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Foreword: "Year in Review" Shows Court of Appeals Continuing Its Great Traditions

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FOREWORD

"YEAR IN REVIEW" SHOWS COURT OF APPEALS CONTINUING ITS GREAT TRADITIONS

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"There shall be a Court of Appeals . . . ."[1] With that decisive constitutional declaration 150 years ago, the Court of Appeals of the State of New York, the state's highest court, was born.

During this landmark anniversary year, I am especially pleased to introduce your inaugural Year in Review issue. Often I have complained that insufficient scholarly attention is paid to the work of the state courts,[2] which determine roughly ninety-eight percent of the nation's litigation.[3] This Year in Review issue certainly rises to the challenge, providing serious analysis of significant Court of Appeals decisions of the September 1996 to August 1997 term.

In reviewing the articles that follow, I was reminded that you should be careful what you wish for. Scholarly *attention* invariably means scholarly *criticism*. Like most of humanity, I suspect, being criticized has never been a favorite activity of mine. On balance, however, I welcome the thoughtful study of the Court's decisions, which have enormous impact

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1. Article VI, Section 2 of the 1846 New York State Constitution provided:
> There shall be a Court of Appeals composed of eight judges, of whom four shall be elected by the electors of the State for eight years, and four selected from the class of Justices of the Supreme Court having the shortest time to serve. Provision shall be made by law, for designating one of the number elected, as chief judge, and for selecting such Justices of the Supreme Court, from time to time, and for so classifying those elected, that one shall be elected every second year.

N.Y. CONST. art. VI, § 2 (1846).

2. *See, e.g.*, JUDITH S. KAYE, THE IMPORTANCE OF STATE COURTS: A SNAPSHOT OF THE NEW YORK COURT OF APPEALS, 1994 Annual Survey of American Law xi. I have a more general complaint as well: that the public is not well informed about the work of the courts, but I will reserve that complaint for another day. It seems to me that the profession needs to do a much better job of educating the public about the vital role of the law, lawyers and the courts in our society. We have, regrettably, too long left that important function entirely to the schools and the media.

3. *See* BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 95 (1996).

on the everyday lives of New Yorkers. And I welcome the alliance: courts searching for the best path on unmarked terrain often turn to law reviews for insights.[4]

The coincidence of our anniversary and your inaugural issue prompts me first to examine the Court of Appeals in its historical context before commenting on the term under review.

I. THE COURT IN HISTORICAL CONTEXT

After the Court of Appeals convened for the first time on September 7, 1847, the *Albany Evening Journal* reported that the original eight judges were "distinguished jurists" whose "well known adaption to the duties which the people have imposed upon them furnishes a guarantee that whatever is brought before them will be despatched with proper facility, and with a single eye to justice and right."[5] Although much has changed over the last 150 years, that guarantee endures.

Indeed, while neither life nor law in 1997 bears much resemblance to 1847, the Court's rich tradition of justice, fairness and equal treatment under the law continues to define our work today. For 150 years, the Court of Appeals has decided cases without fear or favor, enforcing obligations and protecting rights guaranteed by the constitutions and laws of the state and nation. Time has not eroded our commitment to justice and the rule of law.

Adherence to these timeless principles is, of course, not our only link with the past. Indeed, the continuity of the Court's process is clearly visible in many other respects, especially the volume and sweep of landmark decisions. As Professor Stewart E. Sterk recently noted, "no other state court has generated leading case after leading case in every decade for 150 years."[6] These influential decisions are beacons of the past that continue to illuminate today's legal pathways, guiding us in the resolution of cases that have a distinctly modern twist.

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4. *See* Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989); *see also* Ruth Bader Ginsburg, *Remark: On the Interdependence of Law Schools and Law Courts*, 83 VA. L. REV. 829 (1997).

5. THERE SHALL BE A COURT OF APPEALS: 150TH ANNIVERSARY OF THE COURT OF APPEALS OF THE STATE OF NEW YORK (1997) [hereinafter 150TH ANNIVERSARY BOOK]. *See* FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932, at 44 (1985). Judge Bergan served as an Associate Judge of the Court of Appeals from 1963 to 1972. His book is the only published history of the Court, and a basic source for this portion of the Foreword. A second basic source is a book issued in September 1997 by the Court of Appeals itself, to commemorate its anniversary.

6. Stewart E. Sterk, *The New York Court of Appeals: 150 Years of Leading Decisions*, *in* 150TH ANNIVERSARY BOOK, *supra* note 5, at 49-50. Professor Sterk describes selected decisions since 1847.

From its inception the Court of Appeals has been among the busiest courts in the nation. In its early days, the court was besieged with far too many cases, a consequence of the court's broad jurisdiction and the state's burgeoning economy. Indeed, overcrowded calendars, case backlogs and long delays were a persistent problem. By 1870 the *Albany Law Journal* asked:

> "How can this court expect to decide nearly twice as many cases as the Federal Supreme Court, and live? It is no exaggeration to say that the work has killed three of the former members, and it must tell on the others eventually . . . . There is a general feeling in our profession that this pace cannot be kept up much longer."[7]

In 1883, the *Journal* noted that four judges had "literally worked themselves to death" trying to keep up with the incredible caseload, "and other members of the court have seriously impaired their health in their hopeless undertaking."[8]

Today, the Court of Appeals of the State of New York decides about three times as many cases as the Federal Supreme Court,[9] or close to 300 cases annually. And I am pleased to report that my six colleagues[10]—though extremely hard working—are in excellent health. Even more happily, the Court of Appeals for the past several decades has been completely current in its docket. Litigants usually can expect to

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7. BERGAN, *supra* note 5, at 125-26. *See generally The Court Through the Decades*, *in* 150TH ANNIVERSARY BOOK, *supra* note 5, at 3-24 (referring repeatedly to the calendar problems).

8. BERGAN, *supra* note 5, at 125-26.

9. During the 1996 term of the United States Supreme Court, 90 cases were argued and 80 signed opinions issued. *See* WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (1998).

10. Judges Vito J. Titone, Joseph W. Bellacosa, George Bundy Smith, Howard A. Levine, Carmen Beauchamp Ciparick and Richard C. Wesley. In the late nineteenth century, judges were added to the Court's complement of eight in an effort to deal with the backlog of cases accumulating on the calendar. An 1899 constitutional amendment authorized the governor to designate up to four Supreme Court Justices to serve as Associate Judges of the Court of Appeals until the pending calendar was brought below 200 cases. *See* N.Y. CONST. art. VI, § 7 (1899); 150TH ANNIVERSARY BOOK, *supra* note 5, at 19; Indeed, Benjamin Cardozo was first named to the Court of Appeals in 1914 as a Supreme Court Justice in New York City, "temporarily" serving by designation of the governor. With the addition of temporary judges, the Court generally had nine or ten Associate Judges and a Chief Judge. The Court continued, however, to sit as a single bench of seven when hearing cases. By 1922, the Court returned to its normal complement of one Chief and six Associates, as it remains to this day. *See id.* at 19, 22.

receive their decisions, in full opinions, within six weeks of oral argument—likely a record for busy high courts.

A mountain of history explains the difference. Most pertinently, we evolved to what is now essentially a "cert" court. The Court's docket of close to 300 full appeals is by and large selected by the judges from the approximately 1500 civil motions and 3000 criminal applications for leave to appeal received annually. In civil cases, applications for leave to appeal are made by motion to the full Court (a vote of two judges suffices to bring a case to the Court), and in criminal cases by letter addressed to a single judge of the Court (who alone grants or denies leave). Our docket is generally about sixty percent civil, forty percent criminal.

In its early years, the Court consistently convened in Albany about 100 days a year, commencing each session with a consultation among the judges about cases that had been argued the previous session.[11] Opinions written and circulated during the next intersession were then "subjected to thorough discussion" and to "more or less modification."[12] Decisions announced at the close of that session were revised even further before they were sent to the Reporter for publication.[13]

Today, the Court still convenes in Albany for about 100 days a year—approximately eight two-week sessions. The Albany sessions are usually followed by three-week sessions in Home Chambers (situated throughout the State), during which time the judges individually draft and review decisions, study briefs for upcoming arguments and review applications for leave to appeal. Additionally, in June and December the Court meets for Decision Days (at which no arguments are heard), and in August for a special session of election appeals. Thus, except for July, the Court of Appeals convenes in Albany during every month.

Although the work days in Home Chambers are invariably long, full and fascinating, there is a special excitement as we prepare for the two-week Albany sessions. The judges look forward to spirited arguments with one another around the Conference Table every morning, followed by lively oral arguments every afternoon in our courtroom,[14] when we can

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11. *See* BERGAN, *supra* note 5, at 45-46.

12. *Id.*

13. *See id.*

14. Having visited courts around the world, I continue to believe that ours is the most magnificent courtroom anywhere—not the largest or most ornate by any means, but the most magnificent setting for the presentation of oral argument on the law. The scale of the room and handsome carved walls, ceiling and furniture help to create the ambience, but it is the portraits of the judges—a silent progression from the Court's very beginnings—that imbue a sense of the seamless web of the law. A chapter in our *150th Anniversary Book* chronicles the homes that preceded the current Court of Appeals Hall on Eagle Street in Albany. *See* 150TH ANNIVERSARY BOOK, *supra* note 5, at 25-34.

confront counsel with concerns gleaned from the briefs. Having enjoyed the practice of law for twenty-one years as a commercial litigator with New York City law firms before the miracle of my appointment to the Court of Appeals, I can honestly say that no professional experience matches those weeks in Albany, when the seven of us focus our entire energies—from early morning until late evening—on the business of the Court.

While the changed jurisdiction accounts in part for the Court's remarkable currency, major credit is also due to administrative reforms put in place by Chief Judge Charles D. Breitel more than two decades ago. At that time, the Court became a "hot bench," meaning that each of us arrives in Albany prepared for the oral arguments and prepared to vote the cases the following day; until that time there is no discussion among the judges about the cases. Additionally, unlike other courts where the chief or senior judge in the majority assigns the writings, on the Court of Appeals cases are assigned for writing randomly. At the close of the day's oral arguments, each judge selects an index card, turned face down, bearing the name of a case argued that afternoon. We are then responsible for reporting that case at Conference the following morning and, assuming the reporting judge carries a majority, for the writing. Randomness means that—although the Court's docket is wildly diverse—no one of us is designated "the expert" in any particular subject area. The combination of a hot bench and randomness, moreover, insures both that every case receives the best independent judgment of each member of the Court of Appeals, and that we are prepared to reach resolution—and disposition—promptly, which best serves the litigants and the law.

Against this backdrop I now turn to the Year in Review.

II. THE COURT'S WORK DURING THE YEAR IN REVIEW

In many ways, the Year in Review followed the pattern of recent terms. Statistically, our caseload neared 300 appeals, almost two-thirds civil. We began, and ended, the year with no backlog.

After nearly fifteen years as a Judge of the Court of Appeals, I still find the range of issues coming before the Court nothing short of dazzling. Every session is a full law school curriculum. A typical day of oral argument can consist of a free speech case, criminal matter, teacher tenure dispute, service of process issue, zoning controversy, family law matter and insurance law question.[15] The year in review was no exception.

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15. There are undoubtedly litigation trends, although I cannot account for them. For example, I have lately noticed a proliferation of insurance cases. In the criminal law area, defendant's right to be present recently dominated the Court's calendar, as did *Rosario* issues years earlier. *See* People v. Rosario, 173 N.E.2d 881, 882-84 (N.Y.

Some of last term's issues had a uniquely modern stamp—like the proper statute of limitations for failure to properly safeguard blood from HIV-contamination,[16] whether private dental offices were "places of public accommodation" for purposes of the Human Rights Law,[17] whether Eurodollar accounts belonging to banks in Asia were subject to seizure here,[18] the tension between corporate downsizing and age discrimination,[19] interpretation of pollution exclusion clauses in insurance policies,[20] and the sufficiency of a juvenile delinquency petition sworn to by a 12-year-old.[21]

Other times I wonder, hasn't this issue long been resolved? Wouldn't you think, for example, that the question whether the State could be sued for a constitutional tort was by now well settled?[22] Or that we had years

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1961) (discussing a defendant's right to access prior statements made by prosecution witnesses). One of my first purchases upon joining the Court in 1983 was a workers' compensation text—we had so many "comp" cases. Lately, however, we have had *no* workers' compensation cases.

16. *See* Weiner v. Lenox Hill Hosp., 673 N.E.2d 914, 917 (N.Y. 1997) (holding that a hospital's failure to properly safeguard its blood supply from HIV contamination "sounds in negligence, not medical malpractice," for statute of limitations purposes).

17. *See* Cahill v. Rosa, 674 N.E.2d 274, 277 (N.Y. 1997); Lasser v. Rosa, 667 N.E.2d 339 (N.Y. 1996) (holding that private dental offices are considered places of public accommodation subject to Human Rights Law).

18. *See* Superintendent of Banks v. CITIC Industrial Bank, 683 N.E.2d 756, 761 (N.Y. 1997) (holding that Banking Law § 606(4) vests Superintendent of Banks with considerable discretion regarding the appropriate manner of gathering, liquidating and dealing with the business and property of a foreign bank's failed New York agency).

19. *See* Laverack & Haines, Inc. v. State Div. of Human Rights, 673 N.E.2d 586, 586 (N.Y. 1996) (holding that employer adequately rebutted the prima facie case of age discrimination by admitting evidence of legitimate, independent and nondiscriminatory reasons to support its employment decision, such as downsizing of the company's employment rolls due to business setbacks).

20. *See* Northville Indus. Corp. v. National Union Fire Ins. Co., 679 N.E.2d 1044, 1049 (N.Y. 1997) (holding that "sudden and accidental" discharge exceptions in insurance policy's pollution exclusion were not applicable because evidence did not show leakages at issue were sudden or environmentally significant).

21. *See In re* Nelson R., 683 N.E.2d 329, 331 (N.Y. 1997) (concluding that a juvenile delinquency petition is not facially defective when the only supporting deposition containing factual allegations against the respondent has been sworn to by a child under 12 years old without a prior judicial determination of the child's competency as a witness).

22. *See* Brown v. State, 674 N.E.2d 1129, 1131 (N.Y. 1996) (holding that Court of Claims has subject matter jurisdiction to entertain constitutional tort claims against the state); *see also* Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown: *The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447 (1998).

ago determined that administrative review boards could act by quorum,[23] and that a suit for loss of consortium could not be brought separately from the injured spouse's personal injury action?[24] How can it be that the proper venue for prosecuting crimes committed on a commuter train first comes to us in the year 1997?[25] Always, there continue to be so many novel questions, whether in traditional or modern dress.

And as in years past, the 1996-1997 term again yielded issues that impact directly on the everyday lives of New Yorkers. Would a group home for the mentally retarded substantially alter a residential neighborhood?[26] Can a school board suspend a student for possessing a gun in a public school?[27] Can car rental companies in New York refuse to rent to persons under twenty-five years old solely on the basis of age?[28] We determined that street vendors could be precluded from selling hot dogs on certain New York City streets;[29] that the Transit Authority could

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23. *See* Wolkoff v. Chassin, 675 N.E.2d 447, 447 (N.Y. 1996) (determining that an action taken by three-member quorum of the Administrative Review Board for Professional Medical Conduct is valid).

24. *See* Buckley v. National Freight, Inc., 681 N.E.2d 1287, 1288 (N.Y. 1997) (deciding that because a loss of consortium claim could have been commenced and joined with an impaired spouse's personal injury claim before settlement, the impaired spouse's release barred the plaintiff from pursuing his loss of consortium claim).

25. *See* People v. Greenberg, 678 N.E.2d 878, 881 (N.Y. 1997) (deciding under CPL 20.40(4)(f) that an offense committed on board a common carrier may be prosecuted in any county through which the carrier passed during the trip).

26. *See* Jennings v. New York State Office of Mental Health, 682 N.E.2d 953, 955 (N.Y. 1997) (finding that substantial evidence supported determination that a proposed community residential facility for the mentally disabled would not substantially alter the nature or character of the community).

27. *See* Juan C. v. R.C. Cortines, 679 N.E.2d 1061, 1063 (N.Y. 1997) (holding that the doctrine of collateral estoppel does not apply to foreclose education officials from separately determining the suspension and reassignment of a student from whom a gun was seized in his high school, even though the gun had been suppressed in a prior juvenile delinquency proceeding).

28. *See* People v. Alamo Rent-A-Car, 678 N.E.2d 882, 883 (N.Y. 1997) (holding that New York Automobile Insurance Plan is "available" insurance coverage within the meaning of General Business Law § 391-g, which specifies that it is unlawful to refuse to rent motor vehicles to persons 18 or over solely on the basis of age, provided that insurance coverage for persons of such age is "available").

29. *See* Big Apple Food Vendors' Ass'n v. Street Vendor Review Panel, 683 N.E.2d 752, 755 (N.Y. 1997) (determining that City Street Vendor Review Panel properly adopted rule extending certain existing street vending restrictions and creating additional restricted locales).

prohibit sale of political newspapers in subway stations;[30] and that Albany's taxes on transient businesses, like flea markets, were unconstitutional.[31] In some way, every case decided last term touched the life of New Yorkers.

The Year in Review followed the pattern of recent terms in another significant respect. Our docket for the term, like prior terms, was divisible into three types of matters, reflecting the three sources of our law: common law cases; statutory questions; and state and federal constitutional issues. In the paragraphs that follow, I illustrate each of these categories with one significant matter from last term.

III. THE COMMON LAW

Unlike their federal counterparts, state courts are "common law courts." The common law is derived not from authoritative texts such as constitutions and statutes, but rather from human wisdom collected case by case over the years to form a stable body of rules that not only determine immediate controversies but also guide future conduct. While it is durable, certain and predictable at its core, the common law is not static. It proceeds and grows incrementally, in restrained and principled fashion, to fit a changing society.

Possibly the most familiar example of common law jurisprudence is the delineation of liability for negligent personal injury. Though the facts of each case differ and the answers vary, the court's function is always the same—to weigh and balance the relation of the parties, the nature of the risk and the public interest.[32]

Consider, for example, a cluster of cases heard last term involving plaintiffs who sustained injuries while engaged in sports activities—bobsledding, karate, Tae Kwon Do and tennis.[33] Under the old contributory negligence rule, the assumption of risk doctrine would have

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30. *See* Rogers v. New York City Transit Authority, 680 N.E.2d 142, 144 (N.Y. 1997) (holding that New York City Transit Authority had authority to determine that sale of a political newspaper on subway property was commercial and therefore expressly prohibited under Transit Authority Regulations).

31. *See* Homier Distrib. Co., v. City of Albany, 681 N.E.2d 390, 397 (N.Y. 1997) (determining that a special tax on transient retailers operating at temporary business sites discriminated in favor of local retail businesses and violated the Commerce Clause).

32. The modern field of product liability law is another excellent illustration of an area of common law development. *See, e.g.*, Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222 (N.Y. 1992); Robinson v. Reed-Prentice Div., 49 N.Y.2d 471 (1980).

33. *See* Morgan v. State of New York (bobsledding), Beck v. Scimeca (karate), Chimerine v. World Champion John Chung Tae Kwon Do, Inst. (Tae Kwon Do), Siegel v. City of New York (tennis), 685 N.E.2d 202 (N.Y. 1997).

barred all recovery by these plaintiffs. With the 1975 adoption of a comparative negligence rule by the New York State Legislature, however, the assumption of risk doctrine required reevaluation.

These four "sports-tort" cases—argued and decided together—called upon the Court of Appeals to formulate a rule that would take into account the inherent risks of the various activities, yet encourage owners and operators to exercise care in the maintenance of their facilities. Balancing these interests, the Court distinguished between the tennis player injured when he tripped on the torn hem of a net, and the plaintiffs in the other three cases—a bobsledder hurt when his sled tipped over as he ended the run, a karate student who landed awkwardly after a "jump roll," and a Tae Kwon Do injury during a kick maneuver. Torn nets, we held, are not a risk inherent in the sport of tennis, but could very well have resulted from negligent maintenance of the facility—in which case comparative negligence principles would be implicated. The other injuries, however, did not result from conditions over and above the usual dangers inherent in the sports, and those plaintiffs lost.

By concluding that participation in a sport does not bring with it the assumption of concealed or unreasonably increased risks attributable to the owner of the sports facility, the decision encourages proper maintenance of such facilities. By also recognizing, however, that participants assume the normal risks inherent in their sport the Court does not impose a crushing burden on owners, discouraging the operation of such facilities. Thus, while the assumption of risk doctrine no longer provides an absolute defense, it still helps to define the standard that circumscribes a defendant's duty of care.

Every term, indeed every Court of Appeals session, includes similar common law issues, where the Court—drawing on precedents from its earliest days—fixes the limits of lawful conduct.

IV. STATUTORY LAW

Despite the continued vitality of the common law, unquestionably in modern times the law increasingly has become "statutorified."[34] Today there are statutes on every imaginable subject. Even cases in traditional common-law fields like torts, contracts and property, routinely involve questions of statutory interpretation.[35] Indeed, statutory interpretation has

34. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

35. *See, e.g.*, Felker v. Corning, Inc., 682 N.E.2d 950, 952-53 (N.Y. 1997) (holding that an owner or contractor who fails to provide any safety devices for workers at a building worksite is, under Labor Law § 240(1), absolutely liable in damages for injuries sustained by a worker when the absence of such devices is the proximate cause of the injuries).

likely become the principal task engaged in by "common law courts" everywhere.

My choice of a statutory interpretation case, from among the many we reviewed last term, is *Dox v. Tynon*,[36] involving a front-page issue today: child support. This case combines both a contemporary life problem and a traditional exercise in statutory interpretation.

The issue before the Court of Appeals in *Dox* was whether a spouse's long delay in seeking enforcement of an award impliedly waived her right to child support. To be precise, the judgment of divorce, including child support, had been entered eleven years before the mother sought enforcement. When petitioner-mother did come into Family Court seeking a money judgment for arrears, the father claimed that she had told him more than a decade earlier that she wanted him out of her life and he had agreed on condition that she would receive no money from him. The trial court, however, did not find that this conversation ever took place. Instead, the issue turned on whether the mother's failure to demand payment or enforce the judgment for so long a period constituted an implied waiver. The answer lay in the New York statutes.

The evolution of New York's statutory scheme governing the payment of child support itself reflects the change in societal attitudes toward "dead-beat dads." Early statutes placed the burden of enforcing child support orders entirely on the party entitled to the benefits—typically the mother.[37] As a result, the defaulting spouse could sit by and allow arrears to accumulate until an enforcement proceeding was commenced, and then argue for abatement or annulment.[38] Over the years, however, the Legislature gradually shifted the burden onto the spouse obligated to pay the support.[39]

In 1986, the New York State Legislature put child support on a different footing from all forms of support payment. Cancellation of accumulated child support arrears was by law prohibited. Not even good

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36. 681 N.E.2d 398 (N.Y. 1997).

37. *See id.* at 400.

38. *See id.*

39. Under the pre-1980 statute, the court had discretion whether to enter a money judgment unless one had already been entered for the arrears. *See* N.Y. DOM. REL. LAW § 244 (McKinney 1986); N.Y. FAM. CT. ACT § 460(1) (McKinney 1983). In 1980, these sections were amended to make the entry of a money judgment mandatory "unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears." N.Y. DOM. REL. LAW § 244 (amended by L 1980, ch. 645, §§ 1, 5); *see also* N.Y. FAM. CT. ACT § 460 (amended by L 1980, ch. 241, § 2).

cause for having failed to seek a prospective downward modification could justify annulling a defaulting spouse's child support arrears.[40]

Chronicling this statutory evolution, the Court of Appeals rejected the argument that the mother implicitly waived her right to the outstanding child support payments by delaying enforcement. As the Court noted, to have recognized an "impled waiver" here would have produced the result the statute sought to avoid: retroactive modification of child support arrears. Instead, following the statute, parties seeking modification of child support orders must do so prospectively, by application to the court.

Volumes could be—and have been—written about the interrelationship among the three branches of government centering on the interpretation of statutes. Plainly, cases would not reach our Court if application of a statute were purely mechanical. No legislature, drafting in the abstract, could possibly foresee the endless variety of questions that arise as statutes are applied to real-life factual situations. Frequently courts construing statutes are called upon to fill gaps and make choices among reasonable interpretations—much like applying, fitting and tailoring judge-made precedents to new facts as part of the common law process. And in both instances—common law decision-making and statutory interpretation—the Legislature is the ultimate policy-maker. Within constitutional limits, the People's elected representatives can adopt, modify or override a court's ruling simply by passing, or amending, a statute.

V. CONSTITUTIONAL LAW

In addition to common law and statutory law issues, the Court regularly confronts questions arising under the State and Federal Constitutions, where the Judicial Branch has the last word. Here my choice of a single example for this Foreword was especially difficult. I debated among a First Amendment church/state matter,[41] a group of property takings cases,[42] and criminal courtroom closure cases,[43] all argued

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40. Only prospective modifications, where tenable under the limited situations outlined in the Domestic Relations Law and the Family Court Act, were permitted.

41. *See* Grumet v. Cuomo, 681 N.E.2d 340, 345 (N.Y. 1997) (holding that a law used to establish a school district for the religious community of Kiryas Joel violated neutrality principles of the Establishment Clause).

42. *See* Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1036 (N.Y. 1997) (holding that environmental restrictions did not effect an unconstitutional taking of property for which a landowner must be justly compensated); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 870 (N.Y. 1997) (stating that the denial of variance from "steep slope" ordinance, which prevented petitioner from building a one-family dwelling on his parcel, did not constitute a taking); Kim v. City of New York, 681 N.E.2d 312, 319 (N.Y. 1997) (determining that city enforcement of the legal duty to regrade road,

and decided last term. Eventually I selected the criminal cases because they illustrate our relationship to the federal courts—although I hope you will study all of the decisions. Notably, certiorari was denied by the United States Supreme Court in all of these cases.

For a more thorough treatment of the issues actually presented by the closure cases, I refer you to Randolph Jonakait's article, *Secret Testimony and Public Trials in New York*.[44] I want only to touch briefly on the conundrum presented—both as a matter of substantive law and as a matter of procedure.

The factual scenario in all of these cases is the same: an undercover officer, say, in front of the Port Authority bus terminal in Manhattan, purchases with prerecorded "buy" money a small amount of contraband, typically for $10 or $20, from defendant. As prearranged, another officer then immediately makes the arrest, or "bust." These "buy and bust" operations have become standard operating procedure in New York City. One constitutional issue that can arise in these cases is the balancing of defendant's Sixth Amendment right to public trial against law enforcement's interest in protecting the identities of active undercover officers, whose safety may be jeopardized by public disclosure of their identities in open court.

The cases heard last term centered on just one facet of the larger closure issue. Given the defendant's right to a public trial, closing a courtroom, even for the testimony of one witness, obviously should be allowed only where clearly necessary. Thus, there must be an established risk to the safety of the undercover officers. A number of measures short of closure—such as testifying behind a screen or a disguise, or stationing a court officer at the door to monitor those seeking entry—may provide adequate protection for the officer without impinging the defendant's right to a public trial. In *Ramos* and *Ayala*, the precise issue was this: once a threat to the officers' safety is established, who is to speak in favor of less restrictive alternatives to closing the courtroom—the prosecutor, the defendant or the judge? In the interest of heightening your curiosity, and directing you immediately to Professor Jonakait's article or the New York Reports, I withhold the answer to this question. I will say only that the New York State Court of Appeals held one way and the United States Court of Appeals for the Second Circuit, on habeas review, initially held another way, but ultimately agreed with us after *en banc* review.

So what of the relationship between the state and federal courts? Just a few observations. Our parallel court systems by and large function

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which required plaintiffs to raise property to the legal grade, did not constitute a taking).

43. *See* People v. Ramos, 685 N.E.2d 492 (N.Y. 1997).

44. *See* Randolph N. Jonakait, *Secret Testimony and Public Trials in New York*, 42 N.Y.L. SCH. L. REV. 407 (1998).

separately and independently. I have jokingly commented that federal court jurisdiction is everything left over by the states, but that is plainly not true. There are well-defined areas of federal jurisdiction. And the work of the state and federal courts obviously overlaps at the highest level, since our decisions are, of course, subject to review by the United States Supreme Court.

There are, however, other points of intersection, and I will close this section by commenting on only three. The first, illustrated by the closure cases, is habeas review: where a federal constitutional issue is at stake, criminal defendants can begin again, going from the state's highest court to the entry level federal court for review of their claim. The federal courts will only review habeas corpus petitions if the available state judicial remedies have been exhausted and the constitutional argument has already been "fairly presented" to the state courts.[45] Second, and relatedly, state courts in the American justice system have the same authority as federal courts interpreting and applying the federal Constitution, subject to Supreme Court review, but additionally state courts are the ultimate arbiters on matters of state constitutional law.[46] And third, in recent years, a new point of intersection has been established: certified questions. Regularly since 1985, when the law went into effect, the Court of Appeals has received from the Second Circuit novel, significant questions of state law—as to which state courts are the final arbiters—avoiding the need for important state law issues in federal court litigation to remain open and unresolved until later state court litigation.[47]

I close this survey of the Year in Review with the observation that last term, as in the past, there was never a moment's need for the judges of the Court of Appeals of the State of New York to look for things to do.

VI. CONCLUSION

I conclude by returning, full circle, to the Court's early history. In a State Bar Report of 1894, Walter S. Logan observed that the "organization of our courts and the establishment of our judicial policy is

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45. *See* 28 U.S.C. § 2254(b) (1994); Picard v. Connor, 404 U.S. 270, 275 (1971); Irvin v. Dowd, 359 U.S. 394 (1959).

46. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

47. *See* Rule 500.17. *See, e.g.*, Rooney v. Tyson, 91 N.Y.2d 830 (1997); Insurance Co. of N. Am. v. ABB Power Generation, Inc., 1997 WL 729117 (N.Y.); Norcon Power Partners v. Niagara Mohawk Power, 681 N.E.2d 1293 (N.Y. 1997).

what comes nearest to the everyday life of the people, and on which most depends their progress and their happiness."[48]

Obviously, much has changed in society over the past 150 years, and court dockets mirror society. Those original Court of Appeals Judges would likely find little familiar about the subject matter of our cases, as courts increasingly have become the battlefield of first resort in societal conflicts of a distinctly modern vintage. One hundred fifty years ago, the courts were overwhelmingly concerned with private property disputes, like wills, mortgages, promissory notes and deeds. Today, by contrast, we regularly hear appeals concerning child sex abuse, juvenile delinquency, violent crime; commercial cases concerning worldwide mergers and electronic wire transfers; environmental law; mass torts; products liability; suits against government for services and entitlements. Unchanged, however, is a tradition of respectful, thoughtful consideration of weighty, difficult, often cutting-edge legal questions, whether they are statutory, constitutional or common law issues.

In a time of rampant criticism and discontent about public institutions, it is easy to lose sight of the manifold contributions courts every day make to an orderly, peaceful, principled society. Indeed, throughout history independent courts, respected by government and the people, have been—and they remain—the cornerstone of a free society. Though we cannot know what the new century will add to our dockets, we can be confident that the Court of Appeals' longstanding commitment to justice and the rule of law will continue to light a path in the years ahead.

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48. Walter S. Logan, *The Judiciary Article of the New Constitution*, *in* PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION (1894), *reprinted in* 150TH ANNIVERSARY BOOK, *supra* note 5, at 19.