

CHIEF JUDGE JONATHAN LIPPMAN: A NEW ERA

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I. INTRODUCTION

As the recently appointed chief judge of the New York State Court of Appeals, Jonathan Lippman inherits a position previously held by many of the best and brightest legal minds in our country's, let alone state's, history.¹ Although all of the judges of the Court, both past and present, share in the Court's successes, the influence and impact of many of the Court's chief judges is indisputable. Indeed, from Benjamin Cardozo, Cuthbert Pound, and Irving Lehman to Lawrence Cooke, Charles Breitel, and, most recently, Judith Kaye, the Court, through its chiefs, has exerted enormous influence in almost every field of American law, not only developing the common law, but contributing to the scholarship on state-protected rights and liberties.²

For instance, it was Chief Judge Cardozo who delivered the unanimous ruling in *Schloendorff v. Society of New York Hospital*³ that has since served as the common law foundation for the constitutional right to refuse medication and other similar liberties.⁴ It was Chief Judge Lehman who wrote in *People v. Barber*⁵ that religious proselytizing must be exempt from a local

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¹ See, e.g., HISTORICAL SOCIETY OF THE COURTS OF THE STATE OF NEW YORK, "THERE SHALL BE A COURT OF APPEALS . . ." (1997), available at <http://www.courts.state.ny.us/history/elecbook/thereshallbe/cover.htm>.

² *Id.* at 50.

³ 211 N.Y. 125, 105 N.E. 92 (1931)

⁴ *Id.* at 129, 105 N.E. at 93 ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body.").

⁵ 289 N.Y. 378, 46 N.E.2d 329 (1943).

license requirement for peddlers in order for the requirement to survive under the New York State Constitution—an opinion which was later cited and adopted by the United States Supreme Court in *Murdock v. Pennsylvania*.⁶ And it was Chief Judge Breitel whose opinion in *People v. Hobson*⁷ reversed the conviction of a defendant who, in the absence of counsel, was submitted to custodial questioning after waiving his right to counsel, and thereby reaffirmed the Court's commitment to, when appropriate, “extend[ing] constitutional protections . . . beyond those afforded by the Federal Constitution.”⁸ These are a few of the countless examples of leading decisions by chief judges of the Court that have gained traction and become impactful throughout the country—no doubt a storied tradition that could, and should, be covered by its own law review article.⁹

Hence, on February 11, 2009, when Jonathan Lippman was confirmed by the New York State Senate as chief judge¹⁰—a position that has been held by the likes of Cardozo, Cooke, and Kaye—he had big shoes to fill. And not only were there high expectations, but there was a swirl of controversy surrounding the appointment process,¹¹ as well as an impending budget crisis in New York State.¹² Chief Judge Lippman certainly must have anticipated a demanding and difficult start as chief. But even with the recognition of the challenges ahead, few knew exactly what to expect from him.

This is not to suggest that Chief Judge Lippman is new to the court system or otherwise a relative unknown in New York State. Quite to the contrary, Chief Judge Lippman has worked in various capacities in New York State courts for over four decades.¹³ Almost immediately following his graduation from law school, he began methodically rising through the hierarchy of the state court system, holding positions as court attorney, clerk, justice, judge, and now

⁶ 319 U.S. 105, 112 (1943).

⁷ 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

⁸ *Id.* at 483–84, 348 N.E.2d at 897, 384 N.Y.S.2d at 422.

⁹ See, e.g., Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERG. ISS. ST. CONST. L. 31 (1989) (discussing influential decisions issued by the Court during the chief judgeships of Benjamin Cardozo, Cuthbert Pound, Irving Lehman, and Lawrence Cooke) [hereinafter Bonventre, *State Constitutionalism*].

¹⁰ Joel Stashenko, *Senate Confirms Lippman as Chief Judge*, N.Y. L.J., Feb. 13, 2009, at 1.

¹¹ Joel Stashenko, *Lippman Is Pick for Chief Judge*, N.Y. L.J., Jan. 14, 2009, at 1 [hereinafter Stashenko, *Lippman Is Pick*].

¹² *Id.*

¹³ New York State Court of Appeals, Chief Judge Jonathan Lippman, <http://www.nycourts.gov/ctapps/chjl.htm> (last visited Apr. 14, 2010).

chief judge¹⁴—an impressive and workmanlike career by any standard.

Most are familiar with Chief Judge Lippman's accomplishments as chief administrative judge. Appointed by Chief Judge Kaye in 1996, Lippman earned victories developing specialty courts and implementing jury reform, among many others.¹⁵ He has also fought relentlessly for pay raises for judges in New York State—a goal he continues to pursue as chief judge.¹⁶ And his administrative prowess is well-documented by his peers who consider him “a skilled consensus builder with an innate ability to relate to legislators and the executive as well as judges and lawyers,”¹⁷ and have said that “[h]e knows the court system and administrative structure as well as anyone in the state.”¹⁸ These skills will serve Chief Judge Lippman well when executing his duties as chief judge, where he must not only oversee the seven judge court but manage the entire Unified Court System, which includes a \$2.5 billion budget and over sixteen thousand employees.¹⁹

But for all of his experience and success as an administrator of the courts, many have noted that he has little experience actually deciding cases.²⁰ Although Chief Judge Lippman has served as a judge of the court of claims, a justice of the Supreme Court for the Ninth Judicial District, an associate justice of the Appellate Term, Ninth and Tenth Judicial Districts, and as the presiding justice of the Appellate Division, First Department, his scant judicial record before joining the Court of Appeals has many wondering whether he has the necessary experience to deal with the difficult and consequential issues that high courts inevitably decide.²¹

¹⁴ *Id.*

¹⁵ Stashenko, *Lippman Is Pick*, *supra* note 11, at 1.

¹⁶ See Joel Stashenko, *Lippman Defends Courts' Budget Against Criticism by Governor*, N.Y. L.J., Jan. 20, 2010, at 1 [hereinafter Stashenko, *Lippman Defends*]. The Court recently held in a 5–1 decision “that the independence of the judiciary is improperly jeopardized by the current judicial pay crisis and this constitutes a violation of the Separation of Powers Doctrine.” *Maron v. Silver*, Slip Op. 01528, 2010 WL 605279, at *1 (Feb. 23, 2010). Chief Judge Lippman recused himself from the case since he was a plaintiff in one of the cases that the ruling addresses.

¹⁷ Stashenko, *Lippman Is Pick*, *supra* note 11, at 1 (quoting Bernice K. Leber, then President of the New York State Bar Association).

¹⁸ *Id.* (quoting Oscar Chase, co-director of the Institute of Judicial Administration at New York University School of Law).

¹⁹ *Id.*

²⁰ See, e.g., Posting of Vincent Martin Bonventre to New York Court Watcher, *New York Court of Appeals: The New Chief's Judicial Record (Part 1: An Overview of Not Too Much)*, <http://www.newyorkcourtwatcher.com/2009/01/new-york-court-of-appeals-new-chiefs.html> (Jan. 21, 2009, 20:50 EST).

²¹ *Id.*

In an attempt to profile Chief Judge Lippman as a jurist and leader of the Court, this article reviews each of the fifty-five cases in which he has taken part, spanning from when he joined the Court until November 25, 2009. Specifically, this article looks at non-unanimous decisions to explore Chief Judge Lippman's decision-making by identifying trends in his criminal and civil opinions. In addition, this article explores many of the changes to the administration of the Court over the past year. There are, however, obvious limitations in profiling Chief Judge Lippman using less than a full year's worth of opinions.²² Future studies will certainly fill in the gaps that remain open from this piece. And of course, even with the best intentions, "[t]rying to probe the influence of judicial personality on judicial decisions is no easy task."²³

Emerging from this comment are several themes. As the leader of the Court, Chief Judge Lippman has demonstrated, both as an administrator and jurist, that he is unafraid, and indeed, unapologetic when addressing a controversial issue or case. Hence, the chief judge authored two of this year's most high-profile and controversial decisions²⁴ and continues to challenge the executive branch to better compensate the judiciary.²⁵ His record thus far suggests that he is a new, dynamic leader for the Court, less concerned with unanimity among the judges and more interested in getting results. Thus, dissenting opinions have risen significantly since his appointment and many of the members of the Court have not hesitated to harshly criticize opinions authored or joined by Chief Judge Lippman.²⁶ Some commentators have described the Court's opinions as much more divisive than in recent history.²⁷ Chief Judge Lippman has also had a notable influence on the Court's treatment of criminal issues, both inside and outside the courtroom. Not only has he established a permanent New York

²² See *infra* Part II.

²³ C. HERMAN PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT*, at vii (1954).

²⁴ *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357, 366 (2009); *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009).

²⁵ Stashenko, *Lippman Defends*, *supra* note 16, at 1.

²⁶ See, e.g., *People v. Weaver*, 12 N.Y.3d 433, 447, 909 N.E.2d 1195, 1203–04, 882 N.Y.S.2d 357, 366 (2009) (Smith, J., dissenting) (calling the majority's opinion that was authored by Chief Judge Lippman "unsound" as well as "illogical, and doomed to fail"); *Duffy v. Vogel*, 12 N.Y.3d 169, 178, 905 N.E.2d 1175, 1180, 878 N.Y.S.2d 246, 251 (2009) (Smith, J., dissenting) (describing the Court's holding authored by Chief Judge Lippman as a "nightmarish result"); *Misicki v. Caradonna*, 12 N.Y.3d 511, 525, 909 N.E.2d 1213, 1222, 882 N.Y.S.2d 375, 385 (2009) (Smith, J., dissenting) (calling the majority's reasoning that was joined by Chief Judge Lippman as "an exercise akin to deciding whether I would be a bicycle if I had wheels").

²⁷ William Glaberson, *Top Judge Sets Liberal Course for New York*, N.Y. TIMES, Feb. 18, 2010, at A1.

State Justice Task Force on wrongful convictions,²⁸ but during his tenure the number of criminal leave applications granted by the Court has risen significantly.²⁹

In regard to his judicial philosophy and decision-making, Chief Judge Lippman's record suggests that he is a progressive jurist. Hence, in close decisions, he has often supported workers' rights, individual rights and liberties, and the rights of the accused, when appropriate. Moreover, based on the analysis of his cases, he has not aligned with any particular judge of the Court besides Judge Ciparick and, to some extent, Judge Jones. Thus, his record may suggest to some that he is a "liberal" judge.³⁰ Nevertheless, whatever his record, style, or philosophy, Chief Judge Lippman's tenure will be, and is, a new era for the Court of Appeals.

II. BACKGROUND: A METHOD OF ANALYSIS

There are few resources discussing the judicial philosophy and decision-making of Jonathan Lippman. This is, of course, unsurprising since he was only recently appointed as the chief judge and has spent most of his legal career in court administration. In addition, Chief Judge Lippman had only a brief tenure as a justice of the supreme court, appellate term, and appellate division, leaving only a handful of cases from which to assess his decision-making. Few, if any, have been able to systematically explore Chief Judge Lippman's judicial record in an attempt to assess his tendencies as a judge. Thus, those that have attempted to describe Chief Judge Lippman the jurist have done so broadly by using terms such as "moderately liberal" or "shrewd and pragmatic."³¹

²⁸ Joel Stashenko, *Lippman Forms Task Force to Study Ways to Avoid Wrongful Convictions*, N.Y. L.J., May 1, 2009.

²⁹ Joel Stashenko, *Criminal Leave Grants Begin to Increase Under Lippman's Prodding*, N.Y. L.J., Nov. 27, 2009, at 1 [hereinafter Stashenko, *Criminal Leave Grants*].

³⁰ For purposes of this paper, terms such as "liberal," "pro-individual," and "pro-individual rights," as well as "conservative," "pro-government," and "pro-prosecution" are defined according to their common usage in the variety of judicial studies on both state and federal courts. See, e.g., Harold J. Spaeth & Jeffrey A. Segal, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Database Project*, 73 JUDICATURE 103, 103 (1989). Thus, "liberal" suggests support for civil rights or the rights of the accused, and may indicate a tendency for extending the scope of those rights and liberties. Terms such as "conservative," by contrast, indicates support for the government or prosecution against claims of civil rights or the rights of the accused. See Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1165 n.11 (1989) [hereinafter Bonventre, *Chief Judge Kaye*].

³¹ See John Eligon, *A High Court Choice Who Knows How to Break Up a Logjam*, N.Y. TIMES, February 11, 2009, at A25.

After close to a year on the Court, however, Chief Judge Lippman has taken part in fifty-five cases and counting. And he had a busy first year authoring opinions for the Court. In fact, of the cases he took part in, he authored more opinions than any other judge.³² For all cases, both unanimous and non-unanimous, Chief Judge Lippman authored sixteen opinions, thirteen opinions of the Court,³³ one concurrence,³⁴ and two dissents.³⁵ For non-unanimous decisions, Chief Judge Lippman authored six opinions, four opinions of the Court,³⁶ and the two dissents.

In an attempt to sketch a profile of Chief Judge Lippman from these cases, this article focuses on the twenty-five decisions that were non-unanimous.³⁷ Many of these opinions constitute the most high-profile cases the Court decided last year. In fact, during 2009 alone, the Court ruled on hot-button issues including same-sex marriage,³⁸ warrantless and suspicionless GPS tracking of criminal defendants,³⁹ creditors' suits,⁴⁰ and the power of the executive branch to appoint the lieutenant governor,⁴¹ among many others. From a cursory review, one will note that Chief Judge Lippman has authored opinions in many, in fact most, of these cases.

³² There are numerous cases that the chief judge did not take part in during the course of his first year on the Court. Thus, his rate of authoring opinions compared to other members of the Court does not reflect what other judges published in those opinions not represented in this review.

³³ *Garth v. Bd. of Assessment*, 13 N.Y.3d 176, 918 N.E.2d 103, 889 N.Y.S.2d 513 (2009); *Hargett v. Town of Ticonderoga*, 13 N.Y.3d 325, 918 N.E.2d 933, 890 N.Y.S.2d 421 (2009); *People v. D'Allesandro*, 13 N.Y.3d 216, 918 N.E.2d 126, 889 N.Y.S.2d 536 (2009); *People v. Decker*, 13 N.Y.3d 12 (2009); *Lackawanna Cmty. Dev. Corp. v. Krakowski*, 12 N.Y.3d 578, 910 N.E.2d 997, 883 N.Y.S.2d 168 (2009); *Kassis v. Ohio Cas. Ins. Co.*, 12 N.Y.3d 595, 913 N.E.2d 933, 885 N.Y.S.2d 241 (2009); *Sargiss v. Magarelli*, 12 N.Y.3d 527, 909 N.E.2d 573, 881 N.Y.S.2d 651 (2009); *People v. Almeter*, 12 N.Y.3d 591, 912 N.E.2d 41, 884 N.Y.S.2d 209 (2009); *People v. Goldstein*, 12 N.Y.3d 295, 907 N.E.2d 692, 879 N.Y.S.2d 814 (2009); *Duffy v. Vogel*, 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246 (2009); *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009); *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009); *People v. Borrell*, 12 N.Y.3d 365, 909 N.E.2d 559, 881 N.Y.S.2d 637 (2009).

³⁴ *N.Y. Charter Sch. Ass'n v. DiNapoli*, 13 N.Y.3d 120, 133, 914 N.E.2d 991, 999, 886 N.Y.S.2d 74, 82 (2009) (Lippman, C.J., concurring).

³⁵ *Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 913 N.E.2d 394, 885 N.Y.S.2d 8 (2009) (Lippman, C.J., dissenting); *Bazakos v. Lewis*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009) (Lippman, C.J., dissenting).

³⁶ *Duffy*, 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246; *Skelos*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846; *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357; *Borrell*, 12 N.Y.3d 365, 909 N.E.2d 559, 881 N.Y.S.2d 637 (2009).

³⁷ See app.A.

³⁸ *Godfrey v. Spano*, 13 N.Y.3d 358 (2009).

³⁹ *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357.

⁴⁰ *Koehler v. Bank of Berm. Ltd.*, 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009).

⁴¹ *Skelos*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846.

This article focuses on non-unanimous opinions for two reasons. First, a unanimous decision offers little insight into the deliberations involved in the case.⁴² Lost in a unanimous decision are the internal discussions, conflicts, and compromises that ultimately lead to the final opinion of the court.⁴³ Thus, as Herman Pritchett observed in his innovative study of the Roosevelt Court in 1948, the unanimous opinion is “largely valueless for purposes of understanding the values and motivation of individual [judges].”⁴⁴

Second, non-unanimous decisions permit a different and more focused analysis of individual judges.⁴⁵ In such cases, since the judges are unable to compromise on a final opinion and decision, the judges find it necessary to publish their separate opinions. As a result, the judges offer a picture into their own attitudes and values, unaltered by the compromising process of a unanimous decision. As Pritchett discusses, non-unanimous decisions provide evidence that the judges “are operating on different assumptions, that their inarticulate major premises are dissimilar, that their value systems are differently constructed and weighted, that their political, economic, and social views contrast in important respects.”⁴⁶

The non-unanimous decisions in which Chief Judge Lippman has taken part provide a solid foundation for assessing his judicial philosophy. From a review of these cases, several patterns emerge that suggest an early profile of Chief Judge Lippman. Thus, what follows is in part a quantitative and qualitative review of his first year on the Court; tracking voting patterns, as well as his attitudes towards various issues.

Before reviewing these cases, however, a few caveats must be noted in regard to the statistical analysis that follows. First, the charts below encompass nothing more than a descriptive analysis concerning voting patterns over the past year. It does not suggest any causal relationship between types of cases, litigants, and issues

⁴² C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES*, 1937–1947, at xii (1948); *see also* Bonventre, *Chief Judge Kaye*, *supra* note 30, at 1167–68 (focusing on the dissenting and concurring opinions to describe the state constitutional profile of Chief Judge Kaye since they reflect “most accurately, and often vividly, the authors’ attitudes, views, and beliefs”).

⁴³ PRITCHETT, *supra* note 42, at xii.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* Notably, in divided and undivided opinions alike, the majority decision often includes a give and take between judges resulting in the court’s final opinion. Thus, even in a divided opinion of the court, the author of the majority opinion must still make compromises to obtain the number of votes necessary for the result desired. Bonventre, *Chief Judge Kaye*, *supra* note 30, at 1168–69.

and the chief judge's decisions. In fact, as someone with a statistical background, this author encourages such an analysis in the future when more data becomes available on Chief Judge Lippman. Second, there are inherent limitations using the methods employed below when dealing with judicial decision-making. The number of factors that play a role in the ultimate decision of any particular judge cannot and are not encompassed in this article's analysis. Nevertheless, the mere counting of votes and the tracking of patterns between judges, coupled with a qualitative review of the cases, provides an informative review of Chief Judge Lippman's first year on the Court. As Max Lerner noted when he discussed one of the earliest books employing statistical analyses to review the United States Supreme Court: "What is obviously needed is a method in which the analysis is kept from shooting off into the void by being moored to a statistical and factual base, and in which fact-gathering is kept from becoming meaningless by being related to significant analysis."⁴⁷ The following review is this author's attempt to meet such a standard of review.

III. CHIEF JUDGE LIPPMAN'S RECORD IN NON-UNANIMOUS CASES

Throughout the appointment process, Chief Judge Lippman was touted as a strong leader and consensus builder who succeeded in "develop[ing] a culture of working together" as a court administrator.⁴⁸ His colleagues even coined the phrase "to be Lippmanized" to describe when Chief Judge Lippman convinces someone to side with his position.⁴⁹ But convincing colleagues as a court administrator is significantly different from convincing the six judges of the Court of Appeals. And to make matters more difficult for Chief Judge Lippman, a Democratic appointee, he inherits a Court with a clear majority of four Republican appointees.⁵⁰

After analyzing Chief Judge Lippman's record in non-unanimous cases, as well as reviewing many of his statements regarding his approach to his position, it is clear the he understands that his

⁴⁷ PRITCHETT, *supra* note 42, at xii (quoting Max Lerner).

⁴⁸ Eligon, *supra* note 31, at A25 (quoting Justice Angela M. Mazzarelli, Appellate Division, First Department).

⁴⁹ *Id.* ("He is one of those people who really does engender loyalty and support because he treats everyone with dignity and respect." (quoting Presiding Justice A. Gail Prudenti, Appellate Division, Second Department)).

⁵⁰ Judges Graffeo, Pigott, Read, and Smith were appointed by Governor Pataki. Chief Judge Lippman and Judges Ciparick and Jones were appointed by Governors Paterson, Cuomo, and Spitzer, respectively.

position is a matter more of leadership and influence than control. A self-described “result-oriented person,” Chief Judge Lippman has made it clear, both in his opinions and statements, that he is less concerned with unanimity among the judges and more interested in “bolder decisions” reached at the expense of compromise.⁵¹ Although dissenting opinions have risen significantly during his first year on the Court, Chief Judge Lippman has succeeded in convincing his colleagues to join some of the most controversial decisions the Court decided this year.⁵²

The analysis that follows reviews his record in non-unanimous cases. Figure 1 displays the percentage of cases in which judges of the Court aligned with Chief Judge Lippman in non-unanimous decisions, as well as how often he voted for the more “liberal” position before the Court.⁵³

FIGURE 1 VOTING PATTERNS IN NON-UNANIMOUS DECISIONS (N=25)							
	Lippman	Ciparick	Graffeo	Jones	Pigott	Read	Smith
% With Lippman	N/A	92% (23/25)	48% (12/25)	60% (15/25)	40% (10/25)	36% (9/25)	24% (6/25)
% Liberal	76%	76%	28%	68%	48%	36%	16%

Reviewing the data, a few interesting patterns emerge. Most notably, Judge Ciparick and Chief Judge Lippman voted together in almost every non-unanimous decision—92% of the time. This suggests of course that many of the fundamental values of Judge Ciparick are likely shared by the chief judge. Prior articles on Judge Ciparick have described her as a “compassionate jurist who focuses on the individual, specifically, minorities, the underprivileged, and the defenseless.”⁵⁴

Besides consistent voting with Judge Ciparick, however, no other judge presents a consistent pattern of voting with Chief Judge

⁵¹ Glaberson, *supra* note 27, at A1 (quoting Chief Judge Lippman).

⁵² See, e.g., *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009); *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009).

⁵³ See *supra* note 30 and accompanying text; see also app.A. There are inherent limitations in attempting to code each decision as a “liberal” or “conservative” result. Holdings and separate opinions often do not fit nicely in those broad categories. Thus, this author recognizes the limitations from such broad descriptions and cautions against drawing definitive conclusions based on both sample size and methodology.

⁵⁴ John M. Bagyi, Comment, *Carmen Beauchamp Ciparick: The Court of Appeals’ Voice of Compassion*, 59 ALB. L. REV. 1913, 1932 (1996).

Lippman. Indeed, Judge Jones is the only other member of the Court who voted more times with the chief judge than against him. Even so, Judge Jones aligned with Chief Judge Lippman only 60% of the time.

For the members of the Court who voted with the chief judge less than 50% of the time, Judge Smith was the least likely to vote with the chief judge, voting with him only 24% of the time. In fact, of all the non-unanimous opinions that Judge Smith authored, Chief Judge Lippman only joined one of them: Judge Smith's dissent in *Reiber v. GMAC, LLC*.⁵⁵ A similar pattern can be identified with Judges Graffeo, Read, and Pigott as well. Each voted with Chief Judge Lippman less than 50% of the time.

In addition, Figure 1 displays the number of cases in which the judges supported the more "liberal" position before the Court. Again, it must be noted that the sample size of cases is far too small to draw definitive conclusions and the attempt to broadly codify decisions of the Court as "liberal" presents significant difficulties and limitations.⁵⁶ Nevertheless, the results do suggest that Chief Judge Lippman tends to vote in favor of positions that may lead some to describe him as a "liberal" jurist.

A. Criminal Justice

Chief Judge Lippman has shown an affinity for criminal issues as both a jurist and administrator of the Court. Since his appointment, he has set up a permanent task force on wrongful convictions,⁵⁷ and made Judge Smith the public's liaison for issues involving criminal leave applications.⁵⁸ Moreover, Chief Judge Lippman was the keynote speaker and moderator for an event held by the *Albany Law Review* on wrongful convictions in March 2010.⁵⁹

His personal interest in and awareness of criminal issues has seemed to rub off on his colleagues. After notable criticism regarding the level of criminal leave applications granted over the past several years, as well as the chief judge's appointment of Judge

⁵⁵ *Reiber v. GMAC, LLC*, 13 N.Y.3d 75, 913 N.E.2d 387, 885 N.Y.S.2d 1 (2009).

⁵⁶ See *supra* note 30.

⁵⁷ Joel Stashenko, *Lippman Forms*, *supra* note 28, at 1.

⁵⁸ Joel Stashenko, *Lippman Appoints Smith to Oversee Criminal Appeals*, N.Y. L.J., July 8, 2009, at 1.

⁵⁹ The *Albany Law Review* held a symposium entitled "Wrongful Convictions: Understanding and Addressing Criminal Injustice." To view a video of the event, see *Wrongful Convictions: Understanding and Addressing Criminal Injustice*, Albany Law Review, <http://www.totalwebcasting.com/view/?id=albanylaw> (last visited Apr. 14, 2010).

Smith as public liaison on the issue, the level of criminal leave applications granted has risen significantly.⁶⁰ In fact, Chief Judge Lippman has granted more criminal leave applications than any other member of the Court. As of January 2010, he has already tripled his predecessor, Chief Judge Kaye, in the number of applications granted.⁶¹

1. Voting Patterns

Since joining the Court in February 2009, Chief Judge Lippman has taken part in fifteen criminal cases that have gone to a full opinion. Out of these cases, he authored six opinions of the Court,⁶² far more than any other judge.⁶³ And although this paper focuses only on the eight of the fifteen cases that were non-unanimous,⁶⁴ the fact that the chief judge has paid such close attention to criminal issues both inside and outside the courtroom is significant.

Figure 2 below displays the voting patterns of the Court in the above mentioned non-unanimous criminal cases. The sample size is clearly too small to draw any definitive conclusions concerning Chief Judge Lippman's attitudes towards the rights of the accused. But Chief Judge Lippman's early record in criminal dispositions does suggest a "liberal" position consistent with that of Judges Ciparick and Jones.

⁶⁰ Posting of Vincent Martin Bonventre to New York Court Watcher, *NY Court of Appeals: Granting Criminal Appeals—Up, Down, Now Up Again? (Part 10: Who's Granting Now?)*, http://www.newyorkcourtwatcher.com/2010_01_01_archive.html (Jan. 26, 2010, 9:40 EST) (reviewing the substantial increase in the number of criminal leave applications granted in 2009); see also Stashenko, *Criminal Leave Grants*, *supra* note 28, at 1.

⁶¹ Posting of Vincent Martin Bonventre, *supra* note 60.

⁶² *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009); *People v. Borrell*, 12 N.Y.3d 365, 909 N.E.2d 559, 881 N.Y.S.2d 637 (2009); *People v. Goldstein*, 12 N.Y.3d 295, 907 N.E.2d 692, 879 N.Y.S.2d 814 (2009); *People v. Almeter*, 12 N.Y.3d 591, 912 N.E.2d 41, 884 N.Y.S.2d 209 (2009); *People v. Decker*, 13 N.Y.3d 12 (2009); *People v. D'Alessandro*, 13 N.Y.3d 216, 918 N.E.2d 126, 889 N.Y.S.2d 536 (2009).

⁶³ The judge who wrote the next most number of opinions was Judge Ciparick, who authored three opinions of the Court out of these fifteen cases. Judges Graffeo and Jones each authored two opinions of the Court, Judge Smith authored one, and one was a per curiam decision.

⁶⁴ *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (4–3 decision); *People v. Bailey*, 13 N.Y.3d 67, 915 N.E.2d 611, 886 N.Y.S.2d 666 (2009) (5–2 decision); *People v. Davis*, 13 N.Y.3d 17, 912 N.E.2d 1044, 884 N.Y.S.2d 665 (2009) (5–2 decision); *People v. Fuentes*, 12 N.Y.3d 259, 907 N.E.2d 286, 879 N.Y.S.2d 373 (2009) (5–2 decision); *People v. Kalin*, 12 N.Y.3d 225, 906 N.E.2d 381, 878 N.Y.S.2d 653 (2009) (4–3 decision); *People v. Bauman*, 12 N.Y.3d 152, 905 N.E.2d 1164, 878 N.Y.S.2d 235 (2009) (5–2 decision); *Borrell*, 12 N.Y.3d 365, 909 N.E.2d 559, 881 N.Y.S.2d 637 (6–1 decision); *People v. Buchanan*, 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337 (2009) (6–1 decision).

FIGURE 2 VOTING PATTERNS IN NON-UNANIMOUS CRIMINAL DECISIONS (N=8)							
	Lippman	Ciparick	Graffeo	Jones	Pigott	Read	Smith
% With Lippman	N/A	100% (8/8)	75% (6/8)	63% (5/8)	50% (4/8)	50% (4/8)	38% (3/8)
% Pro-Defendant Vote	63% (5/8)	63% (5/8)	38% (3/8)	88% (7/8)	38% (3/8)	38% (3/8)	25% (2/8)

2. Notable Decisions

Any review of Chief Judge Lippman's first year on the Court will inevitably address his opinion in *People v. Weaver*, which involved the warrantless placement of a global positioning system device ("GPS") on a suspect's van, and the subsequent tracking of his location for sixty-five days.⁶⁵ Thus, perhaps it is appropriate that as Lippman's "first big test"⁶⁶ on the Court and one of the earliest cases he decided, it is also the first case reviewed in this comment. And besides being one of the most controversial cases the Court decided in 2009, Chief Judge Lippman's opinion suggests not only how he will address future issues involving the rights of the accused, but also how he approaches state constitutional adjudication.

From the very first line of Chief Judge Lippman's opinion in *Weaver*, it was clear that he had serious misgivings concerning the law enforcement conduct at issue. Lippman's description of the facts in *Weaver* began by noting how a police officer "crept underneath defendant's street-parked van" to install the GPS tracking device on the inside of the bumper.⁶⁷ The other facts of *Weaver*, namely that the device tracked the location of defendant's van for sixty-five days without a warrant and without any justification offered by law enforcement, were equally troubling to

⁶⁵ *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357.

⁶⁶ Posting of Vincent Martin Bonventre to New York Court Watcher, *Court of Appeals: The First Big Test for the Lippman Court—Is a Search a Search? Or the Supreme Court's Nonsense?*, <http://www.newyorkcourtwatcher.com/2009/03/court-of-appeals-is-search-search-or.html> (Mar. 24, 2009, 17:55 EST).

⁶⁷ *Weaver*, 12 N.Y.3d at 436, 909 N.E.2d at 1195, 882 N.Y.S.2d at 357.

the chief judge as he addressed whether such law enforcement action constituted a search that ran afoul of the federal or New York State Constitution.⁶⁸

In finding that such conduct indeed is a search under the state constitution—and is therefore invalid absent a warrant or exigent circumstances—the chief judge’s opinion focused on the implications of permitting law enforcement agents to collect data by the use of such devices without requiring any individualized suspicion of the person tracked. The chief judge first distinguished the federal case law relating to tracking devices, which he admitted “[a]t first blush . . . does not bode well for Mr. Weaver,”⁶⁹ by discussing the capabilities of the GPS device used in *Weaver*. He noted that the capabilities of the device far exceeded those of the tracking beeper used in cases such as *United States v. Knotts*⁷⁰ by “facilitat[ing] a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over . . . a practically unlimited period.”⁷¹ Thus, the chief judge concluded, however small the defendant’s expectation of privacy in his vehicle, the use of this technology constituted a “massive invasion of privacy . . . inconsistent with even the slightest reasonable expectation of privacy.”⁷²

As memorable as the *Weaver* opinion may be for its conclusion, it also offers an early glimpse into Chief Judge Lippman’s attitude toward state constitutional adjudication. In basing the opinion independently on the New York State Constitution, Chief Judge Lippman noted that the Court has traditionally not hesitated to “interpret[the state’s] own Constitution to provide greater protections when circumstances warrant.”⁷³ And even though the chief judge recognized that the standard enunciated in *Weaver* may later differ from the federal standard, he believed that the result was justified regardless of any future disparity.⁷⁴ This suggests a

⁶⁸ *Id.* at 436, 909 N.E.2d at 1195–96, 882 N.Y.S.2d at 357–58.

⁶⁹ *Id.* at 440, 909 N.E.2d at 1199, 882 N.Y.S.2d at 361. Notably, even though Chief Judge Lippman’s opinion in *Weaver* discussed federal case law, he did note that this issue remained undecided under the federal and state constitution. *Id.* at 442, 909 N.E.2d at 1200, 882 N.Y.S.2d at 362.

⁷⁰ 460 U.S. 276 (1983).

⁷¹ *Weaver*, 12 N.Y.3d at 441, 909 N.E.2d at 1199, 882 N.Y.S.2d at 361.

⁷² *Id.* at 444, 909 N.E.2d at 1201, 882 N.Y.S.2d at 363.

⁷³ *Id.* at 445, 909 N.E.2d at 1202, 882 N.Y.S.2d at 364; *see also* *People v. Johnson*, 66 N.Y.2d 398, 407, 488 N.E.2d 439, 445, 497 N.Y.S.2d 618, 624 (1985) (“[T]he protection of the individual rights of our citizens are best promoted by applying State constitutional standards.”).

⁷⁴ *Id.*

more proactive view of state constitutional adjudication and one championed by his predecessor, Chief Judge Kaye—an approach that has gained the Court much prestige and notoriety in the past.⁷⁵ Indeed, for Chief Judge Lippman any other standard applied to the facts presented in *Weaver* “would be . . . the consequent marginalization of the State Constitution and judiciary in matters crucial to safeguarding the privacy of our citizens.”⁷⁶

Of the four remaining non-unanimous criminal decisions in which Chief Judge Lippman voted in favor of the defendant, he did not author an opinion of the Court or in dissent.⁷⁷ Nevertheless, the opinions he joined, either in majority or dissent, do offer some additional indication of his analysis in criminal dispositions, namely when dealing with the pleading requirements for the prosecution. For instance, in *People v. Kalin*, Chief Judge Lippman joined Judge Ciparick’s dissenting opinion that criticized the majority for effectively overruling prior case law, which thereby minimized the rights of the accused in misdemeanor cases.⁷⁸

In *Kalin*, the defendant pleaded guilty to misdemeanor possession of a controlled substance without being advised that he had the right to be prosecuted under a misdemeanor information. Since the defendant did not, however, expressly waive his right to be prosecuted under a misdemeanor information, the Court had to assess whether the accusatory instrument was jurisdictionally sufficient as a misdemeanor information. To be sufficient as a misdemeanor information, the instrument must state “nonhearsay allegations’ which, if true, establish every element of the offense charged and the defendant’s commission thereof.”⁷⁹ Thus, the crux of the case became whether the arresting officer’s “reliance on his experience and training” was sufficient to establish a *prima facie*

⁷⁵ See, e.g., Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 50 (1988) (discussing the significant increase in state courts analyzing state constitutions, as well as the legitimacy of “state constitutional decisionmaking by state courts”); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 42 REC. ASS’N B. CITY N.Y. 285, 289 (1987) (reviewing the history of state constitutional adjudication and arguing for its heightened use); Bonventre, *State Constitutionalism*, *supra* note 9, at 36–51 (discussing notable decisions of the Court of Appeals grounded in the New York State Constitution).

⁷⁶ *Weaver*, 12 N.Y.3d at 445, 909 N.E.2d at 1202, 882 N.Y.S.2d at 364.

⁷⁷ *People v. Kalin*, 12 N.Y.3d 225, 906 N.E.2d 381, 878 N.Y.S.2d 653 (2009) (4–3 decision); *People v. Bauman*, 12 N.Y.3d 152, 905 N.E.2d 1164, 878 N.Y.S.2d 235 (2009) (5–2 decision); *People v. Buchanan*, 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337 (2009) (6–1 decision); *People v. Bailey*, 13 N.Y.3d 67, 915 N.E.2d 611, 886 N.Y.S.2d 666 (2009) (5–2 decision).

⁷⁸ *Kalin*, 12 N.Y.3d at 234, 906 N.E.2d at 387, 878 N.Y.S.2d at 659 (Ciparick, J., dissenting).

⁷⁹ *Id.* at 228–29, 906 N.E.2d at 383, 878 N.Y.S.2d at 655.

case as a misdemeanor information.⁸⁰

In finding that the accusatory instrument was sufficient to satisfy the jurisdictional requirements of a misdemeanor information, the majority of the Court stated that all that is needed is notice such that the defendant can avoid being tried twice for the same offense.⁸¹ In other words, a misdemeanor information should not be given an “overly restrictive or technical reading.”⁸² In response, the dissent, joined by Chief Judge Lippman, noted that this standard overrules *In re Jahron S.*,⁸³ which held that an officer’s statement that allegations are supported by his experience and training is insufficient to satisfy the requirements of a misdemeanor information.⁸⁴ The dissent pointed out that such a ruling “brushes aside the protections that must be afforded to misdemeanor defendants to ensure that such prosecutions do not become routinized or treated as insignificant or unimportant.”⁸⁵

Consistent with his voting in *Kalin*, Chief Judge Lippman joined other decisions that put a greater burden on the prosecution both in pleading and proof. For instance, in *People v. Bauman*,⁸⁶ he joined a majority of the Court in holding that a single count indictment charging depraved indifference assault, which encompassed eleven acts over an eight-month period, violates Criminal Procedure Law 200.30(1).⁸⁷ In so holding, the Court noted that compliance with CPL 200.30(1) is important because “[t]he prohibition against duplicity furthers not only the functions of notice to a defendant and of assurance against double jeopardy, but also ensures the reliability of the unanimous verdict.”⁸⁸ Similarly, in *People v. Bailey*,⁸⁹ Chief Judge Lippman joined a majority of the Court in holding that the prosecution’s failure to establish intent to defraud compelled the conclusion that the evidence was legally insufficient to convict the defendant of criminal possession of a forged instrument, even though the defendant admitted that he was in

⁸⁰ *Id.* at 228, 906 N.E.2d at 382, 878 N.Y.S.2d at 654.

⁸¹ *Id.* at 230, 906 N.E.2d at 384, 878 N.Y.S.2d at 656.

⁸² *Id.* (quoting *People v. Konieczny*, 2 N.Y.3d 569, 575, 813 N.E.2d 626, 630, 780 N.Y.S.2d 546, 551 (2004)).

⁸³ 79 N.Y.2d 632, 595 N.E.2d 823, 584 N.Y.S.2d 748 (1992).

⁸⁴ *Kalin*, 12 N.Y.3d at 233, 906 N.E.2d at 386, 878 N.Y.S.2d at 658 (Ciparick, J., dissenting).

⁸⁵ *Id.* at 234, 906 N.E.2d at 387, 878 N.Y.S.2d at 659 (Ciparick, J., dissenting).

⁸⁶ 12 N.Y.3d 152, 905 N.E.2d 1164, 878 N.Y.S.2d 235 (2009).

⁸⁷ *Id.* at 154, 905 N.E.2d at 1165, 878 N.Y.S.2d at 236.

⁸⁸ *Id.* at 154–55, 905 N.E.2d at 1165, 878 N.Y.S.2d at 236 (quoting *People v. Keindl*, 68 N.Y.2d 410, 418, 502 N.E.2d 577, 580, 509 N.Y.S.2d 790, 793 (1986)).

⁸⁹ 13 N.Y.3d 67, 915 N.E.2d 611, 886 N.Y.S.2d 666 (2009).

possession of counterfeit bills.⁹⁰

In the three non-unanimous criminal cases in which Chief Judge Lippman voted for the state, the Court addressed issues including the competence of appellate counsel,⁹¹ whether the nondisclosure of a medical document constituted a *Brady* violation,⁹² and the constitutionality of a statute that permits a class B misdemeanor to be tried and determined by a judicial hearing officer.⁹³ Of the three decisions, *People v. Borrell* is especially notable since (1) Chief Judge Lippman authored the opinion of the Court, and (2) this was the only non-unanimous criminal decision in which Judge Jones, a traditionally “liberal” judge when dealing with the rights of the accused, joined the Court in supporting the state’s position.

In *Borrell*, the Court decided whether the appellate division properly granted the defendant’s petition for writ of error *coram nobis*, which alleged that the defendant was not afforded effective assistance of counsel based on appellate counsel’s failure to raise the legality of consecutive sentences for two counts of robbery.⁹⁴ Chief Judge Lippman, joined by five other members of the Court, held that the conduct of the appellate attorney did not amount to ineffective assistance of counsel since, considering the attorney’s conduct as a whole, the representation was “constitutionally adequate.”⁹⁵

B. Civil Actions

As informative as Chief Judge Lippman’s voting patterns and opinions in non-unanimous criminal cases are for assessing his decision-making, his dispositions in civil actions are equally revealing. Since his appointment, Chief Judge Lippman has had the opportunity to pass judgment on issues involving labor law,⁹⁶

⁹⁰ *Id.* at 71–72, 915 N.E.2d at 613–14, 886 N.Y.S.2d at 668–69. The remaining non-unanimous criminal case in which Chief Judge Lippman sided with the defendant was a per curiam opinion in *People v. Buchanan*, 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337 (2009). In that case, the Court held that, absent a specific justification, a defendant may not be restrained by the use of a stun belt while on trial. *Id.* at 3, 912 N.E.2d at 554, 884 N.Y.S.2d at 338.

⁹¹ *People v. Borrell*, 12 N.Y.3d 365, 909 N.E.2d 559, 881 N.Y.S.2d 637 (2009).

⁹² *People v. Fuentes*, 12 N.Y.3d 259, 907 N.E.2d 286, 879 N.Y.S.2d 373 (2009).

⁹³ *People v. Davis*, 13 N.Y.3d 17, 912 N.E.2d 1044, 884 N.Y.S.2d 665 (2009).

⁹⁴ *Borrell*, 12 N.Y.3d at 367–68, 909 N.E.2d at 559–60, 881 N.Y.S.2d at 637–38.

⁹⁵ *Id.* at 370, 909 N.E.2d at 561, 881 N.Y.S.2d at 639.

⁹⁶ *Misicki v. Caradonna*, 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (2009); *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009); *Lee v. Astoria Generating Co.*, 13 N.Y.3d 382 (2009).

medical malpractice,⁹⁷ creditors' suits,⁹⁸ executive power,⁹⁹ and a variety of constitutional questions.¹⁰⁰ Consistent with his dispositions in criminal cases, his record suggests that in approaching these issues, he is a more "liberal" judge as compared to other members of the Court.

In addition to the predictions of commentators concerning his judicial tendencies,¹⁰¹ Chief Judge Lippman's experiences rising through the state court system and working for Chief Judge Kaye have likely influenced his decision-making in civil actions. Although certainly not the only, or even most influential, factor that impacts his judicial philosophy, Chief Judge Lippman has worked his entire career in the state court system, never leaving for private practice.¹⁰² Moreover, in his role as chief administrative judge, he consistently fought for pay raises and better benefits for those working below him.

This pattern has continued. As chief judge of the Court, Lippman has fought relentlessly—and in the face of significant criticism from Governor Paterson—for judicial pay raises and a larger budget.¹⁰³ In response to Governor Paterson's scolding statement that Chief Judge Lippman's recently proposed budget is excessive and represents the judiciary conducting "business as usual" in the midst of a statewide budget crisis, Lippman fired back noting that he makes "no excuses whatsoever" for proposing \$48 million to address the "painful and inconceivable" lack of raises for judges.¹⁰⁴ Thus, it is perhaps unsurprising that in deciding issues such as those involving workers' rights, he has consistently sided with the position of the worker.¹⁰⁵

⁹⁷ *Duffy v. Vogel*, 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246 (2009); *Bazakos v. Lewis*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009).

⁹⁸ *Koehler v. Bank of Berm. Ltd.*, 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009); see David D. Siegel, *Court with Jurisdiction of Garnishee Can Make It Deliver Debtor's Property from Outside State if Garnishee Controls It*, 595 N.Y. ST. L. DIG. 1 (2009) ("[T]he Court of Appeals . . . has made a sweeping application of the enforcement provisions of Article 52 of the CPLR, with the potential of making New York a mecca for judgment creditors pursuing assets of their judgment debtors Such is the impact of *Koehler v. Bank of Bermuda* . . .").

⁹⁹ *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009).

¹⁰⁰ *Anonymous ex rel. Anonymous v. City of Rochester*, 13 N.Y.3d 35, 915 N.E.2d 593, 886 N.Y.S.2d 648 (2009); *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 909 N.E.2d 70, 881 N.Y.S.2d 377 (2009).

¹⁰¹ See *supra* note 31 and accompanying text.

¹⁰² See *supra* Part I.

¹⁰³ Press Release, Statement of Chief Judge Jonathan Lippman (2009), available at <http://www.nylj.com/nylawyer/adgifs/decisions/012010statement.pdf>.

¹⁰⁴ Stashenko, *Lippman Defends*, *supra* note 16, at 1.

¹⁰⁵ See, e.g., *Misicki v. Caradonna*, 12 N.Y. 3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375

1. Voting Patterns

Chief Judge Lippman has taken part in seventeen non-unanimous civil cases¹⁰⁶ since his appointment. Although this is a larger sample size than the criminal cases discussed above, the conclusions that may be drawn from this grouping of cases are, similarly, limited. Regardless, these cases do provide an early profile of Chief Judge Lippman's tendencies in civil cases.

FIGURE 3 VOTING PATTERNS IN NON-UNANIMOUS CIVIL DECISIONS (N=17)							
	Lippman	Ciparick	Graffeo	Jones	Pigott	Read	Smith
% With Lippman	N/A	88% (15/17)	35% (6/17)	53% (9/17)	35% (6/17)	29% (5/17)	18% (3/17)
% Liberal Vote	82% (14/17)	82% (14/17)	24% (4/17)	59% (10/17)	53% (9/17)	35% (6/17)	11% (2/17)

Figure 3 presents Chief Judge Lippman's record in non-unanimous civil cases. The results are consistent with his pattern discussed in criminal cases above. Namely, Chief Judge Lippman's record during his first year on the Court suggests that he is a "liberal" judge, often siding with the rights of the worker, as well as

(2009); *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009); *Lee v. Astoria Generating Co.*, 13 N.Y.3d 382 (2009).

¹⁰⁶ *Astoria Generating*, 13 N.Y.3d 382 (5–2 decision); *Godfrey v. Spano*, 13 N.Y.3d 358 (2009) (4–3 decision); *Crucible Materials Corp. v. N.Y. Power Auth.*, 13 N.Y.3d 223, 918 N.E.2d 107, 889 N.Y.S.2d 517 (2009) (5–2 decision); *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009) (4–3 decision); *Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 913 N.E.2d 394, 885 N.Y.S.2d 8 (2009) (5–2 decision); *Bazakos v. Lewis*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009) (4–3 decision); *Reiber v. GMAC, LLC*, 13 N.Y.3d 75, 913 N.E.2d 387, 885 N.Y.S.2d 1 (2009) (4–3 decision); *Anonymous ex rel. Anonymous v. City of Rochester*, 13 N.Y.3d 35, 915 N.E.2d 593, 886 N.Y.S.2d 648 (2009) (5–2 decision); *Koehler v. Bank of Berm. Ltd.*, 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009) (4–3 decision); *Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 911 N.E.2d 817, 883 N.Y.S.2d 755 (2009) (5–2 decision); *Misicki*, 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (4–3 decision); *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 909 N.E.2d 70, 881 N.Y.S.2d 377 (2009) (5–2 decision); *Passante v. Agway Consumer Products, Inc.*, 12 N.Y.3d 372, 909 N.E.2d 563, 881 N.Y.S.2d 641 (2009) (4–3 decision); *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 912 N.E.2d 26, 884 N.Y.S.2d 194 (2009) (6–1 decision); *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 907 N.E.2d 292, 879 N.Y.S.2d 379 (2009) (4–3 decision); *Ferluckaj*, 12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009) (4–3 decision); *Duffy v. Vogel*, 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246 (2009) (6–1 decision).

furthering civil rights and liberties in close cases. In addition, Chief Judge Lippman and Judge Ciparick present an almost identical voting record in non-unanimous civil cases with only two examples of when they did not vote together.¹⁰⁷

2. Notable Decisions

As anticipated as was the outcome of *People v. Weaver*,¹⁰⁸ the Court's ruling in *Skelos v. Paterson*,¹⁰⁹ addressing the authority of the governor to fill a vacancy in the office of lieutenant governor by appointment, may have been of more interest to the state at large. As in *Weaver*, Chief Judge Lippman authored the opinion of the Court, which held that Governor Paterson's appointment of the lieutenant governor pursuant to Public Officers Law section 43 was entirely consistent with article IV, section 6 of the New York State Constitution. Even though the decision was highly anticipated, it likely provides little insight into the chief judge's tendencies in other civil cases, since this issue will likely never arise in practice again.¹¹⁰ As a result, the remainder of this article focuses on his other rulings in the more traditional types of civil actions.

a. *Negligence (Medical Malpractice)*

Two medical malpractice cases decided by the Lippman Court are particularly noteworthy. In each case, Chief Judge Lippman authored an opinion and sided with the plaintiff.¹¹¹ Both opinions suggest that Chief Judge Lippman is concerned with the abrogation or minimization of plaintiffs' rights in medical malpractice and traditional negligence cases.

For instance, in *Duffy v. Vogel*, the Court was asked to decide whether the supreme court's improper denial of the plaintiff's

¹⁰⁷ *Buffalo Crushed Stone*, 13 N.Y.3d 88, 913 N.E.2d 394, 885 N.Y.S.2d 8; *Bazakos*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785.

¹⁰⁸ 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009).

¹⁰⁹ 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009).

¹¹⁰ See, e.g., David D. Siegel, *Four Judges Say the Governor Can Fill the Vacancy and Three Say No: The Four Have It*, 599 N.Y. ST. L. DIG. 2 (2009) ("For the bar in general, the issues in [*Skelos v. Paterson*] are not likely to arise often in their practice. So, wishing all sides good luck, including of course the new lieutenant governor, we leave all interested members to read the opinions and revel—or suffer, as their convictions may dictate."). For a complete discussion of the *Skelos* decision see an article appearing in this issue by Professor Briffault. 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).

¹¹¹ *Duffy*, 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246; *Bazakos*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (Lippman, C.J., dissenting).

motion to poll the jury to ascertain whether “each juror consents this is the verdict as read by the foreperson” was harmless error or, to the contrary, entitled the plaintiff to a mistrial.¹¹² Chief Judge Lippman, writing his first opinion for the Court, held that “failure to poll a jury may never be deemed harmless” because a verdict is not properly entered when a jury poll is sought but improperly denied, and since “[n]o cogent, principled argument” suggests that rule should be changed.¹¹³

Also notable in the *Duffy* decision is Chief Judge Lippman’s blunt response to the dissent’s view that the Court’s holding that the failure to poll a jury can never be considered harmless error creates a “nightmarish result.”¹¹⁴ While acknowledging that forcing the defendant to retry the entire case is not ideal, Chief Judge Lippman argued that the dissent’s approach “is an even less attractive option, prospectively involving courts too confident of their ability to discern what is in a juror’s mind in the unwitting validation of false verdicts and the concomitant deprivation of true verdicts.”¹¹⁵ Thus, for Chief Judge Lippman and a majority of the Court, even though polling the jury may not necessarily lead to a different result in the case, the practice is so fundamental to the litigant’s right to a jury trial that it can never, in hindsight, be considered merely harmless error.

Similarly, in *Bazakos v. Lewis*,¹¹⁶ Chief Judge Lippman again aligned with the rights of the plaintiff in a medical malpractice case. The plaintiff in *Bazakos* brought a negligence action against a doctor who had conducted an independent medical examination (“IME”) of the plaintiff in another negligence case that the plaintiff had previously commenced.¹¹⁷ Since the plaintiff did not commence the action until two years and eleven months after being treated, the question became whether her action was more appropriately defined as one for medical malpractice or ordinary negligence (a

¹¹² *Duffy*, 12 N.Y.3d at 172, 905 N.E.2d at 1175, 878 N.Y.S.2d at 246.

¹¹³ *Id.* at 175, 905 N.E.2d at 1177, 878 N.Y.S.2d at 248.

¹¹⁴ *Id.* at 178, 905 N.E.2d at 1180, 878 N.Y.S.2d at 251 (Smith, J., dissenting).

¹¹⁵ *Id.* at 177, 905 N.E.2d at 1179, 878 N.Y.S.2d at 250.

¹¹⁶ 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009)

¹¹⁷ *Id.* at 633, 911 N.E.2d at 848, 883 N.Y.S.2d at 786; see also David D. Siegel, *When Physician Injuries P While Conducting IME at Behest of Tort Defendant, Is That Malpractice or Mere Negligence?*, 595 N.Y. ST. L. DIG. 2 (July 2009) (“In the course of his exam, the IME doctor is said to have ‘forcefully rotated’ the plaintiff’s head ‘while simultaneously pulling it.’ We’re not told the degree of rotation, but we assume it was less than 360 degrees, and we’ll further speculate that the pull was just that, and not a removal.” (quoting *Bazakos*, 12 N.Y.3d at 633, 911 N.E.2d at 848, 883 N.Y.S.2d at 786)).

finding of the former would mean the action was time-barred).¹¹⁸

Finding that the relationship between the plaintiff and the physician in this case is appropriately considered a “limited physician-patient relationship,” a majority of the Court held that the action was subject to the two year and six month limitations period applicable to medical malpractice claims, rather than the three year period for ordinary negligence actions, and therefore time-barred.¹¹⁹ In a highly critical dissent, Chief Judge Lippman argued that the Court’s holding that there can be medical malpractice without medical treatment is a “novel and highly problematic notion,”¹²⁰ and that the Court reached this result “only by dint of an exercise in judicial artifice untethered to any law or to the actual nature of the transaction known euphemistically as an ‘independent’ medical examination.”¹²¹ Indeed, for Chief Judge Lippman, the majority’s holding only leads to the “the arbitrary creation of an exception for a group of practitioners who, as a group, neither seek nor are entitled to the protection properly afforded and reserved to those engaged in the delivery of medical care and treatment.”¹²²

b. Workers’ Suits

In each of the three non-unanimous civil decisions involving labor issues, Chief Judge Lippman joined the position of the Court supporting workers’ rights.¹²³ For instance, in *Ferluckaj v. Goldman Sachs & Co.*, the Court addressed whether a lessee of an office building could be subject to liability under Labor Law section 240(1),¹²⁴ even though the person injured worked for a company that was hired by the owner of the apartment building.¹²⁵ The majority of the court found for the defendant, since no liability can exist under that section of the Labor Law absent some right of

¹¹⁸ *Bazakos*, 12 N.Y.3d at 633, 911 N.E.2d at 848, 883 N.Y.S.2d at 786.

¹¹⁹ *Id.* at 635, 911 N.E.2d at 850, 883 N.Y.S.2d at 788; *see* N.Y. C.P.L.R. 214-a, 214(5) (McKinney 2005).

¹²⁰ *Bazakos*, 12 N.Y.3d at 637, 911 N.E.2d at 852, 883 N.Y.S.2d at 790 (Lippman, C.J., dissenting).

¹²¹ *Id.* at 638, 911 N.E.2d at 852, 883 N.Y.S.2d at 790 (Lippman, C.J., dissenting).

¹²² *Id.* at 639, 911 N.E.2d at 853, 883 N.Y.S.2d at 791 (Lippman, C.J., dissenting).

¹²³ *See* *Misicki v. Caradonna*, 12 N.Y. 3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (2009); *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009); *Lee v. Astoria Generating Co.*, 13 N.Y.3d 382 (2009).

¹²⁴ *See* N.Y. LAB. LAW § 240(1) (McKinney 2004). This section of the Labor Law, the “elevation” statute, imposes on owners and contractors an absolute liability for elevation-related injuries to a worker.

¹²⁵ *Ferluckaj*, 12 N.Y.3d at 318, 908 N.E.2d at 869–70, 880 N.Y.S.2d at 879–80.

control by the lessee over the injured employee—a fact they found lacking in the case.¹²⁶ In dissent Judge Pigott, joined by Chief Judge Lippman, reiterated that the case was at the summary judgment stage, and that the ultimate question was “whether Goldman tendered sufficient evidence to eliminate any issue of fact concerning whether it had the right to control plaintiff’s work.”¹²⁷ Based on a variety of facts covered extensively in the dissenting opinion, including the “Services Agreement” between the building’s manager and the plaintiff’s employer, the dissent found that there were triable issues of fact improper to decide on a motion for summary judgment.¹²⁸ Although this case is likely one which will not make much law but rather another example of whether summary judgment is appropriate based on the facts of the case, something the dissent notes near the end of their opinion, it is consistent with Chief Judge Lippman’s tendency to promote and support workers’ rights.¹²⁹

Chief Judge Lippman again joined a dissenting opinion in *Lee v. Astoria Generating Company, L.P.*, supporting a position of statutory interpretation favorable to workers’ interests.¹³⁰ In *Astoria Generating*, the Court addressed whether certain provisions of the Longshore and Harbor Workers’ Compensation Act¹³¹ preempt claims under Labor Law sections 240(1) and 241(6).¹³² The majority found that since the plaintiff was injured on a “vessel” within the meaning of the federal statute in question there was a federal remedy available under section 905(b) of the Longshore and Harbor Workers’ Compensation Act.¹³³ Thus, based on the statutory language, the Court held that the plaintiff’s state law claims were preempted by the federal maritime law and the federal

¹²⁶ *Id.* at 319–20, 908 N.E.2d at 870–71, 880 N.Y.S.2d at 880–81.

¹²⁷ *Id.* at 322, 908 N.E.2d at 872, 880 N.Y.S.2d at 882 (Pigott, J., dissenting).

¹²⁸ *Id.* at 322–25, 908 N.E.2d at 872–74, 880 N.Y.S.2d at 882–84 (Pigott, J., dissenting).

¹²⁹ *Id.* at 325, 908 N.E.2d at 874, 880 N.Y.S.2d at 884 (Pigott, J., dissenting) (“I conclude by noting that I would expect the majority opinion in this case to have fairly limited precedential value. This is a fact-specific area of law in which almost every case is *sui generis*.”); *see also* David D. Siegel, *Because Tenant Didn’t Control Cleaning Company, It Did Not Face Absolute Liability for Fall of Company’s Employee*, 593 N.Y. ST. L. DIG. 1 (2009).

¹³⁰ *Lee v. Astoria Generating Co.*, 13 N.Y.3d 382 (2009).

¹³¹ Longshore and Harbor Workers’ Compensation Act, §§ 901–950 (2004).

¹³² *See* N.Y. LAB. LAW §§ 240(1), 241(6) (McKinney 2004). The Court also addressed and found that under the above referenced Longshore and Harbor Workers’ Compensation Act a barge containing an electricity generating turbine is a vessel. *Astoria Generating*, 13 N.Y.3d at 390–91. The dissent also agreed that the barge is a vessel within the meaning of the statute. *Id.* at 395 (Ciparick, J., dissenting).

¹³³ *Astoria Generating*, 13 N.Y.3d at 391–93.

statute.¹³⁴ Although agreeing that the ship was a vessel within the meaning of the statute, Judge Ciparick, in her dissenting opinion joined by Chief Judge Lippman, argued that the plaintiff could, nevertheless, not assert a maritime tort claim, and therefore section 905(b) of the Longshore and Harbor Workers' Compensation Act could not act to preempt his state law claims.¹³⁵ Although only apparent in a small sampling of cases involving workers' rights, Chief Judge Lippman has consistently supported the workers' position, even when it required him to dissent against his colleagues.¹³⁶

Similarly, Chief Judge Lippman joined a majority of the Court in a products liability decision that has certainly increased the viability of suits against manufacturers. In *Passante v. Agway Consumer Products, Inc.*,¹³⁷ the Court addressed whether the defendant manufacturer was properly granted summary judgment by the appellate division as to defective design and failure to warn claims relating to a mechanical dock leveler. The plaintiff, who had been injured when he was "walking down" the dock leveler to get the platform to rest on the tractor-trailer, alleged that the leveler was defectively designed by the manufacturer since it lacked optional safety equipment that could have restrained the trailer or secured it to the loading dock while the leveler was in use.¹³⁸ In addition, the plaintiff alleged that the manufacturer negligently failed to warn that movement of the trailer while the leveler was in operation could cause it to collapse.¹³⁹

Judge Pigott wrote the opinion of the Court, joined by Chief Judge Lippman, Judge Ciparick, and Judge Jones, and found triable issues of fact as to both the defective design and failure to warn claims, which precluded summary judgment for the manufacturer.¹⁴⁰ In regard to the defective design claim, the Court was forced to address whether its previous ruling in *Scarangella v. Thomas Built Buses*¹⁴¹ precluded recovery by the plaintiffs.

¹³⁴ *Id.* at 394.

¹³⁵ *Id.* at 395–97.

¹³⁶ See also *Misicki v. Caradonna*, 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (2009) (holding that § 23-9.2(a) of the safety and rules regulations promulgated by the Commissioner of the Department of Labor provides a sufficiently distinct standard of conduct such that violation of the provision may serve as the basis for a cause of action under Labor Law § 241(6); Chief Judge Lippman joining the majority).

¹³⁷ 12 N.Y.3d 372, 909 N.E.2d 563, 881 N.Y.S.2d 641 (2009).

¹³⁸ *Id.* at 375, 909 N.E.2d at 564, 881 N.Y.S.2d at 642.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 381–82, 909 N.E.2d at 568, 881 N.Y.S.3d at 646.

¹⁴¹ 93 N.Y.2d 655, 717 N.E.2d 679, 695 N.Y.S.2d 520 (1999).

Scarangella had held that failure to include optional safety equipment does not make a product defectively designed as a matter of law where there is evidence that:

(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of *the buyer's* use of the product.¹⁴²

Finding the second prong lacking—namely that the “[d]efendants have not shown that the dock leveler would normally be used in circumstances in which the product is not unreasonably dangerous without [the safety device]”—the Court reinstated the defective design claim.¹⁴³

But what seemed to be a simple application of the *Scarangella* holding by the majority is described as a flat overruling of the decision by the dissent. Thus, Judge Smith, who authored the dissenting opinion joined by Judges Read and Graffeo, criticized the Court arguing that what the majority has held is that the manufacturer is subject to liability “for not overruling the buyer’s objections and insisting that [buyer] purchase a dock leveler either with the [safety equipment] or not at all. . . . Under circumstances like these, whether safety equipment should be bought is a decision for the buyer, not the seller and not the courts.”¹⁴⁴ Regardless of whether *Scarangella* was overruled or just significantly weakened, the holding in *Passante* certainly opens the door for more defective design claims in the future.¹⁴⁵

¹⁴² *Passante*, 12 N.Y.3d at 380, 909 N.E.2d at 567, 881 N.Y.S.2d at 645 (quoting *Scarangella*, 93 N.Y.2d at 661, 717 N.E.2d at 683, 695 N.Y.S.2d at 524).

¹⁴³ *Id.* at 381, 909 N.E.2d at 567, 881 N.Y.S.3d at 645. The Court also found triable issues of fact relating to the failure to warn claim since it was not clear from the record that the workers were “fully aware of the danger of standing on the dock leveler lip *after* it had engaged the trailer bed.” *Id.* at 382, 909 N.E.2d at 568, 881 N.Y.S.3d at 646.

¹⁴⁴ *Id.* at 384, 909 N.E.2d at 569, 881 N.Y.S.3d at 647 (Smith, J., dissenting).

¹⁴⁵ Judge Smith seemed especially bothered by the effect of the majority’s holding:

I think both the majority’s holdings are wrong. But the more troubling of the two is the evisceration of *Scarangella*, which I fear will have real economic consequences. The predictability that was offered until today to manufacturers and distributors of equipment in this state is gone, and the result can only be an increase in cost—in the cost of liability insurance, and in the cost of safety features that buyers will no longer have the option to refuse. In much of this state, our economy struggles in the best of times,

c. Individual Rights and Liberties

Chief Judge Lippman's record in cases involving individual rights and liberties suggests a judicial philosophy interested in enhanced protection of such rights as compared to other members of the Court. For instance, Chief Judge Lippman joined Judge Ciparick's dissenting opinion in *Khrapunskiy v. Doar*, which was critical of the Court's holding that legal resident aliens who are aged, blind, or disabled are not entitled under the New York State and Federal Constitutions to the same level of benefits received by U.S. citizens with similar disabilities through the federal Social Security program.¹⁴⁶ The dissent called the majority's holding "regrettable" and noted not only that the decision runs contrary to controlling precedent, but that it is entirely "inconsistent with the long tradition in New York of fully providing assistance to the poor aged, blind and disabled."¹⁴⁷ After a thorough discussion of the historical enactment of the existing statutory framework, as well as the case law regarding benefits in this context, the dissent concluded that by "improperly import[ing] federal restrictions on alien eligibility for benefits . . . [New York] has violated article XVII of our State Constitution."¹⁴⁸ As a result, the dissent noted in a highly critical final paragraph, that "the majority today has turned its back on the history of New York's commitment to protect its most fragile and

and these are not the best of times. Decisions like today's can only make things worse. *Id.* at 386–87, 909 N.E.2d at 571, 881 N.Y.S.3d at 649 (Smith, J., dissenting).

¹⁴⁶ 12 N.Y.3d 478, 481–83, 909 N.E.2d 70, 72–73, 881 N.Y.S.2d 377, 379–80 (2009). Since 1974, the federal government has provided public assistance to the needy aged, blind, or disabled individuals through the Supplemental Security Income ("SSI") program in conjunction with additional state payments ("ASP") provided by the states, which Congress requires as a mandatory minimum supplement. In 1996, however, Congress passed legislation that cuts off SSI and ASP benefits for legal aliens who do not become United States citizens within seven years. Thus, the issue in the case is whether New York's attempt to mirror the federal rule through the enactment of Social Service Law § 209, which essentially limits ASP benefits to those who are eligible for federal assistance, is unconstitutional under the State and Federal Constitutions. *Id.*

¹⁴⁷ *Id.* at 493, 909 N.E.2d at 80, 881 N.Y.S.2d at 387 (Ciparick, J., dissenting).

¹⁴⁸ *Id.* (Ciparick, J., dissenting). Judge Ciparick also found that Social Service Law § 209 violates the Equal Protection Clauses of the Federal and State Constitutions by impermissibly restricting benefits based on immigration status absent a compelling justification by the state. *Id.* at 493–94, 909 N.E.2d at 80–81, 881 N.Y.S.2d at 387–88 (Ciparick, J., dissenting); see also David D. Siegel, *Legal Aliens, Though Resident in State, Need Not Be Paid Same Level of Benefits as Citizens*, 596 N.Y. ST. L. DIG. 3 (2009) ("The holding may seem inconsistent with some earlier New York cases, notably the relatively recent (2001) decision of the Court of Appeals in *Aliessa* . . . which held that the state's denial of benefits . . . based on alien status violated the state constitution.").

vulnerable populations.”¹⁴⁹

Moreover, there are several other examples in which the chief judge favored a position in support of heightened protection of individual rights. In *Anonymous ex rel. Anonymous v. City of Rochester*, Chief Judge Lippman joined a majority of the Court in finding that Rochester’s juvenile curfew law violated a father’s substantive due process rights.¹⁵⁰ Similarly, in *Godfrey v. Spano*, Chief Judge Lippman joined Judge Ciparick’s concurring opinion arguing that directives by executive and county officials that recognize out-of-state same-sex marriage for purposes of eligibility for benefits should be recognized based on New York’s “long-standing marriage recognition rule.”¹⁵¹ Although agreeing with the result of the case, it is notable that the concurring opinion did not rest its conclusions on the narrower holding of the majority—namely, that the legislature intended for the appropriate local officials, such as those issuing the directives in this case, to have complete discretion in determining the limits of dependent coverage provided that spouses and dependent children are covered.¹⁵² Thus, by basing its conclusions on the marriage recognition rule, the reasoning of the concurrence offers greater protections for out-of-state same-sex marriages as compared to the Court’s opinion.¹⁵³

IV. CONCLUSION

It has certainly been a busy and pressure-packed first year on the Court for Chief Judge Lippman. Considering that he took over for Chief Judge Kaye, as well as the controversy and criticism surrounding his appointment, it would not have been a surprise if there had been a letdown at the Court. Nevertheless, after a year as chief, few can argue that his tenure thus far has been anything short of a complete success.

As the leader of the Court, Chief Judge Lippman has been at the forefront of controversial issues both inside and outside the courtroom. He has organized a permanent task force on wrongful convictions in New York, succeeded in increasing the number of criminal leave applications granted, and continued to champion the

¹⁴⁹ *Khrapunskiy*, 12 N.Y.3d at 495, 909 N.E.2d at 81, 881 N.Y.S.2d at 388 (Ciparick, J., dissenting).

¹⁵⁰ 13 N.Y.3d 35, 915 N.E.2d 593, 886 N.Y.S.2d 648 (2009).

¹⁵¹ 13 N.Y.3d 358, 377 (2009) (Ciparick, J., concurring).

¹⁵² *Id.* at 376.

¹⁵³ See also Roberta Kaplan, *The Court of Appeals’s Decision in Godfrey v. Spano: A Troubling Exercise of Indecision*, 73 ALB. L. REV. 701 (2010).

rights of judges who have not been given a pay raise for over a decade. And he has done so aggressively, unafraid of criticism even from the person who appointed him.

His decisions have signaled the development of a more progressive Court compared to recent history. Over the past year, Chief Judge Lippman won major victories in several high-profile cases including those involving workers' rights, the rights of the accused, and individual rights and liberties—many cases of which will certainly have impact beyond New York State. To achieve his desired result, Chief Judge Lippman has brought a new approach— independent of his predecessor—that focuses more on getting results rather than garnering unanimity. And although controversial, the Court's opinions have been bolder, with judges consistently challenging holdings through separate opinions. Even with the rising number of dissents and the divisiveness within opinions it seems that many of the other members of the Court have, at least to some extent, been “Lippmanized,” joining him in several high-profile decisions.¹⁵⁴

Ultimately, there seems to be a new buzz surrounding the Court of Appeals during the Lippman era. No doubt a large part of that is due to his leadership style, as well as his aptitude as a jurist. And, even after all the criticism concerning his lack of a judicial record, Chief Judge Lippman may turn out to be one of those famous chief judges mentioned at the beginning of this article. In the words of Chief Judge Lippman, “not too shabby” for a kid from the Lower East Side.¹⁵⁵

¹⁵⁴ See Eligon, *supra* note 31, at A25.

¹⁵⁵ Joel Stashenko, *Paterson Impressed by Lippman's Creativity, Administrative Skills*, N.Y. L.J., Jan. 15, 2009, at 1 (quoting Chief Judge Lippman).

APPENDIX A							
Non-Unanimous Decisions of the Court of Appeals in 2009; Chief Judge Lippman Taking Part							
Case	Case type	Result	Vote	Lippman Votes	Op. Author	Concur.	Dissent
<i>Criminal Cases</i>							
People v. Bailey	Criminal	Defendant	5-2	W/Majority	Jones	x	Pigott
People v. Bauman	Criminal	Defendant	5-2	W/Majority	Jones	x	Pigott
People v. Borrell	Criminal	State	6-1	W/Majority	Lippman	x	Pigott
People v. Buchanan	Criminal	Defendant	6-1	W/Majority	Per Curiam	x	Read
People v. Davis	Criminal	State	5-2	W/Majority	Ciparick	x	Jones
People v. Fuentes	Criminal	State	5-2	W/Majority	Ciparick	x	Jones
People v. Kalin	Criminal	State	4-3	W/Dissent	Graffeo	x	Ciparick
People v. Weaver	Criminal	Defendant	4-3	W/Majority	Lippman	x	Smith
<i>Civil Cases</i>							
Anonymous v. City of Rochester	Const. Issues	Pro-Individual	4-3	W/Majority	Jones	Graffeo	Pigott
Khrapunskiy v. Doar	Const. Issues	Pro-State	5-2	W/Dissent	Jones	x	Ciparick
Skelos v. Paterson	Const. Issues	Pro-State	4-3	W/Majority	Lippman	x	Pigott
Koehler v. Bank of Bermuda	Cred. Suits	Pro-Creditor	4-3	W/Majority	Pigott	x	Smith
Kipper v. NYP Holdings Co.	Defamation	Pro-Defendant	6-1	W/Majority	Ciparick	x	Pigott
Godfrey v. Spano,	Indiv. Rights	Pro-Individual	4-3**	W/Concurrence	Pigott	Ciparick	None
Allstate Ins. Co. v. Rivera	Insurance	Pro-Insurer	5-2	W/Dissent	Jones	x	Ciparick
Ferluckaj v. Goldman Sachs & Co.	Labor	Con-worker	4-3	W/Dissent	Smith	x	Pigott
Lee v. Astoria Generating Co.	Labor	Con-Worker	5-2	W/Dissent	Jones	x	Ciparick
Misicki v. Caradonna	Labor	Pro-worker	4-3	W/Majority	Read	x	Graffeo*
Bazakov v. Lewis	Malpractice	Con-plaintiff	4-3	W/Dissent	Smith	x	Lippman
Duffy v. Vogel	Malpractice	Pro-plaintiff	6-1	W/Majority	Lippman	x	Smith
Buffalo Crushed v. Cheektowaga	Muni. Corp.	Pro-landowner	5-2	W/Dissent	Ciparick	x	Lippman
Gorman v. Town of Huntington	Muni. Corp.	Pro-Muni	4-3	W/Dissent	Pigott	x	Ciparick*
Passante v. Agway Consumer	Prod. Lib.	Pro-worker	4-3	W/Majority	Pigott	x	Smith
Crucible Materials v. N.Y. Power	Pub. Auth.	Con-State	5-2	W/Majority	Graffeo	x	Read
Reiber v. GMAC, LLC	Sales	Pro-Creditor	4-3	W/Dissent	Pigott	x	Smith
x = no concurring opinion * = two dissenting opinions **Although in <i>Godfrey v. Spano</i> all members of the Court concurred in the result, the majority and concurrence reached their conclusions on significantly different grounds. Therefore, that decision is included in this Comment's analysis.							