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Court of Appeals - State Constitutional Law Review, 1990

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Articles

Court of Appeals — State Constitutional Law Review, 1990

Vincent Martin Bonventre*

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In the interest of disclosure, the author notes that he clerked at the Court of Appeals for six years — three for Judge Matthew J. Jasen and, upon his retirement, three more for Judge Stewart F. Hancock, Jr., his successor. Some of the decisions discussed herein were rendered during that time. The author also acknowledges his considerable fondness for the court and admiration for current and former members. Of course, the views expressed herein are those of the author alone and, except where specifically stated otherwise, are not intended to reflect those of any other individual or institution. See also *infra* note 368.

The author is grateful to his research assistant, Nancy L. Ginsburg, whose loyal efforts and substantial contributions were essential to this project; to his wife, Karen, whose support and suggestions have been vital to every writing; and to Emily Pedro and Donna Parent who typed the manuscript.

Finally, this inaugural *Review*, as well as all that follow by the author's pen, are for a great lady, Raffaella Bonventre, his mother.

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I. Introduction

New York has a long and proud tradition of state constitutionalism.¹ That tradition continues today.² Indeed, with state

1. See generally Vincent M. Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 32 (1989). See also Edward S. Corwin, *The Extension of Judicial Review in New York: 1783-1905*, 15 MICH. L. REV. 281 (1917); Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFF. L. REV. 157 (1979).

2. See Bonventre, *supra* note 1, at 55, et seq. See also Sol Wachtler, *Our Constitutions - Alive and Well*, 61 ST. JOHN'S L. REV. 381 (1987); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 42 RECORD ASS'N. BAR CITY N.Y. 288 (41st Benjamin N. Cardozo Lecture, 1987).

To be sure, this tradition of state constitutional decision-making at the Court of Appeals has not been uniformly, or even predominantly, "liberal", as that term is commonly applied. See, e.g., *infra* notes 7-39 and accompanying text. See also Vincent M. Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, 4 EMERGING ISSUES ST. CONST. L. 1 (1991). But the New York court has historically exercised independent judgment — i.e., it has not simply relied on federal case law — in deciding rights and liberties issues under state law. Moreover, the court has typically done so as a matter of course, not merely in isolated periods or in cases reacting to trends or specific decisions at the Supreme Court. See *People v. Barber*, 289 N.Y. 378,

constitutional law enjoying a "renaissance"³ throughout the nation in response to the retrenchment in civil rights and liberties at the Supreme Court during the Burger-Rehnquist era,⁴ leading commentators view the New York Court of Appeals as being in the forefront.⁵ An annual examination of state constitutional developments at New York's highest tribunal thus seems particularly appropriate. Needless to say, as one who has great respect for the court, the author is pleased to inaugurate this *Court of Appeals — State Constitutional Law Review*.

The purpose here is not to review developments in criminal procedure, administrative law, family law, or other areas of the law that also happen to involve the state constitution. The focus here is on New York's *fundamental* law — its application, interpretation and development — regardless of its substantive context in a particular case. More specifically, this article examines the adjudication of rights and liberties at New York's highest tribunal, the Court of Appeals, to the extent such decision-making is based on this state's independent — i.e., non-federal — supreme law.⁶ Among the matters to be examined are

384, 46 N.E.2d 329, 331 (1943) (Lehman, C.J.) (emphasis added):

[P]arenthetically we may point out that in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, *this court is bound to exercise its independent judgment* and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.

3. See A. E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 1 (1988). See also Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969).

4. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 547-48 (1986). See also A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Hans A. Linde, *E Pluribus - Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

5. See William J. Brennan, Jr., *A Tribute to Chief Judge Charles S. Desmond*, 36 BUFF. L. REV. 1, 3 (1987) (the New York Court of Appeals is "the acknowledged leader"); Peter J. Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, 71 JUDICATURE 100, 103 (Aug.-Sept. 1987) (the Court of Appeals "made the largest number of state-based rights decisions going beyond federal law of any state in the nation" in the year under study, 1986); Ronald K.L. Collins, quoted in Elizabeth Kolbert, *On Rights, New York Looks to State, Not U.S., Law*, N.Y. TIMES, Jan. 8, 1990, at A1 ("the New York Court is in the forefront").

6. There are, to be sure, some fascinating constitutional developments in Court of Appeals case law that either do not deal directly with individual rights and liberties or are not based on state law. These are not covered here. Among the most notable of such

the court's approaches to constitutional issues, the sources from which it derives fundamental law, the constitutional direction of the court, the public law jurisprudence and views of its individual members, and the philosophical tensions among them as reflected in their separate opinions.

Part II of this article, *The Cases*, reviews the state constitutional developments in the areas of criminal justice and civil liberties and equality, respectively. Part III, *The Court*, examines tabulations of the Court of Appeals' state constitutional deci-

excluded cases are: *City of New York v. State of New York*, 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990); *In re Raquel Marie X.*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, 111 S. Ct. 517 (1990); *In re Lionel F.*, 76 N.Y.2d 747, 558 N.E.2d 30, 559 N.Y.S.2d 228, *cert. denied*, 111 S. Ct. 304 (1990); *Cahill v. Public Service Commission*, 76 N.Y.2d 102, 556 N.E.2d 133, 556 N.Y.S.2d 840, *cert. denied*, 111 S. Ct. 344 (1990). In *City of New York v. State of New York*, the court examined the home rule (N.Y. CONST., art. IX, § 2(b)(2)) implications of a special law placing a referendum on the ballot in Staten Island for the voters there to decide whether a commission should be established to study how the borough might secede from New York City and become a city itself. 76 N.Y.2d 479, 483, 562 N.E.2d 118, 119, 561 N.Y.S.2d 154, 155. The majority, in an unsigned per curiam opinion, held that the referendum was aimed only at an exploratory procedure, with no binding force upon New York City, and, therefore, did not interfere with local property, affairs or government such as would trigger the constitutional requirement for a home rule message by the legislature. *Id.* at 486, 562 N.E.2d at 120, 561 N.Y.S.2d at 156. In dissent, Judge Hancock, joined by Judge Alexander, argued that home rule was indeed implicated because of the "direct and immediate impact on the personnel, finances and administration of the city" that would necessarily follow approval of the referendum. *Id.* at 488, 562 N.E.2d at 122, 561 N.Y.S.2d at 158 (Hancock, J., dissenting). In *In re Raquel Marie X.*, the court, in a unanimous opinion by Judge Kaye, relying solely on the Federal Constitution, strengthened an unwed father's right to consent to the adoption of his child, by striking the requirement in Domestic Relations Law § 111 (1)(e) that conditioned that right on the father's living together with the child's mother for six continuous months prior to the child's placement for adoption. The court reasoned that an unwed father might well establish his parental responsibility for the child regardless of whether he satisfied the "living together" prerequisite. 76 N.Y.2d 387, 406, 559 N.E.2d 418, 427, 559 N.Y.S.2d 855, 863 (1990). In *Cahill v. Public Serv. Comm'n*, the court, speaking through Judge Bellacosa, held that the federal first amendment rights of ratepayers were violated by a policy permitting utilities to pass along to them the costs of the utilities charitable contributions. 76 N.Y.2d 102, 114, 556 N.E.2d 133, 138, 556 N.Y.S.2d 840, 845 (1990); In *In re Lionel F.*, the court, in an unsigned memorandum opinion over the partial dissent of Judge Alexander who was joined by Judge Titone, held that the Double Jeopardy Clause of the federal constitution was not violated by a Family Court ruling which, in a juvenile delinquency proceeding, first granted a defense motion to dismiss certain counts, but then, upon reconsideration, vacated the ruling while the proceeding was still pending, while the remainder of the motion to dismiss was still under advisement, and before the evidence was closed. The earlier dismissal was thus not, in the court's view, tantamount to an acquittal. 76 N.Y.2d at 749, 558 N.E.2d at 31, 559 N.Y.S.2d at 229 (Alexander, J., dissenting).

sions and the individual judges' votes to determine the court's record on rights and liberties issues, as well as the voting patterns and alignments of its members.

II. The Cases

A. *Criminal Justice: Substantive Rights*

1. *Right to Counsel*

State constitutional law is not always "liberal."⁷ Reliance on the state constitution, rather than the federal, does not necessarily signal a state court's intention to extend individual rights and liberties.⁸ Indeed, the first decision reviewed here, one of the most significant criminal justice rulings in New York in recent years, illustrates the Court of Appeals — much like the post-Warren Supreme Court -- "retrenching"⁹ from a prior rights-protective position.

In *People v. Bing*,¹⁰ the New York court sharply curtailed its own expansive right to counsel rule.¹¹ Under the so-called "derivative right to counsel" rule¹² adopted by the court in *People v. Bartolomeo*,¹³ a suspect represented by counsel on a prior pending charge could not, in the absence of that attorney, be questioned on a new unrelated charge, even if the suspect did not wish to consult with an attorney on the new charge.¹⁴ This

7. See Barry Latzer, *The Hidden Conservatism of the State Court "Revolution"*, 74 JUDICATURE 190 (Dec.-Jan. 1991). See also Earl M. Maltz, *False Prophet — Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L. Q. 429, 433 (1988); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

The terms "liberal" and "conservative" are used throughout in their conventional sense in judicial studies. See *supra* notes 331-32.

8. See Vincent M. Bonventre, *Beyond the Reemergence — "Inverse Incorporation" and Other Prospects for State Constitutional Law*, 53 ALB. L. REV. 403, 412-15 (1989).

9. See generally Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, 4 EMERGING ISSUES ST. CONST. L. 1 (1991).

10. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

11. See generally Peter J. Galie, *supra* note 1, at 178-86 (outlining the development of New York's right to counsel rule). See also Bonventre, *supra* note 1, at 45-49; Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 764 (1982).

12. *Bing*, 76 N.Y.2d at 337, 558 N.E.2d at 1014, 559 N.Y.S. at 477.

13. 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981).

14. *Id.* at 231, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

rule — actually a derivative “indelible”¹⁵ right to counsel rule — was overruled in 1990 in *Bing*.¹⁶

Judge Simons, who authored the comprehensive opinion for a four-judge majority, while noting that the court has long “provided protection to accuseds far more expansive” than federally mandated,¹⁷ nevertheless explained:

[The right to counsel] recognized must rest on some principled basis which justifies its social cost. *Bartolomeo* has no such basis. It rests on a fictional attorney-client relationship derived from a prior charge [when, in fact,] *Bartolomeo* defendants have waived their right to counsel and chosen not to hire a lawyer to represent them on the new unrelated charge. Indeed, they have done so after receiving the benefit of legal advice and after at least one prior experience dealing with the authorities.¹⁸

Outlining the development of the derivative right to counsel in New York, the majority in *Bing* recounted how the decision in *Bartolomeo* had, without explanation, contravened a line of precedents — including one only four months old at the time¹⁹ -- specifically rejecting the notion of an indelible right to counsel on new unrelated charges.²⁰ Further, according to the *Bing* majority, the change wrought by *Bartolomeo* made little sense. Persistent offenders, who were likely to be represented already on some pending charge, were thereby immunized from any questioning on new charges; they were thus provided a veritable “dispensation” under *Bartolomeo*.²¹ As a result, the major-

15. The term “indelible” has been used to describe that aspect of the New York rule providing that, once attached, the right to counsel cannot be waived, regardless of how voluntary, knowing, understanding and deliberate, unless counsel is present. The rule was first announced in a two-paragraph opinion by Chief Judge Fuld in *People v. Vella*, 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967), reaffirmed in strong terms in *People v. Arthur*, 22 N.Y.2d 325, 328-29, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 665-66 (1968), and subsequently dubbed the “indelible” right by Judge Cooke, beginning in *People v. Settles*, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978).

16. 76 N.Y.2d 331, 337, 558 N.E.2d 1011, 1014, 559 N.Y.S.2d 474, 477 (1990).

17. *Id.* at 339, 558 N.E.2d at 1015, 559 N.Y.S.2d at 478.

18. *Id.* at 349, 558 N.E.2d at 1021, 559 N.Y.S.2d at 484.

19. *People v. Kazmarick*, 52 N.Y.2d 322, 329, 420 N.E.2d 45, 49, 438 N.Y.S.2d 247, 251 (1981). See also *People v. Taylor* 27 N.Y.2d 327, 330-32, 266 N.E.2d 630, 631-33, 318 N.Y.S.2d 1, 3-4 (1971).

20. *Bing*, 76 N.Y.2d at 340-41, 558 N.E.2d at 1016, 559 N.Y.S.2d at 479. See also *People v. Kazmarick*, 52 N.Y.2d 322, 420 N.E.2d 45, 438 N.Y.S.2d 247 (1981).

21. *Bing*, 76 N.Y.2d at 342, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480 (quoting

ity continued, *Bartolomeo* caused considerable difficulty in subsequent cases, it was applied unevenly by the court, and it was gradually diluted into a rule prohibiting little more than deliberate police oversight of the fact that a defendant was already represented on a prior charge.²²

Finally, the majority noted that the rationale for *Bartolomeo* was not even articulated until the court's decision, seven years later, in *People v. Robles*.²³ There, the court explained that the derivative right to counsel on a new charge was intended only to safeguard the right to counsel on the prior pending charge.²⁴ But if that is the rationale, Judge Simons asked in his *Bing* decision, then why not exclude the defendant's statements only in the prosecution of the *prior pending* charge?²⁵ Finding no justification for continuing such a problem-riddled and exception-tattered rule, the majority concluded that *Bartolomeo* should be overruled.²⁶

Disagreeing strenuously, Judge Kaye, joined by Judges Alexander and Titone, argued that the *Bartolomeo* rule was the "product of the careful, considered implementation of three guarantees of our State Constitution due process, the privilege against self-incrimination, and the right to assistance of counsel" ²⁷ "Today," Judge Kaye lamented, "the court breaks with its proud tradition" ²⁸

Bartolomeo, in Kaye's view, was not an "aberrant decision."²⁹ Rather, it was one of a long line of cases premised on the concept of "fundamental fairness,"³⁰ intended to rectify the inherent imbalance in custodial settings where an accused is subject to the awesome power of the state. In such settings, only the presence of an attorney can ensure that the defendant's waiver

Bartolomeo, 53 N.Y.2d 225, 239, 423 N.E.2d 374, 385, 440 N.Y.S.2d 894, 909 (1981) (Wachtler, J., dissenting)).

22. *Id.* at 342-43, 558 N.E.2d at 1017, 559 N.Y.S.2d at 480.

23. 72 N.Y.2d 689, 691, 533 N.E.2d 240, 242, 536 N.Y.S.2d 401, 403 (1988). See *Bing*, 76 N.Y.2d at 343-44, 558 N.E.2d at 1018, 559 N.Y.S.2d at 481.

24. See *Robles*, 72 N.Y.2d at 698, 533 N.E.2d at 244, 536 N.Y.S.2d at 405.

25. See *Bing*, 76 N.Y.2d at 341, 558 N.E.2d at 1016-17, 559 N.Y.S.2d at 478-79.

26. *Id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

27. *Id.* at 351, 558 N.E.2d at 1023, 559 N.Y.S.2d at 486 (Kaye, J., dissenting).

28. *Id.*

29. *Id.* at 352, 558 N.E.2d at 1023, 559 N.Y.S.2d at 486.

30. *Id.*

of constitutional rights is competent, intelligent and voluntary.³¹ As for the majority's contrary contentions, Judge Kaye noted that those arguments had been pressed by the dissenters in *Bartolomeo* and were, in that case, rejected by the court.³² "That there are now four votes for those same rejected policy considerations," Judge Kaye lectured, "is, of course, not a valid reason to overrule the case."³³

In his rejoinder for the majority, however, Judge Simons was emphatic:

As noted at the outset of this opinion, our right to counsel rules are based on (common sense and fairness) But there is little to be said for a rule which is not firmly grounded on prior case law, cannot be applied uniformly, favors recidivists over first-time arrestees, and exacts such a heavy cost from the public.³⁴

The New York right to counsel was further trimmed in *People v. Davis*.³⁵ There, the court, again speaking through Judge Simons, limited the "indelibility" of that right by holding that a suspect who initially requests an attorney in a non-custodial setting could, thereafter, even when in custody, waive her constitutional rights without the attorney being present.³⁶ The court, this time unanimous, explained that the rule of indelibility was intended to provide a buffer between the suspect and the especially coercive power of the state in a custodial setting.³⁷ Such coercive power, the court reasoned, is absent where the suspect, at the time she requests an attorney, is not in custody. The need for counsel in that circumstance is substantially diminished.³⁸ The court's rationale — advanced to permit a *custodial waiver* or *withdrawal* of such a request for counsel — evoked no dissent.³⁹

31. *Id.* at 352, 558 N.E.2d at 1024, 559 N.Y.S.2d at 487.

32. *Id.* at 360, 558 N.E.2d at 1028, 559 N.Y.S.2d at 491.

33. *Id.* (citing Sol Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 ST. JOHN'S L. REV. 445 (1985) (Chief Judge Wachtler, a dissenter in *Bartolomeo*, was a member of the *Bing* majority)).

34. *Id.* at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

35. 75 N.Y.2d 517, 553 N.E.2d 1008, 554 N.Y.S.2d 460 (1990).

36. *Id.* at 522, 553 N.E.2d at 1012, 554 N.Y.S.2d at 464.

37. *Id.*

38. *Id.*

39. *Id.* It might well have been argued that the court's reasoning, while perhaps relevant to permitting *non-custodial waivers* of the right to counsel, explains little about

2. Right to Confront

In *People v. Cintron*,⁴⁰ the Court of Appeals, relying largely on the several concurring opinions at the Supreme Court in *Coy v. Iowa*,⁴¹ upheld a state statute⁴² authorizing the use of live, two-way, closed-circuit television to present the testimony of child witnesses in sex crime cases, where the child might be

permitting *custodial waivers* — whether or not the initial requests for counsel were non-custodial. The coercive power of the state, even if absent when a suspect requests counsel, such as in a non-custodial setting, is certainly not absent when the suspect is thereafter placed into custody and, *in that setting*, as in *Davis*, withdraws the request.

There were several other right to counsel decisions in 1990. In *People v. Wicks*, 76 N.Y.2d 128, 556 N.E.2d 409, 556 N.Y.S.2d 970 (1990), the court, in an unsigned *per curiam* opinion, held that harmless error analysis is applicable to the failure to provide counsel at a preliminary hearing that is intended only to determine whether a defendant could be held for action by a grand jury. *Id.* at 130-31, 556 N.E.2d at 409-10, 556 N.Y.S.2d at 970-71. The court explained that the outcome of such a hearing does not necessarily affect the fairness of the subsequent trial and that, in any event, if it did, the error would not be harmless and would then require reversal. *Id.* at 133, 556 N.E.2d at 411, 556 N.Y.S.2d at 972. In dissent, Judge Titone, joined by Judge Kaye, argued that harmless error analysis is inappropriate because of the impossibility of determining what an attorney might have done if present at the preliminary hearing, especially since such hearings provide a rare opportunity for discovery, cross-examining prosecution witnesses, and subpoenaing other witnesses whom the prosecution has elected not to summon. *Id.* at 137-38, 556 N.E.2d at 414, 556 N.Y.S.2d at 975.

Additionally, in *People v. Gonzales*, 75 N.Y.2d 938, 554 N.E.2d 1269, 555 N.Y.S.2d 681, *cert. denied*, 111 S. Ct. 99 (1990), the court, in an unsigned memorandum, refused, on the spontaneous utterance theory, to suppress the statements of a Spanish-speaking defendant who, after asking the court-appointed interpreter at an arraignment whether he could speak and after being told yes, proceeded to admit that he had killed the man he was accused of murdering. *Id.* at 939-40, 554 N.E.2d at 1270, 555 N.Y.S.2d at 682. In lone dissent, Judge Bellacosa argued that an accused who asks to speak in a judicial setting should be warned against doing so in the absence of counsel as part of the court's responsibility to safeguard the accused's rights. *Id.* at 941-42, 554 N.E.2d at 1271-72, 555 N.Y.S.2d at 683-84 (Bellacosa, J., dissenting).

Finally, in *People v. LaClere*, 76 N.Y.2d 670, 564 N.E.2d 640, 563 N.Y.S.2d 30 (1990), the single right to counsel case reviewed herein in which the defendant's claim of violation was sustained, the unanimous Court of Appeals, speaking through Judge Bellacosa, suppressed the evidence of a pre-accusatory, investigatory lineup conducted in the absence of counsel; the police officers had disregarded counsel's notification, relayed through a presiding judge on an unrelated matter, that counsel represented the defendant and that no statements should be taken in his absence. *Id.* at 672-73, 564 N.E.2d at 641, 563 N.Y.S.2d at 31.

40. 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990).

41. 487 U.S. 1012 (1988). See *Cintron*, 75 N.Y.2d at 257-59, 551 N.E.2d at 566-67, 552 N.Y.S.2d at 73-74.

42. See N.Y. CRIM. PROC. LAW § 65.20 (McKinney & Supp. 1991).

traumatized if required to testify inside the courtroom.⁴³ Initially, the court, in an opinion by Judge Hancock, rejected the claim that criminal defendants are absolutely entitled to face-to-face confrontation with child witnesses.⁴⁴ The "State's manifest interest in protecting the child witness in child sexual abuse prosecutions,"⁴⁵ wrote Judge Hancock, justifies "some infringement of a defendant's confrontational rights" under the state, as well as the federal, constitution.⁴⁶

In considering the constitutionality of the statute, the court in *Cintron* was guided by two major considerations: (1) infringement of confrontational rights must be justified by individualized necessity; and (2) the infringement must be kept to a minimum.⁴⁷ In the court's view, the statute met both criteria.⁴⁸ The physical arrangements and technology prescribed by the statute ensure that the televised testimony is as close to face-to-face confrontation in the courtroom as is reasonably feasible. The television must be two-way; the judge, jury and defendant must be able to see and hear the child witness; the images of the jury and the defendant must be transmitted simultaneously to the witness; the judge must be in full visual and auditory contact with the witness; and cross examination must be possible to the same extent as if the child were in the courtroom.⁴⁹

With regard individualized necessity, the court acknowledged that it was construing the statute to avoid possible constitutional infirmity.⁵⁰ Under the court's construction, before a motion to permit closed-circuit testimony may be granted — whether that motion is made prior to or during trial -- the trial judge must find by clear and convincing evidence, and not merely by her own subjective observations, that the child witness is "vulnerable."⁵¹ Thus the judge must find that the witness would likely suffer mental or emotional trauma

43. *Cintron*, 75 N.Y.2d at 256, 551 N.E.2d at 567, 552 N.Y.S.2d at 72.

44. *Id.* at 259, 551 N.E.2d at 567, 552 N.Y.S.2d at 74.

45. *Id.*

46. *Id.* at 259-60, 551 N.E.2d at 567-68, 552 N.Y.S.2d at 74-75.

47. *Id.* at 258, 551 N.E.2d at 567, 552 N.Y.S.2d at 74.

48. *Id.* at 261, 551 N.E.2d at 569, 552 N.Y.S.2d at 76.

49. *Id.* at 260-61, 551 N.E.2d at 568-69, 552 N.Y.S.2d at 75.

50. *Id.* at 260, 551 N.E.2d at 567, 552 N.Y.S.2d at 75.

51. *Id.* at 262-63, 551 N.E.2d at 569-70, 552 N.Y.S.2d at 76-77.

if the motion is not granted, and that such trauma would be the result of extraordinary circumstances.⁵² Additionally, the trial judge must be satisfied that the defendant's rights to an impartial jury and to confrontation would not be impaired.⁵³

Despite the Court of Appeal's holding that the statute is facially valid as construed, it nevertheless reversed the defendant's conviction in *Cintrón* on the ground that the trial judge had based the determination of vulnerability solely on his subjective impressions of the child witness.⁵⁴

In *People v. Hults*,⁵⁵ the court held that a complaining witness's post-hypnotic statements, even though inconsistent with her trial testimony, could not be used by the criminal defendant for impeachment, because such statements are inherently unreliable.⁵⁶ The defendant in *Hults* had argued that such a limitation impermissibly interfered with his constitutional right to cross examine a prosecution witness.⁵⁷ The majority, however, speaking through Judge Alexander, upheld the trial judge's ruling to preclude the use of the post-hypnotic statements.⁵⁸ The court reasoned that "the scope of cross-examination is within the sound discretion of the Trial Judge and like the exclusion of a physically coerced statement, the exclusion of an inherently unreliable hypnotic statement may be within the Judge's discretion."⁵⁹

Judge Hancock, joined by Judge Titone, dissented on the

52. *Id.*

53. *Id.*

54. *Id.* at 265, 551 N.E.2d at 571, 552 N.Y.S.2d at 78. Judge Alexander, concurring separately, opined that before closed-circuit television procedures could be used, there must be an additional showing, by clear and convincing evidence, that the jury's ability to assess the demeanor and credibility of the child witness would not be impaired. *Id.* at 267-68, 551 N.E.2d at 572-73, 552 N.Y.S.2d at 79-80. He also expressed "grave reservations" in light of present technological limitations — especially the inadequacies of closed-circuit transmissions — whether the statute could in fact ever be constitutionally applied. *Id.* at 272, 551 N.E.2d at 575, 552 N.Y.S.2d at 82.

In lone dissent, Judge Bellacosa argued that the conviction should have been affirmed on the ground that the trial judge's observations provided legally sufficient support for his finding of vulnerability. *Id.* at 272-76, 551 N.E.2d at 575-78, 552 N.Y.S.2d at 82-85.

55. 76 N.Y.2d 190, 556 N.E.2d 1077, 557 N.Y.S.2d 270 (1990).

56. *Id.* at 192-93, 197-98, 556 N.E.2d at 1078, 557 N.Y.S.2d at 271.

57. *Id.* at 196, 556 N.E.2d at 1080, 557 N.Y.S.2d at 273.

58. *Id.* at 199, 556 N.E.2d at 1082, 557 N.Y.S.2d at 275.

59. *Id.* (citations omitted).

ground that the defendant's state and federal confrontation rights had been unduly restricted.⁶⁰ According to the dissenters, there was no strong state interest, as required by both the Court of Appeals and the Supreme Court, to justify the infringement.⁶¹ Judge Hancock elaborated that even if, as the majority claimed, post-hypnotic recollections are inherently unreliable and unreliable statements are inadmissible as prior inconsistencies:

[That] hardly provides a compelling reason for denying a criminal *defendant* the opportunity to confront a *prosecution witness* with *her hypnotic statement* which not only conflicts with her trial testimony, but also *exculpates the defendant*. At the least, something more than an evidentiary rule of general application is necessary to limit the exercise of a basic trial right.⁶²

60. *Id.* at 200, 556 N.E.2d at 1083, 557 N.Y.S.2d at 276 (Hancock, J., dissenting). Judge Hancock also argued that, contrary to the majority's assertion, post-hypnotic recollections are not *necessarily* unreliable, but simply not yet proven to be sufficiently reliable to "be used by the *prosecution* as evidence to convict the defendant." *Id.* at 201, 556 N.E.2d at 1083, 557 N.Y.S.2d at 276. Judge Hancock added that even if post-hypnotic recollections are unreliable, that is irrelevant where a recollection is used solely for impeachment as a prior inconsistent statement, because "[i]t is [then] not offered for its truth; its reliability as an assertion of the truth is entirely beside the point." *Id.* at 202, 556 N.E.2d at 1084, 557 N.Y.S.2d at 277. With regard to the majority's analogy to involuntarily obtained confessions, Judge Hancock emphasized that such confessions were precluded from impeachment and every other use, "not because of any lack of probative value, but because of the core due process violation involved." *Id.* at 203, 556 N.E.2d at 1085, 557 N.Y.S.2d at 278.

61. 61. *Id.* at 204, 556 N.E.2d at 1085, 557 N.Y.S.2d at 278.

62. *Id.* In another confrontation rights case, *Matter of Laureano v. Kuhlman*, 75 N.Y.2d 141, 550 N.E.2d 437, 551 N.Y.S.2d 184 (1990), the unanimous court, in an opinion by Chief Judge Wachtler, rejected a prison inmate's claim that prison authorities "violated due process" [sic — federal or state?] when they denied his request in a disciplinary proceeding to call the confidential informant to testify. *Id.* at 147, 550 N.E.2d at 440, 551 N.Y.S.2d at 187. The record showed that the hearing officer feared reprisal against the informant if he were exposed. *Id.* at 148, 550 N.E.2d at 441, 551 N.Y.S.2d at 188. According to the court, that was justification for denying the inmate's request, and "the Constitution [sic — federal or state?] imposes no heavier burden." *Id.* It is not clear whether the decision in *Laureano* had any independent state constitutional basis, despite the citation to some New York precedents. References throughout the court's opinion to "the Constitution" and reliance primarily on Supreme Court case law would suggest — albeit not unequivocally — that the court rested its decision solely on federal law.

3. *Right to be Present*

In *People v. Cain*,⁶³ the court held that the defendant's state and federal due process right to be present at all material stages of trial was violated when the trial judge, in the defendant's absence and prior to "accepting" the jury's guilty verdict, discussed his jury instructions with a single juror who had indicated reservations during a poll on the verdict.⁶⁴ The judge had invited the prosecutor and defense counsel to attend the post-verdict conference; he ended the conference and announced his "acceptance" of the verdict after the juror indicated that he was no longer confused and was satisfied with his vote of guilty.⁶⁵

Speaking through Judge Titone, the Court of Appeals ruled that, under these facts, where the actions of the judge made clear that the trial was still ongoing during the pendency of the post-verdict session, the defendant had a constitutional right to be personally present — not merely through his attorney.⁶⁶ The *Cain* majority concluded that, because prior case law established that actual prejudice is irrelevant where this "absolute" right is concerned,⁶⁷ the trial judge's failure to honor it mandated a reversal.⁶⁸

Two months later, however, in *People v. Harris*,⁶⁹ the court rejected a right-to-be-present claim on the ground that the communication between the judge and the jury was purely ministerial.⁷⁰ In *Harris*, the deliberating jury had sent a note requesting a read-back of some trial testimony concerning the complainant.

63. 76 N.Y.2d 119, 556 N.E.2d 141, 556 N.Y.S.2d 848 (1990).

64. *Id.* at 123-24, 556 N.E.2d at 143, 556 N.Y.S.2d at 850.

65. *Id.* at 122-23, 556 N.E.2d at 142-143, 556 N.Y.S.2d at 849.

66. *Id.* at 124, 556 N.E.2d at 143, 556 N.Y.S.2d at 850 (citing *People v. Mehmedi*, 69 N.Y.2d 759, 760, 505 N.E.2d 610, 611, 513 N.Y.S.2d 100, 101 (1986)).

67. *Id.* at 124, 556 N.E.2d at 143, 556 N.Y.S.2d at 850.

68. *Id.* at 124, 556 N.E.2d at 144, 556 N.Y.S.2d at 851. Judge Simons, dissenting in part, concurred with the majority on the state constitutional right to be present "because defendant was absent during a material part of the trial." *Id.* at 125, 556 N.E.2d at 144, 556 N.Y.S.2d at 851. Judge Bellacosa, however, disagreed on that issue, arguing that the post-verdict session "had absolutely nothing to do with the integrity of the verdict." *Id.* at 127, 556 N.E.2d at 145, 556 N.Y.S.2d at 852. He also argued that the "unwarranted" result reached by the majority "proves the danger of developing per se procedural rules which are then applied and extended unreasonably and preciously." *Id.* at 127, 556 N.E.2d at 145, 556 N.Y.S.2d at 852.

69. 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990).

70. *Id.* at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

The judge, accompanied by the prosecutor and defense counsel, went to the door of the jury room and asked whether the request was for the victim's testimony.⁷¹ In an unsigned memorandum, the majority held that the defendant's presence during that communication bore no relation to defending the charges and, therefore, defendant's presence was not constitutionally required.⁷² This "ministerial communication," the court reasoned, "was wholly unrelated to the substantive legal or factual issues of the trial."⁷³

Taking issue with the majority, Judge Titone, joined by Judge Kaye in dissent, found the court's reasoning, "to say the least, puzzling, since the colloquy directly concerned which portion of the trial testimony would be reread — clearly a matter of substance."⁷⁴ Noting that the court had recently held that a one-sentence directive to the jury to continue deliberating could not be characterized as merely "ministerial,"⁷⁵ Judge Titone argued that, *a fortiori*, neither could the task of clarifying a jury's request for testimony.⁷⁶ Such a task demands "specialized judicial discretion" in framing the clarifying questions, avoiding potentially prejudicial remarks, and ultimately deciding what exactly the jurors want.⁷⁷

Moreover, added Judge Titone, a personally present defendant who has himself heard the testimony at trial and observed the jurors' reactions might well have insights about the jury's inquiry, the clarifying questions, or the appropriate response to the jury's request.⁷⁸ Because the "fullness of [the defendant's] opportunity to defend is [thus] unquestionably implicated when the defendant is excluded from a 'clarifying colloquy' such as this one,"⁷⁹ Judge Titone concluded, the state and federal due process requirements of the right to be present at trial were not

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

72. *Id.* at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

73. *Id.*

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

75. *Id.* at 813, 559 N.E.2d at 662, 559 N.Y.S.2d at 969 (citing *People v. Torres*, 72 N.Y.2d 1007, 1009, 531 N.E.2d 635, 636, 534 N.Y.S.2d 914, 915 (1988)).

76. *Id.* at 814, 559 N.E.2d at 663, 559 N.Y.S.2d at 969.

77. *Id.*

78. *Id.*

79. *Id.* at 815, 559 N.E.2d at 663, 559 N.Y.S.2d at 969 (quoting *Snyder v. Mass.*, 291 U.S. 97, 105-106 (1934)).

satisfied.⁸⁰

B. *Criminal Justice: Procedural Safeguards*

1. *Investigation*

In *People v. Dunn*,⁸¹ the Court of Appeals ruled that, as a matter of state law, police use of specially trained narcotics detection dogs in the common hallways of an apartment building, for the purpose of determining whether illegal contraband is present inside private residences, must be justified by reasonable suspicion.⁸² Concluding that such hallway "canine sniffs" do not constitute searches under federal case law and, therefore, are not subject to Fourth Amendment restrictions,⁸³ the court turned to the New York Constitution. Judge Titone, writing for the majority, noted that the Court of Appeals "has not hesitated to interpret article I, § 12 independently of its Federal counterpart"⁸⁴ when Supreme Court decisions have "threatened to undercut the right of our citizens to be free from unreasonable government intrusions."⁸⁵ Because, in the Court of Appeals' view, applicable Supreme Court precedent "does just that", New York would take a different course.⁸⁶

Rejecting the Supreme Court's analysis in *United States v. Place*,⁸⁷ Judge Titone opined that the fact that an investigative

80. *Id.* at 816, 559 N.E.2d at 664, 559 N.Y.S.2d at 970. In another right-to-be-present decision, *People v. Brooks*, 75 N.Y.2d 898, 553 N.E.2d 1328, 554 N.Y.S.2d 818 (1990), the court, in a brief unsigned memorandum, unanimously held that it was reversible error for the trial judge to proceed with summations and charge to the jury in defendant's absence, only thirty-seven minutes after trial was scheduled to recommence, where the record revealed no inquiry into defendant's absence nor any facts or reasons relied upon by the judge to support a determination that defendant's absence was deliberate, and therefore, that the defendant had forfeited his right to be present. *Id.* at 899, 553 N.E.2d at 1329, 554 N.Y.S.2d at 819.

81. 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990).

82. *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

83. *Id.* at 23, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390.

84. *Id.* at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391. Article I, § 12 of the New York State Constitution is the identical counterpart of the federal Fourth Amendment.

85. *Id.* at 24, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

86. *Id.* at 23, 564 N.E.2d at 1056, 563 N.Y.S.2d at 390 (citing *U.S. v. Place*, 462 U.S. 696 (1983) [an airport canine sniff held not subject to Fourth Amendment restrictions] and *United States v. Jacobsen*, 466 U.S. 109 (1984) [government conduct revealing contraband but no other private facts does not constitute a Fourth Amendment search]).

87. *Id.* See also 462 U.S. at 707.

procedure, such as the "canine sniff", only discloses evidence of criminality is not significant in determining whether the procedure constitutes a search.⁸⁸ Though the procedure may be relatively "discriminate and nonintrusive," Judge Titone reasoned, nevertheless "it remains a way of detecting the contents of a private place."⁸⁹ The proper focus of analysis, he asserted for the majority, is not what the government investigative technique might uncover, but whether the technique intrudes into an area of reasonably expected privacy.⁹⁰ Thus focused, the analysis makes "clear that the use of the trained canine outside defendant's apartment constituted a search," because it revealed "information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy."⁹¹

The court's conclusion in *Dunn* was supported, not only by the "more appropriate"⁹² analysis, but also by fundamental policy considerations which the court derived from state constitutional notions of protected privacy.⁹³ Judge Titone explained:

To hold otherwise, we believe would raise the specter of the police roaming indiscriminately through the corridors of public housing projects with trained dogs in search of drugs. Such an Orwellian notion would be repugnant under our State Constitution. "[T]he State Constitution protects the privacy interests of the people of our State . . . against the *unfettered discretion* of government officials to search or seize."⁹⁴

Having thus explained why a "canine sniff" was to be treated as a "search" under state law, the court nonetheless held that neither a warrant nor probable cause was required.⁹⁵ Inasmuch as a canine sniff is less intrusive than a full-blown search — i.e., "[i]t does not entail entry into the premises or

88. *Dunn*, 77 N.Y.2d at 24, 564 N.E.2d 1057, 563 N.Y.S.2d 391.

89. *Id.* at 24-25, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391 (citing *Jacobsen*, 466 U.S. at 140-141 (Brennan, J., dissenting)).

90. *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 25-26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392 (quoting *People v. Belton*, 55 N.Y.2d 49, 52, 447 N.Y.S.2d 873, 874, 432 N.E.2d 745, 746 (1982) (Cooke, C. J.) (emphasis in *Dunn*) (citations omitted)).

95. *Id.* at 26, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392.

exposure of one's personal effects"⁹⁶ — the court concluded that a lesser justification was required and held that reasonable suspicion was sufficient.⁹⁷ The court in *Dunn* also concluded that, under the facts presented, the police did have reasonable suspicion that defendant's apartment contained illegal drugs, and thus, the canine sniff in the common hallway did not violate the state constitution.⁹⁸

In another Court of Appeals decision, *People v. Centano*,⁹⁹ the court rejected the defendant's claim that his interrogation was custodial and, therefore, that his non-Mirandized statements should have been suppressed.¹⁰⁰ Applying the general rule that the Court of Appeals can overturn a trial court's factual findings, left undisturbed by the Appellate Division, only if the supporting proof is insufficient as a matter of law,¹⁰¹ the majority held that the evidence in the record sufficed to permit the finding below that the interrogation was non-custodial.¹⁰²

The majority's unsigned, two-paragraph memorandum evoked a vehement dissent from Judge Titone who was joined by Judges Alexander and Hancock. "[W]e are still bound to examine the conclusions of the lower courts from a realistic view-

96. *Id.*

97. *Id.*

98. *Id.* at 26-27, 564 N.E.2d at 1059, 563 N.Y.S.2d at 393.

Judges Simons and Bellacosa concurred in result only, in a one line addition to the court's remittitur, "stress[ing] that in their view the sniff by a trained police dog in the hallway outside defendant's apartment did not constitute a search within the meaning of the Fourth Amendment of the United States Constitution or New York Constitution, article I, § 12." *Id.* at 27, 564 N.E.2d at 1059, 563 N.Y.S.2d at 393.

In *People v. Natal*, 75 N.Y.2d 379, 553 N.E.2d 239, 553 N.Y.S.2d 650 (1990), *cert. denied* 111 S. Ct. 169 (1990), another state constitutional search and seizure case, a unanimous court, in an opinion by Judge Kaye, upheld the validity of a warrantless inspection of the defendant's clothing and personal effects which had previously been inventoried and searched in the course of a concededly lawful routine procedure at the time of his arrest and placement into pre-trial confinement. Because the disputed items were "already fully exposed to view and identified, in accordance with law," their subsequent transfer to the district attorney, solely for his use as evidence at trial, did not, in the court's view, constitute an intrusion into any remaining expectation of privacy the defendant could reasonably and legitimately have entertained. *Id.* at 384, 553 N.E.2d at 241, 553 N.Y.S.2d at 652.

99. 76 N.Y.2d 837, 559 N.E.2d at 1280, 560 N.Y.S.2d at 121 (1990).

100. *Id.* at 838, 559 N.E.2d at 1281, 560 N.Y.S.2d at 122.

101. *Id.* (citing *People v. Williamson*, 51 N.Y.2d 801, 802 (1980) (findings must be based on the proper legal standard and supported by evidence in the record)).

102. *Id.*

point," Judge Titone chided, "and to overturn those conclusions when they rest on inferences that go beyond the borders of ordinary common sense."¹⁰³ Such, the dissenters argued, was the case here. The defendant was at the stationhouse for twenty-eight hours; he was at all times in the presence of a police officer, even in the bathroom;¹⁰⁴ after he "failed" the first polygraph test, he said that he no longer wished to cooperate; he was neither advised that he could leave nor advised that he could end the questioning; instead, he was "asked" to remain to take another polygraph test and to stay overnight; the defendant complied and, the next day, he was advised that he had "failed" the second polygraph.¹⁰⁵ Only then did the defendant begin to confess.¹⁰⁶ By that time, the dissenters insisted, "[n]o sensible person [in defendant's] shoes could have rationally believed that he could simply have thanked the police for their trouble and walked away."¹⁰⁷

In closing, Judge Titone explained his primary motivation for writing a full-blown dissent in an essentially fact-based case.¹⁰⁸ "My underlying concern," he said, "is for the degree to which the 'mixed question' doctrine¹⁰⁹ may have impaired our ability as a court of last resort to supervise the lower courts' enforcement of well-settled constitutional principles."¹¹⁰ The dissenters stressed that, while the mixed-question rule serves the salutary purpose of judicial economy,¹¹¹ it ought not to insulate from the court's review factual holdings, such as those in *Centano*, that defy "common sense and experience."¹¹² The court should reject such "findings," urged an adamant Judge Titone, and thereby demonstrate its "commitment to the en-

103. *Id.* at 841, 559 N.E.2d at 1283, 560 N.Y.S.2d at 124.

104. *Id.* at 839, 559 N.E.2d at 1282, 560 N.Y.S.2d at 123.

105. *Id.*

106. *Id.*

107. *Id.* at 840, 559 N.E.2d at 1282, 560 N.Y.S.2d at 123.

108. *Id.*

109. *Id.* See also *People v. Harrison*, 57 N.Y.2d 470, 477-78, 443 N.E.2d 447, 451, 457 N.Y.S.2d 199, 203 (1982) (on issues such as reasonable suspicion, probable cause, and custody, in which fact and law are closely intertwined, the determinations of the lower courts, as on pure factual questions, will be upheld as long as they are supported by some evidence in the record).

110. *Centano*, 76 N.Y.2d at 840, 559 N.E.2d at 1282, 560 N.Y.S.2d at 123.

111. *Id.* at 841-42, 559 N.E.2d at 1282-83, 560 N.Y.S.2d at 124.

112. *Id.*

forcement of the constitutional rights it posits.”¹¹³

In *People v. Sirno*,¹¹⁴ the court again affirmed “undisturbed findings” below,¹¹⁵ again in an unsigned memorandum — this time in one paragraph — over another forceful dissent by Judge Titone. In *Sirno*, the court held that the Spanish speaking defendant implicitly waived his *Miranda* rights by, first, writing “yes” next to each statement on a card, which described his rights in his language, and second, by proceeding to give the police a statement.¹¹⁶ Noting that New York case law permits waivers of *Miranda* rights to be inferred,¹¹⁷ the majority asserted that “it is difficult to imagine that [the defendant’s] . . . cooperation could be interpreted as anything other than [his] intention to waive those rights.”¹¹⁸

But in Judge Titone’s view, this time alone in dissent, “there is simply no circumstance in this case — apart from the bare fact of defendant’s statement itself — from which a waiver of rights could be inferred.”¹¹⁹ Hence, according to Judge Titone, the majority could not legitimately “resort to the talismanic ‘mixed question’ doctrine,” which applies only when the findings below are supported by the record.¹²⁰ The Spanish form given the defendant did not ask whether he understood the rights described.¹²¹ Thus, his writing “yes” or “no” in English next to each statement, as he was told to do by the police, “cannot be construed as an affirmative acknowledgement of his understanding that the law would protect him if he chose not to speak.”¹²² Nor, in Judge Titone’s view, could a waiver validly be inferred from the defendant’s failure to ask any questions — conduct amounting to nothing more than silence which

113. *Id.* at 841, 559 N.E.2d at 1283, 560 N.Y.S.2d at 124.

114. 76 N.Y.2d 967, 565 N.E.2d 479, 563 N.Y.S.2d 730 (1990).

115. *Id.* at 968, 565 N.E.2d at 480, 563 N.Y.S.2d at 731 (1990).

116. *Id.*

117. *Id.* (citing *People v. Davis*, 55 N.Y.2d 731, 431 N.E.2d 634, 447 N.Y.S.2d 149 (1981) (defendant’s arrest on eleven prior occasions permitted the inference that he understood his conduct to constitute a *Miranda* waiver)).

118. *Id.*

119. *Id.* at 970, 565 N.E.2d at 481, 563 N.Y.S.2d at 732.

120. *Id.*

121. *Id.*

122. *Id.*

has no permissible evidentiary value.¹²³ Finally, complained Judge Titone, the majority's proposition — that a defendant's cooperation is the clearest manifestation of an implied waiver¹²⁴ — “inverts the well-established burden of proof” on the prosecution, and effectively requires defendants to disprove the inference of waiver, now permitted, whenever they speak after *Miranda* warnings are given.¹²⁵

2. Grand Jury and Trial

In *People v. Menchetti*,¹²⁶ the court held that waiver of the right to grand jury indictment, by pleading to an information filed by the district attorney, is authorized by the state constitution,¹²⁷ even if the information only charges a lesser included offense of the crime charged in the felony complaint.¹²⁸ The defendant argued that the information to which he had pleaded was defective because it did not charge the same offense as that in the felony complaint.¹²⁹ Acknowledging that the state constitutional requirement of prosecution by indictment “implicates the personal rights of the defendant as well as a fundamental

123. *Id.* at 968, 970, 565 N.E.2d at 480, 563 N.Y.S.2d at 732 (citing *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (no inference of waiver permitted “simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”)).

124. *Id.* at 968, 565 N.E.2d at 481-82, 563 N.Y.S.2d at 733.

125. *Id.* at 971, 565 N.E.2d at 482, 563 N.Y.S.2d at 733. In *People v. Basora*, 75 N.Y.2d 992, 556 N.E.2d 1070, 557 N.Y.S.2d 263 (1990), another case dealing with implications and inferences, the court held that no legitimate inference could be drawn from the defendant's smiling when he was arrested. Relying in part on the federal Fifth Amendment right to remain silent, the court ruled that, as an evidentiary matter, a defendant's smile is too ambiguous to have any communicative value. *Id.* at 993-994, 556 N.E.2d at 1070, 557 N.Y.S.2d at 263.

126. 76 N.Y.2d 473, 561 N.E.2d at 536, 560 N.Y.S.2d at 760 (1990).

127. *Id.* at 476, 561 N.E.2d at 537, 560 N.Y.S.2d at 761. See also Article I, Section VI which provides, in pertinent part:

a person held for the action of grand jury upon a charge for an [infamous] offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel.

N.Y. CONST. Art. I, §VI.

128. *Menchetti*, 76 N.Y.2d at 474, 561 N.E.2d at 537, 560 N.Y.S.2d at 761.

129. *Id.* at 475, 561 N.E.2d at 537, 560 N.Y.S.2d at 761.

public right,"¹³⁰ and that the constitution provides only a single exception to that requirement,¹³¹ the court nevertheless noted that "nothing in article I, § VI [of the New York Constitution] mandates that the superior court information charge each and every offense in the felony complaint."¹³²

Instead, explained Judge Alexander in a unanimous decision, the constitutional provision permits the waiver of indictment "upon a charge" as long as the defendant consents to prosecution "on an information."¹³³ Moreover, the court reasoned, the provision contemplates that the offense charged in the information will not necessarily mirror that in the complaint; it "requires that the [defendant's] written waiver expressly state the charges to be included in the information."¹³⁴ Hence, the court concluded, the information need only charge *some* offense for which the defendant was being held for grand jury action, which, under the Criminal Procedure Law,¹³⁵ includes lesser included offenses as well as the greater one explicitly charged in the felony complaint.¹³⁶

130. *Id.* at 476, 561 N.E.2d at 538, 560 N.Y.S.2d at 762.

131. *Id.*

132. *Id.* at 477, 561 N.E.2d at 538, 560 N.Y.S.2d at 762.

133. *Id.* (emphasis in original).

134. *Id.*

135. See N.Y. CRIM. PROC. LAW §§ 195.65, 210.20 [1][b], 210.30 [1].

136. *Menchetti*, 76 N.Y.2d at 475, 561 N.E.2d at 537, 560 N.Y.S.2d at 761. The Court of Appeals decided two other interesting cases on indictment waivers in 1990; both, however, under the statutory scheme found in N.Y. CRIM. PROC. LAW § 195.10. In *People v. Boston*, 75 N.Y.2d 585, 554 N.E.2d 64, 555 N.Y.S.2d 27 (1990), the unanimous court, speaking through Judge Kaye, nullified the defendant's plea to an information on the ground that the purported waiver of indictment violated the unequivocal language of section 195.10 that the waiver be exercised "prior to the filing of an indictment by the Grand Jury." *Id.* at 586-87, 554 N.E.2d at 65, 555 N.Y.S.2d at 28.

But five months later, in an unsigned memorandum in *People v. D'Amico*, 76 N.Y.2d 877, 562 N.E.2d 488, 561 N.Y.S.2d 411 (1990), a divided court upheld the defendant's plea to an information, even though he had already been indicted, on the ground that a new felony complaint had been filed after the original indictment. The majority explained that *Boston* did not decide whether the waiver procedure is available when, albeit after indictment, the defendant is held again for grand jury action on the basis of a new felony complaint. According to the majority, because there was a new order holding the defendant in this case, the predicate for a waiver existed anew. *Id.* at 880, 562 N.E.2d at 490, 561 N.Y.S.2d at 413.

Not surprisingly, Judge Kaye, in a dissent joined by Judges Alexander and Hancock, took issue. "We are again asked the same question [as in *Boston*] but, remarkably, give the opposite answer." *Id.* at 881, 562 N.E.2d at 490, 561 N.Y.S.2d at 413. (Kaye, J., dissenting). As for the critical distinction between this case and *Boston* relied upon by

In *People v. Scalza*¹³⁷ and *People v. Carter*,¹³⁸ the Court of Appeals rejected due process claims that were based, respectively, upon a non-judge's presiding over a pre-trial suppression hearing¹³⁹ and a non-lawyer's prosecution of the government's case at the grand jury and at trial.¹⁴⁰ In *Scalza*, the defendant was convicted in county court after his suppression motions were heard and denied by a "judicial hearing officer" [hereinafter *JHO*]. Under Criminal Procedure Law § 255.20(4), the judge presiding over a criminal case may refer any pre-trial motion to a hearing officer who, although not authorized to render the final decision, does make factual and legal conclusions for use by the court.¹⁴¹ The defendant in *Scalza* argued that the referral of any part of the judicial function to a non-judge violated the state constitutional provision establishing the county courts, as well as state constitutional due process.¹⁴²

The majority, in an opinion by Judge Bellacosa, noted that the state constitutional provisions governing the county courts "contain no such express or implied prohibitory language" precluding referrals to *JHOs*.¹⁴³ Moreover, the majority continued,

the majority — i.e., that the defendant was being held for grand jury action on a new felony complaint — Judge Kaye's response was sharp: "No such order was issued . . . [The new] felony complaint was filed merely to facilitate the plea bargain, not to hold this defendant." *Id.* at 882, 562 N.E.2d at 491, 561 N.Y.S.2d at 414. The majority's "aboutface," Judge Kaye warned, "cannot engender respect for this court's holdings" and, moreover, means that prosecutors can now obtain a waiver in any case "[b]y the simple expedient of filing a felony complaint." *Id.*

137. 76 N.Y.2d 604, 563 N.E.2d 705, 562 N.Y.S.2d 14 (1990).

138. 77 N.Y.2d 95, 566 N.E.2d 119, 564 N.Y.S.2d 992 (1990).

139. *Scalza*, 76 N.Y.2d at 606, 563 N.E.2d at 706, 562 N.Y.S.2d at 15.

140. *Id.* at 606, 563 N.E.2d at 705-06, 562 N.Y.S.2d at 14-15.

141. Section 255.20(4) of the New York Civil Practice Laws and Rules provides in pertinent part:

Any pre-trial motions . . . may be referred by the court to a judicial hearing officer who shall entertain it in the same manner as a court. In the discharge of this responsibility, the judicial officer shall have the same powers as a judge of the court making the assignment, except that the judicial officer shall not determine the motion but shall file a report with the court setting forth findings of fact and conclusions of law.

N.Y. CRIM. PROC. LAW 255.20(4) (McKinney 1982 & Supp. 1990).

142. *Scalza*, 76 N.Y.2d at 607, 563 N.E.2d at 706, 562 N.Y.S.2d at 15. The New York State Constitution sets forth the terms and conditions of county court judges and establishes the jurisdiction of these courts over all crimes and other violations of the law. N.Y. CONST. art. VI, §§ 10, 11.

143. *Id.* at 609, 563 N.E.2d at 707, 562 N.Y.S.2d at 16.

"[t]he Trial Judge always keeps the plenary power to reject, accept or modify the JHO's report"¹⁴⁴ under the statute, "and holds the tether on the case throughout the completion of the referral."¹⁴⁵ As for the due process claim under the *state* constitution, it was "readily answered,"¹⁴⁶ wrote Judge Bellacosa, who then applied a *United States* Supreme Court¹⁴⁷ precedent rejecting a *federal* due process claim against a similar referral procedure. The majority agreed with the Supreme Court that the "protections at a suppression hearing 'may' be less demanding and elaborate than the protections accorded the defendant at the trial itself."¹⁴⁸

Judge Titone dissented alone. A "judge who merely 'holds the tether' and does not personally preside at a suppression hearing," argued Judge Titone, "cannot realistically be expected accurately to perform [the essential] task" of weighing and appraising testimony.¹⁴⁹ Because the referral procedure transfers "a critical aspect of the judicial decision-making process to non-judicial officers," it effects, according to Judge Titone, an impermissible delegation of the authority that trial court judges should be exercising themselves.¹⁵⁰

Additionally, Judge Titone took issue with the majority's reliance on *federal* law to resolve the *state* due process issue. While agreeing that state, as well as federal, due process requires a balancing of interests,¹⁵¹ Judge Titone thought an independent analysis more appropriate:

[The] Supreme Court majority's decision in *United States v. Raddatz* is all but dispositive of any claims appellant might make under the Due Process Clause of the Federal Constitution. However we remain free to chart a separate course under our own State constitutional due process provisions. Although the major-

144. *Id.* at 608, 563 N.E.2d at 707, 562 N.Y.S.2d at 16.

145. *Id.* at 609, 563 N.E.2d at 707, 562 N.Y.S.2d at 16.

146. *Id.*

147. See *United States v. Raddatz*, 447 U.S. 667 (1980) (upholding the Federal Magistrates Act authorizing district court judges to refer suppression motions to magistrates who conduct hearings and make recommendations).

148. *Scalza*, 76 N.Y.2d at 609, 563 N.E.2d at 707-08, 562 N.Y.S.2d at 16-17 (quoting *Raddatz*, 447 U.S. at 679).

149. *Id.* at 612, 563 N.E.2d at 709, 562 N.Y.S.2d at 18.

150. *Id.* at 613, 563 N.E.2d at 709, 562 N.Y.S.2d at 18.

151. *Id.* at 614, 563 N.E.2d at 711, 562 N.Y.S.2d at 20.

ity has apparently chosen to follow the *Raddatz* analysis in resolving appellant's State constitutional claim, I would opt for a different approach in light of our long-standing recognition of the central importance of suppression hearings in many criminal proceedings.¹⁵²

Disagreeing with the majority that diminished protection is justified at suppression hearings because guilt or innocence is not at issue, Judge Titone rejoined that "the outcomes of suppression hearings implicate the basic liberty interests of the accused."¹⁵³ As a practical matter, wrote Judge Titone recalling Court of Appeals precedent,¹⁵⁴ "the determination of the motion to suppress often determines the ultimate question of guilt."¹⁵⁵

In *People v. Carter*,¹⁵⁶ the court refused to vacate convictions obtained by an assistant district attorney who was not a licensed lawyer. The defendants had argued, among other things, that their prosecution by a non-lawyer violated federal and state due process.¹⁵⁷ The court, speaking through Judge Hancock, noted that it was unaware of any authority supporting the claimed fundamental right of a defendant to be prosecuted

152. *Id.* at 614, 563 N.E.2d at 710-11, 562 N.Y.S.2d at 19-20 (citations omitted).

153. *Id.* at 615, 563 N.E.2d at 711, 562 N.Y.S.2d at 20.

154. *See* *People v. Anderson*, 16 N.Y.2d 282, 213 N.E.2d 445, 266 N.Y.S.2d 110 (1965) (accused has right to be present at suppression hearings no less than at trial).

155. *Scalza*, 76 N.Y.2d at 615, 563 N.E.2d at 711, 562 N.Y.S.2d at 20 (quoting *Anderson*, 16 N.Y.2d at 288, 213 N.E.2d at 448, 266 N.Y.S.2d at 114). Judge Titone also expressed his concern with the trend of replacing constitutional judges with JHOs as a way to alleviate overcrowded dockets:

While the chronic logjams in our courts, the threat of inundation and breakdown in some of the most critical parts of the justice system and the insistent public pressure to "process" cases more swiftly make [heavy reliance on non-judicial personnel] a tempting option, I am hesitant to embrace it too readily, lest "principles that were meant to endure be sacrificed to expediency."

Id. at 616-17, 563 N.E.2d at 712, 562 N.Y.S.2d at 21 (quoting *United States v. Raddatz*, 447 U.S. 667, 714 (1980) (Marshall, J., dissenting)).

Finally, the majority chose not to address the concerns thoughtfully expressed in Judge Titone's dissent. Instead, Judge Bellacosa's majority opinion concluded with this final line: "The views expressed in the dissenting opinion do not warrant direct response other than the analysis and authorities already supplied by the opinion of the Court to decide this case." *Id.* at 611, 563 N.E.2d at 708, 562 N.Y.S.2d at 17. But, of course, the majority's reliance on federal authority to answer a state issue emphatically did not answer Judge Titone's query as to why the majority did, in fact, rely on federal rather than state precedent.

156. 77 N.Y.2d 95, 566 N.E.2d 119, 564 N.Y.S.2d 992 (1990).

157. *Id.* at 106, 566 N.E.2d at 123, 564 N.Y.S.2d at 996.

by a duly admitted attorney.¹⁵⁸ Consequently, in the absence of some showing that the defendants were actually prejudiced, the court held that the fact that the prosecutor was not a lawyer did not, without more, result in any deprivation of due process.¹⁵⁹

In another dissent, Judge Titone, this time joined by Judge Alexander, argued that prosecution by a non-lawyer, rather than being a mere technical defect, operates to impair the very integrity of the grand jury process.¹⁶⁰ "[T]here can be no assurance," reasoned Judge Titone, that a legal impostor "exercised the considerable discretion that the law confers upon the District Attorney in a manner consistent with the controlling legal principles, the ethical precepts that constrain licensed attorneys and the sound judgment that licensed attorneys are presumed to possess."¹⁶¹

Warning that the grand jury process is demeaned when indictments obtained by an unlicensed, fraudulent prosecutor are

158. *Id.*

159. *Id.* at 107, 566 N.E.2d at 124, 564 N.Y.S.2d at 997.

160. *Id.* at 110, 566 N.E.2d at 126, 564 N.Y.S.2d at 999. Titone quoted the court's former observations in *People v. DiFalco*, 44 N.Y.2d 482, 377 N.E.2d 732, 406 N.Y.S.2d 279 (1987):

During the actual [Grand Jury] proceedings, the legal advisor of the Grand Jury is the District Attorney [represented by an appointed Assistant]. . . . The District Attorney [through an appointed Assistant] determines the competency of witnesses to testify . . . and must instruct the jury on the legal significance of the evidence. . . . He, in effect, determines what witnesses to present . . . and who should be excluded. These duties and powers . . . vest th[e District Attorney and the appointed Assistants] with substantial control over the Grand Jury proceedings, requiring the exercise of completely impartial judgment and discretion.

Carter, 77 N.Y.2d at 110-11, 566 N.E.2d at 126, 564 N.Y.S.2d at 999 (quoting *Di Falco*, 44 N.Y.2d at 486-87, 377 N.E.2d at 735, 406 N.Y.S.2d at 282.)

161. *Carter*, 77 N.Y.2d at 111, 566 N.E.2d at 127, 564 N.Y.S.2d at 1000 (citations omitted). Indeed, although the facts in *DiFalco* were certainly distinguishable — there, the indictments were dismissed because the special prosecutor lacked subject matter jurisdiction — the reasoning of the unanimous court in that case, in an unsigned per curiam opinion, was identical to that proffered here by Judge Titone. The *DiFalco* court said:

The basic issue on this appeal is whether the presence of an unauthorized prosecutor before a Grand Jury is sufficiently likely to result in prejudice to the defendant that dismissal of the indictment is appropriate. We find that the crucial nature of the prosecutor's role *vis à vis* the Grand Jury, particularly in view of his discretionary authority, mandates a finding that prejudice to the defendant is likely to result from the presence of an unauthorized prosecutor before the Grand Jury.

44 N.Y.2d at 485, 377 N.E.2d at 734, 406 N.Y.S.2d at 281.

not dismissed as fatally tainted, Judge Titone explained:

Given the central importance of the prosecutor's role in the Grand Jury system, I do not believe that we can, or should, accept as a proper predicate for a criminal prosecution the work product of a Grand Jury whose "legal adviser" was a person . . . who was never certified as competent by the State Board of Law Examiners, was never approved by the Committee on Character and Fitness and who himself had such little personal regard for the law that he was willing to perpetuate a 16-year fraud on both his employers and the public.¹⁶²

In *People v. Vilardi*,¹⁶³ the Court of Appeals, rejecting Supreme Court case law,¹⁶⁴ adopted a rule more protective of criminal defendants. The New York court held that prosecutorial failure to disclose exculpatory evidence *specifically* sought by a defendant requires reversal and a new trial, whenever there is a reasonable *possibility* — not probability — that the non-disclosure contributed to the conviction.¹⁶⁵

The Supreme Court, in *Brady v. Maryland*,¹⁶⁶ established the federal constitutional requirement that the prosecution disclose to the defendant all evidence in its possession that is both material and favorable to the defendant.¹⁶⁷ Subsequently, in *United States v. Agurs*,¹⁶⁸ the Supreme Court created two separate tests to determine whether the failure to disclose required reversal of a conviction.¹⁶⁹ In the case of specifically requested evidence, non-disclosure was held to require reversal whenever it "*might have affected*" the trial outcome.¹⁷⁰ On the other hand, non-disclosure in the face of a mere general request was held to require reversal only if the evidentiary material, in fact, "*create[d] a reasonable doubt that did not otherwise exist.*"¹⁷¹ Later,

162. *Carter*, 77 N.Y.2d at 112, 566 N.E.2d at 127-28, 564 N.Y.S.2d at 1000-01.

163. 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

164. See *United States v. Bagley*, 473 U.S. 667, 684 (1985) (prosecutorial failure to disclose specifically requested exculpatory evidentiary material requires a new trial only if it were "reasonably probable" that the trial outcome would have been different).

165. *Vilardi*, 76 N.Y.2d at 71, 555 N.E.2d at 917, 556 N.Y.S.2d at 520.

166. 373 U.S. 83 (1961).

167. *Id.* at 86-87.

168. 427 U.S. 97 (1976).

169. *Id.* at 103-04.

170. *Id.* at 104 (emphasis added).

171. *Id.* at 112.

in *United States v. Bagley*,¹⁷² a divided Supreme Court replaced the two-tiered approach with a single test, requiring reversal for non-disclosure only where the defendant demonstrates a "reasonable probability" that the outcome of the trial would have been different.¹⁷³

The Court of Appeals in *Vilardi* declined to adopt the single-test approach.¹⁷⁴ Instead, the court retained the "reasonable possibility"-of-prejudice test for application whenever the non-disclosed material was specifically requested.¹⁷⁵ Speaking through Judge Kaye, the court majority explained:

[This] "reasonable possibility" standard . . . essentially a reformulation of the "seldom if ever excusable" rule — is a clear rule that properly encourages compliance with these [*Brady*] obligations, and we therefore conclude that as a matter of State constitutional law it is preferable to *Bagley*. Moreover, the . . . "reasonable probability" standard — which we have chosen not to adopt as a matter of State law despite several invitations to do so — remits the impact of the exculpatory evidence to appellate hindsight, thus significantly diminishing the vital interest this court has long recognized in a decision rendered by a jury whose ability to render that decision is unimpaired by failure to disclose important evidence.¹⁷⁶

In a concurring opinion in which he elaborated his views on state constitutional differences with corresponding Supreme Court case law,¹⁷⁷ Judge Simons argued that the Court of Appeals "should not disregard the Supreme Court's decisions merely because it disagrees with them or dislikes the result reached."¹⁷⁸ Judge Simons, who was joined by Chief Judge Wachtler and Judge Bellacosa, asserted that in this area of the law, New York has no rules independent of federal precedents.¹⁷⁹ Moreover, the *Bagley* rule "strikes a fair and proper

172. 473 U.S. 667 (1985).

173. *Id.* at 682 (emphasis added).

174. *People v. Vilardi*, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 920, 556 N.Y.S.2d 518, 523 (1990).

175. *Id.*

176. *Id.* at 77-78, 555 N.E.2d at 920, 556 N.Y.S.2d at 523 (citations omitted).

177. *See id.* at 80-81, 83-84, 555 N.E.2d 915, 922, 924, 556 N.Y.S.2d 518, 525, 527 (Simons, J., concurring).

178. *Id.* at 80, 555 N.E.2d at 922, 556 N.Y.S.2d at 525.

179. *Id.* at 85, 555 N.E.2d at 925, 556 N.Y.S.2d at 528.

balance between prosecution and defense and offers the advantages of uniformity and consistency with the Federal standards in criminal proceedings"¹⁸⁰ Hence, finding "no reason to construe our State Constitution's Due Process Clause in a way different from the Due Process Clauses in the Federal Constitution," Judge Simons concluded that he would apply the federal "reasonable probability"-of-prejudice standard to determine whether a non-disclosure of *Brady* material — generally or specifically requested — justifies reversal.¹⁸¹

3. Sentencing and Appeal

In *People v. Van Pelt*,¹⁸² the court held that the severity of a sentence may not be increased upon retrial, even if by a different judge than presided at the first trial, unless justified by some new intervening fact.¹⁸³ Under Supreme Court precedent,¹⁸⁴ a harsher retrial sentence is presumptively vindictive and must be rebutted by "identifiable conduct on the part of the defendant occurring after the time of the original sentencing"¹⁸⁵ When the sentencer on retrial is different, however, a rebuttal is not required because the new sentence is not deemed an "increase," but a different sentence altogether.¹⁸⁶

In a unanimous opinion by Judge Bellacosa, the Court of Appeals in *Van Pelt* adopted a different rule. The court held that New York State Due Process "requires the application of the presumption" of "institutional" vindictiveness "as a procedural safeguard against punitively toughened sentences."¹⁸⁷ That a different judge imposed the second sentence is not dispositive. Under the state constitution it is but one factor to be weighed along with other justifications articulated on the record.¹⁸⁸

180. *Id.* at 86, 555 N.E.2d at 926, 556 N.Y.S.2d at 529.

181. *Id.* at 78-79, 555 N.E.2d at 921, 556 N.Y.S.2d at 524. Judge Simons concurred in result apparently on the ground that a reasonable probability of prejudice had been demonstrated. *Id.* (emphasis in original).

182. 76 N.Y.2d 156, 556 N.E.2d 423, 556 N.Y.S.2d 984 (1990).

183. *Id.* at 156, 556 N.E.2d at 423, 556 N.Y.S.2d at 984.

184. See *North Carolina v. Pearce*, 395 U.S. 711 (1969).

185. *Id.* at 726.

186. *Texas v. McCullough*, 475 U.S. 134, 140 (1986).

187. *Van Pelt*, 76 N.Y.2d at 161, 556 N.E.2d at 425, 556 N.Y.S.2d at 986 (emphasis added).

188. *Id.*

The only arguable justification alluded to by the retrial judge was that defendant had forced the complainant to “‘come in twice and relive the trauma’” of the violent crime.¹⁸⁹ But that, the Court of Appeals explained, was the result of errors in the first trial and of defendant’s successful appeal;¹⁹⁰ the former surely can not be blamed on the defendant,¹⁹¹ and the latter is the exercise of an important New York right.¹⁹² Absent any qualifying justification on the record, the court held in *Van Pelt* that the imposition of a harsher sentence violated state due process requirements, and therefore the defendant was entitled to resentencing.¹⁹³

C. Civil Liberties and Equality

1. Expression, Autonomy and Privacy

In *Golden v. Clark*,¹⁹⁴ the court upheld a New York City Charter provision¹⁹⁵ prohibiting a wide range of high city officials from holding any one of several significant party positions — e.g., county leader, officer of the county committee, or national or state committee member. The charter provision was challenged as violative of various state constitutional guarantees of free expression, association and equal treatment.¹⁹⁶ The court,

189. *Id.* at 162, 556 N.E.2d at 426, 556 N.Y.S.2d at 987.

190. *Id.*

191. *Id.*

192. *Id.* at 162-63, 556 N.E.2d at 425-26, 556 N.Y.S.2d at 987-88.

193. *Id.* at 158, 556 N.E.2d at 424, 556 N.Y.S.2d at 984-85. In *People v. Moissett*, 76 N.Y.2d 909, 564 N.E.2d 653, 563 N.Y.S.2d 43 (1990), another case involving the right to appeal, the court held that the record supported the conclusion that the defendant knowingly, voluntarily, and intelligently waived his right, albeit not explicitly so at the plea allocution. Counsel had advised the trial judge that the defendant was waiving any right to appeal and the defendant himself assured the judge that he understood counsel’s statements and had no questions before entering his plea. *Id.* at 911, 564 N.E.2d at 654-55, 563 N.Y.S.2d at 44-45.

194. 76 N.Y.2d 618, 564 N.E.2d 611, 563 N.Y.S.2d 1 (1990).

195. NEW YORK CITY CHARTER § 2604 (b)(15) provides in pertinent part:

No elected official, deputy mayor, . . . or other public servant who is charged with substantial policy discretion

. . . may be a member of the national or state committee of a political party, serve as an assembly district leader of a political party or serve as a chair or as an officer of the county committee or county executive committee of a political party.

196. Specifically, the plaintiffs alleged violations of Article I, § 1, [right against disfranchisement], Article I, § 8 [freedom of speech], Article I, § 9 [right of association], Article I, § 11 [equal protection], and Article II, § 1 [right to vote] of the New York State

in a majority opinion authored by Judge Simons, rejected all claims.

Ruling that the provision does not infringe upon the fundamental political and voting rights of any identifiable class,¹⁹⁷ but instead applies neutrally¹⁹⁸ — i.e., regardless of political affiliation or political viewpoint — the court held that the provision's "at most, only incidental [burdens]"¹⁹⁹ should be sustained as long as "rationally related to some conceivable and legitimate State interest."²⁰⁰ Not surprisingly, the majority had no difficulty in finding that standard satisfied. In light of the background of corruption against which the provision was enacted,²⁰¹ the legislative purposes — i.e., eliminating the conflicts that arise whenever an individual holds both partisan and political office, and reducing the opportunities for corruption that dual office-holding affords — were more than sufficient, in the court's view, to defeat the equal protection challenge.²⁰²

As for the freedoms of association and expression, the rights of political parties were not sufficiently burdened, according to the majority, to invalidate the charter provision.²⁰³ The majority, in fact, held unequivocally that "there has been *no impairment* of plaintiff political parties associational rights, either directly or

Constitution. *Golden*, 76 N.Y.2d at 623, 564 N.E.2d at 613, 563 N.Y.S.2d at 3.

To the court's evident puzzlement and displeasure, however, the plaintiffs failed to develop their state-based arguments and relied, instead, on federal case law. In a separate footnote the Court remarked:

Although plaintiffs rest their case solely on State grounds, they have not distinguished the State constitutional provisions from their Federal counterparts nor have they attempted to demonstrate how the State provisions, either singly or in combination, establish any more or greater rights than those guaranteed to the citizens of New York by the Federal Constitution. They argue only that fundamental rights guaranteed them by the State Constitution have been impaired and seek to persuade the Court that § 2604(b)(15) cannot survive strict scrutiny. Paradoxically, in doing so plaintiffs deny the applicability of the few available State precedents and rely principally on Federal law.

76 N.Y.2d at 623 n.2, 564 N.E.2d at 613 n.2, 563 N.Y.S.2d at 3 n.2 (citations omitted).

197. *Id.* at 626, 564 N.E.2d at 614-15, 563 N.Y.S.2d at 4-5.

198. *Id.* at 626, 564 N.E.2d at 615, 563 N.Y.S.2d at 5.

199. *Id.*

200. *Id.*

201. *Id.* at 627, 564 N.E.2d at 616, 563 N.Y.S.2d at 6.

202. *Id.* at 626, 564 N.E.2d at 615, 563 N.Y.S.2d at 5.

203. *Id.*

indirectly.”²⁰⁴ Not only is the provision “entirely neutral,”²⁰⁵ but it simply does not, asserted the majority, deprive political parties or their members of the rights to associate with whomever they chose, to identify their membership, to express opinions, to select an internal organization, or to select party leaders or candidates for city office — as long as the same person is not selected for both positions.²⁰⁶ Finally, regarding the expression and association rights of the individual plaintiffs, the court summarily dismissed as “de minimis” any burden imposed,²⁰⁷ and thus, had little difficulty holding such burden to be justified by the already identified important government interests.

In a forceful dissent, Judge Hancock, joined by Judge Titone, decried the majority’s “seeming break”²⁰⁸ with long standing New York tradition to provide the “broadest possible protection”²⁰⁹ to expression-related freedoms. “Unquestionably,” protested Judge Hancock, “[the provision] infringes on the rights of political parties and their adherents to select and elect candidates of their choice to positions in city government,” and at the same time “abridges the associational rights of parties [to choose their] leaders.”²¹⁰ Moreover, the “debasement of these constitutional prerogatives of political parties is *unquestionably significant*,”²¹¹ continued Judge Hancock, and there-

204. *Id.* at 628, 564 N.E.2d at 616-17, 563 N.Y.S.2d at 6-7 (emphasis added).

205. *Id.* at 628, 564 N.E.2d at 616, 563 N.Y.S.2d at 6.

206. *Id.*

207. *Id.* at 630, 564 N.E.2d at 617, 563 N.Y.S.2d at 7. Indeed, in a footnoted reply to the dissent’s charge that the majority applied a standard less onerous than strict scrutiny, the majority seemed to say that no review was necessary at all: “[S]tandards of review are applied only to provisions which impair constitutionally protected rights. Since there is no significant impairment of plaintiffs’ speech and associational rights in this case, there is no need to engage in an examination of whether [the provision] withstands strict scrutiny analysis.” *Id.* at 630 n.3, 564 N.E.2d at 618 n.3, 563 N.Y.S.2d at 8 n.3 (citations omitted).

208. *Id.* at 632, 564 N.E.2d at 619, 563 N.Y.S.2d at 9.

209. *Id.* See also *id.* at 634 n.5, 564 N.E.2d at 621 n.5, 563 N.Y.S.2d at 12 n.5.

210. *Id.* at 634, 564 N.E.2d at 620, 563 N.Y.S.2d at 10.

211. *Id.* at 636, 564 N.E.2d at 622, 563 N.Y.S.2d at 12. As put by Judge Hancock: Can there be any measure which encroaches more directly on the core freedom of a political party than one which restricts — on the basis of the candidate’s activities within the party — a political party’s power to perform the primary function for which it exists: the selection, nomination and election of persons who, in its opinion, are best suited to represent the party as candidates? And can any measure more surely curtail the autonomy of a political association than one which

fore, should be tested under strict scrutiny analysis.²¹² That test, Judge Hancock asserted, is not met.²¹³

The Charter provision, which regulates "*who the candidates and party leaders should be*,"²¹⁴ is hardly, in Judge Hancock's view, "narrowly tailored to accomplish the intended result of preventing corruption."²¹⁵ At the least, less drastic measures, such as full financial disclosure and free access to government records, are available.²¹⁶ Judge Hancock concluded:

Corruption in political and public office . . . cannot be tolerated and, to be sure, all lawful steps to stop it are required. But it is far better, and unquestionably less harmful, to rely on an alert citizenry, diligent prosecutors and resourceful reporters to combat corruption — *in ways which are consistent with our democratic process* — than to resort to legislation that strikes at the very heart of the associational freedoms on which the process is based.²¹⁷

In *Johnson Newspaper Corp. v. Melino*,²¹⁸ Judge Hancock, this time writing for the court in a unanimous decision, rejected the claim of a newspaper publisher to a public right of access to professional disciplinary hearings — in this case, a hearing involving a dentist.²¹⁹ With regard to federal law, the court held that the First Amendment provides no such right because professional hearings have traditionally been closed and because there was no showing that public access would play any "signifi-

forces it to choose between using its talented advocates to direct its own affairs and using them to carry out its policies and public objectives as candidates for political office?

Id., 564 N.E.2d at 621, 563 N.Y.S.2d at 12.

212. *Id.* at 639, 564 N.E.2d at 624, 563 N.Y.S.2d at 14. Judge Hancock concluded: In sum, the undeniable effect of [the charter provision] is that registered party voters are deprived of their rights (1) to select seven categories of party officials as elected city officers and (2) to choose specified officials as their party leaders. Because [the provision] implicates fundamental rights under article I, §§ 1, 8 and 9 of the State Constitution, the provision must pass strict scrutiny.

Id. at 640-41, 564 N.E.2d at 625, 563 N.Y.S.2d at 15.

213. *Id.* at 641-43, 564 N.E.2d at 625-26, 563 N.Y.S.2d at 15-16.

214. *Id.* at 638, 564 N.E.2d at 623, 563 N.Y.S.2d at 13.

215. *Id.* at 642, 564 N.E.2d at 626, 563 N.Y.S.2d at 16.

216. *Id.*

217. *Id.* at 643, 564 N.E.2d at 626, 563 N.Y.S.2d at 16 (emphasis added).

218. 77 N.Y.2d 1, 564 N.E.2d 1046, 563 N.Y.S.2d 380 (1990).

219. *Id.* at 4, 564 N.E.2d at 1047, 563 N.Y.S.2d at 381.

cant positive role".²²⁰

With regard to state law, the court, while acknowledging that it has oftentimes found New York expressional freedoms more protective than their federal counterparts, noted that "there is no such precedent [in this state] with respect to the right of access."²²¹ Moreover, the court continued, the publisher "cited no authority and ma[de] no persuasive argument for the proposition that our State Constitution affords a protected right of access to disciplinary hearings"²²²

In *Seelig v. Koehler*,²²³ the Court of Appeals rendered its third major drug-testing decision in the last four years.²²⁴ In its unanimous 1987 *Patchogue-Medford Congress of Teachers v. Board of Education*²²⁵ decision, the court invalidated a program of mandatory urinalysis of probationary public school teachers on the ground that there was no individualized reasonable suspicion of drug abuse.²²⁶ The following year, in *Caruso v. Ward*,²²⁷

220. *Id.* at 7-8, 564 N.E.2d at 1049, 563 N.Y.S.2d at 383 (citing *Press-Enterprises Co. v. Superior Court*, 478 U.S. 1 (1986)).

221. *Id.* at 8, 564 N.E.2d at 1049, 563 N.Y.S.2d at 383.

222. *Id.* The court also did not find the state's common law supportive of public access. Rather, the court, reviewing precedent, concluded that state case law reflected a policy of keeping disciplinary hearings involving licensed professionals confidential — at least until finally determined — even in the absence of a specific statutory provision mandating closure. *Id.* at 10, 564 N.E.2d at 1050, 563 N.Y.S.2d at 384.

The court also applied the state's common law to a free press issue in *Finger v. Omni Publications Int'l*, 77 N.Y.2d 138, 566 N.E.2d 141, 564 N.Y.S.2d 1014 (1990). This time, however, the court found the common law supportive of the claim that, despite the proscriptions of the state Civil Rights Law, sections 50 and 51 prohibiting the non-consensual use of a person's photograph for advertising, the publisher was free to use the plaintiffs' photograph in connection with a news article in which the plaintiffs were not specifically involved. *Id.* at 143, 566 N.E.2d at 144-45, 564 N.Y.S.2d at 1017-18. Noting that a "newsworthiness" exception has been read into the statute's proscriptions by the courts of the state, *id.* at 141-142, 566 N.E.2d at 143, 564 N.Y.S.2d at 1016, and that the exception should be applied liberally to avoid judicial intervention into "reasonable editorial judgment and discretion," the court held that the non-consensual use of a photograph by a news publisher was actionable only where there was "no real relationship" between the photograph and the article, or even the theme of the article, or where the article is a patent advertisement in disguise. *Id.* at 142, 566 N.E.2d at 144, 564 N.Y.S.2d at 1016.

223. 76 N.Y.2d 87, 556 N.E.2d 125, 556 N.Y.S.2d 832 (1990).

224. *Id.* See also *Caruso v. Ward*, 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 143 (1988); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

225. 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

226. *Id.* at 68-69, 510 N.E.2d at 331, 517 N.Y.S.2d at 462.

in what Judge Kaye called “an abrupt about-face,”²²⁸ the court upheld a program of wholly suspicionless, random urine-testing of special narcotics officers in the New York City Police Department.²²⁹ In 1990, in *Seelig*,²³⁰ over the dissenting opinion of Chief Judge Wachtler — the author of the court’s unanimous opinion in *Patchogue*, but a member of the *Caruso* majority — the court approved a drug-testing program instituted by the New York City Department of Correction, requiring random urinalysis of every uniformed member of the Department.²³¹

Speaking through Judge Bellacosa, who had also written the majority opinion in *Caruso*, the court in *Seelig* once again held that *Patchogue* presented no obstacle to the mandatory suspicionless testing; the individuals to be tested, according to the majority, enjoyed a drastically diminished expectation of privacy in their work.²³² “[D]espite the hyperbolic attributions of the dissenting opinion,” wrote Judge Bellacosa, the *Seelig* majority was concluding “no more” than that

the particular combination of crucial circumstances comprising the paramilitary workplace milieu of jail guards, [and] their severely diminished privacy expectations under a sedulous set of testing procedures, in the face of the significant State interest, satisfy the analytic and constitutional underpinnings of *Patchogue* and *Caruso* — a concededly rigorous set of standards.²³³

Specifically, the assertedly still-“rigorous” *Patchogue* standards were met, in the majority’s view, because correction officers are “traditionally among the most heavily regulated” public employees;²³⁴ because the “jail guards [therefore] retain the barest minimal privacy expectation;”²³⁵ and because the “prevention, detection and resolution of the myriad daily crises in

227. 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 143 (1988).

228. *Id.* at 442, 530 N.E.2d at 855, 534 N.Y.S.2d at 148. (Kaye, J., dissenting). Judge Kaye’s dissent was joined by Judge Titone.

229. *Id.* at 441-42, 530 N.E.2d at 854-55, 534 N.Y.S.2d at 147.

230. 76 N.Y.2d 87, 556 N.E.2d 125, 556 N.Y.S.2d 832 (1990).

231. *Id.* at 89, 556 N.E.2d at 125, 556 N.Y.S.2d at 832.

232. *Id.* at 90, 556 N.E.2d at 126, 556 N.Y.S.2d at 833.

233. *Id.*

234. *Id.* at 91, 556 N.E.2d at 127, 556 N.Y.S.2d at 834.

235. *Id.* at 93, 556 N.E.2d at 128, 556 N.Y.S.2d at 835. As restated by Judge Bellacosa, the correction officers “suffer a reduced order of constitutional circumspection proportionate to their accepted level of humble privacy expectations.” *Id.*

this netherworld demand the acutest sensory awareness, undulled by the use of illicit drugs.”²³⁶ Hence, concluded the majority, the random urinalysis program for all uniformed officers “must be allowed” as a “proportionate and constitutional means” to reduce the drug traffic into and within city jails.²³⁷

Chief Judge Wachtler, joining the *Caruso* dissenters Judges Kaye and Titone, accused the majority of transforming the “narrow [*Caruso*] exception into a general warrant”²³⁸ Moreover, he argued, the entire uniformed membership of the city’s correction department cannot be compared to the specialized, “elite” corps in *Caruso*, who must fight “the war against drug trafficking . . . in fish-bowl like circumstances undreamed of by Calpurnia herself.”²³⁹

Explained Chief Judge Wachtler, the only distinction between the officers in *Seelig* and ordinary police officers is that uniformed correction officers work in a “controlled environment, . . . under close supervision and constant scrutiny.”²⁴⁰ But these circumstances, he continued, only mean that “the employer here is in a better position than any to detect illegal drug use,” and therefore, that there is “no basis for relieving [the correction department] of the minimal reasonable suspicion requirement.”²⁴¹

236. *Id.* Judge Bellacosa added that, “analogously to the narcotics officers in *Caruso* who regularly deal with ‘the drug world inhabitant out in the hard streets,’ the ‘jail guards’ in *Seelig* constantly ‘interact with the most dangerous of society’s concentrated mass in the confines of their walled symbiotic universe.’” *Id.* at 95, 556 N.E.2d at 129, 556 N.Y.S.2d at 836.

237. *Id.*

238. *Id.* at 97, 556 N.E.2d at 130, 556 N.Y.S.2d at 837.

239. *Id.* at 96-97, 556 N.E.2d at 130, 556 N.Y.S.2d at 837 (quoting *Caruso v. Ward*, 72 N.Y.2d 432, 441, 530 N.E.2d 850, 854, 534 N.Y.S.2d 143, 146 (1988)).

240. *Id.* at 99-100, 556 N.E.2d at 132, 556 N.Y.S.2d at 839.

241. *Id.* at 100, 556 N.E.2d at 132, 556 N.Y.S.2d at 839. Chief Judge Wachtler, warning of the ultimate ramifications of the majority’s adoption of the city’s justifications for the random drug-testing concluded:

The government can always argue, as the Commissioner does here, that random urine testing is the only effective means for detecting drug abuse And arguments can always be made that one group or another serving the public, even in the private sector, should be above suspicion of drug use and thus subject to random urine testing ordered by the government. The arguments are difficult to resist because urine testing is effective and the eradication of illegal drug use is such a desirable goal.

Id. at 100-101, 556 N.E.2d at 132, 556 N.Y.S.2d at 839.

Indeed, as Judge Kaye had argued in her *Caruso* dissent, the “criteria the court identifies [and has now reaffirmed in *Seelig*] are applicable to a wide array of public

2. Due Procedure

In *Savastano v. Nurnberg*,²⁴² the court rejected a due process challenge to the nonconsensual transfer of involuntarily committed, mentally ill patients from local acute-care facilities to long-term state institutions without prior judicial approval.²⁴³ "Assuming, without deciding"²⁴⁴ that such a transfer implicates a constitutional liberty interest, the court, speaking through Judge Titone, held that the "procedural protections provided by the regulatory scheme at issue here sufficiently safeguard the [state and federal] due process rights of those involuntary patients who object to being transferred."²⁴⁵

Balancing the individual and state interests involved in requiring additional judicial safeguards, the court noted that the transfers at issue involve primarily medical judgments about the

employees — even teachers [as in *Patchogue*] who are in an environment where drug abuse is particularly high." *Caruso*, 72 N.Y.2d at 443, 530 N.E.2d at 856, 534 N.Y.S.2d at 148 (Kaye, J., dissenting).

In *McKenzie v. Jackson*, 75 N.Y.2d 995, 556 N.E.2d 1072, 557 N.Y.S.2d 265 (1990), the court applied *Seelig*, decided the same day, to uphold the dismissal of a probationary correction officer who had tested positive in the random urinalysis program just approved. *Id.* at 96, 556 N.E.2d at 1072, 557 N.Y.S.2d at 265.

In another privacy and personal autonomy case, *Fosmire v. Nicoleau*, 75 N.Y.2d 218, 551 N.E.2d 77, 551 N.Y.S.2d 876 (1990), the court relied solely on state common law to uphold a patient's claim, asserted on federal and state constitutional grounds, of a right to refuse lifesaving medical treatment. *Id.* at 226, 551 N.E.2d at 81, 551 N.Y.S.2d at 880. The court majority, in a narrowly drafted opinion by Chief Judge Wachtler, ruled that the lower court judge erred in authorizing the hospital to administer blood transfusions over the mentally competent patient's religious-based objections — at least without first giving the patient an opportunity to be heard. *Id.* at 224, 551 N.E.2d at 80, 551 N.Y.S.2d at 879. Noting that the common law right is not absolute, the court concluded, nonetheless, that in the absence of some identified state interest, — i.e., the hospital had "point[ed] to no law or regulation," — the non-terminal, parental patient was entitled to decline the blood transfusions. *Id.* at 230, 551 N.E.2d at 83, 551 N.Y.S.2d at 882.

Judges Simons and Hancock concurred in separate opinions. They agreed with the majority's result under the facts of the case, but shared each other's rejection of the majority's proposition that, in the absence of some specific legislative expression of society's interest in preserving life and protecting innocent third parties e.g., protecting infant children from the loss of a parent, an otherwise healthy parent of infant children has an *unqualified* right to refuse lifesaving treatment. *Id.* at 232-39, 551 N.E.2d at 84-89, 551 N.Y.S.2d at 883-88 (Simons, J., concurring, Hancock, J., concurring).

242. 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990).

243. *Id.* at 307, 569 N.E.2d at 424, 567 N.Y.S.2d at 621.

244. *Id.*

245. *Id.* See N.Y. MENTAL HYG. LAW § 29.11 (McKinney 1988); N.Y. COMP. CODES R. & REGS., §517.4 (1962).

patients' therapeutic needs that, in the court's view, are best left to psychiatrists rather than judicial or administrative hearing officers.²⁴⁶ Moreover, the regulatory scheme affords an objecting patient an appeal prior to the transfer, personally or through a representative, before the director of the sending institution.²⁴⁷ The director is required to review the patient's history and objections and to render a determination whether the transfer would be in the patient's best interest.²⁴⁸ Also, the receiving institution may reject any transfer it deems inappropriate and a patient may obtain judicial review of a transfer determination and seek injunctive relief pending the court proceedings.²⁴⁹ Additionally, regardless of the outcome of the judicial review, the receiving institution may hold the patient no longer than the initially authorized period in the absence of a further court order extending the duration.²⁵⁰

To require that nonconsensual transfers be pre-approved in a "full-scale judicial hearing,"²⁵¹ with the panoply of trial rights and adherence to rules of evidence, the court continued, would add little procedural protection to the safeguards already provided against the risk of erroneous *medical* judgment.²⁵² Finally, while the real interests of patients in prior judicial hearings are minimal, the state's interest in avoiding the attendant "administrative and fiscal burdens"²⁵³ is especially substantial, according to the court, because of the "diversion of scarce resources from the care and treatment of mentally ill patients" that would result.²⁵⁴ Hence, though acknowledging that "a patient's interest in not being inappropriately transferred . . . is not insubstantial,"²⁵⁵ Judge Titone, for the majority, concluded that the existing procedural scheme satisfies state and federal constitu-

246. *Savastano*, 77 N.Y.2d at 309, 569 N.E.2d at 424, 567 N.Y.S.2d at 621.

247. *Id.* at 306, 569 N.E.2d at 423, 567 N.Y.S.2d at 620.

248. *Id.*

249. *Id.* at 307, 569 N.E.2d at 423-24, 567 N.Y.S.2d at 620-21. *See* N.Y. CIV. PRAC. L. & R. 7805 (McKinney 1981 & Supp. 1991).

250. *Savastano*, 77 N.Y.2d at 307, 569 N.E.2d at 424, 567 N.Y.S.2d at 621. *See* N.Y. MENTAL HYG. LAW § 29.11(j) (McKinney 1988 & Supp. 1991).

251. *Savastano*, 77 N.Y.2d at 307, 569 N.E.2d at 424, 567 N.Y.S.2d at 621.

252. *Id.* at 309, 569 N.E.2d at 425, 567 N.Y.S.2d at 622.

253. *Id.*

254. *Id.* at 310, 569 N.E.2d at 425, 567 N.Y.S.2d at 622.

255. *Id.* at 308, 569 N.E.2d at 424, 567 N.Y.S.2d at 621.

tional due process.²⁵⁶

Judge Bellacosa concurred alone.²⁵⁷ He objected neither to the result nor to the statutory or regulatory scheme. He simply did not believe that any constitutional rights were involved in the case.²⁵⁸ In an entry in the court's remittitur, Judge Bellacosa noted his concurrence solely "on the threshold ground that no constitutionally cognizable liberty interest is implicated by the statutory and regulatory scheme at issue."²⁵⁹

The court rejected another claim of right to a full judicial hearing in *Motor Vehicle Manufacturers Association v. State*.²⁶⁰ There, the court upheld the arbitration provision of the New Car Lemon Law²⁶¹ against a challenge that it contravened the constitutional right to trial by jury.²⁶²

Several trade associations representing automobile manufacturers, importers, and distributors sought a declaration that the provision allowing the consumer unilaterally to invoke compulsory arbitration violated the state constitutional mandate that "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."²⁶³ Speaking through Judge Simons, the court explained that the constitutional provision, first enacted in 1777, was intended to guarantee a jury trial in all cases in which it had been provided at common law.²⁶⁴ If the relief sought was legal, a jury

256. *Id.* at 310, 569 N.E.2d at 425, 567 N.Y.S.2d at 622.

257. *Id.* at 310, 569 N.E.2d at 426, 567 N.Y.S.2d at 623.

258. *Id.*

259. *Id.*

260. 75 N.Y.2d 175, 550 N.E.2d 919, 551 N.Y.S.2d 470 (1990).

261. N.Y. GEN. BUS. LAW § 198-a(k) affords the consumer the option of arbitrating a claim of entitlement to a replacement vehicle or a refund, and, if the consumer does choose arbitration, the vehicle manufacturer is compelled to participate. N.Y. GEN. BUS. LAW § 198-a(k) (McKinney 1988 & Supp. 1991).

262. *See* N.Y. CONST., art. I, § 2. The arbitration provision was also challenged as an impermissible abridgement of State Supreme Court's jurisdiction, *see* N.Y. CONST., art. VI, § 7, and as an unauthorized delegation of judicial authority, *see* N.Y. CONST., art. VI, §§ 1, 7. All challenges were rejected. *Motor Vehicle Mfrs. Ass'n*, 75 N.Y.2d at 183-84, 550 N.E.2d at 923, 551 N.Y.S.2d at 474.

263. *Motor Vehicle Mfrs. Ass'n*, 75 N.Y.2d at 180, 550 N.E.2d at 921, 551 N.Y.S.2d at 472 (quoting N.Y. CONST., art. I, § 2).

264. *Id.* at 180-81, 550 N.E.2d at 921, 551 N.Y.S.2d at 472. With minor, non-substantive changes in terminology, the constitutional provision was reenacted with the adoption of each new state constitution. *Id.* at 181, 550 N.E.2d at 921, 551 N.Y.S.2d at 472.

trial was required; but not, according to the court, if the nature and substance of what was sought was equitable.²⁶⁵

Thus, continued the court, whether a jury trial must be provided under the Lemon Law, depends upon the nature of remedies created by the statute.²⁶⁶ Because they are equitable, wrote Judge Simons, no jury trial is necessary.²⁶⁷ The replacement remedy is "analogous to specific performance;" it is designed to produce "the same performance promised under the [automobile purchase] contract."²⁶⁸ As for the refund remedy, unlike common law breach of warranty or revocation of acceptance, it permits the consumer to seek a "recision and restoration of the status quo ante, similar to an action for restitution, and is equitable in nature."²⁶⁹

In lone dissent, Judge Titone argued that the arbitration provision of the Lemon Law constitutes an impermissible delegation of judicial authority.²⁷⁰ "[T]here can be little doubt," Judge Titone contended, that the function the statute "assigns to private arbitrators is judicial in nature."²⁷¹ He explained:

Under the statute, manufacturers are compelled to submit to binding arbitration breach of warranty disputes that differ very little from those that formerly would have been adjudicated in the courts. Arbitrators are empowered to take evidence, to subpoena witnesses and documents, and make binding determinations of fact and law. These traits are unique characteristics of the sovereign judicial function.²⁷²

In response, the majority noted that the Lemon Law arbitrators are given narrow powers, which must be exercised under very specific guidelines to resolve fact-specific disputes, and are restricted to granting one of only two specified types of relief.²⁷³

265. *Id.* at 181, 550 N.E.2d at 921, 551 N.Y.S.2d at 472.

266. *Id.* at 181, 550 N.E.2d at 922, 551 N.Y.S.2d at 473.

267. *Id.* at 182, 550 N.E.2d at 922, 551 N.Y.S.2d at 473.

268. *Id.*

269. *Id.* at 183, 550 N.E.2d at 922, 551 N.Y.S.2d at 473.

270. *Id.* at 188-95, 550 N.E.2d at 926-30, 551 N.Y.S.2d at 477-81 (Titone, J., dissenting).

271. *Id.* at 190, 550 N.E.2d at 927, 551 N.Y.S.2d at 478.

272. *Id.* (citations omitted). See also discussion of Judge Titone's dissent in *Scalza*, *supra* notes 149-55 and accompanying text.

273. *Motor Vehicle Mfrs. Ass'n*, 75 N.Y.2d at 186, 550 N.E.2d at 924-25, 551 N.Y.S.2d at 475-76.

The legislature "has merely created a new limited class of disputes," the majority continued, and has "provided a procedure for resolving them" ²⁷⁴ Finally, noted the majority, the judicial "traits" identified by the dissenter are characteristic of all dispute-resolvers, not just courts, ²⁷⁵ and in any event, "expanded judicial review" is available under the Lemon Law for all compulsory arbitration awards. ²⁷⁶

3. *Equality* ²⁷⁷

In *People v. Kern*, ²⁷⁸ the court held that "purposeful racial discrimination in the exercise of peremptory challenges, . . . exercised by the prosecution or the defense" is prohibited under the New York Constitution. ²⁷⁹ The unanimous court, speaking through Judge Alexander, ruled that race-based peremptory challenges violate both the Civil Rights and Equal Protection Clauses of Article I, § 11 of the state's charter. ²⁸⁰ The court explained that, because jury service in New York is a "civil right" ²⁸¹ — i.e., it is both a constitutional privilege of citizenship ²⁸² and a statutory entitlement and duty — ²⁸³ denial solely

274. *Id.* at 187, 550 N.E.2d at 925, 551 N.Y.S.2d at 476.

275. *Id.*

276. *Id.*

277. Court of Appeals decisions involving race-based peremptory challenges of jurors are treated herein as "equality" cases, even though they arise in the context of criminal prosecutions, because the state constitutional issue presented in those cases is predominantly one of equal protection and the civil right to serve on a jury regardless of race, creed, color or religion. See *supra* notes 280-84 and accompanying text.

278. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990). The case grew out of the highly publicized Howard Beach incident in which a group of white teenagers attacked three black men. *Id.* at 643-46, 554 N.E.2d at 1236-38, 555 N.Y.S.2d at 648-50.

279. *Id.* at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655 (emphasis added).

280. *Id.* at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653. N.Y. CONST., art. I, § 11 provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

The first sentence is the equal protection clause; the second is the civil rights clause. See *Kern*, 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

281. *Id.* at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654.

282. *Id.* See N.Y. CONST., art. I, § 7, § 1.

283. *Kern*, 75 N.Y.2d at 652-53, 554 N.E.2d at 1242, 555 N.Y.S.2d at 655. See N.Y. JUD. LAW § 500 (McKinney 1975 & Supp. 1991) (providing that all eligible citizens shall

on the basis of race violates the proscription of the Civil Rights Clause against "any discrimination in [a person's] *civil rights* by any other person," private organization, or state authority.²⁸⁴

Moreover, according to the court, "the State is inevitably and inextricably involved"²⁸⁵ in excluding peremptorily challenged jurors. State statute authorizes peremptories²⁸⁶ and summoning citizens for jury service,²⁸⁷ and "it is the Judge, with the full coercive authority of the State, who enforces the discriminatory decision by ordering the excused juror to leave the courtroom escorted by uniformed court officers or Deputy Sheriffs."²⁸⁸ The court, thus, had little hesitation in concluding that "the judicial enforcement of racially discriminatory peremptory challenges exercised by defense counsel constitutes 'State action' for the purpose of our State equal protection provision,"²⁸⁹ and therefore, that race-based peremptories by the defense, as well as by the prosecution, violates the guarantee of equal protection in the New York Constitution.

Consequently, continued the court, once the prosecution has made a *prima facie* case of racial discrimination in the defense counsel's exercise of peremptory challenges, the defense must demonstrate "nonpretextual, racially neutral explanations for [the] challenges."²⁹⁰ Emphasizing the "fundamental concerns" involved, whether it is the defense or the prosecution that engages in racial peremptories, the court explained:

Racial discrimination in the selection of juries harms the excluded juror by denying this opportunity to participate in the administration of justice, and it harms society by impairing the integrity of the criminal trial process.²⁹¹

have the opportunity and obligation to perform jury service); N.Y. CIV. RIGHTS LAW § 13 (McKinney 1975 & Supp. 1991) (providing that an otherwise qualified citizen shall not be disqualified from petit jury service on account of race).

284. N.Y. CONST., art. I, § 11 (emphasis added). See *Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1242, 555 N.Y.S.2d at 655.

285. *Kern*, 75 N.Y.2d at 656, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657.

286. *Id.* See N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

287. *Kern*, 75 N.Y.2d at 656, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657. See N.Y. JUD. LAW § 516 (McKinney 1975 & Supp. 1991).

288. *Kern*, 75 N.Y.2d at 657, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657.

289. *Id.*, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658.

290. *Id.* at 657-58, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658.

291. *Id.* at 652, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654 (citations omitted). In *Peo-*

Having thus extended the prohibition against racially discriminatory peremptory challenges in *Kern*, the Court of Appeals nevertheless refused, in two other cases decided in 1990, to grant relief to defendants who were allegedly victimized by such discrimination. In *People v. Hernandez*,²⁹² the court rejected a defendant's claim that the prosecutor's peremptory exclusion of all Spanish-speaking Hispanic jurors violated both federal and state equal protection.²⁹³ The majority, in an opinion by Judge Bellacosa, held that the "prosecution [had] responded with a satisfactory nondiscriminatory explanation for excluding the only Latino jurors"²⁹⁴ when the assistant district attorney told the trial judge that the Spanish-speaking jurors seemed hesitant, because of their knowledge of Spanish, to accept the official interpreter's English translation of the Spanish-proffered testimony.²⁹⁵ "It was for the trial judge," according to Judge Bellacosa, "to determine if the prosecutor's explanation was pretextual or real and justified."²⁹⁶

ple v. Jenkins, 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990), addressing only the federal constitutional issue (apparently, no state constitutional issue was raised) *id.* at 553, 554 N.E.2d at 48, 555 N.Y.S.2d at 11, the unanimous court, again through the pen of Judge Alexander, held that racially motivated peremptory exclusion of jurors by the prosecution violates equal protection under the Fourteenth Amendment, even if the prosecution does not exclude from the jury all members of the race in question. As Judge Alexander explained: "For the purposes of equal protection, the constitutional violation is the exclusion of *any* blacks solely because of their race. If any blacks are so excluded, it is of no moment that the jury nevertheless contains a token number of blacks." *Id.* at 559, 554 N.E.2d at 51-52, 555 N.Y.S.2d at 14-15 (emphasis in original).

292. 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990), affirmed as a matter of federal law, 111 S. Ct. 1859 (1991). The Supreme Court majority held that the "trial court did not commit clear error in choosing to believe the reasons given by the prosecutor." *Id.* at 1873. Justice Stevens in dissent, joined by Justices Marshall and Blackmun, argued that even assuming the prosecutor's good faith, "the justification proffered was insufficient to dispel the existing inference of racial animus." *Id.* at 1877. Echoing Judge Kaye's objections, the dissenters explained that the facially race-neutral justification advanced by the prosecutor "would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons," thereby serving as "merely a proxy for a discriminatory practice." *Id.*

293. *Id.*

294. *Id.* at 356, 552 N.E.2d at 623, 553 N.Y.S.2d at 87.

295. *Id.*

296. *Id.* Judge Titone, while joining in the majority opinion, wrote separately to suggest that, "rather than developing a complex set of judicially imposed limitations and standards, the most constructive course would be for the Legislature to take a hard look at the existing peremptory system with a view toward determining whether it is still viable, at least as it is presently constituted." *Id.* at 359, 552 N.E.2d at 625, 553 N.Y.S.2d

Judge Kaye, joined in dissent by Judge Hancock, disagreed that such deference to the trial court was appropriate in a case of this kind.²⁹⁷ Initially, Judge Kaye emphasized her view that in a matter of "such day-to-day vital importance locally,"²⁹⁸ the citizens of the state would be best served by "an authoritative body of *State* law instead of being held in suspense, case-by-case," by what the Supreme Court might decide as it fleshes out the scope and limits of the *federal* prohibition against race-based peremptories.²⁹⁹ As to the merits, Judge Kaye argued that for the Court of Appeals merely to defer to the trial court's acceptance of "some ostensibly neutral ground" asserted by the prosecution,³⁰⁰ would be tantamount to surrendering "the role of this court in defining and protecting [this] nascent constitutional right"³⁰¹ of criminal defendants.

Despite the majority's reliance on the Spanish-speaking jurors' supposed hesitance to accept the official court translation, Judge Kaye noted that the trial judge was, in fact, satisfied with the jurors' reassurances.³⁰² Moreover, Judge Kaye added, there was no indication on the record that any non-Hispanic members of the jury were ever asked if they too understood Spanish.³⁰³ "[G]iven the potential for disparate impact and the meager record made by the People on the issue,"³⁰⁴ the prosecution had not, in the dissenters' view, satisfied its burden of rebutting the *prima facie* case of discrimination.³⁰⁵

Finally, addressing the untoward implications of "language-based" exclusion of jurors, especially in New York, Judge Kaye concluded:

Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subjected to enhanced scrutiny .

at 89 (footnote omitted).

297. *Id.* at 361, 552 N.E.2d at 627, 553 N.Y.S.2d at 91.

298. *Id.* at 360, 552 N.E.2d at 626, 553 N.Y.S.2d at 90.

299. *Id.* (emphasis added).

300. *Id.* at 361, 552 N.E.2d at 627, 553 N.Y.S.2d at 91.

301. *Id.*

302. *Id.* at 363, 552 N.E.2d at 628, 553 N.Y.S.2d at 92.

303. *Id.*

304. *Id.*

305. *Id.*

. . . Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily be justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of our juries of permitting such language-based justifications without close inspection would be intolerable.³⁰⁶

The Supreme Court, in a 6-3 decision has affirmed the Court of Appeals' ruling in *Hernandez* as a matter of federal constitutional law.³⁰⁷

In *People v. Green*,³⁰⁸ the Court of Appeals rejected another defendant's claim of discriminatory peremptories.³⁰⁹ In *Green*, however, the court did not reach the merits. Rather, in a cursory, unsigned memorandum over the dissenting opinion of two members of the court, the majority held that the defendant's guilty plea waived any right to appeal the prosecutor's systematic exclusion of blacks from the jury.³¹⁰ Asserting that "[w]e all agree completely with the policy considerations that warrant remedying and ending *Batson* violations in the selection of trial juries,"³¹¹ the majority nonetheless, on the same day it decided *Kern*, summarily refused to permit the defendant to complain about racially-motivated peremptories.³¹² The court merely explained that, "[i]nasmuch as we have held that the whole jury trial right may be waived, there is no basis in law or logic for

306. *Id.* at 363-64, 552 N.E.2d at 628, 553 N.Y.S.2d at 92.

307. See *Hernandez v. New York*, 111 S. Ct. 1859 (1991). The Supreme Court majority held that the "trial court did not commit clear error in choosing to believe the reasons given by the prosecutor." *Id.* at 1873. Justice Stevens, in dissent, joined by Justices Marshall and Blackmun, argued that even assuming the prosecutor's good faith, "the justification proffered was insufficient to dispel the existing inference of racial animus." *Id.* at 1877. Echoing Judge Kaye's objections, the dissenters explained that the facially race-neutral justification advanced by the prosecutor "would inevitably result in a disproportionate disqualification of Spanish-speaking venireperson," thereby serving as "merely a proxy for discriminatory practice." *Id.*

308. 75 N.Y.2d 902, 553 N.E.2d 1331, 554 N.Y.S.2d 821 (1990).

309. *Id.*

310. *Id.* at 904-05, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822.

311. *Id.* at 904, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822. (citing *Batson v. Kentucky*, 476 U.S. 79 (1986) (racially-motivated peremptory challenges by the prosecution held to violate federal constitutional equal protection)).

312. *Id.* at 905, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822.

permitting one component of the plenary right to survive a guilty plea."³¹³

In dissent, Judge Hancock, joined by Judge Alexander, argued that the only question before the court was whether racial discrimination in peremptory challenges "affects the fundamental fairness of a trial or implicates societal interests in the integrity of the criminal process."³¹⁴ That is the test, explained the dissenters, that the court had consistently applied in prior cases to determine whether a defendant's claim survives a guilty plea and thus could be raised on appeal.³¹⁵ A prosecutor's race-based exercise of peremptories is such a "fundamental matter," insisted Judge Hancock, because it does "affect the basic fairness of a criminal trial [and does] implicate society's interests in the integrity of the process itself."³¹⁶

Moreover, the dissent noted, discriminatory peremptories by the prosecution might well be the very reason a defendant chooses to plead guilty rather than proceed to a jury trial — i.e., a trial by a racially-unbalanced jury.³¹⁷ Finally, argued Judge Hancock, it should make no difference whether a defendant is convicted on a guilty plea or a jury verdict. He explained:

Racial discrimination in jury selection is so anathema to the mandate of fundamental fairness in our criminal process that no conviction infected by it — whether that conviction be by verdict or guilty plea — should be permitted to stand "Not only the individual defendant but the *public at large* is entitled to assurance that there shall be full observance and enforcement of the *cardinal right of a defendant to a fair trial*."³¹⁸

313. *Id.* The majority, stating its rule otherwise, said: "By pleading guilty instead of going to trial, the defendant waived all of his trial rights" *Id.* at 904, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822.

314. *Id.* at 905, 553 N.E.2d at 1332, 554 N.Y.S.2d at 822.

315. *Id.* at 905-07, 553 N.E.2d at 1332-34, 554 N.Y.S.2d at 822-24.

316. *Id.* at 909, 553 N.E.2d at 1335, 554 N.Y.S.2d at 825. *See also id.* at 910-11, 553 N.E.2d at 1335-36, 554 N.Y.S.2d at 825-26. *Compare with* *People v. Kern*, 75 N.Y.2d at 652, 554 N.E.2d at 1242, 555 N.Y.S.2d at 655, *supra* note 291 and accompanying text.

317. *Id.* at 911, 553 N.E.2d at 1337, 554 N.Y.S.2d at 827.

318. *Id.* at 911, 553 N.E.2d at 1336, 554 N.Y.S.2d at 826 (emphasis in original) (quoting *People v. Crimmins*, 36 N.Y.2d 230, 238, 326 N.E.2d 787, 791, 367 N.Y.S.2d 213, 218 (1975)).

In *Forti v. New York State Ethics Commission*,³¹⁹ the court rejected another equal protection claim arising in an entirely different context. In *Forti*, the court upheld the “revolving door” provisions of the New York Ethics In Government Act³²⁰ against equal protection and due process challenges.³²¹ As a matter of both state and federal equal protection, the court had little difficulty discerning a rational basis to justify the statute’s imposition of stricter post-employment limitations upon executive branch employees than are imposed on those who work for the legislature.³²² “[T]here was adequate basis for the Legislature to conclude that administrative agencies are more susceptible to the ethical problems associated specifically with ‘revolving door’ employment,”³²³ according to the court, because of the “fundamental institutional differences” between the Executive and Legislative Branches.³²⁴

As for the due process challenge asserted on both state and federal grounds, the court rejected the contention that the revolving door restrictions prevent former executive branch employees — including attorneys such as the *Forti* plaintiffs — from pursuing their careers.³²⁵ Rather, explained the unanimous court, speaking through Judge Titone, the post-employment restrictions in question “merely forbid them from accepting employment in a limited class of cases that poses the greatest potential for the unfair exploitation of the contacts they

319. 75 N.Y.2d 596, 554 N.E.2d 876, 555 N.Y.S.2d 235 (1990).

320. N.Y. PUB. OFF. LAW § 73(a) (McKinney 1988 & Supp. 1991). Under the “revolving door” provisions in question, separated executive branch employees may *never* appear before their former agencies on matters in which they were directly involved during their government service; nor may they appear before their former agencies in relation to any matter for two years after separation from state service. See *Forti*, 75 N.Y.2d at 606, 554 N.E.2d 879, 555 N.Y.S.2d 238.

321. *Forti*, 75 N.Y.2d at 617-18, 554 N.E.2d at 886, 555 N.Y.S.2d at 245.

322. *Id.* at 612-14, 554 N.E.2d at 882-84, 555 N.Y.S.2d at 242-43.

323. *Id.* at 613, 554 N.E.2d at 883, 555 N.Y.S.2d at 242. The court also noted that executive branch employees are not an identifiable “suspect class” warranting a higher level of scrutiny for equal protection analysis. *Id.* at 612, 554 N.E.2d 882, 555 N.Y.S.2d 241.

324. *Id.* at 613, 554 N.E.2d at 884, 555 N.Y.S.2d at 243. The court listed, among other things, the bicameral structure of the Legislature and the close personal accountability of legislators as a result of biannual elections — neither of which affects most administrative employees in the executive branch. *Id.* at 612-13, 554 N.E.2d at 883, 555 N.Y.S.2d at 242.

325. *Id.* at 614, 554 N.E.2d at 884, 555 N.Y.S.2d at 243.

made, and the knowledge they obtained, during their State service."³²⁶ Such restrictions, the court concluded, are "reasonably related to the legislative goal of restoring public confidence in government."³²⁷

III. The Court

A. *The Figures*

The Court of Appeals decided thirty state constitutional rights cases in 1990.³²⁸ In each of these cases, a substantial state constitutional argument was the basis for the court's decision or was advanced in a concurring or dissenting opinion. The court was divided 63% of the time. That is, in nineteen of the thirty cases that involved a substantial state constitutional question, there was disagreement among the judges on the constitutional issue.³²⁹

Table A lists all thirty state constitutional rights cases and

326. *Id.*

327. *Id.* The unanimous court also had little difficulty rejecting the equal protection challenge in *Schneider v. Sobol*, 76 N.Y.2d 309, 558 N.E.2d 23, 559 N.Y.S.2d 221 (1990), where the Excellence in Teaching Program, see N.Y. EDUC. LAW §§ 1950(15)(a) (McKinney 1981 & Supp. 1991), 3602(27)(a) (McKinney 1988 & Supp. 1991), as implemented by the state education department, see 8 N.Y. COMP. CODES R. & REGS. § 175.35[e][1][i], was upheld against claims that it impermissibly discriminated against school administrators by denying them eligibility for financial supplements that are awarded annually to improve the salaries of full-time teachers. *Id.* at 317, 558 N.E.2d at 26, 559 N.Y.S.2d at 224. The court, speaking through Judge Bellacosa, concluded that it was clearly rational to exclude from the program those who, even though teaching part-time, work primarily as administrators and are paid under *administrative* salary schedules — which, according to the court, are consistently higher than those for teachers. 76 N.Y.2d at 314-15, 558 N.E.2d at 25, 559 N.Y.S.2d at 223.

In *Binghamton GHS Employees FCU v. State Div. of Human Rights*, 77 N.Y.2d 12, 564 N.E.2d 1051, 563 N.Y.S.2d 385 (1990), the court sustained a claim of gender discrimination, but did so under its interpretation of the State Human Rights Law. See N.Y. EXEC. LAW § 296-a(1) (McKinney 1988 & Supp. 1991). Noting that it had previously held that singling out pregnancy for different treatment than other disabilities constitutes prohibited sex discrimination under the statute, the unanimous court, speaking through Judge Simons, concededly construed the statute "liberally" to "apply the statutory prescription against discrimination to all provisions of a credit offering, not simply those which are mandatory," and thus held that a lender may not exclude pregnancy from an optional disability insurance policy in an automobile loan agreement. *Id.* at 17-18, 564 N.E.2d at 1053-54, 563 N.Y.S.2d at 387-88.

328. Each of these cases is discussed in Part II, *supra* notes 7-327 and accompanying text. They are listed in Table A.

329. Figures derived from Table A.

indicates, for each case, which judges formed the court majority, who authored the majority opinion if signed, which judges voted separately on the state constitutional question,³³⁰ whether those judges concurred or dissented in the court's decision, and who authored the separate opinions. Table A also indicates whether the case outcome was Liberal³³¹ or Conservative.³³² Additionally, Table A breaks the cases down into three categories — criminal justice, civil liberties, and equality — depending on the nature of the state constitutional right at issue.³³³

Table B shows the number of majority, concurring and dissenting opinions written by each member of the court, as well as the number of unsigned opinions — i.e., per curiam or memorandum. Table C breaks down the divided opinions into major-

330. Only those concurrences and dissents that disagree with the majority's resolution of the state constitutional rights issue are treated as "separate" votes. Hence, in *Cain*, Judge Simons is treated as having voted with the majority because he agreed with the court's resolution of the state constitutional issue; his dissent was based on an unrelated, albeit for him dispositive, question. See *supra* notes 63-68 and accompanying text.

331. The terms "liberal" and "conservative" are used herein as they are commonly understood and employed in judicial studies such as the National Science Foundation's United States Supreme Court Data Base Project. See Jeffrey A. Segal and Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results From the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989); see also Robert Riggs and Mark Urban, *Supreme Court Voting Behavior: 1989 Term*, 5 B.Y.U. J. PUB. L. 1, 10 (1990); David W. Rohde and Harold J. Spaeth, *Ideology, Strategy and Supreme Court Decisions: William Rehnquist as Chief Justice*, 72 JUDICATURE 247, 248 n.14 (1989); Robert Riggs and Mark Urban, *Supreme Court Voting Behavior: 1988 Term*, 4 B.Y.U. J. PUB. L. 1, 10 (1989); Harold J. Spaeth, *Burger Court Review of State Court Civil Liberties Decisions*, 68 JUDICATURE 285, 287 (1985).

"Liberal" is thus applied to any decision or vote to uphold rights of criminal justice, claims of civil liberties, or complaints of discrimination. The term is also applied to decisions or votes in which the recognition, expansion, or extended protection of a state constitutional right or liberty is the overriding significance of the case, regardless of the particular result for the immediate parties [hereinafter Liberal]. For example, in *Dunn*, the court expanded protection against unreasonable searches and seizures by recognizing canine sniffs as searches and, thus, requiring some reasonable suspicion to justify their use in the common hallway of an apartment building. Hence, even though the court ruled against the particular defendant in that case, on the ground that reasonable suspicion had been present, the holding is treated as "liberal" [hereinafter Liberal].

332. See *supra* note 331. "Conservative" is applied to any decision supporting the prosecution or the government against claims of criminal or civil rights and liberties [hereinafter Conservative].

333. Thus, *Kern*, *Green*, and *Hernandez* are treated as "equality" cases, even though they arose in the context of criminal prosecutions, because the primary question in each concerned the discriminatory use of peremptory challenges. See *supra* notes 277-318 and accompanying text.

ity voting blocs, indicating which members of the court were with the majority in the 6-1, 5-2, and 4-3 decisions, respectively. Table C also shows the number of decisions for each majority voting bloc and indicates how many were Liberal and how many were Conservative.

Tables D, E and F all deal with the voting patterns of the individual judges in divided decisions. Table D shows the frequency with which each judge was aligned with the majority and the number of times each judge voted separately on the state constitutional question — i.e., either concurred or dissented because the judge disagreed with the majority's resolution of the state constitutional rights issue. Table E gives the Liberal/Conservative voting record of each judge and of the court itself in the divided decisions. The decisions are broken down into "criminal justice" and "civil liberties and equality" categories, utilizing the same criteria as in Table A.³³⁴ Table F shows the frequency with which the judges aligned with one another in the divided decisions. The table gives the number and percentage of divided cases in which each judge voted with each of the others, in both majority and separate opinions.

B. *Some Observations*

A few observations can be made about the Court of Appeals in state constitutional rights cases in 1990. First, it was a Wachtler-Simons court and it was Conservative. To be sure, the figures in the tables do not reveal whether Chief Judge Wachtler and Judge Simons, in fact, dominated or led the court; nor do the figures demonstrate that the court was Conservative in any absolute sense or as compared to other state high courts throughout the country. But the figures do show that the decisions of the court almost always coincided with the votes of Judges Wachtler and Simons and were mostly pro-prosecution or pro-government.

Judges Wachtler and Simons were each in the majority 93% of the time.³³⁵ More significantly, even in the divided decisions

334. See *supra* notes 331-33 and accompanying text.

335. This figure is derived from Table A. It represents the fact, as shown in that table, that Judges Wachtler and Simons were each in the court majority in twenty-eight of the thirty state constitutional rights cases. No other member of the court was in the

where, presumably, there were legitimate grounds for the court to resolve the state constitutional issue either way, the court's decisions coincided with the votes of Judges Wachtler and Simons 89% of the time.³³⁶ Moreover, in those divided decisions in which Judges Wachtler and Simons voted together, also 89% of the time,³³⁷ the court's decisions coincided with their combined votes in every case but one.³³⁸

With regard to the court's Conservatism in 1990, 73% of the state constitutional cases were decided against the criminal defendant or the civil rights or liberties claimant.³³⁹ More significantly, perhaps, in divided decisions — where at least one judge advanced a substantial argument in support of the state constitutional claim, and thus, where the court could presumably have reached a reasonable Liberal result — the Court of Appeals rendered a Conservative decision 78% of the time.³⁴⁰

The second observation that can readily be made concerns the opposite poles of the court's Liberal/Conservative spectrum. Just as clearly as Judges Wachtler and Simons seem to reflect the court itself, Judge Titone represents its Liberal flank and Judge Bellacosa its most Conservative. For example, in divided criminal justice cases, Judge Titone voted to uphold the asserted right of the accused 92% of the time. Judge Bellacosa's record was exactly the opposite — he voted for the prosecution in 92%

majority as frequently.

336. See Table D. Eighty-nine percent represents seventeen of the nineteen divided decisions. Again, no other member of the court was in the majority as frequently.

337. See Table F. This is the highest figure for any two judges on the Court. Eighty-nine percent represents seventeen of the nineteen divided decisions; these seventeen decisions are not identical to the seventeen in which Judges Wachtler and Simons, respectively, voted with the majority. See discussion of *Dunn*, *supra* notes 81-98 and accompanying text, and discussion of *Seelig*, *supra* notes 223-41 and accompanying text.

338. The only state constitutional rights case in which Judges Wachtler and Simons voted together but were not in the majority was *Vilardi*, see *supra* notes 163-81 and accompanying text.

339. This figure is derived from Table A.

340. See Table E. Notably, this figure is identical to that for Chief Judge Wachtler. Moreover, as shown in Table F, every member of the court, except Judge Titone, was aligned with Chief Judge Wachtler in a high percentage of the divided decisions, especially Judges Simons (89%) and Kaye (73%). Likewise, for Judge Simons, especially Judges Wachtler (89%) and Bellacosa (78%). Contrast these figures, for example, with the alignment figures in Table F for Judges Titone and Bellacosa, (11%), and for Judges Simons and Titone, (32%).

of the cases, or in every case but one.³⁴¹ In all divided cases (criminal justice as well as civil liberties and equality), Judge Titone's record was 83% in favor of the rights and liberties claimants, while Judge Bellacosa's was 94% in support of the prosecution or government.³⁴²

Not surprisingly, Judges Titone and Bellacosa voted together in only 11% of the divided decisions, by far the lowest figure within the court.³⁴³ Also, although typically on opposite sides in divided cases, Judges Titone and Bellacosa were the most prolific members of the court. Judge Titone authored a total of twelve opinions, majority and separate.³⁴⁴ Judge Bellacosa authored a total of nine; he also expressed a separate view in two entries.³⁴⁵ Additionally, Judge Bellacosa wrote the most majority opinions among his colleagues — six. His output was exceeded only by the number of opinions that were unsigned — eight.³⁴⁶

The three remaining judges on the court, Kaye, Alexander and Hancock, each had a record evenly divided between Liberal and Conservative votes in non-unanimous court decisions.³⁴⁷ Though the three are situated at the center of the court's Liberal — Conservative spectrum and potentially comprise the court's "swing" block, they voted together in only 42% of the divided cases.³⁴⁸ Judges Hancock and Alexander voted together 72% of the time, more than either of them did with any other member of the court.³⁴⁹ Judge Kaye, however, voted fairly evenly with most of the court. She was with Judges Simons and Titone each approximately 60% of the time; that is as frequently as she was with either Alexander or Hancock.³⁵⁰ She

341. See Table E. The court's record in criminal justice cases was 69% Conservative.

342. See *id.* By comparison, the court's overall record was 78% Conservative.

343. See *id.*

344. See Table B. Judge Titone wrote four majority opinions, one concurrence, and seven dissents.

345. See *id.* Judge Bellacosa wrote six majority opinions, three dissents, and noted a separate view in two concurring entries.

346. See *id.*

347. See Table E. Judges Kaye and Hancock both voted 50%-50%; Judge Alexander voted 53% Conservative.

348. This figure is derived from Table A. It represents seven of the nineteen divided decisions.

349. See Table F.

350. See *id.*

voted most frequently with Chief Judge Wachtler, in 73% of the divided cases, and least with Judge Bellacosa, 42%.³⁵¹

Finally, as should be evident from the foregoing, the ideological spectrum of the court as a whole was clear for 1990. Judge Titone was, by a wide margin, the court's most Liberal member — i.e., the most sympathetic to assertions of state constitutional rights.³⁵² Judges Kaye, Hancock and Alexander voted equally for rights claimants and the government.³⁵³ Chief Judge Wachtler and the Judges Simons and Bellacosa were significantly pro-prosecution and pro-government in their voting,³⁵⁴ with Judge Bellacosa being the most supportive of the prosecution and the government among his colleagues.

C. Conclusion

Clearly, there was no dearth of significant state constitutional case law at the Court of Appeals in 1990, nor of revealing voting patterns of the judges and the court itself. The court rendered decisions that will have great impact throughout the state — and, likely, considerable influence elsewhere. The court also provided abundant grist for commentary. This *Review* concludes with three general, personal impressions — one positive, one negative and one neutral. To end on a positive note, they are discussed in reverse order.

First, the neutral: the court is “retrenching.” Like the Supreme Court in the Burger-Rehnquist era, the Court of Appeals is cutting back on prior Liberal precedents.³⁵⁵ This is not necessarily an unfortunate development. How one views the court's retrenchment depends, of course, on whether one believes the precedents being curtailed — or even overruled — were rightly

351. *See id.*

352. *See* Table E. Judge Titone's voting record in divided decisions was 83% Liberal.

353. *See id.* Judge Kaye's and Judge Hancock's voting records were each 50%-50%; Judge Alexander, who participated in one less case, voted 53% Conservative.

354. *See id.* Chief Judge Wachtler's voting record in divided decisions was 78% Conservative; Judge Simons' was 87%; Judge Bellacosa's was 94%. The court, like Chief Judge Wachtler, was 78% Conservative.

355. This “retrenchment” did not begin in 1990, but has been noticeable over the last three or four years. *See generally* Bonventre, *State Constitutional Recession: The New York Court of Appeals Retrenches*, 4 EMERGING ISSUES ST. CONST. L. 1 (1991).

or wrongly decided in the first instance, or subsequently proved themselves workable or not. But regardless of the substantive merits of individual decisions, it can scarcely be disputed that the court is, in fact, "retrenching." To be sure, the court continues, on occasion, to extend the limits of state constitutional protections.³⁵⁶ But those instances, as the figures emphatically confirm,³⁵⁷ are quite infrequent exceptions.

In some cases, the court's retrenchment is explicit, or otherwise obvious. For example, in *Bing*, the court expressly overruled a protective right-to-counsel rule.³⁵⁸ In *Seelig*, the court, as the dissenters made clear, relaxed its prior restrictions on suspicionless drug testing.³⁵⁹

In other decisions, the retrenchment was somewhat less apparent, but no less real. For example, in *Davis*, the court, without a dissenting opinion to point it out, significantly limited the protection against custodial waivers of the right to counsel.³⁶⁰ And in *Carter*, the court refused to overturn convictions obtained by a non-attorney prosecutor — a result that may well comport with good reason and practicality, but one that, as the dissent showed, contravened the unequivocal language of an earlier, and perhaps overstated, *unsigned* decision of the court.³⁶¹

That leads to the second — the negative — impression: the court often decided substantial state constitutional cases in unsigned opinions. There may, perhaps, be nothing intrinsically wrong with an anonymous opinion — per curiam or memorandum. But there certainly is, when the absence of a signature also means an inadequate, poorly reasoned or sloppily written decision. And there certainly is, when a dissenting opinion raises legitimate constitutional questions which the unsigned majority fails to address, or fails to address thoughtfully.

Indeed, it is not difficult to understand why opinions whose authors remain unnamed might tend to be less carefully considered and crafted than those that are signed. In 1990, fully one-

356. See e.g., *Dunn*, *supra* notes 81-98 and accompanying text; *Vilardi*, *supra* notes 163-81 and accompanying text.

357. See *supra* notes 339-40 and accompanying text. See also Tables A and E.

358. See *supra* notes 10-34 and accompanying text.

359. See *supra* notes 223-41 and accompanying text.

360. See *supra* notes 35-39 and accompanying text.

361. See *supra* notes 156-62 and accompanying text.

third of the divided decisions of the Court of Appeals in cases raising a substantial state constitutional rights issue were rendered in an unsigned writing.³⁶² Most of those writings, to be kind, were unworthy of a distinguished tribunal.

For example, in *Sirno*, over a vigorous lone dissent, the court, in an anonymously written, superficial, one-paragraph memorandum, held that a defendant had knowingly, intelligently and voluntarily waived his *Miranda* rights — the court relying on the remarkable proposition that the defendant's "cooperation" with his interrogators could mean nothing else.³⁶³ Likewise, in *Green*, where the court held that claims of racial discrimination in jury selection, like most other claims of trial error, are waived upon a guilty plea, the court rendered its decision in a conclusory, one-page memorandum, devoid of much analysis and of any fair response to the strenuous lengthy dissent.³⁶⁴

Last, on a positive note: in many of its 1990 decisions, the court did demonstrate why it is among the nation's most highly regarded tribunals.³⁶⁵ In cases such as *Bing*,³⁶⁶ where the court broke with its own right-to-counsel rule, and *Vilardi*,³⁶⁷ where it broke with the Supreme Court's rule on exculpatory evidence, the Court of Appeals treated the issues comprehensively, analytically and thoughtfully, in logical, clear and frank discussions of the pros and cons. In both *Bing* and *Vilardi*, the court was divided. In both cases, the authors of the majority and separate opinions confronted the issues directly, spelled out the perceived weaknesses and ramifications of each other's positions, and reached conclusions based upon elaborated reasons — not upon verbal legerdemain or mere disregard or disdain for contrary arguments advanced by a colleague or by one of the parties.

The outcome in *Bing* was Conservative; that in *Vilardi* Lib-

362. Figure derived from Table A. The precise numbers were six unsigned opinions out of the eighteen divided decisions in which there was a Liberal/Conservative division on the state constitutional issue. See Table E.

363. See *supra* notes 114-25 and accompanying text.

364. See *supra* notes 308-18 and accompanying text.

365. See Bonventre, *supra* note 1, at 31-32 n. 3. See also Kolbert, *supra* note 5, at A1.

366. See *supra* notes 10-34 and accompanying text.

367. See *supra* notes 163-81 and accompanying text.

eral. But whatever one's ideological or jurisprudential preferences, and however else one might feel about the relative merits of the majority and dissenting opinions in those cases, one cannot help but be impressed with the care and candor of the exposition therein. It is on the strength of opinions such as these, regardless of the Liberal or Conservative result in particular cases, that the author believes the New York Court of Appeals to be the nation's premier state tribunal.³⁶⁸

TABLE A

List of Cases

	HOLDING*	MAJORITY**	SEPARATE**
CRIMINAL JUSTICE			
Bing	C	<u>S</u> W H B	(K) A T
Brooks	L	<u>U</u> nsigned Unanimous	
Cain***	L	<u>T</u> W S K A H	[B]
Carter	C	<u>H</u> W S K B	[T] A
Centano	C	<u>W</u> S K B	[T] A H
Cintron	L	<u>H</u> W S K T	(A) [B]
Davis	C	<u>S</u> , Unanimous	
Dunn****	L	<u>T</u> W K A H	(S) (B)
Gonzales	C	<u>W</u> S K A T H	[B]
Harris	C	<u>W</u> S A H B	[T] K
Hults	C	<u>A</u> W S K B	[H] T
LaClere	L	<u>B</u> , Unanimous	
Menchetti	C	<u>A</u> , Unanimous	
Moisset	C	<u>U</u> nsigned Unanimous	
Natal	C	<u>K</u> , Unanimous	
Scalza	C	<u>B</u> W S K A H	[T]
Sirno	C	<u>W</u> S K A H B	[T]
Van Pelt	L	<u>B</u> , Unanimous	
Vilardi	L	<u>K</u> A T H	(S) W B
Wicks	C	<u>W</u> S A H B	[T] K

368. For the reader who deems it helpful to know the author's predilections, the author is a moderately Conservative Democrat — somewhat Conservative in criminal justice, and somewhat Liberal in civil liberties and equality. Excluding Judge Hancock, for whom the author clerked during part of 1990, the author's overall Liberal/Conservative percentages would most closely resemble those of Chief Judge Wachtler, *see* Table E. The author's percentages would be slightly less Conservative. *See* William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965).

CIVIL LIBERTIES

Golden	C	<u>S</u> W K A B	[H] T
Johnson Newspaper	C	<u>H</u> , Unanimous	
Motor Vehicle			
Mfr. Ass'n.	C	S W K A H B	[T]
Savastano*****	C	<u>T</u> W S K A H	(B)
Seelig	C	<u>B</u> S A H	[W] K T

EQUALITY

Forti	C	<u>T</u> , Unanimous	
Green	C	<u>W</u> S K T B	[H] A
Hernandez*****	C	<u>B</u> W S T	[K] H
Kern	L	<u>A</u> , Unanimous	
Schneider	C	<u>B</u> , Unanimous	

* "L" indicates a Liberal holding; "C" a Conservative holding. *See supra* notes 331-32.

** A judge's name underlined indicates that he or she was the author of the majority opinion, in brackets the dissent and in parentheses, a concurrence.

*** In *Cain*, *see supra* notes 63-68 and accompanying text, Judge Simons agreed with the majority on the state constitutional issue; he dissented on the basis of an unrelated question.

**** *See supra* notes 81-98 and accompanying text.

***** In *Savastano*, *see supra* notes 242-59, the court's holding was Conservative in rejecting the state constitutional claim; Judge Bellacosa's concurring entry was more Conservative, rejecting the notion that a constitutional right was even implicated.

***** Judge Alexander did not participate in the *Hernandez* decision. *See supra* notes 292-307 and accompanying text.

TABLE B
Authorship of Opinions

	W	S	K	A	T	H	B	UNSIGNED
CRIMINAL JUSTICE								
Majority	0	2	2	2	2	2	3	7
Concurrence	0	1*	1	1	0	0	0*	
Dissent	0	0	0	0	6	1	3	
Total	0	3*	3	3	8	3	6*	7
CIVIL LIBERTIES AND EQUALITY								
Majority	0	2	0	1	2	1	3	1
Concurrence	0	0	0	0	1	0	0*	
Dissent	1	0	1	0	1	2	0	
TOTAL	1	2	1	1	4	3	3*	1
ALL DECISIONS								
Majority	0	4	2	3	4	3	6	8
Concurrence	0	1*	1	1	1	0	0**	
Dissent	1	0	1	0	7	3	3	
Total	1	5*	4	4	12	6	9**	8

* plus one entry

** plus two entry

TABLE C
Majority Voting Blocks

6-1 DECISIONS

Judges in Majority	Number of Decisions	Liberal	Conservative
W S K A T H	3	1	2
W S K A H B	3	0	3
Total	6	1 (17%)	5 (83%)

Cases: Gonzales, Sirno, Savastano*, Motor Vehicles Mfg. Ass'n., Cain**

5-2 DECISIONS

Judges in Majority	Number of Decisions	Liberal	Conservative
W S K A B	2		2
W S K T H	1	1	
W S K T B	1		1
W S K H B	1		1
W S A H B	2		2
W K A T H	1	1	
Total	8	2 (25%)	6 (75%)

Cases: Wicks, Hults, Dunn, Carter, Golden, Green, Cintron

4-3 DECISIONS

Judges in Majority	Number of Decisions	Liberal	Conservative
W S K B	1		1
W S T B	1		1
W S H B	1		1
S A H B	1		1
K A T H	1	1	
Total	5	1 (20%)	4 (80%)

Cases: Bing, Centano, Vilardi, Seelig, Hernandez

* See *supra* Table A, note on Savastano.

** See *supra* Table A, note on Cain

TABLE D
*Alignment with Majority
(Divided Decisions)*

	Majority	Separate*
Wachtler	17 (89%)	2 (11%)
Simons	17 (89%)	2 (11%)
Kaye	14 (74%)	5 (26%)
Alexander	13 (72%)	5 (28%)
Titone	8 (42%)	11 (58%)
Hancock	14 (74%)	5 (26%)
Bellacosa	13 (68%)	6 (32%)

* 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. Hence, for example, in *Cain*, see *supra* Table A, Judge Simons is deemed to have voted with the majority.

TABLE E
*Ideological Voting Patterns
(Divided Decisions)**

	W	S	K	A	T	H	B	COURT
CRIMINAL JUSTICE								
Liberal	23% (3)	15% (2)	54% (7)	54% (7)	92% (12)	46% (6)	8% (1)	31% (4)
Conservative	77% (10)	85% (11)	46% (6)	46% (6)	8% (1)	54% (7)	92% (12)	69% (9)
CIVIL LIBERTIES AND EQUALITY								
Liberal	20% (1)	0%	40% (2)	25% (1)**	60% (3)	60% (3)	0%	0%
Conservative	80% (4)	100% (5)	60% (3)	75% (3)**	40% (2)	40% (2)	100% (5)	100% (5)
TOTAL								
Liberal	22% (4)	11% (2)	50% (9)	47% (8)**	83% (15)	50% (9)	6% (1)	22% (4)
Conservative	78% (14)	89% (16)	50% (9)	53% (9)**	17% (3)	50% (9)	94% (17)	78% (14)

* For the purposes of this table only, *Savastano*, *supra* notes 242-59, is not included among the "divided decisions". Although Judge Bellacosa's concurring entry was arguably more Conservative than the majority opinion, both were decidedly Conservative and no Liberal/Conservative division can fairly be identified.

** Judge Alexander did not participate in the *Hernandez* decision. See *supra* notes 292-307 and accompanying text.

TABLE F
Individual Voting Alignments
(Number of Times Judges Voted with Each Other in
*Divided Decisions)**

		W	S	K	A	T	H	B
Wachtler	Majority		84% (16)	68% (13)	61% (11)	39% (7)	63% (12)	63% (12)
	Separate		5% (1)	5% (1)	0% (0)	5% (1)	0% (0)	5% (1)
	Total		89% (17)	73% (14)	61% (11)	42% (8)	63% (12)	68% (13)
Simons	Majority	84% (16)		63% (12)	61% (11)	32% (6)	63% (12)	68% (13)
	Separate	5% (1)		0% (0)	0% (0)	0% (0)	0% (0)	11% (2)
	Total	89% (17)		63% (12)	61% (11)	32% (6)	63% (12)	78% (15)
Kaye	Majority	68% (13)	63% (12)		56% (10)	37% (7)	53% (10)	42% (8)
	Separate	5% (1)	0% (0)		6% (1)	21% (4)	5% (1)	0% (0)
	Total	73% (14)	63% (12)		61% (11)	58% (11)	58% (11)	42% (8)
Alexander	Majority	61% (11)	61% (11)	56% (10)		28% (5)	61% (11)	44% (8)
	Separate	0% (0)	0% (0)	6% (1)		16% (3)	11% (2)	0% (0)
	Total	61% (11)	61% (11)	61% (11)		44% (8)	72% (13)	44% (8)
Titone	Majority	37% (7)	32% (6)	37% (7)	28% (5)		32% (6)	11% (2)
	Separate	5% (1)	0% (0)	21% (4)	16% (3)		16% (3)	0% (0)
	Total	42% (8)	32% (6)	58% (11)	44% (8)		47% (9)	11% (2)
Hancock	Majority	63% (12)	63% (12)	53% (10)	61% (11)	32% (6)		42% (8)
	Separate	0% (0)	0% (0)	5% (1)	11% (2)	16% (3)		0% (0)
	Total	63% (12)	63% (12)	58% (11)	72% (13)	47% (9)		42% (8)
Bellacosa	Majority	63% (12)	68% (13)	42% (8)	44% (8)	11% (2)	42% (8)	
	Separate	5% (1)	11% (2)	0% (0)	0% (0)	0% (0)	0% (0)	
	Total	68% (13)	78% (15)	42% (8)	44% (8)	11% (2)	42% (8)	

* The percentages represent the proportion of divided decisions in which the judges voted together; the number is the number of divided decisions, out of a total of nineteen, in which the judges voted together.