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RIGHTS AND FREEDOMS UNDER THE STATE CONSTITUTION

Sandra M. Stevenson:

We are so fortunate to have Professor Eve Cary from Brooklyn Law School, Professor Helen Hershkoff from NYU Law School, Professor Mary Falk from Brooklyn Law School, and our own Rob Heverly, Assistant Director of the Government Law Center. We are so proud to have all of them here.

I will turn it over to Eve Cary.

*Eve Cary:**

My colleague, Mary Falk, and I became state constitutional groupies a couple of years ago kind of by accident when we wrote an article¹ about *People v. Scott* and *People v. Keta*.² We

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1. Eve Cary & Mary R. Falk, *People v. Scott & People v. Keta: "Democracy Begins In Conversation,"* 58 BROOK. L. REV. 1279 (1993).

2. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). In *Scott*, the New York Court of Appeals held that "where landowners fence or post 'No Trespassing' signs on their property or, by some other means, indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected and that they will be free from unwanted intrusions is reasonable." *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930. Thus, the court of appeals rejected the "open fields doctrine" reconfirmed in *Oliver v. United States*, 466 U.S. 170 (1984), where the United States Supreme Court found warrantless searches of posted or fenced land to be constitutional. *Id.* at 482, 593 N.E.2d at 1333, 583 N.Y.S.2d at 925. Relying on article I, § 12 of the New York Constitution, the court of appeals reasoned that *Oliver* did "not adequately protect fundamental constitutional rights." *Scott*, 79 N.Y.2d at 478, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. See N.Y. CONST. art. I, § 12. This section provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against

were struck in that decision by its peculiar duality. There was the temperate, reasoned discussion of the basic search and seizure issue, then all of a sudden the bizarre explosion in the middle, with accusations going back and forth about the correct method of constitutional adjudication.

I think what really struck us was not so much what the correct method of state constitutional analysis should be, but rather the opposite sides of the court. Judge Bellacosa and Judge Kaye seemed to disagree entirely about what the court had done in the past. Judge Bellacosa said that the court has always adopted non-interpretive analysis,³ whereas Judge Kaye found that the court has not adhered to any fixed methodology.⁴ Ms. Falk and I

unreasonable searches and seizures, shall not be violated . . . but upon probable cause” *Id.*

In *Keta*, the New York Court of Appeals struck down the New York statute “which authorize[d] the police to conduct random warrantless searches of vehicle dismantling businesses to determine whether such businesses are trafficking in stolen automobile parts.” *Scott*, 79 N.Y.2d at 491-92, 593 N.E.2d at 1339, 583 N.Y.S.2d at 931. The court of appeals, relying on article I, § 12 of the New York Constitution, explicitly rejected *New York v. Burger*, 482 U.S. 691 (1987), where the United States Supreme Court found that Vehicle and Traffic Law 415-a(5)(a) did not violate the Fourth Amendment’s proscription against unreasonable search and seizures. *Scott*, 79 N.Y.2d at 491-92, 593 N.E.2d at 1339, 583 N.Y.S.2d at 931. In acknowledging a state’s power to interpret the provisions of its constitution “as providing greater protections than their Federal counterparts,” both the *Scott* and *Keta* decisions made reference to the Supreme Court’s designation of states as “the primary guardian[s] of the liberty of the people.” *Scott*, 79 N.Y.2d at 496, 505, 593 N.E.2d at 1341-42, 1347-48, 583 N.Y.S.2d at 933-34, 939-40 (citing *Massachusetts v. Upton*, 466 U.S. 727, 739 (1984) (Stevens, J., concurring)).

3. *Id.* at 513, 593 N.E.2d at 1353, 583 N.Y.S.2d at 945 (Bellacosa, J., dissenting). Judge Bellaoca advocated that where a federal and state constitutional provision are identical, “there should be ‘[s]ufficient reasons’ . . . for disagreeing before we construe the State provision in a manner different from the construction placed on its Federal counterpart by the United States Supreme Court. *Id.* at 509, 593 N.E.2d at 1350, 583 N.Y.S.2d at 942. Judge Bellacosa warned that “inasmuch as the court’s self-imposed non-interpretive analysis has now been effectively scuttled by [*Scott* and *Keta*], New York’s adjudicative process is left bereft of any external or internal doctrinal disciplines.” *Id.* at 517, 593 N.E.2d at 1355, 583 N.Y.S.2d at 947.

4. *Id.* at 504, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, C.J., concurring). “We must of course be faithful to our precedents, . . . [b]ut

examined the precedents relied upon by the court, however we could not determine what method of state constitutional interpretation the court had been following.

In fact, the whole notion of non-interpretive analysis just sort of seeped in. They kept saying that they had said things in previous cases that it did not appear to us that they had said at all. Thus, we concluded that, irrespective of which method is best, the New York Court of Appeals should adopt and articulate a particular method. The court has left litigators and judges without a clear direction upon which to raise a state constitutional issue.

Our second article addressed the death penalty.⁵ In some respects it is a continuation of the first article,⁶ but it is directed to the most recent controversial issue in the state, the death penalty. Capital punishment is a subject about which there has been an enormous amount of federal litigation, and it will be particularly interesting to try to predict how the New York Court of Appeals would handle these issues. It is our predictions that we wanted to discuss today. A discussion about the death penalty in New York State must begin by addressing the federal floor. There are four or five important cases that basically outline the federal floor on the death penalty.⁷

In 1972, the Supreme Court decided *Furman v. Georgia*.⁸ In *Furman*, the Court did not reach the question of whether the

where we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution" *Id.* at 504, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939.

5. Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges To New York's Death Penalty*, 4 J.L. & POL'Y 161 (1995).

6. *See supra* note 1.

7. *See infra* notes 8-33 and accompanying text.

8. 408 U.S. 238 (1972). *Furman* was a consolidation of three cases which presented the question: "'Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments[.]'" *Id.* at 239 (citations omitted). *See Furman v. Georgia*, 167 S.E.2d 628 (Ga. 1969); *Jackson v. State*, 171 S.E.2d 501 (Ga. 1969); *Branch v. Texas*, 447 S.W.2d 932 (Tex. 1969). *See also* U.S. CONST. amend VIII. This provision states in pertinent

death penalty is per se unconstitutional,⁹ but it did strike down the death penalty statutes that were before it.¹⁰ Furthermore, the decision resulted in the nullification of death penalty statutes in thirty-nine states.¹¹ Basically, the Court concluded that these statutes were unconstitutional because they resulted in the wanton and freakish imposition of death. Thus, the Court's decision established that in order for a capital sentencing statute to be constitutional, at a minimum, the death penalty had to be imposed consistently and it also had to be individualized, taking into consideration the individual circumstances of the crime and the particular defendant.¹²

In the next case, *Gregg v. Georgia*,¹³ the Supreme Court reached the decision that it had left open in *Furman*, holding that

part: "[N]or cruel and unusual punishments inflicted." *Id.* See U.S. CONST. amend. XIV. This provision states in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* In a brief per curiam opinion, the Court held that the Eighth and Fourteenth Amendments were indeed violated in these cases. *Id.* at 240.

9. *Id.* at 311-12. Each of the nine Justices wrote separate opinions. Justices William Douglas, William Brennan, Potter Stewart, Byron White and Thurgood Marshall concurred. *Id.* at 240. Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell and William Rehnquist dissented. *Id.* at 240. However, Justice Brennan and Justice Marshall concluded that the Eighth Amendment prohibits the imposition of death "for all crimes and under all circumstances." *Id.* at 375 (Burger, J., dissenting).

10. *Id.* at 417.

11. *Id.* Additionally, the decision "remove[d] the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country." *Id.*

12. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

13. 428 U.S. 153 (1976). In *Gregg*, the defendant was charged with armed robbery and murder. *Id.* at 158. Georgia utilizes a bifurcated trial in capital cases, consisting of a guilt stage and a sentencing stage. *Id.* In the guilt phase, the jury found the defendant guilty of two counts of armed robbery and two counts of murder. *Id.* at 160. In the penalty phase, the jury, after finding two aggravating circumstances beyond a reasonable doubt, returned verdicts of death on each count. *Id.* at 161. The Georgia Supreme Court affirmed both the convictions and the death sentences for the murders. *Id.* However, the court vacated the death sentences for armed robbery on the grounds, inter alia, that "the death penalty had rarely been imposed in Georgia for that offense." *Id.* at 161-62. The defendant petitioned the Court for certiorari contending that the imposition of death in his case violated the Eighth and Fourteenth

the death penalty is not per se unconstitutional under all circumstances.¹⁴ The Court then went on to suggest a procedure for implementing the consistency and individualization standards mandated in *Furman*.¹⁵

The Court found that “a bifurcated system is . . . likely to ensure elimination of the constitutional deficiencies identified in *Furman*.”¹⁶ This system would comprise a guilt/non-guilt determination stage, and then an entirely separate sentencing stage. Bifurcation of the trial allows relevant information to be presented at the sentencing stage that might have been inadmissible at the guilt stage, so that a rational sentence is imposed.¹⁷

The *Gregg* Court also dealt with a number of state legislative acts that were enacted to comport with the Court’s consistency requirement by passing mandatory death sentences.¹⁸ The Court referred to *Woodson v. North Carolina*¹⁹ and *Roberts v.*

Amendments. *Id.* at 162. The Court granted certiorari and affirmed the judgment of the Georgia Supreme Court. *Id.* at 207.

14. *Id.* at 169.

15. *Id.* at 199. The *Gregg* Court found that “[a]s a general proposition these concerns [expressed in *Furman*] are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.” *Id.* at 195. However, the Court noted that “each distinct system must be examined on an individual basis.” *Id.*

16. *Id.* at 191-92.

17. *Id.* The Court stated that “it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision.” *Id.* at 204. Thus, the Court found that “[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions.” *Id.* at 203-04. However, the Court also noted that since jurors are unlikely to have prior “experience in sentencing, they are unlikely to be skilled in dealing with the information they are given.” *Id.* at 192. Nonetheless, the Court found that this “problem will be alleviated if the jury is guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.” *Id.*

18. *Id.* at 199 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976)).

19. 428 U.S. 280 (1976).

Louisiana,²⁰ which were decided on the same day as *Gregg*. In *Woodson* and *Roberts*, the Court held that mandatory death penalty statutes were unconstitutional.²¹

In *Coker v. Georgia*,²² the Court held that a sentence of death for the crime of rape where a life has not been taken would be “grossly disproportionate and excessive punishment,” and thus unconstitutional.²³

In *Enmund v. Florida*,²⁴ a 1982 case, the Court stated that the death penalty could not be imposed in the case of a non-intentional felony murder.²⁵ The Court found that the Eighth Amendment prohibits the “imposition of . . . death . . . on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, or intend to kill, or intend that a killing take place or that lethal force will be employed.”²⁶

20. 428 U.S. 325 (1976).

21. Accordingly, the Court struck down the mandatory death penalty statutes of North Carolina and Louisiana. *See Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.

22. 433 U.S. 584 (1977). In *Coker*, the jury found the defendant guilty of escape, armed robbery, motor vehicle theft, kidnapping and rape. *Id.* at 587. The death sentence was imposed for the rape. *Id.*

23. The Court found that the Eighth Amendment proscribes not only “barbaric” punishments, “but also those that are ‘excessive’ in relation to the crime committed.” *Id.* at 591-92. *See* U.S. CONST. amend VIII. This provision states in pertinent part: “[N]or cruel and unusual punishments inflicted.” *Id.*

24. 458 U.S. 782 (1982). In *Enmund*, defendant was found guilty of first degree murder and robbery and was sentenced to death. *Id.* at 785. Two elderly victims were robbed and killed in their farmhouse. *Id.* at 784-85.

25. *Id.* at 797.

26. *Id.* The trial court and the Florida Supreme Court had opposing views regarding defendant’s participation. *Id.* at 786 n.2. The trial court found that defendant was the triggerman, but the Florida Supreme Court held that “the only supportable inference with respect to defendant’s participation was that he drove the getaway car.” *Id.* The difference was of no consequence “since the Florida Supreme Court held that driving the escape car was enough to warrant . . . the death penalty, whether or not the defendant intended that life be taken or anticipated that lethal force be used.” *Id.* The United States Supreme Court, in overturning defendant’s death sentence, stated that “[t]he focus must be on [defendant’s] culpability, not . . . those who . . . shot the

The final case, and one which I believe is extremely important, is *McCleskey v. Kemp*.²⁷ *McCleskey* was a challenge to the Georgia death penalty process on the grounds that it was “administered in a racially discriminatory manner,” in violation of the Fourteenth Amendment.²⁸ Defendant relied on a statistical study of over two thousand death penalty cases that occurred in Georgia during a ten year period.²⁹ The study concluded that not only were black murderers more likely to be given the death penalty than white murderers, but also that the murderers of white people were more likely to receive the death penalty than the murderers of black people.³⁰ Thus, statistically, there was enormous discrepancy in capital sentencing based on race.

However, the Supreme Court rejected defendant’s claim on the grounds that he did not prove purposeful discrimination in his own case.³¹ Such proof is virtually impossible to obtain in any case. The Court stated that race discrimination in criminal

victims, for we insist on ‘individualized consideration as a constitutional requirement in imposing the death sentence’” *Id.* at 799 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

Subsequently, the Court refined the culpability standard set forth in *Enmund* by holding that “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.” *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

27. 481 U.S. 279 (1987).

28. *Id.* at 286. *See* U.S. CONST. amend. XIV, § 1. This provision states in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law” *Id.* The New York Criminal Procedure Law requires the court of appeals, upon the request of the defendant, to “review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim for which the defendant was convicted” N.Y. CRIM. PROC. LAW § 470.30(2)(b) (McKinney 1995).

29. *McCleskey*, 481 U.S. at 286. The study was performed by Professors David C. Baldus, Charles Pulaski and George Woodworth. *Id.*

30. *Id.* at 286-87.

31. *Id.* at 297. The Court stated that for defendant “to prevail under the Equal Protection Clause, [he] must prove that the decisionmakers in *his* case acted with discriminatory purpose.” *Id.* at 292 (emphasis added). However, the Court held that “the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in defendant’s case acted with discriminatory purpose.” *Id.* at 297.

sentencing is inevitable,³² and, thus, it was willing to accept some statistical race discrimination without finding a constitutional violation.³³

While these cases were waning their way through the Court, the Court was, at the same time, deciding dozens of other cases, and spending an inordinate amount of time on death penalty cases.³⁴ Finally, the Court balked and said, "We have had enough of this. It is not appropriate for us to be intervening in an issue that is so very much part of state jurisprudence. We should

32. *Id.* at 312-13. *See* *Turner v. Murray*, 476 U.S. 28, 35 (1986) (noting that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate . . ."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 162 (1994) (noting that voir dire regarding racial biases is ultimately ineffective since jurors themselves are unaware of their biases and thus are unable to respond truthfully to questions posed to them during the voir dire process) (Scalia, J., dissenting).

33. *McCleskey*, 481 U.S. at 312-13. The Court noted that "any mode for determining guilt or punishment 'has its weakness and the potential for misuse.'" *Id.* at 313 (citing *Singer v. United States*, 380 U.S. 24 (1965)). Nonetheless, the Court found that "[t]he discrepancy indicated by the Baldus study [was] 'a far cry from the major systematic defects identified in *Furman*.'" *McCleskey*, 481 U.S. at 313. *But see* *Callins v. Collins*, 510 U.S. 1141, 1153 (1994) (stating that "[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die") (Blackmun, J., dissenting); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995) (stating that "race and poverty continue to determine who dies"); Stephen B. Bright, *Counsel For The Poor: The Death Sentence Not For the Worst Crime But For The Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) (arguing that "[p]oor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters").

34. *See* *Godfrey v. Georgia*, 446 U.S. 420, 427-29 (1980) (questioning whether murder is "outrageously or wantonly vile, horrible or inhuman"); *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) (questioning whether murder is "especially heinous, atrocious, or cruel"); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (questioning whether the Eight Amendment is a per se bar prohibiting the admission of victim impact statements at the sentencing phase of capital trials); *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (questioning whether the Eighth Amendment prohibits the execution of the insane).

not be intervening just to prevent the states from allow the death penalty.”

This was occurring during the period of the new federalism enthusiasm and the general cutting back of rights and delegating back to the states a lot of these questions. So, here we have a clear invitation by the Supreme Court to the state courts to do it themselves. “Don’t bother us and habeas corpus anymore. This is up to the states.”³⁵

Thus, I think that the situation we see ourselves in at this moment is one where the state court must determine what its death penalty jurisprudence will be. Thus, an awful lot of issues remain unclear.

What we, Mary Falk and I, have been analyzing is how death penalty cases might be litigated in the New York Court of Appeals, what is likely to happen, and what types of arguments ought to be made. Basically, we have concluded that more research will be required if the court decides to apply a non-interpretive analysis; local, state, empirical evidence could be very important in litigating these issues. This will be true on both sides.

I think our bias in the article creeps through, and we might as well admit that we oppose the death penalty. However, we also believe that a lot of people who are in favor of the death penalty might change their view based on both the amount of litigation that it is going to generate, and that the death penalty in New York State is unconstitutional under standards that have already been established.³⁶

I am just going to end by discussing what we see as the per se challenges to the death penalty under the State Constitution. Then Mary Falk will speak about some of the specific provisions in the death penalty that seem to be ripe for constitutional challenge.

The first thing we can examine is what has happened in those states that have had a death penalty for a long time. What has

35. *See, e.g.*, “The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States . . . , however, remain the primary guardian of the liberty of the people.” *Massachusetts v. Upton*, 466 U.S. 727, 739 (1984) (Stevens, J., concurring).

36. *See* text accompanying notes 53-55.

been the result there? Generally, as a matter of state constitutional litigation, it has been bad in the sense that the states have basically just adopted the method of the Supreme Court and have not developed their own individual state jurisprudence.

On the other hand, if we look at other states, we might think that it is not hopeful to challenge the death penalty since most states have upheld the imposition of the death penalty. However, looking at other states it is somewhat antithetical of state constitutional litigation. There are basically three per se challenges that have been rejected as a matter of Federal Constitutional Law, but may appear to have merit to the New York Court of Appeals. The first is the excessive punishment argument, cruel and unusual punishment.³⁷

The Supreme Court in *Gregg* said the question should be framed to ask whether the death penalty “is so totally without penological justification that it results in the gratuitous infliction of suffering.”³⁸ If the answer is “no,” then there may be some penal law justification. Then it is constitutional and there is a presumption of rationality.³⁹

Generally, the courts have accepted a kind of total logical argument. They point to the fact that the death penalty exists and, therefore, conclude that people must want it to exist.⁴⁰ Thus, it does not offend contemporary notions of decency, and is thus not unconstitutional. They essentially begged the whole question of whether the death penalty is actually cruel, is it excessive.

A quote from Clarence Darrow in our second article said the fact “that capital punishment is horrible and cruel is the reason

37. N.Y. CONST. art. I, § 5. This section provides in relevant part: “[N]or shall cruel and unusual punishments be inflicted” *Id.*

38. *Gregg*, 428 U.S. at 183 (citations omitted).

39. *Id.* at 182-83. The Court stated that “we cannot ‘invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology.’” *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 451 (1972) (Powell, J., dissenting)).

40. *See Gregg*, 428 U.S. at 179-80. The *Gregg* Court noted that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*.” *Id.* at 179. After *Furman*, new death penalty statutes were enacted in at least thirty-five states. *Id.* at 179-80.

for its existence.”⁴¹ Of course, if the citizens of New York want to inflict horrible punishment on murderers, and it seems there is plenty of evidence of that, maybe they should not get what they want, and it is the job of the court to keep them from getting what they want.

It is interesting that the two state courts that have struck down the death penalty, Massachusetts and California, are also the only two courts that have gone into much discussion about what it is like to be executed from the point of view of the person who is being executed.⁴² Additionally, the NAACP has written a lot about what it is like to be executed.

41. Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges To New York's Death Penalty*, 4 J.L. & POL'Y 161, 189 (1995).

42. See *Suffolk Dist. Attorney v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980). Henry Arsenault, a convicted murderer, sentenced to death in Massachusetts, submitted a pro se amicus curiae brief describing his experiences on death row. *Id.* at 1290. Justice Liacos, in his concurring opinion, reiterated Arsenault's experiences. *Id.* The opinion stated, in pertinent part:

For over two years, Henry Arsenault “lived on death row feeling as if the Court's sentence were slowly being carried out.” Arsenault could not stop thinking about death. . . . “There was a day to day choking, tremulous fear that quickly became suffocating.” If he slept at all, fear of death snapped him awake sweating. His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide. The guard was there when he had his nightmares and there when he wet his pants. Arsenault retained neither privacy nor dignity. Apart from the guards he was alone much of the time as the day of his execution neared.

And on the day of the execution, after three sleepless weeks and five days' inability to eat, after a night's pacing the cell, he heard the warden explain the policy of the Commonwealth—no visitors, no special last meal, and no medication. . . . He walked to the death chamber and turned toward the chair. Stopping him, the warden explained that the execution would not be for another hour. . . . When the executioner tested the chair, the lights dimmed. Arsenault heard the other prisoners scream. . . . He wet his pants. Less than an hour before the execution, the Lieutenant Governor commuted his sentence. Arsenault's legs would not hold him up. Guards carried him back to his cell. He was trembling uncontrollably. A doctor sedated him. And he was moved off death row.

We were rather struck by something that the New Jersey Supreme Court said in their determination that kidnapping is one of the aggravating factors in a death penalty case in New Jersey. The court points out that kidnapping makes a murder typically depraved and therefore justifies the death penalty.⁴³ The court said that "if the victim is aware as a practical certainty that he is about to be executed, his psychological suffering obviously is extreme. In making the victim aware of such imminent execution, the defendant must have as his purpose for doing so that this knowledge will cause the victim to endure great psychological suffering."⁴⁴

We thought that this was a pretty accurate description of what happens to people on death row. The notion that the death penalty causes incredible suffering is recognized in one part of the New Jersey decision, but not as an argument that maybe it is cruel and unusual punishment.⁴⁵

The job for lawyers who oppose the death penalty in New York will be to try to make the court of appeals look at what the death penalty is actually like, instead of just saying this is a job for the legislature. As the New Jersey Supreme Court stated: The

Id. (Liacos, J., concurring). See also *People v. Anderson*, 493 P.2d 880 (Cal. 1972). Subsequently, both Massachusetts and California amended their constitutions to permit the death penalty.

43. See *State v. Ramseur*, 524 A.2d 188, 204 (N.J. 1987). In *Ramseur*, defendant was convicted of murder and sentenced to death. *Id.* at 165-66.

44. *Id.* at 232 n.39. See also *State v. Martini*, 651 A.2d 949 (N.J. 1994). In *Martini*, defendant was convicted of purposeful or knowing murder, felony murder, kidnapping and two weapons offenses. *Id.* at 956-57. Defendant was sentenced to death for the murder. *Id.* at 957. The court noted that "[b]ecause [defendant] took no steps to hide his identity from [the victim], the likelihood that defendant entertained any thought of freeing his victim is remote indeed," *Id.* at 973. Thus, in performing their proportionality review, the court compared the kidnapping resulting in murder to, et al., contract killings. *Id.* The court found that, "given the terrorizing of [the victim] and his family and [defendant's] ransom motive, [defendant's] moral blameworthiness, his degree of victimization, and his character," the death penalty in this case does not offend principles of proportionality." *Id.* at 986.

45. The jury that found the "extreme suffering" of the victim was an aggravating factor. *Id.* at 975.

wisdom of the death penalty is not for us to decide. That is obviously a kind of difficult argument.

The second argument has been less accepted or made less often, but it seems like a very good one. It is essentially a due process argument so that the burden of proof is switched and placed on the state.⁴⁶ If we start out with the proposition that life is fundamental, then before the state can deprive a person of life, the state must prove the existence of a compelling state interest and that there is no less drastic alternative. That obviously places the burden on the state to come up with some very good reasoning, a very compelling reason, for having the death penalty rather than some other kind of punishment.⁴⁷

In Massachusetts when the state was arguing death penalty cases, they did not come up with any justification at all, presumably assuming that that would not be the test, and that the legislature would be entitled to a presumption of acting rationally. When a case was put off for the state to come back with a compelling reason, they were unable to do it. They did not have, at their command, the statistics that would show a compelling reason for having a death penalty instead of life imprisonment without parole.

Under the New York State Constitution, lawyers on both sides, in this case the district attorneys' office, if they want to meet this kind of challenge, need to come up with the statistics that will show there is indeed a compelling reason for imposing death rather than just imprisonment.

The final argument is an equal protection argument.⁴⁸ Massachusetts, in striking down its death penalty, relied in part

46. N.Y. CONST. art. I, § 6. This section provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

47. *See Simmons v. South Carolina*, 114 S. Ct. 2187, 2196 (1994) (noting that "if [a] State rests its case for imposing the death penalty . . . on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society").

48. N.Y. CONST. art. I, § 11. This section provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or

on the fact that race considerations enter into capital sentencing decisions.⁴⁹ Most of the other state courts that have decided this issue have essentially treated *McCleskey* as the last word.⁵⁰ *McCleskey* stated that it is permissible to have racial considerations enter into sentencing.⁵¹

It seems to me that it is quite possible that the citizens of the State of New York would not feel that way if the statistics were there to show that indeed race discrimination infects the capital sentencing procedure.

One of the things the Massachusetts court was willing to do was to rely on the *McCleskey* statistic. A lot of the other state courts threw out cases because the defendants were unable to come forward with local statistics, that show, in Ohio say, that race infected sentencing determinations.

Thus, in thinking about this under the New York State Constitution, some thought must be given as to what types of statistics might be persuasive to the court of appeals. What statistics can we use without having to wait ten years for two thousand people to sit around on death row or be executed so we

religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Id.

49. See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984). In *Colon-Cruz*, the Massachusetts Supreme Judicial Court struck down an amendment to the Massachusetts Constitution which provided that "no provision of the state constitution may in the future be construed as prohibiting the imposition of the punishment of death." *Id.* at 123. The court noted that adopting the amendment "would mean that a statute establishing the death penalty for members of one particular race only . . . would be valid under the Massachusetts Constitution." *Id.*

50. See, e.g., *Foster v. State*, 614 So. 2d 455, 463 (Fla. 1992); *State v. Zuern*, 512 N.E.2d 585, 593 (Ohio 1987); *Stephens v. State*, 456 S.E.2d 560, 562 (Ga. 1995); *State v. Green*, 406 S.E.2d 852, 853-54 (N.C. 1991).

51. The *McCleskey* Court acknowledged that "[t]here is . . . some risk of racial prejudice influencing a jury's decision in a criminal case. However, the Court stated that "because of th[at] risk . . . we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *Id.* (citing *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)).

can say at the end of that time, yes, indeed, this has been racially discriminatory.

At this point, I will let Mary Falk discuss specific provisions of the New York Constitution. I suppose that what we have concluded here is that there are a lot of arguments that can be made under the State Constitution, but at the moment we do not have the necessary information to make the arguments. It is going to be the task of the lawyers who are going to be litigating in this area to come up with local statistical information about how New Yorkers feel about all of these different areas.

Mary Falk:

In addition to the argument to the per se challenges that are raisable under the State Constitution, under the Cruel and Unusual Punishment Clause,⁵² the Due Process Clause,⁵³ and the state's equivalent to the Equal Protection Clause,⁵⁴ there are many specific provisions of our new death penalty statute that are challengeable under the State Constitution.

For one thing, the statute itself, running to some thirty pages, provides ample opportunity. Anyone with a basic knowledge of death penalty jurisprudence can, by a perusal of the statute, spot easily a dozen arguable challenges.

Statutory issues that have existed in the statutes of other states and that have been already raised under the Federal Constitution will be relitigated under the New York State Constitution. Additionally, issues that may be unique to our statute, and there

52. N.Y. CONST. art. I, § 5. This section provides in relevant part: “[N]or shall cruel and unusual punishments be inflicted” *Id.*

53. N.Y. CONST. art. I, § 6. This section provides in relevant part: “No person shall be deprived of life, liberty or property without due process of law.” *Id.*

54. N.Y. CONST. art. I, § 11. This section provides:

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

Id.

may be one or two, although raisable under the Federal Constitution, will be raised either under both or solely under the State Constitution in light of the Supreme Court's now ten year long deregulation of the death penalty, the low floor of protection.

The many challenges will obviously be grounded in a whole range of state constitutional provisions, although mainly, for obvious reasons, to provisions in the state Bill of Rights.

I want to share just a few thoughts about three of the possible grounds of challenge: not the challenges themselves, but the grounds of challenge. First of all, challenges under the State Constitution's prohibition of cruel and unusual punishment, its Due Process Clause or clauses and the guarantee or perhaps even guarantees of jury trial.

As with all per se challenges, I think that the instincts of petitioners, and perhaps the courts as well, will be to think about the many statutory challenges raisable under a prohibition against cruel and unusual punishment. That is so because the great temptation is to follow the reasoning of the United States Supreme Court where many of these challenges have traditionally been raised under the Eighth Amendment to the Court.

If we give in to this temptation, my own sense is that it will be a big mistake. First of all, as an opponent of the death penalty, it will be a big mistake because I do not think it will be a successful way to go about making the statutory challenges. Even looking beyond success or failure, I think that litigating under the New York State Cruel and Unusual Punishment Clause, which is virtually identical to the United States Eighth Amendment, creates a risk that New York State death penalty jurisprudence would fall into the same abyss of incoherence that federal death penalty jurisprudence has fallen into.⁵⁵

By that I mean the part of Eighth Amendment jurisprudence that follows from *Furman*, *Gregg* and its progeny. The

55. See U.S. CONST. amend VIII. This provision states in pertinent part: "[N]or cruel and unusual punishments inflicted." *Id.* See also N.Y. CONST. art. I, § 5. This section provides in relevant part: "[N]or shall cruel and unusual punishments be inflicted . . ." *Id.*

jurisprudence that tells us that in order to be constitutional, under the Eighth Amendment, the death penalty must be imposed both consistently and in an individualized fashion.

In practice, certainly in the federal courts and in the Supreme Court particularly, this has shown itself as walking the line between, on the one hand, having it be consistent, and on the other, having it be individual. This has shown itself to be at a minimum sort of a Sisyphean task, if not a totally paradoxical and impossible one.⁵⁶

This is so because obviously it attempts to comply with the requirements of consistency, inevitably runs afoul of the requirement of individualization, and vice versa. Attempts at individualization have somehow sloped over into increasing the juries' discretion and sentencing, and, even certainly to some commentators, have created the same unbridled discretion that the requirement of consistency was intended to do away with the twenty or so years ago.

Therefore, I think that to the extent that New York practitioners and the court end up buying into this traditional Eighth Amendment analysis, and using it to talk about our state constitutional prohibition of cruel and unusual punishment, we are asking for a lot of trouble. We already have enough trouble, but we are asking for more.

In *State v. Ramseur*,⁵⁷ Justice Handler of the New Jersey Supreme Court, warned his brethren when they were considering the New Jersey death penalty statute to abandon the federal consistency individualization framework.⁵⁸ I think his prediction

56. See *Callins v. Collins*, 510 U.S. 1141 (1994) (finding that the Constitution's requirement of "a heightened degree of fairness to the individual, and also a greater degree of equality and rationality in the administration of death, demands sentencer discretion that is at once generously expanded and severely restricted"); *State v. Webb*, 680 A.2d 147, 236 (Conn. 1996) (finding that the "optimal balance between discretion and direction . . . has not and perhaps cannot be reached.").

57. 524 A.2d 188 (N.J. 1987).

58. *Id.* at 304 (Handler, J., dissenting). In his dissent, Justice Handler argued that the court must not follow federal precedent, but should instead look at their own constitutional resources. *Id.* He reasoned that schemes for guided discretion are "[ultimately] . . . ineffectual in guiding sentencing

of years of bitter, and not always entirely comprehensible rancor, was correct, and he has certainly been proven right in New Jersey. Certainly, in my observation, the New Jersey Supreme Court's constitutional discourse has been vastly more and more civil. Although there has been a tremendous amount of disagreement among the justices of the New Jersey Supreme Court on state constitutional issues, I think it has been a more rational and more fully explained discourse. If that court has ended up divided and bitter, just imagine what it could be like in New York.

Unless we can either invent or reclaim some new way of discussing the prohibition on cruel and unusual punishments, we would do better to take Justice Handler's suggestion all those years ago in New Jersey and adopt a due process analysis instead. To analyze the constitutionality of procedures for imposition of the death penalty in terms of due process and fundamental fairness.⁵⁹

Certainly, there is an argument that the New York constitution shows a sort of a special preoccupation with due process. Not only do we have in Article One, Section Six, the sort of traditional analog to the Federal Due Process Clauses, but in the very beginning of the New York State Constitution, in Article One, Section One,⁶⁰ we have the assurance that there will be no deprivation of rights except by the law of the land. I confess to complete ignorance of the history and meaning of the clause, but it certainly sounds to me like due process language.

Another challenge to statutory attacks under the New York State Constitution will be New York's guarantee of a jury trial.

discretion precisely because the unique severity of the penalty to be inflicted so escalates the contrary burdens of uniformity and individualization as to render them extraordinarily difficult, if not impossible to reconcile." *Id.*

59. Justice Handler argues that the only possible framework for the death penalty's equitable imposition is for there to be "a state constitutional doctrine of fundamental fairness grounded in the state guarantee of due process." Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges To New York's Death Penalty*, 4 J.L. & POL'Y 161, 238 n.104 (1995).

60. N.Y. CONST. art. I, § 2. This section states in pertinent part: "No member of this state shall be . . . deprived of any rights . . . unless by the law of the land, or the judgment of his peers . . ." *Id.*

The New York Constitution, at least the Bill of Rights, seems to fairly resonate with insistence on jury trials especially in capital cases. The right to a jury trial is prominently guaranteed and, again, seems to be guaranteed twice: in Article One, Section One, which says that deprivation of rights is to be by judgment of peers, and again in a more obvious provision in Article One, Section Two,⁶¹ which says that the right to a jury trial shall remain inviolate forever. Sort of handsome, emphatic language that is different from the language of the federal Bill of Rights.

In addition, Article One, Section Two provides that where a crime is punishable by death, there is no possibility of waiver of the right to a jury trial. Because the right to an unbiased jury trial is encompassed here, as well as in federal jurisprudence, the guarantee of jury trial will undoubtedly be the ground of a challenge to the provision in New York's new death penalty law that provides for a death qualified jury.

There are many, or at least a certain number of, different meanings to death qualification, a fairly sinister phrase. When I first mentioned it to my husband he said "aren't we all death qualified?" In any event, what the statute means by death qualification is that potential jurors who pronounce themselves unable to impose the death penalty can and will be challenged for cause and will be struck from the jury before the guilt determination phase. Therefore, people who could not impose the

61. N.Y CONST. art. I, § 2. This section states:

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

Id.

death penalty at the separate sentencing phase can not sit at the guilt determination phase.

This is an issue that has been raised many times in federal and state courts because there have been many studies done, the validity of which is acknowledged even by the United States Supreme Court. Studies that say if you take off all of the people who could not impose the death penalty and do not let them sit at a guilt determination, you have a jury that is biased in favor of conviction because people who could impose the death penalty at a sentencing phase are biased or unduly biased and conviction prone.

The obvious argument here is that this violates the guarantee of an unbiased jury. This issue has been raised many times in the past fifteen years or so and has had some considerable success in the lower federal courts. However, when the Supreme Court came to consider it about ten years ago in a case called *Lockhart v. McCree*,⁶² the Court held that “the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”⁶³

62. 476 U.S. 162 (1986). In *McCree*, defendant was convicted of felony murder and was sentenced to life imprisonment without parole. *Id.* at 166. During voir dire, the judge, over defendant’s objections, removed for cause those prospective jurors who stated that they could not vote for the death penalty under any circumstances. *Id.* Defendant subsequently filed a habeas corpus petition alleging that the “death qualification” of the jury “violated his right under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community.” *Id.* at 167. He argued that the removal of the jurors “‘slanted’ the jury in favor of conviction.” *Id.* at 178.

63. *Id.* at 173. The Court further held that the Sixth Amendment requirement that the jury be selected from a fair cross section of the community applies only to the jury panel selected and not the actual jury selected. *Id.* at 174. In 1992, the held that a capital defendant may challenge for cause “[a] juror who will automatically vote for the death penalty in every case” *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). See also Michael W. Peters, *Constitutional Law: Does ‘Death Qualification’ Spell Death for the Capital Defendant’s Constitutional Right to an Impartial Jury?* [*Lockhart v. McCree*, 106 S. Ct. 1758 (1986)], 26 WASHBURN L.J. 382 (1987).

The New York Criminal Procedure Law provides that a prospective juror may be challenged for cause when “[t]he crime charged may be punishable by

In subsequent years, this issue has been raised many times because this provision seems to be in virtually every state death penalty law. The issue has been re-raised under the various state constitutional guarantees of a jury trial. The argument has never succeeded but, because of its acknowledged grounding in what appears to be simple fact, it has divided courts tremendously and certainly has almost succeeded in several instances generating much dissent. I think this issue will be raised very soon in New York and it will be interesting to see what the court of appeals will do with it.

New York's guarantee of a jury trial is also at the center of what seems to be a very curious constitutional conundrum that arises out of the guilty plea provision of New York's death penalty statute. Curiously, it seems that the state constitutional right to a jury trial is at once the impetus behind this provision, and at the same time it is the ground of what seems to be an unanswerable challenge to that very same provision.

The New York statute provides what I call a death avoidance guilty plea, which is a guilty plea that can be offered by the defendant with the permission of the agreement of the prosecutor and the court. A plea of guilty to the capital offense, to capital murder, may be entered, but when a defendant so pleads the only possible sentence is life in prison without parole. A defendant in that situation cannot be exposed to the death penalty.

I do not know the answer to this, but my guess is that this provision was designed by the legislature to permit a guilty plea. Surely they wanted to provide for a guilty plea, but the legislature intended by this provision to provide a guilty plea that would comply with the state constitutional guarantee of the jury trial.

This is a very complicated matter, and again this is something we need a tremendous amount of more research about. Certainly, the state constitutional guarantee of jury trial can be read in a

death and the prospective juror entertains such conscientious opinions either against or in favor of such punishment as to preclude such juror from rendering an impartial verdict or from properly exercising the discretion conferred upon such juror by law" N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney 1995).

similar provision in the Oregon State Constitution,⁶⁴ as read by Judge Hans Linde of the Oregon Supreme Court.⁶⁵ It can be read to forbid the imposition of death except after a jury trial.

Thus, in order to avoid what is perceived to be a collision with the State Constitutional guarantee of a jury trial, the legislature provided for a guilty plea, a plea under which there could be no imposition of the death penalty without the unanimous agreement of twelve citizens that this crime had been committed by the defendant beyond a reasonable doubt. However, the legislature, in trying to avoid this collision with the State Constitution, appears to have run right back into the guarantee of a jury trial and appears to have, at least according to the United States Supreme Court, violated the very provision they set out to avoid colliding with.

In 1968, the United States Supreme Court struck down two federal death penalty statutes that provided precisely the same kind of death avoidance guilty pleas that the New York death penalty statute provides.⁶⁶ The Court held that by permitting

64. See Or. CONST. art. I, § 11. This section provides in pertinent part: "In all criminal prosecutions, the accused shall have the right to a public trial by an impartial jury . . . however, . . . any accused person, *in other than a capital case*, may elect to waive trial by jury and consent to be tried by the judge of the court alone . . ." *Id.* (emphasis added).

65. See *State v. Wagner*, 752 P.2d 1136 (Or. 1988). In *Wagner*, Judge Linde argued that article I, section 11 of the Oregon Constitution requires that no person be put to death without "the highest degree of certainty by a unanimous jury that every element of a capital crime has been proved beyond a reasonable doubt . . ." *Id.* at 1186.

66. See *United States v. Jackson*, 390 U.S. 570 (1968) and *Pope v. United States*, 392 U.S. 651 (1968). In *Jackson*, the Court struck down the death penalty clause of the of the Federal Kidnapping Act. *Id.* at 591. The Federal Kidnapping Act, 18 U.S.C. § 1201(a), provides in pertinent part:

Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Id. "The statute set forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty." *Jackson*, 390 U.S. at 571.

guilty pleas that did not expose a defendant to the death penalty, the statutes unnecessarily burdened the exercise of the Fifth Amendment⁶⁷ right not to incriminate one's self and the Sixth Amendment⁶⁸ right to a jury trial.⁶⁹

The Court was concerned with "the defendant ingenuous enough to seek a jury acquittal. . . . [He] stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die."⁷⁰ Thus, it would appear that the right to a jury trial forbids, or certainly there are very principled arguments with a lot of precedent, guilty pleas, whether the defendant is exposed to a possibility of a death sentence or is completely insulated from any possibility of a death sentence.

That would seem to leave as the only answer a death penalty statute that forbids any guilty pleas to the indictment. Well, maybe so, but there seem to be some good arguments that an accused has a right to plead guilty.

For example, *United States v. Jackson*,⁷¹ a 1968 case in which the Supreme Court found what I call the term "death avoidance pleas" to be constitutional. The Supreme Court struck down not the plea provision but rather the death penalty itself, saying that it seemed unwilling to allow a statute to stand that did not provide

The *Pope* Court struck down the death penalty provision of the Federal Bank Robbery Act, 18 U.S.C. § 2113(e), because it "suffer[ed] from the same constitutional infirmity' as that found in the Federal Kidnapping Act, 18 U.S.C. § 1201(a)." *Pope*, 392 U.S. at 651 (citing to *United States v. Jackson*, 390 U.S. 570 (1968)).

67. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself" *Id.*

68. U.S. CONST. amend VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" *Id.*

69. See *Jackson*, 390 U.S. at 570. The *Jackson* Court found that permitting defendants to avoid the death penalty by pleading guilty and waiving their right to a jury trial resulted in the "inevitable effect" of "discourag[ing] assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment." *Id.* at 581.

70. *Id.*

71. 390 U.S. 570 (1968).

the possibility of a guilty plea. It seems that the constitutionality of this provision, guilty plea to a capital crime, that exposes a defendant only to life imprisonment without parole, simply is a conundrum.

It also seems to be just one example of the kind of vexed constitutional question that the New York Court of Appeals is going to face in these next years.

My own feelings and thoughts on the matter are that this kind of incredibly vexed, if not sort of tortuous and tormented analysis, is the inevitable result. It is the inevitable result of what is a constitutional culture, the entirely futile attempt to devise procedures that take into account what Justice Handler called the stunning moral fact of the death penalty.

That is all I have to say.

Helen Hershkoff:

Good afternoon. It is a privilege for me to be here. During my many years of practice, I have always looked forward to the Albany Law School Conference on the New York State Constitution. Now that I am teaching, it is a bit sobering to be the person at the podium, with so many real experts on the State Constitution in the audience, however, I will try to do my best.

Today, I will be speaking about the treatment of the poor and the treatment of poverty under the New York State Constitution. It is a topic that raises many important questions about the new federalism and its independent interpretation.

This morning, much of the discussion flowed from a focus on constitutional provisions that are similar to, if not identical to, federal constitutional clauses. I am in somewhat different territory. There is, of course, no right to welfare in the Federal Constitution, and its presence in the New York State Constitution⁷² makes us think more clearly about why we ought

72. N.Y. CONST. art. XVII, § 1. This provision states: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." *Id.*

to have a state constitution. The objective is to question both the role of the state within our federal system as well as the role of the government in structuring their affairs so as to insure the material well-being of the members of the community. While I do not pretend to have answers to these questions, they do, provide some interesting background issues for my presentation.

As I have already said, and as you know, the Federal Constitution has never been read to provide for a right to welfare. Certainly, the text does not support such a right. It has been said that having a court declare and enforce such a right would be illegitimate, raising serious questions about judicial competence. There are also troubling concerns about federalism. Such as when a federal court seeks to dictate to a state how it ought to organize its arrangements and use its money for important social priorities.

There are also concerns about sovereignty. You heard some of these concerns this morning when Professor Bonventre referred to the federal floor of rights, which is intended to respect state sovereignty and provide the states with the necessary space to determine their own concerns, and to act on their own interests. All of these policies and factors play out quite differently when we begin to think about a state constitutional right to welfare that is enumerated in a state constitution and is enforced, articulated and implemented by a state court.

The New York State Constitution has been read by the New York Court of Appeals to provide for an affirmative right to welfare,⁷³ thus there is a state duty to protect the poor.⁷⁴ Under the State Constitution, there are three independent provisions that

73. *Tucker v. Toia*, 89 Misc. 2d 116, 390 N.Y.S.2d 794 (Sup. Ct. Monroe County), *aff'd*, 43 N.Y.2d 1, 7, 371 N.E.2d 449, 451, 400 N.Y.S.2d 728, 730 (1977) (holding that “[i]n New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution”). *See Lee v. Smith*, 43 N.Y.2d 453, 460, 373 N.E.2d 247, 250, 402 N.Y.S.2d 351, 355 (1977) (recognizing that under the New York State Constitution, specifically, Article XVII, “aid, care and support of the needy” is “constitutionally charged” to the State).

74. *Tucker*, 43 N.Y.2d 1, 7, 371 N.E.2d 449, 451, 400 N.Y.S.2d 728, 730 (1977). The court of appeals in *Tucker* found that one of the goals behind adopting § 1 of Article XVII of the New York State Constitution was to declare “the existence of a positive duty upon the State to aid the needy.” *Id.*

deal with poverty. The first is, of course, Article XVII, which deals generally with aid, care and support to the needy. The second is Article XVIII,⁷⁵ which deals with low income housing as a public purpose and the third is Article I,⁷⁶ which deals with unemployment benefits. Taken together, these three provisions provide a very provocative alternative to the negative rights model of the constitution which has traditionally been associated with the Federal Constitution.⁷⁷

75. N.Y. CONST. art. XVIII, § 1. This provision states:

Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

Id.

76. N.Y. CONST. art. I, § 6. This provision states in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." *Id.* See *W.H.H. Chamberlain, Inc. v. Andrews*, 271 N.Y. 1, 2 N.E.2d 22 (1936). The court of appeals in *Chamberlain* was confronted with the issue of determining the constitutionality of the 1935 Unemployment Insurance Law. The court stated that the ability of the State to enact such a law originated "in the exercise of the reserve power of the state to meet [those] dangers which threaten the entire commonwealth and affect every home." *Id.* at 13, 2 N.E.2d at 26. The court further explained that the issue of whether the state was correct in exercising this power by enacting the new statute was not an issue to be decided by the courts. *Id.* In fact, the sole issue for the court to determine was whether the act itself was so arbitrary or unreasonable that it would deprive "any employer of his property without due process of law" or that it would deny him the equal protection under the law. *Id.* In conclusion, the court held that the Unemployment Insurance Law does not violate either Article I, § 6 of the New York State Constitution, the Fourteenth Amendment of the Constitution of the United States, nor any other provision of either Constitution. *Id.* at 16, 2 N.E.2d at 27. See also N.Y. LAB. LAW §§ 500-01 (McKinney 1988) (providing public policy of New York State with regard to unemployment insurance and provisions of State program).

77. See Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 16-17 (1993). Providing the following analysis of the negative rights model:

The Federal Constitution has . . . been described as a 'charter of negative rather than positive liberties.' The courts have used this dichotomy between negative and positive rights, although subject to intense academic criticism, to

How we interpret these provisions will raise many important public policy concerns for the state, and certainly there will be high stakes consequences for the quality of life in New York. It is no secret that the nation is now in the midst of a welfare debate and that most of the proposed legislation would shift responsibility for the care of the poor and the elimination of poverty to states and localities. For example, within our own state, sixteen percent of the population is poor and 1.2 million of our residents are receiving either Supplemental Security Income (SSI) or Aid to Families with Dependent Children (AFDC). If those federal benefits are cut, it is not clear how the various state budgets will be affected.

However, in our own state we are aware that the Governor's recent budget calls for a twenty-five percent cut in welfare budgets. This would mean that a family of three would be reduced to subsisting on a welfare grant that is pitched at forty percent of the poverty level. What the rights of the poor will be like, if the new regime of welfare reform comes forward, is thus a very serious question of the new federalism and public policy.

I will focus specifically on Article XVII and look at the decision-making process of the New York Court of Appeals. Unlike some of the other speakers this morning, I will offer an internal discipline approach to the court's reasoning by presenting a three part typology of how the court decides poverty cases. Although New York has gone significantly further in affirming the rights of the poor than it has in affirming rights of

deny a broad variety of claims which have suggested that the federal government has an affirmative duty State Constitutions serve purposes that are very different from those of the Federal Constitution and deviate sharply from the 'negative' model. In contrast to the Federal Constitution, state constitutions unambiguously create affirmative rights to explicit governmental services. Put another way, state constitutional language mandates that states use their plenary authority in specific ways to achieve explicit and highly self-conscious policy goals.

Id. (citing *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (finding that "[t]he men who wrote the Bill of Rights were not concerned that Government might do little for the people but that it might do too much to them"), *cert. denied*, 465 U.S. 1049 (1984)). See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

subsistence, I will assert that it has not gone as far as the 1938 State Constitution would mandate.

I am going to suggest an alternative approach to the analysis of Article XVII claims which involves a more faithful, historical reading of the Article. In this approach I part company from those this morning who said that state tradition means nothing in our interpretation of state constitutional rights.

Article XVII, § 1 provides that the “aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means as the legislature may from time to time determine.” The New York Court of Appeals has said that this Article is judicially enforceable.⁷⁸ Indeed, the court has said that Article XVII is fundamental to the relationship between the individual and the state.⁷⁹

My view is that New York Court of Appeals approach to Article XVII cases falls into three categories. Category one, has the lowest level of legislative discretion and judicial deference with the highest level of judicial review. This approach is applied to cases that involve the denial of relief to poor persons who meet the State’s definition of needy. The seminal case is the 1977 case of *Tucker v. Toia*.⁸⁰ In *Tucker*, the state tried to deny cash home relief benefits, an entirely state funded benefit, to minors who

78. See generally *Tucker v. Toia*, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977).

79. *Id.* at 7, 371 N.E.2d at 451, 400 N.Y.S.2d at 730. In *Tucker*, the court of appeals stated that “[t]he legislative history of the Constitutional Convention of 1938” concerning the adoption of § 1 of Article XVII is indicative of the drafter’s clear intent that this become “a fundamental part of the social contract.” *Id.* Moreover, the comments of Edward D. Corsi, Chairman of the Committee on Social Welfare, stated that one of the purposes behind adoption of this constitutional provision is “to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.” *Id.* at 8, 371 N.E.2d at 452, 400 N.Y.S.2d at 731.

80. 89 Misc. 2d 116, 390 N.Y.S.2d 794 (Sup. Ct. 1977), *aff’d*, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977).

lived separately from their parents but who had not commenced support protections against the responsible adult.⁸¹

In striking down that provision, the court affirmed the imposition of a positive duty upon the State to the needy under Article XVII and the violation of that duty by the legislature in simply refusing to aid those whom it has classified as needy.⁸² The legislature has no discretion to depart from the standard definition of needy which has been articulated. Here, the court imposes a bright line approach, without balance, by vigorously enforcing the parameters of legislation that has fact have been passed.⁸³

81. *Id.* at 118-21, 390 N.Y.S.2d at 796-99. The New York State Home Relief program provides access to support for the needy in New York State. *Id.* at 118, 390 N.Y.S.2d at 796. The program is the most comprehensive program of this type in the state and provides both financial and medical support to the participants. *Id.* On March 30, 1976, § 158 of New York's Social Services Law was amended by the enactment of § 15. *Id.* at 119, 390 N.Y.S.2d at 797 (discussing N.Y. SOC. SERV. LAW § 158 (McKinney 1992)). The principal effects of this change were: 1) to deny benefits to minor children not living with their legally responsible relatives unless they obtained a final order of disposition in a support proceeding and 2) to place the burden of obtaining this final order of disposition on these minor children. *Tucker.* at 119-20, 390 N.Y.S.2d at 797.

82. *Id.* at 124, 390 N.Y.S.2d at 800. The court stated that it can be shown, within the record of the Constitutional Convention, that the responsibility of the State to care for the needy is "recognized to be as fundamental as any responsibility of government." *Id.* at 123, 390 N.Y.S.2d at 800. (citations omitted). Moreover, the Convention record further indicated that "while the method of performance of these obligations was within the purview of the legislature, the obligation was to be established and recognized as mandatory upon the State." *Id.* at 124, 390 N.Y.S.2d at 800. Therefore, based on this analysis, the court determined that it "is inescapable that Article [XVII], [§] 1, of the New York State Constitution establishes a right fundamental to the relationship between the State of New York and its needy citizens." *Id.*

83. *Id.* at 127, 390 N.Y.S.2d at 802. The court, in finding that Article XVII establishes a fundamental right, imposed a burden on the State to prove the constitutionality of the statute under a strict scrutiny standard of review. *Id.* The court shifted the burden of proof to the State to show, beyond a reasonable doubt, that the legislation was necessary to satisfy a compelling state interest and that there was no less restrictive means available to the State to achieve these interests. *Id.*

Category two cases are somewhat more complex. The analysis is typically applied to those cases that involve claims by poor people who have been excluded from the State's definition of needy but who nevertheless seek to enforce a claim to benefits under an existing state statute. In this situation, legislative discretion is at an intermediate level, as is judicial review and judicial deference. The leading case, *Jones v. Blum*,⁸⁴ upheld the legislative exclusion of the working poor from the definition of needy.⁸⁵ The new definition effectively denied the working poor the right to receive benefits by denying assistance to those individuals whose gross income exceeded 150 percent of the state standard of needy.⁸⁶

More recently, in *Hope v. Perales*,⁸⁷ the court held that Article XVII was not violated in the exclusion of the working poor from

84. 101 A.D.2d 330, 476 N.Y.S.2d 214, (3d Dep't 1984), *aff'd*, 64 N.Y.2d 918, 477 N.E.2d 620, 488 N.Y.S.2d 379 (1985) (stating that a statute denying an individual the right to receive public assistance based solely on the determination that his or her gross income exceeded 150% of a state established standard of need was not violative of Article XVII § 1 of the New York State Constitution).

85. *Id.* at 332, 476 N.Y.S.2d at 216. The court determined that the State, despite the Article XVII mandate to provide "aid, care and support of the needy" retains the discretion to narrow the classification of those defined as "needy" and to alter the means of distribution. *Id.* Therefore, they held that the statute redefining the definition of needy to those whose gross income was below 150% of the State standard of need did not violate the duty imposed under Article XVII. *Id.* at 333, 476 N.Y.2d at 216. In addition, the court also reviewed petitioner's claim that the statute violated the Equal Protection Clause. *Id.* The court applied the traditional rational basis test and determined that the clause was not violated because the reclassification of need was "rationally related to the legitimate goals of conserving Federal funding and allocating limited welfare funds to the neediest of applicants." *Id.* at 333-34, 476 N.Y.S.2d at 216-217.

86. *Id.* at 216, N.Y.S.2d at 333 (discussing the revised definition of "needy").

87. 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994) (questioning the validity of the New York Prenatal Care Assistance Program [hereinafter PCAP] under the New York State Constitution because it denies funding for medically necessary abortions to PCAP eligible women). *See generally* N.Y. Pub. Health Law §§ 2520-29 (McKinney 1993).

the right to receive state subsidized reproductive benefits.⁸⁸ In extreme cases, under category two, the court of appeals will police the boundaries of legislative discretion to make sure that impermissible non-economic factors have not entered into the court's decision-making. More typically, however, the court simply rubber stamps a legislative determination and recites a mantra that is typical of federal cases dealing with welfare issues. These are legislative, not judicial functions.⁸⁹

Category three cases are the most problematic for the court. The cases decided under this approach typically involve challenges to legislative determinations regarding the type, amount and form of assistance. The governing case here is clearly *Bernstein v. Toia*;⁹⁰ again, a 1977 case which upheld the

88. *Hope*, 83 N.Y.2d at 573, 634 N.E.2d at 185, 611 N.Y.S.2d at 813. PCAP was created by the Federal Government to provide reimbursement to those states providing prenatal care to pregnant women who had household incomes exceeding the Medicaid eligibility standard. *Id.* at 572, 634 N.E.2d at 185-86, 611 N.Y.S.2d at 812-13. In New York a pregnant woman is presumed eligible to receive PCAP "upon a preliminary showing . . . that her household income falls below 185% of the poverty level." *Id.* at 573, 634 N.E.2d at 185, 611 N.Y.S.2d at 813. Thus, the New York State Legislature, in establishing the procedural guidelines for the PCAP program, presumed that the participants would not be in a position to need or require financial assistance from the State in order to "exercise [their] fundamental right of choice." *Id.* at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816. Therefore, the court stated that because the statute was not enacted to assist in the support of the needy it does not violate Article XVII by not providing financial assistance for medically necessary abortions. *Id.* at 578, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

89. The court in its analysis of PCAP stated that as an "enactment of a coequal branch of government, PCAP is entitled to a strong presumption of constitutionality, and that plaintiffs bear the heavy burden of establishing the contrary beyond a reasonable doubt." *Hope* at 574, 634 N.E.2d at 186, 611 N.Y.S.2d at 814. The court further stated that the judiciary serve a limited role in this determination because they are limited in their discretion by whatever wisdom and motivation surrounded the legislature's enactment. *Id.* at 575, 634 N.E.2d at 186, 611 N.Y.S.2d at 814.

90. 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977). The court in *Bernstein* was confronted with the question of whether the State had a duty, under Article XVII of the State Constitution, to provide individualized shelter grants to public assistance recipients. *Id.* at 443, 373 N.E.2d at 241, 402 N.Y.S.2d at 345. Petitioners argued that the State was obligated to provide grants in an amount sufficient to meet their individual rent expenses

legislative decision to eliminate individualized rent grants for welfare recipients.

In the 1987 case of *McCain v. Kotch*,⁹¹ the court held that *Bernstein* did not deprive the trial courts of the equitable power to articulate standards in cases involving welfare rights;⁹² however, more recently, the court has in fact gone back to a

rather than in the form of a flat grant, in accordance with a schedule of maximum allowances. *Id.* The court of appeals rejected this claim and held “[w]e do not read this declaration and precept as a mandate that public assistance must be granted on an individual basis in every instance . . . or indeed as commanding that . . . the State must always meet in full measure all the legitimate needs of each recipient.” *Id.* at 448-49, 373 N.E.2d at 244, 402 N.Y.S.2d at 348-49.

91. 117 A.D.2d 198, 502 N.Y.S.2d 720 (1st Dep’t 1986), *rev’d*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987). The court in *McCain* was confronted with the question of “whether the court has the power to issue a preliminary injunction requiring the New York City Departments of Social Services (DSS) and Housing, Preservation and Development (HPD), when they have undertaken to provide emergency housing for homeless families with children, to provide housing which satisfies minimum standards of sanitation, safety and decency.” 70 N.Y.2d 109, 113-14, 511 N.E.2d 62, 62-63, 517 N.Y.S.2d 918, 919. There is no question that in a proper case [the] Supreme Court has [the] power as a court of equity to grant a temporary injunction which mandates specific conduct by municipal agencies.” *Id.* at 116, 511 N.E.2d at 64, 517 N.Y.S.2d at 920. The defendants in *McCain* maintained that the New York “[S]upreme Court in setting and enforcing minimum standards for emergency housing . . . violated the principle that a court should, as a matter of policy, ‘abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches of government are far more suited to the task.’” *Id.* at 119, 511 N.E.2d at 66, 517 N.Y.S.2d at 922. However, the court held that the actions of the Supreme Court did not result in an “encroachment on the legislative or executive prerogative” because there was no existing departmental regulation and therefore it became “necessary for the court to establish its own minimum standards.” *Id.* at 120, 511 N.E.2d at 66, 517 N.Y.S.2d at 923.

92. *Id.* at 119-20, 511 N.E.2d at 66, 517 N.Y.S.2d at 922-23. The court in *Bernstein* was precluded from establishing its own regulatory standards because to do so would be in direct conflict with the previously established departmental regulations; whereas, in *McCain*, the court was able to establish its own minimum standards since there were no regulations in existence and therefore no conflict would result. *Id.* See *Bernstein v. Toia*, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977).

rubber stamping approach.⁹³ This argument suggests that the power to define the kinds of programs that are to be provided to the poor is found not only within the general legislative function, but also, as indicated by the language of the Article, within the legislative discretion.

The typology that I have set forth highlights the approach taken by the court of appeals with respect to its treatment of poverty under the New York State Constitution. On the one hand, the court has clearly held that assistance is a positive duty of the state and that the court will enforce claims under Article XVII. On the other hand, the legislature has, under Article XVII, broad discretion to define who are the needy, what the standards of need are and the limitations of state assistance.⁹⁴

The court has provided the legislature with the road map for circumvention of the Article by allowing legislative determinations to be recharacterized as the exercise of legislative discretion and thus becoming immune to judicial review. Article

93. See generally, *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 343-44, 655 N.E.2d 661, 682, 631 N.Y.S.2d 565, 586 (1995) (stating that the New York Court of Appeals has avoided making determinations regarding the qualifications for and amounts provided under various public assistance programs because these are “choices delegated to the people’s elected representatives, not Judges, and in the absence of their manifest failure to address the problem, the judiciary should refrain from interfering”); *Goodwin v. Perales*, 88 N.Y.2d 383, 396, 669 N.E.2d 234, 240, 646 N.Y.2d 300, 306 (1996) (relying on *Bernstein* and concluding that it is beyond the power of the court to alter a departmental regulation unless it is “so lacking in reason for its promulgation that it is essentially arbitrary”); *Darns v. Sabol*, 165 Misc. 2d 77, 80-81, 627 N.Y.S.2d 526, 529-30 (Sup. Ct. New York County 1995) (stating that although it is not the place of the judiciary to act as a “superlegislature,” it does have the responsibility of enforcing the protection of those rights which “may have been violated without exercising legislative powers, for which it lacks constitutional authority”).

94. See *Tucker v. Toia*, 43 N.Y.2d 1, 8, 371 N.E.2d 449, 452, 400 N.Y.S.2d 728, 731 (1977) (stating that despite the fact that the State Constitution allows for legislative “discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term ‘needy,’ [sic] it unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy”).

Id. (citations omitted).

XVII jurisprudence, as it develops, fails to protect the poor against the primary danger to which the Article was directed; namely, governmental indifference to the needs of the poor.

Article XVII was adopted in 1938 at the first constitutional convention of the Twentieth Century, the first constitutional convention to come closely on the heels of the Great Depression.⁹⁵ Thus, it is against this background of the New Deal and the rise of totalitarianism that the Article must be seen.⁹⁶ Robert Cover,⁹⁷ a great constitutional theorist who taught at Yale before his death, said “each constitutional generation organizes itself about paradigmatic events.”⁹⁸ The paradigmatic events of that era, for the Constitutional Convention Committee that recommended the adoption of Article XVII, were the New Deal, the Great Depression, and the rise of totalitarianism.

The 1938 Constitutional Convention Committee understood the relationship between democratic order and material well-being. The committee understood there was an evolving role for the state in assuring material well-being when the market did not function as it ought to function in protecting lives against deprivations. Moreover, they recognized that poverty had become

95. *Id.* at 7, 371 N.E.2d at 451, 400 N.Y.S.2d at 730. The court in *Tucker* explained that

[t]his provision was adopted in 1938, in the aftermath of the great depression, and was intended to serve two functions: [f]irst, it was felt to be necessary to sustain from constitutional attack the social welfare programs first created by the State during that period . . . ; and, second, it was intended as an expression of the existence of a positive duty upon the State to aid the needy.

Id. (citation omitted).

96. See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (discussing New Deal reformation and shifting constitutional commitments).

97. Robert M. Cover was a Professor of Law at Yale Law School and wrote extensively on the subject of constitutional law. See, e.g., Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

98. *Id.* at 1316.

a structural and inevitable feature of modern day market arrangements.⁹⁹

Article XVII was thus intended to give the government full authority to enact social welfare programs. It was intended to foreclose Lockler¹⁰⁰ style objections that violations of due process resulted from redistribution programs, prohibitions on the use of public money and even from State credit to aid private individuals.

The Committee of Social Welfare, which originally drafted the text that became Article XVII, was very explicit about these purposes and I will just read to you some language. The committee said it hoped to “remove from the area of constitutional duties the responsibility of the state to those who must look to society for the bare necessities of life,”¹⁰¹ but at the same time the committee wrote “[w]hat [the legislature] may not do is shirk its responsibilities, which in the opinion of the committee, is as fundamental as any responsibility of government.”¹⁰²

99. See *Tucker v. Toia*, 43 N.Y.2d 1, 7-8, 371 N.E.2d 449, 451-52, 400 N.Y.S.2d 728, 730-31 (1977). The court of appeals in *Tucker* detailed the legislative history behind the enactment of Article XVII. *Id.* Specifically, the Committee on Social Welfare stated at the 1938 Constitutional Convention: “[w]e have made provision for the relief of the needy. Convinced that the care of the employed and their dependents is in our modern industrial society a permanent problem of major importance affecting the whole of society” *Id.*

100. Among the various concepts woven into the United States Constitution by the framers were the writings of John Locke. Locke believed in the concept of collective rights: that “the concept that rights, in addition to being individually held, may also be held collectively by the body politic, which creates and provides the justification for civil government.” Donald L. Doernberg, “*We The People.*” *John Locke, Collective Constitutional Rights, And Standing To Challenge Governmental Action*, 73 CAL. L. REV. 52, 55-56. (1985). See also, John Locke, *Two Treatises of Government Second Treatise* (P. Laslett ed. 1960)

101. *Tucker*, 43 N.Y.2d at 8, 371 N.E.2d at 452, 400 N.Y.S.2d at 731 (citing the Revised Record of the Constitutional Convention, vol. III, p. 2126 (1938)).

102. *Id.*

Against this historical background, I will argue, discretion has a particular meaning. Of course, discretion was surely intended to insulate social welfare legislation against reversal by the courts. However, we have to place the term “discretion” in the context of 1938, in what I will call the plasticity of the moment. It was a period of bold social experiment where the states were acting as social laboratories. This discretion was not intended to be a license for the legislature to ignore the economic needs of the poor. That structure of analysis, if I may draw on a federal analogy, is similar to that of Justice Brennan in *Katzenbach v. Morgan*,¹⁰³ the famous footnote ten about the role of Section 5 enforcement under the 14th Amendment.¹⁰⁴

Justice Brennan in *Katzenbach* stated that legislative power is “limited to adopting measures to enforce the guarantees of the 14th Amendment, but Section 5 grants no power to restrict, abrogate or dilute these guarantees.”¹⁰⁵ Likewise, I would suggest, Article XVII is a one way ratchet for the legislature. The legislature has a responsibility to take seriously what the 1938

103. 384 U.S. 641 (1966). The Court in *Katzenbach* was asked to determine the constitutionality of §4e of the Voting Rights Act of 1965 because it was contrary to the New York English literacy requirement. *Id.* at 643. The Court held that “§ 4e was a proper exercise of the powers under § 5 of the Fourteenth Amendment, and by virtue of the Supremacy Clause, New York’s English literacy requirement cannot be enforced to the extent it conflicts with § 4e.” *Id.* at 646-47. The statute, § 4e, was challenged because it negated the effects of the previously enacted New York English literacy requirement, which denied citizens the right to vote unless they possessed the capacity to read and write English. *Id.* at 643-44.

104. *Id.* at 651-52, n.10.

“Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact ‘statutes so as in effect to dilute equal protection and due process decisions of this Court.’ We emphasize that congress’ power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants to Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be -- as required by § 5 -- a measure ‘to enforce’ the Equal Protection Clause since that clause of its own force prohibits such state laws.”

Id.

105. *See supra* notes 103-04 and accompanying text.

convention intended when it created a positive right to welfare, and the court has a responsibility to police the enforcement of that obligation when discretion would otherwise deprive the poor of subsistence which they need to survive.

It is not surprising that the New York State Court of Appeals has been hesitant to review legislative decision-making when it comes to questions involving the kind and amount of benefits and assistance provided to the poor. First, the court is acting against the backdrop of federal law, and second, we know that the federal courts have taken a hands off approach to social and economic matters. In *Dandrich v. Williams*,¹⁰⁶ the court specifically stated that welfare is outside the domain of the federal court.¹⁰⁷

In fact, there is a similar hesitancy when any economic issue comes before the court of appeals because these determinations are said to be a function of the legislature.¹⁰⁸ This raises very serious concerns about majoritarianism by implicating both the legitimacy of the judicial act and the competency of the court to work.

In looking at these concerns, legitimacy and competency, from an internal approach, the argument for legitimacy, at least on the federal side, is that the material world is somehow outside the

106. 397 U.S. 471 (1970).

107. *Id.* at 487. The Supreme Court held that the intractable economic, social and even philosophical problems presented by the public welfare assistance programs are not the business of this court. The constitution may impose certain procedural safeguards upon systems of welfare administration . . . [b]ut the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. (citations omitted).

108. *See supra* note 99 and accompanying text. *See also* *Bernstein v. Toia*, 43 N.Y.2d 437, 446, 373 N.E.2d 238, 243, 402 N.Y.S.2d 342, 347. In *Bernstein*, the court of appeals could not comment on whether, "under the constraints of fiscal trimming and in the light of administrative experience, the legislature's recourse to the flat grant concept was without a reasonable basis or lacked a rational relationship to the legitimate state interest of seeking to assure optimum realized benefits from available public assistance monies." *Id.*

domain of constitutional life. That there is a shape and a limit to what the Constitution ought to reach and economic well-being simply falls outside that domain.

Here, by contrast in New York, in both the New York State Constitution and Article XVII, there is explicit text that commits welfare rights to the constitutional demand that at least goes part of the way dealing with issues of legitimacy.¹⁰⁹

The second concern is that of competency. Somehow the courts are not institutionally equipped to deal with issues of money or well-being. They do not have the internal institutional structure to deal with analyzing and processing either complex data or competing policy considerations.

My own view is that it is way too late in the day to argue about the competency of the court in dealing with complex social and material matters. It is not only that the courts, both federal and state, have for many decades failed to deal with highly complex policy issues. In fact, they have dealt with complex issues involving, school finance, desegregation, bankruptcy, and tax law, each raising fundamental issues about the raising and spending of public money. When we look at a state court, it is also inconsistent with the common law tradition. It is inconsistent with the generative capacity that state courts have always had when they resolve complex issues of public matters.

It is here that state courts are especially equipped to construct norms and to articulate a social vision for the state. In such circumstances the court can, insist that the legislature take its Article responsibilities seriously. It can compel the legislature to articulate a basis for its decision-making. It can require a strong justification. It can police the decision-making process through something similar to the "hard look doctrine" that has been used by federal courts to review administrative agency decision-making.¹¹⁰

109. See N.Y. CONST. art. XVII, § 1. This provision states: "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." *Id.*

110. See Matthew J. McGrath, *Covergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rule Making*,

On the common law side, the approach that I am suggesting is not dissimilar from the approach that the court would use to find a breach of corporate duty to shareholders. There we look to see whether a process of decision-making has been complied with. We look to see whether various factors have been considered, that process-oriented approach that leads us to the major substance of the decision. The court will ask in the corporate context: Is the decision ultimately fair to the shareholders?

On the Federal Constitutional side, one version of this test was articulated by the Supreme Court in the *Youngberg v. Romeo*¹¹¹ decision. There it says that constitutional decisions that involve a large expenditure of money in an institutional context must fall within the range of professional decision-making.¹¹²

In closing, our instinct in the last twenty years, and in the last post Warren period, has viewed judicial activism as anti-democratic, as imperial, and even inefficient. Most of our thinking about judicial activism, however, comes from an analysis of federal courts interpreting Federal Constitutional provisions, rather than from the decision-making of state courts looking to state constitutional provisions that are unique to particular states.

State courts are very differently situated from the federal courts in a number of institutional respects on which we have already commented. The common law background clearly is preeminent. In some instances state court judges are elected by the people, therefore, they are considered, in a sense, politically accountable.

54 GEO. WASH. L. REV. 541 (1986). This author defines the "hard look doctrine" as "operat[ing] to make the arbitrary and capricious standard stricter [by] bringing it closer to the substantial evidence test." *Id.* at 550. Moreover, under the operation of this doctrine, "the reviewing court must take a 'hard look' at the agency decision if it believes that the agency 'has not genuinely engaged in reasoned decisionmaking.'" *Id.* (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)).

111. 457 U.S. 307 (1982).

112. *Id.* at 320-21. The Court in *Youngberg* stated that there must ultimately be a healthy balance between the liberty interests held by an individual and the organizational requirements of a complex social system. *Id.* Moreover, in an institutional setting professional judgment must be adequately exercised in order to comply with constitutional mandates. *Id.*

Much has also been spoken about the new and different relationship between the judiciary and the legislature within the state court system. Certainly the literature on the school finance cases speaks about the dialogue that comes into play when a state court articulates and enforces a positive right.¹¹³ My own view is that the defining characteristic of the common law was to restrain the legislature, not only when the legislature goes beyond the bounds of discretion, but also when it fails to meet the obligation that discretion provides.

The New York Court of Appeals has an obligation to insure that the legislature takes seriously its Article XVII obligation. Justice Cardozo, summarized this view when he eloquently stated; “the chief worth of courts is making vocal and audible the ideals that might otherwise be silenced, in giving the continuity of life and expression, in guiding and directing choice within the limits where choice ranges.”¹¹⁴

Thank you.

Robert A. Heverly:

It is my pleasure to be here and included in this panel. When we began setting up the program for this year a number of people asked if I would like to be involved in it formally, although I had not been in the past. I am going to be speaking about the right to freedom of expression under the New York State Constitution,¹¹⁵

113. See Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 18-19 (1993).

“In the last six years, state courts around the country have issued a number of decisions that have recognized the right to adequate education and have ordered significant changes and improvements in each of their state’s public school systems. The elaboration of these rights has evolved out of a unique interaction between the state judiciary, on the one hand, and the state legislature and executive branches on the other. At least one state judge described this kind of interaction as one to which the ‘[f]ederal courts are . . . strangers.’”

Id. (citation omitted).

114. Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 92-94 (1921).

115. N.Y. CONST. art. I, § 8. Section eight provides in pertinent part: “Every citizen may freely speak, write and publish his sentiments on all

with a substantive analysis from 1991 to 1995. Do not let the “substantive” title fool you. We are also going to have to talk about process. However, the analysis will not be as in depth as that of the panel this morning, or the panel this afternoon. We are going to look at some case law decided prior to 1991, as well as some historical developments.

We should probably start with a reading of the constitutional provisions in issue. Article I, section 8 of the New York State Constitution reads in pertinent part: “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”¹¹⁶ Whereas the United States Constitution, the Bill of Rights, states: “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹¹⁷ There definitely a different feel to the latter. I think that the relevance of the distinction between the two is, in a large part, why we are here today.

Freedom of Expression issues have been raised throughout the history of New York State, but the more modern types of jurisprudence started with a 1980 case, *Bellanca v. New York State Liquor Authority*.¹¹⁸ Now, there are some recurring themes to watch for in the First Amendment, article I, section 8 cases in New York State case law and they begin with *Bellanca*.

First, this is the second time that the New York Court of Appeals has heard the *Bellanca* case.¹¹⁹ The case was originally

subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” *Id.*

116. *Id.*

117. U.S. CONST. amend. I. The First Amendment provides in pertinent part: “Congress shall make no law . . . abridging the freedom of speech, or of the press” *Id.*

118. 51 N.Y.2d 879, 414 N.E.2d 404, 433 N.Y.S.2d 1029 (1980). *rev'd*, 452 U.S. 714 (1981), *on remand to* 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981), *cert. denied*, 456 U.S. 1006 (1982).

119. The Erie County Supreme Court granted plaintiff’s summary judgment motion, declaring a New York statute, prohibiting topless dancing in all premises licensed by the New York State Liquor Authority, unconstitutional. *Id.*, 50 N.Y.2d 524, 407 N.E.2d 460, 429 N.Y.S.2d 616 (Sup. Ct. Erie County 1980). The State appealed and the New York Court of Appeals

heard by the New York Court of Appeals and was then appealed to the United States Supreme Court. The Supreme Court then remanded the case back to the court of appeals where they heard and decided the case for the second time. When a situation such as this happens, and it has happened more than once, there is always an earlier court of appeals decision, where the court found a certain way under the Federal Constitution but was reversed. Essentially what has happened is that the court of appeals reached a decision, they reasoned it out under the Federal Constitution, and the case was then appealed to the United States Supreme Court who says "you were wrong." The Court then remands the case back to the state court to deal with it.

Second, and I have not exactly figured out how this fits in, is that the New York Court of Appeals tends to be involved in a lot of cases involving risqué types of speech and expression, lewd and lascivious behavior, adult videos and topless dancing. These issues seem to recur in those cases where the court is expounding

affirmed the lower court, holding that the statute was "unconstitutional under the First Amendment of the United States Constitution." *Id.*, 54 N.Y.2d at 231, 429 N.E.2d at 766, 445 N.Y.S.2d at 88. Certiorari was granted. *Id.* at 230, 429 N.E.2d at 766, 445 N.Y.S.2d at 88. The Court, in deciding the case, stated that even if they were to find the statute "unconstitutional under the First Amendment its enactment by the State would be authorized under the provisions of the Twenty-first Amendment of the Federal Constitution." *Id.* at 233, 429 N.E.2d at 767, 445 N.Y.S.2d at 89. The Court upheld the constitutionality of the statute by recognizing that the Twenty-first Amendment grants broad powers to the state "to regulate the times, places and circumstances under which liquor may be sold . . . [and] pursuant to [this] power [the state may ban topless dancing in] establishments granted a license to serve liquor." *Id.* at 233, 429 N.E.2d at 767, 445 N.Y.S.2d at 89. The Supreme Court then remanded the case to the New York Court of Appeals "to consider the validity of the [statute] under the provisions of [the New York] State Constitution, an issue which [was] not address[ed] when the case was before [the court] on the prior occasion and which, of course, was not within the scope of the Supreme Court's review." *Id.* at 234, 429 N.E.2d at 768, 445 N.Y.S.2d at 90. The court of appeals held that "the guarantee of freedom of expression set forth in our State Constitution is of no lesser vitality than that set forth in the Federal Constitution" and that the State Constitution does not contain a provision similar to the Twenty-first Amendment of the Federal Constitution, therefore, the statute remains unconstitutional under the New York State Constitution. *Id.* at 235, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

on the right to freedom of expression under the state constitution. In *Bellanca*, the facts involved a challenge to a state prohibition against topless dancing in establishments that serve liquor.¹²⁰

The New York Court of Appeals validated the statute in *Bellanca* based on an analysis of the Federal Constitution.¹²¹ The United States Supreme Court reversed this decision and remanded the case to the court of appeals because of the United States Constitution's Twenty-First Amendment which gives the States the right to control liquor.¹²² The Court found no significant conflict between the Twenty-first and the First Amendments in this case.¹²³ The case was then remanded to the New York Court of Appeals. As is typical, the court reaffirmed their previous decision, but with different reasoning.¹²⁴ Rather than blessing the New York State Constitution, the court stated that "we do not have a similar amendment to the Twenty-first as it regards the state controller for liquor, we only have article I, section 8." Absent the balancing function of the Twenty-first Amendment, the First Amendment or article I, section 8 will control. The court expressly refused to decide whether the State Constitution provided any more protection.¹²⁵

In *Beach v. Shanley*,¹²⁶ a reporter wrongfully obtained a sealed report detailing a grand jury investigation of alleged violations within the Rensselaer County Sheriff's Office which outraged the District Attorney (DA) because the sealed reports were not to be

120. *Bellanca*, 54 N.Y.2d at 230, 429 N.E.2d at 766, 445 N.Y.S.2d at 88.

121. *Id.* at 233-34, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

122. *See Id.* at 233-34, 429 N.E.2d at 767-68, 445 N.Y.S.2d at 89-90.

123. *Id.*

124. *Id.* at 234, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

125. *Bellanca*, 54 N.Y.2d at 234-35, 429 N.E.2d at 768, 445 N.Y.S.2d at 90.

126. 94 A.D.2d 542, 466 N.Y.S.2d 725 (3d Dep't 1983), *rev'd* 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984) (finding that the quashing of a subpoena, which would have compelled a television reporter to testify before a grand jury regarding his unauthorized receipt of a report of another grand jury, was constitutional despite the criminal nature of the reporter's act because the identity of the reporter's confidential source was privileged pursuant to the New York Shield Law).

given to reporters.¹²⁷ The DA subpoenaed the reporter to find out who provided him with the reports.¹²⁸ Subsequent to this, the DA recused himself for fear that someone from his own office “was responsible for disclosing the sealed report’s contents.”¹²⁹ Consequently, a special prosecutor was appointed to the matter and the reporter sought to quash the subpoena by asserting protections afforded under the New York Shield Law,¹³⁰ a statutory privilege defense.¹³¹

The New York Court of Appeals reversed the appellate division, which had found that the statutory Shield Law conflicted with article I, section 6 of the State Constitution¹³²

127. *Id.* at 246, 465 N.E.2d at 306, 476 N.Y.S.2d at 767.

128. *Id.*

129. *Id.*

130. N.Y. CIV. RIGHTS LAW § 79-h (b) (McKinney 1992). Section 79-h (b) provides:

[N]o professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person’s possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.

Id. at § 79 h (b).

131. *Beach*, 62 N.Y.2d at 246-47, 465 N.E.2d at 306-307, 476 N.Y.S.2d at 767-68.

132. N.Y. CONST. art. I, § 6. Article I, § 6 states: “[t]he power of grand juries to inquire into the willful misconduct in office of public officers, and to

because it impaired the powers granted to the grand jury.¹³³ The appellate division, in reinstating the subpoena, agreed with respondent's reasoning that "section 79-h [wa]s invalid because it r[an] afoul of the constitutional proscription against laws that suspend or impair a grand jury's power to inquire into willful misconduct by a public officer."¹³⁴ However, the court of appeals found respondent's argument unpersuasive, and therefore, reversed the appellate division's argument.¹³⁵

The most interesting aspect of the *Beach* case, for purposes of our discussion, centers on Judge Wachtler's concurring opinion in which he recognized a free speech guarantee under article I, section 8 of the State Constitution.¹³⁶ Judge Wachtler expressed displeasure with the idea that section 79-h interfered with a constitutional grant of power to a Grand Jury. Therefore, he expressed the need to recognize the free expression right in this context.¹³⁷ New York State has always had a tradition of protecting the freedom of the press. For example, the John Peter Zenger trial in 1735,¹³⁸ which resulted in Mr. Zenger's acquittal, is consistent with this practice of providing broad protections to

find indictments or to direct the filing of information in connection with such inquiries, shall never be suspended or impaired by law." *Id.*

133. *Beach*, 62 N.Y.2d at 247, 465 N.E.2d at 307, 476 N.Y.S.2d at 768.

134. *Id.* at 252, 465 N.E.2d at 310, 476 N.Y.S.2d at 771.

135. *Id.* (holding that the purpose of Article I, Section 6 of the New York Constitution was to protect from legislative interference the powers of the grand jury, not to prevent the creation of evidentiary privileges by the Legislature). *Id.*

136. *Id.* at 255, 465 N.E.2d at 311, 476 N.Y.S.2d at 772 (Wachtler, J., concurring) (positing that the expansive free press guarantees embodied in the State Constitution under Article 1, Section 8 should be recognized as providing a reporter or newspaper protection from being held in contempt for refusing to disclose their confidential news sources to official investigators). *Id.*

137. *Id.* at 256, 465 N.E.2d at 312, 476 N.Y.S.2d at 773 (Wachtler, J., concurring).

138. *Id.* at 255, 465 N.E.2d at 312, 476 N.Y.S.2d at 773 (Wachtler, J., concurring) (discussing the trial of Mr. Zenger who "was prosecuted for publishing articles critical of the New York colonial Governor after he refused to disclose his source," but was later acquitted). *Id.* See 23 Ency. Brit. 1956 p. 944 (describing the John Peter Zenger trial of 1735).

the press in the actions of the City and the State and actions governed by the Constitution.¹³⁹

In 1986, Judge Wachtler wrote the decision in *Arcara v. Cloud Books*.¹⁴⁰ Again, procedural posturing. To the court of appeals, the United States Supreme Court said, in effect, “you were wrong, send it back down.”

The New York Court of Appeals in this case was again examining risqué issues. In *Arcara*, an investigator from the District Attorney’s Office entered a combination adult bookstore and theater.¹⁴¹ While in the store, he witnessed various lewd and lascivious acts going on. He saw people engaged in actual sexual activities in the bookstore, in the movie booths, and in the aisles.¹⁴² The District Attorney, instead of arresting or prosecuting the offenders, chose to close the bookstore pursuant

139. *Id.* at 255-56, 465 N.E.2d at 312, 476 N.Y.S.2d at 773 (Wachtler, J., concurring) (discussing New York’s long history of providing broad protection to publishers and other news sources). *Id.*

140. 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986). This was an action by the Erie County District Attorney seeking to close a bookstore “as a public nuisance” because the premises were being used for illegal sexual conduct. *Arcara*, 68 N.Y.2d at 555, 503 N.E.2d at 493, 510 N.Y.S.2d at 845. On remand from the Supreme Court, the New York Court of Appeals was asked to determine “whether an order closing the bookstore, to curtail the illegal acts of customers, incidentally affects the store’s constitutional right to freedom of expression, so as to require the State to show that it is the only available means to abate the nuisance.” *Id.* The court of appeals originally held that “such an order would have an incidental impact on the bookseller’s First Amendment rights and that the prosecutor had not demonstrated that closing the defendant’s store was the least restrictive means to abate the nuisance created by some of its customers.” *Id.* (citations omitted). Alternatively, the Supreme Court reversed this decision stating “that the bookseller’s First Amendment rights would not be implicated or sufficiently affected by an order aimed at curtailing the illegal conduct of some of the store’s patrons. *Id.* (citations omitted). The Supreme Court remanded the case for the court of appeals to determine whether the bookseller would receive greater protection under the New York State Constitution’s guarantee of freedom of expression, Article I, section 8. *Id.* at 555-56, 503 N.E.2d at 493, 510 N.Y.S.2d at 845.

141. *Id.* at 556, 503 N.E.2d at 493, 510 N.Y.S.2d at 845.

142. *Id.* at 556, 503 N.E.2d at 493-94, 510 N.Y.S.2d at 845-46.

to Public Health Law, article 23, title II.¹⁴³ The statute would allow them to close an operation such as this, as a nuisance, for one year.¹⁴⁴ The store owner said: “We are a bookstore. We have books that are protected under freedom of expression in our store, shutting us down is going too far, you are doing more than you need to do.”¹⁴⁵

Well, as you might guess from Wachtler’s opinion, the court found for the book store.¹⁴⁶ The court determined that the District Attorney had gone too far in that closing the store for a year was too harsh. The fact that the owners could move the same business to another store did not matter to the court. Instead, they were more concerned with the fact that they were

143. *Id.* at 556, 503 N.E.2d at 494, 510 N.Y.S.2d at 846. *See generally* N.Y. PUB. HEALTH LAW §§ 2320-34 (McKinney 1993) (discussing houses of prostitution, injunctions and abatements).

144. *Id.*

145. *Id.* at 556-57, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.

146. In his opinion Judge Wachtler stated that “the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State’s constitutional guarantee of freedom of expression.” *Id.* at 557, 503 N.E.2d at 494-95, 510 N.Y.S.2d at 846-47. In his opinion, Judge Wachtler concurs with the court’s earlier reasoning in *Bellanca*, which stated that the “the guarantee of freedom of expression set forth in our State Constitution is of no lesser vitality that that set forth in the Federal Constitution.” *Id.* at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847 (citing *Bellanca v. State Liquor Authority*, 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981)). In deciding the state constitutional issue the court determined that closing the store was not done for the purpose of restraining free expression by prohibiting the selling of books. *Id.* The reason for the closing was to prevent the patrons from committing illegal acts, therefore the action will be subjected to a lower level of scrutiny than if it had been a restraint of speech. *Id.* In order for the court to determine whether the State action infringes on the store owners freedom of expression the test “is the impact of the action on the protected activity and not the nature of the activity which prompted the government to act.” *Id.* When a government regulation “would incidentally burden free expression, the government’s action cannot be sustained unless the State can prove that it is no broader” than necessary. *Id.* Here, the court determined that the reason for closing the store was to prevent illegal sexual acts and the impact on the legitimate business of selling books was incidental. *Id.* Therefore, State had the burden of proving that they have “chosen a course no broader than necessary to accomplish its purpose.” *Id.* at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847.

going to shut down the store at that site which was too much for them. The court in that case wanted a close fit between the state's objectives and how it accomplished them.

In 1991, the New York Court of Appeals wrote a Federal Constitutional decision when it decided *Immuno Ag v. Moor Jankowski*.¹⁴⁷ I disagree with with the statement made this morning, that the court in *Immuno* decided the case on both state and federal grounds.¹⁴⁸ The original court decision briefly referred to the state court decisions, however, all of the analysis in the case cited to federal court decisions.¹⁴⁹ Although the court

147. 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989), *reh'g denied*, 75 N.Y.2d 866, 552 N.E.2d 179, 552 N.Y.S.2d 931 (1990), *cert. granted*, 497 U.S. 1021 (1990), *remanded*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991), *cert. denied*, 500 U.S. 954 (1991). *Immuno* involved a libel action against an editor of a scientific journal because of his publication of a letter to the editor that involved a public controversy. *Immuno*, 77 N.Y.2d at 239, 567 N.E.2d at 1271, 566 N.Y.2d at 907. The New York Court of Appeals in its original decision held that there was no triable issue of fact because the opinions contained in the letter "were entitled to the absolute protection of the State and Federal constitutional free speech guarantees, and that charges of defendant's deliberate incitement to have a defamatory letter published lacked factual foundation." *Id.* The courts determination that there was no triable issue of fact was based solely on a Federal Constitutional analysis. *Immuno*, 74 N.Y.2d at 555-61, 549 N.E.2d at 132-35, 549 N.Y.S.2d at 941-44 (discussing various federal court decisions in constructing the appropriate standard of review). The United States Supreme Court subsequently granted plaintiff's petition for appeal and reversed and remanded the case to the New York Court of Appeals to be reevaluated in light of their recent decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). *Immuno*, 77 N.Y.2d at 239-40, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. The New York Court of Appeals, reviewing the case on remand, affirmed their prior holding. *Id.* at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. However, the court, in their reevaluation, not only decided the case on federal grounds but also premised this second "decision on independent State constitutional grounds as well as the Federal review directed by the Supreme Court." *Id.*

148. *See Immuno*, 74 N.Y.2d 548, 549 N.Y.S.2d 938, 549 N.E.2d 129 (1989). The court, in its examination of the letter to the editor, whether fact or opinion, conducted this review in accordance with established federal law. *See id.* 74 N.Y.2d at 555-61, 549 N.E.2d at 132-35, 549 N.Y.S.2d at 941-44.

149. *Id.* 74 N.Y.2d at 555-61, 549 N.E.2d at 132-35, 549 N.Y.S.2d at 941-44. The court in determining whether a triable issue of fact existed cited

discussed some state and common law issues the State Constitution was not addressed in the court's decision.¹⁵⁰ Instead, the court merely stated and raised certain state issues without settling the state claims. The case was subsequently appealed to the United States Supreme Court, where it was reversed and remanded.¹⁵¹

On remand, the New York Court of Appeals reaffirmed its prior position.¹⁵² The facts here involve that of opinion and the dichotomy analysis of the court. The court of appeals found that the prior case law in this area had clearly established that if a statement was an opinion then it would be protected under the guaranteed right to free speech contained in the Federal Constitution.¹⁵³ In other words, you can state your opinion about the character of a person without worrying about repercussions, because such an opinion constitutes protected speech.

In *Immuno*, the protected speech involved concerned a letter to an editor of a specific journal which alleged that a research company was moving to South Africa to bypass restrictions on the use of chimpanzees in research.¹⁵⁴ The allegation, however,

case law from numerous federal court decisions, thereby indicating both its preference for a Federal Constitutional analysis and lack of a State Constitutional analysis.

150. *Id.*

151. 497 U.S. 1026 (1990).

152. *Immuno*, 77 N.Y.2d at 257, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918.

153. *Immuno*, 74 N.Y.2d at 555, 549 N.E.2d at 132, 549 N.Y.S.2d at 941 (stating that "it is settled that pure opinion -- however misguided or vituperative -- is entitled to the absolute protection of the State and Federal constitutional free speech guarantees.").

154. The publication of a letter to the editor in a specialized scientific journal was the cause of this libel action. *Immuno*, 77 N.Y.2d at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. The defendant Dr. J. Moor-Jankowski, was a professor at New York University who both cofounded and edited the journal. *Id.* The letter was submitted by Dr. S. McGreal, Chairwoman of a primate advocacy group, the International Primate Protection League (IPPL). *Id.* The focus of the letter was to expose a plan by Immuno AG, a large multinational corporation, to establish a hepatitis research facility in West Africa. *Id.* The letter criticized this plan for a number of reasons:

could not be proven to be false and therefore, constituted protected opinion which was non-actionable defamation. 155

The case was remanded by the United States Supreme Court for consideration in light the Court's decision in *Milkovich v. Lorain*

“(1) that the motivation for the plan was presumably to avoid international policies or legal restrictions on the importation of chimpanzees, an endangered species; (2) that it could decimate the wild chimpanzee population, as capture of chimpanzees generally involved killing their mothers, and it was questionable whether experimental animals could be returned to the wild, as plaintiff proposed; and (3) that returning the animals to the wild could well spread hepatitis to the rest of the chimpanzee population.”

Id.

The publication of the letter was accompanied by an introductory note explaining its origin. *Id.* The note identified the author as an member of IPPL, that Immuno Ag. had been sent a copy of the letter for comment or reply, that plaintiff, Immuno Ag. had received the letter and had declined to make any response other than that the matter had been referred to their attorneys. *Id.* at 240-41, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. The note further stated that the attorneys representing Immuno Ag. responded by alleging that the statements within the letter were “inaccurate, unfair and reckless, and requested the documents upon which the accusations were based.” *Id.* at 241, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908. The attorneys also threatened legal action if the plaintiff was not given a reasonable opportunity to reply before the letter was printed. *Id.* The plaintiff was given two additional months to draft a response and, after receiving no additional contact from the plaintiff or its lawyers, the letter was finally published approximately one year after it had been received. *Id.* Plaintiff filed this cause of action “against Moor-Jankowski and seven other defendants, including McGreal and the publishers and distributors of the Journal.” *Id.* at 241, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909. The case was vigorously litigated and “all the defendants except for Moor-Jankowski have settled for what the motion court described as ‘substantial sums.’” *Id.* at 242, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909. The original court of appeals decision was in accord with the findings of the appellate division, which found that because the plaintiff failed to produce evidence of a falsity the letter “was a constitutionally protected expression of opinion that could not, as a matter of law, support an action for defamation.” *Id.* The court of appeals, reweighing the case on remand from the United States Supreme Court, affirmed this decision “adopting without further elaboration our prior conclusion as to the lack of factual foundation for the deliberate incitement charges, and concentrating our analysis on the substance of the challenged statements.” *Id.*

155. *Id.* at 242, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

*Journal Co.*¹⁵⁶ *Milkovich* changed the way the Court analyzed statements of opinion and fact. The Court in *Milkovich* eliminated the opinion and fact dichotomy by looking for assertable facts. Under the Supreme Court's guidance, the court of appeals on remand, was instructed to hear the *Immuno* case again and reach a decision under the Federal Constitution. However, on remand, the Court of Appeals determined that under the new law laid down in *Milkovich* its prior decision was still correct.¹⁵⁷

156. 497 U.S. 1 (1990). The court of appeals, applying the Supreme Court holding in *Milkovich v. Lorain Journal, Co.* stated: "*Milkovich* leaves in place all previously existing Federal constitutional protections, including the 'breathing space' which 'freedoms of expression require in order to survive,' and specifically including immunity for statements of opinion relating to matters of public concern that do not contain a provably false factual connotation. *Milkovich* puts an end to the perception . . . that, in addition to all other Federal constitutional protections, there is a 'wholesale defamation exemption for anything that might be labeled 'opinion'." *Immuno*, 77 N.Y.2d at 242, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909 (citing the Supreme Court decision in *Milkovich*, 497 U.S. 1 (1990)).

157. *Immuno*, 77 N.Y.2d at 244-48, 567 N.E.2d at 1274-77, 566 N.Y.S.2d at 910-13. In *Milkovich* the Supreme Court appears to have struck a balance "between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable." *Id.* at 245, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911. The letter in question states, as a core premise, the following: "Release of chimpanzee veterans of hepatitis non-A, non-B research would be hazardous to wild populations, as there is not way to determine that an animal is definitely not a carrier of the disease." *Id.* at 246, 567 N.E.2d at 1275, 566 N.Y.S.2d at 911. In applying the standards of *Milkovich*, the core premise analysis, to the contents of the letter, the court of appeals was able to ascertain two statements of fact, "one express and one implied." *Id.* The first statement alleged that there was, at the time, no scientific method to determine whether an exposed chimpanzee was a carrier of the disease and the second statement alleged that the plaintiff planned to release chimpanzees which were possible carriers into the wild population. *Id.* at 246, 567 N.E.2d at 1276, 566 N.Y.S.2d at 912. Although the court determined that the "core premise could be actionable" because the statements contained verifiable claims, were of a type of speech which was restrained, were seriously maintained, and had an apparent basis in fact the complaint was dismissed because the plaintiff was unable to meet their burden of proving the falsity of the statements. *Id.* Thus, as in the prior court of appeals decision, the same failure on the part of the

In hearing the case on remand, the court of appeal's also addressed New York State Constitutional issues¹⁵⁸ by stating, "this State, a cultural center for the nation, has long provided a hospitable climate for the free exchange of ideas."¹⁵⁹ Remember, there was no citation by Judge Wachtler for those types of remarks other than to John Peter Zenger and the concentration publications.¹⁶⁰ He stated "[t]hat tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that '[e]very citizen may freely speak, write and publish . . . sentiments on all subjects.'"¹⁶¹

The court of appeals in the second *Immuno* decision, was confusing by failing to specify whether its decision was based on interpretive or non-interpretive factors or whether it used historical analysis to reach its conclusion.¹⁶² This confusion was further compounded by the court considering additional State Constitutional issues on remand where such issues were not raised on the initial appeal.¹⁶³ This presented an interesting

plaintiff to meet its burden of proof justified the courts granting of the summary judgment. *Id.*

158. *Id.* at 1277-82 (containing the full analysis applied by the court of appeals).

159. *Id.* at 1277 See also *Beach v. Shaney*, 62 N.Y.2d 241, 255-56, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984).

160. See generally *Beach*, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765.

161. *Immuno*, 77 N.Y.2d at 249, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913; See also N.Y. CONST., art. I, § 8.

162. *Immuno*, 77 N.Y.2d at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914. The court stated: "Thus, whether by the application of 'interpretive' (e.g., text, history) or 'noninterpretive' (e.g., tradition, policy) factors, the 'protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by' the Federal Constitution." *Id.* (citations omitted). The court further provided: "[W]e decide this case on the basis of State law independently, and that in our State Law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result we reach. *Id.* at 250, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913.

163. *Id.* at 250, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914.

process for the court in deciding these issues on a summary judgment motion.¹⁶⁴

Procedurally, the court of appeals, in deciding the summary judgment on remand, went through and searched the previous record which led to the dismissal of plaintiff's complaint.¹⁶⁵ There were many more State Constitutional issues raised on remand than on the initial appeal.¹⁶⁶ However, three concurring opinions said, in effect, that the analysis of State law was ridiculous and that there was no need for the court to go that far.¹⁶⁷

Also in 1991, the New York Court of Appeals decided *Children of Bedford v. Petromelis*.¹⁶⁸ In this case there was a

164. *Id.* The case was presented to the court of appeals as a summary judgment motion, "which searches the record and presents only issues of law." *Id.* The court in this search found that there were "no factual issues to be resolved" under State law and granted the request for summary judgment. *Id.* However, the court did not stop there. Instead they cited to the United States Supreme Court in *Milkovich*, n. 5, where the Court indicated that "the Ohio court remains free, on remand some fifteen years after the challenged article, to address State law issues." *Id.* at 251, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 n.5 (1989)). The court of appeals found this situation to be equally true of the *Immuno* case and proceeded to conduct an independent State law review of the constitutional claims. *Id.* at 251, 567 N.E.2d at 1278-79, 566 N.Y.S.2d at 914-15. In deciding the case on independent state grounds, the court in effect, was able to preclude further review of the case by the Supreme Court. *Id.* at 257, 567 N.E.2d at 1283, 566 N.Y.S.2d at 919 (Simons, J., concurring).

165. The court held that "defendant's summary judgment motion was properly granted and the complaint dismissed, premising our decision on independent State constitutional grounds as well as the Federal review directed by the Supreme Court." *Immuno*, 77 N.Y.2d at 240, 567 N.E.2d at 1272, 566 N.Y.S.2d at 908.

166. *Id.* at 249-55, 567 N.E.2d at 1278-82, 566 N.Y.S.2d at 914-18.

167. *Id.* n.6 at 1282 (providing a detailed analysis of the various opinions issued by the members of the court).

168. 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S.2d 453 (1991), *cert. granted*, 502 U.S. 1025 (1992), *rev'd*, 79 N.Y.2d 972, 592 N.E.2d 796, 583 N.Y.S.2d 188 (1992) (declaring, on remand from the United States Supreme Court, that "Executive Law § 632-a [is] unconstitutional under the First Amendment . . ."). *Id.*, 79 N.Y.2d at 975, 592 N.E.2d at 796, 583 N.Y.S.2d at 188. Executive Law § 632-a "was enacted in response to public outrage over the 1977 Son of Sam murders and news reports that the killer was being

state statute, Executive Law section 632-a,¹⁶⁹ which stated that if you profit from your crimes, you must place that money in escrow where a victim can make a claim against it. If the victim does not make a claim against it, the money will, after a certain number of years, revert back to the accused or convicted person.

The New York Court of Appeals found that the statute as applied did not violate either the right to due process or the right to freedom of speech.¹⁷⁰ The court concluded that the statute, although, content based, imposed a direct burden on the right to freedom of speech. Therefore, the state had to show that the statute was narrowly tailored to meet a compelling state interest and the court determined that they did.¹⁷¹

offered substantial sums of money for the exclusive rights to his story." *Id.*, 77 N.Y.2d 713, 720-21, 573 N.E.2d 541, 544, 570 N.Y.S.2d 453, 456. The bill established various procedures to "ensure that criminals would not profit from their crimes before the victims of those crimes had an opportunity to obtain compensation." *Id.* The issue in *Children of Bedford v. Petromelis* involved the publication of a book and the assignment of the book royalties by Jean Harris after her conviction and imprisonment for the killing of Dr. Herman Tarnower. *Id.* at 718, 573 N.E.2d at 543, 570 N.Y.S.2d at 455. Harris had written a book which detailed her version of the crime "as well as expressions of her thoughts, feelings, opinions [and] emotions regarding the crime." *Id.* (citations omitted). See N.Y. EXEC. LAW § 632-a(1) (McKinney 1996).

169. See N.Y. EXEC. LAW § 632-a (McKinney 1996).

170. *Children of Petromelis*, 77 N.Y.2d at 718, 573 N.E.2d at 543, 570 N.Y.S.2d at 455. The court determined that "[t]he statute is content-based and imposes a direct burden on speech: it singles out a category of speech based on subject matter and imposes special burdens on that category. Thus, the statute must be strictly scrutinized and unless it serves a compelling governmental purpose and is narrowly tailored to accomplish that purpose, it is invalid." *Id.*

171. The court in determining that the statute satisfied a compelling state interest stated: "[t]he statute is the codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs and also an expression of the penological concept which provides that victims expect and are entitled to retributive satisfaction from our criminal justice system." *Id.* at 727, 573 N.E.2d at 548, 570 N.Y.S.2d at 460. (citations omitted). In its determination that the statute was narrowly tailored to meet this state interest the court stated that the statute:

creates a unique and identifiable resource and preserves it for the benefit of victim's equitable right to be compensated from moneys earned by a

The defendants in this case specifically raised a State Constitutional argument stating that the statute violated the State Constitutional Guarantee of free speech.¹⁷² Petitioners alleged that “where free expression is at stake, article I, section 8 of the New York State Constitution demands a genuinely close fit between the asserted State interest burdening free speech and the restrictions imposed by law.”¹⁷³ Petitioners argument is premised on the test applied by the court in *Arcara*, that this standard must be more burdensome than that requiring the statute be narrowly tailored.¹⁷⁴ It must be different or why else why would we use it? The court states: “assuming without deciding, that [A]rticle I, §8 does require some type of ‘genuinely close fit’ between the statute and its purpose, this requirement is not more burdensome than requiring that the statute be narrowly tailored to meet its objective and section 632-a satisfies this test.”¹⁷⁵ The court here is beginning to to depart from where they went in *Arcara*; the language they used was no more burdensome than the narrowly tailored test.

So, now we are starting to look at it from a different approach. The United States Supreme Court subsequently reversed *Children of Petromelis*¹⁷⁶ on Federal Constitutional grounds and remanded it back to the New York Court of Appeals. Now there is no State Constitutional law issue because the party asserting their rights

criminal as a result of the victimization. It creates a unique and identifiable resource and preserves it for the benefit of victims directly injured by a crime to compensate them for the damages sustained, gives them priority over the criminal’s other creditors and extends the time within which a claim to the proceeds may be asserted by a victim. The statute regulates only the criminal’s receipt of money, not the right to speak about the crime and it does not impose a forfeiture of all profits -- it merely delays payment.

Id. at 729-30, 573 N.E.2d at 550, 570 N.Y.S.2d at 462. See N.Y. EXEC. LAW § 632-a (11) (e) (McKinney 1996).

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

173. *Id.* (citing *Arcara v. Cloud Books*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986)).

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

175. *Id.*

176. 502 U.S. 1025 (1992).

has won, so the state can do nothing further. The court simply drafts a short opinion in favor of the plaintiff.¹⁷⁷

In *Matter of Holtzman*,¹⁷⁸ a district attorney sent a letter to one of the judicial committees and then released the letter to the press accusing a judge of “making the victim assume the position she was forced to take when she was sexually assaulted” in chambers.¹⁷⁹ In addition, the district attorney strongly attacked the actions of the judge.¹⁸⁰ There have been investigations that showed that these allegations were not true.¹⁸¹ Subsequently, the district attorney in *Holtzman*, was charged with violating the disciplinary rules.¹⁸²

Once in the lawyer conduct system, the district attorney, was admonished in a private letter which she subsequently appealed.¹⁸³ Although the attorney faced three charges,¹⁸⁴ only one charge made it to the court of appeals. This charge involved the attorney’s conduct reflecting on her “unfitness to practice law” because she released the letter concerning the Judge, which the disciplinary committee alleged, she should have known was

177. 79 N.Y.2d 972, 592 N.E.2d 796, 556 N.Y.S.2d 483 (1992).

178. 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991), *cert. denied*, 502 U.S. 1009 (1991) (holding that an attorney “had engaged in conduct that adversely reflected on her fitness to practice law in releasing a false accusation of misconduct against [a judge]”). *Id.* at 189, 193, 577 N.E.2d at 32, 34, 573 N.Y.S.2d at 41, 43.

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

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

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

182. *Id.*

183. *Id.*

184. *Id.* Of the three charges, the attorney faced under the Disciplinary Rules, the first and only charge which was heard on appeal, specifically alleged that the attorney had “engaged in conduct that adversely reflected on her fitness to practice law in releasing a false accusation of misconduct against [the] Judge.” *Id.* The second charge involved the attorney’s “subsequent videotaping of the complaining witness’s statement under oath, and release of a portion of the audio tape to the media, despite [the attorney’s] knowledge that the complainant would be a necessary witness in other investigations.” *Id.* Finally, the third charge involved the further demeaning of the Judge, when the attorney stated at a press release that she “had knowledge of other allegations of misconduct involving the Judge.” *Id.*

false.¹⁸⁵ The court of appeals, in upholding the attorney's violation of the disciplinary rules, found that a reasonable lawyer should know that the release of false allegations about a judge will be considered in determining the attorney's fitness to practice law.¹⁸⁶ The court rejected the attorney's argument that "her conduct would not be actionable under the 'constitutional malice' standard enunciated by the Supreme Court in *New York Times Co. v. Sullivan*."¹⁸⁷ In essence, the attorney argued that because her comments were directed at a judge, the standard for a public figure and public matter should be applicable.¹⁸⁸ However, the court of appeals declined to "extend[] the *Sullivan* standard to lawyer discipline"¹⁸⁹ because "[i]n order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard of what a reasonable attorney would do in similar circumstances."¹⁹⁰ It seems that the court of appeals is finding a compelling state interest served by narrowly tailored means to punish the attorney for her conduct.¹⁹¹ Interestingly, the court in *Holtzman* did not entertain any discussions about free speech and the protections which are afforded under such a right as was done for John Peter Zenger. Thus, the attorney in *Holtzman* lost when faced with such an

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

186. *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42. The court found that "[r]ather than an absolute prohibition on broad standards, the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed." *Id.* (citations omitted).

187. *Id.* at 192, 577 N.E.2d at 33, 573 N.Y.S.2d at 42. (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

188. *Id.* at 192, 577 N.E.2d at 33-34, 573 N.Y.S.2d at 42-43. The attorney's contention that her actions "would not be actionable under the 'constitutional malice' standard," if accepted, "would immunize all accusations, however, reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as the their truth." *Id.* at 192, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

189. *Id.*

190. *Id.* at 192-93, 577 N.E.2d at 34, 573 N.Y.S.2d at 43. The court of appeals reasoned that "[i]t is the reasonableness of the belief, not the state of mind of the attorney, that is determinative."

191. *Id.*

objective standard for discipline of a lawyer rather than a freedom of speech standard.¹⁹²

The next case we will discuss is *600 West 115th Street v. Von Gutfeld*.¹⁹³ This case involved allegations of defamation and was analyzed by the New York Court of Appeals according to some of the precedents set forth in *Immuno*. The plaintiff in *Von Gutfeld* alleged that the defendant made certain defamatory statements when he voiced his opposition to plaintiff's application to open a sidewalk cafe in defendant's apartment building during a public hearing.¹⁹⁴

At the hearing, Von Gutfeld complained of numerous problems caused by the restaurant, such as unpleasant smells, parking congestion and the general denigration of the building.¹⁹⁵ In reference to the proposed sidewalk cafe, he also went on to state: "Why do they want to do it? Because they have an illegal lease with Coronet [plaintiff's prior landlord] that said they could take the sidewalk. Therefore, this entire lease and proposition . . . is as fraudulent as you can get and it smells of bribery and corruption."¹⁹⁶ He then concluded by stating that the Board of Managers had not authorized the addition of a sidewalk cafe and that they "sure as hell are not going to grant it now."¹⁹⁷ This action was commenced when the Community Board subsequently denied plaintiff's building application.¹⁹⁸

Immuno involved an allegation, contained in a letter to the editor, stating that the company was attempting to move its operations to South Africa in order to bypass the restrictions on chimpanzee research which existed in the United States.

192. *Id.* at 193, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

193. 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (granting the defendant's motion for summary judgment on the grounds that his comments at a public hearing, where he alleged that the plaintiff's building permit was fraudulent, smelled of bribery and corruption, and ought not to be granted because the plaintiff's restaurant denigrated the building, were constitutionally protected opinion as opposed to potentially defamatory statements of fact).

194. *Id.* at 133-35, 603 N.E.2d at 931-32, 589 N.Y.S.2d at 826-27.

195. *Id.* at 133, 603 N.E.2d at 931, 589 N.Y.S.2d at 826.

196. *Id.* at 134-35, 603 N.E.2d at 931-32, 589 N.Y.S.2d at 826-27.

197. *Id.* at 135, 603 N.E.2d at 932, 589 N.Y.S.2d at 827.

198. *Id.*

Alternatively, in *Von Gutfeld*, we had a private individual stating his personal beliefs at a public meeting. The defendant, Von Gutfeld, argued that his statements were protected speech under both the Federal and State Constitutions and moved for summary judgment.¹⁹⁹ The New York Court of Appeals began its analysis by stating that it would be considering the state and federal claims separately.²⁰⁰ The court has determined that these are two different claims and that the bar needs to be educated to think of them as separate.

The court began its analysis with the Federal Constitutional issue and detailing the federal test.²⁰¹ Pursuant to this test, the court must first define the words as they are commonly understood, and then determine whether they are subject to verification. The third and final step is an examination of the general tenor of the entire expression. This final step resulted from the Supreme Court decision in *Milkovich* which eliminated some of the flexibility the courts had in deciding these cases.²⁰²

199. *600 West 115th St.* 80 N.Y.2d at 135, 603 N.E.2d at 932, 589 N.Y.S.2d at 827.

200. *Id.* at 136, 603 N.E.2d at 932, 589 N.Y.S.2d at 827. The defendant's constitutional argument which he presents to the court is undifferentiated. However, as previously stated by this court in *Immuno*, "the protection[s] afforded by the First Amendment of the United States Constitution and that afforded by article I, § 8 of the New York Constitution [are] quite different." *Id.* Therefore, the court's analysis of the defendant's claims under the two documents will be made separately. *Id.*

201. *Id.* "As in *Immuno*, we analyze first the Federal provision, resolving the issue according to our understanding of the holding in *Milkovich v. Lorain Journal, Co.* (497 U.S. 1), and then examine defendant's rights under the state Constitution." *Id.* "Our Federal law analysis requires, as we set forth in *Immuno*, that we begin by, first, looking at the commonly understood meaning of the words and, second determining whether they are verifiable." *Id.* at 142, 603 N.E.2d at 936, 589 N.Y.S.2d at 831. Once these two prongs of the *Milkovich* test are satisfied we must next look at "whether the statements are 'loose, figurative or hyperbolic' or whether the 'general tenor' of [the defendant's] remarks negate the impression of factual assertions." *Id.* at 143, 603 N.E.2d at 937, 589 N.Y.S.2d at 832 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

202. *Id.* at 139-40, 603 N.E.2d at 934-35, 589 N.Y.S.2d at 829-30 (concluding that pursuant to *Milkovich* "[o]nly if the expression fell into the narrow category of a protected type of speech could the impression that an

The New York Court of Appeals found for the defendant on federal grounds.²⁰³ The court based this decision on the defendant's choice of words, stating that a reasonable person would not interpret the defendant's remarks, spoken at an emotional public meeting, as fact.²⁰⁴ The words he used to describe the plaintiff do not imply a basis in fact. Terms such as "smells of bribery" are not terms that are normally used to state a factual allegation, it is rhetorical hyperbole.²⁰⁵ A reasonable person would know the defendant was just expressing his frustration.

The court, after deciding the federal issue, next addressed the State Constitutional issue.²⁰⁶ They stated that:

[w]hen the factors discussed above as part of our Federal analysis are considered under a State contextual analysis, it is clear that, to the extent they make up the "content, tone and purpose" of the communication, they dictate a finding that Von Gutfeld's speech was a statement of opinion and advocacy, and not a presentation alleging objective fact. No useful purpose would be served in articulating the differences between the two

apparently verifiable assertion was intended be negated.") *Id.* at 139, 603 N.E.2d at 935, 589 N.Y.S.2d at 830.

203. *Id.* at 144, 603 N.E.2d at 938, 589 N.Y.S.2d at 833 (stating that "given the loose nature of the language, the general tenor of the remarks made at a public hearing, and the skepticism a reasonable listener brings to such proceeding, we believe that [the] statement[s] [were] not such that a reasonable listener would conclude factual assertions were being made about plaintiff"). *Id.*

204. *Id.* at 143, 603 N.E.2d at 937, 589 N.Y.S.2d at 832 (concluding that "[t]his is not the language of someone inviting reasonable persons at a heated public hearing to find specific factual allegations in his remarks"). *Id.* at 937.

205. *Id.*

206. *Id.* at 145, 603 N.E.2d at 938, 589 N.Y.S.2d at 833. The court concluded that Von Gutfeld's motion for summary judgment would also be granted pursuant to a state constitutional analysis. The state analysis, established in *Immuno*, "requires that the court look at the content of the whole communication, its tone and apparent purpose." *Id.*

approaches when the defendant is able to prevail under the narrow federal test.²⁰⁷

The court also stated that this more flexible New York analysis would allow the court to avoid “the fine parsing . . . that might now be required under Federal law.”²⁰⁸ Moreover, they found that under a state analysis it is not necessary for the court to dive down in to each and every word, in order to analyze what may or may not be defamatory.²⁰⁹ We want greater protection than that.

Later that year, the New York Court of Appeals, *In Matter of Rowe*,²¹⁰ held that a suspended attorney did not violate an order of suspension by publishing a law review article and identifying himself as an attorney by signing the article “J.D.”²¹¹ The court reasoned that the attorney’s actions did not violate his suspension order and, furthermore, he did not engage in the unauthorized practice of law.²¹² In sum, the court held as follows:

[t]he courts may, in the public interest, prohibit attorneys from practicing law and that prohibition may incidentally affect the attorney’s constitutional right to free speech by forbidding giving of advice to clients. Where the individual is not practicing law, however, [suspended], and “does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he

207. *Id.*

208. *Id.*

209. *Id.* (finding that “[t]he state law approach [is] better able to ‘assure that — with due regard for the protection of individual reputation — the cherished constitutional guarantee of free speech is preserved’”). *Id.* (citations omitted).

210. 80 N.Y.2d 336, 604 N.E.2d 728, 590 N.Y.S.2d 179 (1992), *cert denied*, 508 U.S. 928 (1993).

211. *Rowe*, 80 N.Y.2d at 341, 604 N.E.2d at 730-31, 590 N.Y.S.2d 181-82 (stating that the letters “J.D.” identified him “as one who had successfully completed a law school curriculum, not as a member of the Bar licensed to practice law”). *Id.* at 342-43, 604 N.E.2d at 731, 590 N.Y.S.2d at 182.

212. *Id.* (holding that by foreclosing defendant from publishing an article the court would “improperly prohibit him from engaging in endeavors which he could have undertaken had he never been admitted to the Bar in the first place”). *Id.* at 342, 604 N.E.2d at 731, 590 N.Y.S.2d at 182.

is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech," but rather impermissibly interferes with that individual's First Amendment rights.²¹³

Based on the reasoning of the court in *Rowe*, by merely publishing an article, the lawyer's constitutional right to free speech was preserved while under the supervision of the disciplinary system provided the lawyer refrained from giving advice to clients.²¹⁴ Consequently, suspension of an attorney from the practice of law will effectively and permissibly infringe on his First Amendment right to free speech by prohibiting him from counseling his clients.²¹⁵ Incidentally, the court did not provide an analysis as to a suspended attorney's rights under the State Constitution.²¹⁶

The next case, *Gross v. New York Times*,²¹⁷ involved an series of investigative articles written about the New York City Medical Examiner.²¹⁸ The articles alleged that the Chief Medical Examiner of New York City, mishandled cases and misused his authority.²¹⁹ The articles led to the instigation of four criminal investigations into the actions of the medical examiner. However, none of the investigations produced any evidence of misconduct.²²⁰ The medical examiner subsequently filed this action for libel against *The New York Times*.²²¹

We are back to defamation, back to *Immuno*. "The issue . . . is whether plaintiff's pleadings sufficiently allege false, defamatory statements of fact rather than mere nonactionable statements of opinion."²²² Opinion or fact? The court says we have a more

213. *Id.* (citation omitted).

214. *Id.*

215. *Id.*

216. *Id.*

217. 82 N.Y.2d 146, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993).

218. *Id.* at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815.

219. *Id.* at 150, 623 N.E.2d at 1166, 603 N.Y.S.2d at 816.

220. *Id.* at 149, 623 N.E.2d at 1165, 603 N.Y.S.2d at 815.

221. *Id.*

222. *Id.*

flexible standard under the New York Constitution.²²³ However, “the dispositive inquiry, under either Federal or New York law, is ‘whether a reasonable reader could have concluded that the articles were conveying facts about the plaintiff.’”²²⁴

In our state, the inquiry which must be made by the court entails an examination of the challenge statement with a view toward (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to “signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.”²²⁵

The third part of this test is where the federal and state analysis differ. The court, in applying the state test decided the case against *The New York Times*. The court stated that some of the assertions contained in the article “such as the charges that plaintiff engaged in cover-ups, directed the creation of misleading autopsy reports and was guilty of possibly illegal conduct . . . [could be] understood by the reasonable reader as assertions of fact.”²²⁶ The court determined that the statements, appearing in the context of a lengthy investigative article, were

223. *Id.* at 152, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817. The United States Supreme Court “has recognized that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Id.* Similarly, the New York Court of Appeals, has adopted “a test for determining what constitutes a nonactionable statement of opinion [under the New York State Constitution] that is more flexible and is decidedly more protective of the ‘cherished constitutional guarantee of free speech.’” *Id.* (citing 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 603 N.E.2d 930, 589 N.Y.S.2d 825 (1992)).

224. *Gross*, 82 N.Y.2d at 152, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817.

225. *Id.* at 153, 623 N.E.2d at 1167, 603 N.Y.S.2d at 817.

226. *Gross*, 82 N.Y.2d at 154, 623 N.E.2d at 1168, 603 N.Y.S.2d at 818.

intended to “convey facts that were capable of being proven true or false.”²²⁷

The court further stated that “[h]aving been offered as a special feature series rather than as coverage of a current news story, the disputed articles were calculated to give the impression [that] they were ‘the product of some deliberation, not of the heat of the moment.’”²²⁸ Therefore, the court held that *The New York Times* published the articles in such a way so that the reasonable reader was encouraged to be “less skeptical and more willing to conclude that they stated or implied facts.”²²⁹

We are getting closer. In 1994 the court of appeals decided *Zaretsky v. New York City Health and Hospitals Corp.*²³⁰ Zaretsky, the plaintiff, was discharged from his position at one of the defendant’s hospitals after, as president of a related not-for-profit organization, he authorized a lawsuit against the hospital.²³¹ As president of a non-profit foundation he was expected to support the organization of the hospital.²³² Unfortunately, the hospital thought he was misusing funds and demanded an inquiry.²³³ In response, Zaretsky stated that they had no right to conduct such an audit and authorized a lawsuit against the corporation.²³⁴ Despite the lawsuit, he did however, ultimately provide the corporation with the records and

227. *Id.* at 155, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819.

228. *Id.* at 156, 623 N.E.2d at 1169, 603 N.Y.S.2d at 819.

229. *Id.*

230. 84 N.Y.2d 140, 638 N.E.2d 986, 615 N.Y.S.2d 341 (1994), *aff’g*, 196 A.D.2d 454, 601 N.Y.S.2d 290 (1st Dep’t 1993). Plaintiff, Zaretsky, brought a claim against the New York Health and Hospitals Corporation (hereinafter, HHC) alleging that the circumstances of his discharge violated his constitutional rights to free speech, free association and petition. *Id.* at 144, 638 N.E.2d at 988, 615 N.Y.2d at 344. HHC argued that Zaretsky was an at will employee and had failed to prove that “his removal violated any constitutional, statutory or contractual provision.” *Id.* The court of appeals dismissed Zaretsky’s petition and any right to a hearing because he was unable to meet his burden of proof in showing how his removal violated his constitutional rights. *Id.* at 145, 638 N.E.2d at 989, 615 N.Y.2d at 344.

231. *Id.* at 142-43, 638 N.E.2d at 987, 615 N.Y.2d at 342.

232. *Id.* at 143, 638 N.E.2d at 987, 615 N.Y.2d at 342.

233. *Id.*

234. *Id.*

documents requested by their investigators.²³⁵ The investigation led to evidence of several suspicious financial dealings and the corporation requested Zaretsky be removed from his position.²³⁶ The court of appeals dismissed the case.²³⁷

What the court did, or rather did not do, was look specifically at the impact on speech. It did not look for any other tests. The court simply balanced the petitioners' rights against the defendants' interests in effectively and efficiently discharging its mandate.²³⁸ This was a new approach for the court: Where you have an at will situation, you must balance the rights of the employer, even if a public employer, to effectively discharge its duty against somebody's free speech and free association rights.²³⁹ Notice also that there was no state constitutional discussion by the court in this case.

Next we have a 1995 libel action, *Armstrong v. Simon and Schuster*.²⁴⁰ Plaintiff, Armstrong, is a defense attorney who

235. *Id.*

236. *Id.*

237. *Id.* The New York Court of Appeals held that "[a]s a public employer, respondent, HHC is under no constitutional or legal obligation to retain an employee whose conduct the public employer deems disruptive of its operation . . . [t]hus, when petitioner's constitutional rights are balanced against respondent's interests in effectively and efficiently discharging its mandate, respondent's interests must prevail." *Id.* at 145, 638 N.E.2d at 989, 615 N.Y.2d at 344. (citations omitted).

238. *Id.* at 145, 638 N.E.2d at 989, 615 N.Y.2d at 344.

239. *Id.*

240. 85 N.Y.2d 373, 649 N.E.2d 825, 625 N.Y.S.2d 477 (1995). Plaintiff, Armstrong, alleged that he was retained as counsel to Lowell Milken, Michael Milken's brother. *Id.* at 376, 649 N.E.2d at 826-27, 625 N.Y.S.2d 478-79. Another client represented by Armstrong, Craig M. Cogut, possessed information, which, if given to the U.S. Attorney, would convince them that Lowell Milken should not be prosecuted. *Id.* at 376-77, 649 N.E.2d at 827, 625 N.Y.S.2d at 479. Armstrong drafted an affidavit and submitted it to Cogut. *Id.* at 377, 649 N.E.2d at 827, 625 N.Y.S.2d at 479. Cogut then retained additional counsel, upon the recommendation of Armstrong, and consulted with them regarding the affidavit prepared by Armstrong. *Id.* Cogut eventually signed the affidavit with an enclosed caveat stating that his recollection of the events were vague and that he was unsure of the facts to which he was swearing. *Id.* Armstrong did not include the caveat with the affidavit when he submitted it to the U.S. Attorney, in fact he replaced with

represented some of the individuals involved in the Michael Milken incident. Essentially, the claim involves an allegation which was leveled in a book, (a book, not a newspaper or an article, but a book on the entire situation) stating that the plaintiff's client read over an affidavit prepared by the plaintiff for that client's signature, which exonerated another one of the plaintiff's clients.²⁴¹

In other words, according to the book, the defense attorney presented one person with an affidavit to sign which would exonerate one of his other clients. Accordingly, this client had only one problem: the facts were not true. At the end of the paragraph containing this information, the author stated that this particular client subsequently retained alternative independent counsel.²⁴²

The issue presented here is: How are we going to look at these contested statements, and are they reasonably susceptible of a defamatory connotation?²⁴³ The New York Court of Appeals says it is going to read this in the context of the entire publication.²⁴⁴ The client hired the new attorney, all the facts being present. The court found that those words were susceptible to a defamatory meaning. The court does not really focus to a great degree on the constitutional elements of libel and slander; they found that these were susceptible to a defamatory meaning,

his own note stating that Cogut had a full and complete recollection of the facts and circumstances surrounding the subject of the investigation. *Id.* at 377-78, 649 N.E.2d at 827, 625 N.Y.S.2d at 479. The present litigation involved a footnote in a book published by Simon & Schuster. *Id.* at 378, 649 N.E.2d at 827-28, 625 N.Y.S.2d at 479-80. In this footnote, Armstrong alleged that the "quoted paragraph is materially false and defamatory in that it depicts him as 'attempting unsuccessfully to procure the perjured oath of his client'" and was "published with gross irresponsibility or actual malice." *Id.* at 379, 649 N.E.2d at 828, 625 N.Y.S.2d at 480.

241. See *id.* at 376-77, 649 N.E.2d at 826-27, 625 N.Y.S.2d at 478-79.

242. See *id.* at 377-78, 649 N.E.2d at 827-28, 625 N.Y.S.2d at 479-80.

243. The legal question presented to the court of appeals was whether the "contested statements [were] reasonably susceptible of a defamatory connotation." *Id.* at 380-81, 649 N.E.2d at 828-29, 625 N.Y.S.2d at 480-81.

244. *Id.* at 381, 649 N.E.2d at 829, 625 N.Y.S.2d at 481 (stating that "[i]n making this determination, the court must give the disputed language a fair reading in the context of the publication as a whole"). *Id.*

and off they went.²⁴⁵ Simon & Schuster did not get out of that case, which brings me to my favorite case: *People v. Shack*.²⁴⁶

Shack involved a defendant who had been found guilty of aggravated harassment.²⁴⁷ The defendant was suffering from a mental illness and was receiving psychiatric help.²⁴⁸ During this period he found out that he had a cousin whom he had not spoken to in a while and who happened to be a psychiatrist.²⁴⁹ He called her and she started helping him. She said: "Take this medicine . . . if you stop taking your medicine I am not going to help you any more." He said: "I am feeling better, I am going to stop taking my medicine." She said: "Do not call anymore." ²⁵⁰ He increased the number of calls he made and continued to make them over a long period of time.²⁵¹

245. See *id.* at 380-81, 649 N.E.2d at 829-30, 625 N.Y.S.2d at 481-82 (detailing the court's unwillingness to declare the appropriate standard of review for defamation by implication claims).

246. 86 N.Y.2d 529, 658 N.E.2d 706, 634 N.Y.S.2d 660 (1995).

247. *Id.* at 533, 658 N.E.2d at 706, 634 N.Y.S.2d at 663. Defendant, Shack, was convicted of "violating Penal Law § 240.30(2), aggravated harassment in the second degree." *Id.* In his defense, Shack asserted that the statute violated his right to free speech under both the United States and New York State Constitutions. *Id.* At the time of the incidents in question Shack suffered from a mental illness and was undergoing treatment from a psychiatrist in New York. *Id.* The actions in dispute began when he contacted his cousin, a psychologist living in Michigan, whom he had not seen in over 12 years. *Id.* Shack began to call her to discuss his treatment and she agreed to accept his calls as long as he remained in therapy and continued to take his medication as prescribed. *Id.* He then began to telephone his cousin on a regular basis and would speak to her approximately two times a week for a few months until he informed her that he was feeling better and had stopped taking his medication. *Id.* The cousin responded to this information by requesting that he stop telephoning her, stating that she would no longer welcome his phone calls. *Id.* at 533-34, 658 N.E.2d at 709, 634 N.Y.S.2d at 663. Shack, unhappy with this response, threatened his cousin and proceeded to call her repeatedly, "sometimes calling as many as seven times a day." *Id.* at 534, 658 N.E.2d at 709, 634 N.Y.S.2d at 663. The cousin eventually came to New York and filed a criminal complaint against Shack for which he was arrested and convicted. *Id.* at 534, 658 N.E.2d at 710, 634 N.Y.S.2d at 664.

248. *Id.* at 533, 658 N.E.2d at 709, 634 N.Y.S.2d at 663.

249. *Id.*

250. *Id.*

251. *Id.*

New York State Penal Law § 240.30(2) states: “[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten, or alarm another person, he or she . . . [m]akes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication.”²⁵² The defendant attacks this statute in two ways: (1) that it is facially unconstitutional and (2) that it is unconstitutional as applied to this particular person.²⁵³ The court held that the statute is not facially unconstitutional because it does not prohibit speech or expression, it prohibits telephone calls.²⁵⁴ It prohibited his conduct, placing the telephone calls. In addition, the court also stated that the part of the statute that says you cannot make the call, without the purpose of a legitimate communication, takes protected speech outside of the statute, thereby limiting its application.²⁵⁵

The court said that even if the statute does infringe on speech, we are going to balance that. We are going to balance the privacy rights of the individual to be harassed against the First Amendment or free speech rights of the other person.²⁵⁶ One of the ways they do that is by following the opinions of the United States Supreme Court, not State Constitutional law. The New York Court of Appeals, applied the same reasoning applied by the Supreme Court where the “Court noted that in regulating unwanted mail, permitting communications to be foisted upon an unwilling recipient, in a private place would be tantamount to licensing a form of trespass and thus ‘a mailer’s right to

252. *Id.* (citing N.Y. PENAL LAW §240.30(2) (McKinney 1996)).

253. *Id.* at 535, 658 N.E.2d at 710, 634 N.Y.S.2d at 664.

254. *Id.*

255. *Id.* (holding that the statute merely applies to conduct and “[t]he limiting clause which expressly excludes constitutionally protected speech from its reach plainly distinguishes this statute from those which impose criminal liability for ‘pure speech’”). *Id.*

256. *Id.* at 535-36, 658 N.E.2d at 710, 634 N.Y.S.2d at 664 (stating that “[a]n individual’s right to communicate must be balanced against the recipient’s right ‘to be let alone’ in places in which the latter possesses a right of privacy, or places where it is impractical for an unwilling listener to avoid exposure to the objectionable communication.”). *Id.* (citations omitted).

communicate must stop at the mailbox of an unreceptive addressee.”²⁵⁷

The New York Court of Appeals extended the Supreme Court ruling on unwanted mail to unwanted telephone calls.²⁵⁸ So, defendant Shack lost on that issue. In his second claim, alleging that the statute was unconstitutional as applied, “his liability arose from his harassing conduct,”²⁵⁹ rather than his speech. The statute as it applied to him did not prohibit protected speech. He called with intent to harass. The jury concluded this despite his claims that he was calling because he wanted help.²⁶⁰

One of the most important elements of this case is that although the defendant challenged the constitutionality of the statute on several grounds, he “did not contend that the Free Speech or Due Process Clauses of the New York State Constitution afforded him greater protection than those of the Federal Constitution. Accordingly, our analysis assumes the requirements of both documents are the same.”²⁶¹ Free speech, John Peter Zenger, central publications and publishing people in New York City. State and federal are the same. We assume it because they didn’t raise it.

Here are some final thoughts and conclusions on all of this, or what it means in three minutes or less. I would not say that historical context does not matter, but I think when the court started talking about John Peter Zenger and jumped to 1980 it missed a little bit. In the middle, we have cases like *Commercial Pictures Corporation v. Board of Regents*.²⁶² Here, we had a

257. *Id.* at 535-36, 658 N.E.2d at 710, 634 N.Y.S.2d at 664 (citing *Rowan v. Post Office Dep’t*, 397 U.S. 728 (1970)).

258. *Shack*, 86 N.Y.2d at 536, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

259. *Id.*

260. *Id.* at 536-37, 658 N.E.2d at 710, 634 N.Y.S.2d at 665.

261. *Id.* at 535 n.1, 634 N.Y.S.2d at 664.

262. 305 N.Y. 336, 113 N.E.2d 502 (1953), *rev’d*, 346 U.S. 587 (1954). Petitioner, *Commercial Pictures Corp.* alleges that the New York State Education Law §122 violates the constitutional rights to freedom of speech and press. *Id.* at 339, 113 N.E.2d at 502. The provision provides: “that a motion picture shall not be licensed if it is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite crime.” *Id.* at 343, 113 N.E.2d at 504. (citations omitted).

statute which required that all films be submitted to the Board of Regents for approval before they could be shown in a theater.²⁶³ The New York Court of Appeals found that this was not an infringement on the tradition of free speech and upheld the constitutionality of the statute.²⁶⁴

We also had a scheme in New York City which required people preaching atheism to get permits. If you want to go out and talk about politics on the street and have a public meeting can, without a license. However, the Atheists had to get a license. The court upheld this because a municipality can do those things. They can control the streets, but not the speech. They said as long as they have some reasonable way to set standards to determine which classes of people are required to have a permit and which are not, we are done. Reasonable classes.

So the long history and tradition is not really so clear in between. It started out very nice, and there are certainly cases along the way where the court uses definitions of indecency and obscenity to allow speech. It is not clear throughout all time.

With the adult use cases as a back drop, the court of appeals has essentially carved out exceptions to State Constitution protection by saying that the constitution does not apply. In other words, instead of remaining with a standard type of analytical structure, and saying, "Here is our test, we are going to apply that test, certain things will meet it and certain things will not", instead they simply say, "The State Constitution does not apply."

Thus, they do not have to go through the analytical structure, they can claim whatever it is they claim. Look at *Holtzman*.

The Supreme Court in 1954 in an opinion written by Justice Douglas reversed the New York Court of Appeals decision and held "that the government may establish censorship over moving pictures is one I cannot accept . . . motion pictures are within the free speech and free press guaranty of the First and Fourteenth Amendments." 346 U.S. at 589.

263. *Id.* at 339, 113 N.E.2d at 502.

264. *Id.* at 348, 113 N.E.2d at 508 (holding that "motion pictures may be censored, upon proper grounds, and that sexual immorality is one such ground. The standard 'immoral' and 'tend to corrupt morals' embodied in the statute and here applied relates to sexual immorality, and the Regents had the right to find that the motion picture in question falls within the prohibited category").

Attorneys have no protection to certain speech under the State Constitution. In *Rowe*, suspended attorneys got their rights back. Note that the disciplinary system meets a certain criteria under the State Constitution, but it does not apply in that situation. In *Shack*, the court balanced the privacy interests and ignored any potential State Constitutional aspects.

The court, ever since *Arcara* and *Beach* still seems to be getting its sea legs. Clearly the members of the court do not agree. There is no clear guidance on either procedure or on substance, in fact the standards of interpretation are not even clear.

Another real problem in this area is that attorneys do not raise these issues separately. That is something that the court needs to insist upon. If the court insists that the state and federal constitutional issues be raised independently of each other it will be done.

The cycle whereby the New York Court of Appeals decides a case, the United States Supreme Court reverses and remands it, and the court of appeals on remand again reaches its original conclusion, looks reactionary. It looks as though the court is immersed in result oriented discussions rather than in articulating a process of principled decision-making, which is one of the things that was raised this morning.

My final point -- this is almost in spite of any substantive ideological or evaluative judgments -- is if the court is going to address the Constitution, it needs to consistently address it. The court needs to expressly state that the New York State Constitution provides greater protection in order for that greater protection to be realized. It should not turn it on and off when it wants.

I am not here advocating that there should be greater protection, but they are doing it, they are talking about the greater protection. If they are going to talk about it they ought to do something about it. As a final note, this hit and miss attack, allows for the confusion in the law because very often they will address an issue under federal law, and if there is no appeal everybody thinks that's the law of the state. When someone else raises a State Constitutional issue later, it is going to mess

everything up. The idea is to get these things all addressed the first time the case hits the court.

Thank you very much.

Sandra Stevenson:

Questions? Comments? Reactions?

Peter Galie:

Question for the death penalty. Would a defendant have a right not to have a jury?

Mary Falk:

No, because if you go to trial, under the constitution, we know that you must have a jury trial. You can not be tried by a judge.

Peter Galie:

You mean in New York State.

Mary Falk:

New York State.

Peter Galie:

What I am suggesting by the question is that they do not have a right not to have a jury. Another issue is whether we should ever allow death penalty proponents on a jury. If a juror is biased in favor of conviction, should he ever serve on any jury?

Mary Falk:

They should, certainly. There is a principal argument they certainly should be able to serve at the guilt phase. I personally would not agree; they should be able to serve at the sentencing phase but certainly not on the guilt phase.

Peter Galie:

Is every death penalty supporter, in fact, more likely to convict than every anti-death penalty individual?

Mary Falk:

I gather that that is the case. I mean there are a lot of studies on the issue. I do not remember the exact study.

Peter Galie:

What I am getting at is that the court has the same problem it had in *McClesky*. You look at statistical patterns and you find one thing, and you look at individuals, it is not at all clear that automatically follows in each particular case. If that is the case we have the *McClesky* problem all over again with the question of pro-ness to convict.

Barry Latzer:

Don't we have a few early cases interpreting the state cruel and unusual punishments' provision? I thought I read a case in which they upheld the electric chair back in the nineteenth century. Doesn't that undermine your per se argument?

Eve Cary:

Why?

Peter Galie:

Because it rejects it.

Eve Cary:

There is a circular argument that if we have it we must want it, then it does not offend. I am questioning whether that is actually correct logic because perhaps we want it because we want to inflict cruel and unusual punishment.

I am suggesting that reason begs the whole question of whether the punishment is cruel and unusual. I think if you are actually addressing the question of whether a punishment is cruel and unusual one of the things you can look at is whether we feel the same way today as back when we boiled people in oil.

Barry Latzer:

Well, “we” was not the United States, of course.

Eve Cary:

Apparently somebody was crucified in the Revolutionary Army.

Peter Galie:

In the provisions you mentioned, the death penalty itself, you might say that was then and this is now, but unlike the national constitution, we have had eight or nine constitutional conventions and every one of those, that was up for decision as to whether that would be continued or not. We did make the decision to continue that.

Mary Falk:

Certainly an argument. No question it is an argument. It is one that is made all the time. There are special provisions in most State Constitutions that protect in capital cases. It is your half empty, half-full.

Peter Galie:

This needs to be addressed.

Eve Cary:

That is what we are really saying. We are not saying if you look back what are the attitudes of the people in New York about the death penalty, we need pronouncements, we are against it.

1996]

RIGHTS AND FREEDOMS

133

We probably will not. The question is exactly what is the current question.

Sandra Stevenson:

Are there other questions and comments about the death penalty presentation?

Peter Galie:

I have one, but they are hungry. (Whereupon, a lunch recess was taken.).

