of educating nonresident children."

*Id.* at 560, 571 N.E.2d at 665, 569 N.Y.S.2d at 357 (quoting Memorandum in Support of State Dep't of Education, Jan. 1, 1974, reprinted in Legislative Bill Jacket, 1973 N.Y. Laws ch. 867) (alterations added and in original).

478. *Id.* at 562, 571 N.E.2d at 667, 569 N.Y.S.2d at 359.

the child's custodial arrangement as they wished.<sup>479</sup> Hence, in the majority's view, the Commissioner of Education's ruling that the child was not a "resident" of the school district was rational and should not be disturbed.<sup>480</sup>

In dissent, Judge Bellacosa complained that "[f]acile application of the cold formalism that children are deemed to reside with their natural parents in genuine circumstances such as presented here is plainly wrong . . . ."<sup>481</sup> The dissenter invoked the state constitutional right to a free education<sup>482</sup> to argue against undue reliance on the common law presumption and the fiscal considerations that concerned the majority and the legislature.<sup>483</sup>

Judge Bellacosa—in a rare instance of urging the Court to be *more* protective of state constitutional rights, and an equally rare joinder with Judge Titone<sup>484</sup> in a non-unanimous decision<sup>485</sup>—argued that the plaintiff was, as a matter of fact and policy, a "resident" entitled to a free education.<sup>486</sup> As a matter of fact, the circumstances could not be more compelling in the dissenter's view: "the developmentally disabled youngster has been physically, i.e., 'actually', and continuously, i.e., 'only', residing in the same home at board since the age of three weeks and has never even visited his natural parents' residence."<sup>487</sup>

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479. *Id.* at 562, 571 N.E.2d at 666, 569 N.Y.S.2d at 358.

480. *Id.* at 562 n.4, 571 N.E.2d at 666 n.4, 569 N.Y.S.2d at 358 n.4.

481. *Id.* at 566, 571 N.E.2d at 669, 569 N.Y.S.2d at 361 (Bellacosa, J., dissenting).

482. N.Y. CONST. art. XI, § 1.

483. *Catlin*, 77 N.Y.2d at 565, 571 N.E.2d at 668, 569 N.Y.S.2d at 360.

484. Judge Titone's voting record is consistently the Court's most supportive of individual rights. See, e.g., Bonventre and Powell, *Changing Course at the High Court*, *supra* note 10, at 60; Daniel Wise, *Wachtler Court at 5: Panel Defies Labels, But Individual Trends Emerge*, N.Y. L.J., Oct. 15, 1991, S-3.

485. *Catlin* is the only decision in 1991 in which Judge Bellacosa disagreed with the Court's rejection of a claim of constitutional right or liberty; by contrast, Judge Titone authored or joined a separate opinion doing so in nine of the Court's fourteen divided constitutional decisions. See Table A, List of Cases. In 1990, out of the Court's eighteen divided state constitutional cases, Judge Bellacosa did so, again, only once; Judge Titone did so eleven times. See Bonventre, *supra* note 3, at 55; see also discussion *infra* notes 534-42 and accompanying text.

486. *Catlin*, 77 N.Y.2d at 564-66, 571 N.E.2d at 668-69, 569 N.Y.S.2d at 360-61 (Bellacosa, J., dissenting).

487. *Id.* at 566, 571 N.E.2d at 669, 567 N.Y.S.2d at 361 (Bellacosa, J., dissenting).



As a matter of policy, the dissent argued that the majority's position led to an absurdity: that the benefit of the statute must be denied a child because his natural parents have failed to sever all ties to him.<sup>488</sup> Judge Bellacosa explained:

[I]t is inconceivable that the Legislature would have wanted to induce parents to cease all financial support in contravention of existing statutory support obligations and to renounce their developmentally disabled children in order to qualify for a free education in instances where parents seek stable placements—sometimes permanent, as here—and education for those children away from the natural parents' home.<sup>489</sup>

Lastly, the dissent tackled the "local educational fiscal concerns"<sup>490</sup> that seemed to weigh heavily on the majority, and apparently, the Legislature as well.<sup>491</sup> Those concerns, in the dissent's view, did not override, and perhaps were overridden themselves by, the state's "transcendent" educational policy.<sup>492</sup> As Judge Bellacosa's dissenting opinion put it:

The undeviating focus of the pertinent provisions in the Education Law is the right of New York children to a free public education . . . . Few things in our society are more fundamental. Inasmuch as the child is the one guaranteed an education by the State, the child's circumstance and actual residence ought to dictate the resolution of this issue . . . .<sup>493</sup>

In short, according to the dissent, the majority had issued a "legal ultimatum" to nonresident parents: "either pay tuition to the school district where [the child] actually and only resides or withdraw him from the only home and school he has ever known."<sup>494</sup> By doing so, the Court had failed to honor the "constitutional and statutory entitlement" of its children "to a free public education."<sup>495</sup>

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488. *Id.* at 564, 571 N.E.2d at 668, 569 N.Y.S.2d at 360 (Bellacosa, J., dissenting).

489. *Id.* (Bellacosa, J., dissenting).

490. *Id.* at 565, 571 N.E.2d at 668, 569 N.Y.S.2d at 360 (Bellacosa, J., dissenting).

491. *See id.* at 560-61, 571 N.E.2d at 665-66, 569 N.Y.S.2d at 357-58.

492. *Catlin*, 77 N.Y.2d at 565, 571 N.E.2d at 668, 569 N.Y.S.2d at 360 (Bellacosa, J., dissenting).

493. *Id.* (Bellacosa, J., dissenting) (citing N.Y. CONST. art. XI, § 1).

494. *Id.* (Bellacosa, J., dissenting).

495. *Id.* Another social welfare decision in 1991 was *Couch v. Perales*, 78 N.Y.2d 595, 600, 585 N.E.2d 772, 774, 578 N.Y.S.2d 460, 462 (1991) (holding, in an

In *Alliance of American Insurers v. Chu*,<sup>496</sup> the Court of Appeals protected the rights of insurance companies to income derived from their mandatory contributions to a state created insurance security fund. The Court based its decision "on the constitutionally based protection against legislative interference with vested rights, a doctrine with a long tradition."<sup>497</sup> Denying that its decision was "a throwback to the discredited *Lochner* era,"<sup>498</sup> the majority, in an opinion by Chief Judge Wachtler, insisted that it was "simply giving meaning to the words used by the Legislature"<sup>499</sup> that "granted . . . rights [which] may not be extinguished" by subsequent legislation.<sup>500</sup>

In brief, legislation was enacted in 1969 requiring insurance carriers to contribute to a "Property and Liability Insurance Security Fund" until the fund reached \$200 million; as part of the legislative scheme, income derived from the contributions was to be credited or returned to the insurers proportionate to their contributions.<sup>501</sup> Beginning in 1970, the insurers contributed to the fund until 1973 when the \$200 million goal was reached. Thereafter, in 1979, the legislature amended the 1969 statute and provided that income from the fund would no longer be credited or returned to the contributors; it also provided that the fund monies in excess of \$240 million would be placed in the state's general fund.<sup>502</sup> Additionally,

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unanimous opinion by Judge Alexander, that the mandate of New York Constitution article XVII, section 1, to provide "aid, care, and support of the needy," does not preclude the commissioner of social services from recouping overpayment of Aid to Families with Dependent Children from the grant to the family unit, rather than from the proportionate share of the individual recipient of the overpayment; nor does it preclude such recoupment prior to a determination that the needs of the children of that family unit have diminished).

496. 77 N.Y.2d 573, 571 N.E.2d 672, 569 N.Y.S.2d 364 (1991).

497. *Id.* at 586 (citation omitted).

498. *Id.* (referring to *Lochner v. New York*, 198 U.S. 45, 53 (1903) (striking down state regulation of wages and hours of workers on the ground that it interfered with freedom of contract, which was part of the "liberty of the individual protected by the [Due Process Clause] of the 14th Amendment of the Federal Constitution"))).

499. *Id.*

500. *Id.*

501. Act of Apr. 21, 1969, ch. 189, § 3, 1969 N.Y. Laws 233 (McKinney).

502. Act of Aug. 1, 1979, ch. 503, § 4, 1979 N.Y. Laws 1042, 1043 (McKinney).

in 1982, the legislature transferred \$87 million from the fund to the state's general fund.<sup>503</sup>

According to the Court of Appeals majority, "[t]he 1969 legislation granted the contributors rights in the income generated by their contributions, which rights, we conclude, attached to all contributions made to the fund [between 1970 and 1973] while that legislation remained in effect."<sup>504</sup> The question before the Court then, in its own words, was "whether the State may extinguish [those] property right[s] by the simple expedient of repealing the provision which gives rise to it."<sup>505</sup> The majority's answer was given categorically in the opening lines of its opinion:

The integrity of the State government, upon which the public is entitled to rely, requires, at the very least, that the State keep its lawfully enacted promises. When our Legislature grants to contributors property rights in the income of a fund and pledges the "full faith and credit of the State of New York" for the safekeeping of that fund it cannot simply ignore the pledge and abrogate those vested rights.<sup>506</sup>

Curiously, as emphatic as the majority was in pronouncing such overarching principles, it was equally emphatic in disclaiming their application beyond the case at hand. "We emphasize," the majority was strangely compelled to add, "that *our holding is limited* to the legislation affecting the Property and Liability Insurance Security Fund."<sup>507</sup>

The majority opinion forcefully defends "contributors' rights,"<sup>508</sup> "vested rights,"<sup>509</sup> and "property right[s],"<sup>510</sup> it condemns "legislative interference with"<sup>511</sup> and "abrogat[ion of]" those rights,<sup>512</sup> and it insists upon the "constitutionally based

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503. See Act of Apr. 12, 1982, ch. 55, § 92, 1982 N.Y. Laws 85 (McKinney).

504. *American Insurers*, 77 N.Y.2d at 578, 571 N.E.2d at 674, 569 N.Y.S.2d at 366.

505. *Id.* at 585, 571 N.E.2d at 678, 569 N.Y.S.2d at 370.

506. *Id.* at 577, 571 N.E.2d at 673, 569 N.Y.S.2d at 365 (quoting Act of Apr. 11, 1947, ch. 801, § 6, 1947 N.Y. Laws 1477, 1480 (McKinney), the precursor of the 1969 legislation).

507. *Id.* at 578, 571 N.E.2d at 674, 569 N.Y.S.2d at 366 (emphasis added).

508. *Id.*

509. *Id.* at 586, 571 N.E.2d at 678, 569 N.Y.S.2d at 370.

510. *Id.*

511. *Id.*

512. *Id.* at 577, 571 N.E.2d at 673, 569 N.Y.S.2d at 365.

protection"<sup>513</sup> of those rights and upon "the State keep[ing] its lawfully enacted promises."<sup>514</sup> But language inserted in that opinion also ensures that the Court could not be held to what it said—thus ensuring that the Court's decision has precious little, if any, precedential value. Seemingly addressing those who would take issue with its decision—indeed, as if it were mollifying the fears of those who might take the decision too seriously—the Court included this line: "The validity of the State's actions with respect to other funds will depend on the unique set of statutory provisions governing each of the funds affected and is *not controlled by our decision here*."<sup>515</sup>

It would appear that the author of the Court's opinion, or one or more members of the majority, were troubled by the ramifications of their own decision. The majority's strikingly limiting language seems wholly out of place with the grand pronouncements and sweeping sentiment that otherwise mark the opinion. But that language does limit the Court's decision. In fact, it seems to render the decision *sui generis*. Perhaps, the majority was worried about the concerns raised in the dissent.

Judge Hancock, joined by Judge Titone, warned that the decision in *American Insurers* "constitutes a substantial interference in the State's management of [the insurance security] fund and a deep intrusion into the power of the State to regulate the insurance industry."<sup>516</sup> Judge Hancock chided the majority for its "concern for the protection of plaintiff insurance companies' 'property rights' "<sup>517</sup>—for its resurrection of the discredited notion of "economic due process."<sup>518</sup>

What was really being claimed by the insurance companies, according to Judge Hancock, was that "the State had no right to repeal the provisions of the 1969 legislation and that with respect to income to be earned on the contributions made between 1970 and 1973 they have what amounts to a perpetual annu-

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513. *Id.* at 586, 571 N.E.2d at 678, 569 N.Y.S.2d at 370.

514. *Id.* at 577, 571 N.E.2d at 673, 569 N.Y.S.2d at 365.

515. *Id.* at 578, 571 N.E.2d at 674, 569 N.Y.S.2d at 366 (emphasis added).

516. *Id.* at 609, 571 N.E.2d at 693, 569 N.Y.S.2d at 385 (Hancock, J., dissenting).

517. *Id.* (Hancock, J., dissenting).

518. *Id.* (Hancock, J., dissenting).

ity. . . ."<sup>519</sup> And what the majority agreed, in Judge Hancock's view, was "that under some legal theory the State had barred itself from giving any effect to legislation which would extinguish plaintiffs' prospective rights to refunds or credits . . . ."<sup>520</sup>

The real issue in the case, according to the dissent, was not legislative interference with insurance companies' vested rights, but judicial interference with legislative regulation of a "closely controlled industry."<sup>521</sup> The dissent assessed the majority's treatment of that issue:

[T]he judicial branch [ought] not [to] encroach upon the prerogative of the Legislature to make the laws, particularly in the area of establishing reasonable conditions on heavily regulated businesses. This decision stands as a precedent that is contrary to that tenet. It will be law—law which, if it does not affect the State's right to manage other funds (as the majority assures us, that, for some reason, it will not), will certainly stand for a significant and novel proposition in the law of separation of powers.<sup>522</sup>

Perhaps, beyond this particular case, the majority did not intend to affect the State's power to manage funds. Perhaps this decision will, thus, remain a novel, and singular, one. But if so—if as the majority "assures us," this decision will not control other cases<sup>523</sup>—what is to be made of the majority's pronouncements of constitutional doctrine? What of its declarations about "vested rights"?<sup>524</sup> About "constitutionally protected property interests"?<sup>525</sup> About the State's "integrity" and the Legislature's promises?<sup>526</sup>

It is certainly not clear whether the constitutional pronouncements in *American Insurers* should be relied upon, or even taken seriously. In a subsequent case, can the decision be

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519. *Id.* at 595-96, 571 N.E.2d at 684, 569 N.Y.S.2d at 376 (Hancock, J., dissenting).

520. *Id.* at 596, 571 N.E.2d at 685, 569 N.Y.S.2d at 377 (Hancock, J., dissenting) (citation omitted).

521. *Id.* at 609, 571 N.E.2d at 693, 569 N.Y.S.2d at 385 (Hancock, J., dissenting).

522. *Id.* at 610, 571 N.E.2d at 693, 569 N.Y.S.2d at 385 (Hancock, J., dissenting) (citation omitted).

523. *Id.* at 609, 571 N.E.2d at 693, 569 N.Y.S.2d at 385 (Hancock, J., dissenting).

524. *Id.* at 586, 571 N.E.2d at 678, 569 N.Y.S.2d at 370.

525. *Id.* at 585, 571 N.E.2d at 678, 569 N.Y.S.2d at 370.

526. *Id.* at 589, 571 N.E.2d at 681, 569 N.Y.S.2d at 373.

confidently cited to the Court of Appeals in support of a similar ruling? As the majority opinion surely seems to foretell, the decision in *American Insurers* and what it appears to stand for will likely be distinguished away, because the decision is "limited" to the "particular" and "unique" circumstances of the case.<sup>527</sup>

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527. *Id.* at 578, 571 N.E.2d at 674, 569 N.Y.S.2d at 366.

The Court rejected another separation of powers challenge in 1991, this one directed against the executive branch, in *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 582 N.E.2d 568, 576 N.Y.S.2d 185 (1991). In this case, a four to three majority, in an opinion by Judge Bellacosa, held that the governor did not exceed his constitutional or statutory authority in entering an agreement with the Long Island Lighting Company (LILCO) to transfer the Shoreham nuclear power facility to the Long Island Power Authority (LIPA), which would oversee the facility's closure. *Id.* at 411, 582 N.E.2d at 573, 576 N.Y.S.2d at 188-90. This transfer was an objective of the LIPA Act of 1986, which created LIPA to replace LILCO as the power utility for Long Island, close Shoreham, and thereby reduce power costs. *Id.* at 407, 582 N.E.2d at 570, 576 N.Y.S.2d at 187; see also Long Island Power Authority Act, ch. 517, § 1, 1986 N.Y. Laws 1140 (McKinney) (codified at N.Y. PUB. AUTH. LAW §§ 1020-1020(gg) (McKinney 1994)). In dissent, Judge Hancock, joined by Judges Alexander and Titone, argued that the governor exceeded the proper limits of executive power and usurped legislative authority when he entered and implemented the agreement which the legislature had refused to ratify and which contravened the legislative policy, codified in the LIPA Act, of replacing LILCO *in conjunction with* closing Shoreham—not retaining LILCO by transferring Shoreham and taking other measures to save it from economic ruin. *Id.* at 418-19, 582 N.E.2d at 571, 576 N.Y.S.2d at 194-95 (Hancock, J., dissenting).

Other 1991 decisions implicating the regularity of government activities and procedures were: *In re Colt Indus. Shareholder Litig.*, 77 N.Y.2d 185, 566 N.E.2d 1160, 565 N.Y.S.2d 755 (1991). In *Colt Industries*, a unanimous Court, speaking through Chief Judge Wachtler, held that class members, whether resident or non-resident, have "no [federal or state] due process right to opt out of an otherwise properly brought New York class action suit seeking predominantly equitable relief." *Id.* at 195, 566 N.E.2d at 1165, 565 N.Y.S.2d at 760. According to the Court, a favorable judgment benefits the class as a whole and the importance of obtaining a single final ruling outweighs any individual interest in controlling the litigation. *Id.* at 195, 566 N.E.2d at 1166, 565 N.Y.S.2d at 761.

In *Derle v. North Bellmore Union Free Sch. Dist.*, 77 N.Y.2d 483, 571 N.E.2d 58, 568 N.Y.S.2d 888 (1991), the Court held, in a unanimous per curiam opinion, that the salary of a teacher could not be withheld pending determination of disciplinary charges where the teacher requested adjournment of the Education Law § 3020-a disciplinary hearing until final disposition of the criminal prosecution based on parallel charges. *Id.* at 488-89, 571 N.E.2d at 60, 568 N.Y.S.2d at 890. The teacher's request, based on concerns that his rights to defend himself and against compulsory self-incrimination, was deemed neither obstructionist nor otherwise in bad faith. *Id.* at 488, 571 N.E.2d at 60, 568 N.Y.S.2d at 890.

In *ISCA Enterprises v. City of New York*, 77 N.Y.2d 688, 572 N.E.2d 610, 569 N.Y.S.2d 927 (1991), the Court held, in an unanimous opinion by Judge Kaye de-

### III. Summary and Assessment

The Court of Appeals rendered a total of forty-seven state constitutional rights decisions in 1991.<sup>528</sup> In each, a state constitutional issue was resolved by the Court's decision, advanced in a concurring or dissenting opinion, or raised by one of the parties and necessarily considered by the Court. Thirty of these decisions were set forth in a signed or per curiam opinion, or triggered a separate opinion by at least one of the judges. Hence, in the judgment of the Court's members themselves, thirty decisions were sufficiently significant to generate at least one full opinion.

The Court was divided in fourteen cases. That is, there was disagreement among the judges in 47% or nearly half of the thirty "significant" decisions involving a substantial state constitutional rights question. It is these non-unanimous cases that are, perhaps, the most revealing. As C. Herman Pritchett first stated nearly fifty years ago in his seminal study on the Roosevelt [Supreme] Court:

A nonunanimous opinion admits the public to the Supreme Court's inner sanctum. . . . For the fact of disagreement demonstrates that the members of the Court are operating on different assumptions, that their inarticulate major premises are dissimilar, that their value systems are differently constructed and weighted, that their political, economic, and social views contrast in important respects.<sup>529</sup>

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ciding two consolidated cases, that a mortgagee's challenge to the constitutionality of New York City's "notice by request" procedure for *in rem* tax foreclosures under the Administrative Code of the City of New York, Title 11, was time barred where the mortgagee received actual notice well within the two year period from the recording of the tax deed to apply for release of the property, but had waited nearly four years from receiving notice to complain of its constitutionality. *Id.* at 697, 572 N.E.2d at 613, 569 N.Y.S.2d at 930. In the second case, the Court held that, at least insofar as property owners are concerned, the minimum due process requirements of *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950)—which the Court of Appeals said "we apply for determining the adequacy of notice"—are satisfied by the "notice by request" procedure where the City publishes notices, sends notices to those who have filed request cards, and if no cards are filed, mails notices to the names and addresses on the assessment record. *See id.* at 699-701, 572 N.E.2d at 615-16, 569 N.Y.S.2d at 932-33.

528. Each of these decisions is discussed in the preceding sections. The figures herein are derived from Table A, List of Cases-1991.

529. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES* xii (1948). To quote Pritchett more fully:

In these divided decisions,<sup>530</sup> the Court was 79% "conservative" or pro-government.<sup>531</sup> Stated otherwise, in the

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A unanimous judicial decision throws little light upon . . . deliberation in process. It tells nothing of the conflicts around the judicial conference table, the alternative lines of argument developed, the accommodations and the compromises which went into the final result. A unanimous opinion is a composite and quasi-anonymous product, largely valueless for purposes of understanding the values and motivation of individual justices.

A nonunanimous opinion admits the public to the Supreme Court's inner sanctum. In such a case the process of deliberation has failed to produce a conclusion satisfactory to all participants. Having carried the argument as far as they usually can, the justices find it necessary finally to take a vote, state and support the winning and losing positions, and place the argument before the world for judgment. In informing the public of their divisions and their reasons, the justices also supply information about their attitudes and their values as is available in no other way. For the fact of disagreement demonstrates that the members of the Court are operating on different assumptions, that their inarticulate major premises are dissimilar, that their value systems are differently constructed and weighted, that their political, economic, and social values contrast in important respects. These differences in contrast are not always evident on the surface of the conflicting opinions. It may be necessary to search out the true causes of disputes, and not all the searches will come back with the same findings. But that the search is appropriate and essential to a fuller understanding of the judicial process, few will doubt.

*Id.*; see also Vincent M. Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Revised State Constitutionalism at the Court of Appeals*, TEMPLE L. REV. (forthcoming 1994) (manuscript at 4-7 nn. 18-38, on file with author).

For reasons stated by Pritchett, and subsequently by others, political scientists and legal commentators have looked to nonunanimous decisions in studying judicial decisionmaking generally and the voting behavior and ideological disposition of judges particularly. In addition to Pritchett's *THE ROOSEVELT COURT*, see, e.g., C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 890 (1941); C. Herman Pritchett, *CIVIL LIBERTIES AND THE VINSON COURT* (1954); Patrick Brown and William A. Haddad, *Judicial Decision-making on the Florida Supreme Court: An Introductory Behavioral Study*, 29 U. FLA. L. REV. 566 (1966); Jerry Beatty, *Decision-making on the Iowa Supreme Court—1965-1969*, 19 DRAKE L. REV. 342 (1969-70); Sheldon Goldman, *Conflict on the U.S. Courts of Appeals 1965-1971: A Quantitative Analysis*, 42 U. CIN. L. REV. 635 (1973); Robert E. Riggs and Guy L. Black, *Supreme Court Voting Behavior: 1990 Term*, 6 B.Y.U. J. PUB. L. 1 (1992); Christopher Smith & Scott Patrick Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172 (Dec.-Jan. 1993).

530. The following figures for divided decisions in 1991 are derived from Table A, List of Cases-1991 and are reflected in Tables B and C, and in Graphs A and B.

531. The term "conservative," "pro-government," and "pro-prosecution," as well as "liberal," "pro-individual," and "pro-individual rights," are used as they previously have been by the author and as they traditionally have been by political scientists and legal commentators in studies of judicial behavior, such as the Na-



nonunanimous cases—where the judges openly disagreed, and thus, where there were presumably reasonable grounds to resolve the issue before the Court either way, for or against the state constitutional claim—the Court’s decision was favorable to individual rights and liberties approximately one-fifth of the time, or in three of the fourteen cases.<sup>532</sup> In the previous year, the figures were 78% pro-government, 22% pro-individual.<sup>533</sup> Hence, the Court’s ideological record in divided decisions was virtually identical in 1990 and 1991.

The ideological spectrum was very nearly the same as well. In 1991, as in the previous year, Judge Titone’s voting record was the most sympathetic to rights and liberties; Judge Bellocosa’s was the least. Judge Titone supported the constitutional claim in 79% of the 1991 split decisions—exactly the

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tional Science Foundation’s United States Supreme Court Data Base Project. See Bonventre, *supra* note 3, at 48 n.331; see also Robert Carp *et al*, *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 299 (Apr.-May 1993) (providing definitions of “liberal” and “conservative” for civil rights and liberties and criminal justice); Goldman, *supra* note 529, at 642 n.16 (illustrating “political liberalism”).

Hence, “conservative,” “pro-government,” and “pro-prosecution” are applied to decisions, votes and positions supporting the government or prosecution against claims of civil rights and liberties, equal protection, or rights of the accused, or in favor of limiting the scope or protection of such rights and liberties. “Liberal,” “pro-individual,” and “pro-individual rights” are applied to decisions, votes, and positions upholding claims of civil rights and liberties, equal protection, or rights of the accused, or in favor of extending the scope or protection of such rights and liberties.

Though difficult cases typically involve a multiplicity of considerations, a persistent pattern of ruling or voting or otherwise taking positions favorable to the government (or the individual), regardless of the competing interests and values involved in the different cases, is a strong indicator of an overriding pro-government (or pro-individual) judicial ideology or disposition. This is especially true for divided or non-unanimous decisions. In such decisions, the convictions of individual judges are intense enough that they are willing to disagree amongst themselves publicly. Moreover, because the judges have taken different sides, these split decisions afford comparisons between the judges’ respective commitments to government authority or to individual freedoms and entitlements. See C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT, *supra* note 529, at 191-92; see also Bonventre, *supra* note 529; Riggs and Black, *supra* note 529, at 12.

532. The figures for all 30 “significant” decisions, both unanimous and nonunanimous, were similar: 70% pro-government, 30% pro-individual rights. See discussion *supra* notes 528-29 and accompanying text.

533. See Bonventre, *supra* note 3, at 59, Table E.

reverse of the Court as a whole. Judge Bellacosa, by contrast, voted in favor of rights and liberties only 14% of the time.<sup>534</sup>

Also, as in the previous year, the records of Chief Judge Wachtler and Judge Simons for 1991 were at least as pro-government as that of the Court as a whole: Chief Judge Wachtler's was 14% pro-individual; Judge Simons' 21%—or identical to the Court's record.<sup>535</sup> Chief Judge Wachtler and Judge Simons, together with Judge Bellacosa, continued to form a strongly pro-government bloc. As the Court's 79% pro-government record would indicate, that bloc, just one short of a majority, usually got the additional vote it needed. Moreover, the records of the three remaining judges show why that should not be surprising.

In 1991, as in 1990, the records of Judges Kaye, Alexander, and Hancock were significantly more pro-individual rights than that of the pro-government bloc, as well as that of the Court as a whole; but their records were not nearly as pro-individual as that of Judge Titone. Their records were, at least comparatively, ideologically "centrist." Judge Kaye's voting record was 43% pro-individual, Judge Alexander's was 38%, and Judge Hancock's was 46%.<sup>536</sup>

In short, the Court's three "centrists" were at least as likely to vote for the government or prosecution—i.e., the same way Chief Judge Wachtler, Judge Simons, and Judge Bellacosa did in a very high proportion of the cases—as they were to vote in favor of the constitutional claimant. In any given case, it was thus likely that at least one of the centrists would join the three-judge pro-government bloc to ensure a majority. In only one-fifth of the cases—i.e., 21% of the split decisions—that did not happen.<sup>537</sup>

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534. See Graph A. In 1990, the figures were 83% pro-individual for Judge Titone; 6% for Judge Bellacosa. See Bonventre, *supra* note 3, at 59, Table E.

535. See Graph A. In 1990, the figures were 22% pro-individual for Chief Judge Wachtler; 11% for Judge Simons. See Bonventre, *supra* note 3, at 59, Table E.

536. See Graph A. In 1990, the figures were 50% pro-individual rights for Judge Kaye; 47% for Judge Alexander; 50% for Judge Hancock. See Bonventre, *supra* note 3, at 59, Table E.

537. The total number of divided decisions in 1991—i.e., 14—would appear small. But divided decisions, especially perhaps if every divided decision is considered as is here, would seem to be particularly sensitive data. Indeed, the foregoing 1991 figures are consistent with those found in 1990 (between which time there

The Court remained a Wachtler-Simons court in 1991.<sup>538</sup> The figures themselves cannot tell whether Chief Judge Wachtler, Judge Simons, or both actually led their colleagues. But the numbers do show that the way the Court decided cases coincided closely with the way those two judges voted.

As already mentioned, the ideological record of the Court's decisions was identical to Judge Simons' voting record; both were 79% pro-government. Chief Judge Wachtler's was not much different at 86%.<sup>539</sup> Moreover, Judge Simons was in the majority 86% of the time, or in twelve of the fourteen divided decisions. Chief Judge Wachtler's alignment with the majority was even higher at 93%, or in every divided decision but one. By contrast, Judge Titone, the most pro-individual rights member of a significantly more pro-government tribunal, was aligned with the majority—and vice versa—the least: 29% of the time or in only four of the fourteen nonunanimous decisions.<sup>540</sup> The previous year, the comparative alignment figures for these three judges were very similar.<sup>541</sup> In both years, none

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were no personnel changes or other known changes within the Court that would have presaged a change in voting or decision records); they also comport with the figures determined by others—even when different samplings of decisions were examined for different purposes. See, e.g., Wise, *supra* note 484, at S-3 (*New York Law Journal* sample of 12 divided criminal cases decided in 1990-1991 showing a pro-prosecution bloc of Judge Bellacosa, Judge Simons and Chief Judge Wachtler, with Judge Titone being the most pro-defendant, followed by Judges Alexander, Kaye and Hancock; Legal Aid Society of Greater New York's survey of 43 divided criminal cases decided during 1989-1990 found Judge Bellacosa at 91% pro-prosecution, followed by Chief Judge Wachtler at 77%, Judge Simons at 74%, Judge Hancock at 49%, Judge Kaye at 37%, Judge Alexander at 32%, and Judge Titone at 23%; *New York Law Journal* sample of divided tort cases showing Judge Bellacosa the most "anti-recovery," Judge Titone the most pro-recovery, and the remaining judges following a pattern very similar to that seen in the criminal and constitutional cases).

538. See Bonventre, *supra* note 3, at 49.

539. See Graph A. Though Judge Bellacosa's ideological voting record was the same as Chief Judge Wachtler's, his alignment with the majority was lower. See Tables B and C. In 1990, Judge Bellacosa's alignment with the majority was considerably lower than that of either Chief Judge Wachtler or Judge Simons. See Bonventre, *supra* note 3, at 59, Table D. Moreover, his record has consistently been significantly more pro-government or prosecution than that of the Court and the other judges. See, e.g., Spencer, *supra* note 12, at S2, Graph.

540. See Graph B and Table C.

541. See Bonventre, *supra* note 3, at 59, Table D. The alignment figures for 1990 were the highest for both Chief Judge Wachtler and Judge Simons, 89%, and the lowest for Judge Titone, 42%. *Id.*

of the other judges were aligned with the majority as frequently as Chief Judge Wachtler and Judge Simons, or as seldom as Judge Titone.<sup>542</sup>

Beyond these figures, a few observations seem particularly pertinent. Overall, 1991 was at best a disappointing year for state constitutional adjudication at the Court of Appeals; for state constitutional rights and liberties, it was not even that. Among the various reasons, many already discussed in the preceding commentaries on individual cases, some are especially troubling and merit a specific recounting.

The Court continued in 1991 to decide many state constitutional cases in unsigned opinions. In fact, some of the most significant cases, raising the most critical issues of rights and liberties, were decided by the Court in these typically superficial and abrupt writings whose authors chose not to be identified. An unsigned opinion—memorandum or *per curiam*—might be appropriate in the most routine cases where only well-settled law is involved, where an obvious result is dictated, and where there is no disagreement within the Court. But a short, shallow, sketchy statement of the Court's ruling—whose author, for usually apparent reasons, wishes to remain anonymous—would seem wholly inappropriate in those cases where significant constitutional issues are raised, where the law is not or ought not to be settled, where the result is not preordained, and, especially, where at least one member of the Court disagrees with that result and advances an opposing constitutional argument in a separate *signed* opinion of his or her own.<sup>543</sup>

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542. Notable also is that Chief Judge Wachtler and Judge Simons authored the majority opinions in the cases which seemed to divide the Court the most deeply in 1991. In *People v. Jackson*, 78 N.Y.2d 638, 585 N.E.2d 795, 578 N.Y.S.2d 483 (1991), Chief Judge Wachtler held together a bare majority to curtail the *per se* reversal rule for Rosario violations. See discussion *supra* notes 131-209 and accompanying text. In *People v. Harris*, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991), Judge Simons broke from the Court's pro-government bloc, and the Supreme Court as well, and carried a five-judge majority to suppress a confession he believed was obtained by means of deliberate and flagrant police misconduct. See discussion *supra* notes 25-89 and accompanying text.

543. See discussion *supra* note 468. For a similar discussion about 1990 see Bonventre, *supra* note 3, at 53-54. One-third of the divided decisions were rendered in an unsigned writing in that year. *Id.*

In 1991, more than one-third of the divided state constitutional decisions were rendered in an unsigned writing.<sup>544</sup> The figure the previous year was virtually the same.<sup>545</sup> To appreciate the import of these figures, it must be recalled precisely what they mean: in one out of every three cases, where at least one member of the Court believed the constitutional issue to be serious enough and the Court's resolution to be wrong enough to justify authoring, signing and publicly registering a disagreement, the majority nonetheless issued its decision in an anonymous writing.

Not surprisingly, these decisions include some of the more dubious ones rendered by the Court. They include, for example, *Alison D. v. Virginia M.*,<sup>546</sup> in which a nonbiological but wholly functional "parent" was conclusorily denied status as a parent, and thus, precluded from even seeking visitation rights.<sup>547</sup> Over the sensitive and sensible dissent of Judge Kaye,<sup>548</sup> the unsigned majority opinion paid little heed to the child's best interest, and utterly disregarded the factual background of the functional parent's nurture and support of the child for six years. These decisions also include *People v. Hunt*.<sup>549</sup> There, in a one line entry approving the decision below, the Court summarily dismissed the dissenting argument, again by Judge Kaye, that double jeopardy protection ought to bar the prosecution's second attempt at enhanced sentencing after its first effort had failed.<sup>550</sup>

The unsigned rulings among the unanimous cases were at least as troublesome. These decisions even lacked the benefit of a signed separate opinion to point out the deficiencies in the

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544. The precise figure, derived from Table A, was 36% or five out of the fourteen non-unanimous decisions. For all thirty "significant" decisions, unanimous as well as nonunanimous, the figure, also derived from Table A, was 27% or eight out of thirty. See Table A.

545. The figure for 1990 was 33%. See Bonventre, note 3, at 53-54.

546. 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991); see discussion *supra* notes 444-68 and accompanying text.

547. See discussion *supra* notes 450-53 and accompanying text.

548. *Alison D.*, 77 N.Y.2d at 657, 572 N.E.2d at 30, 569 N.Y.S.2d at 589 (Kaye, J., dissenting); see discussion *supra* notes 454-68 and accompanying text.

549. 78 N.Y.2d 932, 579 N.E.2d 208, 574 N.Y.S.2d 178 (1991); see discussion *supra* note 264.

550. *Id.* at 933, 579 N.E.2d at 208, 574 N.Y.S.2d at 178.

Court's anonymous writing. They include *People v. Velasco*.<sup>551</sup> There, in rejecting all of the defendant's various claims in court language that was at odds with prior holdings,<sup>552</sup> the Court added a yet another layer of befuddling rules to its already confused law of the right to be present. And in *In re Holtzman*<sup>553</sup>—the year's most pernicious decision in this writer's view—the Court embraced a chilling standard for penalizing pure speech. Moreover, it did so in a doubtful opinion that treated the facts of the case with less than complete candor, and refused even to address the fundamental values supporting the protection of uninhibited discussion of public affairs.

But the principal point here is not that the ultimate outcomes in such unsigned decisions are always or necessarily wrong. Rather, it is that the care and consideration reflected in these anonymous opinions typically fall well below the standard that distinguishes thoughtful from shoddy judicial decision-making.

*Holtzman* is also illustrative of another phenomenon that continued to afflict the Court of Appeals in 1991. Commencing a few years into Sol Wachtler's tenure as chief judge—i.e., since the late 1980s—the Court had been back-pedaling on state constitutional rights and liberties.<sup>554</sup> By the end of 1991, the Court's direction became unmistakable.<sup>555</sup> Whatever the merits of the Court's retrenchment, in general or in any particular area of the law, freedom of speech was not spared. With the decision in *Holtzman*, the Court's decreasing regard for the liberty of public expression reached a sort of nadir.

In the early years of the Wachtler Court, New York's high tribunal added to a list of recent precedents<sup>556</sup> in which it had

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551. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991); see discussion *supra* notes 222-39 and accompanying text.

552. *Id.* at 472, 570 N.E.2d at 1071, 569 N.Y.S.2d at 722; see discussion *supra* notes 227-28, 236 and accompanying text.

553. 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991); see discussion *supra* notes 351-412 and accompanying text.

554. See generally Bonventre, *supra* note 2; Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, *supra* note 10; Bonventre, *supra* note 4.

555. See Bonventre, *supra* note 2, at 122.

556. See, e.g., *Bellanca v. New York State Liquor Auth.*, 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981). In *Bellanca*, topless dancing was given state constitutional protection following the Supreme Court's decision that the Federal

demonstrated a strong inclination to expand the scope of protected expression. In its 1986 decision in *People v. P.J. Video, Inc.*,<sup>557</sup> the Court invalidated the police seizure of certain "adult" videotapes.<sup>558</sup> According to the Court's majority, the affidavit used to obtain the seizure warrant—which the Supreme Court had found adequate "beyond peradventure"<sup>559</sup>—was held insufficiently descriptive under the state constitution to establish probable cause to believe the alleged obscenity.<sup>560</sup> That same year, in *People ex rel. Arcara v. Cloud Books, Inc.*,<sup>561</sup> the Court blocked the closure of an "adult" bookstore that concededly violated an otherwise applicable nuisance statute. The Supreme Court reversed, ruling that the case had "nothing to do with books or expressive activity" but with "an establishment used for prostitution."<sup>562</sup> In response, the Court of Appeals held that, under the state constitution, even an incidental burden on an expressive activity is prohibited, unless first shown to be "no

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Constitution permitted state restriction. *Id.* at 230-31, 429 N.E.2d at 766, 445 N.Y.S.2d at 88; *see also* *Doran v. Salem Inn*, 422 U.S. 922 (1975).

In *People v. Uplinger*, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), the Court held that public solicitation of deviant sexual intercourse was protected because such sexual conduct itself is protected. *Id.* at 937-38, 447 N.E.2d at 62-63, 460 N.Y.S.2d at 514-15. The Supreme Court dismissed certiorari because of inability to determine the basis of the Court of Appeals' decision. *See* *New York v. Uplinger*, 467 U.S. 246 (1984). *Notably, the Court of Appeals' majority opinion was unsigned. See Uplinger*, 58 N.Y.2d at 937, 447 N.E.2d at 62, 460 N.Y.S.2d at 514.

In *People v. Ferber*, 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981), *rev'd*, 458 U.S. 747, *on remand*, 57 N.Y.2d 256, 441 N.E.2d 1100, 455 N.Y.S.2d 582 (1982), the Court invalidated a child pornography statute as an infringement of free expression. 52 N.Y.2d at 680-81, 422 N.E.2d at 526, 439 N.Y.S.2d at 867. The statute was upheld under the United States Constitution by the Supreme Court. 458 U.S. at 747, 765. *On remand*, the Court of Appeals summarily conformed the state constitution to the Supreme Court's decision. 57 N.Y.2d at 259, 441 N.E.2d at 1101, 455 N.Y.S.2d at 582-83. *Notably again, the opinions for the Court of Appeals, before and after Supreme Court reversal, were unsigned. See Ferber*, 52 N.Y.2d at 677, 422 N.E.2d at 524, 439 N.Y.S.2d at 864; 57 N.Y.2d at 259, 441 N.E.2d at 1101, 455 N.Y.S.2d at 582-83.

557. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *on remand from* 475 U.S. 868 (1986).

558. 68 N.Y.2d at 309, 501 N.E.2d at 571, 508 N.Y.S.2d at 916.

559. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 876 (1986).

560. 68 N.Y.2d at 304-05, 501 N.E.2d at 561, 508 N.Y.S.2d at 912-13.

561. 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986), *on remand from* 478 U.S. 697 (1986).

562. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986).

broadier than necessary to accomplish [the governmental] purpose.”<sup>563</sup>

If *Arcara* represented an outer limit of expression-protection,<sup>564</sup> a remarkably sharp and persistent contraction began as soon as the Court revisited that decision a few years thereafter. In 1989, in *Town of Islip v. Caviglia*,<sup>565</sup> the Court of Appeals upheld a zoning ordinance forcing adult bookstores to relocate to an industrial area of town. Over the dissents of Judges Titone and Kaye, who both decried the abandonment of *Arcara*’s highly protective standard,<sup>566</sup> the majority insisted that *Arcara*’s “no broader than necessary” test was satisfied because the town adopted an “appropriate method” to address its problems,<sup>567</sup> regardless of less burdensome possibilities.<sup>568</sup> The following year in *Golden v. Clark*,<sup>569</sup> the Court upheld a New York City provision barring political party officials from holding high office in city government. Over Judge Hancock’s dissenting complaint that the Court was breaking with its tradition of broadly protecting expression-related activities,<sup>570</sup> the majority ruled that political leaders could be denied the right to run for office—and government officials the right to run for party positions—because the burdens on those rights were “at most, only incidental,”<sup>571</sup> and thus, readily justifiable.<sup>572</sup>

The very next year, 1991, the Court decided *Children of Bedford v. Petromelis*<sup>573</sup> and *In re Holtzman*.<sup>574</sup> In the former,

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563. *Arcara*, 68 N.Y.2d at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

564. Some, evidently including the Supreme Court (and, to be candid, this writer), found the Court of Appeals’ reasoning and decision in *Arcara* difficult to take seriously. Perhaps unexpectedly, Professor Lawrence Tribe also criticized the reasoning adopted by the Court of Appeals, labelling it “First Amendment fetishism.” Lawrence Tribe, Remarks at the U.S.L.W. Constitutional Law Conference, 55 U.S.L.W. 2225, 2227 (Oct. 8, 1986).

565. 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).

566. *Id.* at 565, 540 N.E.2d at 226, 542 N.Y.S.2d at 150 (Titone, J., dissenting); *Id.* at 579, 540 N.E.2d at 236, 542 N.Y.S.2d at 160 (Kaye, J., dissenting).

567. *Id.* at 560, 540 N.E.2d at 223-24, 542 N.Y.S.2d at 147-48.

568. *Id.* at 559, 540 N.E.2d at 223, 542 N.Y.S.2d at 147.

569. 76 N.Y.2d 618, 564 N.E.2d 611, 563 N.Y.S.2d 1 (1990).

570. *Id.* at 632, 564 N.E.2d at 619, 563 N.Y.S.2d at 9. (Hancock, J., dissenting).

571. *Id.* at 628, 564 N.E.2d at 616, 563 N.Y.S.2d at 6.

572. *Id.* at 630, 564 N.E.2d at 617, 563 N.Y.S.2d at 7.

573. 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991), *vacated*, 112 S. Ct. 859 (1992); see discussion *supra* notes 317-50 and accompanying text.



the Court of Appeals, in the view of a unanimous Supreme Court, provided too little protection for expression-related activity. Thus, in a recently unimaginable switch in roles, the New York tribunal was overruled by the Supreme Court for falling below federal strict scrutiny standards.<sup>575</sup> And finally, in *Holtzman*, the Court of Appeals applied its own strict scrutiny, not to protect speech, but to prevent it. Henceforth, attorney speech about judges is free speech in New York only if it compares favorably—in the view ultimately of judges—to what a reasonable, and presumably reverential, attorney would have said.<sup>576</sup>

From *Arcara* to *Holtzman*—"from fetish to fizzle"<sup>577</sup> in concern for expressive freedom—constituted a dramatic transformation in the Court's free speech decisions. No longer could New York's high tribunal accurately boast of its exceptional protection and toleration of expression.<sup>578</sup> Indeed, despite an occasional indication to the contrary,<sup>579</sup> by the end of 1991 the Court of Appeals jurisprudence of expressive liberty was neither exceptional nor particularly tolerant.

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574. 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, cert. denied, 112 S.Ct. 648 (1991); see discussion *supra* notes 351-412 and accompanying text.

575. *Children of Bedford, Inc. v. Petromelis*, 112 S. Ct. 859 (1992), vacating 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991).

576. See discussion *supra* notes 394-443 and accompanying text.

577. *Bonventre*, *supra* note 2, at 141. As noted therein:

In *Arcara*, taking a stand on behalf of selling "adult" books, the court barred a penalty on *non-expressive activity*, even though the burden on speech was strictly *incidental*, and the court did so by adopting an exceptionally *speech protective test* that *scrutinized government action*. In *Holtzman*, refusing to take a similar stand on behalf of public criticism of judges, the court permitted a sanction on *purely expressive activity*, thereby approving a *direct burden* on speech itself, and the court did so by adoption a distressingly *speech-restrictive test* that focuses *scrutiny on expressive conduct*. If the court's ruling in *Arcara* reflected a "fetish" for protecting expression, *Holtzman* certainly seems to indicate that the court's enthusiasm for doing so has fizzled.

*Id.* (footnotes omitted).

578. See *Immuno A.G. v. Moor-Jankowski (Immuno II)*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1277, 566 N.Y.S.2d 906, 913 (1991).

579. See, e.g., *id.*, at 251, 567 N.E.2d at 1279, 566 N.Y.S.2d at 915 (ruling, notably, however, that its decision was dictated by federal law and it chose not to rely on state constitutional law exclusively); see *supra* notes 271-313 and accompanying text; see also *People v. Dietze*, 75 N.Y.2d 47, 51, 549 N.E.2d 1166, 1168, 550 N.Y.S.2d 595, 597 (1989) (stating that its decision to invalidate a harassment statute which criminalized mere "abusive" language was dictated by federal law as well as the state constitution).

If there were bright spots in an otherwise unfortunate year, the brightest were perhaps to be found in *People v. Harris*<sup>580</sup> and *Immuno A.G. v. Moor-Jankowski (Immuno II)*.<sup>581</sup> In *Harris*, a majority of the Court refused to tolerate flagrant official disregard of state constitutional rights of the accused.<sup>582</sup> In *Immuno II*, the Court of Appeals, in the face of an apparent dilution in the Supreme Court's protection of defamatory opinion,<sup>583</sup> refused to budge from the broad immunity it had previously afforded to statements of opinion in defamation actions.<sup>584</sup>

But—to take a cue from *Immuno II*—“tak[ing] into account the full content of”<sup>585</sup> the Court's decisions in *Harris* and *Immuno II*, even these two decisions were hardly unqualified victories for state constitutionalism. Both cases represent “state constitutional law on the rebound.”<sup>586</sup> The Court resorted to the state constitution only after its interpretation of federal law met with disapproval or uncertainty at the United States Supreme Court. Protection of rights and liberties under the state constitution was treated in both cases as a fall-back position, such an

580. 72 N.Y.2d 614, 536 N.E.2d 1, 532 N.Y.S.2d 1229 (1989); see discussion *supra* notes 25-89 and accompanying text.

581. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991), *on remand from* 497 U.S. 1021 (1990), see discussion *supra* notes 271-316 and accompanying text.

582. See *People v. Harris*, 77 N.Y.2d 434, 440-41, 570 N.E.2d 1051, 1055, 568 N.Y.S.2d 702, 706 (1991) (*Harris II*). Regardless of the merits of the Court's ultimate decision in *Harris II* to suppress the confession—to be candid, this writer disagrees with that result—the Court made clear that it will not tolerate violations of state constitutional rights with impunity. *Id.*; see also *supra* notes 25-89 and accompanying text.

583. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

584. See *Immuno II*, 77 N.Y.2d at 255, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918. Prior Court decisions reaffirmed in *Immuno II* include: *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 384-85, 366 N.E.2d 1299, 1308-09, 397 N.Y.S.2d 943, 952-53 (1977) (holding that defamatory statements about judges are protected by the *New York Times v. Sullivan* standard; *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292, 501 N.E.2d 550, 554, 508 N.Y.S.2d 901, 905 (1986) (holding that defamatory statements should be analyzed as a whole and in context to determine whether they are protected as opinion). But see discussion of *In re Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991), *supra* notes 351-412 and accompanying text).

585. *Immuno II*, 77 N.Y.2d at 255, 567 N.E.2d at 1281, 566 N.Y.S.2d at 917.

586. Bonventre, *The New York Court of Appeals: An Old Tradition, Struggles with Current Issues*, *supra* note 10, at 151. See generally Vincent M. Bonventre, *New York and the Supremes: State Constitutional Law on the Rebound at the Court of Appeals*, ST. CONST. COMMENTARIES AND NOTES (forthcoming 1994).

approach to state constitutional law detracts from the legitimacy of the Court's independent decision-making, and inevitably fuels suspicions about the result-orientation of state constitutionalism generally.<sup>587</sup>

Although the Court was unanimous in result in *Immuno II*, there was no majority for rendering a decision based *exclusively* on independent state grounds. Even the second time around, following remand by the Supreme Court, only one member of the Court of Appeals argued that the case could and should be decided on state law alone.<sup>588</sup> Two judges wrote separately to press for an exclusively federal law-based decision.<sup>589</sup> And Judge Kaye, a vigorous proponent of independent state constitutionalism,<sup>590</sup> was evidently compelled to craft two opinions in one—a federal opinion together with a state opinion<sup>591</sup>—in order to secure the remaining bare majority of four.

That the Court was unsettled on its approach to state constitutional law—i.e., the when and the how—was made clear again in *Immuno II*.<sup>592</sup> That this was likely due, in substantial

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587. See discussion *supra* notes 303-04 and accompanying text; see generally Collins, *supra* note 83, at 2-3, 13-14 (criticizing such a "reactionary" or "reactive" approach as instrumental, expedient, and unprincipled, thus reducing the state's constitution to a "grab-bag" of rights to be "exploited in order to circumvent disfavored United States Supreme Court decisions"). Collins elaborated:

a reactionary approach uses the state charter in a piecemeal fashion, whenever the occasion may arise—in the minds of the judges—for purposes of philosophical disagreement or in order to insulate a controversial decision from Supreme Court review. Seen in this light, the sovereign law of the state constitution becomes little more than a plaything.

*Id.* at 13-14; see also Ronald K. L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 Miss. L.J. 371, 375 n.15 (1984); Galie, *supra* note 2, at 236 (stating that "this reactive mode of state constitutional law on the rebound was the 'dominant approach' of the Court of Appeals at the time"); Bonventre, *supra* note 73, at 51-54.

588. *Immuno II*, 77 N.Y.2d at 263-64, 567 N.E.2d at 1287, 566 N.Y.S.2d at 923 (Titone, J., concurring).

589. *Id.* at 262-63, 567 N.E.2d at 1286, 566 N.Y.S.2d at 922 (Simons, J. concurring); *id.* at 268, 567 N.E.2d at 1286, 566 N.Y.S.2d at 926 (Hancock, J., concurring).

590. See, e.g., O'Neill v. Oakgrove Constr. Inc., 71 N.Y.2d 521, 531, 523 N.E.2d 277, 282, 528 N.Y.S.2d 1, 6 (1988) (Kaye, J., concurring); see also Kaye, *supra* note 84; Kaye, *supra* note 308; Kaye, *supra* note 73.

591. See discussion of *Immuno II*, *supra* notes 271-313 and accompanying text.

592. 77 N.Y.2d at 248-56, 567 N.E.2d at 1277-83, 566 N.Y.S.2d at 913-18; see discussion *supra* notes 295-313 and accompanying text. See also *People v. Vilardi*,

part, to actual disagreement within the Court over the very legitimacy of independent state decision-making was made plain a few weeks later in *Harris II*.<sup>593</sup> There, two members of the Court—including the Court's chief judge<sup>594</sup>—railed against the majority's "affront" to the Supreme Court<sup>595</sup> in rejecting that court's "wisdom and experience"<sup>596</sup> and "superior perspective."<sup>597</sup> In a remarkably vituperative and accusatory writing, the two dissenters betrayed a distressing lack of understanding of the role of state courts and state constitutions in the federal system.

To the *Harris II* dissenters, it was "institutional egocentricity"<sup>598</sup> for the majority to exercise independent judgment instead of simply parroting the Supreme Court. As seen by these two judges, it represented "a kind of Copernican view of the judicial universe"<sup>599</sup> for the majority to take state constitutional rights seriously, rather than simply conforming state law to the minimum federal standards set by the Supreme Court.

This overt hostility to independent state constitutionalism surely belied any protestations to the contrary in the dissenting opinion.<sup>600</sup> And although the dissenters' views were manifested most stridently in *Harris II*, they likely infected other 1991 de-

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76 N.Y.2d 67, 78, 555 N.E.2d 915, 921, 556 N.Y.S.2d 518, 524 (1990) (Simons, J., concurring); *People v. Torres*, 74 N.Y.2d 224, 236, 543 N.E.2d 61, 69, 544 N.Y.S.2d 796, 804 (1989) (Bellacosa, J., dissenting); *O'Neill v. Oakgrove Constr. Inc.*, 71 N.Y.2d 521, 531, 523 N.E.2d 277, 282, 528 N.Y.S.2d 1, 6 (1988) (Kaye, J., concurring); *People v. Kohl*, 72 N.Y.2d 191, 204-05, 527 N.E.2d 1182, 1189-90, 532 N.Y.S.2d 45, 52-53 (1988) (Hancock, J., dissenting).

593. 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991), *on remand from New York v. Harris*, 495 U.S. 14 (1990); *see also* discussion *supra* notes 25-89 and accompanying text.

594. *Id.* at 442, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J., dissenting, joined by Wachtler, C.J.).

595. *Id.* at 443, 570 N.E.2d at 1056-57, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).

596. *Id.* at 442, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J., dissenting).

597. *Id.* at 446, 570 N.E.2d at 1058, 568 N.Y.S.2d at 709 (Bellacosa, J., dissenting).

598. *Id.* at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting).

599. *Id.* (Bellacosa, J., dissenting). Presumably the dissent meant *Ptolemy*, who theorized that Earth was the center of the universe, not Copernicus, whose heliocentric theory corrected Ptolemy's centuries later.

600. *See Harris II*, 77 N.Y.2d at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting) (stating that "we remain equal, true, steadfast and

cisions,<sup>601</sup> thus contributing to a rather inhospitable year for state constitutional rights and liberties. This vehement hostility in *Harris II* came to a head the following year in *People v. Scott*.<sup>602</sup> In *Scott*, involving a pair of consolidated cases, the divisions within the Court were even deeper, angrier, and more telling.

*Scott* was one of the most significant Court of Appeals' decisions in 1992. This and the other cases raising questions of state constitutional rights and liberties and state constitutional adjudication in Wachtler's final months as Chief Judge will be reviewed in a forthcoming work by this author.<sup>603</sup>

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proud participants" in the state constitutional right to counsel tradition); see *id.* at 447, 570 N.E.2d at 1058, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting).

Notably, the voting records of the two dissenters, Chief Judge Wachtler and Judge Bellacosa, have for several years evinced a rather low level of support for state constitutional rights and liberties. See, e.g., Bonventre & Powell, *supra* note 10, at 60, Graph (showing Chief Judge Wachtler and Judge Bellacosa to be the least supportive of rights and liberties among Court of Appeals judges for the three-year period, 1990-1992); see also discussion *supra* notes 534-35 and accompanying text.

601. See, e.g., *People v. Jackson*, 78 N.Y.2d 638, 644, 585 N.E.2d 795, 799, 578 N.Y.S.2d 483, 487 (1991) (diluting and de-constitutionalizing the *Rosario* rule); see discussion *supra* notes 131-209; *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 657, 572 N.E.2d 27, 29, 569 N.Y.S.2d 586, 588 (1991) (ignoring the state constitutional arguments supportive of a broad definition of "parent"); see discussion *supra* notes 444-68 and accompanying text.

602. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

603. For the reader who wishes to know, see William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965), the author's pro-individual/pro-government voting record in the divided cases in 1991 would have been 50 percent/50 percent. Regarding the most controversial cases, unanimous and nonunanimous, the author would have voted pro-prosecution in both *Harris* and *Jackson*, but would not have joined the respective dissenting and majority opinions. The author would have voted pro-individual in both *Holtzman* and *Alison D.*, dissenting in *Holtzman* and joining the dissent in *Alison D.* The author would have been aligned most closely with Judges Kaye and Hancock.

Table A  
List of Cases — 1991

## Criminal Justice

	Holding*	Majority**	Separate***
Bayes	L	WSKATHB	
Bin-Wahad	C	WSKB (memo)	[A [T] [H
Blount	L	WSKATHB (memo)	
Bonaparte	C	<u>WSKATHB</u>	
Burts	L	<u>WSKATHB</u>	
Cardwell	L	WSKATHB (memo)	
Charles	L	WSKATHB (memo)	
Cloud	C	WSKATHB (memo)	
Colon	C	WSKAHB (memo)	[T]
Coutin	C	WSKATHB (memo)	
Duuvon	C	<u>WKAB</u>	(S (T) (H
Felton	L	WSKATHB (memo)	
Ford	C	WSKATHB (memo)	
Harris	L	SKA(T)H	[W [B]
Hunt	C	WSATHB (memo)	[K]
Jackson, E.	C	<u>WSKB</u>	[A [T] [H
Moquin	L	WKATH	[S [B]
Nacey	C	WSKATHB (memo)	
Offen	C	WSKATHB (memo)	
O'Rama	L	WSKATHB	
Ortega	L	WSKATHB (memo)	
Patterson	C	WSAB	[K [T]
Richards	C	WSKATHB (memo)	
Rosario	C	WSKAHB	[T]
Slaughter	L	WSKATHB	
Smith, A.	C	WSKATHB (memo)	
Smith, D.	C	WSKATHB (memo)	
Strachan	C	<u>WSKATHB</u>	
Turaine	L	WSKATHB (memo)	
Tucker	C	WSKAHB (memo)	[T]
Velasco	C	WSKATHB (per curiam)	
Webb	C	WSKATHB	
Williamson	L	WSKATHB (memo)	
Zanghi	L	WSKATHB (memo)	

## Civil Liberties and Equality

	Holding*	Majority**	Separate***
Alison, D.	C	WSATHB (per curiam)	[K]
Amer. Ins.	L	WSKB, Kooper	[T [H]
Amodei	L	WSKATHB (memo)	
Catlin	C	WSKAH	[T [B]
Ch. of Bedford	C	WSAHB	
Cit. for Energy	C	WSKB	[A [T [H]
Colt Inds.	C	WSKATHB	
Couch	C	WSKATHB	
Derle	L	WSKATHB (per curiam)	
Holtzman	C	SKATHB (per curiam)	
Immuno	L	W(S)KA(T)(H)B	
ISCA	C	WSKAHB	
w/Campbell****	C	WSKAHB	

\* "L" indicates a "Liberal" or pro-individual rights, or in a divided decision, a ruling that is more liberal or pro-individual rights than the position taken in a separate opinion; "C" indicates "Conservative" or pro-government or disapproval of the claim of individual right. For further explanation of the terms "liberal" and "conservative," see *supra* note 531.

\*\* A judge's last initial underlined indicates authorship of the majority opinion, in brackets a dissent, in parentheses a concurrence, in single bracket or parenthesis joinder in a dissent or concurrence respectively. W=Wachtler, S=Simons, K=Kaye, A=Alexander, T=Titone, H=Hancock, B=Bellacosa. Unsigned opinions are identified as "per curiam" or "memo"(memorandum), as labelled by the Court.

\*\*\* A judge is identified as having written or joined a separate opinion only if there was a "liberal"/"conservative" disagreement with the majority on the state constitutional rights issue.

\*\*\*\* Consolidated cases are identified individually where they raise different state constitutional issues, or where the same issue is resolved distinctly.

Table B  
*Ideological Voting Patterns — 1991*

	W	S	K	A	T	H	B	Court
<b>Criminal Justice</b>								
Liberal	10%(1)	20%(2)	40%(4)	40%(4)	90%(9)	56%(5)	0%(0)	20%(2)
Conservative	90%(9)	80%(8)	60%(6)	60%(6)	10%(1)	44%(4)	100%(10)	80%(8)
<b>Civil Liberties and Equality</b>								
Liberal	25%(1)	25%(1)	50%(2)	33%(1)	50%(2)	25%(1)	50%(2)	25%(1)
Conservative	75%(3)	75%(3)	50%(2)	67%(2)	50%(2)	75%(3)	50%(2)	75%(3)
<b>Total</b>								
Liberal	14%(2)	21%(3)	43%(6)	38%(5)	79%(11)	46%(6)	14%(2)	21%(3)
Conservative	86%(12)	79%(11)	57%(8)	62%(8)	21%(3)	54%(7)	86%(12)	79%(11)

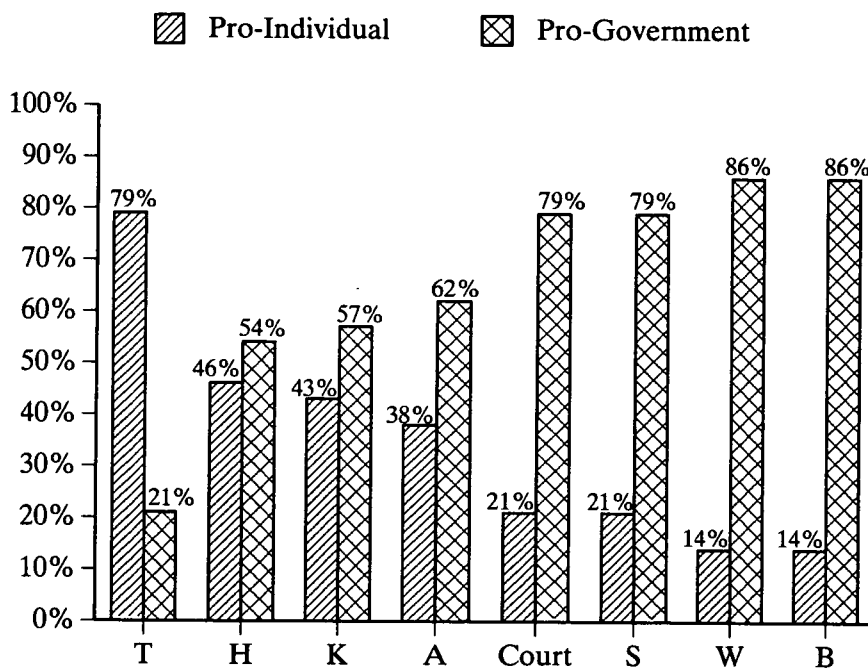
Table C  
*Alignment with Majority — 1991*

	Majority	Separate*
Wachtler	93% (13)	7% (1)
Simons	86% (12)	14% (2)
Kaye	79% (11)	21% (3)
Alexander	77% (10)	23% (3)
Titone	29% (4)	71% (10)
Hancock	62% (8)	38% (5)
Bellacosa	79% (11)	21% (3)

\* A judge is deemed to have cast a "separate" vote only if the judge disagreed with the majority on the substantial state constitutional issue in a case.

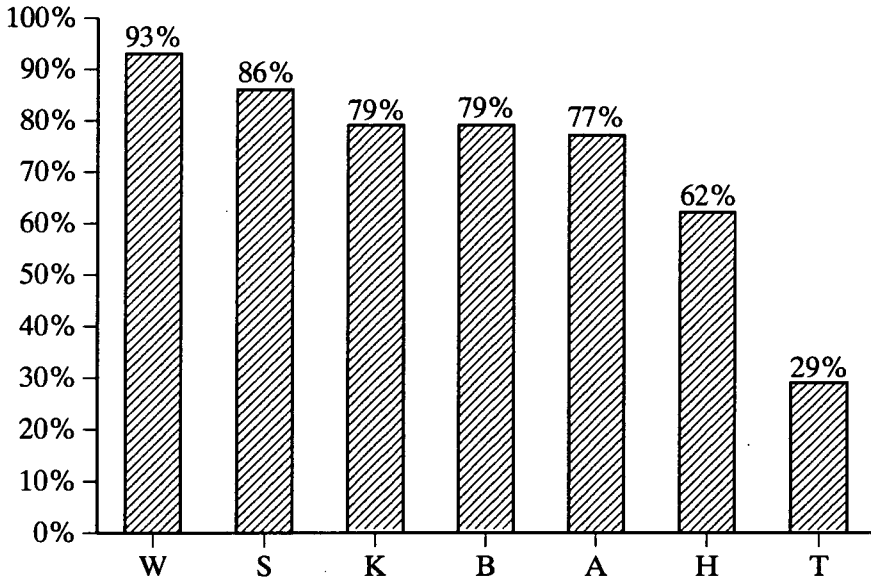


Graph A  
Ideological Voting Patterns — 1991  
(14 total divided decisions on state  
constitutional rights and liberties)



Source: Vincent M. Bonventre, Albany Law School

Graph B  
Alignment with Majority — 1991  
(Divided Decisions)



Source: Vincent M. Bonventre, Albany Law School