

1979

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### Recommended Citation

Jill Paradise Botler, M. Christine DeVita, Stephen John Kallas, and William J. Ruane, *The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court*, 47 Fordham L. Rev. 929 (1979).

Available at: <https://ir.lawnet.fordham.edu/flr/vol47/iss6/2>

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# The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court

## Cover Page Footnote

\*The authors wish to express their appreciation to Charles D. Breitel, Former Chief Judge of the New York Court of Appeals; J. Robert Lynch, Justice of the Appellate Division, First Department; and James B.M. McNally, Aron Steuer, and Emilio Nunez, Former Justices of the Appellate Division, First Department, for sharing their insights into, and perspectives on, the appellate process during interviews with members of this study. The authors also wish to thank Paul Moskowitz, Administrative Assistant to the Presiding Justice, Appellate Division, First Department, and Stephen R. Grotzky, Librarian, Appellate Division, First Department, for their assistance in the empirical survey. \*\*The Introduction was prepared by Sephan J. Kallas, who also assisted in the research for Part II; Parts I and V were prepared by William J. Ruane; Part II by M. Christine DeVita; Part III by Lucille LaBozzetta Weisbrot; and Part IV by Jill Paradise Botler.

# PROJECT

## THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK: AN EMPIRICAL STUDY OF ITS POWERS AND FUNCTIONS AS AN INTERMEDIATE STATE COURT\*

### INTRODUCTION

The Appellate Division of the Supreme Court of New York<sup>1</sup> is one of the busiest intermediate appellate courts in the United States.<sup>2</sup> In addition, the jurisdiction of the First Department of the Appellate Division over New York City's financial district probably makes it the country's most important state appellate court in the commercial field.<sup>3</sup> The court's importance and its

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1. The Appellate Division of the Supreme Court is the intermediate appellate court of New York State. The Appellate Division is actually comprised of four separate courts, one for each judicial department in the state. Each department handles appeals from the lower courts within its territorial jurisdiction, with the majority of such appeals arising from the supreme court or the county courts. The Appellate Division also hears appeals from administrative agencies. *See, e.g.*, N.Y. Civ. Prac. Law § 7804(g) (McKinney 1963); N.Y. Exec. Law § 298 (McKinney 1972 & Supp. 1978). The Appellate Division has the power to exercise "all of the original jurisdiction of the supreme court." *In re Association of the Bar*, 222 A.D. 580, 585, 227 N.Y.S. 1, 6 (1st Dep't 1928); *see* N.Y. Civ. Prac. Law §§ 506(b), 3222(b), 7002(b) (McKinney 1970 & Supp. 1964-1978). *But see* *Waldo v. Schmidt*, 200 N.Y. 199, 93 N.E. 477 (1910). The *Waldo* court stated: "There is but one Supreme Court, . . . but it is divided . . . into two distinct parts. The Trial and Special Term comprise one part, vested with the general original jurisdiction in law and equity. . . . The Appellate Division forms another and distinct part of the same court. [It was] created . . . for the express purpose of exercising appellate jurisdiction . . . ." *Id.* at 202, 93 N.E. at 478. In any event, the Appellate Division rarely, if ever, exercises such jurisdiction. D. Siegel, *New York Practice* § 11 (1978). The Appellate Division also has exclusive original jurisdiction with respect to the licensing and supervision of attorneys. N.Y. Jud. Law § 90 (McKinney 1968 & Supp. 1978). For a discussion of the original jurisdiction of the court, *see* D. Siegel, *supra*, § 11.

2. It appears that the Appellate Division of New York and the California Court of Appeals are the most active intermediate appellate courts in the country. In 1977, the four departments of the Appellate Division decided 14,628 motions and disposed of 7,744 appeals from judgments or orders. Twenty-Third Ann. Rep. N.Y. Jud. Conference 51 (1978). The total of 22,372 decided motions and dispositions of judgments or orders appealed from slightly exceeds the 22,223 transactions in the California Courts of Appeal for the fiscal year 1976-77. Judicial Council of California, Annual Report of the Administrative Office of the California Courts 71 (1978). The total number of transactions includes appeals, original proceedings, motions, rehearings granted or denied, and miscellaneous orders. *Id.*

3. It is precisely for this reason that the United States Court of Appeals for the Second Circuit has been cited as the most important federal commercial court in the country. N.Y. Times, Mar. 13, 1979, at 1, col. 1. A former justice of the Appellate Division, First Department, has stated that the high concentration of business and industry in New York County is the "only explanation" for the large caseload. Transcript of Interview with James B.M. McNally, Former

overwhelming caseload are also attributable to the breadth of the court's appellate powers<sup>4</sup> with respect to both the range of orders and judgments appealable to the court<sup>5</sup> and the wide scope of review it may exercise.<sup>6</sup>

In essence, the Appellate Division has de novo review powers which allow the court to render whatever decree the case requires.<sup>7</sup> Courts of other jurisdictions typically apply a narrower review standard, scrutinizing only whether the trial proceedings were fair and whether the judgment appealed from was supported by sufficient evidence.<sup>8</sup> In contrast, the Appellate Division's de novo review power gives it the authority to review questions of fact as well as questions of law.<sup>9</sup>

A purported advantage of de novo review is that it allows the appellate court to alleviate any plain miscarriage of justice. It also permits the court to make new findings of fact in certain circumstances, further ensuring a more thorough review of the case below. Allowing such review, however, gives rise to the potential threat of relegating the trial court proceeding to little more than a preliminary hearing with the final decision reserved for the appellate court.<sup>10</sup> This may allow the Appellate Division to invade the traditional factfinding functions of the jury or, in a nonjury case, the trial judge. Moreover, the breadth of the court's review powers creates the risk that the lower courts will perceive their function as preliminary, and thus render adjudications with less care and attention than they might otherwise.

Appealability in New York is also very broad. The New York Civil Practice Law and Rules (CPLR) allows appeals from almost all judgments, whether final or interlocutory, as well as most orders determining motions made upon notice to all parties.<sup>11</sup> The relevant provisions of the New York Criminal Procedure Law (CPL) are also very liberal.<sup>12</sup> In civil actions this ease of appealability often enables a party to gain immediate review of an order made during the course of an action, rather than waiting until entry of a final order in the action. On the other hand, broad appealability as of right has imposed a burdensome caseload upon the Appellate Division, allowing appeals from all but the most preliminary orders in an action.<sup>13</sup>

Justice of the Appellate Division, First Department, in New York City, at B1 (Nov. 15, 1978) [hereinafter cited as McNally Interview].

4. As used herein, the term "appellate powers" refers both to the range of orders and judgments appealable to the court and to the court's "scope of review" or "review powers." These latter terms are used interchangeably to refer specifically to the types of questions the Appellate Division may consider and to the various dispositions the court may make.

5. The range is especially broad in civil appeals from the supreme court or a county court. N.Y. Civ. Prac. Law § 5701(a) (McKinney 1978); see pt. II(A)(1) *infra*.

6. N.Y. Civ. Prac. Law § 5501(c) (McKinney 1978); N.Y. Crim. Proc. Law § 470.15(1) (McKinney 1971); see pt. III *infra*.

7. See note 290 *infra* and accompanying text.

8. *E.g.*, Cal. Penal Code §§ 1235, 1259 (West 1970); Conn. Gen. Stat. Ann. §§ 52-263, 54-96 (West Supp. 1978); notes 311-12 *infra* and accompanying text.

9. N.Y. Civ. Prac. Law § 5501(c) (McKinney 1978).

10. See note 316 *infra* and accompanying text.

11. N.Y. Civ. Prac. Law § 5701 (McKinney 1978).

12. N.Y. Crim. Proc. Law §§ 450.10, .20 (McKinney 1971).

13. See notes 147-49 *infra* and accompanying text.

Although there is probably no consensus on the precise role of an intermediate appellate court, three principal functions are regularly attributed to the Appellate Division: to screen cases for the New York Court of Appeals by acting as the final court of review for many actions not important enough to merit review in the state's highest court;<sup>14</sup> to supervise the supreme court and other lower courts;<sup>15</sup> and to ensure that substantial justice is available to the litigants.<sup>16</sup> This study aims to examine the relationship between the Appellate Division's performance of these functions and its unusually broad appellate powers. More specifically, the study seeks to determine how these powers developed, to what extent they are necessary for fulfilling the court's functions, and whether certain modifications of them might be desirable. The first three parts of this study outline the legislative history of the Appellate Division's powers, the policies underlying the current statutes governing appealability to it, and its scope of review. These parts of the study also address several questions raised by the court's broad scope of review and by the ease of appealability to the court: Should the rules governing appealability be narrower in order to reduce the Appellate Division's overwhelming caseload and to eliminate frivolous appeals? Is the Appellate Division's power to substitute its own view of the case broader than necessary to fulfill its primary functions? Is this review power so broad as to allow the Appellate Division to interfere with the jury's traditional factfinding function? Finally, in an effort to determine how the court actually exercises its broad powers, the fourth part of the study statistically analyzes a random sample of cases decided by the First Department in 1965 and 1975. The data derived from this analysis will be examined with particular emphasis on the efficiency of the appellate system. This discussion will also focus on any trends or abuses that were uncovered, along with the effect, if any, of the specific variables analyzed on the outcome of appeals. Based upon the results of this statistical analysis, the fifth part of the study will suggest ways in which the Appellate Division's powers might be revised or restricted to eliminate frivolous and dilatory appeals without sacrificing the court's ability to serve its primary functions.

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14. See Hopkins, *The Role of an Intermediate Appellate Court*, 41 Brooklyn L. Rev. 459, 462 (1975); notes 70-75 *infra* and accompanying text.

15. See Transcript of Interview with Charles D. Breitel, Former Justice of the Appellate Division, First Department, and Former Chief Judge of the New York Court of Appeals, in New York City, at A7, B7, C6 (Nov. 17, 1978) [hereinafter cited as Breitel Interview]; note 20 *infra* and accompanying text.

16. See ABA Comm'n on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.00, Commentary at 4 (Approved Draft 1977) [hereinafter cited as ABA Standards]; Transcript of Interview with J. Robert Lynch, Justice of the Appellate Division, First Department, in New York City, at B2 (Nov. 13, 1978) [hereinafter cited as Lynch Interview]; McNally Interview, *supra* note 3, at A1, B2; Transcript of Interview with Emilio Nuñez, Former Justice of the Appellate Division, First Department, in New York City, at 1 (Nov. 30, 1978) [hereinafter cited as Nuñez Interview]; notes 140-42 *infra* and accompanying text.

A fourth function that has been suggested as befitting an appellate court is maintaining the uniformity of the law within the state. ABA Standards, *supra*, § 3.00, Commentary at 4. However, this function is more appropriate for the New York Court of Appeals, in its capacity as the state's highest court, than for the Appellate Division. See note 526 *infra*.

## I. THE HISTORICAL ORIGINS OF THE APPELLATE DIVISION'S POWERS

Before any attempt can be made to examine how scope of review and appealability operate today and how they affect the performance of the Appellate Division, it is necessary to examine their historical origins. The court's powers have been gradually expanding for over 100 years. Although these powers are currently embodied in the CPLR and the CPL,<sup>17</sup> these statutes, to a large extent, merely incorporate preexisting practices. Thus, the rationale for the Appellate Division's broad powers can be found only by exploring their development over time, isolating those points at which critical choices have been made by the legislatures and constitutional conventions, and examining how those choices have been interpreted by the courts.

This part will attempt to pinpoint those developments that have had a significant effect on the operation of the Appellate Division today. First, it will trace the scope of review in and appealability of civil actions from the time of the state's first constitution in 1777, through the codification and recodification of the common law from 1846 to 1920, and up to the enactment of the CPLR in 1962. The development of criminal appellate procedures will be discussed separately, for they have not undergone the constant change that the civil appellate procedures have witnessed.

### A. Appeals in Civil Cases

#### 1. The Supervisory Role of the Early Supreme Court

Prior to the New York State Constitution of 1846, New York's appellate procedures followed the rigid common law rules governing writs of error and appeals which had been adapted from the English judicial system.<sup>18</sup> Appellate review was exercised by the Supreme Court of Judicature,<sup>19</sup> the forerun-

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17. N.Y. Civ. Prac. Law §§ 5501(c) (scope of review), 5701 (appealability) (McKinney 1978); N.Y. Crim. Proc. Law §§ 450.10-.20 (appealability), 470.15 (scope of review) (McKinney 1971).

18. See N.Y. Const. of 1777, art. XXXV. Although the state's constitution did provide that the law of the new state was to consist of the law of England as modified by the acts of the new state legislature, this had little effect on procedure. Because the state had adopted the common law court system, and because the legislature was prohibited from creating any new courts which were not common law courts, the few legislative acts that were passed regarding court procedures dealt with such minor aspects as limitations on actions, fees, and references. Fitzpatrick, *Procedural Codes of the State of New York*, 17 Law Lib. J. 12, 13 (1924). After 1828, the procedure in the courts was largely regulated by Part III of the Revised Statutes of New York. Law of Dec. 10, 1828, ch. 20, § 3, 1828-1829 N.Y. Laws 19 (repealed 1877). The section of the Revised Statutes governing writs of error, 2 N.Y. Rev. Stat. §§ 1-66, at 590-602 (1829) (repealed 1877), did not affect the review power of the supreme court or the types of orders appealable thereto, but merely set down the common law rules as amended by the legislature, such as the fact that the writ of error was a writ of right in civil cases and could only be taken on a final judgment. *Id.* § 1, at 591.

19. The Supreme Court of Judicature was established in New York in 1691 by an act which created the first permanent court system in the colony. Law of May 6, 1691, ch. 4, 1664-1719 N.Y. Colonial Laws 226 (expired 1693); see Note, *Law in Colonial New York: The Legal System of 1691*, 80 Harv. L. Rev. 1757, 1760-69 (1967). The new system was necessary because, prior to 1691, the remnants of three separate court systems, based on a mixture of Dutch and English law, were operating in New York. *Id.* at 1761. The supreme court was given jurisdiction over all cases "Civill Criminall, and Mixt" as well as the power to review writs of error from the various

ner of the present supreme court and Appellate Division, whose primary function was to supervise the lower courts of limited jurisdiction by reviewing their decisions.<sup>20</sup> The scope of review possessed by the supreme court at common law was severely limited in comparison to the Appellate Division's current review powers. The court was limited to reviewing questions of law,<sup>21</sup>

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lower courts created by the act. Law of May 6, 1691, ch. 4, 1664-1719 N.Y. Colonial Laws 226 (expired 1693); see note 20 *infra* and accompanying text.

When New York changed from colonial to state status in 1777, the supreme court was maintained, although it was not expressly created by the state constitution, as was the state's highest court, the Court for the Trial of Impeachments and the Correction of Errors. N.Y. Const. of 1777, art. XXXII. As a result, the court that was in existence was not changed to reflect the colony's new status as a state. 2 A. Chester, *Courts and Lawyers of New York* 645 (1925) [hereinafter cited as *Courts & Lawyers*]. The only noticeable change in status was that on the day the new constitution took effect, the first case was called in the name of "The People of the State of New York," and not "*Dominus Rex*." 1 Legal and Judicial History of New York 361 (A. Chester ed. 1911) [hereinafter cited as *Legal & Judicial History*]. It has been suggested that the framers of the constitution regarded the existing court system as a part of the common law which they had expressly continued, N.Y. Const. of 1777, art. XXXV, and, therefore, did not see the need to specify its existence in the constitution. 2 *Courts & Lawyers*, *supra*, at 836. For a general review of the supreme court in this transition period from colonial to state court, see *id.* at 835-37.

20. The inferior courts in existence at the time of the first constitution included the justices' courts, the courts of sessions, the courts of common pleas, the court of admiralty, and the mayor's court of New York City. 1 *Legal & Judicial History*, *supra* note 19, at 323, 351. These were courts of limited jurisdiction. For example, the justices' courts were empowered during the colonial period to try certain civil cases up to a value of 40 shillings, and the courts of common pleas could hear all common law actions if the amount in controversy did not exceed 20 pounds. See Note, *Law in Colonial New York: The Legal System of 1691*, 80 Harv. L. Rev. 1757, 1762-69 (1967). As the only court having unlimited statewide jurisdiction, the supreme court possessed the power to review the decisions of these inferior courts, which did not have the power to correct their own records. *Armstrong v. Court of Common Pleas*, 20 Johns. 22, 24 (Sup. Ct. 1822) (per curiam); W. Wyche, *Treatise on the Practice of the Supreme Court of Judicature of the State of New York in Civil Actions* 272 (New York 1794). This power was carried over from the court's colonial predecessor, which had the same authority in this regard as the English courts of King's Bench, Common Pleas, and the Exchequer. Law of May 6, 1691, ch. 4, 1664-1719 N.Y. Colonial Laws 226 (expired 1693); see *Smith v. Kingsley*, 19 Wend. 620, 621 (Sup. Ct. 1838); *Lawton v. Commissioner of Highways*, 2 Cai. R. 179, 182 (Sup. Ct. 1804).

The third level in the New York court system of this period was the Court for the Trial of Impeachments and the Correction of Errors, which consisted of the president of the senate, the senators, the chancellor, and the justices of the supreme court, and which was created as the state's highest court by the first constitution. N.Y. Const. of 1777, art. XXXII; see Law of Nov. 23, 1784, ch. 11, 1777-1787 Laws of New York 149. The court, however, eventually became the subject of considerable criticism because of the political activity of its members. See 2 *Courts & Lawyers*, *supra* note 19, at 792-803; 2 C. Lincoln, *The Constitutional History of New York* 145-46 (1905). It was eventually replaced in 1846 by a new "court of appeals," comprised solely of judges. N.Y. Const. of 1846, art. VI, § 2.

21. See *Pelletreau v. Jackson*, 7 Wend. 471, 472 (Sup. Ct. 1831) (findings of fact cannot be reviewed on a writ of error); accord, 3 W. Blackstone, *Commentaries* \*406 (English common law). The method of review in the supreme court was by the common law writ of error. See *Van Antwerp v. Newman*, 4 Cow. 82, 84 (Sup. Ct. 1825). The writ of error was the method of review in all courts of record that followed the common law. When, however, a new court was created by statute and given the power to act in a summary manner or in any manner other than that of the common law, the method of review was not by the writ of error, a writ of right in all

although under the common law writ system these were sometimes designated as issues of fact.<sup>22</sup> Appealability at common law was also limited compared to

civil cases, but by a petition to a superior court for certiorari. *See* Groenwelt v. Burwell, 91 Eng. Rep. 134 (K.B. 1700). Although writs of error are briefly mentioned in the writings of Lord Coke, E. Coke, *Institutes of the Laws of England* 288b (T. Day ed. 1851), and Blackstone, 3 W. Blackstone, *supra*, at \*406, the most extensive treatment of the writ and its operation at common law can be found in an annotation to the case of Jaques v. Caesar, 85 Eng. Rep. 776 (K.B. 1669). In New York, all such writs arising in the inferior courts were reviewable by the supreme court, while all legal errors in the supreme court were reviewable in the Court for the Trial of Impeachments and the Correction of Errors. 2 J. Dunlap, *A Treatise on the Practice of the Supreme Court of New-York in Civil Actions Together With the Proceedings in Error* 1126 (Albany 1823); D. Graham, *A Treatise on the Practice of the Supreme Court of the State of New York* 943 (New York 1836).

The method of review in equitable actions, on the other hand, was the appeal. Equitable claims could be brought in the court of chancery either before the chancellor, who had original jurisdiction throughout the state, or, after 1821, before one of the circuit justices, in their capacity as vice-chancellors. *See* 2 N.Y. Rev. Stat. §§ 1-2, at 168 (1829) (repealed 1877); 1 G. Van Santvoord, *A Treatise on the Practice in the Supreme Court of the State of New York in Equity Actions* 4 (3d ed. 1874). The vice-chancellors' decrees were subject to review by the chancellor, 2 N.Y. Rev. Stat. § 2, at 168 (1829) (repealed 1877), who in turn was reviewed by the Court for the Trial of Impeachments and the Correction of Errors. *Id.* §§ 24, 27-28, at 166-67. The proceedings on appeal differed significantly from those on the writ of error. Among the differences were: that an interlocutory order or decree made by a circuit judge in his capacity as a vice-chancellor could be appealed almost immediately, *id.* § 59, at 178; that a separate writ was not needed to commence the appeal, which was formally begun by serving notice upon the other party, *id.* § 60, at 178; and that on the appeal the chancellor was permitted to make any order in the interest of justice, *id.* § 62, at 178, a much broader review power than that possessed by an appellate court dealing with a writ of error. For a capsulized view of the procedures in equitable actions in the court of chancery prior to 1846, see 1 G. Van Santvoord, *supra*, at 8-15.

22. Both the common law and the New York courts provided for a proceeding known as a "writ of error of fact." These writs were limited in their application to correcting ministerial defects appearing on the face of the record, such as the appearance of an infant by an attorney rather than by a next friend, *Dewitt v. Post*, 11 Johns. 460, 460 (Sup. Ct. 1814), a suit by or against a married woman prosecuted solely in her name, *Haydon & Miller's Case*, 81 Eng. Rep. 654, 654 (K.B. 1618), or the death of one of the parties prior to judgment, *Meggot v. Broughton*, 78 Eng. Rep. 364, 364 (K.B. 1588). The theory behind this type of review was that the error was the fault of the parties, not the court, and that the court possessed the inherent power to ensure the accuracy of its own records. *See* *Dewitt v. Post*, 11 Johns. 460, 460 (Sup. Ct. 1814); 3 W. Blackstone, *supra* note 21, at \*406 n.4; W. Wyche, *supra* note 20, at 284. In New York, all writs of this type arising in the inferior courts were brought in the supreme court. *Armstrong v. Court of Common Pleas*, 20 Johns. 22, 24 (Sup. Ct. 1822); *Arnold v. Sandford*, 14 Johns. 417, 422 (Sup. Ct. 1817); *see* 2 J. Dunlap, *supra* note 21, at 1126; D. Graham, *supra* note 21, at 932, 942-43; W. Wyche, *supra* note 20, at 284. A writ of error in fact arising out of an action in the supreme court, however, could be corrected by that court sitting in its appellate capacity and did not have to be appealed to a higher court. *See* *Smith v. Kingsley*, 19 Wend. 620 (Sup. Ct. 1838); *Dewitt v. Post*, 11 Johns. 460 (Sup. Ct. 1814); *Lawton v. Commissioner of Highways*, 2 Cai. R. 179, 182 (Sup. Ct. 1804); 2 J. Dunlap, *supra* note 21, at 1125; W. Wyche, *supra* note 20, at 272, 284. The supreme court's disposition of such a writ was reviewable in the Court for the Trial of Impeachments and the Correction of Errors only if it constituted an error of law in itself. *Davis v. Packard*, 6 Wend. 327, 334 (N.Y. 1830), *rev'd on other grounds*, 32 U.S. (7 Pet.) 276 (1833). In current New York practice, the trial court may "[a]t any stage of an action . . . permit a mistake, omission, defect or irregularity to be corrected . . . or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." N.Y. Civ. Prac. Law § 2001 (McKinney 1976).



its current counterpart, although the review itself was a matter of right.<sup>23</sup> Writs of error could only be brought on a final judgment or an award in the nature of a final judgment.<sup>24</sup> There were no provisions for a separate review of any intermediate orders made by the trial judge.<sup>25</sup>

During this pre-1846 period there was a great deal of dissatisfaction with the structure of the New York court system.<sup>26</sup> The delegates to the 1846

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At common law there was no writ available to remedy errors in the determination of what would be known today as "questions of fact." See *Pelletreau v. Jackson*, 7 Wend. 471, 472 (Sup. Ct. 1831) (per curiam) (findings on the facts cannot be reviewed on a writ of error); *Starr v. Trustees of Rochester*, 6 Wend. 564, 566 (Sup. Ct. 1831) ("The common law powers of this [supreme] court . . . are confined to an examination of the jurisdiction of such inferior tribunals, and to questions of law arising out of their proceedings; not to an examination of their decisions upon questions of fact."); 3 W. Blackstone, *supra* note 21, at \*406; 2 J. Dunlap, *supra* note 21, at 1119; W. Wyche, *supra* note 20, at 284. Such questions arise "[w]hen facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact exists and another that it does not exist." *Hirsch v. Jones*, 191 N.Y. 195, 198, 83 N.E. 786, 787 (1908); see *Alsens Amer. Portland Cement Works v. Degnon Contracting Co.*, 222 N.Y. 34, 38, 118 N.E. 210, 211 (1917). The only method of correcting such errors was by motion to the trial judge for a new trial. See 3 W. Blackstone, *supra* note 21, at \*406; 2 J. Dunlap, *supra* note 21, at 1119; W. Wyche, *supra* note 20, at 284. Grounds for suspending a judgment and granting a new trial included lack of notice of trial, prejudicial conduct toward the jury, juror misconduct, and a verdict supported by insufficient evidence. See *Hale v. Cove*, 93 Eng. Rep. 753, 753 (K.B. 1725); *Lady Herbert v. Shaw*, 88 Eng. Rep. 937, 938 (K.B. 1707); *Dent v. The Hundred of Hertford*, 91 Eng. Rep. 546, 546 (K.B. 1696); W. Wyche, *supra* note 20, at 176. Motions for a new trial today are generally available on the same grounds and are governed by N.Y. Civ. Prac. Law §§ 4402-4404 (McKinney 1963).

During the early statehood period, the trial judge could also order a new trial if, having heard all the evidence himself, he disagreed with the jury's verdict. See W. Wyche, *supra* note 20, at 176. See also *Mumford v. Smith*, 1 Cai. R. 520 (Sup. Ct. 1804); *Hart v. Hosack*, 1 Cai. R. 25 (Sup. Ct. 1803). This power to disagree with the jury's verdict is similar to the power currently exercisable by the Appellate Division. See pt. III(B)(1)(a)(i) *infra*.

23. See notes 21 *supra*, 54 *infra*.

24. *Brooks v. Hunt*, 17 Johns. 484, 486-87 (N.Y. 1820); *Clason v. Shotwell*, 12 Johns. 31, 62 (N.Y. 1814); see E. Coke, *supra* note 21, at 288b. An award in the nature of a final judgment included any decision by the court which settled or determined the merits of a cause of action. See generally 2 J. Dunlap, *supra* note 21, at 1130-31; D. Graham, *supra* note 21, at 932-33.

25. As under the current practice, however, a writ of error on a final judgment brought up for review any ruling made by the trial judge during the course of the trial which affected the final judgment. Compare 2 J. Dunlap, *supra* note 21, at 1149-50 with N.Y. Civ. Prac. Law § 5501(a)(1) (McKinney 1978). Once the appellant had raised his errors in the writ, he was not confined to arguing those errors in the higher court, 2 J. Dunlap, *supra* note 21, at 1149, but could question any decision made by the lower court as long as the decision appeared on the record brought before the reviewing court. *Id.* at 1150.

26. Two of the primary areas of contention during this period were the separation of law and equity and the structure devised for the supreme court by the constitution of 1821. By 1846, the court of chancery had fallen into such disrepute that its abolition was inevitable. Although the court had started out as a true court of chancery, liberally administering its equitable jurisdiction, it had become as procedurally rigid as the common law courts. The delegates to the convention were so overwhelmingly in favor of the court's abolition and the merger of its jurisdiction with that of the supreme court that it was approved without a roll-call vote. See 2 *Courts & Lawyers*, *supra* note 19, at 685; 2 C. Lincoln, *supra* note 20, at 152.

The dissatisfaction with the 1821 court structure, however, was far greater than the displeasure with which the delegates had viewed the court of chancery. The 1821 constitution had changed the supreme court from a five- to a three-justice bench, with an additional circuit judge in each of

constitutional convention, therefore, proposed a new statewide court structure,<sup>27</sup> consisting of "circuit courts," administered by supreme court justices, to preside over cases tried to a jury,<sup>28</sup> and "special terms" to hear those cases to be tried by a single judge.<sup>29</sup> The "general term" was to hear appeals coming from those branches and from the lower courts.<sup>30</sup> Thus, the supervisory function of the court was now concentrated in a specific body.

Perhaps the most significant feature of the constitution, however, was the section calling for the appointment of a commission to "revise, reform, simplify and abridge" the rules of procedure for the new court system.<sup>31</sup> The Code of Procedure, more commonly known as the Field Code, was the legislature's response to this constitutional mandate for a new procedural codification.<sup>32</sup> The code was a watershed for appellate procedure in New

the newly-created judicial circuits possessing the power of a supreme court justice to try issues of fact before a jury in jury trials arising in the supreme court. N.Y. Const. of 1821, art. V, §§ 4-5. Under the new system, the circuit justices tried at the circuit any such factual issues and then sent the case back for the three-justice supreme court to apply the law. *See* D. Graham, *supra* note 21, at 25; 1 C. Lincoln, *supra* note 20, at 681; J. Tiffany & H. Smith, *The New York Practice* 23 (Albany 1864). This split between the factfinding and the law-pronouncing justices seems to have been the beginning of the bifurcation of the supreme court, which resulted first in the distinction between special and general terms, *see* notes 28-30 *infra* and accompanying text, and later between the trial functions of the court and the appellate functions of the Appellate Division. The system established in 1821 became a subject of criticism as early as 1828 when Governor De Witt Clinton termed it "a 'fatal error' to separate 'the judges who try the fact from the tribunals that pronounce the law' by 'creating circuit courts as distinct and independent forums, and not as emanations from the supreme court.'" 2 C. Lincoln, *supra* note 20, at 66. The plan was attacked again in 1839 by Governor William Seward, who called for the abolition of the office of circuit judge and an increase in the number of supreme court justices "with power to try both issues of fact and issues of law." *Id.* at 68. Seward again recommended abolition of the post in 1840, claiming that the benefits expected from the plan had never materialized. *Id.* at 69. The split between the factfinding and law-pronouncing justices, however, did not alter the court's appellate jurisdiction; the three supreme court justices continued to review writs of error from within the court and from the inferior courts. D. Graham, *supra* note 21, at 943.

27. Prior to 1846, the only changes in the structure of the court system appeared in the judiciary article of the constitution of 1821. These changes, however, aside from the creation of the office of circuit judge, were relatively minor and dealt primarily with the terms of, and restrictions on, the holders of judicial office. N.Y. Const. of 1821, art. V, §§ 3-7; *see* 1 C. Lincoln, *supra* note 20, at 688.

28. *See* J. Tiffany & H. Smith, *supra* note 26, at 21-23.

29. *Id.* at 21; *see* N.Y. Const. of 1846, art. VI, § 6.

30. The general terms consisted of three or more supreme court justices, one of whom was designated as the presiding justice. N.Y. Const. of 1846, art. VI, § 6. The decisions made by the general terms were the only final determinations that the supreme court could make; a litigant in the supreme court was required to appeal to the general term before he could take an appeal to a higher court. *See* *Potter v. Van Vranken*, 36 N.Y. 619, 623 (1867); *Gracie v. Freeland*, 1 N.Y. 228, 229-31 (1848); J. Tiffany & H. Smith, *supra* note 26, at 22.

31. N.Y. Const. of 1846, art. VI, § 24. Pursuant to the constitution, the legislature appointed Arphaxed Loomis, Nicholas Hill, Jr., and David Graham as "commissioners on practice and pleading." Law of April 8, 1847, ch. 59, § 8, 1847 N.Y. Laws 66. When Hill resigned after disagreements with the other two, David Dudley Field, a New York lawyer who had been one of the leading advocates for reform, was substituted for Hill by a joint resolution of the legislature. *See* Joint Resolution Appointing a Commissioner on Practice and Pleadings, 1847 N.Y. Laws 744.

32. Although the Revised Statutes of 1828 had collected all of the procedural law of the state into one source, they were neither intended nor used as a code of procedure. *See* 2 Courts &

York, unleashing the expansion of the scope of review and the broadening of appealability that came to characterize the New York appellate process.<sup>33</sup>

The first expansion of the supreme court's scope of review came with the interim version of the Field Code,<sup>34</sup> which permitted the general terms to review factual questions that had been tried to a single judge.<sup>35</sup> This provision was thought to be necessary because, under the 1846 constitution, the parties were permitted for the first time to waive their right to a jury trial and to have any factual issues decided by the trial judge.<sup>36</sup> The commissioners who developed the code, however, were reluctant to make the judge's determination on the facts conclusive,<sup>37</sup> as was the case with jury determinations.<sup>38</sup> They therefore proposed the limited appeal in such situations, on the theory that an examination of the facts by two courts could serve the ends of justice as reliably as would a trial by jury.<sup>39</sup>

Although the interim provision was inexplicably dropped when the final version of the code was enacted in 1849,<sup>40</sup> it was readopted in 1852.<sup>41</sup> The

Lawyers, *supra* note 19, at 854 n.25; Fitzpatrick, *supra* note 18, at 13. The final version of the Field Code was passed by the legislature in 1849. Field Code, ch. 438, 1849 N.Y. Laws 613 (repealed 1877). This version was a revision of the first draft of the code, which had been enacted by the legislature the previous year. Law of April 12, 1848, ch. 379, 1848 N.Y. Laws 497 (repealed 1849).

33. Field himself saw the code as an attempt to "break up the present system, and reconstruct a simple and natural scheme of legal procedure." D.D. Field, *What Shall Be Done With the Practice of the Courts?*, in 1 Speeches, Arguments and Miscellaneous Papers of David Dudley Field 226, 229 (A.P. Sprague ed. 1884). As one of its first steps in this direction, the code abolished the writ of error with its cumbersome requirements, *see* note 21 *supra*, and substituted the broader right of appeal. Field Code, ch. 438, § 323, 1849 N.Y. Laws 613 (repealed 1877); *see* First Report of the Commissioners on Practice and Pleadings—Code of Procedure 214 (1848) [hereinafter cited as First Report]; *cf.* Walsh, *Merger of Law and Equity Under Codes and Other Statutes*, 6 N.Y.U. L. Rev. 157, 157-58 (1929) (conflicts between legal and equitable rules are generally resolved by establishing the in personam equitable rule as the law). The procedures on appeal were not uniform, however, as the code established varying degrees of appellate powers for the different courts. Field Code, ch. 438, §§ 333-343 (appeals to the court of appeals), 344-347 (appeals to the supreme court from the inferior courts), 348-350 (appeals within the supreme court), 1849 N.Y. Laws 613 (repealed 1877); *see* First Report, *supra*, at 214.

34. *See* note 32 *supra*.

35. Law of April 12, 1848, ch. 379, § 297, 1848 N.Y. Laws 497 (repealed 1849).

36. N.Y. Const. of 1846, art. I, § 2. The Field Code was the first statute to provide for a uniform mode of trial in all cases, legal and equitable. *See* First Report, *supra* note 33, at 176-81. All cases were to be tried before a single justice. Field Code, ch. 438, § 255, 1849 N.Y. Laws 613 (repealed 1877). The justices were to try all issues of law, *id.* § 254, and the jury all questions of fact. *Id.* § 253. When the parties waived their right to a jury trial, however, the trial justice would try all issues of fact and law arising in the case. *Id.* §§ 253-254.

37. The commissioners reasoned that vesting the power to determine the facts in a single judge, with no provision for review, would lead to abuse and "would be subject to great suspicion, whether abused or not." First Report, *supra* note 33, at 178.

38. The commissioners apparently did not even consider permitting a second review of a jury's verdict. *See* First Report, *supra* note 33, at 178-79. Such verdicts had been conclusive at common law. *Pelletreau v. Jackson*, 7 Wend. 471, 472 (Sup. Ct. 1831) (*per curiam*); *see* note 21 *supra* and accompanying text.

39. First Report, *supra* note 33, at 178-79.

40. *Compare* Law of April 12, 1848, ch. 379, § 297, 1848 N.Y. Laws 497 (repealed 1849) with Field Code, ch. 438, § 348, 1849 N.Y. Laws 613 (repealed 1877).

41. *See* Law of April 16, 1852, ch. 392, § 348, 1852 N.Y. Laws 651 (repealed 1876).

reasons for the legislature's change of heart in 1852 are unknown. The cases between 1849 and 1852 are divided on the reviewability of facts on appeal,<sup>42</sup> but they fail to highlight any gross abuses of the factfinding power by the judges at special term or any other compelling reason for the legislature's changes of position. Evidently, the legislature was simply persuaded that the code commissioners had been correct in the first place by allowing factual review.<sup>43</sup>

Just as the Field Code marked the start of the expansion of the scope of review, it also began the trend toward broad appealability to the general term. The general term was no longer limited to reviewing final judgments, but could now also review a variety of intermediate orders, including those going to the merits of a cause of action<sup>44</sup> and those made on summary application after judgment which affected a substantial right.<sup>45</sup> On appeal

42. "[T]his branch of the practice has, until very recently, been wholly unsettled." *Collins v. Albany & S.R.R.*, 5 How. Pr. 435, 437 (Sup. Ct. Gen. T. 1851) (per curiam). The majority view among the courts was that review was only available on the law. *Munson v. Hagerman*, 5 How. Pr. 223, 225 (Sup. Ct. Gen. T. 1850); *Leggett v. Mott*, 4 How. Pr. 325, 326 (N.Y.C. Super. Ct. 1850) (per curiam). The passage of the 1852 amendment apparently settled the question, allowing review on the facts as well as the law. *Gilchrist v. Stevenson*, 7 How. Pr. 273, 276 (Sup. Ct. 1852). *But see Lynch v. McBeth*, 7 How. Pr. 113, 117 (Sup. Ct. Gen. T. 1852) (per curiam); *Adsit v. Wilson*, 7 How. Pr. 64, 68 (Sup. Ct. Gen. T. 1852) (per curiam) (construing a similar provision of the code, which allowed the county courts to review the justice courts "on the facts," to imply no greater review than that permitted by a writ of error of fact at common law).

43. A second possible reason for the shift back to the broader provision may be related to the issue of judicial tenure. Prior to 1846, supreme court justices were appointed with life tenure. The 1846 constitution, however, provided that the justices of the new supreme court should be elected. N.Y. Const. of 1846, art. VI, § 12; *see 2 Legal & Judicial History, supra* note 19, at 167-72. By 1852, the accountability of the supreme court justices may have reached the point where the legislature was willing to trust them with the review of certain factual issues.

44. Field Code, ch. 438, § 349(2), 1849 N.Y. Laws 613 (repealed 1877). "[T]he expression, 'when it involves the merits of the action, or some . . . part thereof,' [has been construed] to mean that which relates to the strict legal rights of the parties as contradistinguished from mere questions of practice, which every court regulates for itself, and all matters which depend on the discretion or favor of the court." *Burhans v. Tibbits*, 7 How. Pr. 74, 78-79 (Sup. Ct. Gen. T. 1852) (per curiam). An order refusing to strike scandalous material from a pleading, therefore, would not involve the merits, *Whitney v. Waterman*, 4 How. Pr. 313 (Sup. Ct. Gen. T. 1850), although an order allowing a defendant to plead a new defense, which would be conclusive if established, would involve the merits. *Harrington v. Slade*, 22 Barb. 161 (Sup. Ct. 1856) (per curiam).

45. Field Code, ch. 438, § 349(4), 1849 N.Y. Laws 613 (repealed 1877). "[The] term, substantial, had no special legal signification when it was incorporated by the legislature into the Code . . . . For that reason, it must be construed according to its popular and usual signification; and, understood in that manner, it includes all positive, material and absolute rights, as distinguishable from those of a merely formal or unessential nature." *Security Bank v. National Bank*, 9 N.Y. Sup. Ct. (2 Hun.) 287, 290 (Gen. T. 1874). The use of the wrong form of summons, for example, was held not to affect a substantial right. *Barnett v. Benjamin*, 16 N.Y. Sup. Ct. (9 Hun.) 705 (Gen. T. 1877) (mem.). An order granting permission to examine an adverse party's books and papers, on the other hand, was held to affect a substantial right. *Thompson v. Erie Ry.*, 9 Abb. Pr. (n.s.) 212 (Sup. Ct. Gen. T. 1870) (per curiam). The requirement that the order be made after judgment was subsequently dropped, allowing appeal from any order affecting a substantial right. *See* note 52 *infra* and accompanying text. The Field Code also permitted appeal to the general term of orders granting or refusing a provisional

from the inferior courts to the general term, however, review was still limited to final judgments.<sup>46</sup>

Like the Field Code, the Code of Civil Procedure of 1876,<sup>47</sup> New York's second attempt at a simple codification of procedural rules, expanded the jurisdiction of the supreme court general terms. Although the scope of review remained basically the same as before,<sup>48</sup> the Code of Civil Procedure rolled back the boundaries of appealability even further than had the Field Code. The variety of appealable orders was increased, both as to appeals within the supreme court and appeals from the inferior courts. Within the supreme court, the new code permitted the appeal of interlocutory judgments,<sup>49</sup> and provided for the appeal of two other types of intermediate orders for the first time: orders granting or refusing a new trial<sup>50</sup> and orders determining the constitutionality of a state statute.<sup>51</sup> The code also made appealable all orders affecting a substantial right, not simply those made on summary application after judgment as the Field Code had allowed.<sup>52</sup> Finally, the new code broadened appealability by allowing the general terms to hear appeals from the inferior courts not only on final judgements, but also on intermediate orders affecting a substantial right.<sup>53</sup>

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remedy, or deciding a question of practice which in effect determined the action without a trial or precluded an appeal. Field Code, ch. 438, § 349(1), (3), 1849 N.Y. Laws 613 (repealed 1877); *see* pt. II(A)(1)(b) *infra*.

46. *See* Quinn v. Weed, 12 N.Y. Sup. Ct. (5 Hun.) 350, 350 (Gen. T. 1875) (mem.); Hone v. Joslien, 17 How. Pr. 338, 338-39 (N.Y.C. C.P. 1859) (per curiam); Field Code, ch. 438, § 344, 1849 N.Y. Laws 613 (repealed 1877).

47. Code of Civil Procedure, ch. 448, 1876 N.Y. Laws 1 (repealed 1920).

48. The judge/jury distinction as to review of facts, however, was specifically held not to apply to appeals from the inferior courts; review in these cases could only be had on questions of law. *See* Bailey v. Gluth, 72 N.Y. Sup. Ct. (65 Hun.) 620, 620, 19 N.Y.S. 945, 945 (Gen. T. 1892). The court in *Bailey* based its decision on the holding of the court of appeals in *Thurber v. Townsend*, 22 N.Y. 516 (1860), which construed the Field Code to limit the supreme court's review of inferior courts to questions of law.

49. Code of Civil Procedure, ch. 448, § 1349, 1876 N.Y. Laws 1 (repealed 1920). An interlocutory judgment "is a final determination of part of the issue, which leaves the rest of the issue to be thereafter adjudged." *Garner v. Harmony Mills*, 6 Abb. N. Cas. 212, 223 (N.Y.C. Super. Ct. 1879); *see* *Victory v. Blood*, 93 N.Y. 650, 650 (1883); *Coleman v. Phelps*, 31 N.Y. Sup. Ct. (24 Hun.) 320, 321 (Gen. T. 1881); pt. II(A)(1)(a) *infra*.

50. Code of Civil Procedure, ch. 448, § 1347(2), 1876 N.Y. Laws 1 (repealed 1920); *see* note 166 *infra* and accompanying text; *cf.* *Randall v. Randall*, 114 N.Y. 499, 500, 21 N.E. 1020, 1020 (1889) (granting of new trial is a matter of discretion which, once reviewed by a general term, cannot be reviewed in the court of appeals); *Bowen v. Becht*, 42 N.Y. Sup. Ct. (35 Hun.) 434, 437 (Gen. T. 1885) (limitation on the appeal in jury trial situations).

51. Code of Civil Procedure, ch. 448, § 1347(6), 1876 N.Y. Laws 1 (repealed 1920); *see* note 155 *infra*; *cf.* *People v. Schoonmaker*, 50 N.Y. 499, 501 (1872) (lower courts must pass directly on issue of constitutionality before appeal can be taken on that ground).

52. Code of Civil Procedure, ch. 448, § 1347(4), 1876 N.Y. Laws 1 (repealed 1920); *see* *Gleason v. Smith*, 41 N.Y. Sup. Ct. (34 Hun.) 547, 548 (Gen. T. 1885) (right of review is absolute in all cases where a substantial right is affected); *Hand v. Burrows*, 22 N.Y. Sup. Ct. (15 Hun.) 481, 483 (Gen. T. 1878) (unqualified right of review by general term when order affects a substantial right); note 45 *supra* and accompanying text. Unqualified review of orders affecting a substantial right remains the law today. *See* notes 153-63 *infra* and accompanying text.

53. Code of Civil Procedure, ch. 448, § 1342, 1876 N.Y. Laws 1 (repealed 1920); *see* *Newell v. Cutler*, 26 N.Y. Sup. Ct. (19 Hun.) 74, 75 (Gen. T. 1879) (contempt citation by county court

## 2. The Creation of the Appellate Division as a Screening Mechanism for the Court of Appeals

The constitution of 1894 was the culmination of the trend toward judicial reform which had begun in 1846.<sup>54</sup> The court system was radically restructured in an attempt to streamline the judicial process,<sup>55</sup> resulting in the creation of the Appellate Division, in much the same shape and with much the same power as it has today.

The two segments of the judiciary on which the 1894 convention focused were the court of appeals and the general terms of the supreme court.<sup>56</sup> The

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affects a substantial right); note 139 *infra*. *But cf.* *Andrews v. Long*, 79 N.Y. 573, 574 (1880) (per curiam) (case must originate in, not be an appeal to, an inferior court). The Code of Civil Procedure was amended in 1881 to allow the supreme court to hear cases appealed to the county courts. Law of April 22, 1881, ch. 135, 1881 N.Y. Laws 177 (repealed 1920).

The numerous types of appeals permitted under the Code of Civil Procedure, as under the Field Code and at common law, were primarily appeals as of right. Writs of error had always been writs of right at common law, *see* note 21 *supra* and accompanying text, and this right to appeal was recognized by both codes. Code of Civil Procedure, ch. 448, § 1294, 1876 N.Y. Laws 1 (repealed 1920) (any aggrieved party may appeal except as limited by the code); Field Code, ch. 438, § 325, 1849 N.Y. Laws 613 (repealed 1877) (same). In the few cases in which an appeal could be taken by permission only, the distinction was usually based on the court of first instance or on the amount in controversy. For example, under the Field Code, an action commenced in a justices' court could not be appealed to the supreme court unless the appellant first secured the permission of a justice of the supreme court. *Id.* § 344. This provision was omitted from the Code of Civil Procedure sections pertaining to appeals from inferior courts, so that no appeals at all were permitted from the justices' court to the supreme court. Code of Civil Procedure, ch. 448, §§ 1340-1345, 1876 N.Y. Laws 1 (repealed 1877). A later amendment rectified the situation, however, by allowing appeals to the supreme court from cases originating in the justices' courts. Law of April 22, 1881, ch. 135, 1881 N.Y. Laws 177 (repealed 1920).

54. *See* notes 27-30 *supra* and accompanying text. Part of this trend was the movement toward centralization of the general terms which began in the 1860's. In an attempt to overcome the fragmentation of the law taking place among the supreme court's eight general terms, *see* 2 *Courts & Lawyers*, *supra* note 19, at 858, the delegates to the 1867 constitutional convention authorized the legislature to reduce the number of terms to four. N.Y. Const. of 1846, art. VI, § 6 (1869). The amendment was effectuated by the Law of April 27, 1870, ch. 408, § 2, 1870 N.Y. Laws 947 (repealed 1881), which created four "departments" encompassing the eight judicial districts. Each department had a general term of three justices, and provisions were made for the general term to be held in each district at least once a year. *Id.* §§ 2-3. In 1867, an amendment was also proposed, although not passed, which would have provided for meetings of the presiding justices of the general terms to review conflicting decisions among the terms regarding matters of practice. 2 *C. Lincoln*, *supra* note 20, at 270. The only other change in the structure of the court system during the early period of the Code of Civil Procedure was an amendment to the state constitution in 1882 which added a fifth department and general term. N.Y. Const. of 1846, art. VI, § 28 (1882). In creating the Appellate Division, however, the 1894 constitution returned to a four-department structure. *See* note 62 *infra* and accompanying text. The 1882 measure, passed along with a proposal to increase the number of supreme court justices, was intended to decrease the workload of the other four departments. *See* 2 *C. Lincoln*, *supra* note 20, at 586-88.

55. *See* 3 *C. Lincoln*, *supra* note 20, at 335-36. The debate on the judiciary article of the 1894 constitution, including the minority plans for restructuring the court system, can be found at 2 *Revised Record of the Constitutional Convention of the State of New York of 1894*, at 890-1202 (1900) [hereinafter cited as *Revised Record*], and at 3 *Revised Record*, *supra*, at 3-66. *See generally* 3 *C. Lincoln*, *supra* note 20, at 335-75.

56. *See* 2 *Courts & Lawyers*, *supra* note 19, at 739-40; 3 *C. Lincoln*, *supra* note 20, at 335-36, 341-60.

delegates to the convention saw the general terms as weak and ineffective, primarily because they were ill-equipped to handle the volume of business coming up from the lower courts.<sup>57</sup> The delegates were also concerned that the legislature was constantly expanding the jurisdiction of the court of appeals as the court of last resort.<sup>58</sup> This resulted in increasing disrespect for the general terms, which were often considered to be required but superfluous way-stations on the road toward final adjudication.<sup>59</sup> Finally, it should be noted that in 1894 a total of nine general terms operated in the state: five in the supreme court and one each in the Court of Common Pleas for the City and County of New York and in the so-called "superior city courts" in New York, Brooklyn, and Buffalo.<sup>60</sup> The general terms were often as diverse in their interpretation of the law as they were in their territorial jurisdiction.<sup>61</sup> These factors all combined to produce widespread distrust of the type of justice administered by the general terms.

The solution to these problems settled upon by the delegates was to unite the general terms into a single "Appellate Division" of the supreme court, divided into four departments,<sup>62</sup> which would be the final court of review not only for many cases originating in the inferior courts, as the general terms had been,<sup>63</sup> but also for all interlocutory judgments and intermediate orders<sup>64</sup> and for all questions of fact in cases tried by the court without a jury.<sup>65</sup> This scheme in turn allowed the court of appeals to become a "tribunal of final resort to settle great principles of law" and to reconcile differences among the departments of the new court.<sup>66</sup> The 1894 constitution, therefore, gave the Appellate Division its second function—to act as a screening mechanism for the court of appeals.<sup>67</sup>

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57. A major complaint was that the general terms consisted of only three justices, who also doubled as justices at special term. Because a judge was not allowed to review his own decisions, appeals were often decided by only two justices. 2 Revised Record, *supra* note 55, at 464-65, 894-96.

58. The judiciary committee felt that the legislature had opened "doorway after doorway" through which appeals could be taken from the general terms to the court of appeals. *Id.* at 895.

59. *Id.*

60. See N.Y. Const. of 1894, art. VI, § 5; 2 Legal & Judicial History, *supra* note 19, at 320 n.4.

61. See 2 Legal & Judicial History, *supra* note 19, at 320.

62. N.Y. Const. of 1894, art. VI, § 2.

63. See note 53 *supra* and accompanying text.

64. See N.Y. Const. of 1894, art. VI, § 9; 2 Revised Record, *supra* note 55, at 462, 895-96; 2 Courts & Lawyers, *supra* note 19, at 739-40; 3 C. Lincoln, *supra* note 20, at 356. The constitution, however, did allow the Appellate Division to certify questions of law to the court of appeals when appeal thereto did not lie as of right, if the Appellate Division found that the issues merited further review. N.Y. Const. of 1894, art. VI, § 9.

65. The new court was made the final court of review for factual questions by limiting review in the court of appeals to questions of law, except in capital cases. See N.Y. Const. of 1894, art. VI, § 9; 2 Revised Record, *supra* note 55, at 462, 465, 896-97; 2 Courts & Lawyers, *supra* note 19, at 739; 3 C. Lincoln, *supra* note 20, at 350-51.

66. 3 C. Lincoln, *supra* note 20, at 336; see 2 Revised Record, *supra* note 55, at 464, 893; 2 Courts & Lawyers, *supra* note 19, at 739; 2 Legal & Judicial History, *supra* note 19, at 320; 3 C. Lincoln, *supra* note 20, at 349.

67. Breitel Interview, *supra* note 15, at A7-8, B7-8, C6; see Lynch Interview, *supra* note 16, at B1-2. Effective January 1, 1896, the Appellate Division was vested with all of the powers of the general terms of all the courts of general jurisdiction. N.Y. Const. of 1894, art. VI, § 2.

The screening device for the court of appeals was a necessity. Prior to 1894, the court of appeals was overburdened with work—<sup>68</sup> so overburdened that a constitutional amendment had been passed and put into use whereby the governor appointed seven supreme court justices to form a second court of appeals to handle the backlog.<sup>69</sup> This backlog was largely due to loopholes in the Code of Civil Procedure which resulted in the presentation of questions of fact to the court of appeals.<sup>70</sup> The delegates thought that the best solution to the court's docket problems was to amend the constitution to restrict the court's review to questions of law, except in capital cases.<sup>71</sup> Furthermore, in making the Appellate Division the final court of review for questions of fact in nonjury cases, the constitution went so far as to remove from the court of appeals the power to review the sufficiency of the evidence supporting a factual finding, normally a question of law, if that question had been decided unanimously by the Appellate Division.<sup>72</sup> This restriction on the high court's

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Simultaneously, the courts of general jurisdiction other than the supreme court were abolished, and their powers and jurisdiction transferred to the supreme court. *Id.* art. VI, § 5. The constitution specifically provided that appeals from inferior courts which had previously been heard by these courts of general jurisdiction should be heard "in the Supreme Court in such manner and by such justice or justices as the Appellate Divisions in the respective departments . . . shall direct . . ." *Id.* The intended result was that "all appeals, from whatever tribunal, [should] go in the first instance" to the Appellate Division. 2 Revised Record, *supra* note 55, at 895. In an effort to handle this influx of appeals, the First and Second Departments created "appellate terms" to hear them. 2 Courts & Lawyers, *supra* note 19, at 784-85. Later, a 1925 constitutional amendment institutionalized the appellate terms by granting the First and Second Departments the power to establish such terms and to discontinue and reestablish them at will. N.Y. Const. of 1894, art. VI, § 3 (1925). The appellate terms were given the power to hear all appeals which could be taken to the Appellate Division except those originating in the supreme court, the surrogate's court, or the Court of General Sessions of the City of New York. The amendment also permitted an appeal to be taken from the appellate term to the Appellate Division "whenever in the opinion of either [court] a question of law or fact is involved which ought to be reviewed." *Id.*

68. 2 Revised Record, *supra* note 55, at 464-65, 891, 893-94; see 2 Courts & Lawyers, *supra* note 19, at 739; 3 C. Lincoln, *supra* note 20, at 349

69. N.Y. Const. of 1846, art. VI, § 6 (1888). The second division was put into operation in 1889 and continued its duties for three years before adjourning in 1892. 2 C. Lincoln, *supra* note 20, at 585-86.

70. The Code of Civil Procedure limited review by the court of appeals primarily to questions of law. The court could consider fact questions only in special circumstances. Code of Civil Procedure, ch. 448, § 1337, 1876 N.Y. Laws 1 (repealed 1920). An appeal to the court of appeals, however, brought up every question determined by the general term which affected a substantial right. *Id.* In addition, the question of whether the evidence was sufficient to support the findings of fact was a question of law, as was a justice's refusal to make a finding of fact which the parties had requested. *Id.* § 993; see note 327 *infra* and accompanying text. These issues, therefore, could be brought to the general term and then to the court of appeals because they usually affected a substantial right. See, e.g., *James v. Cowing*, 82 N.Y. 449, 457 (1880); 2 Revised Record, *supra* note 55, at 465.

71. N.Y. Const. of 1894, art. VI, § 9. Although the Code of Civil Procedure had restricted review primarily to questions of law, Code of Civil Procedure, ch. 448, § 1337, 1876 N.Y. Laws 1 (repealed 1920), the restriction had never before been constitutionally mandated.

72. See N.Y. Const. of 1894, art. VI, § 9. The theory behind the restriction was that when "five justices have unanimously declared that [a fact] was proved, we say that the State has done its whole duty to the litigants in that case, and the controversy upon that fact should stop, and



jurisdiction was the chief source of the Appellate Division's new power.<sup>73</sup>

The case law prior and subsequent to the changes made by the 1894 constitution shows the Appellate Division adjusting to its new role, and new power, as the final court of review for questions of fact. Although justices of the general terms had been mandated by statute to review questions of fact tried to a judge rather than a jury,<sup>74</sup> they were reluctant to do so before they were given the power in 1894 to review the facts conclusively. The general rule was that, except in extraordinary circumstances, the appellate court should defer to the factual determinations of the trial judge, who had had the opportunity to view the courtroom proceedings, and should not reverse a finding on conflicting evidence merely because the appellate justices disagreed with the trial court. A preponderance of the evidence had to be against the trial court's determination before the general term would reverse.<sup>75</sup>

After they were made the final reviewers of factual questions, however, the Appellate Division justices began to realize that they were perhaps in a better position than the trial judge to view the evidence as a whole and to ferret out any inconsistencies which might have passed unnoticed at trial. In *New York Ice Co. v. Cousins*,<sup>76</sup> for example, the First Department found itself confronted with "an extreme case for the exercise by [the] court of its power to review and reverse upon the facts."<sup>77</sup> The case involved a fraudulent conveyance by the defendant in an effort to deceive his creditors. The trial judge had ruled for the defendant, despite evidence which showed that fraud had indeed been perpetrated. The First Department held that when the veracity of the witnesses was not the central issue, the appellate court was in a better position to "examine the printed record at leisure, carefully collate fact with fact, and thus often get a clearer view of the situation."<sup>78</sup> In reversing the trial court,<sup>79</sup> the First Department noted that the court of appeals had often

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that the question as to the fact should not be allowed to go on to the court of last resort." 2 Revised Record, *supra* note 55, at 897. This restriction was a specific attempt to close the loopholes left available by the Code of Civil Procedure. *Id.* at 464; *see* note 70 *supra* and accompanying text. In the discussion and debate on the judiciary article amendments, the clause containing the restriction was not contested, although one of the delegates did voice his objection to it on the roll call vote. *See* 4 Revised Record, *supra* note 55, at 601-02. The clause eventually proved to have been ill-conceived and was repealed by the constitutional amendments of 1925. N.Y. Const. of 1894, art. VI, § 7 (1925). For a detailed discussion of the Code of Civil Procedure loopholes, review of facts by the court of appeals, and the unanimous affirmance rule in particular, *see* H. Cohen & A. Karger, Powers of the New York Court of Appeals 463-64 n.43 (rev. ed. 1952).

73. *See* 2 Revised Record, *supra* note 55, at 464-65, 896-97.

74. Code of Civil Procedure, ch. 448, § 1346(1), 1876 N.Y. Laws 1 (repealed 1920); *see* note 65 *supra* and accompanying text.

75. *See, e.g.*, *Carpenter v. Mosher*, 63 N.Y. Sup. Ct. (56 Hun.) 647, 9 N.Y.S. 897 (Gen. T. 1890); *Clark v. Livingstone*, 8 N.Y.S. 102 N.Y.C. C.P. 1889 (per curiam); *Bishop v. Stebbins*, 48 N.Y. Sup. Ct. (41 Hun.) 243 (Gen. T. 1886).

76. 23 A.D. 560, 48 N.Y.S. 799 (1st Dep't 1897).

77. *Id.* at 565, 48 N.Y.S. at 803.

78. *Id.* at 566, 48 N.Y.S. at 803-04. Today's Appellate Division justices, lacking such "leisure" time because of their large caseload, are more likely to defer to the trial court's findings except in extreme cases. *See* note 379 *infra* and accompanying text.

79. 23 A.D. at 566, 48 N.Y.S. at 804.

criticized the general terms in the past for not using their power to review facts.<sup>80</sup> This shift in opinion may well have resulted from an increased awareness on the part of the Appellate Division justices that their silence as to the facts meant that they had conclusively approved the lower court's factual findings.

### 3. The Development of the Court's Function of Ensuring Substantial Justice

A 1914 amendment to the Code of Civil Procedure produced the next step in the expansion of the Appellate Division's scope of review in civil cases. The amendment gave the Appellate Division the specific power to review findings of fact made by the jury in the trial of an action,<sup>81</sup> and made the court, for the first time, the final arbiter of facts in *all* cases. Although the reasons for this amendment are unknown, it is likely that the legislature amended the code either to make the Appellate Division's review power uniform or, perhaps, to enable it to carry out a third function in addition to screening and supervising—ensuring substantial justice to litigants in their trials.<sup>82</sup>

Although the amendment added to the Appellate Division's review power, it did not usurp the litigants' right to a jury trial. At the time, the Appellate Division did not have the power, as it does today, to make its own findings of fact based upon evidence in the record.<sup>83</sup> The court in 1914 was limited in its review to either affirming the findings or reversing them and, in most cases, ordering a new trial.<sup>84</sup> Thus, if after a review of the facts in a jury case, the litigants were to be given a new trial with a new jury, the Appellate Division could not be usurping the jury trial right.

The Civil Practice Act,<sup>85</sup> passed by the legislature in 1920, was the last major step in the development of the Appellate Division's civil review power. Although its effect on the Appellate Division's scope of review was minimal,<sup>86</sup>

80. *Id.* at 565, 48 N.Y.S. at 803 (citing *Kaare v. Troy Steel & Iron Co.*, 139 N.Y. 369, 376, 34 N.E. 901, 903 (1893); *Smith v. Aetna Life Ins. Co.*, 49 N.Y. 211, 216 (1872) ("Justice would be promoted if the Supreme Court should more frequently exercise its unquestioned right of reviewing verdicts upon the facts.")).

81. Law of April 15, 1914, ch. 351, 1914 N.Y. Laws 978 (repealed 1920). As had been the case in nonjury trials, silence by the Appellate Division in regard to the facts in a jury trial implied its approval of them, thus clearing the way for an appeal on the law to the court of appeals. The amendment was therefore interpreted as making it incumbent upon the Appellate Division to review the findings of fact in all cases. *Larkin v. New York Tel. Co.*, 220 N.Y. 27, 31, 114 N.E. 1043, 1045 (1917). In *Larkin*, a negligence case in which plaintiff's intestate had died while repairing a telephone wire, the Appellate Division had held that the question of whether the company's work procedures were unsafe or negligent was a question for the jury. It did not, however, inquire whether the jury's finding was supported by the weight of the evidence. *Id.* at 31, 114 N.E. at 1045. The court held that the Appellate Division's failure to specify any question of fact for its reversal required that it be conclusively presumed that the reversal was on the law. The Civil Practice Act of 1920, however, limited the *Larkin* presumption to nonjury trials. Civil Practice Act, ch. 925, § 602, 4 N.Y. Laws 19 (repealed 1962); see *Lapp v. Lapp*, 286 N.Y. 252, 253, 36 N.E.2d 134, 135 (1941); *Goodman v. Marx*, 234 N.Y. 172, 173-74, 136 N.E. 853, 853-54 (1922).

82. See note 16 *supra* and accompanying text.

83. See notes 90-94 *infra* and accompanying text.

84. See *Ross v. Caywood*, 162 N.Y. 259, 262, 56 N.E. 629, 629 (1900).

85. Civil Practice Act, ch. 925, 4 N.Y. Laws 19 (1920) (repealed 1962).

86. The provisions of the Civil Practice Act governing the scope of review of the Appellate

it provided the last great thrust in the broadening of appealability. Specifically, it expanded the Code of Civil Procedure by allowing appeals to the Appellate Division on interlocutory judgments issued by the inferior courts.<sup>87</sup> By this time, New York had an extremely broad range of appealable orders and judgments,<sup>88</sup> as broad as the current range under the CPLR.<sup>89</sup>

In the years following the enactment of the Civil Practice Act, the Appellate Division gradually acquired the power to make new findings of fact on appeal. Although the court had always had the power to review facts and reverse the findings of the trial court, it was not until a constitutional amendment was passed in 1925 that the Appellate Division's power to make its own findings of fact on the basis of the record before it was recognized.<sup>90</sup> In 1942, the Civil Practice Act was amended to conform to the constitution. The amendment provided that when the Appellate Division found *new* facts and based a reversal or modification thereon, those facts could in turn be reviewed by the court of appeals.<sup>91</sup> The amendment was basically an attempt to ensure that litigants had at least one higher court in which to challenge the Appellate Division's determination.<sup>92</sup> Without such a provision, a litigant losing an appeal on new facts would have no opportunity to challenge the correctness of the findings.<sup>93</sup> Finally, in 1945, the court of appeals explicitly recognized the Appellate Division's power to make new findings of fact.<sup>94</sup>

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Division were almost identical to those in force under the Code of Civil Procedure. *Compare* Code of Civil Procedure, ch. 448, § 1346, 1876 N.Y. Laws 1, as amended by Law of June 6, 1895, ch. 946, § 1346, 1 N.Y. Laws 796, as amended by Law of April 15, 1914, ch. 351, 1914 N.Y. Laws 978 (repealed 1920) with Civil Practice Act, ch. 925, § 608, 4 N.Y. Laws 19 (1920) (repealed 1962).

87. Civil Practice Act, ch. 925, § 622, 4 N.Y. Laws 19 (1920) (repealed 1962). In the First and Second Departments, however, these appeals could be heard by the appellate term. *Id.* § 627; see note 67 *supra*.

88. On appeal to the supreme court from an inferior court, the Appellate Division or the appellate term could review an interlocutory or final judgment or an order affecting a substantial right. Civil Practice Act, ch. 925, §§ 622, 627, 4 N.Y. Laws 19 (1920) (repealed 1962). Appeals within the supreme court could be taken from final or interlocutory judgments as well as from a wide range of intermediate orders. See *id.* §§ 608-609, 611.

89. See N.Y. Civ. Prac. Law § 5701 (McKinney 1978); pt. II(A) *infra*.

90. See N.Y. Const. of 1894, art. VI, § 7 (1925). The amendment simply stated that when the Appellate Division made any new findings on appeal, those findings could be reviewed by the court of appeals. The Appellate Division's power to make such findings, however, had not yet been recognized by the legislature, see note 91 *infra* and accompanying text, or the court of appeals. See note 94 *infra* and accompanying text.

91. Law of April 2, 1942, ch. 297, § 605, 1942 N.Y. Laws 873 (repealed 1962). For a discussion of the court of appeals' review of the Appellate Division's original or substitute findings, see H. Cohen & A. Karger, *supra* note 72, at 462-73.

92. See H. Cohen & A. Karger, *supra* note 72, at 465.

93. The amendment itself was changed two years later to make it applicable to interlocutory as well as to final judgments and to specify that the facts could be found "expressly or impliedly" by the Appellate Division. Law of April 5, 1944, ch. 528, § 7, 1944 N.Y. Laws 1064 (repealed 1962); see notes 370-85 *infra* and accompanying text. The Appellate Division's power to make new findings of fact was enhanced by an amendment to the Civil Practice Act made in 1938, dispensing with the need to take formal exceptions to disputed rulings as long as a litigant made his objection known to the court. A formal exception was necessary only to object to a jury charge. Law of March 3, 1938, ch. 61, 1938 N.Y. Laws 539 (repealed 1962). The change was made to simplify appellate procedure and to conform to the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 46; Fourth Ann. Rep. N.Y. Jud. Council 18 (1939).

94. *Bernardine v. City of New York*, 294 N.Y. 361, 366-67, 62 N.E.2d 604, 606 (1945)

In the period from 1920 to 1962, the courts interpreted the Appellate Division's scope of review broadly. The Appellate Division's Second Department in 1934 expressed the view that it was the duty of the appellate court to do justice by making whatever ruling the trial court should have made in the first place.<sup>95</sup> A similar theory of the function of the Appellate Division was advanced by Judge Lehman, writing for the court of appeals in 1943: "Where the Appellate Division reviews a finding of fact its inquiry is not confined to an examination of whether the finding is supported by some credible evidence, if it appears that upon *all* the credible evidence a different finding would not have been unreasonable."<sup>96</sup> Moreover, the position of the First Department just prior to the enactment of the CPLR was that mistakes of fact were as easily corrected as mistakes of law and that it was a breach of the court's duty to avoid factual issues.<sup>97</sup> Thus, the appellate justices' attitudes had turned 180 degrees in 100 years; while the justices of the general terms were noted for their cautiousness,<sup>98</sup> their counterparts on the Appellate Division were essentially activists.<sup>99</sup>

### B. Appeals in Criminal Cases

The Appellate Division's powers on appeal in criminal cases have also developed gradually over the years, but without the constant turmoil that characterized the changes in civil appellate procedure. Prior to 1881, the common law and the Revised Statutes<sup>100</sup> provided the supreme court with only a limited scope of review.<sup>101</sup> The Revised Statutes provided that the court had the power to examine the record of the trial<sup>102</sup> and to affirm or reverse.<sup>103</sup> If the supreme court reversed the trial court's conviction, it could

(Appellate Division is entitled "to direct final judgment on a fresh fact basis" even though the new findings do not touch upon the subject matter of the original findings); *see* *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498, 382 N.E.2d 1145, 1147, 410 N.Y.S.2d 282, 285 (1978). Prior to 1945, the court of appeals had declined to recognize this power of the Appellate Division, despite the 1925 amendment. *See* *Heller v. Yaeger*, 283 N.Y. 19, 22-23, 27 N.E.2d 219, 220-21 (1940) (per curiam) (Appellate Division should not have made findings "[u]pon this state of the record"); *McKee v. McKee*, 267 N.Y. 96, 101, 195 N.E. 809, 810 (1935) (new findings by Appellate Division reversed as unwarranted).

95. *See* *Terry & Gibson, Inc. v. Bank of New York & Trust Co.*, 242 A.D. 699, 700, 273 N.Y.S. 32, 33 (2d Dep't 1934) (per curiam).

96. *MacCracken v. Miller*, 291 N.Y. 55, 61-62, 50 N.E.2d 542, 544 (1943).

97. *See* *Gerson v. Jo White, Inc.*, 19 Misc. 2d 730, 730, 189 N.Y.S.2d 346, 347 (Sup. Ct. App. T. 1st Dep't 1959) (per curiam).

98. *See* note 75 *supra* and accompanying text.

99. *Contra, In re Gahan*, 276 A.D. 647, 648, 97 N.Y.S.2d 232, 234 (3d Dep't 1950) (function of appellate court is to correct manifest error and not to supersede one judge's estimation of the facts with that of another); *Robison v. Lockridge*, 230 A.D. 389, 391, 244 N.Y.S. 663, 666 (4th Dep't 1930) (court has no right to substitute its judgment for the trier of facts).

100. Criminal procedure in New York after 1828 was governed by Part IV of the Revised Statutes of New York. Law of Dec. 10, 1828, ch. 20, § 4, 1828-1829 N.Y. Laws 19 (repealed 1881). The sections governing the supreme court's scope of review can be found at 2 N.Y. Rev. Stat. §§ 14-24, at 740-41 (1829) (repealed 1886).

101. 2 N.Y. Rev. Stat. § 23, at 741 (1829) (repealed 1886).

102. *Id.*

103. *Id.* § 24, at 741.

either order a new trial or dismiss the case entirely.<sup>104</sup> The case law, however, indicates that the supreme court had no power to review a jury's verdict<sup>105</sup> or to inspect the sufficiency of the evidence supporting the verdict.<sup>106</sup>

In 1881, the Code of Criminal Procedure was enacted.<sup>107</sup> On the theory that the appellate court had the power to do justice on appeal according to the circumstances of the case, the code simply stated that the court should render judgment without regard to nonprejudicial errors<sup>108</sup> and that it could affirm, reverse, grant a new trial, or conform an erroneous judgment to the verdict.<sup>109</sup>

The problem with the scope of review provisions of the Code of Criminal Procedure was that they spoke strictly in terms of judgments<sup>110</sup>—the final determinations entered by the trial court upon the jury verdict. The code made no provisions whatever for appellate review of the jury's work, and made no distinction between questions of fact and questions of law. Nevertheless, the post-1881 case law shows the supreme court, and later the Appellate Division, broadening its scope of review by allowing for the reversal of guilty verdicts that were clearly against the weight of the evidence.<sup>111</sup> Although the court usually deferred to the jury's findings<sup>112</sup> and although the test for reversal was strict,<sup>113</sup> review of the jury's findings was a significant departure

104. *Id.*

105. *See, e.g.,* *La Beau v. People*, 34 N.Y. 223, 230-31 (1866); *People v. Butler*, 3 Park. Cr. R. 377, 384 (Sup. Ct. Gen. T. 1857) (this "rule of the common law must prevail until it is abolished by our own laws"); *Colt v. People*, 1 Park. Cr. R. 611, 621 (Ch. 1842). The writ of error brought up for review the indictment, all pleas thereto, and any proceedings thereon. *Grant v. People*, 4 Park. Cr. R. 527, 531 (Sup. Ct. Gen. T. 1860). The supreme court, therefore, while not able to review the jury's determination of guilt or innocence, could at least review the sentence given the defendant by the trial judge. *See Barthelemy v. People*, 2 Hill 248, 255-56 (Sup. Ct. 1842).

106. *La Beau v. People*, 34 N.Y. 223, 228-29 (1866).

107. Code of Criminal Procedure, ch. 442, 2 N.Y. Laws 1 (1881) (repealed 1970).

108. *Id.* § 542.

109. *Id.* § 543.

110. *Id.* §§ 543 ("[T]he appellate court may, in cases where an erroneous judgment has been rendered upon a lawful verdict, correct the judgment to conform to the judgment [*sic*]; in all other cases they must affirm or reverse the judgment . . ."), 770 (defendant may appeal "in the same manner as from a judgment in an action prosecuted by indictment").

111. *See, e.g.,* *People v. Schooley*, 96 N.Y. Sup. Ct. (89 Hun.) 391, 394, 35 N.Y.S. 429, 430 (Gen. T. 1895), *aff'd*, 149 N.Y. 99, 43 N.E. 536 (1896) (appellate court may interfere with verdict to avoid injustice); *People v. Burton*, 84 N.Y. Sup. Ct. (77 Hun.) 498, 505, 28 N.Y.S. 1081, 1085 (Gen. T. 1894) ("court will not interfere with [a conviction] 'unless it is clearly against the weight of evidence, or appears to have been influenced by passion, prejudice, mistake or corruption' ") (quoting *People v. Taylor*, 138 N.Y. 398, 405, 34 N.E. 275, 278 (1893)); *People v. Zounek*, 73 N.Y. Sup. Ct. (66 Hun.) 626, 20 N.Y.S. 755, 756 (Gen. T. 1892) (general term may order a new trial if satisfied that the verdict against the accused was against the weight of the evidence).

112. *See* *People v. Druse*, 103 N.Y. 655, 655-56, 8 N.E. 733, 734 (1886) (mem.) (court may not interfere with verdict when the evidence offered warrants the jury's conclusion); *People v. Zounek*, 73 N.Y. Sup. Ct. (66 Hun.) 626, 20 N.Y.S. 755, 756 (Gen. T. 1892) (appellate court will not interfere with jury's determination of controverted questions on conflicting evidence).

113. The verdict had to be clearly against the weight of the evidence. *People v. Taylor*, 138 N.Y. 398, 405, 34 N.E. 275, 278 (1893); *People v. Schooley*, 96 N.Y. Sup. Ct. (89 Hun.) 391, 394, 35 N.Y.S. 429, 430 (Gen. T. 1895), *aff'd*, 149 N.Y. 99, 43 N.E. 536 (1896); *People v.*

from the common law practice.<sup>114</sup> This power to examine completely the trial court's determinations, including the jury's findings if necessary,<sup>115</sup> was incorporated into the CPL,<sup>116</sup> which replaced the Code of Criminal Procedure and governs criminal appeals today.

Appealability in criminal cases at common law and under the Revised Statutes was also restricted: writs of error, which were writs of right in all but capital cases,<sup>117</sup> could only be taken by the defendant,<sup>118</sup> and only on the final judgment of the trial court.<sup>119</sup> The People were prohibited from taking a writ of error on an acquittal because of the state's prohibition against double jeopardy.<sup>120</sup> In 1852, however, the legislature broadened appealability by allowing, for the first time, appeal by the People when there had been a final determination for the defendant not on the merits,<sup>121</sup> such as when the trial

Burton, 84 N.Y. Sup. Ct. (77 Hun.) 498, 505, 28 N.Y.S. 1081, 1085 (Gen. T. 1894); *People v. Zounek*, 73 N.Y. Sup. Ct. (66 Hun.) 626, 20 N.Y.S. 755, 756 (Gen. T. 1892).

114. In permitting review of the jury verdict in certain situations, the courts may have been following the spirit, if not the letter, of the law. Although the code did not expressly authorize such a review by the supreme court, it did provide for review by the county courts in nonindictment cases of an "erroneous decision or determination of law or fact upon the trial." Code of Criminal Procedure, ch. 442, § 750, 2 N.Y. Laws 1 (1881), as amended by Law of June 21, 1882, ch. 360, 1 N.Y. Laws 489 (1882) (repealed 1970). Also, the code allowed the supreme court to conform a judgment to a "lawful verdict," Code of Criminal Procedure, ch. 442, § 543, 2 N.Y. Laws 1 (1881) (repealed 1970), which would seem to imply that some verdicts might be unlawful and perhaps susceptible to review.

115. See, e.g., *People v. Bergman*, 252 N.Y. 346, 347, 169 N.E. 408, 408 (1929) (per curiam) (in reviewing a conviction, Appellate Division should pass not only on the law but also on the facts); *People v. Patterson*, 21 A.D.2d 356, 361, 250 N.Y.S.2d 715, 721-22 (1st Dep't 1964) (evidence in record must be sufficient to sustain finding of guilt); *People v. Farrell*, 2 A.D.2d 797, 798, 153 N.Y.S.2d 284, 285 (3d Dep't 1956) (mem.) (reviewing court may not substitute its judgment for the judgment of the jury unless it is against the weight of the evidence). The Appellate Division's review power in criminal cases was strengthened in 1946 when the Code of Criminal Procedure was amended to provide that formal exceptions need not be taken at trial as long as an objection was made. Law of March 23, 1946, ch. 209, 1946 N.Y. Laws 640 (repealed 1970). The amendment was made to conform the practice in criminal cases to that in civil actions, see note 93 *supra*, and to the new Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 51; Twelfth Ann. Rep. N.Y. Jud. Council 51 (1946).

116. "The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence." N.Y. Crim. Proc. Law § 470.15(5) (McKinney 1971).

117. 2 N.Y. Rev. Stat. § 15, at 740 (1829) (repealed 1886).

118. The Revised Statutes did not expressly limit the writ to the defendant's use, but it is clear from the statutory language that it was only the defendant who was taking the writ. See *id.* § 21, at 740 ("The district attorney of the county shall bring on for argument . . . the return to such writ of error . . ."); *id.* § 24, at 741 (upon affirming, the supreme court "shall direct the sentence pronounced to be executed") (emphasis added).

119. *Id.* § 15, at 740; see *People v. Merrill*, 14 N.Y. 74, 76 (1856).

120. See N.Y. Const. of 1846, art. I, § 6; N.Y. Const. of 1821, art. VII, § 7.

121. Law of March 22, 1852, ch. 82, 1852 N.Y. Laws 76 (repealed 1886). The writ, however, was not a writ of right as far as the state was concerned; rather, it had to be approved by a justice of the supreme court. *Id.* Although the statute did not so specify, it was interpreted to allow such writs only upon final judgments. *People v. Merrill*, 14 N.Y. 74, 76 (1856).

court sustained the defendant's demurrer to the indictment.<sup>122</sup> The Code of Criminal Procedure later codified the People's right to appeal the defendant's demurrer and also permitted the People to appeal an order of the trial court arresting its judgment.<sup>123</sup> To a lesser extent, the code also broadened appealability by the defendant.<sup>124</sup>

During the code's lifetime, and as recently as 1969, the code was often amended by the legislature to expand the People's right to appeal, although these appeals were still limited to specific nonacquittal situations.<sup>125</sup> The state, therefore, was given the maximum opportunity to prosecute the defendant in order to offset his advantage in being permitted to appeal the final judgment. It is significant to note that the last three amendments to the provision governing the People's right to appeal<sup>126</sup> were made during the

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122. See *Hartung v. People*, 26 N.Y. 154, 160 (1862); *People v. Clark*, 7 N.Y. 385, 386 (1852).

123. Code of Criminal Procedure, ch. 442, § 518, 2 N.Y. Laws 1 (1881) (repealed 1970). An order arresting judgment was a favorable ruling on the defendant's motion that no judgment be entered on a guilty plea or verdict. Such a motion could be based on any defect in the original indictment, such as lack of legal authority for a grand jury indictment or failure of the facts stated in the indictment to constitute a crime. *Id.* §§ 323, 467. Basically, the defendant's motion was a form of demurrer to the indictment made after the defendant had pleaded or been found guilty.

124. As passed in 1881, the code did not significantly expand the defendant's right to appeal. The defendant was still limited to the appeal of final judgments, *id.* §§ 517, 770, and, although the code expressly provided that such an appeal brought up for review any intermediate decisions of the trial court, *id.* § 517, this did not change the practice at common law, whereby the supreme court could, on review, render judgment on the record before it. See note 103 *supra* and accompanying text. If the writ of error brought up all of the proceedings on the indictment, see note 105 *supra*, it would seem that the lower court's decisions during the trial were also subject to review. The code was subsequently amended to allow the defendant to appeal the denial of a motion to vacate a conviction, Law of April 7, 1947, ch. 706, § 1, 1947 N.Y. Laws 1304 (repealed 1970), but such an appeal was a post-judgment, not an intermediate or interlocutory, appeal. By a 1971 amendment to the CPL, appeal from the denial of a motion to vacate a conviction was transferred from as-of-right to by-permission status unless the conviction was punishable by death. Law of June 22, 1971, ch. 671, §§ 1-2, 1971 N.Y. Laws 1782 (codified at N.Y. Crim. Proc. Law § 450.15(1) (McKinney 1971)). The change was apparently designed to stem the tide of such appeals, many of which were frivolous. Denzer, *Practice Commentary*, N.Y. Crim. Proc. Law § 450.15, at 379 (McKinney 1971).

125. The code was amended to allow appeals by the People in the following situations: from an order, based upon the court's review of the grand jury minutes, dismissing an indictment, Law of April 16, 1926, ch. 445, 1926 N.Y. Laws 785 (repealed 1942); in all cases in which the defendant could appeal, except when a verdict or judgment of not guilty had been rendered, Law of March 26, 1927, ch. 337, 1927 N.Y. Laws 794 (repealed 1970); from an order, made at any stage of the action, which set aside or dismissed the indictment on a ground other than the insufficiency of the evidence, Law of May 14, 1942, ch. 832, § 1, 1942 N.Y. Laws 1834 (repealed 1970) (replacing the 1926 amendment); from an order granting a motion to vacate a judgment of conviction, Law of April 7, 1947, ch. 706, § 2, 1947 N.Y. Laws 1305 (repealed 1970); from a pretrial order granting a motion for the return of property or the suppression of evidence, Law of April 29, 1962, ch. 954, § 2, 1962 N.Y. Laws 3819 (repealed 1970); from a pretrial order granting a motion to suppress a confession or an admission, Law of July 16, 1965, ch. 846, § 2, 1965 N.Y. Laws 2024 (repealed 1970); and from a pretrial order granting a motion to suppress eavesdropping evidence, Law of May 26, 1969, ch. 1147, § 3, 1969 N.Y. Laws 3064 (repealed 1970).

126. See note 125 *supra*.

1960's, in the wake of the United States Supreme Court's decisions which applied many of the procedural and substantive due process safeguards of the Bill of Rights to the states.<sup>127</sup> In addition to indirectly increasing appealability by the People, these decisions also resulted in an increase in appeals by defendants, who could now appeal the violation of their new constitutional rights.<sup>128</sup>

Perhaps the most noticeable area in which criminal appeals developed differently from civil appeals was with respect to appeals from intermediate orders. While the civil codes were developing the right to appeal such orders on many different grounds,<sup>129</sup> the criminal cases were emphatically holding that such appeals were not possible in criminal actions.<sup>130</sup> Criminal appeals could not be taken from any intermediate orders, sentences, or decisions of the trial court, but only from final judgments or final orders.<sup>131</sup>

### C. Summary

The Appellate Division's power has grown to enable it to perform those functions that it was designed, and later modified, to serve: the supervision of the lower courts; the screening of cases for the court of appeals; and the promotion of substantial justice. The screening and supervisory functions have resulted in the Appellate Division's broad judicial lawmaking power, which has also been enhanced by the volume of litigation which the court handles and the tendency for the law to develop within the four departments before the court of appeals has spoken on an issue.

The chief source of the Appellate Division's power, however, has been New York's tradition of allowing litigants the widest possible review in the interests of justice. This is evident in the appeal procedure developed by the drafters of the Field Code who realized that judges were mere mortals, prone to human error in the determination of facts, and often in need of a second review to certify the accuracy of their findings.<sup>132</sup> It is also obvious in the 1914 amendment to the Code of Civil Procedure which realized that the verdict rendered by the jury, which is easily swayed by courtroom rhetoric, need not be inviolate.<sup>133</sup> Finally, it is apparent in the gradual process through which the number of appealable decisions was expanded from the common law final judgment limitation<sup>134</sup> to the broad range of orders appealable

127. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); notes 270-72 *infra* and accompanying text. See also F. Ludwig, *The New Criminal Procedure Law* 9-10 (1971).

128. Breitel Interview, *supra* note 15, at A4-5, B3-4, C3; see notes 270-72 *infra* and accompanying text.

129. See notes 44-46, 49-53, 87-89 *supra* and accompanying text.

130. See, e.g., *People v. Prince*, 19 A.D.2d 903, 903, 244 N.Y.S.2d 820, 822 (2d Dep't 1963) (mem.); *People v. Shannon*, 1 A.D.2d 226, 232, 149 N.Y.S.2d 550, 556 (2d Dep't), *aff'd*, 2 N.Y.2d 792, 139 N.E.2d 430, 158 N.Y.S.2d 334 (1956); *People v. Conklin*, 261 A.D. 1032, 1033, 26 N.Y.S.2d 36, 38 (3d Dep't 1941) (per curiam).

131. See *Bloeth v. Cyrtta*, 21 A.D.2d 979, 979-80, 243 N.Y.S.2d 490, 491 (2d Dep't 1963) (mem.).

132. See notes 34-43 *supra* and accompanying text.

133. See notes 81-84 *supra* and accompanying text.

134. See notes 24-25 *supra* and accompanying text.



under the CPLR.<sup>135</sup> This broad range serves the interests of justice by allowing the appellate justices to review many cases immediately, thus enabling them to dispose of meritless claims without the necessity and expense of a full trial.<sup>136</sup> The expansion in criminal cases of the People's right to appeal intermediate orders was also an expansion in the interests of justice; its primary goal was the neutralization of the extreme appellate advantage possessed by a defendant in the nineteenth century.<sup>137</sup> Although this expansion, and the expansion of the Appellate Division's powers in general, has ended, the court's jurisdiction has remained extensive, leaving New York with one of the largest and most powerful intermediate appellate courts in the country.

## II. JUDGMENTS AND ORDERS APPEALABLE TO THE APPELLATE DIVISION

This part of the study examines New York's present appeals procedure and will attempt to determine whether such procedures are properly defined to enable the Appellate Division to fulfill efficiently its functions of screening for the court of appeals, supervising the trial courts, and ensuring that all litigants receive substantial justice. To this end, this part will first examine the appealability of judgments and orders in civil actions, focusing on the policies underlying these procedures and comparing New York's scheme to that of the federal courts, other state intermediate appellate courts, and the *Standards Relating to Appellate Courts* recently propounded by the American Bar Association (ABA Standards).<sup>138</sup> This same analysis will then be applied to criminal appeals. In discussing each of these sections, this part will explore those instances in which appealability in New York seems to be too broad and in which, theoretically at least, there are possible areas of abuse.

### A. Civil Appeals

#### 1. Appeals from the Supreme Court and the County Courts

##### a. Final and Interlocutory Judgments

The appealability of judgments and orders originating in the supreme court and county courts<sup>139</sup> is extremely broad. The primary statutory authority for

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135. N.Y. Civ. Prac. Law § 5701 (McKinney 1978).

136. Immediate review may also enable the appellate justices to control effectively their large caseload, see notes 426-430 *infra* and accompanying text, by resolving disputes and heading off possible frivolous appeals.

137. See note 125 *supra* and accompanying text.

138. ABA Standards, *supra* note 16.

139. Appeals from courts other than the supreme court or county court are governed by N.Y. Civ. Prac. Law § 5702 (McKinney 1978) in conjunction with any other statutes applicable to the particular court. Some such statutes expressly adopt the CPLR provisions. N.Y. Ct. Cl. Act § 24 (McKinney 1963 & Supp. 1978); N.Y. Surr. Ct. Proc. Act § 2701 (McKinney 1967). Others have provisions similar to CPLR 5701. See N.Y. Just. Ct. Act §§ 1701-1702 (McKinney Supp. 1978); N.Y. Uniform Dist. Ct. Act §§ 1701-1702 (McKinney 1963); N.Y. Uniform City Ct. Act §§ 1701-1702 (McKinney Supp. 1978). The family court, however, provides more explicit instruction on how appeals from that court are to be handled. N.Y. Fam. Ct. Act §§ 1111-1120 (McKinney 1975). Such appeals are taken to the department of the Appellate Division in which the family court is located. An appeal from a final order or judgment may be taken as of right, as may an appeal from any order, final or intermediate, or decision in an abuse case *Id.* § 1112. The CPLR

appeals to the Appellate Division is section 5701 of the CPLR,<sup>140</sup> which provides, with one very limited exception,<sup>141</sup> that any judgment—final or interlocutory<sup>142</sup>—is appealable as of right. However, the determination from which the appeal is taken must be embodied in a judgment. Thus, an appeal may not be taken from a determination in the form of a decision,<sup>143</sup> opinion,<sup>144</sup> verdict,<sup>145</sup> ruling,<sup>146</sup> finding of fact, or conclusion of law.<sup>147</sup> Some of these determinations, however, may be reviewable when the final judgment is appealed<sup>148</sup> or may qualify as intermediate orders appealable as of

otherwise applies "where appropriate." *Id.* § 1118. Appeals from the New York City Civil Court are governed by N.Y. City Civ. Ct. Act §§ 1701-1707 (McKinney 1963). Appeals from this court are taken to the appropriate department of the Appellate Division, unless that department has created an appellate term and directed that the appeals be handled there. *Id.* § 1701. Because New York City is within the territorial jurisdiction of the First and Second Departments, and because both these departments have created appellate terms, *see* [1978] 22 N.Y.C.R.R. §§ 640.1, 730.1, all appeals from the New York City Civil Court are handled by the appropriate appellate term.

140. N.Y. Civ. Prac. Law § 5701 (McKinney 1978).

141. The exception is a judgment "entered subsequent to an order of the appellate division which disposes of all the issues in the action." *Id.* § 5701(a)(1). The reason for this exception is that such a judgment is purely a "ministerial act." Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5701, at 574 (McKinney 1978).

142. The most common use of the interlocutory judgment disappeared when the New York divorce laws were changed in 1968 to eliminate the requirement that a matrimonial action terminate in an interlocutory judgment for a definite period before becoming final. *See* Law of June 16, 1968, ch. 645, § 1, 1968 N.Y. Laws 1405 (repealing N.Y. Dom. Rel. Law § 241 (McKinney 1968)). Nevertheless, an interlocutory judgment is still available. It may be used, for example, in a bifurcated personal injury action if liability has been determined but the issue of damages has not yet been tried. *Fortgang v. Chase Manhattan Bank*, 29 A.D.2d 41, 43, 285 N.Y.S.2d 110, 111 (2d Dep't 1967) (per curiam); *Hacker v. City of New York*, 25 A.D.2d 35, 36-37, 266 N.Y.S.2d 194, 196 (1st Dep't 1966); *see* *Trimboli v. Scarpaci Funeral Home, Inc.*, 37 A.D.2d 386, 388, 326 N.Y.S.2d 277, 229 (2d Dep't 1971), *aff'd*, 30 N.Y.2d 687, 283 N.E.2d 614, 332 N.Y.S.2d 637 (1972). An appeal will not lie, however, when the issues of liability and damage are to be tried successively but before the same jury. *Jack Parker Constr. Corp. v. Williams*, 35 A.D.2d 839, 317 N.Y.S.2d 911 (2d Dep't 1970) (mem.).

143. *E.g.*, *Horner v. Village of Mamaroneck*, 47 A.D.2d 904, 366 N.Y.S.2d 212 (2d Dep't 1975) (mem.); *Hunter v. Zelker*, 41 A.D.2d 970, 343 N.Y.S.2d 1015 (2d Dep't 1973) (mem.).

144. *E.g.*, *Zisman v. Leasing Consultants Inc.*, 35 A.D.2d 726, 314 N.Y.S.2d 603 (2d Dep't 1970) (mem.); *Goldberg v. Orzac*, 30 A.D.2d 697, 698, 291 N.Y.S.2d 910, 911 (2d Dep't 1968) (mem.), *aff'd*, 23 N.Y.2d 919, 246 N.E.2d 168, 298 N.Y.S.2d 318 (1969).

145. *E.g.*, *People v. Swift*, 26 A.D.2d 821, 273 N.Y.S.2d 844 (2d Dep't 1966) (mem.); *Duffy v. Owen A. Mandeville, Inc.*, 3 A.D.2d 756, 757, 160 N.Y.S.2d 97, 100 (2d Dep't 1957) (mem.), *rev'd on other grounds*, 5 N.Y.2d 730, 152 N.E.2d 669, 177 N.Y.S.2d 713 (1958).

146. *E.g.*, *Skyliner Diner Corp. v. Board of Assessors*, 45 A.D.2d 712, 356 N.Y.S.2d 99 (2d Dep't 1974) (mem.); *Richardson v. Wengatz*, 33 A.D.2d 947, 306 N.Y.S.2d 1018 (3d Dep't 1970) (mem.).

147. *E.g.*, *Smart v. Lefkowitz*, 49 A.D.2d 882, 883, 372 N.Y.S.2d 737, 738 (2d Dep't 1975) (mem.); *Fleetash Realty Co. v. August Serverio Constr. Co.*, 11 A.D.2d 769, 205 N.Y.S.2d 212 (2d Dep't 1960) (mem.). *But see* *Kletnieks v. Brookhaven Memorial Ass'n*, 53 A.D.2d 169, 174, 385 N.Y.S.2d 575, 579 (2d Dep't 1976) ("appeals from orders denying relief with respect to findings of medical malpractice panels will be permitted only by [permission] upon a demonstration of good cause shown").

148. *See* N.Y. Civ. Prac. Law § 5501 (McKinney 1978).

right or by permission.<sup>149</sup> In addition, although CPLR 5511 specifically provides that an appeal may not be taken from a default judgment,<sup>150</sup> CPLR 5701 still provides the losing party in such a case with a method of obtaining appellate review. He need only make a motion to open the default; if denied, the order denying the motion is appealable.<sup>151</sup>

#### b. Orders Appealable as of Right

Most orders are appealable as of right provided the motions determined by such orders were made on notice.<sup>152</sup> The primary sources of the myriad interlocutory appeals heard in the Appellate Division are two subparagraphs of CPLR 5701(a)(2) that allow appeal as of right if the order "involves some part of the merits"<sup>153</sup> or "affects a substantial right."<sup>154</sup> Because almost all orders can be categorized under one or the other of these subsections, one author has likened them to "enormous vacuums, overlapping the other listed grounds . . . drawing in so much that it is futile even to start a list of orders included."<sup>155</sup>

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149. See notes 152-87 *infra* and accompanying text. The determination, however, must be reduced to an order first. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5701, at 574 (McKinney 1978). Others have noted that trial rulings, even though cloaked in a formal order, cannot be appealed under the statute. 7 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶ 5701.04 (1978) [hereinafter cited as Weinstein, Korn & Miller].

150. N.Y. Civ. Prac. Law § 5511 (McKinney 1978).

151. 7 Weinstein, Korn & Miller, *supra* note 149, ¶ 5701.07.

152. N.Y. Civ. Prac. Law § 5701(a)(2) (McKinney 1978).

153. *Id.* § 5701(a)(2)(iv).

154. *Id.* § 5701(a)(2)(v). The drafters of the CPLR believed that the provisions of the Civil Practice Act governing appeals of intermediate orders were "a prime source of delay and expense in litigation," Advisory Comm. on Practice and Procedure, Second Preliminary Report, N.Y. Leg. Doc. No. 13, 181st Sess. 116 (1958) [hereinafter cited as Second Preliminary Report], and represented an extreme position on appeals relative to other jurisdictions. *Id.* They proposed that the appeals which could be taken as of right be specified in the statute and that the remainder be appealable only by permission. See *id.* at 114-22. The proposed section was amended in 1961, however, "in light of comments received from the public." Senate Finance Comm. & Assembly Ways & Means Comm., Fifth Preliminary Report to the Legislature Relative to the Revision of the Civil Practice Act, N.Y. Leg. Doc. No. 15, 184th Sess. 143 (1961) [hereinafter cited as Fifth Preliminary Report]. Specifically, the committee decided it would be preferable to exclude the types of orders which it felt caused the most delay, rather than listing a limited number of orders appealable as of right. As a result, they returned to the list of appealable orders in the Civil Practice Act, with three narrow exceptions. See N.Y. Civ. Prac. Law § 5701(a), (b) (McKinney 1978); Fifth Preliminary Report, *supra*, at 141-44. In so doing, the drafters retained the clause allowing appeals of orders "affecting a substantial right," which has been cited as the source of the majority of intermediate appeals. D. Siegel, *supra* note 1, § 526, at 722-23.

155. D. Siegel, *supra* note 1, § 526, at 723. Further, when used in conjunction with the other subparagraphs of CPLR 5701(a)(2), they often provide the appellant with several grounds upon which to appeal as of right. For example, an order is appealable as of right if it "in effect determines the action," N.Y. Civ. Prac. Law § 5701(a)(2)(vi) (McKinney 1978), or if it declares a state statute unconstitutional. *Id.* § 5701(a)(2)(vii). But both of these orders would also be appealable as affecting some part of the merits or as affecting substantial rights. For this reason, it has been noted that subparagraphs (vi) and (vii) are rarely used and are probably obsolete. 7 Weinstein, Korn & Miller, *supra* note 149, ¶ 5701.20-22.

When such interlocutory orders are made appealable as of right, two competing policies come into play. On the one hand, free appealability affords the Appellate Division substantial opportunity to supervise the trial court and to ensure that its actions are within permissible legal and discretionary bounds. On the other hand, it may also lead to excessive appellate intrusion into the proceedings below with a resultant demoralization of the trial judges.<sup>156</sup> If the supervisory function sufficiently outweighs the risk of undue appellate intrusion, then giving an intermediate order appealability-as-of-right status is desirable. Conversely, if the risk of intrusion is substantial and outweighs any supervisory need, providing an appeal as a matter of right is inappropriate; the better policy is to wait until a final judgment has been entered or until irreparable injury becomes imminent.

In fact, only a few orders, those deemed to be "only preliminary to a disposition of the motion on the merits,"<sup>157</sup> fall outside the substantial rights umbrella and, consequently, are not appealable as of right. Such orders include those referring a motion from one county to another<sup>158</sup> and those passing upon objections made to questions at an examination before trial.<sup>159</sup> Where such preliminary motions are involved, the risk of excessive appellate intrusion seems to outweigh any need for supervision.

Such is generally not the case, however, when a substantial right is involved. In this situation the potential harm to the litigant requires appellate supervision and justifies intrusion into the trial proceedings. Thus, an order granting or denying a motion to dismiss a claim or defense is appealable as of right. In *Winn v. Warren Lumber Co.*,<sup>160</sup> the Second Department held an order denying a motion to dismiss without prejudice to renew to be appealable. The Third Department has held that this is true for motions to dismiss a cause of action or a defense under CPLR 3211 regardless of whether such a motion is granted or denied.<sup>161</sup> In *Tribolati v. Lippman*,<sup>162</sup> however, the Second Department held an order granting a motion to dismiss made at trial not appealable. One commentator attempted to explain this result on the ground that the motion was oral or embodied a mere "ruling."<sup>163</sup> In any event, it

156. ABA Standards, *supra* note 16, § 3.11, Commentary at 20; *see* note 546 *infra* and accompanying text.

157. 7 Weinstein, Korn & Miller, *supra* note 149, ¶ 5701.16.

158. *Baker, Voorhis & Co. v. Heckman*, 28 A.D.2d 673, 280 N.Y.S.2d 940 (1st Dep't 1967) (mem.).

159. *Siegel v. Arnao*, 61 A.D.2d 812, 402 N.Y.S.2d 44 (2d Dep't 1978) (mem.); *Lacerenza v. Rich*, 39 A.D.2d 716, 332 N.Y.S.2d 230 (2d Dep't 1972) (mem.). The rationale here is that such objections should be reserved for determination at trial. 7 Weinstein, Korn & Miller, *supra* note 149, ¶ 5701.17. *But see* *Freedco Prods., Inc. v. New York Tel. Co.*, 47 A.D.2d 654, 366 N.Y.S.2d 401 (2d Dep't 1975) (mem.). In this case the court, while emphasizing that it was not deviating from the rule that orders dealing with objections to questions asked at examinations before trial are not appealable, nevertheless held such an order appealable as affecting a substantial right because it was made by one judge who improperly overruled another judge of the same court. *Id.* at 654-55, 366 N.Y.S.2d at 402.

160. 11 A.D.2d 713, 204 N.Y.S.2d 552 (2d Dep't 1960) (mem.).

161. *Kearney v. Atlantic Cement Co.*, 33 A.D.2d 848, 306 N.Y.S.2d 45 (3d Dep't 1969) (mem.).

162. 24 A.D.2d 769, 264 N.Y.S.2d 6 (2d Dep't 1965) (mem.).

163. D. Siegel, *supra* note 1, § 526, at 723.

seems beyond argument that a motion to dismiss, whether granted or denied, affects a substantial right.

Another order appealable as of right is one which denies, without prejudice to renew, a motion to implead another as party defendant.<sup>164</sup> Clearly, the inability of a party to implead another to share in any possible liability affects a substantial right. One must question, however, whether the ability to renew without prejudice sufficiently alters the equation so that the risk of appellate intrusion outweighs the need for supervision. Because the potential harm to the litigant is so great, and because the trial judge who denied the motion the first time is likely to consider the same factors and come to the same conclusion the second time, the need for supervision seems to outweigh the risk of excessive intrusion. Similarly, an order in a consolidated action which appoints one firm as counsel for all plaintiffs and denies appellant's counsel various rights, powers, and duties is appealable as of right.<sup>165</sup> In this instance, the litigant is faced with possible irreparable harm by not being able to have the counsel of his choice present his case. Because of the substantial right involved, the supervision/intrusion balance tips in favor of supervision.

CPLR 5701(a)(2)(iii) specifically provides that an order granting or refusing a new trial is appealable as of right.<sup>166</sup> In this situation the risk of disrupting the trial in order to appeal is slight because the order is issued at the end of the proceedings. At the same time, however, the trial judge has been supervising the proceedings and is much more familiar with the problems that have arisen. There is a danger, therefore, that excessive appellate interference will have a demoralizing effect on the trial judge.<sup>167</sup> On the other hand, the

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164. In such a case, either the movant or his opponent may appeal the order as of right. *Sherman v. Morales*, 50 A.D.2d 610, 611, 375 N.Y.S.2d 377, 380 (2d Dep't 1975) (mem.). Appealable-as-of-right status is also accorded an order dealing with the resettlement of a trial transcript or statement on appeal. N.Y. Civ. Prac. Law § 5701(a)(2)(ii) (McKinney 1978). When the parties cannot agree upon what constitutes the trial transcript, or, if no written record was made in the trial court, upon what information should be included in the statement on appeal, the matter must be settled by the judge or his referee. *Id.* § 5525. If one party then makes an application to the trial court to have the transcript resettled, the order passing upon that application is appealable as of right. At first glance, the appealable-as-of-right status accorded such an order seems excessively broad. However, because the Appellate Division reviews both law and facts solely on the transcript before it, it is important that the record on appeal be accurate. In this respect, the CPLR reflects a value judgment that the agreement of the parties will produce the most accurate record. Thus, if the parties cannot agree and the record reflects a third party's assessment of what the Appellate Division should consider, a substantial right of the litigant is being affected, and therefore the appeal should be a matter of right.

165. *Katz v. Clitter*, 58 A.D.2d 777, 396 N.Y.S.2d 388 (1st Dep't 1977) (mem.).

166. N.Y. Civ. Prac. Law § 5701(a)(2)(iii) (McKinney 1978). One rare exception to this rule arises when a case, otherwise not triable by a jury, is nevertheless tried before an advisory jury. *Id.* § 4212 (McKinney 1963). An appeal as of right will not lie from an order granting or refusing a new trial in this instance because the advisory jury's verdict is not a final determination of the case but merely an aid to the court, to be accepted or rejected by the trial judge in his discretion. *E.g.*, *Consolidated Laundries Corp. v. Roth*, 241 A.D. 48, 270 N.Y.S. 881 (1st Dep't 1934); *Anderson v. Carter*, 24 A.D. 462, 465, 49 N.Y.S. 255, 257 (4th Dep't 1897), *aff'd mem.*, 165 N.Y. 624, 59 N.E. 1118 (1900). This seems to be in accord with Fed. R. Civ. P. 52, which requires the court to find the facts even though the case is tried with an advisory jury.

167. See notes 156 *supra*, 546 *infra* and accompanying text.

litigant undoubtedly has a substantial interest in obtaining appellate review of the order. Under these circumstances, therefore, perhaps the better practice would be to require permission to appeal. This would enable the Appellate Division to supervise and correct any serious abuse by the lower court and protect both the rights of the litigant and the morale of the trial judge. Such a procedure would also have the added benefit of lessening the caseload of the Appellate Division.

Another order appealable as of right under CPLR 5701(a)(2) is one which "grants, refuses, continues or modifies a provisional remedy."<sup>168</sup> The provisional remedies are listed in CPLR 6001 as arrest,<sup>169</sup> attachment,<sup>170</sup> injunction,<sup>171</sup> receivership,<sup>172</sup> and notice of pendency.<sup>173</sup> The appealable-as-of-right status accorded these orders would appear to be appropriate because the remedies themselves are extraordinary and have immediate, and sometimes irreparable, effect.<sup>174</sup>

The condition precedent for appealability as of right is that the order appealed from must determine a motion made on notice to all parties.<sup>175</sup> Therefore, one would logically conclude that ex parte orders are not appealable. The concept of easy appealability, however, is so firmly established in New York that a method for obtaining appellate review of ex parte orders is also provided.<sup>176</sup> The aggrieved party must move, on notice to the opposing party, to vacate the ex parte order. This motion gives the trial court a chance to review its order. If the motion to vacate the ex parte order is denied, there is an appeal as of right,<sup>177</sup> provided that the initial order would have been appealable as of right had it been made upon notice.<sup>178</sup> In addition to this procedural strategy, CPLR 5704(a) provides another method for obtaining appellate review of ex parte orders.<sup>179</sup> Under this provision the Appellate Division may review any ex parte order upon motion by the aggrieved party.<sup>180</sup> There has been some question, however, as to the conditions under

168. N.Y. Civ. Prac. Law § 5701(a)(2)(i) (McKinney 1978).

169. The provisional remedy of arrest is governed by *id.* §§ 6101-6119 (McKinney 1963 & Supp. 1964-1978) and is available now only in equity actions. McLaughlin, *Supplementary Practice Commentary*, N.Y. Civ. Prac. Law § 6101, at 9 (McKinney Supp. 1964-1978).

170. N.Y. Civ. Prac. Law §§ 6201-6226 (McKinney 1963 & Supp. 1964-1978).

171. *Id.* §§ 6301-6330.

172. *Id.* §§ 6401-6405.

173. *Id.* §§ 6501-6515.

174. Even the federal system, which usually grants appeal-as-of-right status only to final judgments, makes an exception for appeals from such interlocutory orders. 28 U.S.C. § 1292(a) (1976).

175. N.Y. Civ. Prac. Law § 5701(a)(2) (McKinney 1978).

176. *Id.* § 5701(a)(3).

177. See *In re Scotti*, 53 A.D.2d 282, 285-86, 385 N.Y.S.2d 659, 662 (4th Dep't 1976). If the motion to vacate is made without notice, however, it too is ex parte and thus unappealable. *James v. Powell*, 30 A.D.2d 340, 341, 292 N.Y.S.2d 135, 136 (1st Dep't), *aff'd*, 23 N.Y.2d 691, 243 N.E.2d 746, 296 N.Y.S.2d 139 (1968).

178. N.Y. Civ. Prac. Law § 5701(a)(3) (McKinney 1978).

179. *Id.* § 5704(a). However, only those motions permitted to be made ex parte may take this path to appellate review. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5704, at 627 (McKinney 1978).

180. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5704, at 626 (McKinney 1978).

which such CPLR 5704(a) applications would be accepted. In *In re Willmark Service Systems, Inc.*,<sup>181</sup> for example, the First Department held that the statutory power should be invoked only "in unusual circumstances" and required the appellant to follow the procedural route of first moving to vacate in the trial court.<sup>182</sup> Later, however, the First Department seemed to abandon these requirements in *Cawley v. Brust*,<sup>183</sup> and one commentator has noted that the *Willmark* decision is not generally followed today.<sup>184</sup> Indeed, neither the Second<sup>185</sup> nor the Third<sup>186</sup> Department has hesitated to use the authority to review such ex parte orders.

It would seem that CPLR 5704(a) applications should be accepted only when circumstances warrant immediate appellate review. The requirement that a party make a motion to vacate in the lower court first is not overly burdensome and has two beneficial effects: it gives the trial judge the opportunity to reconsider his order; and it provides the appellate court with a more completely considered record.<sup>187</sup> Proceeding in this manner enables the Appellate Division to supervise the trial court but, at the same time, prevents any premature appellate intrusion into the proceedings.

### c. Orders Not Appealable as of Right

Any order not appealable as of right may be appealed with the permission<sup>188</sup> either of the judge who made the order or, if that is unsuccessful, with the permission of a justice of the Appellate Division.<sup>189</sup> If an appeal is attempted without the required permission, it must be dismissed.<sup>190</sup>

There are no guidelines detailing the circumstances under which permission to appeal should be granted. Appeal has been permitted from an order compelling a party to answer certain questions asked at an examination before trial,<sup>191</sup> and from an order denying a motion to dismiss an article 78

181. 21 A.D.2d 478, 251 N.Y.S.2d 267 (1st Dep't 1964).

182. *Id.* at 479, 251 N.Y.S.2d at 268.

183. 42 A.D.2d 951, 348 N.Y.S.2d 345 (1st Dep't 1973) (mem.).

184. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5704, at 627 (McKinney 1978).

185. *E.g.*, *City of New York v. McFeely*, 48 A.D.2d 872, 369 N.Y.S.2d 481 (2d Dep't 1975) (mem.); *In re Estate of Karan*, 41 A.D.2d 842, 342 N.Y.S.2d 1021 (2d Dep't 1973) (mem.). *But see* *County of Orange v. Civil Serv. Employees Ass'n*, 51 A.D.2d 1031, 1032, 381 N.Y.S.2d 313, 314 (2d Dep't 1976) (per curiam). The court in *County of Orange* said that its statutory power would not be "lightly exercised." *Id.* at 1032, 381 N.Y.S.2d at 314. The defendants, however, had asked the court to vacate a restraining order they had never obeyed.

186. *E.g.*, *Martin v. Hunt*, 40 A.D.2d 571, 334 N.Y.S.2d 454 (3d Dep't 1972) (mem.); *Tarantino v. Bardino*, 23 A.D.2d 945 (3d Dep't 1965) (mem.); *Wheeler v. Hoffman*, 23 A.D.2d 800, 258 N.Y.S.2d 988 (3d Dep't 1965) (mem.).

187. *See* 7 Weinstein, Korn & Miller, *supra* note 149, ¶ 5704.04.

188. As a practical matter, however, there are few appeals by permission. *See* note 458 *infra* and accompanying text.

189. N.Y. Civ. Prac. Law § 5701(c) (McKinney 1978). However, if the application is made directly to the Appellate Division and is refused, it may not be resubmitted to the trial judge. 7 Weinstein, Korn & Miller, *supra* note 149, ¶ 5701.27.

190. *E.g.*, *Wallace v. Wyandanch Union Free School Dist.*, 58 A.D.2d 813, 396 N.Y.S.2d 421 (2d Dep't 1977) (mem.); *Cirasole v. Simins*, 48 A.D.2d 795, 796, 369 N.Y.S.2d 423, 424 (1st Dep't 1975) (mem.).

191. *Ithier v. Solomon*, 59 A.D.2d 935, 399 N.Y.S.2d 450 (2d Dep't 1977) (mem.).

proceeding.<sup>192</sup> The First Department, however, has held that permission to appeal should not be granted from those orders the statute expressly excludes from appeal as of right or from those orders traditionally held unappealable.<sup>193</sup>

In determining whether to grant permission to appeal an interlocutory order, the court should consider the competing policies of supervision and undue appellate influence in the trial proceedings. Because New York has such easy appealability, it would seem that permission to appeal those interlocutory orders which cannot fit into an appealability-as-of-right category should not be granted unless it is clear that the failure to hear the appeal will cause the litigant immediate, irreparable harm.

There are three specific orders that are not appealable as of right—those made pursuant to Article 78 of the CPLR, those requiring a more definite pleading statement, and those striking scandalous or prejudicial matter from a pleading.<sup>194</sup> The exclusion of orders made in an article 78 proceeding from those appealable as of right would not seem to affect the Appellate Division's caseload significantly. A motion made during such a proceeding is likely to be decided at the same time the judgment is rendered in the proceeding itself.<sup>195</sup> Therefore, the aggrieved party can appeal as of right from the final judgment<sup>196</sup> and thus obtain review of any interlocutory order which affects the judgment.<sup>197</sup>

The remaining two categories of orders not appealable as of right—those ordering a more definite statement<sup>198</sup> or striking "scandalous or prejudicial matter unnecessarily inserted in a pleading"<sup>199</sup>—deal with corrective motions<sup>200</sup> made pursuant to CPLR 3024. A similar motion is one made to require a separate statement and numbering of allegations in a pleading.<sup>201</sup>

192. *Wininger v. Williamson*, 46 A.D.2d 689, 360 N.Y.S.2d 262 (2d Dep't 1974) (mem.), *appeal denied*, 36 N.Y.2d 648 (1975); *Bistran v. Lester*, 41 A.D.2d 853, 343 N.Y.S.2d 576 (2d Dep't 1973) (mem.). *But see Goodman v. Nickerson*, 24 A.D.2d 726 (2d Dep't 1965) (mem.).

193. *Lee v. Chemway Corp.*, 20 A.D.2d 266, 267, 247 N.Y.S.2d 287, 288 (1st Dep't 1964); *see Marrico v. Misericordia Hosp.*, 59 A.D.2d 680, 398 N.Y.S.2d 659 (1st Dep't 1977) (mem.); *Klein v. Schneiderman*, 58 A.D.2d 763, 395 N.Y.S.2d 1022 (1st Dep't 1977) (mem.).

194. N.Y. Civ. Prac. Law § 5701(b) (McKinney 1978). Article 78 proceedings are governed by N.Y. Civ. Prac. Law §§ 7801-7806 (McKinney 1963 & Supp. 1978) and are used to challenge or review administrative agency actions in court. *See generally* D. Siegel, *supra* note 1, §§ 557-570.

195. An article 78 proceeding terminates in a judgment, not an order. N.Y. Civ. Prac. Law § 7806 (McKinney 1963).

196. *Id.* § 5701(a)(1) (McKinney 1978).

197. *Id.* § 5501(a)(1).

198. A motion for a more definite statement may be made when "a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response." *Id.* § 3024(a) (McKinney 1974).

199. *Id.* § 3024(b). One commentator has suggested that the rules of evidence should determine when such a motion should be granted. If the statement objected to would be relevant and admissible under the rules of evidence, the motion to strike should not be granted. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 3024, at 407 (McKinney 1974).

200. These motions are designated corrective because they seek amendment rather than dismissal of a pleading. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 3024, at 405 (McKinney 1978).

201. *See* N.Y. Civ. Prac. Law § 3014 (McKinney 1974).



The question whether this motion is corrective and, by implication, also not appealable as of right, has elicited different responses from the various departments. The First Department has held that such a motion is appealable only by permission, reasoning that it is merely a variation of the corrective motions.<sup>202</sup> Both the Second and Third Departments, on the other hand, disagree with the First and have held such motions appealable as of right if a substantial right is affected.<sup>203</sup>

The First Department's view appears to be preferable for two reasons. First, it aids in reducing the caseload of the Appellate Division. Second, it seems clear that a motion requiring a separate statement and numbering of allegations is essentially a request for a more definite statement and, therefore, should only be appealable by permission. Because the trial court is more familiar with the litigation at this stage, it is probably better qualified to deal with these motions and to ensure that they are not being used for dilatory purposes. Thus, in weighing the competing policies behind Appellate Division supervision, the scale tips toward excessive appellate intrusion and reinforces the view that such appeals should be permissive rather than matters of right.

## 2. Appeals from Other Appellate Courts

To enable the Appellate Division to deal with its caseload, each department is authorized to create appellate terms.<sup>204</sup> Orders of an appellate term determining an appeal from a lower court judgment or order may be further appealed to the Appellate Division.<sup>205</sup> Such an appeal, however, may be taken only with the permission either of the appellate term or, if that is refused,<sup>206</sup> of the Appellate Division.<sup>207</sup> This ability of the Appellate Division to overrule the appellate term and grant permission to appeal seemingly aids the court in fulfilling its role of supervising the lower courts.

Whether to grant leave to appeal from an appellate term is a discretionary matter for the Appellate Division.<sup>208</sup> This procedure ensures that the valuable

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202. *Weicker v. Weicker*, 26 A.D.2d 39, 40, 270 N.Y.S.2d 640, 641 (1st Dep't 1966) (per curiam); see *Goldberg v. Hotel Ass'n*, 34 A.D.2d 764 (1st Dep't 1970) (mem.).

203. See *Alexander v. Kiviranna*, 52 A.D.2d 982, 383 N.Y.S.2d 421 (3d Dep't 1976); *Consolidated Airborne Sys., Inc. v. Silverman*, 23 A.D.2d 695, 257 N.Y.S.2d 827 (2d Dep't 1965) (mem.). *But cf.* *Congregation Anshe Dorshe Emes v. Mishkin*, 64 A.D.2d 620, 406 N.Y.S.2d 555 (2d Dep't 1978) (mem.) (granting permission to appeal an order on a CPLR 3014 motion).

204. N.Y. Const. art. 6, § 8(a); see note 67 *supra*.

205. N.Y. Civ. Prac. Law § 5703(a) (McKinney 1978).

206. Justice Steuer indicated that it is very difficult to obtain permission to appeal from the appellate term, perhaps because to grant such permission would be an implicit acknowledgment of possible error. Transcript of Interview with Aron Steuer, Former Justice of the Appellate Division, First Department, in New York City, at 2 (Nov. 14, 1978) [hereinafter cited as *Steuer Interview*].

207. N.Y. Civ. Prac. Law § 5703(a) (McKinney 1978).

208. *Rosenberg v. Rosenberg*, 24 A.D.2d 26, 27, 263 N.Y.S.2d 586, 588 (1st Dep't 1965) (per curiam). One court has held that the second appeal should not be permitted unless the case "(1) has settled a principle that may affect the decision in numerous other cases, or (2) conflicts directly with one of this court or of the Court of Appeals, or (3) construes or interprets a public statute, or (4) affects a large public interest or is of public importance, or (5) presents a question that is new so far as the decisions of this State are concerned." *Handy v. Butler*, 183 A.D. 359, 361, 169 N.Y.S. 770, 772 (2d Dep't 1918). Interestingly, these criteria reflect a concern for

time of the justices will not be spent deciding frivolous appeals.<sup>209</sup> The policy that second appeals be reserved for important cases is further enforced by the requirement that if the appeal is from an order granting a new trial, the appellant must stipulate that judgment absolute may be entered against him if the order is affirmed.<sup>210</sup> If such a stipulation is not entered, the appeal must be dismissed.<sup>211</sup>

An order of a county court, or a special term of the supreme court,<sup>212</sup> determining an appeal from a judgment of a lower court<sup>213</sup> is appealable as of right.<sup>214</sup> In this instance, providing appeal as a matter of right would seem to be desirable. Apparently, these courts have relatively less appellate experience.<sup>215</sup> Thus, when they do act with appellate authority there would appear to be a need for some supervision by the Appellate Division. Further, because the appeal is from a judgment, there is less risk of excessive appellate intrusion.

Interpretation of the statute permitting appeals from these courts has caused some difficulty because the phrase "appeals from a judgment," which governs appeals from county courts and special terms of the supreme court, is narrower than the phrase "appeals from a judgment or order" which governs appeals from an appellate term.<sup>216</sup> The Fourth Department interprets the statute literally and refuses to permit appeal as of right when a lower court order is the subject of an appeal to a county court or a special term of the supreme court.<sup>217</sup> Professor Siegel disagrees and believes "judgment" should

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uniform enunciation of the law, which typically is not a function of an intermediate appellate court. See notes 16 *supra*, 526 *infra* and accompanying text.

209. Justice Nuñez agrees. He noted that very few cases are appealed from the appellate term. Those that are appealed, however, have merit. Nuñez Interview, *supra* note 16, at 1.

210. N.Y. Civ. Prac. Law § 5703(a) (McKinney 1978); see *Tai On Luck Corp. v. Cirola*, 35 A.D.2d 380, 382, 316 N.Y.S.2d 438, 440 (1st Dep't 1970), *appeal dismissed*, 29 N.Y.2d 747, 276 N.E.2d 234, 326 N.Y.S.2d 400 (1971).

211. *Terminato v. Feit*, 29 A.D.2d 651, 286 N.Y.S.2d 592 (2d Dep't 1968) (mem.); see *Jaffe v. British Overseas Airways Corp.*, 34 A.D.2d 527, 309 N.Y.S.2d 58 (1st Dep't) (mem.), *appeal dismissed*, 27 N.Y.2d 796, 264 N.E.2d 349, 315 N.Y.S.2d 856 (1970).

212. As a practical matter, a special term rarely sits in an appellate capacity today. See D. Siegel, *supra* note 1, § 526, at 725 n.26.

213. These include district, city, town and village courts as well as the New York City Civil Court. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5703, at 621 (McKinney 1978).

214. N.Y. Civ. Prac. Law § 5703(b) (McKinney 1978).

215. For example, in 1977 the appellate terms for the First and Second Departments disposed of 3,267 cases. Twenty-Third Ann. Rep. N.Y. Jud. Conference at 54, Table 13 (1976). The county courts, handling cases from the entire state, only heard 155 cases that were not brought originally in that court. *Id.* at 78-79, Table 34. Presumably, in less than 155 cases the court heard appeals from lower courts.

216. Compare N.Y. Civ. Prac. Law § 5703(a) (McKinney 1978) with *id.* § 5703(b).

217. *E.g.*, *Harding v. New York State Teamsters Council Welfare Trust Fund*, 60 A.D.2d 975, 401 N.Y.S.2d 634 (4th Dep't) (mem.), *appeal denied*, 44 N.Y.2d 697, 376 N.E.2d 928, 405 N.Y.S.2d 455 (1978); *Lutwack v. Piteo*, 52 A.D.2d 754, 382 N.Y.S.2d 414 (4th Dep't 1976) (mem.); *Serrino v. D & B Barr Inc.*, 37 A.D.2d 912, 325 N.Y.S.2d 494 (4th Dep't 1971) (mem.). Nevertheless, in all three cases the court went on to discuss what their determination would have been had they considered the merits. Although this may seem contradictory at first glance, it probably does save judicial time. Giving the parties an idea of how an appeal would have been decided had it been properly brought most likely curtails subsequent applications for permission to appeal, provided that the court stops short of imposing its view of proper trial strategy.

be read to include "order."<sup>218</sup> This interpretation is supported by the language proposed by the drafters of the CPLR which included both "judgment" and "order."<sup>219</sup> The legislature, under the assumption that "order" was synonymous with "final order," which had previously been used to conclude special proceedings, apparently erred in deleting the word as superfluous.<sup>220</sup> Professor Siegel argues that because the county court can hear appeals from both judgments and orders of lower courts, it is inconsistent to preclude a subsequent appeal to the Appellate Division simply because the appeal is from an order rather than a judgment.<sup>221</sup> An argument can be made that the Fourth Department's elevation of form over substance should not be given effect, especially when there is no evidence to suggest that the legislature was deliberately trying to limit these appeals because of their "as of right" status.

On the other hand, a second appellate review of such intermediate orders would not appear to be imperative. Such orders have already had the benefit of one review by a court familiar with the proceedings. Therefore, there appears to be less need for supervision. There is, in addition, a great risk of excessive appellate intrusion into the trial because of the interlocutory nature of the orders appealed. Thus, it seems preferable to limit the right to a second appellate review to final orders and judgments.

### 3. New York Compared with Federal and ABA Standards

With respect to the appealability of final judgments, the Appellate Division is substantially in accord with the federal courts,<sup>222</sup> other state appellate courts,<sup>223</sup> and the ABA Standards.<sup>224</sup> It is in the area of appealability of interlocutory orders that New York differs substantially from these other schemes which permit some interlocutory review, but only by permission.<sup>225</sup> Under the ABA Standards, for example, permission to appeal an interlocutory order would be granted when the immediate resolution of the question would: "[m]aterially advance the termination of the litigation or clarify further proceedings therein; . . . [p]rotect a party from substantial and irreparable injury; or . . . [c]larify an issue of general importance in the administration of justice."<sup>226</sup> Under federal law an appeal may be taken from interlocutory orders in five specific instances,<sup>227</sup> and whenever the order involves "a

218. Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5703, at 622 (McKinney 1978).

219. Second Preliminary Report, *supra* note 154, at 123.

220. Fifth Preliminary Report, *supra* note 154, at 146. Under the proposed statute, special proceedings were to be concluded by judgments. *Id.* at 135.

221. See Siegel, *Practice Commentary*, N.Y. Civ. Prac. Law § 5703, at 622 (McKinney 1978).

222. See 28 U.S.C. § 1291 (1976).

223. See, e.g., Conn. Gen. Stat. Ann. § 52-263 (West Supp. 1978); Ga. Code Ann. § 6-701(a)(1)-(3) (1975); Neb. Rev. Stat. § 25-1911 (1975); Wyo. R. Civ. P. 72(c).

224. ABA Standards, *supra* note 16, § 3.12, Commentary at 25.

225. See, e.g., Hawaii Rev. Stat. § 641-1(b) (1976); Miss. Code Ann. § 9-3-9 (1972); Wis. Stat. Ann. § 808.03(2) (West Supp. 1978-1979).

226. ABA Standards, *supra* note 16, § 3.12.

227. Interlocutory orders involving injunctions, appointment of receivers, orders in admiralty cases, and judgments in patent infringement cases which are final except for accounting, 28 U.S.C. § 1292(a) (1976), as well as those in bankruptcy proceedings, 11 U.S.C. §§ 47, 48 (1976), are appealable as of right. In addition to these statutory exceptions to the final judgment rule, there are also a few narrow, judicially created exceptions. Note, *Mandamus As A Means of Federal Interlocutory Review*, 38 Ohio St. L.J. 301, 304-08 (1977).

controlling question of law as to which there is substantial ground for difference of opinion" and the judge determines that an immediate appeal would "materially advance the ultimate termination of the litigation."<sup>228</sup> This certification requirement ensures that the appeals will be meritorious.<sup>229</sup>

New York deviates from these schemes not so much in the types of interlocutory orders appealable, but insofar as such orders are appealable as of right.<sup>230</sup> Admittedly, a major advantage of appealability as of right is that litigants are guaranteed a review of almost all aspects of their proceedings. It is also arguable, however, that such a right can be used to harrass an opposing party and to unreasonably delay the litigation. In such a case it is questionable whether substantial justice is received by a party with limited funds who cannot afford the increased costs of these interlocutory appeals and is thus forced to settle or otherwise terminate the action. A right to appeal also adds to the caseload of the Appellate Division which may consider one case a number of times on interlocutory orders and then again when final judgment is rendered.

The drafters of the CPLR intended that more orders be added to those expressly not appealable as of right if the judiciary and legislature found that the right was being abused.<sup>231</sup> Thus, if many of the appeals taken to the Appellate Division are frivolous, and if the caseload is less than manageable, perhaps the time has come to make the revision contemplated by the drafters of the CPLR. These issues will be addressed directly in Parts IV and V.<sup>232</sup>

## B. Criminal Appeals

### 1. Intermediate Orders

Perhaps the greatest distinction between civil and criminal appeals in New York is that interlocutory orders in criminal cases are generally not appealable

228. 28 U.S.C. § 1292(b) (1976).

229. An alternative route to appellate review of interlocutory orders in the federal system is the All Writs Act, 28 U.S.C. § 1651 (1976). With this procedure a litigant may circumvent the certification requirement and obtain appellate review of an interlocutory order, *Thermtron Prods. Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53 (1976) (remand order); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (order made during discovery interpreting Fed. R. Civ. P. 35); *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (order referring case to a master), by applying to the federal circuit courts for a writ of mandamus. Because the Supreme Court has traditionally limited the mandamus remedy to "exceptional circumstances amounting to a judicial 'usurpation of power,'" *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)); accord, *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976), and has held that it cannot be used as a substitute for appeal, *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953), one commentator suggests that mandamus is used more as a vehicle to express disapproval of a lower court practice than to resolve the issue raised in a particular interlocutory appeal. Note, *Mandamus As A Means of Federal Interlocutory Review*, 38 Ohio St. L.J. 301, 328-29 (1977).

230. See note 225 *supra* and accompanying text. Several other states share New York's commitment to wide appealability as a matter of right. See, e.g., *Ariz. Rev. Stat. Ann.* § 12-2101 (Supp. 1978); *Cal. Civ. Proc. Code* § 940.1 (West Supp. 1979); *Minn. R. Civ. App. P.* 103.03 (language almost identical to N.Y. Civ. Prac. Law § 5701(a) (McKinney 1978)); *S.C. Code* §§ 14-3-320, -330 (1977).

231. Fifth Preliminary Report, *supra* note 154, at 145.

232. See notes 426-30, 552-63 *infra* and accompanying text.

either by right or by permission.<sup>233</sup> The prohibition against appealing interlocutory orders is desirable for a number of reasons. It ensures that the trial will be concluded as quickly as possible, and it prevents the use of such appeals for delay and harrassment. It also prevents piecemeal litigation and reduces the caseload of the Appellate Division because the case is considered only once at its conclusion rather than several times during the trial. Finally, when the case does arrive at the Appellate Division it brings with it a more complete record.

## 2. Appeals by the People

The Criminal Procedure Law provides the People with the right to appeal on a number of grounds<sup>234</sup> and is substantially in accord with federal<sup>235</sup> and other state<sup>236</sup> laws. While such broad appealability is advantageous to the prosecution, it may also present double jeopardy problems for the defendant. One such situation is the People's right to appeal from a trial order of dismissal.<sup>237</sup> In *People v. Brown*,<sup>238</sup> the New York Court of Appeals held such an appeal unconstitutional as violative of the double jeopardy clause of the federal and state constitutions.<sup>239</sup> Relying upon three Supreme Court cases,<sup>240</sup> the court of appeals held that the double jeopardy clause "precludes the People from taking an appeal from an adverse trial ruling whenever such

233. *McLaughlin v. Monroe*, 44 A.D.2d 575, 353 N.Y.S.2d 33 (2d Dep't 1974) (mem.) The intermediate order may be reviewed if the defendant appeals from the conviction. *See People v. Krieger*, 36 A.D.2d 806, 320 N.Y.S.2d 324 (1st Dep't 1971) (mem.).

234. For example, the People have a right to appeal an order dismissing an indictment, N.Y. Crim. Proc. Law § 450.20(1) (McKinney 1971), or vacating a judgment. *Id.* § 450.20(5). They may also appeal a sentence on the ground that it is invalid as a matter of law, *id.* §§ 450.20(4), .30(2), as well as an order setting aside a sentence, *id.* § 450.20(6), and an order denying the People's motion to set aside a sentence. *Id.* § 450.20(7).

235. The federal rules specify two instances in which the United States may appeal as of right: from a dismissal of any count of an indictment or information, except when prohibited by the double jeopardy clause, and from a decision or order suppressing evidence or requiring the return of seized property, provided the United States Attorney certifies that the evidence is substantial proof of a material fact and that the appeal is not being used as a delaying tactic. 18 U.S.C. § 3731 (1976). At first glance this seems considerably narrower than the standard applied in New York. The Supreme Court, however, noted that the legislative history indicates the statute was "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975). Thus, it would appear that the appealability as of right afforded the prosecution in the federal and New York systems is substantially the same.

236. *See, e.g.*, Cal. Penal Code § 1238 (West 1970 & Supp. 1979); Fla. R. App. P. 9.140(c); Hawaii Rev. Stat. § 641-13 (1976 & Supp. 1977); Ill. Ann. Stat. ch. 110A, § 604(a)(1), (e) (Smith-Hurd 1976); Utah Code Ann. § 77-39-4 (1953).

237. N.Y. Crim. Proc. Law § 450.20(2) (McKinney 1971). A trial order of dismissal may be granted, upon defendant's motion, at the end of the People's case. It is used to dismiss any count of an indictment if the evidence presented is not legally sufficient to establish the offense charged or any lesser included offense. *Id.* § 290.10.

238. 40 N.Y.2d 381, 353 N.E.2d 811, 386 N.Y.S.2d 848 (1976), *cert denied*, 433 U.S. 913 (1977).

239. U.S. Const. amend V; N.Y. Const. art. 1, § 6.

240. *Serfass v. United States*, 420 U.S. 377 (1975); *United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Wilson*, 420 U.S. 332 (1975).

appeal if resolved favorably for the People might require the defendant to stand retrial—or even if it would then be necessary for the trial court 'to make supplemental findings.'<sup>241</sup> The United States Supreme Court's recent decision in *United States v. Scott*,<sup>242</sup> however, casts some doubt on this holding because in that case the Supreme Court overruled *United States v. Jenkins*,<sup>243</sup> one of the cases relied upon by the court of appeals in deciding *Brown*.<sup>244</sup> Nevertheless, the New York decision still seems to be valid in light of the *Scott* court's statement that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."<sup>245</sup> Because the trial order of dismissal is used when the evidence is not legally sufficient to support the charge,<sup>246</sup> it would appear that a retrial after such an order was granted would violate the double jeopardy clause.

The court in *Brown* did not leave the People without recourse, and intimated that the following procedure would be constitutional: when the defendant moves for a trial order of dismissal at the end of the People's case, the judge should reserve decision until after the jury verdict has been returned.<sup>247</sup> If the jury acquits the defendant, the point is moot. If the jury returns a guilty verdict and the judge nevertheless grants the motion for a trial order of dismissal, a successful appeal by the People would result merely in the reinstatement of the jury's verdict. There would be no double jeopardy risk because the defendant would not be subject to another trial.<sup>248</sup> This solution seems to be a fair and efficient compromise. The defendant's constitutional rights are protected, the prosecution is assured of appellate review, and the Appellate Division has a complete record upon which to base its decision.

A similar order, one which sets aside a verdict, is also appealable by the People as of right.<sup>249</sup> Although the double jeopardy clause prohibits an appeal by the People from an acquittal,<sup>250</sup> there is no such constitutional prohibition against appealing an order which sets aside a conviction.<sup>251</sup> Whether the double jeopardy clause bars a retrial in this instance depends upon whether the conviction was reversed because of trial error or because of insufficiency of evidence.<sup>252</sup> If the former, it would appear that a subsequent trial is

241. 40 N.Y.2d at 391, 353 N.E.2d at 818, 386 N.Y.S.2d at 855 (quoting *United States v. Jenkins*, 420 U.S. 358, 370 (1975)).

242. 437 U.S. 82 (1978).

243. 420 U.S. 358 (1975).

244. 40 N.Y.2d at 383, 391, 353 N.E.2d at 812, 818, 386 N.Y.S.2d at 849, 855.

245. 437 U.S. at 91 (footnote omitted); see *Burks v. United States*, 437 U.S. 1, 16 (1978).

246. See note 237 *supra*.

247. 40 N.Y.2d at 391, 353 N.E.2d at 818, 386 N.Y.S.2d at 855.

248. *United States v. Scott*, 437 U.S. at 91; see Bellacosa, *Supplementary Practice Commentary*, N.Y. Crim. Proc. Law § 450.15, at 86-87 (McKinney Supp. 1978-1979). Such a procedure has been successfully used in *People v. Leach*, 57 A.D.2d 332, 394 N.Y.S.2d 722 (2d Dep't 1977).

249. N.Y. Crim. Proc. Law § 450.20(3) (McKinney 1971).

250. *Sanabria v. United States*, 437 U.S. 54, 69 (1978); *United States v. Wilson*, 420 U.S. 332, 352 (1975); *United States v. Ball*, 163 U.S. 662, 671 (1896).

251. *United States v. Wilson*, 420 U.S. 332, 352-53 (1975).

252. See note 342 *infra* and accompanying text.

constitutionally permissible.<sup>253</sup> If the latter, the double jeopardy clause would seem to preclude any further proceedings.<sup>254</sup>

The People also have a right to appeal from a pre-trial order suppressing evidence, provided that they file a statement indicating that the suppression has made their case legally insufficient or so weak as to destroy any reasonable possibility of effective prosecution.<sup>255</sup> By requiring such a statement the court is able to assure itself that the appeal is taken in good faith and not for purposes of delay. In this instance it seems desirable to provide an automatic right to appeal even though the motion to suppress is made before trial. Normally such appealability would involve a substantial risk of premature and excessive appellate intrusion into the trial court proceedings. In this situation, however, the risk is outweighed by the rights involved coupled with the need to ensure that the trial judge acts within legal and discretionary bounds.

### 3. Appeals by Defendant

A criminal defendant may appeal to the Appellate Division as of right in three situations.<sup>256</sup> First, he may appeal any criminal court<sup>257</sup> judgment<sup>258</sup> unless it includes a sentence of death.<sup>259</sup> Second, he may appeal any criminal court sentence<sup>260</sup> on the ground that it is invalid as a matter of law<sup>261</sup> or that it is harsh or excessive.<sup>262</sup> Because appeal of the judgment would include a review of the original sentence, this provision is primarily used to appeal a resentence.<sup>263</sup> Third, a defendant may appeal as of right any criminal court

253. *Burks v. United States*, 437 U.S. 1, 14-15 (1978).

254. *United States v. Scott*, 437 U.S. at 90-91; *Burks v. United States*, 437 U.S. 1, 18 (1978).

255. N.Y. Crim. Proc. Law § 450.20(8) (McKinney 1971).

256. Defendants also enjoy the right to appeal motions to suppress evidence. The Second Department, however, has called for an amendment to CPL 710.70(2) to prevent defendants from pleading guilty and then appealing a suppression motion. The department's proposal would require the defendant to stand trial first and then attack the validity of the suppression motion. N.Y.L.J., Mar. 24, 1978, at 1, col. 2.

257. Criminal courts include the supreme court, the county courts, the New York City criminal court, a district, city, town or village court, and a supreme court justice or county judge sitting as a local criminal court. N.Y. Crim. Proc. Law § 10.10 (McKinney 1971).

258. "A judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence." *Id.* § 1.20(15).

259. *Id.* § 450.10(1). If the death sentence is imposed, an appeal as of right lies directly to the court of appeals. New York has, however, declared its death penalty statute unconstitutional. *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978).

260. N.Y. Crim. Proc. Law § 450.10(2) (McKinney 1971).

261. A sentence is invalid as a matter of law when its terms are unauthorized, when it is based on the incorrect belief that the defendant had been previously convicted, or when a resentence follows an improper revocation of probation or conditional discharge. *Id.* § 450.30(1). It is noteworthy that a proposed federal scheme would limit appeals of sentencing and resentencing to those invalid as a matter of law. *See note 567 infra.*

262. N.Y. Crim. Proc. Law § 450.30(1) (McKinney 1971).

263. Denzer, *Practice Commentary*, N.Y. Crim. Proc. Law § 450.30, at 387 (McKinney 1971). Resentencing occurs after a motion to vacate the original sentence is granted. N.Y. Crim. Proc. Law § 440.20 (McKinney 1971). If, for example, the resentence is harsh, it would be

order granting a post-judgment motion by the People to set aside a sentence on the ground that it is invalid as a matter of law.<sup>264</sup> Further, if the subsequent resentencing is greater than that imposed originally, the defendant may appeal the original judgment even though the time for filing such an appeal has expired.<sup>265</sup> This ensures that the entire judgment receives at least one appellate review and that the defendant is not penalized for failing to appeal his original, lighter sentence.

If the order is one denying a motion to vacate or to set aside a sentence,<sup>266</sup> however, the defendant may appeal only with the permission of a justice of the Appellate Division.<sup>267</sup> Requiring permission to appeal in this circumstance is appropriate because the sentence has already been reviewed once on the trial court motion. Further, it is probable that most defendants think their sentences should be set aside for one reason or another. Use of a by-permission scheme in this instance enables the court to correct truly egregious cases and acts as a screening mechanism to protect the court from frivolous appeals.

Although the defendant's right to appeal in New York may seem broad, it is consistent with constitutional considerations and with the federal<sup>268</sup> and other state<sup>269</sup> systems. In the 1960's, the rights of a defendant were greatly expanded. During that period, the Supreme Court handed down decisions requiring that defendants be apprised of their fifth amendment privilege against self-incrimination and the concomitant right to remain silent when taken into police custody for interrogation.<sup>270</sup> If the defendant is indigent, moreover, the Supreme Court has held that he has a right to be represented by court-appointed counsel.<sup>271</sup> The Court further declared that if the state offers

appealable as of right under this section. *Id.* § 450.30(3). If the resentencing occurs more than 30 days after the original sentence, however, and the defendant has not filed an appeal from the judgment, which for purposes of this section "consists of the conviction and the original sentence," *id.* § 450.30(3), only the resentencing will be reviewed on appeal. *Id.*; see *People v. Blim*, 54 A.D.2d 771, 772, 387 N.Y.S.2d 588, 589 (3d Dep't 1976) (mem.); *People v. Jackson*, 25 A.D.2d 481 (4th Dep't 1966) (mem.).

264. N.Y. Crim. Proc. Law § 450.10(3) (McKinney 1971). Such a motion is made pursuant to *id.* § 440.40 and must be made within one year after judgment is entered. *Id.*

265. *Id.* § 450.30(4). In such a case, however, only the conviction is reviewable. If the defendant also wants to challenge the resentencing, he must take a separate appeal. *Id.*

266. *Id.* § 450.15.

267. *Id.* § 460.15.

268. See 18 U.S.C. §§ 3731-3772 (1976). The constitutional protections accorded a defendant make his right to an appeal substantially similar in both the federal and New York appellate systems. The major difference between the two systems is that federal appellate courts generally may not review sentences unless they exceed the statutory limits, *United States v. Tucker*, 404 U.S. 443, 447 (1972); see *Gore v. United States*, 357 U.S. 386, 393 (1958), or constitute a clear abuse of discretion. *United States v. Rosen*, 582 F.2d 1032, 1038 (5th Cir. 1978). For a discussion of the permissible modifications of sentences in the federal courts, see note 351 *infra*.

269. A number of states have statutes similar to New York's and permit appeals from final judgments, sentences, or post-judgment motions. See, e.g., *Ariz. Rev. Stat. Ann.* § 13-4033 (1978); *Cal. Penal Code* § 1237 (West 1970); *Mont. Rev. Codes Ann.* § 95-2404 (1969); *N.D. Cent. Code* § 29-28-06 (1974); *Ohio Rev. Code Ann.* § 2953.02 (Page 1954).

270. *Miranda v. Arizona*, 384 U.S. 436 (1966).

271. *Gideon v. Wainwright*, 372 U.S. 335 (1963).



appellate review of a conviction as of right, such review has to be structured in a way that does not discriminate against poor people.<sup>272</sup> It was in this spirit that the New York Court of Appeals declared that "every defendant has a fundamental right to appeal his conviction."<sup>273</sup> Further, an affirmative duty was imposed on every defense attorney to advise his client of the right to appeal and to institute a timely appeal if the client so desired.<sup>274</sup>

Former Chief Judge Breitel describes the events of the 1960's as a "veritable revolution"<sup>275</sup> in criminal procedure. Clearly the "revolution" has advanced the cause of justice. Providing a defendant with a right to an appeal is warranted because a defendant's right to life and liberty and the eighth amendment prohibition against cruel and unusual punishment require greater appellate supervision in criminal cases than in civil cases. These requirements far outweigh any risk of excessive appellate intrusion, which probably is slight under all of these schemes because conviction occurs at the end of the trial proceedings. It is also difficult to curtail the People's right to appeal because society's interest in ensuring that criminals are prosecuted and punished is equally important. Nevertheless, one must still question whether this "revolution" has resulted in a significant increase in groundless appeals.<sup>276</sup> Justice Steuer points out that as a practical matter indigent defendants<sup>277</sup> have nothing to lose by appealing, and that often it is more difficult for the court-appointed attorney to obtain permission to withdraw from the case than it is for him to proceed with the appeal. Therefore, Justice Steuer believes many of the grounds asserted on appeal are without much merit.<sup>278</sup>

If these appeals increase the caseload of the Appellate Division in actual practice, they probably also result in a misallocation of time. The court may be spending valuable time considering these rather than more complex, and perhaps more meritorious, appeals. If this is the case, other procedures may be more appropriate to increase efficiency without adversely affecting the rights of either the defendant or the People. Whether the system in New York is in fact burdened with inefficiency in this regard will be discussed in Part IV.

### III. THE APPELLATE DIVISION'S SCOPE OF REVIEW

One of the fundamental benefits of an appeal is that it submits the questions involved to collective judicial judgment and does not merely substitute the opinion of a single appellate judge for that of a single trial

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272. *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

273. *People v. Montgomery*, 24 N.Y.2d 130, 132, 247 N.E.2d 130, 132, 299 N.Y.S.2d 156, 159 (1969); *accord*, *People v. Rivera*, 39 N.Y.2d 519, 522, 349 N.E.2d 825, 827, 384 N.Y.S.2d 726, 728 (1976).

274. [1978] 22 N.Y.C.R.R. §§ 606.5, 671.3, 821.2, 1022.11.

275. Breitel Interview, *supra* note 15, at B3.

276. See notes 497-98 *infra* and accompanying text.

277. Justice Steuer estimates that 85% of all criminal defendants are indigent. Steuer Interview, *supra* note 206, at 1.

278. *Id.*

judge.<sup>279</sup> The primary question, then, is whether that collective judicial judgment is designed to ensure that substantial justice is rendered—essentially a review de novo—or merely to ensure that the trial court properly conducted the proceedings before it—a somewhat narrower review. New York has chosen the first alternative by giving the Appellate Division the power to render whatever decree the case requires.<sup>280</sup>

The purpose of this part of the study is to examine the Appellate Division's sweeping review powers. It will attempt to determine how these powers serve the court's three appellate functions—screening for the court of appeals, supervising the lower courts, and ensuring substantial justice to litigants. Generally, a broad scope of review facilitates the court's ability to deal with the infinite variety of legal controversies<sup>281</sup> and lower court procedures that the Appellate Division must pass upon by virtue of the wide range of orders and judgments appealable to the court as of right. To the extent that a plain miscarriage of justice might result if the Appellate Division were powerless to consider an issue not raised in the court below, de novo review powers are also necessary and desirable.

This part will also discuss whether the Appellate Division's powers are so broad that they do not place the proper amount of restraint on the Appellate Division's reviewing authority, for the court's current scope of review creates a potential risk of converting the trial court proceeding from an adjudication into a preliminary hearing. Whether this occurs depends primarily on the extent to which the Appellate Division will substitute its own judgment on questions of fact for that of the trial judge or jury. In addition, unfettered de novo review powers may run afoul of certain constitutional safeguards. The following discussion will illustrate that the Appellate Division tries to temper its enormous powers with self-imposed judicial restraints in order to avoid these dangers. An examination of whether this attempt has been successful is reserved for Part IV.

#### A. *Extent to Which a Case Is Open to Review on Appeal*

The extent to which a case is open to Appellate Division review in both civil and criminal cases is enormous. The only effective limitation on the Appellate Division's power to review issues arising below is that the matters be properly presented in the record on appeal.<sup>282</sup> Within that limit, any issue

279. See, e.g., *In re Gahan*, 276 A.D. 647, 648, 97 N.Y.S.2d 232, 234 (3d Dep't 1950) (function of appellate court is to correct error and not to substitute one judge's estimation of the facts for that of another); *Robison v. Lockridge*, 230 A.D. 389, 391, 244 N.Y.S. 663, 666 (4th Dep't 1930) (court will not substitute its judgment for that of the trier of facts).

280. See N.Y. Civ. Prac. Law § 5522 (McKinney 1978); N.Y. Crim. Proc. Law § 470.15(3)(c) (McKinney 1971).

281. See ABA Standards, *supra* note 16, § 3.11, Commentary at 19.

282. See, e.g., *Battaglia v. Schuler*, 60 A.D.2d 759, 760, 400 N.Y.S.2d 951, 953 (4th Dep't 1977) (mem.); *Runals v. Johnson*, 52 A.D.2d 1049, 384 N.Y.S.2d 288 (4th Dep't 1976) (mem.). This rule has not been applied without exception. See *People v. Weis*, 32 A.D.2d 856, 857-58, 301 N.Y.S.2d 186, 191 (3d Dep't 1969) (mem.), *cert. denied*, 397 U.S. 1047 (1970); *People v. Williams*, 20 A.D.2d 963, 249 N.Y.S.2d 622 (4th Dep't 1964) (mem.) ("Points raised by briefs not properly presented by the record are *ordinarily* not considered by the court.") (quoting *People v. Hicks*, 287 N.Y. 165, 174, 38 N.E.2d 482, 486 (1941) (emphasis added)). The Appellate Division

contained in the record is subject to review in the "interests of justice."<sup>283</sup> The purpose for precluding Appellate Division review of matters not properly presented by the record<sup>284</sup> is to discourage litigants from pursuing a course developed for the first time on appeal, thereby substituting appellate advocacy for trial strategy.<sup>285</sup> This policy also prevents the Appellate Division from interfering excessively with the trial court's decisionmaking process.

Perhaps the best example of the Appellate Division's power to scrutinize the entire record is the court's authority to review questions not formally objected to below. In an effort to emphasize substance over form in criminal cases, for example, the CPL maintains a materially relaxed position<sup>286</sup> with reference to exceptions or objections to trial court rulings or instructions;<sup>287</sup> specific exceptions are not required.<sup>288</sup> It is enough that the appellant "protest," making it known that he objects and thereby giving the trial court an opportunity to change its ruling. Thus, a criminal defendant who unsuccessfully requests the court to make a particular ruling at the trial nevertheless preserves the point on appeal.<sup>289</sup> In criminal cases, this discretionary right has

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also has the authority under its "reserved power" to review matters in the record on a second appeal of the same case that were not reviewed on the first appeal. N.Y. Civ. Prac. Law § 5501(a)(1) (McKinney 1978); N.Y. Crim. Proc. Law § 470.15(1) (McKinney 1971).

283. An example of how far the court may carry this discretionary authority is found in *Van v. Clayburn*, 21 A.D.2d 144, 249 N.Y.S.2d 310 (1st Dep't 1964). There, the First Department reversed and remanded for a new trial even though plaintiff neither objected to the jury charge in the court below nor raised the issue on appeal. Even though the court found the verdict fully justified by the evidence, it reversed because the errors were "so prejudicial to the plaintiffs . . . and [went] so directly to the heart of a vital issue which they had the burden to prove, that a new trial [had to] be granted" so that proper instructions could be given. *Id.* at 145, 249 N.Y.S.2d at 311. Perhaps the First Department found the jury instructions so objectionable that, in this instance, the necessity of supervising the trial court far outweighed the court's other primary functions.

284. Review of such matters is prohibited even if the parties raise the issue on appeal. *See Mulligan v. Lackey*, 33 A.D.2d 991, 992, 307 N.Y.S.2d 371, 373 (4th Dep't 1970).

285. *See* ABA Standards, *supra* note 16, § 3.11, Commentary at 20.

286. Prior to 1946, error in a criminal case did not raise a question of law on appellate review unless formal exception to the ruling of the trial court was expressly taken. *People v. Pindar*, 210 N.Y. 191, 196-97, 104 N.E. 133, 134-35 (1914). Section 420-a of the Code of Criminal Procedure, ch. 209, § 1, 1946 N.Y. Laws 640 (repealed 1970), softened this position somewhat by providing that exceptions would be deemed taken whenever the protesting party sought to or did make his position known to the trial judge by objection or otherwise. *People v. Cipolla*, 6 N.Y.2d 922, 923, 161 N.E.2d 210, 211, 190 N.Y.S.2d 996, 997 (1959) (per curiam). This rule was qualified, however, by requiring specific exceptions to the court's charge. *See Denzer, Practice Commentary*, N.Y. Crim. Proc. Law § 470.05, at 443-44 (McKinney 1971).

287. As used herein, "exception" refers to a protest taken by one party immediately after an unfavorable court ruling. 1 J. Wigmore, *Evidence* § 20, at 357-62 (3d ed. 1940). An "objection" usually follows the opposing party's offer of proof, before the court rules on it. *Id.* § 18, at 321-22.

288. *See* N.Y. Crim. Proc. Law § 470.05(2) (McKinney 1971).

289. *People v. Davis*, 82 Misc. 2d 41, 42, 370 N.Y.S.2d 328, 329 (Sup. Ct. App. T. 1975) (per curiam). The federal rules for both civil and criminal cases are practically identical to the CPL regarding exceptions. Fed. R. Civ. P. 46; Fed. R. Crim. P. 51. Many other states have also abolished the use of exceptions in criminal and civil cases. *See, e.g.,* Cal. Penal Code § 1259 (West 1970); Mich. Comp. Laws Ann. §§ 768.23, .30 (1968) (criminal cases only); Ohio R. Civ. P. 46; Ohio R. Crim. P. 51.

been exercised whenever the court has determined that the proceedings below have prejudiced the defendant or have contributed in any way to depriving him of a fair trial.<sup>290</sup>

The court's power in civil cases to review questions not raised below is as broad as its power in criminal appeals. When the record evidences a "fundamental" error to which the parties did not object at the trial level, the Appellate Division will consider the issue.<sup>291</sup> In this respect, the Appellate Division has acted on the following errors to which no objection had been made: submission of a case to the jury upon a wholly erroneous theory;<sup>292</sup> the trial court's error as to the proper rule of liability;<sup>293</sup> and submission to the jury of a question not relevant to the case.<sup>294</sup>

Such exercises of this review power in both civil and criminal appeals are manifestations of the court's role in ensuring proper conduct of the proceedings below and substantial justice to the parties. The Appellate Division's ability to correct any fundamental error also facilitates the performance of the court's screening function insofar as the necessity of reviewing many of these questions in the court of appeals is thereby avoided.<sup>295</sup>

Although the power to review any issue in the record enables the court to perform its functions adequately, considerations of fairness and judicial economy require caution in reviewing points not objected to in the lower court. A defect in a party's case should be pointed out to the trial judge so that, if possible, he may obviate it,<sup>296</sup> for the trial court should ordinarily be given a chance to correct its errors before the proceedings are transferred to another tribunal for review.<sup>297</sup> For these reasons, the Appellate Division

290. *People v. Robinson*, 36 N.Y.2d 224, 228-29, 326 N.E.2d 784, 786, 367 N.Y.S.2d 208, 211 (1975). *But see* *People v. Congilaro*, 60 A.D.2d 442, 455, 400 N.Y.S.2d 409, 418 (4th Dep't 1977) (error in trial court's charge held not to warrant reversal in the interests of justice because proof of defendant's guilt was overwhelming).

291. In *Werner v. Hertz Corp.*, 18 A.D.2d 888, 237 N.Y.S.2d 629 (1st Dep't 1963) (mem.), for example, the Appellate Division found it error for the court to charge the jury, three times, that plaintiff saw the light as red when there was no testimony to such effect at any time, even though no exception was taken to the charge. In *Niagara Mohawk Power Corp. v. Aetna Ins. Co.*, 15 A.D.2d 390, 393-94, 224 N.Y.S.2d 536, 538-39 (4th Dep't 1962), the trial court improperly allowed irrelevant evidence to be received and charged the jury on three conflicting rules of law. The Appellate Division found this fundamental error and reversed, although no exception was taken by plaintiff. Finally, in *Zeffiro v. Porfido*, 265 A.D. 185, 186, 38 N.Y.S.2d 393, 394-95 (1st Dep't 1942), the court charged the jury twice that plaintiffs had the burden of proving that the accident resulted solely from the negligence of defendant driver. This was held to be a fundamental error requiring reversal and a new trial even though no exception was made below. *Cf.* *Musmacker v. Garwood*, 51 A.D.2d 1006, 380 N.Y.S.2d 762 (2d Dep't 1976) (mem.) (court would not reverse in absence of fundamental error).

292. *Estes v. Town of Big Flats*, 41 A.D.2d 681, 340 N.Y.S.2d 950 (3rd Dep't 1973) (mem.) (erroneous application of law which altered the duties of the parties).

293. *Rosenberg v. New York Cent. R.R.*, 180 A.D. 79, 167 N.Y.S. 518 (2d Dep't 1917).

294. *Caciatore v. Transit Constr. Co.*, 147 A.D. 676, 132 N.Y.S. 572 (2d Dep't 1911).

295. *See* ABA Standards, *supra* note 16, § 3.11, Commentary at 19-20.

296. *Gilbert v. City of New York*, 173 A.D. 359, 362, 159 N.Y.S. 460, 463 (2d Dep't 1916); *Chase Nat'l Bank v. Rosenbaum*, 142 Misc. 349, 352, 254 N.Y.S. 593, 596 (N.Y.C. City Ct. 1931).

297. *Vadney v. United Traction Co.*, 193 A.D. 329, 332, 183 N.Y.S. 926, 928 (3rd Dep't 1920), *aff'd*, 233 N.Y. 643, 135 N.E. 952 (1922) (mem.).

generally refrains from reviewing matters not objected to below<sup>298</sup> unless a fundamental error would remain unremedied.<sup>299</sup>

A second major example of the Appellate Division's power to correct any error found in the record is the ability to grant relief beyond that specifically requested by the appellant.<sup>300</sup> For example, if the trial court denies a plaintiff's request for specific performance of an anticompetition clause, the Appellate Division is not limited to affirming the judgment below. If the case is meritorious but the requested relief is unavailable, the appellate court may order whatever relief is appropriate, such as partial summary judgment and an injunction, even though not requested on appeal.<sup>301</sup> Such a policy seems to be in accord with the Appellate Division's statutory authority to render the decree the case requires and, when exercised prudently, assures substantial justice to the litigants.

The Appellate Division's authority to review and decide any issues presented in the record does not appear to be broader than necessary for the court to fulfill its appellate role efficiently without significantly abusing the system. In exercising this power, the court seems to recognize the dangers of excessive intrusion<sup>302</sup> and, therefore, is cautious when looking beyond questions raised on appeal or objected to below. For example, the court will not go so far as to grant relief against a second defendant whom the jury erroneously found not liable when the plaintiff does not request any relief against that defendant on appeal.<sup>303</sup> In addition, excessive exercise of the power to review the entire record would not be expected to cause caseload problems for the Appellate Division; such problems arise primarily from overbroad appealability. Finally, the ABA Standards propose, in effect, an equally broad power to review questions not raised below but contained in the record: an appellate court may consider such questions if "necessary to prevent manifest injustice" or if the trial or appellate court's jurisdiction is in issue.<sup>304</sup> Other

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298. *Petosa v. City of New York*, 52 A.D.2d 919, 920, 383 N.Y.S.2d 397, 399 (2d Dep't 1976) (mem.); *Mravlja v. Hoke*, 22 A.D.2d 848, 852, 254 N.Y.S.2d 162, 168 (3rd Dep't 1964) (per curiam); *People v. Alexander*, 18 A.D.2d 1092, 239 N.Y.S.2d 364 (2d Dep't 1963) (mem.); *Polebaum v. National House & Farms Ass'n*, 277 A.D. 849, 849, 97 N.Y.S.2d 831, 833 (1st Dep't 1950) (per curiam).

299. See note 291 *supra* and accompanying text.

300. *Costello v. Hoffman*, 30 A.D.2d 530, 531, 291 N.Y.S.2d 116, 118 (2d Dep't 1968) (mem.).

301. *C & B Wholesale Stationery v. De Bella Dresses, Inc.*, 43 A.D.2d 579, 580, 349 N.Y.S.2d 751, 754 (2d Dep't 1973) (mem.) (plaintiff suing for specific performance granted partial summary judgment and injunction on appeal); *Costello v. Hoffman*, 30 A.D.2d 530, 531, 291 N.Y.S.2d 116, 118 (2d Dep't 1968) (mem.) (Appellate Division granted injunction to plaintiff suing for specific performance). The Appellate Division, by virtue of its power to review the facts, is entitled, even without an exception, to pass on the correct measure of damages. *Hollwedel v. Duffy-Mott Co.*, 263 N.Y. 95, 106, 188 N.E. 266, 270 (1933); see N.Y. Civ. Prac. Law § 5501 (McKinney 1978).

302. *People v. Travison*, 59 A.D.2d 404, 408, 400 N.Y.S.2d 188, 191 (3rd Dep't 1977). This caution may also be the result of the appellate justices' desire to restrict frivolous appeals.

303. *Gordon v. City of Albany*, 278 A.D. 233, 104 N.Y.S.2d 736 (3d Dep't 1951). Thus, it would appear that the court may refrain from acting when no relief is requested on appeal, but that the court may fashion different relief if necessary so long as the appellant requests some relief. See note 301 *supra* and accompanying text.

304. ABA Standards, *supra* note 16, § 3.11.

states also allow their appellate courts to review almost any matter in the record if necessary to make a determination.<sup>305</sup> Thus, it would appear to be generally recognized that limiting review of questions not raised below or on appeal to situations when a fundamental error or manifest injustice might otherwise result is a sufficiently effective restraint to prevent the kind of appellate intervention that renders the lower court proceeding a mere "preliminary conference."<sup>306</sup>

#### B. *Types of Questions Reviewable and Permissible Appellate Dispositions*

In addition to the broad range of questions and matters contained in the record that the Appellate Division may review, the court also has broad powers with respect to its standard of review and the possible dispositions it may make on appeal.<sup>307</sup> Essentially, the court may affirm, reverse, or modify the judgment or order before it and, on reversal, may remand for further proceedings or even make new findings of its own in nonjury cases. Furthermore, the court may make any of these dispositions "in the interests of justice,"<sup>308</sup> if necessary to prevent fundamental<sup>309</sup> or substantial error.<sup>310</sup>

### 1. Jury Trials

#### a. Civil Actions

(i) *Verdict Against the Weight of the Evidence*: Unlike most other jurisdictions,<sup>311</sup> the Appellate Division may reverse a judgment on the ground that the jury's verdict was against the weight of the evidence.<sup>312</sup> Such a determination is itself factual; the court essentially decides whether the trier of fact properly weighed the evidence and decided the factual questions before it.<sup>313</sup>

305. See note 289 *supra*. A federal appellate court will consider questions urged on appeal that were not raised in the lower courts only in exceptional cases. See *Lear, Inc. v. Adkins*, 395 U.S. 653, 680 (1969) (citing *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)).

306. See ABA Standards, *supra* note 16, § 3.11, Commentary at 20.

307. See N.Y. Civ. Prac. Law §§ 5501, 5522 (McKinney 1978); N.Y. Crim. Proc. Law §§ 470.15, .20 (McKinney 1971).

308. N.Y. Crim. Proc. Law § 470.15(3)(c) (McKinney 1971); see N.Y. Civ. Prac. Law § 5522 (McKinney 1978); notes 339, 370-75 *infra* and accompanying text.

309. See note 299 *supra* and accompanying text.

310. See note 348 *infra* and accompanying text.

311. See U.S. Const. amend. VII. The Supreme Court has construed the seventh amendment to preclude setting aside a verdict as against the weight of the evidence. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482 (1933); *New York Cent. & H.R.R. v. Fraloff*, 100 U.S. 24, 25 (1879); *The Abbotsford*, 98 U.S. 440, 445 (1878). Many other states follow the federal rule. See, e.g., *Norway-Pleasant Tel. Co. v. Tuntland*, 68 S.D. 441, 445, 3 N.W.2d 882, 884 (1942); *Scheuring v. Northern States Power Co.*, 67 S.D. 484, 487, 294 N.W. 175, 177 (1940); Ill. Ann. Stat. ch. 110A, § 366(b)(1) (Smith-Hurd 1976 & Supp. 1978); Kan. Stat. Ann. § 60-2102(a) (1976 & Supp. 1978); Mass. Ann. Laws ch. 231, § 124 (Michie/Law. Co-op. 1974 & Supp. 1979).

312. See *Boneville Trapp v. American Trading & Prod. Corp.*, N.Y.L.J., Mar. 8, 1979, at 26, col. 1 (1st Dep't Mar. 6, 1979); *Rapant v. Ogsbury*, 279 A.D. 298, 299, 109 N.Y.S.2d 737, 739 (3rd Dep't 1952); N.Y. Civ. Prac. Law § 5501(c) (McKinney 1978).

313. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498, 383 N.E.2d 1145, 1147, 410 N.Y.S.2d 282, 285 (1978).

The wide discretion which the Appellate Division has in estimating the weight of the evidence<sup>314</sup> immediately gives rise to the question whether the court invades the traditional factfinding function delegated to the jury by the New York Constitution.<sup>315</sup> Any danger of such invasion, however, is eliminated by the requirement that the Appellate Division remand the case for a new trial whenever it reverses a jury verdict as against the weight of the evidence.<sup>316</sup> This procedure ensures that the factfinder in all cases is a jury and not an appellate bench.<sup>317</sup> Thus, the Appellate Division's power to set aside a verdict as against the weight of the evidence does not pose constitutional problems.

The test applied by the Appellate Division in setting aside a verdict is the same as that applied by a trial judge in granting a judgment notwithstanding the verdict. The standard is not whether the appellate or trial judge would decide differently, but whether the verdict is so palpably wrong that it could not have been reached on any fair interpretation of the evidence.<sup>318</sup> The New York courts' role in disturbing a jury verdict was best characterized in *Rapant v. Ogsbury*:<sup>319</sup> "The point of interference is where . . . the jury has gone much too far afield from the course the judge regards as proper, in the sense of his professional way of looking at facts."<sup>320</sup> Because this determination involves essentially a matter of personal judgment and appraisal, it is the result of the judges' total impression of the case after a de novo review, based upon their

314. *McAleenan v. Massachusetts Bonding & Ins. Co.*, 232 N.Y. 199, 209, 133 N.E. 444, 447 (1921).

315. N.Y. Const. art. 1, § 2.

316. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498, 382 N.E.2d 1145, 1147, 410 N.Y.S.2d 282, 285 (1978); *Martin v. City of Albany*, 42 N.Y.2d 13, 19, 364 N.E.2d 1304, 1309, 396 N.Y.S.2d 612, 616 (1977).

317. *Imbrey v. Prudential Ins. Co.*, 286 N.Y. 434, 440-42, 36 N.E.2d 651, 654-55 (1941); *York Mortgage Corp. v. Clotar Constr. Corp.*, 254 N.Y. 128, 134, 172 N.E. 265, 267 (1930); *Middleton v. Whitridge*, 213 N.Y. 499, 506, 108 N.E. 192, 195-96 (1915); *H. Cohen & A. Karger*, *supra* note 72, at 653-54. "In equity causes, before the days of code practice, the appellate court was not constrained upon reversal to order a new trial, but might proceed to render whatever new decree the justice of the case required. The Appellate Division has now been reinvested with that power. Indeed, the power has been extended, for it applies to all actions and proceedings whether equitable or legal, *except where the trial under review has been before a jury.*" *Lampont v. Smedley*, 213 N.Y. 82, 85, 106 N.E. 922, 923 (1914) (emphasis added) (citations omitted).

318. *See, e.g.*, *Clark v. Donovan*, 34 A.D.2d 1099, 1099, 312 N.Y.S.2d 610, 611 (4th Dep't 1970) (mem.) (evidence of plaintiff's excessive speed so pervasive that it was against credible evidence for jury to find defendant's action was proximate cause of accident), *appeal dismissed*, 31 N.Y.2d 661, 288 N.E.2d 801, 336 N.Y.S.2d 897 (1972); *Hilts v. Winkler*, 29 A.D.2d 822, 287 N.Y.S.2d 562 (3d Dep't 1968) (per curiam) (in setting aside verdict, court found it difficult to understand how, if proper care had been exercised, defendant failed to see decedent because the weight of the evidence clearly showed that he should have seen the decedent); 4 *Weinstein, Korn & Miller*, *supra* note 149, ¶ 4404.09.

319. 279 A.D. 298, 109 N.Y.S.2d 737 (3rd Dep't 1952).

320. *Id.* at 299, 109 N.Y.S.2d at 739; *see Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499, 382 N.E.2d 1145, 1147-48, 410 N.Y.S.2d 282, 285 (1978) ("[T]he question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors.").

accumulated knowledge and experience. It is, after all, a subjective process strikingly similar to the jury's own determination of the facts in the first place.

The subjectivity inherent in determining whether a jury's verdict is in accord with the weight of the evidence and the possibly arbitrary decisions that may result create a great potential for injustice.<sup>321</sup> In recognition of this danger, the Appellate Division attempts to exercise judicial self-restraint in reviewing a verdict. For example, though the evidence justifies setting aside the verdict under the judgment-notwithstanding-the-verdict test, the Appellate Division will further inquire whether any reasonable person would have come to the same decision as the jury.<sup>322</sup> If so, the court will hesitate to disturb the verdict.<sup>323</sup> In addition, because the appellate court is one step removed from the trial proceedings and cannot observe the witnesses' demeanors, it will refrain more often from reversing on the facts when the decision below rests primarily on credibility issues than when it rests on documentary or physical evidence that is equally accessible to both the appellate court and the jury.<sup>324</sup> Whether the Appellate Division successfully exercises these self-restraints so as to eliminate the danger of abuse is reserved for the discussion of the court's actual operation in Part IV.<sup>325</sup>

(ii) *Insufficient Evidence To Sustain the Verdict*: The Appellate Division may also set aside a verdict and grant judgment notwithstanding it when the record contains insufficient or no evidence to support the verdict.<sup>326</sup> This

321. "[T]he greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made." K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* at v (1969).

322. *Greggo v. City of Albany*, 58 A.D.2d 678, 679, 395 N.Y.S.2d 735, 737 (3d Dep't 1977) (mem.).

323. *Id.*

324. *Goldsmith v. Goldsmith*, 272 A.D. 1011, 1011, 74 N.Y.S.2d 54, 55 (1st Dep't 1947) (per curiam). Examples of this tendency are cases in which the sole issue is whether goods conformed to a sample which was before the appellate court, *Eclipse Embroidery Works v. J.T. Murray & Co.*, 168 N.Y.S. 620 (Sup. Ct. App. T. 1918), or cases in which the question involves the credibility of a witness whose testimony was taken by deposition. *Herring-Curtiss Co. v. Curtiss*, 223 A.D. 101, 227 N.Y.S. 489 (4th Dep't 1928).

325. See note 442 *infra* and accompanying text.

326. See *Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241, 246, 54 N.E.2d 809, 811 (1944); *State Bank v. Hickey*, 29 A.D.2d 993, 993, 288 N.Y.S.2d 980, 981 (3d Dep't 1968), *aff'd*, 23 N.Y.2d 910, 246 N.E.2d 164, 298 N.Y.S.2d 312 (1969) (Appellate Division reversed and directed judgment for plaintiff because terms of contract in issue were plain, unambiguous, and not open to dispute); N.Y. Civ. Prac. Law § 5522 (McKinney 1978). Federal appellate courts are limited in jury cases to a review of the law and may not reexamine the facts as found by the jury, U.S. Const. amend. VII, beyond determining whether as a matter of law there was sufficient evidence to support the jury's findings. *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); *Weyerhaeuser Co. v. Bucon Constr. Co.*, 430 F.2d 420, 423-24 (5th Cir. 1970). This power is further limited to situations where a motion for a directed verdict upon the issue is made at the close of all the evidence or a motion for judgment notwithstanding the verdict has been made as authorized by Fed. R. Civ. P. 50(b). If this was not done, the appellate court may only grant a new trial; it may not direct a proper verdict. *Quinby v. Morrow*, 340 F.2d 584, 585 (2d Cir. 1965). This review of the legal question of sufficiency of the evidence has been adopted by several of New York's sister states as well. See, e.g., *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426,



determination differs from setting aside a verdict as against the weight of the evidence in two respects. First, the sufficiency of the evidence is a question of law similar to the trial court's inquiry when asked to direct a verdict.<sup>327</sup> That is, the standard for reviewing the sufficiency of the evidence is whether the plaintiff has introduced enough facts to make out a prima facie case<sup>328</sup> or whether the defendant has sustained his burden of rebutting the plaintiff's case. In setting aside a verdict as against the weight of the evidence, on the other hand, the question is whether the evidence, albeit sufficient, supports a different conclusion.<sup>329</sup> Second, in reversing for insufficiency of evidence, the Appellate Division may direct judgment for the party against whom the verdict was entered<sup>330</sup> or dismiss the action for failure to prove a prima facie case.<sup>331</sup> In contrast, when the court sets aside a verdict as against the weight of the evidence, it must order a new trial.<sup>332</sup> The primary general policy consideration underlying the Appellate Division's power to make, in effect, a final determination<sup>333</sup> when it finds insufficient or no evidence to support the verdict comes from an interest in disposing of a case after one trial whenever possible, thereby eliminating the need to shuttle unmeritorious cases between the appellate and trial courts.

To disturb a jury verdict and make a final determination on insufficiency-of-evidence grounds poses no danger of invading the jury's factfinding function, for though a thorough review of the facts is required, such a determination is one of law, not of fact. As such, this Appellate Division determination is

429, 561 P.2d 750, 753 (Ct. App. 1977); *Harris v. Murch*, 18 Ariz. App. 466, 467, 503 P.2d 821, 822 (1972); *Western Union Tel. Co. v. Byrd*, 197 Ark. 152, 163, 122 S.W.2d 569, 574 (1938); *Drysdale v. California Dep't of Human Resources Dev.*, 77 Cal. App. 3d 345, 352, 142 Cal. Rptr. 495, 499 (1978); *Smith v. Biscayne Park Estates*, 42 So. 2d 442 (Fla. 1949); *Hunter v. Karchmer*, 285 S.W.2d 918, 928 (Mo. Ct. App. 1955); *Atkinson v. Coca-Cola Bottling Co.*, 275 S.W.2d 41, 44 (Mo. Ct. App. 1955) (jury trials only); *Md. R.P. 1086* (nonjury trials only); *N.D. Cent. Code* § 28-27-28 (1974); *S.C. Code* § 14-3-320 (1977) (appellate jurisdiction to review fact findings only in chancery and in jury cases if verdict not set aside).

327. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498-99, 382 N.E.2d 1145, 1147-48, 410 N.Y.S.2d 282, 285 (1978).

328. *See Jones v. Kent*, 35 A.D.2d 622, 312 N.Y.S.2d 728 (3d Dep't 1970) (mem.) (dismissal of complaint justified because proof showed that plaintiff assumed risk of injury and therefore could not recover as a matter of law).

329. *See* notes 311-13 *supra* and accompanying text. One interesting question that arises with respect to the Appellate Division's powers in this regard involves the fate of the litigant whom the appellate court finds established a prima facie case, but whose evidence is found to be "incredible" and, therefore, substantively insufficient. *See Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241, 246, 54 N.E.2d 809, 811 (1944). Because in such a case an issue of fact has been found for the jury, the case must be returned for a new trial. *Quinlan v. Consolidated Edison Co.*, 26 A.D.2d 913, 914, 274 N.Y.S.2d 460, 462 (1st Dep't 1966) (*per curiam*).

330. *See, e.g., State Bank v. Hickey*, 29 A.D.2d 993, 993, 288 N.Y.S.2d 980, 981 (3d Dep't 1968), *aff'd*, 23 N.Y.2d 910, 246 N.E.2d 164, 298 N.Y.S.2d 312 (1969).

331. *See Jones v. Kent*, 35 A.D.2d 622, 623, 312 N.Y.S.2d 728, 730 (3d Dep't 1970) (mem.).

332. *See* notes 314-17 *supra* and accompanying text.

333. The term "final determination" has been construed to include any final disposition of the parties' rights that the trial court could have made. *United Paperboard Co. v. Iroquois Pulp & Paper Co.*, 217 A.D. 253, 253, 217 N.Y.S. 762, 762 (4th Dep't 1926) (construing § 584 of the Civil Practice Act, the forerunner of N.Y. Civ. Prac. Law § 5522 (McKinney 1978)).

reviewable by the court of appeals, whereas questions of fact generally are not.<sup>334</sup> Thus, classifying a reversal for insufficient evidence as a matter of law may suggest a desire on the part of the legislature to ensure another review of such a radical disposition. In addition, such further appeal, though costly, requires less time, effort, and expense of both the litigants and the courts than would a new trial.

(iii) *Modification of Damages*: When damages are found grossly excessive or inadequate, the Appellate Division can set aside the verdict and order a new trial unless the figure it substitutes as the correct measure of damages is accepted.<sup>335</sup> The federal powers in this respect are similar except when the damages are inadequate, in which case the federal courts have no power to alter the verdict.<sup>336</sup>

The First Department's use of additur, that is, requiring a new trial unless the defendant agrees to pay higher damages, was challenged on constitutional grounds in *O'Connor v. Papertsian*.<sup>337</sup> When the defendant in this case agreed to an additur, the plaintiff appealed to the court of appeals, alleging that by effectively permitting the defendant alone to determine whether a new trial would be granted, the Appellate Division had deprived plaintiff of her constitutional right to a jury trial. The court of appeals found no deprivation of a jury trial because plaintiff had received the highest allowable recovery as a matter of law. The Appellate Division, it was held, was not reversing the factual determination of the jury, but rather was affirming the jury's finding of liability, determining the damages inadequate as a matter of law, and announcing the limit of damages awardable as a matter of law.<sup>338</sup>

Presumably, the New York rule has its basis in considerations of judicial economy. Taking into account the volume of personal injury actions, the congested court calendars, and the expense of protracted litigation, if all that remains in dispute after a lengthy trial is the amount of damages, making available the option of accepting the substituted damages seems reasonable.

#### b. Criminal Appeals

Except for some distinctions as to the allowable dispositions on reversal, the Appellate Division's review powers in criminal cases do not differ substan-

334. N.Y. Civ. Prac. Law § 5501(b) (McKinney 1978).

335. *Lewis v. Mecca*, 56 A.D.2d 716, 716, 392 N.Y.S.2d 773, 774 (4th Dep't 1977) (mem.); *Livaccari v. Zafonte*, 48 A.D.2d 20, 23-24, 367 N.Y.S.2d 808, 812-13 (2d Dep't 1975); *Tenczar v. Milligan*, 47 A.D.2d 773, 774, 365 N.Y.S.2d 272, 275 (3d Dep't 1975); N.Y. Civ. Prac. Law § 5501(a)(5) (McKinney 1978).

336. A federal appeals court may employ remittitur, that is, grant a new trial unless the plaintiff consents to a reduction of damages, but it may not exercise additur, that is, order a new trial if the defendant does not agree to increased damages. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). The rationale for this rule is that additur entails adding to the judgment something "which in no sense [could] be said to be included" by the jury. *Id.*

337. 309 N.Y. 465, 131 N.E.2d 883 (1956).

338. *Id.* at 473, 131 N.E.2d at 887. When the trial is before a judge, however, no constitutional guarantee of a trial by jury is involved, and, therefore, the Appellate Division may unconditionally increase or decrease the award. This grant of power, presumably founded on considerations of economy, is tempered, however, by deference to the trial judge's assessment of witnesses and credibility of evidence. *See* notes 360-83 *infra* and accompanying text.

tially from its powers in civil jury trials; in both instances the court may consider any alleged errors of law or fact that may have adversely affected the appellant.<sup>339</sup> A significant difference between civil and criminal trials arises when the court determines that the verdict is against the weight of the evidence. If the Appellate Division reverses for this reason, the CPL requires dismissal of the indictment,<sup>340</sup> not direction of a new trial as in civil actions.<sup>341</sup> This distinction may be the result of the higher standard of evidentiary proof required in criminal actions and considerations of judicial economy as well as the prohibition against double jeopardy.<sup>342</sup> An appellate reversal on the facts as against the weight of the evidence is really a determination that the defendant's guilt was not proved beyond a reasonable doubt.<sup>343</sup> Because in such situations the People have had a full opportunity to prove their case against the defendant and have failed, the possibility that they might strengthen their case on a second try presents no logical justification for subjecting the defendant to a new trial.<sup>344</sup>

The New York standards of review and permissible appellate dispositions in criminal appeals do not differ significantly from those of other jurisdictions.<sup>345</sup> An Appellate Division reversal of a conviction requires dismissal of the indictment,<sup>346</sup> unless the court reverses on the ground that the error

339. N.Y. Crim. Proc. Law § 470.05(1) (McKinney 1971).

340. *Id.* § 470.20(5).

341. See notes 316-17 *supra* and accompanying text.

342. Denzer, *Practice Commentary*, N.Y. Crim. Proc. Law § 470.20, at 609-10 (McKinney 1971). In some situations, however, the court may order a new trial. *Id.* at 608-09. Because the law requires that defendants receive a "fair" trial, any trial that has been tainted by error or other defect must be equated to no trial at all, or, at the very least, to a mistrial. Thus, ordering a new trial in the mistrial situation, unlike a case in which the verdict is against the weight of the evidence, would not violate double jeopardy considerations. *United States v. Scott*, 437 U.S. 82 (1978) (defendant in a criminal case, who succeeds in having a verdict and judgment against him set aside, may be tried anew upon the same or another indictment for the same offense of which he was convicted). It should be pointed out that this discussion deals only with an appeal by defendant following a conviction. See generally *id.*

343. See Denzer, *Practice Commentary*, N.Y. Crim. Proc. Law § 470.20, at 609 (McKinney 1971).

344. See *id.*

345. The majority of states conform to the federal standard, see Fed. R. Crim. P. 52, which allows reversal only when the error affects a substantial right. See, e.g., *People v. Thomas*, 7 Mich. App. 519, 540, 152 N.W.2d 166, 175 (1967) (court of appeals may review facts in determining whether error is reversible); *State v. Jordan*, 113 N.J. Super. 563, 569, 274 A.2d 605, 608 (App. Div. 1971); Cal. Penal Code § 1259 (West 1970); Fla. Stat. Ann. § 924.33 (West 1973); Ky. R. Crim. P. 12.02 (adopting Ky. R. Civ. P. 52.01); Mont. Rev. Code Ann. § 95-2412 (1969); N.C. Gen. Stat. §§ 15A-1441 to -1442 (1978); Ohio R. App. P. 12. Several states, however, allow their courts to reverse only for errors of law, allowing no review of the question of guilt or innocence. See, e.g., *State v. Lopez*, 3 Ariz. App. 200, 205, 412 P.2d 882, 887 (1966); Ark. Stat. Ann. § 43-2725.2 (1977); Nev. Rev. Stat. § 177.025 (1977); Or. Rev. Stat. § 138.220 (1978); Vt. Stat. Ann. tit. 13, §§ 7401, 7403 (1974). Only a few states have a scope of review as broad as New York, allowing appellate dispositions in the interests of justice. See, e.g., Ala. Code § 12-22-240 (1977); Del. Const. art. IV, § 11(1)(b); S.D. Comp. Laws Ann. § 23A-32-9 (to become effective July 1, 1979); Tex. Code Crim. Proc. Ann. art. 44.24 (Vernon 1979); Wis. Stat. Ann. § 752.01, Legislative Council Note (West Special Pamphlet 1978).

346. N.Y. Crim. Proc. Law §§ 470.20(2), (5) (McKinney 1971). Reversals by the Appellate

deprived the defendant of a fair trial. In this latter situation, the court must order a new trial.<sup>347</sup> The Appellate Division may not reverse a conviction, however, unless the alleged error or defect affects a substantial right of the defendant.<sup>348</sup> New York also permits the Appellate Division to modify a criminal judgment by reducing the conviction to a lesser included offense,<sup>349</sup> by reversing counts unsupported by sufficient evidence and affirming other counts for which the defendant was proved guilty,<sup>350</sup> and by reducing the sentence and affirming the conviction.<sup>351</sup>

In terms of review standards, however, New York does depart from the federal rule in one significant respect. The federal standard requires affirmation if the alleged error, whether of constitutional or nonconstitutional dimension, is harmless.<sup>352</sup> That is, if a federal court finds a rational possibility that the error affected the verdict, it will reverse.<sup>353</sup> Although the New York Court of Appeals in *People v. Crimmins*<sup>354</sup> adopted the federal standard for errors affecting constitutional rights,<sup>355</sup> it set forth a two-pronged inquiry for determining whether a nonconstitutional error is harmless. First, the appellate court should consider whether, without regard to the error, the proof of guilt

Division in the interests of justice or upon the ground that the verdict is against the weight of the evidence are not reviewable by the court of appeals. *Id.* §§ 470.15(3)(c), (6)(a), .35(1). The CPL, however, does authorize that court to consider and determine the legality of any corrective action taken by the Appellate Division. *Id.* § 470.35(2)(c).

347. See note 342 *supra* and accompanying text.

348. N.Y. Crim. Proc. Law § 470.05(1) (McKinney 1971).

349. *Id.* § 470.15(2)(a) (corresponds to Code of Criminal Procedure, ch. 442, § 543(1), 2 N.Y. Laws 1 (1881)).

350. N.Y. Crim. Proc. Law § 470.15(2)(b) (McKinney 1971) (corresponds to Code of Criminal Procedure, ch. 442 § 543(1), 2 N.Y. Laws 1 (1881)).

351. N.Y. Crim. Proc. Law § 470.15(2)(c) (McKinney 1971). In New York, a sentence may be modified if it is erroneous as a matter of law, see *People v. Skaggs*, 54 A.D.2d 986, 986, 388 N.Y.S.2d 662, 663 (2d Dep't 1976), if it is unduly harsh, see *People v. Greene*, 36 A.D.2d 826, 826, 321 N.Y.S.2d 237, 238 (2d Dep't 1971), or if it is illegally imposed. See *People v. Voelker*, 220 A.D. 528, 535-36, 221 N.Y.S. 760, 767 (2d Dep't 1927) (sentence within statutory guidelines, but defendant erroneously sentenced as second offender). The federal rules also permit modification of the sentence. Fed. R. Crim. P. 35. See generally 2 C. Wright, *Federal Practice and Procedure* §§ 582, at 585-86 (1969). For example, a sentence may be changed if it is illegal, that is, if it exceeds statutory limits, see *United States v. Golay*, 560 F.2d 866, 871 (8th Cir. 1977), is contrary to the applicable statute, see *Thompson v. United States*, 495 F.2d 1304, 1306 (1st Cir. 1974), is ambiguous as to duration or the manner in which it is to be imposed, see *United States v. Solomon*, 468 F.2d 848, 850-51 (7th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973), or if the written sentence does not conform to the trial judge's oral pronouncement. See *United States v. Munoz-Dela Rosa*, 495 F.2d 253, 256 (9th Cir. 1974). The federal appellate court may also correct a sentence illegally imposed in violation of procedural due process concepts. See *United States v. Mack*, 494 F.2d 1204, 1208 (9th Cir. 1974); Fed. R. Crim. P. 35. Finally, an otherwise lawful federal sentence may be reduced if found to be unduly harsh under the circumstances. See, e.g., *United States v. Wigoda*, 417 F. Supp. 276, 281-82 (N.D. Ill. 1976); *United States v. Orlando*, 206 F. Supp. 419, 420 (E.D.N.Y. 1962).

352. Fed. R. Crim. P. 52.

353. *People v. Crimmins*, 36 N.Y.2d 230, 237, 326 N.E.2d 787, 791, 367 N.Y.S.2d 213, 218 (1975).

354. 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975).

355. *Id.* at 237-38, 326 N.E.2d at 791, 367 N.Y.S.2d at 218-19.

was overwhelming, that is, whether the evidence presented was so forceful and logically compelling that a reasonable jury "on consideration of such evidence would almost certainly have convicted the defendant."<sup>356</sup> Second, the court should inquire whether there is a "significant probability," rather than only a "rational possibility," that the jury would have acquitted the defendant were it not for the error.<sup>357</sup> If the proof of guilt was overwhelming and if there was no significant probability of acquittal but for the error, then the appellate court should rule the error harmless and affirm the conviction.<sup>358</sup>

By requiring this "significant probability" of acquittal before an error will be deemed to have affected the verdict, the court of appeals seems to have ensured that when it is difficult or impossible to determine whether the defendant would have been acquitted absent error, an affirmance rather than a new trial would be required. As pointed out by the concurring opinion in *Crimmins*, this would seem at odds with the policy of assuring the defendant a new trial or a dismissal if there is a reasonable doubt that the jury would have convicted.<sup>359</sup> For this reason, an overzealous application of this standard may inhibit a defendant's constitutional guarantee of a fair trial. Thus, although use of this standard aids the Appellate Division in performing its screening function because convictions are more likely to be affirmed at the intermediate level, and although this strict standard prevents excessive intervention into criminal trials, its application may impair the court's ability to ensure substantial justice to the parties—a prevailing function in criminal cases.

## 2. Nonjury Trials

Because the Appellate Division's powers are not limited to normal appellate review, but are as broad as those of the supreme court,<sup>360</sup> the Appellate Division may modify, reverse, remand for reconsideration of the facts, and/or

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356. *Id.* at 242, 326 N.E.2d at 794, 367 N.Y.S.2d at 222.

357. *Id.*

358. *Id.* In *People v. Catalanotte*, 36 N.Y.2d 192, 325 N.E.2d 866, 366 N.Y.S.2d 403 (1975) (per curiam), decided the same day as *Crimmins*, the defendant, a probationary police officer, was convicted of selling a dangerous drug. On appeal, the court found it error to prohibit the defendant from offering rebuttal evidence to explain some of the bank accounts about which he had testified previously. The clear implication of this testimony was that these bank accounts contained the fruits of defendant's crime. However, in view of the conclusive proof of defendant's guilt, the appellate court could not say that there was a significant probability defendant would be acquitted. Thus, under the *Crimmins* harmless error rule, the judgment was affirmed. *Id.* at 196, 325 N.E.2d at 867, 366 N.Y.S.2d at 405. The dissent, however, was of the opinion that because the error may well have influenced the verdict, it could not be treated as harmless, pointing out that "[e]xcessive reliance on the existence of other proof of guilt, in the face of clearly prejudicial error" falls "perilously close to announcing a 'doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt.'" *Id.* at 198, 325 N.E.2d at 869, 366 N.Y.S.2d at 408 (Cooke, J., dissenting in part) (quoting *People v. Mleczko*, 298 N.Y. 153, 163, 81 N.E.2d 65, 69-70 (1948)).

359. 36 N.Y.2d at 244, 326 N.E.2d at 795, 367 N.Y.S.2d at 224 (1975) (Cooke, J., concurring in part). For a discussion of policies underlying the reasonable doubt standard regarding verdicts, see *In re Winship*, 397 U.S. 358 (1970).

360. See note 1 *supra*. The court, however, is not required to make new findings, notwithstanding its unlimited power to do so. 7 Weinstein, Korn & Miller, *supra* note 149, ¶ 5522.05.

make new findings in any nonjury case.<sup>361</sup> Thus, the Appellate Division is not limited to determining whether the findings below are supported by some credible evidence.<sup>362</sup> Rather, if it appears that upon the whole record findings different from those of the trial court are reasonable, the Appellate Division may properly impose its own view of the facts and grant the judgment which should have been granted by the trial court.<sup>363</sup>

Compared to other jurisdictions, New York is virtually unique in granting its intermediate appellate court such a broad power to make new findings in nonjury cases. The relevant federal rule prohibits an appellate court from setting aside the findings of the trial judge unless they are clearly erroneous.<sup>364</sup> Most other states are in accord with the federal system in this respect,<sup>365</sup> and a few adopt an even narrower rule, permitting review of law questions only.<sup>366</sup> Because of the uniqueness of the Appellate Division's authority, it is necessary to examine the various situations in which the court will make new findings in order to determine when it will depart significantly from the practice in other jurisdictions. This inquiry will also take into account the court's self-restraints in this area and will discuss the risks of abuse of the system.

The power to make new findings exists when the findings of the court below are contrary to the Appellate Division's assessment of the facts<sup>367</sup> as well as when the trial judge neglects to make any findings.<sup>368</sup> New findings

361. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498, 382 N.E.2d 1145, 1147, 410 N.Y.S.2d 282, 285 (1978); *Hacker v. City of New York*, 26 A.D.2d 400, 403, 275 N.Y.S.2d 146, 150 (1st Dep't 1966), *aff'd*, 20 N.Y.2d 722, 229 N.E.2d 613, 283 N.Y.S.2d 46 (1967), *cert. denied*, 390 U.S. 1036 (1968).

362. *MacCracken v. Miller*, 291 N.Y. 55, 62, 50 N.E.2d 542, 544 (1943).

363. *Grow Constr. Co. v. State*, 56 A.D.2d 95, 99-100, 391 N.Y.S.2d 726, 729 (3d Dep't 1977); *Shipman v. Words of Power Missionary Enterprises, Inc.*, 54 A.D.2d 1052, 1053, 388 N.Y.S.2d 721, 722 (3d Dep't 1976); *McCarthy v. Port of N.Y. Auth.*, 30 A.D.2d 111, 114, 290 N.Y.S.2d 255, 258 (1st Dep't 1968) (per curiam). In keeping with the policy of allowing at least one review of the facts, any new fact findings by the Appellate Division are reviewable in the court of appeals. N.Y. Civ. Prac. Law § 5501(b) (McKinney 1978).

364. Fed. R. Civ. P. 52. *But cf.* *Borden Co. v. Clearfield Cheese Co.*, 369 F.2d 96 (3d Cir. 1966) (when decision based upon documentary evidence, appellate court may make new findings).

365. *duPont v. duPont*, 59 Del. 206, 214, 216 A.2d 674, 680 (1966) (nonjury trial); *Troxclair v. Illinois Cent. R.R.*, 291 So. 2d 797, 799 (La. Ct. App.), *writ denied*, 294 So. 2d 834 (La. Ct. App. 1974); *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 811, 41 So. 2d 6, 10 (1949); *Estate of O'Connor v. Slaker*, 105 Neb. 88, 112, 179 N.W. 401, 410 (1920); *Nugent v. Saint Dunstan's College of Sacred Music*, 113 R.I. 666, 669, 324 A.2d 654, 656 (1974); *Southern States Life Ins. Co. v. Watkins*, 180 S.W.2d 977, 979 (Tex. Civ. App. 1944); *Hawaii Rev. Stat. § 641-2* (1976); *Ind. R. App. P. 15(M)*; *Ky. R. Civ. P. 52.01*; *Mont. R. App. Civ. P. 2*; *Or. Rev. Stat. § 19.125* (1977); *Utah R. Civ. P. 72(a)* (facts reviewable in equity actions); *Wyo. R. Civ. P. 72(c)*.

366. *Thompson v. Langley*, 44 Ala. App. 665, 667, 219 So. 2d 651, 652 (1969); *Conn. Gen. Stat. Ann. §§ 52-263* (West Supp. 1978); *Del. Const. art IV, § 11(1)(a)* (jury trials); *N.H. Rev. Stat. Ann. § 490:4* (1955 & Supp. 1977).

367. *Weaver Organization, Inc. v. Manette*, 41 A.D.2d 138, 143, 341 N.Y.S.2d 631, 635-36 (1st Dep't 1973) (per curiam), *modified*, 34 N.Y.2d 923, 316 N.E.2d 869, 359 N.Y.S.2d 552 (1974); *Ruegg v. Fairfield Sec. Corp.*, 284 A.D. 703, 134 N.Y.S.2d 562 (1st Dep't 1954), *aff'd*, 308 N.Y. 313, 125 N.E.2d 585 (1955); *Bernardine v. City of New York*, 268 A.D. 444, 448, 51 N.Y.S.2d 888, 892 (1st Dep't 1944), *aff'd*, 294 N.Y. 361, 62 N.E.2d 604 (1945).

368. *Callanan Indus., Inc. v. Fretto*, 42 A.D.2d 664, 345 N.Y.S.2d 704 (3d Dep't 1973)

made in the former context are called substitute findings, while those made in the latter context are known as original findings. Even in affirming a judgment, the Appellate Division may reverse fact findings of which it disapproves and make new findings.<sup>369</sup>

Whether to make a final determination or to grant a new trial remains in the discretion of the Appellate Division.<sup>370</sup> As with any other discretionary matter, no concrete rules exist. Generally, when the findings of a judge are reversed solely as against the weight of the evidence, a new trial is granted.<sup>371</sup> But when the evidence is very compelling in favor of a conclusion different from that of the trial judge, the Appellate Division will make new findings to support the judgment it directs.<sup>372</sup> Factors considered by the court in granting a new trial may include the complexity of the issues,<sup>373</sup> the possibility of additional proof,<sup>374</sup> and the degree of certainty of the record.<sup>375</sup>

Judicial economy seems to be the major policy reason for permitting the court to make a final determination. When it is obvious that, even if a new trial were granted, the basic facts could not be changed nor the defects or errors necessitating reversal cured, shuttling a case between appellate and trial courts serves no useful purpose. Authorizing the Appellate Division to make a final disposition in such cases saves considerable time and effort for the courts and the litigants. This broad grant of power may also evidence a legislative desire to aid the Appellate Division's performance of its supervisory function.<sup>376</sup> Appellate vigilance in this regard may serve to weed out possible

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(mem.) (new facts found in order to determine amount in issue); *Mobil Oil Corp. v. Livingston*, 37 A.D.2d 796, 324 N.Y.S.2d 666 (4th Dep't 1971) (mem.) (original findings made to support judgment which was then affirmed), *appeal dismissed*, 30 N.Y.2d 581, 281 N.E.2d 844, 330 N.Y.S.2d 797, *cert. denied*, 407 U.S. 924 (1972).

369. *Ely v. Barrett*, 224 N.Y. 550, 550-51, 120 N.E. 60, 60 (1918) (per curiam); *Rives v. Bartlett*, 215 N.Y. 33, 38, 109 N.E. 83, 85 (1915); *Canfield v. State*, 244 A.D. 888, 888, 280 N.Y.S. 415, 415 (4th Dep't 1935) (per curiam); *Reich v. Cochran*, 196 A.D. 248, 254, 187 N.Y.S. 53, 57 (1st Dep't 1921).

370. N.Y. Civ. Prac. Law § 5522 (McKinney 1978).

371. *E.g.*, *Caldwell v. Nicolson*, 235 N.Y. 209, 212, 139 N.E. 243, 244 (1923).

372. *York Mortgage Corp. v. Clotar Constr. Corp.*, 254 N.Y. 128, 133, 172 N.E. 265, 267 (1930); *Bernardine v. City of New York*, 268 A.D. 444, 448, 51 N.Y.S.2d 888, 892 (1st Dep't 1944), *aff'd*, 294 N.Y. 361, 62 N.E.2d 604 (1945).

373. *Schechtman v. Board of Educ.*, 25 A.D.2d 676, 268 N.Y.S.2d 407 (2d Dep't 1966) (mem.); *Katona v. Jennings*, 3 A.D.2d 642, 157 N.Y.S.2d 773 (4th Dep't 1956) (per curiam).

374. *Sternberger v. Second Gen. Partners, Inc.*, 29 A.D.2d 523, 524, 285 N.Y.S.2d 154, 155-56 (1st Dep't 1967) (mem.); *Baccialon v. Guerra*, 282 A.D. 755, 122 N.Y.S.2d 573 (1st Dep't 1953) (per curiam).

375. *Ponderosa Pines, Inc. v. Queens Farm Dairy, Inc.*, 48 A.D.2d 760, 368 N.Y.S.2d 358 (4th Dep't 1975) (mem.); *Calwil v. Calwil*, 34 A.D.2d 535, 309 N.Y.S.2d 24 (1st Dep't 1970) (mem.).

376. Chief Judge Breitel tells an interesting anecdote in this regard. The same case came to the Appellate Division three times, and each time the judgment was reversed as against the weight of the evidence. The judge below thought he had done a great service to the litigants and the court on the final remand by having the case settled. The appellate justices felt the case should never have been settled, however, because there was subornation of perjury each time. Breitel Interview, *supra* note 15, at B5. The appellate court unfortunately could not make a final determination to prevent this shuttling because, apparently, there was no credible evidence on which to base such a determination.

imperfections in the judicial system. On the other hand, because any new findings made by the Appellate Division are subject to review in the court of appeals,<sup>377</sup> this power would seem to be at odds with the court's screening function.

The Appellate Division has recognized that granting final judgment on a view of the facts different from that taken by the trial court "may, except in reasonably plain cases, lead to grave injustice."<sup>378</sup> Due account must be given to the fact that appellate determinations are made upon a printed record. Thus, some deference should be given to the trial judge's better ability to weigh the determinative facts and the demeanor of witnesses.<sup>379</sup> Faced with the conflicting interests of justice for the litigant and deference for the trial judge's determinations, judicial restraint must be exercised by the Appellate Division to avoid the "substitution by [that] court of its own speculative assessment for the findings of fact and corollary conclusions made by the Trial Judge after a long trial."<sup>380</sup>

The Appellate Division has created a further self-restraint on this power in its construction of article 6, section 5 of the New York Constitution which provides in essence that an appellate court may render final judgment unless granting a new trial is "necessary or proper."<sup>381</sup> The court has held that those cases involving sharp conflicts of evidence and credibility of witnesses fall within the "necessary or proper" exception, and, though the power exists to make a final determination in such cases, the more prudent course is to grant

377. N.Y. Civ. Prac. Law § 5501(b) (McKinney 1978).

378. *Rives v. Bartlett*, 215 N.Y. 33, 38, 109 N.E. 83, 85 (1915).

379. *Smith v. Smith*, 273 N.Y. 380, 7 N.E.2d 272 (1937); *Rives v. Bartlett*, 215 N.Y. 33, 109 N.E. 83 (1915); *Brunstein v. Brunstein*, 273 A.D. 847, 76 N.Y.S.2d 599 (1st Dep't 1948) (per curiam), *aff'd*, 298 N.Y. 871, 84 N.E.2d 637 (1949). Two examples of appellate restraint in this regard occur when the court reviews a criminal sentence or a motion for a new trial on the ground that the verdict was against the weight of the evidence. In the former case, the appellate court tends to defer to the judgment of the sentencing judge, *see, e.g.*, *People v. Tower*, 308 N.Y. 123, 125, 123 N.E.2d 805, 806 (1954); *People v. Ahmed*, 27 A.D.2d 729, 729-30, 277 N.Y.S.2d 444, 446 (1st Dep't 1967), although the court will not hesitate to modify the sentence in extreme situations. *See, e.g.*, *People v. Paperman*, 19 A.D.2d 656, 242 N.Y.S.2d 927 (2d Dep't 1963) (mem.) (court suspended sentence and held probation to be more appropriate for defendant, a first offender convicted of a misdemeanor); *People v. Burghardt*, 17 A.D.2d 912, 233 N.Y.S.2d 60 (4th Dep't 1962) (mem.) (in case of manslaughter conviction, court reduced sentence because defendant had no prior criminal record and was leader in church, civic, professional, and community affairs). In the case of a motion for a new trial, the court seems to apply an even stricter standard: "Great, if not conclusive, weight must be given to the action of the trial justice . . ." *Taylor v. Glens Falls Auto. Co.*, 161 A.D. 442, 451, 146 N.Y.S. 699, 705 (3d Dep't 1914) (Lyon, J., dissenting) (citing *Suhrada v. Third Ave. R.R.*, 14 A.D. 361, 362, 43 N.Y.S. 904, 905 (1st Dep't 1897)), *aff'd*, 220 N.Y. 740, 116 N.E. 1079 (1917); *see Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L. Rev. 635, 650 (1971). In this case, the Appellate Division is especially loathe to disturb the trial court's findings when the testimony is conflicting and the credibility of witnesses is critical to disposition of the action. *See* note 382 *infra* and accompanying text.

380. *Weaver Organization, Inc. v. Manette*, 41 A.D.2d 138, 144, 341 N.Y.S.2d 631, 637 (1st Dep't 1973) (McGivern, J., dissenting) (per curiam), *modified*, 34 N.Y.2d 923, 316 N.E.2d 869, 359 N.Y.S.2d 552 (1974).

381. N.Y. Const. art. 6, § 5. This qualification also comes into play in cases tried by a jury when the appellate court reverses on the facts. *See* notes 315-16 *supra* and accompanying text.



a new trial.<sup>382</sup> Thus, in light of the advantages of the power to make new findings and the self-restraint that the Appellate Division supposedly exercises in reviewing nonjury cases, the power would not appear to be too broad unless these limitations are not successfully applied in practice. Whether or not any abuse of this power does in fact occur will be discussed in Part IV.<sup>383</sup>

### C. Supervision of the Trial Court

#### 1. Misconduct of the Trial Judge

Among the myriad questions and issues open to review in the Appellate Division is the conduct of the trial judge.<sup>384</sup> When the Appellate Division determines that the conduct of the trial judge has deprived a party of a fair trial, a new trial will be granted.<sup>385</sup> Although no definitive rules exist to govern appellate supervision, interference may be warranted when the trial judge does not allow a party a reasonable amount of time to present his case,<sup>386</sup> when he makes prejudicial statements,<sup>387</sup> or when he comments upon or participates so extensively in the trial that the jury misconstrues his purpose.<sup>388</sup>

A trial judge in New York, however, should not be reversed unless his conduct is overbearing, for to do otherwise would be to render him a mere figurehead, passively sitting by to rule on objections.<sup>389</sup> Thus, Appellate Division intervention should be predicated upon a determination of the seriousness of the trial judge's misconduct. This, in turn, requires a total review of all the facts and circumstances of the particular case. When a judge, sitting without a jury, makes intemperate remarks which evidence bias and indicate that the facts may not have been evaluated fairly, the Appellate Division should reverse. However, if the trial judge's conduct is any less prejudicial, the appellate court probably should not interfere. Whether the point of intervention has been reached, however, remains within the appellate court's discretion.<sup>390</sup>

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382. *Nancy II v. Larry II*, 50 A.D.2d 963, 375 N.Y.S.2d 893 (3d Dep't 1975) (mem.); *Power v. Falk*, 15 A.D.2d 216, 218, 222 N.Y.S.2d 261, 263-64 (1st Dep't 1961) (per curiam); *Wilkinson v. State*, 9 A.D.2d 859, 192 N.Y.S.2d 962 (4th Dep't 1959) (mem.).

383. See note 442 *infra* and accompanying text.

384. N.Y. Civ. Prac. Law § 5501(a)(4) (McKinney 1978).

385. *Schwartz v. Samuel Frank & Co.*, 225 A.D. 763, 232 N.Y.S. 877 (2d Dep't 1928).

386. *Soto v. Correa*, 20 A.D.2d 694, 246 N.Y.S.2d 744 (1st Dep't 1964) (mem.) (when counsel for plaintiff had been placed under undue pressure to complete the trial within one hour, a new trial was ordered in the interests of justice).

387. *Samuel v. Porchia*, 40 A.D.2d 697, 698, 336 N.Y.S.2d 387, 388 (2d Dep't 1972) (mem.) (trial court erred in charging jury that plaintiff's father was not only negligent but "stupid, careless and an idiot" because such comments may have affected resolution of credibility issue).

388. Cf. *London v. Smith-Cairns Motor Sales Co.*, 23 A.D.2d 657, 657-58, 257 N.Y.S.2d 877, 878-79 (1st Dep't 1965) (mem.) (plaintiff not entitled to a new trial even though trial court excessively injected itself into the proceedings because facts clearly established no right to recovery), *aff'd*, 17 N.Y.2d 497, 214 N.E.2d 378, 267 N.Y.S.2d 216 (1966).

389. 4 Weinstein, Korn & Miller, *supra* note 149, ¶ 4404.15.

390. Compare *Levy v. Reilly*, 18 A.D.2d 632, 632, 234 N.Y.S.2d 1021, 1022 (1st Dep't 1962) (mem.) (judgment for defendant reversed and new trial ordered when the judge constantly

## 2. The Trial Court's Use of Discretion

The trial court's exercise of discretion also is a permissible subject for appellate review. The Appellate Division may choose to give such discretion a "hands-off" treatment, thus making the lower court judgment virtually unreviewable in this respect, or the court may deny discretionary immunity, allowing reversals simply because it disagrees with the trial court's exercise of discretion.<sup>391</sup> Although the Appellate Division usually will not reverse in the absence of clear abuse or exceptional circumstances,<sup>392</sup> it has the power to find that the trial court's discretionary rights were not properly exercised simply because the Appellate Division would have decided the question differently if it were faced with a similar set of facts.<sup>393</sup>

In light of the Appellate Division's de novo review powers, when a question of abuse of discretion is presented, the possibilities, indeed the probabilities, for a substitution of appellate judgment are great. The Appellate Division, however, shows a proper concern for this danger, for it will generally not interfere in matters within the discretion of the trial court unless some substantial right of the unsuccessful party is prejudiced, some remedy is impeded, or some serious inconvenience falls upon the appellant.<sup>394</sup>

### D. Summary

The preceding discussion has attempted to show that the Appellate Division's review powers are extremely broad and highly discretionary, but that certain judicial and constitutional restraints are imposed in recognition of the possible abuse that such broad powers may entail. For example, although the Appellate Division will reverse a jury verdict when no reasonable person could agree with the findings below, it will grant a new trial in all cases in which the plaintiff has presented at least a prima facie case. Because of the constitutional requirement that the jury be the factfinder in such cases, the court may make a final determination only if no evidence supports the verdict as a matter of law. In addition, when the case is before a judge alone, the

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interrupted and interfered with the examination of witnesses and injected intemperate remarks "perhaps provoked by the parties") *with* *Fernandez v. Jordan*, 34 A.D.2d 518, 520, 308 N.Y.S.2d 403, 406 (1st Dep't 1970) (mem.) (no reversal despite the trial court's lack of restraint in saying that witnesses "spoke out of both sides of their mouths"), *aff'd*, 28 N.Y.2d 510, 267 N.E.2d 880, 319 N.Y.S.2d 65 (1971).

391. See *Rosenberg*, *supra* note 379, at 643-53.

392. See, e.g., *Bilyou v. State*, 33 A.D.2d 604, 304 N.Y.S.2d 519 (3d Dep't 1969) (mem.); *In re Case*, 24 A.D.2d 797, 263 N.Y.S.2d 861 (3d Dep't 1965) (mem.).

393. *Phoenix Mut. Life Ins. Co. v. Conway*, 11 N.Y.2d 367, 370, 183 N.E.2d 754, 755-56, 229 N.Y.S.2d 740, 742 (1962); *O'Connor v. Papertsian*, 309 N.Y. 465, 471-72, 131 N.E.2d 883, 886 (1956); *Pordy v. Scot Serv. Co.*, 15 A.D.2d 911, 225 N.Y.S.2d 953 (1st Dep't 1962) (mem.); *Jacobs v. Milazzo*, 9 A.D.2d 950, 195 N.Y.S.2d 679 (2d Dep't 1959) (mem.); *Siegler v. Massachusetts Accident Co.*, 255 A.D. 1031, 8 N.Y.S.2d 751 (4th Dep't 1938) (mem.); 7 *Weinstein, Korn & Miller*, *supra* note 149, ¶ 5701.13. For a discussion of the exercise and review of judicial discretion in the federal system, see *Wallach, The Application of Judicial Discretion*, N.Y.L.J., Aug. 14, 1978, at 1, col. 2.

394. *Mongaup Valley Co. v. Nyamco Assocs.*, 247 A.D. 694, 697, 289 N.Y.S. 221, 224 (3d Dep't 1936); *Steinleger v. Frankel*, 117 Misc. 693, 697, 192 N.Y.S. 74, 76-77 (Sup. Ct. App. T. 1922).

Appellate Division may accept his findings, reverse and remand for a new trial, or make findings of its own. Great deference, however, is accorded the trial judge concerning credibility of witnesses and areas within his discretion. Moreover, with an acute awareness of the responsibility inherent in appellate review, the court generally indulges in presumptions and draws inferences freely in order to sustain the lower court's decision; it rarely will do so in order to reverse the lower court.<sup>395</sup>

Despite these restraints, however, serious problems remain. The Appellate Division's broad de novo review power, its ill-defined discretionary authority, and each judge's innumerable unique traits, dispositions, and habits could combine to shape decisions which merely substitute appellate judgment for trial court determination. One danger of having the power to make such an appellate disposition is that its excessive exercise may demoralize the trial judges, even though the authority to make such a determination aids the Appellate Division in ensuring substantial justice to the litigants. In light of these possible abuses and the significant differences between the Appellate Division's review powers and those of other appellate courts, certain questions remain: Is the Appellate Division interfering too much with the functions of the trial court? Or, in light of its own functions and goals, is this degree of power necessary? Part IV of this study will discuss whether these dangers actually exist,<sup>396</sup> and Part V will attempt to answer these questions.<sup>397</sup>

#### IV. AN EMPIRICAL STUDY: THE EXERCISE OF THE APPELLATE DIVISION'S POWERS

The preceding discussions have shown that although the Appellate Division's broad review powers serve the court's three functions, they also present a potential for abuse and raise questions as to the court's efficiency. In light of these findings, this part will attempt to determine how the Appellate Division actually exercises its powers. Specifically, it will analyze the effect of a wide range of variables on appellate decisionmaking in a random sample of cases decided by the First Department.<sup>398</sup> Several articles have been written discussing the general nature of the appellate court's role,<sup>399</sup> but empirical research on the actual performance of these functions at the intermediate appellate court level is lacking.<sup>400</sup> This study is a step toward remedying that

395. *E.g.*, *In re Haas*, 259 A.D. 791, 18 N.Y.S.2d 436 (4th Dep't 1940) (mem.); *see* 21 N.Y. Jur. *Evidence* § 106 (1961). Once an error is shown to exist, however, the burden is on the respondent to show that it is harmless; the court usually makes no presumption of harmlessness. *Hanlon v. Ehrich*, 80 A.D. 359, 361, 80 N.Y.S. 692, 694 (2d Dep't 1903) (presumption of prejudice to defendant by improper exclusion of evidence), *aff'd*, 178 N.Y. 474, 71 N.E. 12 (1904).

396. *See* notes 468-75 *infra* and accompanying text.

397. *See* notes 541-47 *infra* and accompanying text.

398. *See* note 416 *infra* and accompanying text.

399. *E.g.*, Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 Ga. L. Rev. 507 (1969); Parker, *Improving Appellate Methods*, 25 N.Y.U. L. Rev. 1 (1950); Rosenberg, *supra* note 379.

400. The most comprehensive empirical study of state appellate courts to date is found in Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 Stan. L. Rev. 121 (1977) [hereinafter cited as *Business*]. The results of that study are discussed and analyzed in Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 Yale

lack of research. Moreover, the drafters of New York's statute governing appeals issued a mandate that the CPLR should be amended if shown by experience to be necessary.<sup>401</sup> As an initial response to that mandate, this study investigates the operation of the system and examines the need for amendment. In this regard, the study will also show the need for a more exhaustive survey and, more importantly, the direction such a survey should take in order to isolate inefficiencies in New York's procedural scheme.

#### A. Methodology of the Study

The first concern of the study was the possible adverse impact of the extreme ease of appealability on the caseload of the Appellate Division.<sup>402</sup> The First Department, for example, has one of the largest caseloads in the United States.<sup>403</sup> This part, then, will attempt *inter alia* to determine whether the Appellate Division's caseload is too large and, if so, what areas are in need of restricted appealability because of an increased probability of frivolous appeals. To answer the second question the variables chosen included a case's disposition on appeal, the nature of the case, the parties, the relief sought on appeal, and the procedural posture of the case.<sup>404</sup> It was expected that types of cases most susceptible to frivolous appeals would be indicated by a significant probability of affirmance, compared to the overall affirmance rate.<sup>405</sup> These variables were also considered to be a measure of the purity of the system in terms of its ability to withstand the impact of various external factors. Specifically, variables having a significant influence on the Appellate Division's exercise of discretion were expected to signify areas of partiality in the appellate decisionmaking process.<sup>406</sup> Finally, the caseload statistics were also used to assess the Appellate Division's performance of its screening function by determining the number of cases appealed to the court of appeals after an Appellate Division review.<sup>407</sup>

The second area of examination focused on the court's broad scope of review. The functions of the Appellate Division—specifically, supervising the lower courts, screening for the court of appeals, and ensuring substantial

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L.J. 1191 (1978) [hereinafter cited as *Courting Reversal*]. Other studies include: Baum, *Decisions To Grant and Deny Hearings in the California Supreme Court: Patterns in Court and Individual Behavior*, 16 Santa Clara L. Rev. 713 (1976); Birnbaum & Ellman, *Pre-Argument Settlement Process in an Intermediate Appellate Court: The Second Department Experience*, 43 Brooklyn L. Rev. 31 (1976); Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 Hous. L. Rev. 1101 (1974); Fair, *An Experimental Application of Scalogram Analysis to State Supreme Court Decisions*, 1967 Wis. L. Rev. 449; Wanner, *The Public Ordering of Private Relations*, 8 Law & Soc'y Rev. 421 (1974).

401. Fifth Preliminary Report, *supra* note 154, at 145.

402. See note 231 *supra* and accompanying text.

403. See note 2 *supra* and accompanying text.

404. Procedural posture, as the term was used in this study, included both the lower court disposition of a case and the basis of Appellate Division jurisdiction over the appeal. See *Business*, *supra* note 400, at 127.

405. This type of comparison was also made by the *Courting Reversal* study, *supra* note 400, at 1197-98.

406. For an explanation of "significance," as measured in this study, see note 421 *infra* and accompanying text.

407. See notes 431-32 *infra* and accompanying text.

justice—support the existence of this review power.<sup>408</sup> This study, however, was concerned with the advisability of placing stricter limitations on the scope of review, in light of the potential for abuse.<sup>409</sup> The research was aimed at investigating the extent to which, and the circumstances in which, the court interjects its own view, particularly when deciding questions of fact.<sup>410</sup> The variables which were selected to measure the degree of intervention included the nature of the question, the existence of a jury trial in the lower court,<sup>411</sup> and the incidence of each possible appellate disposition.<sup>412</sup>

In a related question, the research measured the effectiveness of appellate supervision of trial courts. Reversal rates were used to determine the degree of supervision exercised in the discovery and trial phases of proceedings below and to indicate a need, or lack thereof, for extensive supervision.<sup>413</sup> The forms of opinions were also examined as an indication of the amount of guidance and direction given to trial judges.<sup>414</sup>

The data used in this study was collected from a total of 300 cases decided in the First Department—150 from the year 1965 and 150 from the year 1975. These years were chosen because the respective benches consisted of the same justices throughout the time periods studied. This ensured that any variation in the results could not be attributed to changes in the judicial philosophies of successive benches.<sup>415</sup> The ten year time interval was chosen in an effort to discover any significant trends. The cases were selected by matching a list of random numbers to the index numbers assigned to the records on appeal by the Appellate Division.<sup>416</sup>

The data was collected by four student researchers who coded information from each case according to the variables chosen. Although some of the variables required subjective decisions on the part of the researchers,<sup>417</sup> a uniform list of classifications was prepared in order to minimize subjectivity. In coding the case information, the researchers looked first to the CPLR 5531 statement which every appellant must file.<sup>418</sup> The statement includes, among other things, the names of the parties, the nature of the action, and the

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408. See notes 20, 62-67, 82 *supra* and accompanying text.

409. See notes 230-31, 317 *supra* and accompanying text.

410. See notes 370-382 *supra*, 442 *infra* and accompanying text.

411. See notes 468-75 *infra* and accompanying text.

412. See notes 436, 442 *infra* and accompanying text.

413. This study hypothesized that a high reversal rate would indicate a need for extensive supervision. See *Courting Reversal*, *supra* note 400, at 1191-92, 1195-96 (characterizing reversal as the primary means of "supervisory communication").

414. For a discussion of the New York statutes governing the requirement that appellate courts give a written rationale for decisions, see Note, *Written Opinions in the Modern Legal System: Publish and Perish*, 41 Alb. L. Rev. 813 (1977).

415. See Breitel Interview, *supra* note 15, at B1.

416. The random number list was obtained from A. Edwards, *Statistical Methods for the Behavioral Sciences* 472-76 (1966) and from D. B. Owen, *Handbook of Statistical Tables* 519 (1962).

417. For example, certain cases, such as a motion by an attorney to withdraw as counsel, could not be classified as to area of law, and, therefore, were placed in a category termed "other." Researchers, however, avoided resorting to this category, and, out of a total of 300 cases, only 12 could not be classified. See Appendix I, Table J.

418. N.Y. Civ. Prac. Law § 5531 (McKinney 1978).

procedural history of the case.<sup>419</sup> If this statement did not contain sufficient information, the researchers referred to the statement of facts in each party's brief.<sup>420</sup>

The coded information was statistically analyzed, and raw percentages and statistical significance under the chi-square test were determined.<sup>421</sup> Hypotheses were tested by comparing significant differences between the two years, as

419. *Id.* § 5531(2), (5), (6).

420. The panel of justices, one of the chosen variables, was printed on the first page of each case.

421. The chi-square statistic of significance is used to evaluate the probability that the distribution of results obtained occurred only by chance. In testing the interaction among variables, the chi-square value is computed by comparing the observed values for each category with the expected values—the values that would occur by chance alone. Thus, to use a hypothetical example, in order to assess the significance of the gender of judges on a particular bench over two years, the data would be tabulated as follows:

	1900	1975	Total
Males	95	150	245
Females	5	50	55
Total	100	200	300

The first step in calculating chi-square is to determine the expected value for each cell by multiplying the row and column totals for that cell and dividing the product by the total number of observed values in the entire table. Thus, in the hypothetical above, the expected value for the male/1900 cell is  $(245 \times 100)/300 = 81.667$ . Similarly, for the female/1900 cell, it is 18.333; for the male/1975 cell, 163.333; and for the female/1975 cell, 36.667. Then to calculate the actual chi-square value, the following formula is performed for each cell:  $(\text{observed value} - \text{expected value})^2/\text{expected value}$ . The sum of the values thus calculated for each cell equals the chi-square significance value. The calculation of the chi-square value for the hypothetical above would proceed as follows:

$$\frac{((95 - 81.667) - .5)^2}{81.667} + \frac{((5 - 18.333) - .5)^2}{18.333} + \frac{((150 - 163.333) - .5)^2}{163.333} + \frac{((50 - 36.667) - .5)^2}{36.667} = 16.499.$$

(Because the data for this hypothetical was such that entry of one observed value in the table enabled all the other observed values to be obtained through calculation, the statistic must be corrected for continuity lacking in the data by reducing the absolute value of the difference between the observed and expected scores by .5 before squaring them.)

The chi-square value calculated is then compared to a standard table of chi-square values to which various significance levels are assigned according to the number of cells in the basic data table. The minimum level of significance recognized by this study was .05, which means that the probability that the distribution of the observed values would occur randomly was less than 1 chance in 20. Thus, if the calculated chi-square value exceeds the chi-square value listed in the table for this probability, then the chances of the observed frequency distribution occurring randomly are less than 1 in 20. A value lower than .05 is an even stricter standard of significance. For example, if a value is significant at .01, there is only 1 chance in 100 that the result occurred randomly. In the hypothetical above, the chi-square value of 16.449 would be significant at .005, meaning that the chances that the increase in female judges in 1975 occurred by chance were less than 1 in 200. For a general discussion of use of the chi-square test, see Hallock, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation*, 23 Vill. L. Rev. 5, 12-13 (1977).

well as by measuring the effect of the variables on the outcome of the appeal within the individual years. The raw percentages of the incidences of each variable were also compared when relevant.<sup>422</sup>

Members of the study also interviewed five justices of the First Department, both current and retired.<sup>423</sup> The primary purpose of these interviews was to supplement the statistical analysis with the justices' interpretations of the results. Copies of the results were furnished to each justice prior to the interviews, and they were encouraged to formulate general comments regarding the statistics. In addition, each justice answered a standard list of questions which were based on the research done for Parts I, II, and III of the study, as well as on the statistical results.<sup>424</sup> This interviewing technique was employed in order to encourage both general and specific observations.<sup>425</sup>

### B. *Hypotheses, Results, and Interpretations*

#### 1. The Burdensome Caseload of the Appellate Division

Beginning in 1960, the caseload of the Appellate Division has steadily increased, posing a serious threat to the performance of its functions. The Judicial Conference of the State of New York,<sup>426</sup> in its annual reports on the performance of court operations, has expressed growing concern regarding this increase and the ensuing delay in the disposition of cases.<sup>427</sup> Although the Conference does not specifically evaluate the backlog in each department of the Appellate Division, the statistics published in these reports clearly point to a heavy burden on the First Department.<sup>428</sup> In addition, the Conference's

422. The primary purpose for computing raw percentages was to provide an alternative means for comparing two variables when their interaction was not statistically significant. In addition, a limited number of comparisons was made using absolute numbers when the categories were so widely distributed as to render percentages meaningless. *See, e.g.,* Appendix I, Table A.

423. Four of the justices were retired: Charles D. Breitel, James B.M. McNally, Emilio Nuñez, and Aron Steuer. One justice, J. Robert Lynch, is currently on the bench.

424. For a list of the questions asked of each justice, see Appendix II.

425. The interviews were conducted by members of the study in teams of two, and all of the interviews took place in the offices of the justices. Each researcher compiled notes of the conversations, and the notes were then compared for completeness and accuracy. Transcripts are on file with the *Fordham Law Review*, but, in order to preserve confidentiality, they are not available for public inspection.

One problem with the transcription of conversations is that punctuation must be added somewhat arbitrarily by the interviewer. *See Note, Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 *Yale L.J.* 1126, 1143 n.80 (1978). Nevertheless, in the interest of clarity, the authors of this study have added punctuation to any quotation, where necessary.

426. The Judicial Conference is composed of the Administrative Board, which includes the chief judge of the court of appeals, the presiding justices of the four Appellate Divisions, and four supreme court justices not designated to the Appellate Division. The Conference also includes one surrogate, one county judge, one judge of the court of claims, one judge of the family court, one judge of the Civil Court of New York City, and one judge of the Criminal Court of New York City. Eleventh Ann. Rep. N.Y. Jud. Conference 9 (1966).

427. Twenty-Third Ann. Rep. N.Y. Jud. Conference 31 (1978); Twenty-Second Ann. Rep. N.Y. Jud. Conference 27-28 (1977).

428. From July 1, 1964 through June 30, 1965, there were 1,520 records on appeal filed and 1,587 dispositions of judgments or orders appealed from in the First Department. Eleventh Ann. Rep. N.Y. Jud. Conference 421 (1966). In comparison, the most recent statistics issued by the

most recent report refers to an overall increase in the pending caseload of the supreme court.<sup>429</sup> As long as the backlog continues to grow at the trial court level, the caseload of the Appellate Division will increase concomitantly.<sup>430</sup>

Notwithstanding this caseload problem, however, it appears from the statistics in the Judicial Conference reports that the Appellate Division is effectively performing its screening function for the court of appeals. In 1966, the Conference reported 548 records on appeal filed with the court of appeals;<sup>431</sup> in 1978, 588 records on appeal were filed<sup>432</sup>—only a slight increase. Nevertheless, because the rising pressure created by the caseload on one side and the importance of screening on the other can result in misallocation of the Appellate Division's time to meritless appeals, the need for controlling the number of appeals from the lower courts is becoming more extreme.

## 2. Disposition of Appeal

The three basic dispositions on appeal—affirmance, reversal and modification—were analyzed to discover how often the Appellate Division uses its decisionmaking tools, as well as to answer the overall question of how much supervision is necessary.<sup>433</sup> In terms of the overall question, this variable was crucial as a standard of comparison for all other variables. For example, the amount of necessary supervision was expected to vary depending on the nature of the case or the relief sought on appeal.<sup>434</sup>

On the basis of the discussions in Parts II and III of this study, a high overall affirmance rate was expected. In view of the easy appealability described in Part II, a vast number of appeals as of right was anticipated, and because the Appellate Division has no choice but to hear such appeals, regardless of actual merit, a high affirmance rate was predicted for these cases. Conversely, when an appeal is heard by permission, the court has recognized its merit, and this would suggest a greater likelihood of reversal.<sup>435</sup>

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Conference show 2,461 records on appeal filed and 2,366 dispositions of judgments or orders appealed from—a substantial increase in both categories. Twenty-Third Ann. Rep. N.Y. Jud. Conference 51 (1978). During these same periods, these reports show that the number of motions decided increased from 1,843 to 4,281. Eleventh Ann. Rep. N.Y. Jud. Conference 421 (1966); Twenty-Third Ann. Rep. N.Y. Jud. Conference 51 (1978).

429. Twenty-Third Ann. Rep. N.Y. Jud. Conference 31 (1978).

430. Chief Judge Kaufman has asserted that despite the Second Circuit's success in reducing its pending caseload, the court would continue to face an "avalanche" of appeals until the trial courts reduced their backlog. See N.Y.L.J., Jan. 3, 1977, at 1, col. 2.

431. Eleventh Ann. Rep. N.Y. Jud. Conference 420 (1966).

432. Twenty-Third Ann. Rep. N.Y. Jud. Conference 48 (1978).

433. Reversals were further subdivided to indicate the entrance of a new judgment, the order of a new trial, or the making of new findings of fact. See Table 1 *infra*; Appendix I, Table A. Cases in which the Appellate Division made new findings of fact were isolated by reading the opinions of all cases which were reversed. The opinions also noted whether a case was "reversed on the facts." See Appendix I, Table A; note 442 *infra* and accompanying text.

434. See notes 490-506 *infra* and accompanying text.

435. Justice Lynch suggested some type of preliminary screening for appeals as of right in order to focus on meritorious appeals. Lynch Interview, *supra* note 16, at A1. Because appeals by



Moreover, the analysis in Part III suggests that the court exercises a certain degree of self-restraint in reviewing facts and that the justices are reluctant to make new findings. This, too, would be reflected in a high affirmance rate.

As shown by Table 1, the expectation of a high affirmance rate was fulfilled; the overall affirmance rate<sup>436</sup> for 1975 was 75.9%, and the rate for 1965 was 72.0%.<sup>437</sup>

Table 1  
DISPOSITION ON APPEAL

		Affirmed	Reversed	Modified	Total
1975	No. of cases	110	20	15	145 <sup>438</sup>
	% of total	75.9%	13.8%	10.3%	100%
1965	No. of cases	108	35	7	150
	% of total	72.0%	23.3%	4.7%	100%

Several interpretations may be placed upon this result. It may be argued that in light of such a high affirmance rate the Appellate Division's time is not efficiently allocated to those appeals most deserving of review.<sup>439</sup> Particularly, affirmance rates for certain types of appeals that were significantly higher than the aggregate rate would evidence a misallocation of time to perfunctory, meritless appeals.<sup>440</sup> An alternative interpretation is that in view of further appeals to the court of appeals, a high affirmance rate is an important indicator of the extent of the intermediate court's screening function.<sup>441</sup> Under this interpretation the Appellate Division's time would not be considered to be misallocated.

As expected, despite the broad review powers, the Appellate Division does not often step in to make new determinations.<sup>442</sup> This may mean that the

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permission must go through a screening process, the presumption is that the Appellate Division would not have granted permission unless there was a likelihood of reversible error.

436. The overall rate includes affirmances of both final and intermediate orders. See Tables 1, 3 *infra*.

437. The increase in affirmance rate over the 10-year period was not statistically significant.

438. Five cases in which the appeals were withdrawn or dismissed were not classified.

439. See Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Divisions*, 16 Buffalo L. Rev. 307, 348 (1966). The drafters of the CPLR also expressed a concern with the efficient allocation of appellate courts' time and energy. Fifth Preliminary Report, *supra* note 154, at 145.

440. It was primarily for this reason that the nature-of-the-case and relief-sought-on-appeal variables were isolated.

441. See note 15 *supra* and accompanying text.

442. There were only two reversals on the facts in 1975 out of a total of 14 reversals of final and intermediate orders during that year. In 1965, there were 11 reversals on the facts out of a total of 26 reversals. See Appendix I, Table A. For a breakdown of the disposition of final versus

court is not interfering excessively, or it also could indicate that little supervision is necessary. In apparent contrast to this result, however, a comparison of 1965 and 1975 dispositions pointed to a significant decrease in reversals and a significant increase in modifications on appeal.<sup>443</sup> At first blush, the rise in modifications seems to indicate a more frequent exercise of the court's supervisory function. This conclusion derives from the interpretation that cases are becoming more complicated, requiring the Appellate Division to look at facts more closely in order to segregate and clarify the issues in a case.<sup>444</sup> On the other hand, the increase in modifications may also be explained in ways that evidence attempts merely to control the supreme court's caseload, and, in turn, that of the Appellate Division itself. For example, when modified, a case does not have to be retried, whereas a reversal is usually followed by further proceedings.<sup>445</sup> This would certainly be true if the increase in modifications merely indicates a greater tendency to modify damages.<sup>446</sup>

### 3. Final and Intermediate Orders and Appealability as of Right

The disposition on appeal was further classified into final or intermediate orders.<sup>447</sup> The primary reason for isolating this data arose out of a concern that the Appellate Division might be overburdened with appeals of intermediate orders. This concern was based upon the belief that intermediate orders are often perfunctory and are frequently used as a delaying tactic.<sup>448</sup> A high affirmance rate was predicted as an indication that many of these appeals are frivolous. The final/intermediate distinction was also used to determine and evaluate the points during the proceedings below at which the greatest amount of appellate supervision is necessary.<sup>449</sup>

Raw percentages were computed to indicate how many intermediate orders the Appellate Division is required to review. The results in Table 2 show a significant decrease in the percentage of appeals from intermediate orders in 1975.<sup>450</sup>

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intermediate orders, see Table 2 *infra*. Two justices confirmed this tendency to affirm fact questions. Lynch Interview, *supra* note 16, at A1; Steuer Interview, *supra* note 206, at 5.

443. These trends were statistically significant at .05 with a chi-square value of 6.82.

444. Judge Breitel noted that when there are a large number of appeals in a given area of law, the court becomes routine in its approach. As the law in these areas becomes settled, the court's focus shifts to more complicated or unsettled matters. Breitel Interview, *supra* note 15, at A4. Justice Nuñez maintained that if the law is settled, lawyers feel that an appeal is a waste of time. Nuñez Interview, *supra* note 16, at 2.

445. See notes 371-75 *supra* and accompanying text

446. For a comparison of modifications with the nature of the case, see Appendix I, Table B.

447. Motions for summary judgment that were granted were classified as final judgments. Denials of summary judgment were classified as intermediate because they did not end the litigation.

448. Two justices reinforced this belief during the interviews. Breitel Interview, *supra* note 15, at B2; Steuer Interview, *supra* note 206, at 5.

449. For instance, a high affirmance rate for intermediate orders might suggest a lesser need to supervise lower court intermediate decisions. See note 433 *supra*.

450. The decrease was significant at .01 with a chi-square value of 9.43.

Table 2  
RAW PERCENTAGES OF FINAL AND INTERMEDIATE ORDERS

		Final	Intermediate	Total
1975	No. of cases	120	25	145
	% of total	82.8%	17.2%	100%
1965	No. of cases	105	45	150
	% of total	70.0%	30.0%	100%

Perhaps the decrease can be attributed to lawyers' being more cognizant of their chance of success in appealing an intermediate order; attorneys may be content to wait for the intermediate order to be reviewed upon appeal of the final judgment.

The comparison of intermediate orders with the affirmance rate, as shown in Table 3, yielded a significant increase from 1965 to 1975.<sup>451</sup> The justices proposed two explanations for the decrease in reversals of intermediate orders: the necessity of saving time<sup>452</sup> and the feeling that practice motions are often more perfunctory than worthwhile.<sup>453</sup> Another interpretation could be a reluctance on the part of the appellate judges to interfere with the trial judge before a final determination is made on a full record.<sup>454</sup>

The jurisdiction of the Appellate Division can be invoked either as of right or by permission. This variable was chosen as an indicator of the extreme ease of appealability in New York.<sup>455</sup> Raw percentages were calculated in each category,<sup>456</sup> and, in light of the broad statutory provisions,<sup>457</sup> the vast majority of appeals were expected to be as of right. This was, in fact, true,<sup>458</sup>

451. The increase was significant at .05 with a chi-square value of 11.42.

452. For example, technically the names of witnesses are not included in a bill of particulars. Therefore, a motion made in the trial court to exclude the names of witnesses from a bill of particulars should be granted. However, even if the motion is denied, the appellate court will likely affirm with costs because this is a matter of "no consequence." Thus, the court avoids taking the time to write an opinion reversing or modifying the ruling on the motion and reduces the work of the lower court by not remanding the matter. Breitel Interview, *supra* note 15, at B2-3. Justice Steuer gave an almost identical example of the court's efforts to save time. Steuer Interview, *supra* note 206, at 5.

453. See note 448 *supra* and accompanying text. Justice Steuer also suggested that the increase in affirmances represents a loose adaptation of the federal practice, see note 227 *supra* and accompanying text, insofar as practice motions that do not materially affect the outcome of the litigation are almost automatically affirmed. Steuer Interview, *supra* note 206, at 5.

454. See Breitel Interview, *supra* note 15, at B9.

455. See pt. II(A)(1) *supra*.

456. In 1975, 94.6% of the total number of appeals, including both final and intermediate orders, were appeals as of right. In 1965, 97.3% were appeals as of right. See Appendix I, Table C.

457. See notes 140-87 *supra* and accompanying text.

458. In 1975, there were 8 appeals by permission out of a total 150 cases. In 1965, only 4 out of 150 appeals were by permission. See Appendix I, Table C.

Table 3  
DISPOSITION OF FINAL AND INTERMEDIATE ORDERS ON APPEAL

		FINAL			INTERMEDIATE		
		Affirmed	Reversed or Modified	Total	Affirmed	Reversed or Modified	Total
1975	No. of cases	94	26	120	16	9	25
	% of total	78.3%	21.7%	100%	64.0%	26.0%	100%
1965	No. of cases	85	22	107	24	19	43
	% of total	79.4%	20.6%	100%	55.8%	44.2%	100%

and, in view of the high overall affirmance rate, it indicates that many of these appeals may be perfunctory or frivolous.<sup>459</sup>

#### 4. Nature of the Question Raised on Appeal and Jury Cases

The nature of the question was characterized as law,<sup>460</sup> fact,<sup>461</sup> or mixed.<sup>462</sup> In addition, cases involving factual disputes on appeal were specifically noted. The statistics on these variables included raw percentages within each year and over the ten year period<sup>463</sup> which reflected how often the Appellate Division is required to exercise its fact review powers. The study also compared the nature of the question with the disposition on appeal<sup>464</sup> to determine the extent to which the court substitutes its own view of the facts.<sup>465</sup>

A high affirmance rate was expected for questions of fact and appeals involving factual disputes. This hypothesis stemmed from the discussion in Part III suggesting that the Appellate Division sparingly exercises its power to make new findings.<sup>466</sup> Although the results were not statistically significant, the affirmance rate for fact questions was 90% in 1975 compared to the overall rate of 75.7%.<sup>467</sup>

Finally, factual disputes were analyzed according to whether the case had been tried before a jury. The jury cases were expected to show a lower incidence of appeals relating to factual findings than nonjury cases because facts decided by twelve jurors are generally given more weight than those decided by one judge.<sup>468</sup> Thus, litigants in jury cases were expected to raise more law questions than fact questions on appeal because of the greater chances of success in presenting law questions. Although the interaction between these two variables was not statistically significant, the absolute numbers recorded for these variables conformed to this expectation.<sup>469</sup>

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459. See note 435 *supra* and accompanying text.

460. It should be noted that criminal cases involving sentencing were classified as a question of law.

461. For a definition of a fact question, see note 22 *supra*.

462. It was difficult to set precise guidelines for coding the nature of the question. Several justices admitted that the court itself is sometimes arbitrary in classifying a decision as "on the law" or "on the facts" because the distinction is not clearcut. Breitel Interview, *supra* note 15, at B8; Lynch Interview, *supra* note 16, at B2; Steuer Interview, *supra* note 206, at 5. For all three classifications—law, fact, or mixed—the researchers looked primarily to the CPLR 5531 statements, see notes 418-19 *supra*, or the statements of facts contained in each brief. The statements of facts were particularly helpful in determining whether facts were in dispute.

463. See Appendix I, Table D.

464. See Appendix I, Table E. This comparison was not statistically significant.

465. A comparison was also made between the nature of the case and the nature of the question to test the hypothesis that a greater number of factual and mixed questions arise in cases where the applicable law is relatively settled. These categories, however, did not interact significantly.

466. See notes 378-83, 460 *supra* and accompanying text; Appendix I, Table A.

467. Compare Appendix I, Table E with Table 1, *supra*.

468. Steuer Interview, *supra* note 206, at 2; note 317 *supra* and accompanying text.

469. Out of a total of 99 cases involving factual disputes, only 17 were connected with a jury trial below—5 in 1965 and 12 in 1975. See Appendix I, Table F.

The study also analyzed jury trial cases<sup>470</sup> in view of the potential effect of this variable on the exercise of review powers. A high affirmance rate was predicted because the Appellate Division was expected to disturb a jury's verdict only rarely.<sup>471</sup> A high reversal rate, on the other hand, would indicate excessive intrusion into the jury's function.<sup>472</sup> Jury trials increased significantly from 1965 to 1975.<sup>473</sup> This may be attributed to the substantial increase in criminal appeals to the Appellate Division.<sup>474</sup> Although the affirmance rate for jury trials was not significantly higher than the overall affirmance rate, the reversal rate was much lower in 1975 than in 1965.<sup>475</sup> This may indicate that the Appellate Division is reviewing more jury trials, but interfering with them less.

### 5. Nature of the Parties

The parties were classified as private, corporate, or government,<sup>476</sup> with the further classification under each of these categories as appellant or respondent. This variable was chosen primarily to examine the effect of the nature of the parties on the outcome of an appeal and on the impartiality of the system in general. The three subclassifications were selected to reflect the disparity in the parties' available resources.<sup>477</sup> Based upon the assumption that corporate and government parties have more resources at their disposal than do private parties, they would be expected to succeed more frequently on appeal.<sup>478</sup> If so, this would evidence some bias in the system insofar as this external factor has an effect on the outcome of appeals.

The sample yielded few cases in which the government was the appellant.<sup>479</sup> One commentator has explained this result by suggesting that the government is more "rational" in deciding whether to appeal.<sup>480</sup> On the other

470. Whether there was a jury trial below was readily ascertainable from the CPLR 5531 statements. See notes 418-19 *supra* and accompanying text.

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

472. See note 317 *supra* and accompanying text.

473. The percentage of jury trials rose from 10% of the cases in 1965 to 29.3% of the cases in 1975, and this increase was significant at .01 with a chi-square value of 16.54. See Appendix I, Table P.

474. See note 497 *infra* and accompanying text.

475. The interaction between jury trials below and the disposition on appeal was not statistically significant. See Appendix I, Table Q.

476. All businesses not clearly partnerships were classified as "corporations." The "government" category included the state, the city, and agencies thereof. See generally *Business*, *supra* note 400, at 127; *Courting Reversal*, *supra* note 400, at 1203-06.

477. See *Courting Reversal*, *supra* note 400, at 1203-06.

478. *Id.*; see Galanter, *Afterword: Explaining Litigation*, 9 *Law & Soc'y Rev.* 347 (1975); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974).

479. The government was a party in 74 cases in 1975 but was the appellant only twice. In 1965, the government was the appellant in 8 out of the 55 cases in which it was a party. See Appendix I, Table G.

480. Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 *Hous. L. Rev.* 1101, 1102 (1974); see Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *Fordham L. Rev.* 1049, 1060 (1978).

hand, there was a significant increase<sup>481</sup> in the number of government respondents and private appellants from 1965 to 1975.<sup>482</sup> Both of these increases appear to be attributable to a corresponding increase in criminal appeals against the government.<sup>483</sup> At the same time, there was a significant decrease in the number of corporate appellants.<sup>484</sup> This may be explained by the decrease in commercial cases during this period.<sup>485</sup> In addition, because corporations have greater resources than private parties, they are more likely to succeed at the trial level, and, thus, may be less likely to appeal.

It was also hypothesized that a high rate of affirmance for appeals against the government might suggest that such appeals are frivolous and serve only to delay termination of the suit. Because the justices stressed that most criminal appeals lack merit,<sup>486</sup> a high affirmance rate was predicted when the government was respondent in these cases. Similarly, a high affirmance rate was expected in noncriminal cases in which the government was a respondent because of the government's greater resources that enable it to succeed more frequently on appeal.

These hypotheses were supported by the statistics. In criminal cases, the affirmance rates were 77.1% in 1975 and 89.6% in 1965, and in other cases the affirmance rates were 80.0% and 94.7% respectively.<sup>487</sup> More importantly, the statistics for the year 1965 showed a significant probability of government-respondents' winning on appeal.<sup>488</sup> Although the same significant probability did not appear in 1975,<sup>489</sup> this result may indicate that the later court was less partial to government-respondents.

#### 6. Nature of the Case

The nature of the case<sup>490</sup> was analyzed to determine the frivolity of appeals. Frivolity was measured in terms of the types of cases, categorized by area of law, which had the highest affirmance rates, and, therefore, the lowest

481. This trend was significant at .01 with a chi-square value of 17.22. See Appendix I, Table G.

482. The number of government respondents increased from 47 to 72, while private appellants increased from 98 to 115. See Appendix I, Table G.

483. This result is discussed under the nature of the case. See notes 497-98 *infra* and accompanying text. The number of government respondents in criminal cases increased from 26 to 37, while the number in other types of cases slightly decreased, thereby indicating that the increase in government respondents is attributable to criminal appeals. See Appendix I, Table H.

484. The decrease was significant at .01 with a chi-square value of 17.22. See Appendix I, Table G.

485. See Appendix I, Table J; notes 493-94 *infra* and accompanying text.

486. Breitel Interview, *supra* note 15, at A4-5; Lynch Interview, *supra* note 16, at B1; Nuñez Interview, *supra* note 16, at 1; Steuer Interview, *supra* note 206, at 1.

487. See Appendix I, Table H.

488. See Appendix I, Table I.

489. See *id.*

490. The nature of the case was classified according to broad, substantive areas of law: tort, commercial, special proceedings, election, article 78, family, criminal, and other. Family cases included suits for divorce, annulment, alimony, custody, and separation, as well as any cases originating in the family court. The uniform classifications of special proceedings listed summary proceedings to oust, appraisal, and arbitration. A few additions were made to the classification lists. For example, bail forfeiture and shareholders' derivative actions were included under special

chances for success on appeal. For example, a high affirmance rate in family cases was predicted on the theory that the Appellate Division defers to the lower courts in this specialized area of the law.<sup>491</sup> Under this theory, a high incidence of fact or mixed questions also was expected as a result of the desire to avoid decisions on family law. Although in this study these variables did not interact significantly, this result has been obtained by other studies.<sup>492</sup>

A comparison of the actual number of cases in each area of law, in 1965 and 1975, yielded some interesting trends.<sup>493</sup> As expected, the greatest number of cases in 1965 fell in the commercial category, undoubtedly because the Appellate Division, First Department, includes the financial district of New York City. Although there was a slight decrease in commercial cases from 1965 to 1975, perhaps if the study had examined 1976 cases, the 1974 recession would have manifested itself in that year. Recessions often lead to an increase in commercial cases, but the 1974 recession might not have made an impact on the caseload by 1975.<sup>494</sup> Another trend which appeared was a significant decrease in tort cases from 1965 to 1975.<sup>495</sup> The most likely explanation is the institution of no-fault insurance plans after 1965, eliminating the need for personal injury litigation.<sup>496</sup>

The most significant increase during the ten year interval, however, occurred in the area of criminal appeals.<sup>497</sup> This corresponds to an increase in the crime rate, the number of grounds for appeal, the availability of counsel for indigents, and recognition by the courts that the criminal defendant must be informed of his right to appeal.<sup>498</sup> The change in the state penal code and the CPL which requires juveniles to be tried as adults in certain circumstances<sup>499</sup> is also noteworthy here because it can be expected to increase further the number of criminal defendants, and, consequently, criminal appellants.<sup>500</sup>

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proceedings. For a comparison of the areas of law chosen by other studies, see *Business*, *supra* note 400, at 132-52; *Courting Reversal*, *supra* note 400, at 1209-10.

491. See Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *Law & Contemp. Prob.* 226, 253-54 (No. 3 1975); Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 *N.Y.U. L. Rev.* 925, 929 (1960).

492. The case sample was not large enough to compute meaningful statistics comparing family cases with disposition on appeal or with the nature of the question. See Appendix I, Tables K, L. The Yale study, based on a sample of 6000 cases, *Courting Reversal*, *supra* note 400, at 1196, found a significant correlation between family cases and a low reversal rate. *Id.* at 1210 n.86. This result supports the validity of the hypothesis proposed here.

493. See Appendix I, Table J.

494. Breitel Interview, *supra* note 15, at B4.

495. This decrease was significant at .02 with a chi-square value of 15.07. See Appendix I, Table J.

496. N.Y. Ins. Law § 673 (McKinney Supp. 1978-1979).

497. See Appendix I, Table J. This increase was significant at .02 with a chi-square value of 15.07. Criminal cases were not classified according to the type of crime because the cases were primarily of one type—appeals from sentencing or resentencing.

498. Breitel Interview, *supra* note 15, at B3; Lynch Interview, *supra* note 16, at A3; Steuer Interview, *supra* note 206, at 1; see notes 270-74 *supra* and accompanying text.

499. Law of July 24, 1978, ch. 628, § 4, 1978 N.Y. Laws 1184 (codified at N.Y. Fam. Ct. Act § 813 (McKinney Supp. 1978-1979)). Prior to the enactment of this statute, juveniles were subject to the Family Court Act, rather than the Criminal Procedure Law. See note 138 *supra*.

500. In view of the low number of family court cases under the prior act and the deference



## 7. Relief Sought on Appeal

The relief sought on appeal was divided into six classifications: legal, equitable, criminal, discovery, administrative and article 78, and other.<sup>501</sup> This variable was chosen as an indicator of the complexity of the case. The hypothesis was that the decision to grant equitable relief is a more complex question and requires more discretion on the part of the trial judge. Because of this discretion, it was predicted that the Appellate Division would exercise more restraint in appeals seeking equitable relief, and, therefore, would tend to affirm these cases.<sup>502</sup> Based on the discussions in Parts II and III of this study, it was also hypothesized that criminal-related relief would have a high affirmance rate because many of these appeals are perfunctory.<sup>503</sup>

The interaction between relief sought on appeal and the disposition on appeal was not statistically significant for either 1965 or 1975. This result may indicate that the justices do not let the complexity of the relief sought affect their decisions. However, some of the expectations for this variable were not fulfilled.<sup>504</sup> For example, the affirmance rates for cases seeking equitable relief were actually lower than the overall rate.<sup>505</sup> Perhaps the difficulty involved in balancing equities requires greater appellate supervision. The raw percentage of cases seeking criminal relief, however, did conform to the hypothesis of a high affirmance rate,<sup>506</sup> thus lending some support to the contention that such appeals are meritless.

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accorded to family court cases, this change should increase the overall number of appellants. See Appendix I, Table J; notes 491-92 *supra*.

501. Legal relief involved actions for damages, declaratory judgments, divorce, annulment, alimony, collection of rent, or quieting title. Equitable relief included injunctions, specific performance, and custody suits. When criminal or article 78 relief was sought, this was clearly indicated in the parties' briefs. Several additions were made to the classification lists as unanticipated difficulties arose in the course of research. For example, relief sought in arbitration and habeas corpus proceedings was considered equitable. The "other" category was avoided, and there were no cases which could not be classified. Relief sought on appeal was not analyzed in *Courting Reversal*, *supra* note 400, or *Business*, *supra* note 400.

502. The deference accorded to the lower courts in family law cases because of the amount of discretion involved is an example of such an approach. See note 491 *supra* and accompanying text.

503. See notes 486, 497-98 *supra*, 522 *infra* and accompanying text.

504. Discovery motions were also examined under the presumption that a high incidence of these motions would evidence extreme ease of appealability and that a high affirmance rate would evidence frivolous appeals. Discovery motions, however, comprised a small portion of the random sample and did not provide evidence of problems relating to ease of appealability. There were only 9 appeals from discovery motions in 1975 and none in 1965. See Appendix I, Table N. Although 7 out of 9 discovery motions were affirmed, restricting their appealability would not have a significant impact on the elimination of frivolous appeals; discovery motions represented only 3% of the total 300 cases.

505. The overall rate was 75.9% in 1975 and 72.0% in 1965; the affirmance rate of cases seeking equitable relief was 66.6% in 1975 and 70.7% in 1965. See Appendix I, Table M; Table 1 *supra*.

506. See Appendix I, Table O.

### 8. Panel of Justices

The researchers listed the panel of justices on a case<sup>507</sup> and noted whether each wrote the opinion, concurred, dissented, wrote a dissent, or abstained. This variable was chosen to determine the rate of concurrence among the justices and to determine the effect, if any, of the bench's composition on the outcome of an appeal. The hypothesis was that a high concurrence rate would indicate greater impartiality in the system because of the decreased likelihood that a particular justice's bias would be outcome determinative. The results supported this hypothesis, showing a significantly high concurrence rate in both 1965 and 1975.<sup>508</sup> This high rate of concurrence also suggests that the particular panel deciding an appeal does not have a significant impact on the outcome.<sup>509</sup>

Because this study's main concern was the efficiency of the system, it was not aimed at statistically analyzing the effect of justices' attitudes on their decisions. Nevertheless, the interviews with the justices provided two interesting observations about their philosophies toward decisionmaking. Some justices will defer to another justice's expertise in a specialized area of law,<sup>510</sup> while others will not.<sup>511</sup> All the justices agreed, however, that the decisions of certain lower court judges almost always start out with a presumption of affirmance by the Appellate Division,<sup>512</sup> while the decisions of other trial judges are scrutinized more closely.<sup>513</sup>

### 9. Form of the Opinion

This variable was divided into full opinions, memoranda, per curiam, and no opinions.<sup>514</sup> It was chosen to determine the correlation between the form of

507. See note 420 *supra*. The Appellate Division usually sits in panels composed of five justices, although a limited number of the cases in the sample were decided by only four. Appellate Division justices are selected by the governor from among the supreme court justices in a given department. The justices are designated to serve for terms of five years or for the remainder of their terms in the supreme court if less than five years. The presiding justice, also named by the governor, serves for the remainder of his term on the bench, even if greater than five years. N.Y. Const. art. 6, § 4; N.Y. Jud. Law § 71 (McKinney 1968).

508. The total number of concurrences recorded in the 1975 sample was 732 compared with 18 dissents. In 1965, there were 745 concurrences compared with 5 dissents. The concurrence rate was statistically significant at .02 with a chi-square value of 6.36. See Appendix I, Table R.

509. Chief Judge Breitel attributed the high rate of concurrence to the ability of justices to work with one another and to the respect that one justice has for another's work or opinions. An alternative interpretation, also offered by Chief Judge Breitel, is that a justice may concur when he is not working hard enough to be well-prepared or when he faces overwhelming time pressures. Breitel Interview, *supra* note 15, at A1-2.

510. *Id.* at C1.

511. Lynch Interview, *supra* note 16, at B6; Nuñez Interview, *supra* note 16, at 4; Steuer Interview, *supra* note 206, at 6. Justice Steuer maintained that he would not defer to another's expertise, although he did say that all justices would give more weight to the opinion of the justice having experience in a particular field. *Id.*

512. Breitel Interview, *supra* note 15, at A5.

513. Steuer Interview, *supra* note 206, at 5-6.

514. A full opinion gives the result, discusses the law, and may have concurring and dissenting opinions attached. A memorandum opinion gives the result but no law is actually discussed. A per curiam decision is a full opinion with no dissent and no author listed. Lynch Interview, *supra* note 16, at A2.

the opinion and the disposition on appeal. It was hypothesized that the results would indicate how often the Appellate Division tries to affect policy by writing a full or per curiam opinion.<sup>515</sup> Also, the form-of-opinion variable was used to measure the performance of a supervisory function, for the issuance of many decisions without opinions would not seem to offer effective guidance to the lower courts.<sup>516</sup>

Because the Appellate Division must enumerate the grounds for reversing a decision, dispositions embodied in some form of opinion were expected to reflect a higher number of reversals than were dispositions without opinion. An increase in the use of memorandum opinions was predicted because of the growing need to save time and money.<sup>517</sup> Also, the form of opinion was compared to the nature of the case to test the hypothesis that a high percentage of no opinion dispositions, when broken down as to types of cases, might indicate types of appeals that are frivolous.

The results indicate that the Appellate Division does not often try to affect policy by writing full or per curiam opinions.<sup>518</sup> When a decision is reversed, however, the opinion is usually a full opinion, either signed or per curiam.<sup>519</sup> The use of memorandum opinions increased slightly, but not significantly. However, memoranda greatly outnumber any other form of written opinion.<sup>520</sup> The high percentage of criminal appeals disposed of without opinion is noteworthy here because it suggests that many of these appeals are meritless.<sup>521</sup>

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515. Justice Steuer intimated that per curiam opinions are sometimes used because it is not "tactful" for the author of an opinion to identify himself if a decision is controversial. Steuer Interview, *supra* note 206, at 4. This could also be true if the opinion calls for a legislative change, or involves the government as a party. Justice Steuer also indicated that a per curiam opinion is more forceful because it evidences the entire court's strong feelings about a particular case. *Id.* This suggests that per curiam opinions have more precedential weight than other types of opinions.

516. See note 414 *supra* and accompanying text.

517. Justice Lynch felt that more opinions should be written and at greater length, but that the caseload and the budget present serious obstacles. The caseload is so large, according to Justice Lynch, that the justices usually have time only to get the result out. Also, the court's budget is insufficient to cover the printing costs for all opinions. Lynch Interview, *supra* note 16, at A2.

518. In 1975, there were only two full opinions and only one per curiam opinion out of the total case sample for that year. In 1965, there was one full opinion and five per curiam opinions, a slight but insignificant increase in the latter. See Appendix I, Table T.

519. The reversal rates for decisions without opinion were 7.5% in 1965 and 5.8% in 1975, significantly lower than the overall rate. In comparison, the reversal rates for memorandum opinions were 55.3% in 1965 and 28.8% in 1975. Because of the small number of full opinions yielded by the sample, a meaningful comparison could not be made. Nevertheless, two of three full opinions in the two years reflected reversals, and the per curiam decisions had a 100% reversal rate in each year. Compare Table 1 *supra* with Appendix I, Table U.

520. See Appendix I, Table S. Justice Lynch believes the focus should be on memorandum opinions because they provide some explanation for the result but take much less time to write than a full opinion. Lynch Interview, *supra* note 16, at B5.

521. The percentage of no opinion dispositions for criminal appeals was 89.6% in 1965 and 78.7% in 1975. See Appendix I, Table S. A high percentage of special proceedings was disposed of without opinion in each year, but, because of the relatively small number of special proceedings in the total sample, these results were not conclusive.

### C. Summary

The empirical research provides a means of assessing the performance of Appellate Division functions. The effective performance of the court's screening function is indicated by the relatively low number of appeals filed in the court of appeals, despite the increasing caseload in the First Department. The high overall affirmance rate is also an indication that many cases are screened out after a second appeal. The court's supervisory function, on the other hand, does not appear to be a primary concern, as evidenced by the low number of written opinions. However, in view of the high affirmance rate, perhaps extensive supervision is not necessary. Although it is difficult to examine the goal of ensuring substantial justice, each Appellate Division justice interviewed stressed this as his most important function.

The statistical analysis here suggests two areas of possible reform. First, the results indicate that criminal appeals present the most serious example of frivolity; they not only account for a substantially larger portion of the caseload over the ten year period, but also have a significantly higher affirmance rate.<sup>522</sup> This, therefore, is an area of the law in which the caseload of the Appellate Division could effectively be reduced, thus enabling the court to devote more time to more meritorious or more complex appeals.

The second area of suggested reform focuses on the high affirmance rate of intermediate orders, which has increased from 1965 to 1975. If so few intermediate orders are being reversed,<sup>523</sup> and because they can be reviewed with the final judgment, restricting their appealability ought seriously to be considered. On the other hand, the results indicate that the broad review powers described in Part III are rarely exercised by the Appellate Division.<sup>524</sup> Moreover, even in those areas where the court did exercise a factual review, there was no evidence of excessive appellate intervention. However, although the statistics do not support the need to restrict the Appellate Division's review powers, there may be broader policy reasons for doing so.<sup>525</sup>

### V. PROPOSALS

The preceding sections have shown that the Appellate Division, in practice, has three basic functions:<sup>526</sup> it must ensure that substantial justice is available

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522. Appendix I, Tables J, O; see notes 486-89, 497-500 *supra* and accompanying text.

523. See notes 451-54 *supra* and accompanying text. The affirmance rate of 72.7% for intermediate orders in 1975 was consistent with the high overall rate. Compare Table 3 *supra* with Table 1 *supra*.

524. Appendix I, Table A; see notes 442, 466-75 *supra* and accompanying text.

525. See notes 576-83 *infra* and accompanying text.

526. The interviews conducted with the Appellate Division justices indicate that they are fairly unanimous in their belief that it is not a primary function of the Appellate Division to provide uniformity of law throughout the state. See note 16 *supra*. Moreover, such a function would not justify either a broad scope of review or broad appealability. If the Appellate Division were concerned primarily with legal uniformity it would not be necessary to look at the facts of each case or to hear appeals immediately on issues which would later come up with the final judgment. Uniformity of law could easily be achieved by a post-judgment review limited to questions of law, such as the current review power of the court of appeals. N.Y. Const. art. 6, § 3.

to the litigants,<sup>527</sup> it must supervise the lower courts,<sup>528</sup> and it must serve as a screening device for the court of appeals.<sup>529</sup> At first, these three functions would seem to justify the Appellate Division's broad appellate powers. Broad appealability provides the court with an effective means of supervising the lower courts through immediate review of the actions of the trial judges. It also allows the Appellate Division to focus on the lower court's handling of intermediate decisions in greater detail than if the intermediate order were reviewed after final judgment. The Appellate Division's broad scope of review enables it to ensure that the litigants are accorded substantial justice. Without broad review powers the Appellate Division might be bound by an unjust result which is nevertheless supported by some evidence. Finally, if appellate review of the facts is desired,<sup>530</sup> as it is in New York, then the power of the Appellate Division to review the facts extensively enables it to screen more efficiently for the court of appeals, so that the latter may concern itself only with settling the law.

Because New York's appellate procedures are an extreme example of appellate procedures generally,<sup>531</sup> however, and particularly in light of the court's ever-expanding caseload,<sup>532</sup> it is necessary to look further into whether these procedures are perhaps unnecessarily broad for accomplishing the Appellate Division's objectives. Put precisely, the question is: Do the federal and other state appellate systems, including those following the new ABA Standards, accomplish these goals just as well with their narrower scope of review and more limited appealability?

To a limited extent, the federal courts of appeals exercise a supervisory function over the district courts through the "law of the circuit" rule, which binds the district courts to the decisions of their particular circuit courts.<sup>533</sup> This type of supervision, based primarily on legal precedent, differs from the New York approach, which is also concerned with the performance of the

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527. See Lynch Interview, *supra* note 16, at B3; McNally Interview, *supra* note 3, at A1, B2; Nuñez Interview, *supra* note 16, at 1.

528. See Breitel Interview, *supra* note 15, at A3-4; note 20 *supra* and accompanying text. While there is a need to supervise the performance of the judges at the trial level, an unwanted side-effect of easy appealability may be a rash of frivolous appeals, according to Chief Judge Breitel. Breitel Interview, *supra* note 15, at A4.

529. See Breitel Interview, *supra* note 15, at A7-8, B7-8, C6; Lynch Interview, *supra* note 16, at B1-2; notes 62-67 *supra* and accompanying text.

530. Because appellate review of facts was not the common law practice, see note 21 *supra* and accompanying text, it has not become ingrained in the majority of American jurisdictions. Most jurisdictions limit their appellate courts to ensuring that there was some evidence in the record to support the findings of fact or the verdict. See note 326 *supra* and accompanying text.

531. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 268 (1957) (Brennan, J., dissenting); P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 131 (1976)

532. See notes 426-30 *supra* and accompanying text.

533. The "law of the circuit" rule was not an original element of the circuit court system, but developed as a result of the Supreme Court's failure to resolve intercircuit conflicts. See Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 87 Yale L.J. 1219, 1219 (1978). For a discussion of the rule and its implications for the increasing federal appellate caseload, see Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 580-96 (1969) [hereinafter cited as *Crowded Dockets*].

lower court justices.<sup>534</sup> Nevertheless, it is a function which the federal system performs with limited appealability.<sup>535</sup> Because all orders are reviewable on the final judgment, and, more importantly, because there are additional provisions for interlocutory review when necessary, the courts are able to set down guidelines to be followed by the district courts. This system seems preferable because the burden of requiring the potential appellant to seek leave to appeal in the limited number of cases deserving interlocutory review is outweighed by the uninterrupted resolution of the majority of cases. Permitting appeal as of right for intermediate orders might tempt those litigants anxious to delay the proceedings to do so by taking frivolous appeals.<sup>536</sup> The ABA Standards, which have basically the same appeal provisions as the federal rules, would also allow supervision while minimizing unnecessary interference with the trial process.<sup>537</sup> As for the state systems, it would appear that the only procedures which would impair an intermediate appellate court's performance of a supervisory role are those limiting appeal exclusively to final judgments.<sup>538</sup>

The necessity of ensuring litigants substantial, although not perfect,<sup>539</sup> justice is a function of all appellate courts, not only New York's Appellate

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534. Breitel Interview, *supra* note 15, at A3-4.

535. See 28 U.S.C. §§ 1291-1292 (1976); notes 222, 227 *supra* and accompanying text. For the origins of the final judgment rule and an analysis of its erosion in recent years, see Crick, *The Final Judgment As a Basis for Appeal*, 41 Yale L.J. 539 (1932); Frank, *Requiem for the Final Judgement Rule*, 45 Tex. L. Rev. 292 (1966).

536. Even without broad appealability, the federal system has been plagued in recent years by an increasing number of frivolous appeals in both civil and criminal cases. See P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 134-35; *Crowded Dockets*, *supra* note 533, at 569-71, 574-79; Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. Rev. 701, 701 (1972); Note, *Disincentives to Frivolous Appeals: An Evaluation of an ABA Task Force Proposal*, 64 Va. L. Rev. 605, 605 (1978) [hereinafter cited as *Disincentives*]. In the civil area, the most commonly suggested disincentives to frivolous appeals are taxing costs to litigants who pursue such appeals in the hope of delaying their day of reckoning, and increasing the interest rate on money judgments. *Crowded Dockets*, *supra* note 533, at 569-71; *Disincentives*, *supra*, at 611-18. The Justice Department hopes to stem the tide of frivolous appeals by introducing legislation in 1979 which would provide for the assessment of attorney's fees against an appellant unless one of the circuit court judges hearing the appeal certifies that the appellant had sufficient grounds for the appeal to create a likelihood that the judgment might be reversed to his substantial benefit. N.Y.L.J., July 14, 1978, at 1, col. 2. As to the suggested disincentives to frivolous criminal appeals, see notes 567-69 *infra* and accompanying text.

537. "Affording a party an appeal of right from orders other than final judgments results in interruption of the proceedings in the court below and can result in piecemeal appellate review of a single case." ABA Standards, *supra* note 16, § 3.12 Commentary at 25.

538. See, e.g., Del. Const. art. IV, § 11(1)(a); Neb. Rev. Stat. § 25-1911 (1975). In these jurisdictions, even if the final judgment brought up for review any intermediate decisions, it would deprive the litigants of the benefits of immediate review on an interlocutory appeal, whether it is by right or by permission. It also deprives the appellate court of its ability to supervise as effectively as possible by dismissing frivolous claims at an early stage.

539. "Substantial" justice is the term of art most frequently applied to the appellate court's function in regard to the facts. This suggests that the goal can be accomplished by something less than a full-scale exploration of all the evidence presented to, and all the facts found by, the trial court. As one judge noted, "perfect justice" cannot be achieved in this life. McNally Interview, *supra* note 3, at A-3.

Division.<sup>540</sup> Yet, almost all other appellate court systems operate with a much narrower power to review facts than that possessed by the Appellate Division. The federal courts, for example, have no power to review the findings of juries<sup>541</sup> and may not reverse the findings made by a judge unless they are "clearly erroneous."<sup>542</sup> Because of the limitations on Supreme Court review of circuit court decisions,<sup>543</sup> the courts of appeals are the end of the line for most federal cases and the point at which justice is finalized. Likewise, many state intermediate appellate courts function with little or no factual review of lower court decisions.<sup>544</sup> Of those that have made the policy decision to provide for such review, few grant the appellate court the broad power possessed by the Appellate Division to make new findings on appeal.<sup>545</sup> Yet the litigants in these states with limited factual review are ensured justice: either by a jury of their peers plus the approval of an appellate panel that the findings are not unreasonable or by two different sets of judges, a trial judge and an appellate panel. In either case, such review, considering only whether the findings were based on substantial evidence, maintains the delicate balance between appellate review of facts and the determination of those facts in the first instance.<sup>546</sup> The ABA Standards, with their detailed criteria as to scope of

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540. See P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 2; Carrington, *supra* note 399, at 520.

541. The seventh amendment, which mandates that "no fact tried by a jury, shall be otherwise reexamined . . . than according to the rules of the common law," greatly restricts appellate review of jury findings in the federal courts. P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 130; see Carrington, *supra* note 399, at 520; Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 St. John's L. Rev. 68, 69-70 (1977) [hereinafter cited as *Appellate Fact Review*].

542. Fed. R. Civ. P. 52; see Carrington, *supra* note 399, at 520; *Appellate Fact Review*, *supra* note 541, at 68-69. As noted above, there is a distinction to be drawn between appellate review of demeanor evidence, which should be minimal because of the trial judge's first-hand knowledge of such evidence, and mere statistical evidence, review of which may be broader because of its nature and availability to the appellate court. See note 324 *supra* and accompanying text.

543. Direct appeal from the circuit courts to the Supreme Court is permitted only when the appellant's case involves a state statute which has been held unconstitutional by the court of appeals. All other cases must be reviewed either by certification or certiorari. 28 U.S.C. § 1254 (1976).

544. Some states have ruled out appellate review of questions of fact by statute or in their constitutions. See, e.g., Del. Const. art. IV, § 11(1)(a) (jury trials); Ga. Const. art. VI, § II, ¶ IV; Iowa Code Ann. § 684.36(2) (West 1946 & Supp. 1978); N.H. Rev. Stat. Ann. § 490:4 (1968 & Supp. 1977). For states which provide only minimal factual review, see the statutes and cases cited in notes 326 *supra*, 545 *infra*.

545. The states which permit appellate fact review limit the use of that power either to certain types of cases, see, e.g., S.C. Code § 14-3-320 (1977) (equitable actions); Utah R. Civ. P. 72(a) (same), or solely to cases tried by the court without a jury. See, e.g., *duPont v. duPont*, 59 Del. 206, 216 A.2d 674 (1966); *State v. Adams*, 125 N.J. Super. 587, 312 A.2d 642 (App. Div. 1973); Md. R.P. 1086.

546. P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 130; Carrington, *supra* note 399, at 517-18, 519-20. The ABA Standards reflect a basic concern that "[t]o the extent an appellate court supersedes the trial court in the decision of factual issues and the application of law to fact, it undermines the authority of the tribunals through which the legal system speaks directly to those who invoke the legal process for the resolution of their controversies." ABA Standards, *supra* note 16, § 3.11, Commentary at 20.

review, also seek to ensure justice to the litigants with limited factual review.<sup>547</sup>

It is much more difficult to make a comparison between New York and other jurisdictions with regard to the third function: screening for the jurisdiction's highest court. The appropriate appealability and scope of review necessary to effectuate this function depends on two variables—the general extent of review the jurisdiction seeks to provide and the extent to which it seeks to limit review by its highest court. Thus, in the federal system, where the policy decision has been made to limit review of facts generally and review by the Supreme Court in particular,<sup>548</sup> the screening function is best served by allowing the case to proceed to a final determination before it is reviewable by the court of appeals. The circuit courts then weed out the majority of cases, with only a small percentage going up to the Supreme Court.<sup>549</sup> Many state systems accomplish the screening function in a similar manner by permitting appeal to the state's highest court only when permission has been granted.<sup>550</sup> Assuming that a jurisdiction wished to limit review of facts to its intermediate appellate courts, as does New York, the ABA Standards would provide an acceptable method of review and would eliminate the need for additional review by a second appellate court.<sup>551</sup> An examination by the intermediate court as to whether the facts, found either by a judge or by a jury, are reasonably supported by the evidence would provide a limited inquiry into the facts without the necessity of a full-scale retrial of the evidence. Once the appellate court's imprimatur has been given to the findings, they are sufficiently settled to obviate the need for further appellate review.

If, therefore, the Appellate Division's primary functions can be achieved by a more limited approach to appealability and review, it may be time to reverse the New York trend by limiting appealability and scope of review. The proposals suggested herein could be an effective first step in that direction.

One way in which the appellate process could be streamlined in the civil area is by restricting the orders which are appealable as of right under CPLR 5701.<sup>552</sup> Such a restriction would reduce the number of appeals which are either frivolous or dilatory in nature, without affecting the Appellate Division's basic functions. This would also ease the court's caseload problems which, as Part IV has shown, are due in large part to such frivolous appeals.<sup>553</sup> The restriction could be achieved in the form of a total ban on the

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547. The standards require an appellate court to ensure that the trial court "rested its determination on factual conclusions reasonably supported by the evidence." ABA Standards, *supra* note 16, § 3.11. The appellate court is entitled to draw its own line as to what constitutes "reasonable support" in each particular case.

548. See notes 541-43 *supra* and accompanying text.

549. In the period from 1962 to 1970, for example, the percentage of litigants who were unsuccessful in the courts of appeals and who sought review in the Supreme Court ranged from 16% to 19%. H. Friendly, *Federal Jurisdiction: A General View* 48 n.165 (1973).

550. See M. Osthus, *Intermediate Appellate Courts* 19-28 (1976).

551. See ABA Standards, *supra* note 16, § 3.11.

552. N.Y. Civ. Prac. Law § 5701 (McKinney 1978).

553. See notes 451-54, 459 *supra* and accompanying text.



appeal of intermediate orders by right, requiring leave to appeal in all such cases.<sup>554</sup> It could also be achieved by allowing certain restricted classes of orders to be appealable as of right while requiring permission for all other interlocutory appeals.

Either alternative would not only reduce the caseload, but would also reduce the cost to the litigants.<sup>555</sup> It has been suggested that it is as easy for an appellate judge to decide the actual appeal of an intermediate order as it is to decide the motion for leave to appeal.<sup>556</sup> This point, however, does not take into account the extra legal and judicial manpower which is expended in deciding an appeal, which must be fully briefed and argued, as opposed to a motion for leave to appeal, which requires only a quick scan of the record below and does not require a formal written opinion. Moreover, under the current statute, the motion for leave may be heard by the trial judge rather than by an appellate justice.<sup>557</sup> In addition, redrafting CPLR 5701 to accommodate either the total or partial ban would not be without historical support. In fact, the committee which drafted the current statute specifically left open the possibility of amending the section to take orders out of the appeal-by-right category and move them into the appeal-by-permission class.<sup>558</sup>

For a number of reasons, however, the second approach, similar to the federal scheme,<sup>559</sup> would appear to be the better alternative. First, it could be achieved by a very simple redrafting of CPLR 5701. The catch-all categories of orders affecting a substantial right and orders involving a part of the merits could be transferred to section 5701(b), which lists the orders appealable by permission. This would limit appealability as of right to the specific situations which would remain in section 5701(a): orders respecting provisional remedies, new trials, transcripts or statements on appeal, and the constitutionality of state statutes, and orders which would prevent judgments from which an

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554. A total ban on the appeal of intermediate orders would result in a return to the rigidity of the common law final judgment rule. *See generally* Crick, *The Final Judgment As a Basis for Appeal*, 41 Yale L.J. 539 (1932). This is probably infeasible, however, given the decline of the rule both on the federal level, *see* Frank, *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292 (1966), and in many state jurisdictions, which often qualify the rule with exceptions permitting certain interlocutory appeals. ABA Standards, *supra* 16, § 3.12, Commentary at 25. Such a radical restriction would also directly confront the current trend toward broader appellate review. *See* P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 130-31; *Crowded Dockets*, *supra* note 533, at 568.

555. It would seem to be much more economical to prepare a simple motion for leave to appeal than to prepare, present and argue a full appeal. Moreover, a party contesting more than one intermediate order could raise them all at one time on the final judgment rather than raising them seriatim.

556. Breitel Interview, *supra* note 15, at A3, B2.

557. *See* N.Y. Civ. Prac. Law § 5701(c) (McKinney 1978).

558. When the drafters of CPLR 5701 retreated from their original plan of restricted review as of right in favor of the current statute, *see* note 154 *supra*, they were aware that certain orders that could be appealed as of right might later so overburden the courts that they would have to be restricted to appeal by permission status: "If the experience of the Judicial Conference should subsequently indicate that other types of orders should be added to this list [of orders appealable by permission], they may be added by amendment to the statute." Fifth Preliminary Report, *supra* note 154, at 144. Section 5701 has not been amended since it was passed in 1962.

559. *See* 28 U.S.C. §§ 1291-1292 (1976).

appeal could be taken.<sup>560</sup> This revision would reflect a policy judgment that when an appellant seeks to rely on the vague "substantial right" or "merits" grounds, he must first prove to at least one judge's satisfaction that he is raising a claim that is not baseless. The judge's decision to allow the appeal should then rest, at least in part, upon whether the appeal will advance the litigation or merely delay it, and not solely upon whether the order affects a substantial right or involves some part of the merits. Moreover, maintaining the current procedure for appeals by permission<sup>561</sup> would strike a judicious balance between the federal scheme, which requires both the approval of the trial judge and the appellate court,<sup>562</sup> and the ABA suggestion, which would leave interlocutory review solely at the discretion of the appellate court.<sup>563</sup> Finally, a redrafting that would not totally eliminate interlocutory appeals would not result in as severe a confrontation with the trend toward increased appellate review as would a return to a strict final judgment rule. It would indicate instead that New York has ventured as far as possible in terms of increasing appellate review, but has realized that the trend must nevertheless be modified to fit the realities of a court system which has rapidly expanded.

As Part IV has shown, the second problem facing the Appellate Division in regard to appealability is the growing number of frivolous criminal appeals.<sup>564</sup> Criminal appellate procedure, however, is an area in which any attempted reform requires a delicate touch. Any attempt to curb the right to appeal in a criminal case runs the risk of violating the appellant's constitutional rights.<sup>565</sup> Indeed, the current criminal appealability provisions in New York strike a careful balance between considerations of double jeopardy and effective prosecution.<sup>566</sup> It is ironic that the plan which has been suggested to reduce the number of frivolous criminal appeals on the federal level—separate review of sentences<sup>567</sup>—is not only the law in New York,<sup>568</sup> but the source of the majority of New York criminal appeals.<sup>569</sup>

560. See N.Y. Civ. Prac. Law § 5701(a)(2) (McKinney 1978).

561. See notes 188-90 *supra* and accompanying text.

562. See 28 U.S.C. § 1292(b) (1976).

563. See ABA Standards, *supra* note 16, § 3.12.

564. See notes 487, 506, 521 *supra* and accompanying text.

565. See *Crowded Dockets*, *supra* note 533, at 574-76; Hermann, *supra* note 536, at 701-02, 704-08; *Disincentives*, *supra* note 536, at 609-10.

566. See notes 120-25, 250-55 *supra* and accompanying text.

567. Although the federal appellate courts can review illegal sentences, such as those which exceed the statutory maximum for the particular offense, they have consistently declined to review the propriety of the sentence when the trial judge does not exceed the permissible bounds of discretion. See *Gurera v. United States*, 40 F.2d 338, 340-41 (8th Cir. 1930) ("If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute."); Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan. L. Rev. 405, 411 (1968). Because many of the increasing number of criminal appeals are motivated not by meritorious legal claims but by dissatisfaction with the sentence received, Hermann, *supra* note 536, at 720, many commentators, as well as Chief Justice Burger, have suggested providing for separate appellate review of sentences, which could be accomplished with less judicial manpower than is needed to review an entire conviction. See Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A. J. 358, 360 (1979); *Crowded Dockets*, *supra* note 533, at 578-79; Hermann, *supra* note 536, at 720-21; Weigel, *supra*, at 417; ABA Standards, *supra* note 16, § 3.70, Commentary at 108.

If, then, the number of criminal appeals cannot easily be reduced, the alternative is a simplified procedure for handling the bulk of appeals from sentencing or resentencing. Adoption of the procedures recommended by the ABA Standards, which would dispense with many formalities including briefs and oral arguments, would greatly reduce the time and effort which go into deciding such appeals.<sup>570</sup> The appellate judges would then have additional time to devote to more substantive appeals. Such a procedure would also provide some degree of uniformity in the handling of criminal appeals, which is now governed by the different court rules adopted by each of the departments.<sup>571</sup> A second solution, according to one former Appellate Division justice, would be the creation of a panel, separate from the Appellate Division, to review criminal sentences. The panel would consist of a trial judge, a lawyer from a recognized defense organization, and a representative of the district attorney's office.<sup>572</sup>

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One commentator has also proposed granting the United States the right to appeal a lenient sentence, thus giving the government a negotiating tool for settling frivolous appeals. *Crowded Dockets*, *supra* note 533, at 579. Judge Friendly, however, disagrees: "[A]doption of [appellate review of sentences] would administer the *coup de grâce* to the courts of appeals as we know them . . . . If the sentences in only half [the cases] were appealed . . . the caseload of the courts of appeals would be doubled . . . ." H. Friendly, *supra* note 549, at 36-37.

568. N.Y. Crim. Proc. Law § 450.10 (McKinney 1971).

569. See note 497 *supra* and accompanying text. Other disincentives to criminal appeals which have been suggested at the federal level, including contempt citations or the taxing of costs where possible, are basically ineffective. The threat of a contempt citation would hardly deter a defendant who is already in jail. See *Crowded Dockets*, *supra* note 533, at 575; *Disincentives*, *supra* note 536, at 610. As to the economic disincentives, they are impractical because the majority of frivolous criminal appeals are brought by indigents, see *Crowded Dockets*, *supra* note 533, at 574 n.141; Hermann, *supra* note 536, at 701-02, and thus any attempt to discriminate against such defendants would run the risk of violating the spirit of Supreme Court decisions upholding the indigent's right to an unimpeded appeal. *Crowded Dockets*, *supra* note 533, at 574 n.141; see *Rinaldi v. Yaeger*, 384 U.S. 305 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956). But see *Disincentives*, *supra* note 536, at 609 n.30 (suggesting postappeal assessment of costs against indigents who would then be required to pay when they obtained sufficient funds).

570. The suggested standard is: "The record in [appeals from sentences] should be limited to the presentence report, if any, and a transcript of the evidence, argument, and other submissions made to the trial court in connection with its imposition of sentence. Briefs may be permitted in the form of letters, and oral argument permitted only when the court specifically authorizes it." ABA Standards, *supra* note 16, § 3.70; see P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 100-03.

571. The current rules governing criminal appeal procedures are the rules of practice promulgated by each of the four Appellate Division departments. The rules vary greatly from department to department. For example: the First Department gives the appellant the option of presenting his appeal by any one of a variety of methods, including the appendix system, the agreed statement in lieu of the record, or by the full record, [1978] 22 N.Y.C.R.R. §§ 600.5, .8; the Third Department requires the appellant in a criminal case to prosecute his appeal by the appendix method, [1978] 22 N.Y.C.R.R. § 800.14; and the Fourth Department makes no specific provision at all for procedures on appeal in a criminal case. The wide divergence among the departments concerning the rules of court has prompted calls for uniform rules of practice for all four departments. See Newman, *Appellate Practice*, N.Y.L.J., Jan. 19, 1978, at 1, col. 1.

572. Nuñez Interview, *supra* note 16, at 1. This is similar to the plan suggested for the federal

In addition to these necessary procedural changes there remains the more substantive issue of the Appellate Division's scope of review. One cannot fault New York's attempt to provide greater factual review to ensure justice to all litigants; indeed, that is the trend today in many jurisdictions including, to some extent, the federal system.<sup>573</sup> The Appellate Division's power, however, is broader than necessary. As shown earlier, the court's power to make original or substitute findings on an appeal from a judge trial is a power which is rarely exercised.<sup>574</sup> There is no reason why that power cannot be restricted while maintaining the New York policy of factual review to ensure substantial justice. Eliminating the right to find new facts would not divest the Appellate Division of any significant weapon in its battle against injustice. When reviewing cases tried to a judge, the court could make the same inquiry into the factual issues as is currently made in jury trial situations. If the Appellate Division disagreed with the lower court on the weight of the evidence it could still remand, or, when justified, dismiss the case.<sup>575</sup>

Although remanding the case would involve a certain amount of duplicative judicial work, the amount would be minimal given the infrequency with which the Appellate Division now uses the power. Moreover, such a restriction on the Appellate Division would provide equal deference to the findings of judges and juries,<sup>576</sup> and would serve to maintain dignity and respect for the trial courts, thereby keeping them from becoming mere stenographers for the Appellate Division.<sup>577</sup> The restriction would also serve the Appellate Division's screening function by removing the court of appeals' burden of reviewing facts in civil cases, which it must now do when the Appellate Division has found new facts.<sup>578</sup> The Appellate Division's power to make original or substitute findings could easily be restricted, either by the court of

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courts by Chief Justice Burger. The Chief Justice's panel, however, would be composed solely of judges. See Burger, *supra* note 567, at 360.

573. See P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 130-31; *Crowded Dockets*, *supra* note 533, at 568; Carrington, *supra* note 399, at 521.

574. See notes 371, 378-80, 442 *supra* and accompanying text.

575. See notes 360-63 *supra* and accompanying text.

576. Equal deference to the findings of both judge and jury is, to the drafters of the ABA Standards, of the utmost importance in maintaining respect for the trial court. See ABA Standards, *supra* note 16, § 3.11, Commentary at 23-24; notes 537, 546 *supra*. To this end, the Standards suggest a reexamination of the purpose and performance of the federal "clearly erroneous" rule, Fed. R. Civ. P. 52(a). ABA Standards, *supra* note 16, § 3.11, Commentary at 24. Professor Carrington, however, has suggested that in practice the "clearly erroneous" judge trial standard and the "substantial evidence" jury standard operate similarly, Carrington, *supra* note 399, at 520-21, and that any attempt to restrict the review power of the appellate judges might run into practical problems of judicial hubris. P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 130-31.

577. The derogation of the trial court function in the face of expanding appellate court review of facts has been a prime concern of some commentators writing in the area. See, e.g., P. Carrington, D. Meador & M. Rosenberg, *supra* note 531, at 130; *Crowded Dockets*, *supra* note 533, at 567; Carrington, *supra* note 399, at 517-20; ABA Standards, *supra* note 16, § 3.11, Commentary at 20-24; Lynch Interview, *supra* note 16, at B6.

578. See note 91 *supra* and accompanying text.

appeals, which only recognized the power as late as 1945,<sup>579</sup> or by an express disclaimer of the power by legislative amendment to CPLR 5501.<sup>580</sup>

Similarly, the Appellate Division could uphold its duty to the trial courts by exercising a guiding function with respect to the trial court's use of discretion.<sup>581</sup> Such guidance, apparently lacking in the present system in view of the extensive use of memorandum opinions,<sup>582</sup> would be a significant manifestation of the court's screening function. Unless an acceptable range of trial court action is specified by an appellate court, appeals contesting an alleged abuse of discretion will continue to present difficult problems.

Either of these proposals, restriction of the right to make new findings or increased guidance for the lower courts, will serve a double function. They will enable the Appellate Division to maintain its position as the defender of the litigants' best interests, while at the same time promoting the best interests, dignity, and respect of the state's trial courts.<sup>583</sup>

Although these recommendations may to some extent increase the efficiency of the Appellate Division, they are but a first step in that direction. What is needed now is a more extensive study—either by the legislature or by the Judicial Conference—of the goals and operations of the Appellate Division. Such a study, concentrating on problems facing all four departments, should address itself to the need for efficient and just appellate review, with due respect for the functions of the trial court.

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579. See note 94 *supra* and accompanying text.

580. N.Y. Civ. Prac. Law § 5501 (McKinney 1978).

581. See ABA Standards, *supra* note 16, § 3.11 & Commentary at 24.

582. Memorandum opinions are used by the Appellate Division more frequently than any other form of written opinion, and have a very high reversal rate. See notes 519-20 *supra* and accompanying text. The abbreviated nature of the memorandum, with its minimal factual discussion, does not lend itself to use as a guide by the lower courts. Also, because of the Appellate Division's broad scope of review in regard to facts and law, it rarely reaches the issue of the trial court's discretion; the court will often merely interpret the facts differently. See notes 392-93 *supra* and accompanying text. At least one trial judge, however, has attempted to set down some parameters for the use of judicial discretion by supreme court judges. See Wallach, *The Application of Judicial Discretion*, N.Y.L.J., Aug. 14, 1978, at 1, col. 2.

583. Revising the appellate process to shore up the sagging dignity of one of the courts is not unprecedented; it is, in fact, part of the reason for the broad powers conferred on the Appellate Division in 1894. See notes 57-61 *supra* and accompanying text.

584. The Introduction was prepared by Stephan J. Kallas, who also assisted in the research for Part II; Parts I and V were prepared by William J. Ruane; Part II by M. Christine DeVita; Part III by Lucille LaBozzetta Weisbrot; and Part IV by Jill Paradise Botler.

## APPENDIX I: TABLES

Table A  
DISPOSAL OF CASES UPON REVERSAL

	No. of cases	Dismissed	Reversed on the facts	Remittitur	New trial or hearing	Further Proceeding	Appeal Dismissed	Total
1975		2	2	0	8	1	1	14
1965		5	11	1	4	3	2	26

Table B  
MODIFICATION AND NATURE OF THE CASE

		Criminal	Commercial	Tort	Family	Total
1975	No. of cases	5	4	4	2	15
1965	No. of cases	0	4	1	2	7

Table C  
JURISDICTION OVER APPEAL

		As of right	By permission	Total
1975	No. of cases	142	8	150
	% of total	94.7%	5.3%	100%
1965	No. of cases	146	4	150
	% of total	97.3%	2.7%	100%

Table D  
NATURE OF THE QUESTION: RAW PERCENTAGES

		Law	Fact	Mixed	Total
1975	No. of cases	102	10	35	147*
	% of total	69.4%	6.8%	23.8%	100%
1965	No. of cases	81	33	36	150
	% of total	54.0%	22.0%	24.0%	100%

\* Three cases were not classified as to nature of the question in the 1975 sample.

Table E  
NATURE OF THE QUESTION AND DISPOSITION ON APPEAL

		LAW				FACT				MIXED			
		Affirmed	Reversed	Modified	Total	Affirmed	Reversed	Modified	Total	Affirmed	Reversed	Modified	Total
1975	No. of cases	79	12	8	99	9	1	0	10	24	3	6	33
	% of total	79.8%	12.1%	8.1%	100%	90.0%	10.0%	0%	100%	72.7%	9.1%	18.2%	100%
1965	No. of cases	60	18	3	81	25	6	2	33	25	10	1	36
	% of total	74.1%	22.2%	3.7%	100%	75.7%	18.2%	6.1%	100%	69.4%	27.7%	2.8%	100%



Table F  
FACTUAL DISPUTES: JURY AND NONJURY TRIALS

		Jury	Nonjury	Total
1975	No. of cases	12	31	43
	% of total	27.9%	72.1%	100%
1965	No. of cases	5	51	56
	% of total	8.9%	91.1%	100%

Table G  
PARTIES AS APPELLANT/RESPONDENT

	PRIVATE			CORPORATE			GOVERNMENT		
	Appellant	Respondent	Total	Appellant	Respondent	Total	Appellant	Respondent	Total
1975	No. 115	41	156	33	37	70	2	72	74
	% of total 73.7%	26.3%	100%	47.1%	52.9%	100%	2.7%	97.3%	100%
1965	No. 98	65	163	44	38	82	8	47	55
	% of total 60.0%	40.0%	100%	53.7%	46.3%	100%	14.5%	85.5%	100%

Table H  
GOVERNMENT AS RESPONDENT

	CRIMINAL						OTHER		
	Affirmed	Reversed	Modified	Total	Affirmed	Reversed	Modified	Total	
1975	No. of cases 37	6	5	48	16	3	1	20	
	% of total 77.1%	12.5%	10.4%	100%	80.0%	15.0%	5.0%	100%	
1965	No. of cases 26	3	0	29	18	1	0	19	
	% of total 89.6%	10.3%	0%	100%	94.7%	5.3%	0%	100%	

Table I  
NATURE OF THE PARTIES AND DISPOSITION ON APPEAL

		Private/ Private	Private/ Corporate	Private/ Government	Corporate/ Private	Corporate/ Corporate	Other*	
1965	Affirmed	No. of cases	23	12	40	17	11	5
		% of total	63.9%	70.6%	88.9%	77.3%	55.5%	50.0%
	Reversed/ Modified	No. of cases	13	5	5	5	9	5
		% of total	36.1%	29.4%	11.1%	22.7%	45.0%	50.0%
	Total no. of cases		36	17	45	22	20	10
1975	Affirmed	No. of cases	25	—	52	—	15	23
		% of total	78.1%	—	76.5%	—	71.4%	79.3%
	Reversed/ Modified	No. of cases	7	—	16	—	6	6
		% of total	21.9%	—	23.5%	—	28.6%	20.7%
	Total no. of cases		32	—	68	—	21	29

\* Certain categories had to be listed in the "other" column because the observed values for these categories were not large enough to test for valid statistical significance. For the year 1965, the "other" category included: government/government, government/corporate, government/private, and corporate/government. For the year 1975, it included: private/corporate, government/government, government/corporate, government/private, corporate/private, and corporate/government.

Table J  
NATURE OF THE CASE

	Tort		Special Proceeding			Article 78		Criminal	Other	Total
	No. of cases	% of total	Commercial	Proceeding	Election	8	5.3%			
1975	16	10.7%	40	15	3	8	8	47	12	150
			26.7%	10.0%	2.0%	5.3%		31.3%	8.0%	100%
1965	35	23.3%	44	16	0	13	13	29	0	150
			29.3%	10.7%	0%	8.7%		19.3%	0%	100%

Table K  
FAMILY CASES AND THE NATURE OF THE QUESTION

		Law	Fact	Mixed	Total
1975	No. of cases	4	1	3	8*
	% of total	50.0%	12.5%	37.5%	100%
1965	No. of cases	6	4	3	13
	% of total	46.1%	30.8%	23.1%	100%

Table L  
DISPOSITION OF FAMILY CASES ON APPEAL

		Affirmed	Reversed	Modified	Total
1975	No. of cases	6	1	2	9
	% of total	66.7%	11.1%	22.2%	100%
1965	No. of cases	9	3	1	13
	% of total	69.2%	23.1%	7.7%	100%

Table M  
DISPOSITION OF CASES SEEKING EQUITABLE RELIEF

		Affirmed	Reversed	Modified	Total
1975	No. of cases	12	3	3	18
	% of total	66.6%	16.7%	16.7%	100%
1965	No. of cases	29	10	2	41
	% of total	70.7%	24.4%	4.9%	100%

Table N  
DISPOSITION OF DISCOVERY MOTIONS

		Affirmed	Reversed	Modified	Total
1975	No. of cases	7	2	0	9
	% of total	77.8%	22.2%	0%	100%
1965	No. of cases	—	—	—	—
	% of total	—	—	—	—

\* One case could not be classified by researchers.

Table O  
DISPOSITION OF CRIMINAL CASES

		Affirmed	Reversed	Modified	Total
1975	No. of cases	37	6	5	48
	% of total	77.1%	12.5%	10.4%	100%
1965	No. of cases	28	2	0	30
	% of total	93.3%	6.7%	0%	100%

Table P  
JURY TRIAL BELOW

		Jury	Nonjury	Total
1975	No. of cases	44	106	150
	% of total	29.3%	70.7%	100%
1965	No. of cases	15	135	150
	% of total	10.0%	90.0%	100%

Table Q  
JURY TRIAL AND DISPOSITION ON APPEAL

		Affirmed	Reversed	Modified	Total
1975	No. of cases	34	4	6	44
	% of total	77.3%	9.1%	13.6%	100%
1965	No. of cases	12	4	1	17
	% of total	70.6%	23.5%	5.9%	100%

Table R  
CONCURRENCE RATE

		Concurrences	Dissents	Total	Total no. of cases
1975	No.	732	18	750	150
	% of total	97.6%	2.4%	100%	—
1965	No.	745	5	750	150
	% of total	98.0%	2.0%	100%	—

Table S  
NATURE OF CASE DISPOSED OF WITHOUT OPINION

		Criminal	Commercial	Tort	Special Proceeding	Election	Article 78	Family	Other
1975	No. disposed without opinion	37	20	11	12	3	5	5	8
	Total no. of cases in the area of law	47	40	16	15	3	8	9	12
	% of total disposed without opinion	78.7%	50.0%	68.8%	80.0%	100%	62.5%	55.5%	66.7%
1965	No. disposed without opinion	26	25	21	13	0	12	9	0
	Total no. of cases in the area of law	29	44	35	16	0	13	13	0
	% of total disposed without opinion	89.6%	56.8%	60.0%	81.2%	—	92.3%	69.2%	—

Table T  
FORM OF OPINION

		Full Opinion	Memoranda	Per curiam	No Opinion	Total
1975	No. of cases	2	45	1	102	150
	% of total	1.3%	30.0%	0.7%	68.0%	100%
1965	No. of cases	1	38	5	106	150
	% of total	0.7%	25.3%	3.3%	70.7%	100%



Table U  
FORM OF OPINION AND DISPOSITION OF APPEAL

		FULL OPINIONS				MEMORANDA			
		Affirmed	Reversed	Modified	Total	Affirmed	Reversed	Modified	Total
1975	No. of cases	1	1	0	2	19	13	13	45
	% of total	50.0%	50.0%	0%	100%	42.2%	28.9%	28.9%	100%
1965	No. of cases	0	1	0	1	11	21	6	38
	% of total	0%	100%	0%	100%	28.9%	55.3%	15.8%	100%
PER CURIAM									
		Affirmed	Reversed	Modified	Total	Affirmed	Reversed	Modified	Total
1975	No. of cases	0	1	0	1	95	6	2	103
	% of total	0%	100%	0%	100%	92.2%	5.8%	2.0%	100%
1965	No. of cases	0	5	0	5	99	8	0	107
	% of total	0%	100%	0%	100%	92.5%	7.5%	0%	100%
NO OPINION									

## APPENDIX II: STANDARD LIST OF QUESTIONS

1. Is [was] the current caseload too large?
2. If so, would you attribute this, in whole or in part, to the broad scope of review, ease of appealability, or both?
3. Why do you think CPLR 5701(a) grants such ease of appealability? Is it too broad?
4. Why does the Appellate Division have such broad scope of review, especially over fact questions? Is its purpose to screen for the court of appeals? Is it to provide the sober second look at the supreme court? Has the basic purpose in this regard evolved from the former to the latter?
5. What do you see as the Appellate Division's overall function? To influence legislative change? To simply provide parties with the right to a second hearing? To keep common law uniform within the department or state? In light of the answers to these questions, should the Appellate Division justices take a hands-off or hands-on approach to review?
6. What does "plenary powers in the interests of justice" mean?
7. What is the role of the Appellate Term? Is a second appeal to the Appellate Division in cases originating in the civil court a waste of time?
8. Do you think the standard of review expected if a case is appealed affects attorneys' decisions with respect to such matters as whether to demand a jury or what kind of record to make?
9. When presented with factual questions, what is your initial approach?
10. Should the Appellate Division have such a broad scope of review?
11. How do you decide when to make new findings of fact and when to send back for a new trial?
12. In your initial approach, are the decisions of certain trial judges scrutinized more closely?
13. Would you defer to another justice's expertise in a specialized area of law when making a decision?