FOREWORD

NEW YORK APPEALS: A NEW TRADITION

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The Albany Law Review is proud to introduce its inaugural issue of New York Appeals. This special annual issue is dedicated to the examination of New York appellate practice from the widest possible range of perspectives. New York Appeals is intended as a forum for exploring all facets of New York appellate practice from issues raised in the Court of Appeals and the four departments of the appellate division to a variety of other issues facing practitioners. By publishing this issue, we hope to create a useful resource for courts, practitioners, and academics concerning New York appellate practice, an area that has statewide—often nationwide—significance. To commemorate this new tradition, the Albany Law Review is pleased and honored to dedicate the inaugural issue of New York Appeals to the presiding justice of the Appellate Division, Third Department—Anthony V. Cardona.

A TRIBUTE TO PRESIDING JUSTICE ANTHONY V. CARDONA

Based on his service to and support of Albany Law School and the Albany Law Review, as well as his seventeen-plus years of public service as the presiding justice of the Third Department, recognizing Justice Cardona is long overdue. It is unsurprising that upon learning that the issue is being dedicated to him, several of his colleagues and clerks jumped at the opportunity to express their admiration and respect for Justice Cardona. Thus, this book begins with four tributes to Justice Cardona authored by: chief judge of the State of New York, Jonathan Lippman; associate justice of the

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Third Department, Thomas Mercure; clerk of the court for the Third Department, Michael Novack; and senior law clerk to Justice Cardona, Michele McKay.

The tributes characterize Justice Cardona as “a superb judge, dynamic leader, and dedicated public servant”\textsuperscript{1} with a “tireless energy and persistent desire to ‘do things right.”\textsuperscript{2} They describe “his determination and devotion to the law and his work,”\textsuperscript{3} as well as “his tireless commitment to improving the quality of [the Third Department] and his compassion for the parties that appear before [it].”\textsuperscript{4} Indeed, each tribute provides unique and invaluable insight into Justice Cardona the jurist, colleague, family man, and friend. Here, we will attempt to add to this much deserved dialogue by humbly offering our perspective as two students and members of the law review.

Justice Cardona consistently displays an unwavering dedication to, and is involved in the success of, his alma mater. He believes that one of the best ways that he can give back to the school is by building strong relationships with current students and alumni. One of the most notable ways in which Justice Cardona has influenced students at Albany Law is by establishing the Third Department’s annual session held in the school’s Dean Alexander Moot Courtroom. The event is one of the most anticipated and highly attended events at Albany Law School, and provides a unique opportunity for students to observe oral arguments. Justice Cardona does more than provide students the opportunity to observe; he gives students the chance to ask questions to the justices of the Third Department. This gives students an opportunity to do something which some lawyers wish they could do: to understand how the justices evaluate cases. The Third Department sessions certainly contributed to our decisions to become involved in appellate advocacy in the school’s moot court program, and would not be possible without Justice Cardona.

\textsuperscript{1} Jonathan Lippman, \textit{A Tribute to Presiding Justice Anthony V. Cardona: A Great Jurist and Dynamic Leader of the Appellate Division, Third Department}, 73 \textit{Alb. L. Rev.} 653, 653 (2010).


Of course, Justice Cardona’s dedication to Albany Law School extends far beyond holding an annual session of the Third Department at the school. As a member of the Board of Trustees, he is a mainstay at the school’s and law review’s events, consistently expressing his support for the student body. The *Albany Law Review* was honored to welcome Justice Cardona, as well as several other justices of the Third Department (Justices Egan, Malone, Jr., and McCarthy) to our recent spring symposium entitled *Wrongful Convictions: Understanding and Addressing Criminal Injustice*. Although their schedules are surely busy, not only did Justice Cardona and the other justices stay for the entire event, but they offered their support and words of encouragement following it. As the editor-in-chief and managing editor of the law review, this was one of our proudest moments of the year, and is but one of the numerous examples of Justice Cardona supporting student groups at Albany Law.

On a more personal level, in our capacity on the editorial board, we have had the distinct pleasure of being able to meet and correspond with Justice Cardona over these past several months. Although his reputation as a compassionate, friendly, and supportive judge and Albany Law School alumnus precedes him, he always seems to exceed our expectations. When we first spoke with Justice Cardona and explained that we would be honored to dedicate this issue to him, his expression of gratitude was both sincere and heartfelt. But after three years of law school, we have come to realize that it is we who owe him the thank you. This gratitude comes not just from two members of the law review, or two current students of the law school—we owe him a thank you on behalf of all the students who came before and who will come after us. Justice Cardona is a true friend to the Albany Law School community who we now know as much for his compassion, warmth, and wit as we do for his status as a dedicated public servant. Genuinely interested in our success, he always offers a kind word of encouragement or piece of advice contributing to our growth as students, lawyers, and, most importantly, people. Thus, it is with admiration and gratitude that we are pleased and honored to dedicate this inaugural issue to Justice Cardona.

**THE INAUGURAL ISSUE**

Ever since the New York State Constitution of 1846 proclaimed that “[t]here shall be a Court of Appeals,” the Court has operated as
one of the most influential and innovative courts in the country, playing a role not only in state, but national jurisprudence.\textsuperscript{5} Indeed, during this year alone, the Court has decided controversial issues including same-sex marriage,\textsuperscript{6} warrantless and suspicionless GPS tracking of criminal defendants,\textsuperscript{7} creditors’ suits,\textsuperscript{8} and the power of the executive branch to appoint a lieutenant governor,\textsuperscript{9} among many others. These issues cover only a fraction of what New York appellate courts decide during any given year. In fact, the overwhelming majority of appeals are decided by the four departments of the appellate division. Thus, it is our hope that this issue and future issues of \textit{New York Appeals} will recognize the influence and impact of New York appellate courts, not only on the jurisprudence in New York, but across the country.

The inaugural issue is an excellent beginning to this new tradition, offering a diverse selection of articles and student submissions covering and studying issues, judges, and courts in the context of New York appellate practice. From articles reviewing the Court's opinions in \textit{Skelos v. Paterson} and \textit{Godfrey v. Spano} to those addressing unanswered questions in practice concerning the status of a default judgment entered absent compliance with CPLR 3215(f), as well as the failure of courts to honor conditional orders imposed after a party’s failure to comply with disclosure requests, this issue covers a broad spectrum of issues that we hope is of interest and assistance to the bench and bar.

Following the four tributes to Justice Cardona, \textit{New York Appeals} begins with three articles covering several high-profile decisions decided by the Court in 2009. First, Professor Richard Briffault of Columbia Law School covers the Court of Appeals's recent decision in \textit{Skelos v. Paterson}, which held that Governor Paterson acted within his constitutional authority when he appointed a lieutenant governor in the aftermath of the Spitzer scandal.\textsuperscript{10} Concluding that the Court got it right, Professor Briffault’s article provides an analysis of the existing statutory and constitutional framework supporting the Court’s decision, as well as a discussion concerning


\textsuperscript{7} People v. Weaver, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009).


\textsuperscript{10} Richard Briffault, Skelos v. Paterson: The Surprisingly Strong Case for the Governor’s Surprising Power to Appoint a Lieutenant Governor, 73 ALB. L. REV. 675 (2010).
state constitutional interpretation and filling vacancies in state offices more generally. Next, Roberta Kaplan, a partner at Paul Weiss, Rifkind, Wharton & Garrison LLP, reviews the Court’s recent decision in Godfrey v. Spano concerning New York State’s recognition of out-of-state marriages between same-sex couples. Ms. Kaplan argues that the Court left an unnecessary ambiguity in the law by not explicitly addressing whether the marriage recognition rule compels recognition of same-sex marriages, and notes that a case will likely soon arise where the issue can no longer be ignored by the Court. Following Ms. Kaplan’s article, Professor Raymond Brescia of Albany Law School offers a unique perspective on the Court’s decision in Roberts v. Tishman Speyer Properties, L.P., which found in favor of the tenants of Stuyvesant Town and Peter Cooper Village and barred the new landlords from lifting rent regulations and returning many previously unregulated units to rent regulation. In his article, Professor Brescia reviews the scholarship regarding progressive lawyering for social change in the context of the litigation surrounding the Tishman Speyer case. After reviewing the Roberts litigation, he also provides an empirical assessment of the success of the legal campaign in light of the elements of a progressive lawyering strategy adopted.

The next article in New York Appeals focuses on the process by which the Court of Appeals decides criminal leave applications. Authored by Alan Pierce, a partner at Hancock & Estabrook, LLP, this article reviews the recent controversy surrounding the grant of criminal leave applications by the Court, as well as the work of many committees exploring the issue. Mr. Pierce, himself a member on one of the committees, argues that the procedures for criminal leave applications at the Court should be the same as the Court’s civil leave application process, so that criminal leave applications are decided by the full seven members of the Court rather than by one judge as is the current statutory practice.

The final three articles cover undecided issues in appellate practice. John Higgitt, the chief court attorney of the Supreme Court, Appellate Term, First Department, follows Mr. Pierce with

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an article reviewing the status of a default judgment entered absent compliance with CPLR 3215(f). An Albany Law School alumnus and recent contributor to the *Albany Law Review*, Mr. Higgitt provides a lucid overview of the default judgment statute and surveys of the case law on the consequences of a plaintiff's failure to submit sufficient proof of its claim. Next, Brian Shoot, an attorney at Sullivan Papain Block McGrath & Cannavo, P.C., explores the circumstances in which affirmative relief may be granted to a non-appellant who actually deserves affirmative relief on the merits. The article also examines whether the Second Department's 2008 ruling in *Koscinski v. St. Joseph's Medical Center* broadens the non-appellant's rights under these circumstances. Finally, anchoring the articles section of *New York Appeals* is an article by Professor Patrick Connors of Albany Law School on the failure of courts to honor conditional orders imposed after a party's failure to comply with disclosure requests. After conducting a comprehensive examination of the existing case law and statutory framework, Professor Connors argues that the failure to satisfy a conditional order of discovery under CPLR 3126 should not be so easily forgiven by courts in New York.

The next section of the issue, “New York's Court of Appeals,” studies the individual judges of the Court. That section begins with an article by Professor Vincent Bonventre of Albany Law School comparing the Kaye Court with the Lippman Court. Professor Bonventre’s piece is followed by seven articles that explore a particular aspect of the jurisprudence of each individual judge of the Court of Appeals. This is the first time that the individual judges of the Court have been analyzed in a law review since volume 59, issue 5 of the *Albany Law Review* in 1996.

The final article included in *New York Appeals* pays tribute to the current justices of the Third Department who are also Albany Law School alumni. Submitted by Jonathan Gillerman, a note and

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comment editor on the *Albany Law Review*, this article provides a short biography of each justice detailing his or her path to the court. It also provides a sampling of the jurisprudence of the justices by broadly examining several of their decisions, and reviews several examples of “vindicated dissenters” whereby alumni justices who dissented from their colleagues were later vindicated by the Court of Appeals.

Undertaking a new special issue such as this is the result of a great deal of dedication and skill on the part of many individuals. We are, of course, indebted to each of the authors who contributed to the inaugural issue of *New York Appeals*. As previously discussed, our authors range from law professors to law firm partners, and we greatly appreciate their effort in making this issue of *New York Appeals* possible. Special thanks are owed to Professor Patrick Connors, whose valuable advice and insights about the articles within this book were essential to the issue. Not only was he a contributor to the inaugural issue, but our discussions with him one year ago planted the seeds to make this issue possible.

In our positions on the editorial board, we are particularly grateful to the editors and members of the 2009–2010 *Albany Law Review*. Being a member of a law review is no easy task. It requires a great deal of dedication, hard work, and sacrifice. And this year, especially, we have asked more from our members in terms of quality and quantity of work. Many of them will never receive the recognition they are rightfully due. But we are indebted to them for their work, and honored to call them colleagues and friends.

Last, but certainly not least, special thanks are owed to the *Albany Law Review*’s faculty advisor, Professor Vincent Bonventre. The success of the journal and this inaugural issue would not be possible without him. We have both had the privilege to get to know “Prof. B.” over the past few years. He treats us like true professionals and gives us the leeway to take the law review in whichever direction we please, provided that it isn’t towards no-man’s land. His guidance, support, and genuine interest in the success of the journal are unmatched, and his contagious positive attitude makes his students feel like they can accomplish anything. We are better students and people for having known him. We are honored that he is our faculty advisor and mentor. Most

importantly, we are happy to call him a friend. We hope that you, the reader, enjoy this book. If you are interested in writing on issues affecting New York appellate practice, we hope that you will consider contributing to *New York Appeals* in the future.