

JUDGE VICTORIA A. GRAFFEO: COMMITTED,  
CONSERVATIVE, COLLEGIAL

*Jeremy A. Cooney\**

*It is too early for all but speculation on how Judge Graffeo's appointment will impact the court. Commentators generally expect her to be moderately conservative and self-restrained. If her voting does turn out to be staunchly conservative—i.e., strongly pro-prosecution and pro-government authority—she would be continuing in the path of her predecessor, [Judge] Bellacosa. That in itself would create no change . . . . On the other hand, if Graffeo's voting were to be more centrist or, by surprise, somewhat liberal, her presence would then have a moderating and even liberalizing effect on the Court of Appeals . . . .<sup>1</sup>*

I. INTRODUCTION

After nearly a decade of service on the New York Court of Appeals, Associate Judge Victoria A. Graffeo is far from liberal.

Appointed in 2001 by Republican Governor George E. Pataki, Judge Graffeo's judicial philosophy on the high court bench has been unsurprisingly conservative. Her voting record has been consistently pro-prosecution and pro-government authority. But despite cultural and ideological similarities, she has distinguished herself from Judge Joseph W. Bellacosa, whose seat she replaced after his departure from the court.<sup>2</sup>

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\* Executive Editor for Symposia, *Albany Law Review*; J.D. Candidate, Albany Law School of Union University, May 2010; B.A., Hobart College, 2004. With appreciation to Professor Vincent Bonventre, whose expertise and vast knowledge of the New York Court of Appeals is unparalleled. Special thanks also to my friends Matthew Laroche, Peter McCormack, and the members of the *Albany Law Review* editorial board for their guidance, patience, and support.

<sup>1</sup> Vincent Martin Bonventre & Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments, 2000*, 64 ALB. L. REV. 1355, 1394–95 (2001).

<sup>2</sup> See John Caher, *Pataki Names Graffeo to Court Of Appeals*, N.Y. L.J., Nov. 3, 2000, at 1 (“And like the man she apparently will replace, Justice Graffeo is an Italian American who lives in the Albany suburb of Guilderland.”); see also *id.* at 1 (“[Judge Bellacosa] was known for his conservative, law-and-order decisions and bitter dissents.”).

Unlike Judge Bellacosa, Judge Graffeo has taken a gentler role on the state's highest tribunal.<sup>3</sup> By most often joining in the majority's decisions, many observers would not describe her as a "mover and shaker." In fact, during her lengthy tenure, she has only authored a small number of dissenting opinions.<sup>4</sup> Her reluctance to authoring dissents was somewhat predictable based upon the fact that she had only written or joined three dissenting opinions in the over 1,800 cases that came before her on the Third Department.<sup>5</sup> Moreover, in contrast to some of her colleagues, her dissents are neither written with a sharp tongue nor laced with hostility, but rather written in a clear-cut fashion; exacting the legal point and supporting her proposition with only the facts of the case at-hand.<sup>6</sup>

Her mild presence should not, however, be mistaken for complacency or insecurity. Judge Graffeo is steadfast in her beliefs and is not afraid to voice discontent. Most importantly, she is consistent when applying her judicial beliefs. To that end, by reviewing her professional background, selected case law, and her decision-making during her tenure, this article explores some of her judicial themes that have emerged to afford the reader a better understanding of who she is as a judge on the state's highest court.

## II. BACKGROUND

On November 3, 2000, at a news conference in the state's Executive Chamber, Governor Pataki nominated then-Appellate Division Justice Victoria Graffeo for the New York Court of the Appeals.<sup>7</sup> She was appointed to fill the vacancy left by Associate

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<sup>3</sup> *Id.* (noting that "there is nothing biting, nothing particularly controversial, nothing of the kind of vehemence you saw in [Judge Graffeo's] predecessor's dissenting opinions").

<sup>4</sup> According to this author's estimate, Judge Graffeo has authored approximately eighteen dissenting opinions during her entire tenure on the Court of the Appeals. In 2009 alone, Judge Graffeo wrote only one dissenting opinion. See generally Matthew J. Laroche, Comment, *Chief Judge Jonathan Lippman: A New Era*, 73 ALB. L. REV. 925 (2010). Contrast this with her colleague, Judge Robert Smith, who has written over sixty five dissenting opinions since his joining the Court in 2004. Peter A. Mancuso, Comment, *The Independent Jurist: An Analysis of Judge Robert S. Smith's Dissenting Opinions*, 73 ALB. L. REV. 1019 (2010).

<sup>5</sup> See Raymond Hernandez, *Pataki Selected Judge for Appeals Court He Sees as Lenient*, N.Y. TIMES, Nov. 3, 2000, at B11 ("The experts describe Judge Graffeo as a moderate who has virtually always joined in the majority opinion of the Appellate Division . . ."); see also Joe Mahoney, *Pataki Picks State Judge; Taps Woman for High Court*, N.Y. DAILY NEWS, Nov. 3, 2000, at 26 (noting that Judge Graffeo only dissented in a "handful of opinions out of more than 1,500 issued during her time on the appellate bench").

<sup>6</sup> See John Caher, *Pataki Names Graffeo to Court Of Appeals*, N.Y. L.J., Nov. 3, 2000, at 1 [hereinafter Caher, *Pataki Names Graffeo*].

<sup>7</sup> See Hernandez, *supra* note 5.

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Judge Joseph Bellacosa, who left the court to become Dean of St. John's University Law School.<sup>8</sup> Upon nominating Judge Graffeo, Governor Pataki stated that she "ha[d] greatly distinguished herself throughout her diverse career in public service."<sup>9</sup>

Judge Graffeo's public service to the State of New York began in 1982, when she served as assistant counsel to the New York State Division of Alcoholism and Alcohol Abuse.<sup>10</sup> Two years later, she served in the state legislature as counsel to the Assembly Republican Minority Leader Pro Tempore, Kemp Hannon, and then as chief counsel to Assembly Minority Leader Clarence D. Rappleyea, Jr. from 1989 through 1994.<sup>11</sup>

In 1995, newly elected Republican Attorney General Dennis Vacco named Victoria Graffeo as his solicitor general. In her capacity as a solicitor general, Victoria Graffeo worked closely with Attorney General Vacco to defend New York's 1995 revival of its death penalty statute.<sup>12</sup> She also was instrumental in the criminalization of physician-assisted suicide.<sup>13</sup>

In September 1996, Governor Pataki appointed Victoria Graffeo to fill a vacancy for the New York State Supreme Court, Third Judicial District, in Albany, N.Y.<sup>14</sup> Three months later, she was elected to a full-term on the state's supreme court.<sup>15</sup> Her campaign for the supreme court seat was made difficult after Democrats exposed that she was receiving large amounts of funding from then U.S. Senator Alfonse D'Amato, a Republican, and Goldman Sachs. Both of these funding streams caused people to question her ability to be an independent judicial voice on the court.<sup>16</sup> Nevertheless, she prevailed and shortly thereafter, in 1998, Judge Graffeo was elevated to the New York State Supreme Court, Appellate Division, Third Department, as an associate justice.

Less than five years after first serving on the bench, on November

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<sup>8</sup> See Mahoney, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> New York State Court of Appeals, The Honorable Victoria A. Graffeo, <http://www.courts.state.ny.us/ctapps/vag.htm> (last visited Mar. 21, 2010) [hereinafter Court of Appeals Web site].

<sup>11</sup> *Id.*

<sup>12</sup> See Mahoney, *supra* note 5.

<sup>13</sup> *Id.*

<sup>14</sup> See Court of Appeals Web site, *supra* note 10. The Pataki appointment was not surprising as many viewed Graffeo as one of the governor's "political protégés." Hernandez, *supra* note 5. The relationship between Graffeo and Pataki most likely first stemmed from their service in the New York State Assembly, when Pataki was a Republican assemblyman and Graffeo working for the Republican minority leader. *Id.*

<sup>15</sup> See Court of Appeals Web site, *supra* note 10.

<sup>16</sup> *Id.*

29, 2000, the New York State Senate unanimously confirmed Victoria Graffeo as an associate judge for the highest tribunal in the state.<sup>17</sup> She was selected over six candidates: Appellate Division, First Department Justice Richard T. Andrias; Administrative Justice Stephen G. Crane, Manhattan; Administrative Justice Steven W. Fisher, Queens; former New York State Bar Association President James C. Moore; Deputy Chief Administrative Judge Juanita Bing Newton; and then-Presiding Judge of the Court of Claims Susan Phillips Read (a later Pataki appointment to the Court of Appeals).<sup>18</sup> The governor attributed his selection of Judge Graffeo to her professional experience in the three branches of government and her receiving the highest ratings possible from the New York State Bar Association, the Association of the Bar of the City of New York, the Women's Bar Association of the State of New York and the New York State Trial Lawyers Association.<sup>19</sup>

Judge Graffeo became the third woman to serve on the state high court, joining then-Chief Judge Judith Kaye and Senior Associate Judge Carmen Beauchamp Ciparick.<sup>20</sup> Today, at age fifty-eight, Judge Graffeo is the second-most senior member of the Court of Appeals.

Judge Graffeo, originally from Rockville Center on Long Island, grew up in New York's capital region.<sup>21</sup> She graduated from the State University of New York at Oneonta in 1974 and, most notably for this law journal, she is a favorite daughter of Albany Law School of Union University, who received her law degree in 1977.<sup>22</sup> She presently resides in Guilderland, New York, with her husband, Mr. Edward E. Winders.<sup>23</sup> She has two grown children, Jennifer and

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<sup>17</sup> Laura Mansnerus, *A New Judge is Welcomed for Top Court in Albany*, N.Y. TIMES, Nov. 30, 2000, at B5.

<sup>18</sup> See Caher, *Pataki Names Graffeo*, *supra* note 6.

<sup>19</sup> *Id.*

<sup>20</sup> See Mahoney, *supra* note 5. Judge Graffeo was the first woman named to the Court of Appeals by Governor Pataki. *Id.* Both Chief Judge Judith Kaye and Senior Associate Judge Carmen Beauchamp Ciparick were appointed by Governor Mario Cuomo, a Democrat. See Hernandez, *supra* note 5.

<sup>21</sup> See Hernandez, *supra* note 5.

<sup>22</sup> *Id.* Special mention should be made that Judge Graffeo is an alumnus of Albany Law School of Union University. She is a member of the Albany Law School National Alumni Association Board of Directors, a recipient of the Distinguished Alumni Award, a former commencement speaker, and a recipient of the Distinguished Alumni in Government Award. Without question, Judge Graffeo has been a loyal and dedicated alumnus, and the law school is most proud to recognize her as one of its own. See Albany Law School, <http://www.albanylaw.edu> (last visited Mar. 21, 2010).

<sup>23</sup> See Hernandez, *supra* note 5; see also Caher, *supra* note 6 (noting her family background).

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Judge Graffeo previously served as president and board member of the Capital District Chapter of the Women's Bar Association of the State of New York.<sup>25</sup> She is also a member of the Albany County Bar Association and New York State Bar Association, for which she served as a member of the Committee to Promote Public Trust and Confidence in the Legal System.<sup>26</sup>

### III. JUDICIAL THEMES

#### A. *Strict Statutory Interpretation and Legislative Deference*

After ten years of serving in the New York State Assembly chamber,<sup>27</sup> it is of little surprise that Judge Graffeo strictly adheres to statutory framework and declines to judicially postulate legislative intent.<sup>28</sup> In her tenure on the bench, she has consistently looked at the plain meaning of language, sponsors' memos, floor debates, and other legislative history devices to best determine legislative intent. And if given the opportunity, she will defer to the legislative branch.<sup>29</sup> This is something that Governor Pataki found important in her selection to the high court when he stated "I have made it very plain that I don't believe that a court should be usurping legislative authority."<sup>30</sup> He got what he wanted with Judge Graffeo.

One example of Judge Graffeo's methodology for indentifying legislative intent is seen in her majority opinion in *In re M.B.*<sup>31</sup> The case involved the guardian-brother of a forty-two year old mentally retarded man, M.B.<sup>32</sup> Due to Down's Syndrome, M.B. never possessed the ability to make health care decisions for himself.<sup>33</sup>

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<sup>24</sup> See Caher, *Pataki Names Graffeo*, *supra* note 6 (noting her family background).

<sup>25</sup> *Id.* (noting her professional activities).

<sup>26</sup> *Id.*

<sup>27</sup> See *supra* Part II.

<sup>28</sup> Upon her appointment to the Court of Appeals, "[l]egal observers called Graffeo a moderate who shares Pataki's belief that courts are not meant to legislate via judicial fiat." Mahoney, *supra* note 5.

<sup>29</sup> See John Caher, *On a Court Where Consensus Dominates, Divisions Begin to Emerge*, N.Y. L.J., Aug. 4, 2004, at 1 ("Judge Graffeo and Read are conservative in both civil and criminal matters and more deferential to the legislature and executive. Judge Graffeo worked in the legislative and executive branches before joining the judiciary. Judge Read was an assistant counsel to the governor.").

<sup>30</sup> See Caher, *Pataki Names Graffeo*, *supra* note 6.

<sup>31</sup> 6 N.Y.3d 437, 846 N.E.2d 794, 813 N.Y.S.2d 349 (2006).

<sup>32</sup> *Id.* at 444, 846 N.E.2d at 798, 813 N.Y.S.2d at 353.

<sup>33</sup> *Id.*

And, in January of 2003, his brother was appointed guardian.<sup>34</sup> Sometime after this new guardian appointment, M.B. fell terminally ill and his brother sought to end life-sustaining treatment.<sup>35</sup>

In the fall of 2002, the state legislature passed legislation that clarified and expanded the rights of guardians' authority to make health care decisions for their respective wards.<sup>36</sup> The new law, the Health Care Decisions Act for Persons with Mental Retardation ("HCDA"), went into effect on March 16, 2003.<sup>37</sup> The guardian-brother sought to employ these new rights with respect to his brother, but his authority to do so was challenged by the Mental Hygiene Legal Service, the residential service that took care of M.B. before he was hospitalized. This case, therefore, was brought to the Court of Appeals to interpret the legislative intent surrounding HCDA. More specifically, the question presented was whether guardians appointed prior to HCDA's effective date were retroactively granted the authority to make health care decisions, including the decision to end life-sustaining treatment.<sup>38</sup>

Writing for the Court, Judge Graffeo stated "our task—as it is in every case involving statutory interpretation—is to ascertain the legislative intent and construe the pertinent statutes to effectuate that intent."<sup>39</sup> To accomplish this task, she examined the statutory text and the contents of the bill jacket, including sponsors' memos and letters of support.<sup>40</sup>

First, in examining the act's language, Judge Graffeo wrote that "statutory text . . . is the clearest indicator of legislative purpose."<sup>41</sup> By going word-by-word and phrase-by-phrase, she was able to identify the legislature's intent by their inclusion and exclusion of language. Second, by reviewing assembly and senate sponsors' memos, she was able to decipher the specific bill sponsors' goals and intentions for passing the legislation.<sup>42</sup> For example, Judge Graffeo quoted her former boss in the assembly, later-turned state senator Kemp Hannon, to demonstrate his intent to grant authority to all guardians, present and future, the ability to make health care

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *In re M.B.*, 6 N.Y.3d at 441, 846 N.E.2d at 796, 813 N.Y.S.2d at 351.

<sup>38</sup> *Id.* at 444, 846 N.E.2d at 798, 813 N.Y.S.2d at 353.

<sup>39</sup> *Id.* at 447, 846 N.E.2d at 800, 813 N.Y.S.2d at 355.

<sup>40</sup> *Id.* at 447–51, 846 N.E.2d at 800–04, 813 N.Y.S.2d at 355–59.

<sup>41</sup> *Id.* at 447, 846 N.E.2d at 800, 813 N.Y.S.2d at 355.

<sup>42</sup> *Id.* at 449–50, 846 N.E.2d at 802–03, 813 N.Y.S.2d at 357–58.

decisions.<sup>43</sup> Third, and finally, she looked inside the bill jacket at the letters written to the counsel to the governor in support or opposition to the legislation.<sup>44</sup> She looked to these letters as a further means of understanding how outside groups and organizations viewed the legislation and how these groups understood the legislature's intent.

The Court ultimately decided that the brother-guardian was able to make medical decisions for M.B., despite being appointed before HCDA. The outcome, however, is not as important as the method employed to reach it. By deferring to statutory language and historical legislative documents, Judge Graffeo did not substitute her own judgment for that of the Court. Instead, she chose to rely on documented evidence to interpret the meaning of the act.

In another case, *Hernandez v. Robles*,<sup>45</sup> Judge Graffeo more explicitly stated her preference for legislative deference. Writing in a separate concurring opinion, she said “[a]bsent a constitutional violation, we may not disturb duly enacted statutes to, in effect, substitute another policy preference for that of the Legislature.”<sup>46</sup> This particular case, one of the many same-sex marriage challenges brought during her tenure, gave her the ability to advise the Court on what she often thinks is the most appropriate route—deference to the legislature. Although she agreed with the majority that the challenged Domestic Relations Law did not violate the state's constitution, she wrote separately to especially note that “[t]his type of determination is a central legislative function and law-makers are afforded leeway in fulfilling this function. . . . [T]he decision . . . rests with our elected representatives.”<sup>47</sup> And, thus, Judge Graffeo continued to voice her belief that laws should be narrowly read and that statutory interpretation be confined to the intent of law-makers, not judges.

### *B. Favors Bright-Line Rules*

One of the most challenging tasks for law students and practicing attorneys alike is being able to identify the legal rules that court opinions promulgate. When case law or statutory language is ambiguous or judicial interpretation is divided, the bar looks to the

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<sup>43</sup> *Id.* at 449, 846 N.E.2d at 802, 813 N.Y.S.2d at 357.

<sup>44</sup> *Id.* at 450, 846 N.E.2d at 802, 813 N.Y.S.2d at 357.

<sup>45</sup> 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

<sup>46</sup> *Id.* at 367, 855 N.E.2d at 13, 821 N.Y.S.2d at 782.

<sup>47</sup> *Id.* at 379, 855 N.E.2d at 22, 821 N.Y.S.2d at 791.

Court of Appeals to clarify and provide guidance on how to proceed. As a member of the high court, Judge Graffeo favors providing bright-line rules to avoid future confusion and to decrease the litigation that ultimately results from the confusion.

In *Graev v. Graev*,<sup>48</sup> the Court of Appeals explored the definition of “cohabitation” with respect to matrimonial actions and related settlement agreements. The case concerned an ex-wife who sought to enforce a settlement agreement’s spousal maintenance obligation against her ex-husband.<sup>49</sup> The controversy stemmed from the ex-husband’s refusal to pay future support because his ex-wife began an extended intimate relationship with a new partner.<sup>50</sup> According to their divorce settlement agreement, if his ex-wife cohabited with an unrelated adult for a period of sixty consecutive days, the spousal maintenance obligation would be terminated.<sup>51</sup> The ex-wife denied cohabitating with her new partner because she and her partner were economically independent of each other.<sup>52</sup> The question raised to the Court was what specifically constituted “cohabitation.”

The Court held that the term “cohabitation” was ambiguous and the term required extrinsic evidence as to the parties’ intent to its specific meaning.<sup>53</sup> As a result of the term’s vagueness, the Court did not uphold the *Graev* cohabitation provision as triggering a termination of spousal maintenance. The case, therefore, was remitted to state supreme court for further fact-finding proceedings on the intent of the parties as to the meaning of cohabitation.

In an unusually sharp dissenting opinion for Judge Graffeo, she found the cohabitation provision to be unambiguous because of its specific sixty day time period.<sup>54</sup> And, as noted above, Judge Graffeo narrowly confines her interpretation of statutes to the plain meaning of the text and, if necessary, the legislative history to determine lawmakers’ intent.<sup>55</sup> As a result, when reviewing the settlement agreement’s plain language, she stated that the term cohabitation has “a commonly-accepted core meaning,” based upon law dictionaries, existing case law, and common understanding.<sup>56</sup>

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<sup>48</sup> 11 N.Y.3d 262, 898 N.E.2d 909, 869 N.Y.S.2d 866 (2008).

<sup>49</sup> *Id.* at 265–66, 898 N.E.2d at 910–11, 869 N.Y.S.2d at 867–68.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 266, 898 N.E.2d at 910, 869 N.Y.S.2d at 867.

<sup>52</sup> *Id.* at 267–68, 898 N.E.2d at 911–12, 869 N.Y.S.2d at 868–69.

<sup>53</sup> *Id.* at 274, 898 N.E.2d at 916, 869 N.Y.S.2d at 873.

<sup>54</sup> *Id.* at 274, 898 N.E.2d at 916, 869 N.Y.S.2d at 873.

<sup>55</sup> *See supra* Part III.A.

<sup>56</sup> *Graev*, 11 N.Y.3d at 277, 898 N.E.2d at 918, 869 N.Y.S.2d at 875.

She, therefore, chose offer something the majority refused to offer—clarity—when she stated “[t]he wiser choice is to articulate a clear rule of law: cohabitation occurs when two un-related adults who are not married to each other have an intimate relationship and love together habitually for an agreed-to period of time.”<sup>57</sup>

Judge Graffeo’s decision to devise a bright-line rule for cohabitation was based upon two factors. First, to avoid a “proliferation of litigation” that may result from the use of such a provision in future matrimonial actions.<sup>58</sup> And, second, the majority’s requirement of finding extrinsic evidence “undermines the primary purpose for entering into written agreements-to memorialize the parties’ understanding of the parameters of permissible and impermissible conduct and personal relations,” which results in future uncertainty among parties.<sup>59</sup> Certainly, Judge Graffeo’s decision to dissent in a separate opinion demonstrated her dislike for ambiguous court interpretations, but it also highlighted her commitment to providing guidance to the bench and bar on how to resolve future questions of law.

The interest of Judge Graffeo in establishing bright-line rules also applies in the criminal context. In *People v. Grice*,<sup>60</sup> she clarified the threshold moment at which the state constitutional requirement for indelible right to counsel is satisfied.<sup>61</sup> It should also be noted, that the pro-prosecution result from this case is also characteristic of decisions penned by Judge Graffeo.<sup>62</sup>

The defendant in *Grice* was arrested in relation to a shooting, taken into custody, and advised of his *Miranda* rights.<sup>63</sup> At 11:20 A.M., defendant waived his *Miranda* rights.<sup>64</sup> At 12:30 P.M., defendant’s father contacted a detective to advise him that his son was represented by counsel and the attorney was en route to the station.<sup>65</sup> Despite this notice by defendant’s father, the police continued their interrogation which yielded two inculpatory statements signed at 1:45 P.M. and 2:00 P.M., respectively.<sup>66</sup> At 2:10 P.M., the defendant’s attorney contacted the lead detective to advise

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<sup>57</sup> *Id.* at 280, 898 N.E.2d at 920, 869 N.Y.S.2d at 877.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> 100 N.Y.2d 318, 794 N.E.2d 9, 763 N.Y.S.2d 227 (2003).

<sup>61</sup> *Id.*

<sup>62</sup> *See infra* Part III.D.

<sup>63</sup> *Grice*, 100 N.Y.2d at 320, 794 N.E.2d at 10, 763 N.Y.S.2d at 227–29.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

him of the representation and the interrogation ended.<sup>67</sup> At trial, defendant moved to suppress the two statements on the basis that his indelible right to counsel attached before the inculpatory statements were signed because of his father's notification that defendant was represented by counsel.<sup>68</sup> The hearing court denied the motion, and convicted defendant of multiple charges derived from his signed statements to the police.<sup>69</sup> The appellate division affirmed the conviction, and the Court of Appeals granted leave to review the state constitutional claim.<sup>70</sup>

Judge Graffeo, writing for the Court, allocates a large part of the opinion to the review of a series of state high court opinions that address the right to counsel. She does this not to emphatically make a point, but rather to weave together themes that form a clear rule of law. Accordingly, in an effort to clarify when the right to counsel attaches to a criminal defendant, she devised "workable standards" that have been the "hallmark of [the Court's] right to counsel jurisprudence."<sup>71</sup> With that in mind, she articulated a rule that the indelible right to counsel is triggered for a criminal defendant when the attorney or agent of the attorney notifies police that defendant is represented by counsel.<sup>72</sup> The result of this rule, therefore, allows Grice's statements to be admitted and the convictions to be upheld because his father's notice to the police cannot be substituted for the notice directly from counsel.<sup>73</sup>

What is important for the present analysis is not necessarily the pro-prosecution result, but rather Judge Graffeo's affinity for establishing understandable rules of law. Said best in her own words in *Grice*,

[t]he bright-line rule we reaffirm in this case insures that counsel's involvement in reliably communicated to the police as soon as possible, thereby preventing an interrogation from continuing on the basis of what a particular police officer may consider to be ambiguous or untrustworthy information provided by a relative or friend of the suspect, or some other third party.<sup>74</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 320, 794 N.E.2d at 10, 763 N.Y.S.2d at 227–29.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 324, 794 N.E.2d at 13, 763 N.Y.S.2d at 232.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 323–324, 794 N.E.2d at 12–14, 763 N.Y.S.2d at 231–32.

*C. Procedural Stalwart*

Judge Graffeo is the kind of judge that procedural junkies adore. Her vast knowledge of civil and criminal procedure law allows her to guard the docket of the Court by dismissing or refusing to decide cases on the merits that are procedurally barred. And while some members of the bar pay too little attention to the idiosyncrasies of New York civil and criminal practice, Judge Graffeo's strict adherence to the procedure should caution the practicing attorney to follow the rules or risk an unfortunate result at the Court of Appeals. Two notable examples of her affection for procedural nuance can be found in *Silver v. Pataki*<sup>75</sup> and *Harris v. Niagara Falls Board of Education*.<sup>76</sup>

In Judge Graffeo's first year on the Court of Appeals, she authored the lone dissenting opinion in *Silver*, arguing that the appellant, Sheldon Silver, member and speaker of the New York State Assembly lacked capacity and standing to challenge the constitutionality of Governor Pataki's exercise of line-item vetoes with respect to "non-appropriation bills."<sup>77</sup> The case was brought by Speaker Silver who was angered by the governor's invocation of his veto power in striking fifty five line-items on bills passed by the assembly that were "non-appropriation," but rather policy orientated.<sup>78</sup> The speaker argued that under the state constitution, the governor lacked the authority to veto this specific type of legislation.<sup>79</sup>

In response, Governor Pataki made a motion to dismiss based upon the legal capacity of the speaker to even bring the issue before a judicial body.<sup>80</sup> A Manhattan trial court rejected the governor's procedural motion,<sup>81</sup> but that decision was narrowly overturned by the First Department, which, in a 3-2 vote, stated the speaker lacked capacity and standing to bring his claim.<sup>82</sup> The Court of Appeals reversed, finding that the speaker was aggrieved as his vote, cast as an individual assemblyman, was directly injured by the governor's nullifying line-item veto, and thus he was conferred

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<sup>75</sup> 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482 (2001).

<sup>76</sup> 6 N.Y.3d 155, 844 N.E.2d 753, 811 N.Y.S.2d 299 (2006).

<sup>77</sup> *Silver*, 96 N.Y.2d 535, 755 N.E.2d at 845, 730 N.Y.S.2d at 485.

<sup>78</sup> John Caher, *Pataki Seeks To Reargue Ruling on Veto Challenge 'Silver'*, N.Y. L.J., July 30, 2001 at 1.

<sup>79</sup> *Id.*

<sup>80</sup> *Silver*, 96 N.Y.2d at 535, 755 N.E.2d at 845, 730 N.Y.S.2d at 485.

<sup>81</sup> 179 Misc. 2d 315, 684 N.Y.S.2d 858 (Sup. Ct. 1999).

<sup>82</sup> 274 A.D.2d 57, 711 N.Y.S.2d 402 (App. Div. 1st Dep't 2000).

standing.<sup>83</sup> The high court's per curiam decision was 6–1, with Judge Graffeo as the sole dissenter.

One could make the argument that Judge Graffeo dissented because of her allegiance to Governor Pataki, who fast-tracked her judicial career by nominating her to the state high court less than a year before this decision was authored. Similarly, one might also speculate that Judge Graffeo's dissent was born out of malice for Speaker Silver, who has aggressively commanded the majority power of the New York State Assembly for years, including a brief period when Judge Graffeo was working for the assembly minority. Both of these hypotheticals, however, cannot be validated by reading her dissent. For, in a style that she has embraced throughout her time on the bench, Judge Graffeo concisely stated her opposition with supported legal reasoning based on the specific facts of the controversy before the Court. Showing neither support for her friend, the governor, nor disdain for the speaker, she challenged the majority's holding that the claim could be individually brought.

Judge Graffeo clearly stated her position when she wrote:

Capacity ensures that rights sought to be vindicated in court will be assured by a party legally entitled to enforce such rights. Here, I find that this dispute essentially involves the extent to which powers are to be shared by the two branches of government . . . . I therefore conclude this is clearly an institutional claim.<sup>84</sup>

Her dissent argues that the speaker's challenge was brought in his capacity as the leader of the assembly chamber, as part of the state's legislative branch, against the governor, the executive branch.<sup>85</sup> She argues that there has been no deprivation of Assemblyman Silver's individual ability to perform legislative duties and rather that the governor has "counteracted the cumulative actions of a majority of legislators by improperly vetoing legislation."<sup>86</sup> The injury suffered, therefore, was to the institution, not the individual lawmaker. Furthermore, as noted above, as a strict statutory textualist, she found no explicit authority in the

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<sup>83</sup> *Silver*, 96 N.Y.2d at 539, 755 N.E.2d at 847, 730 N.Y.S.2d at 487.

<sup>84</sup> *Id.* at 543, 755 N.E.2d at 850, 730 N.Y.S.2d at 490; *see also* Roy L. Reardon & Mary Elizabeth McGarry, *Assemblyman's Suit Against Governor Allowed to Proceed*, N.Y. L.J., Aug. 15, 2001, at 3 (noting that Judge Graffeo dissent "argued against the Court injecting itself into what is essentially a political quarrel").

<sup>85</sup> *See Silver*, 96 N.Y.2d at 543, 755 N.E.2d at 850, 730 N.Y.S.2d at 490.

<sup>86</sup> *Id.* at 545–546, 755 N.E.2d at 852–53, 730 N.Y.S.2d at 492–93.

state's constitution for an individual legislator to remedy wrongs made against his or her institution.<sup>87</sup> Again, perhaps best said by her own words in the dissent, "to vest a sole member of a legislative house with the implied authority to initiate a challenge to redress an institutional injury suffered by the legislative body that passed particular legislation . . . is to overlook fundamental principles of capacity and standing."<sup>88</sup>

In addition to larger concepts of procedure, such as standing, Judge Graffeo also hones in on some of the smaller technical details of procedure. In *Harris*, the Court explored an issue that most practitioners take for granted in civil practice—filing fees.<sup>89</sup> While commonly overlooked, the Court's decision in *Harris* created a devastating result for a plaintiff who failed to comply with CPLR 304 by not paying the required fee for a court index number.

The plaintiff in *Harris* brought a personal injury action against the Niagara Falls Board of Education and Niagara Falls School District, presumably both "deep pockets," for the injuries he sustained when his bicycle was struck by the defendant driver.<sup>90</sup> The vehicles were owned by the defendant government actors.<sup>91</sup> Under General Municipal Law section 50-e, the plaintiff was required to serve a notice of claim on the municipal defendants. Having failed to do so within the prescribed ninety days after the accident, the plaintiff filed for a special proceeding to obtain court leave to file a late notice of claim.<sup>92</sup> After being granted leave and serving the school board and district with the requisite notice of claim, the plaintiff commenced a personal injury action against both defendants in Niagara County.<sup>93</sup> The issue was that in the personal injury action, plaintiff used the same index number previously used for the special proceeding, and thus failed to obtain a new index number by paying the additional filing fee.<sup>94</sup>

The defendants quickly made a pre-answer motion to dismiss under CPLR 3211, claiming the action failed to properly commence

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<sup>87</sup> *Id.* at 544, 755 N.E.2d at 851, 730 N.Y.S.2d at 491. ("[T]here is no legal basis to find an individual legislator has the capacity to seek vindication for such alleged institutional harm.")

<sup>88</sup> *Id.* at 546, 755 N.E.2d at 853, 730 N.Y.S.2d at 493.

<sup>89</sup> *Harris v. Niagara Falls Bd. of Ed.*, 6 N.Y.3d 155, 157, 844 N.E.2d 753, 754, 811 N.Y.S.2d 299, 300 (2006).

<sup>90</sup> *Id.* at 157, 844 N.E.2d at 754, 811 N.Y.S.2d at 300.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

prior to the expiration of the statute of limitations.<sup>95</sup> Responding to the motion, the plaintiff sought leave to pay the filing fee, but the trial and appellate courts rejected the application opting instead for dismissal based on the court's lack of subject matter jurisdiction.<sup>96</sup>

In a decision that most would classify as draconian in nature, Judge Graffeo wrote for the Court in affirming the lower courts' decisions. She held that "[a] court should dismiss an action or proceeding only where the plaintiff or petitioner does not fulfill all the filing requirements *and* the defendant or respondent timely objects."<sup>97</sup> Moreover, relying on procedural case law, she quoted *Gershel v. Porr*, stating "[s]trict compliance with CPLR 304 and the filing system is mandatory, and the extremely serious result of noncompliance."<sup>98</sup>

The hard line ruling of the Judge Graffeo's *Harris* decision prompted then-Chief Administrative Judge Jonathan Lippman to request the state legislature reevaluate the procedural rules surrounding filing fees.<sup>99</sup> And, in 2007, the legislature acted by amending CPLR 2001 to allow more court discretion over filing fees.<sup>100</sup> The passage of the amendment allows the court to now cure unpaid filing fees without a jurisdictional consequence.<sup>101</sup> It is noteworthy that Professor Siegel wrote in his renowned treatise on New York Civil Procedure, "[t]he most immediate catalyst of the CPLR 2001 amendment was the Court of Appeals decision in *Harris v. Niagara Falls Bd. of Educ.*"<sup>102</sup> And thus, Judge Graffeo's strict adherence to procedure for the Court of Appeals was instrumental in effectuating statewide change in the civil procedure law. Moreover, it demonstrated that even the most minuscule procedural mechanisms, are still subject to scrutiny with Judge Graffeo on the high court.

#### *D. Conservative and Pro-Prosecution*

Upon her elevation to the state's highest tribunal, court watchers

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 157, 844 N.E.2d at 754, 811 N.Y.S.2d at 300.

<sup>97</sup> *Id.* at 159, 844 N.E.2d at 755, 811 N.Y.S.2d at 301.

<sup>98</sup> *Id.* at 158, 844 N.E.2d at 755, 811 N.Y.S.2d at 301 (quoting *Gershel v. Porr*, 89 N.Y.2d 327, 675 N.E.2d 836, 653 N.Y.S.2d 82 (1996)).

<sup>99</sup> Joel Stashenko, *Bill Would Disregard Some Procedural Errors*, N.Y. L.J., May 17, 2007, at 1.

<sup>100</sup> *Id.* (quoting Senator Volker, "[i]t gives the court discretion to correct or ignore mistakes that don't go to the heart of the cases").

<sup>101</sup> DAVID D. SIEGEL, *NEW YORK PRACTICE*, § 63, at 16 (4th ed., Supp. 2009).

<sup>102</sup> *Id.*

and commentators predicted that Judge Graffeo would bring a conservative voice, and thus a pro-prosecution vote, to the bench.<sup>103</sup> But her predicted role on the court was far from settled. The *New York Times* quoted longtime court expert and Albany Law School Professor Vincent Bonventre, stating that “Governor Pataki’s rhetoric has indicated that he wanted a very conservative judge who was very strong on law and order . . . [b]ut there is no indication that he is getting that in Justice Graffeo.”<sup>104</sup>

After her first year, the indication was certainly made much clearer. In an article published in this law review, Professor Bonventre joined with then student co-author Kelly M. Galligan, to reflect, in-part, upon Judge Graffeo’s first year on the court.<sup>105</sup> They noted that “Judge Graffeo . . . compiled a record in her first year that was as staunchly conservative as her predecessor’s typically was. In every divided public law case in 2001, criminal and civil, Graffeo sided with the position less favorable to the claim of individual right, liberty, or entitlement.”<sup>106</sup> Moreover, in classifying the seven judges of the Court of Appeals, they singled out Judge Graffeo as being the only “very conservative” voice in comparison with her colleagues.<sup>107</sup>

Notably, the Court has changed considerably since 2002. And with Governor Pataki’s subsequent appointments of Robert Smith, Susan Read, and Eugene Pigott to the Court, the conservative ideology of Judge Graffeo has become considerably less pervasive, and instead a voice that joins opinions made by more vocal conservatives, such as Judge Read and Judge Smith.<sup>108</sup> Nonetheless, her impact and vote on the high court bench has consistently been a reliable conservative vote, essentially always voting pro-prosecution.<sup>109</sup>

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<sup>103</sup> See e.g., Mansnerus, *supra* note 17 (noting that Judge Graffeo has a “very Republican resume”).

<sup>104</sup> Hernandez, *supra* note 5.

<sup>105</sup> Vincent Martin Bonventre & Kelly M. Galligan, *Court of Appeals Update, 2000 & 2001: Conservative Voting, Narrow Rulings*, 65 ALB. L. REV. 1085, 1115 (2002).

<sup>106</sup> *Id.*

<sup>107</sup> John Caher, *Court Observers See Gradual Shift from Solidarity to Individualism*, N.Y. L.J., July 25, 2002, at 1. Judges Wesley, Rosenblatt, Ciparick, and Levine were classified as “conservative,” Chief Judge Kaye was deemed “moderate conservative,” and Judge George Bundy Smith was the only “true liberal.” *Id.*

<sup>108</sup> See posting of Vincent Martin Bonventre to New York Court Watcher, *New York Court of Appeals: More Dissents in Kaye Court (Part 2: Who? How Many? What?)* (July 10, 2008, 17:23 EST) [hereinafter Bonventre, *More Dissents*] (“Graffeo and Read are very dependable conservative votes.”).

<sup>109</sup> See posting of Vincent Martin Bonventre to New York Court Watcher, *NY Court of Appeals: Granting Criminal Appeals---Up, Down, Now Up Again? (Part 5: When did the*

In 2008, Professor Bonventre examined the dissenting opinions of the Court of Appeals.<sup>110</sup> His analysis was rooted in the understanding that dissents “provide insights into other disagreements that are never made public. They afford us the strong indications we have of the authors’ strongest feelings, views, philosophies, tendencies, and ideological leanings.”<sup>111</sup> In his study, Professor Bonventre analyzed the thirteen total dissents written by Judge Graffeo and found that in the eight criminal cases “she disagreed with the majority which found some merit in a defendant’s arguments” and that “[i]n every one, she took the side of the prosecution.”<sup>112</sup> The same trend followed for another Pataki appointment, Judge Susan Read, who in every one of her criminal dissenting opinions, was pro-prosecution.<sup>113</sup> It should be noted that Judge Graffeo and Judge Read often vote together, dependably casting their pro-prosecution votes with or against the Court’s majority.<sup>114</sup> For this, Professor Bonventre labeled both Judges Graffeo and Read as “staunchly pro-prosecution judges.”<sup>115</sup>

One indicator of pro-prosecutorial inclination is the number of criminal leave applications granted by the individual judges of the Court of Appeals.<sup>116</sup> Upon being named chief judge, Jonathan Lippman vowed to examine why the Court of Appeals was so rarely granting criminal leave applications, in most instances reviewing only one or two out of every one hundred criminal convictions that appealed to the high bench.<sup>117</sup> In the mid 1990s, the granting of leave applications started to decrease.<sup>118</sup> This trend continued into the 2006.<sup>119</sup> Court experts have attributed this to the 1994 election

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*Grants Drop?*) (November 30, 2009, 23:59 EST) (“Shortly after his election as Governor in 1994, the Republican Pataki began a campaign of publicly rebuking the court for being too liberal, for coddling criminals, for caring more about criminals than victims . . . . He made it clear that he intended to appoint judges who were much more law-and-order oriented than those on the court at the time . . .”).

<sup>110</sup> Bonventre, *More Dissents*, *supra* note 108.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Joel Stashenko, *Though Often Unanimous, Independent Voices Emerge*, N.Y. L.J., Aug. 25, 2008, at 1 (“Judge Graffeo is apt to join Judge Read when the two disagree with the majority.”).

<sup>115</sup> Bonventre, *More Dissents*, *supra* note 108.

<sup>116</sup> Joel Stashenko, *Chief Judge To Review Why Court Accepts Few Criminal Appeals*, N.Y. L.J., April 22, 2009, at 1 (“Applications for leaves to appeal in criminal cases are assigned to Court of Appeals judges on a rotating basis and decided individually.”).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

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of Governor Pataki who ran in-part on a law and order platform.<sup>120</sup> It is not shocking, therefore, that Governor Pataki's appointment of Judge Graffeo reflected this trend of pro-prosecution.

Observers have labeled Judge Graffeo as "miserly" in granting criminal leave applications.<sup>121</sup> In an article published in this same law review issue, Alan Pierce tabulated the number of criminal leave grants for individual judges between 1999 and 2007.<sup>122</sup> According to his analysis, since being appointed, Judge Graffeo granted on average 4.1 leaves a year.<sup>123</sup> This number is below the average grant per judge and is reflective of Judge Graffeo's conservative and pro-prosecutorial leanings.<sup>124</sup> It is interesting to note, however, that in a recent article published in the *New York Law Journal*, Judge Graffeo increased the percentage of criminal leave application grants from 1.3% in 2008 to 2.7% through October 31, 2009.<sup>125</sup> Nevertheless, her grant percentage was still lower than that of the majority of the court.<sup>126</sup>

New York's controversial death penalty statute and its recent jurisprudential history is yet another strong indicator of Judge Graffeo's pro-prosecutorial theme. When Governor Pataki was first elected he promised to restore New York's death penalty.<sup>127</sup> On March 7, 1995, he signed the state's death penalty into law, calling it "the most effective of its kind in the nation."<sup>128</sup> What he did not anticipate was the courts' reticence to enforce the law in the many years that followed. In the last decade, the Court of Appeals has repeatedly stripped capital verdicts and reduced them to prison terms.<sup>129</sup> But these decisions have generally been far from unanimous, often at times with vehement dissents.<sup>130</sup> As a pro-prosecutorial maven, Judge Graffeo is often one of these dissenters.

There have been six cases appealed to the state's highest court to

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<sup>120</sup> *Id.* (quoting Professor Bonventre, "[i]t happened almost immediately after Pataki was condemning the Court for being too liberal and it has continued ever since.").

<sup>121</sup> *Id.*

<sup>122</sup> Alan J. Pierce, *If The System Is Not Working Let's Fix It: Why Seven Judges Are Better Than One for Deciding Criminal Leave Applications at the Court Of Appeals*, 73 ALB. L. REV. 765, 774 tbl.1 (2010).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Joel Stashenko, *Criminal Leave Grants Begin to Increase Under Lippman's Prodding*, N.Y. L.J., Nov. 27, 2009, at 1.

<sup>126</sup> *Id.*

<sup>127</sup> William Glaberson, *Division over Death Penalty*, N.Y. TIMES, Nov. 29, 2003, at B1.

<sup>128</sup> *Id.*

<sup>129</sup> Joel Stashenko, *Court of Appeals to Hear Last Pending Death Case*, N.Y. L.J., Sept. 10, 2007, at 1 [hereinafter Stashenko, *Last Pending Death Case*].

<sup>130</sup> *Id.*

evaluate the imposition of the death penalty statute. First, in 2002, the Court in *People v. Harris*<sup>131</sup> upheld the conviction but struck down the death penalty for a man who killed three people during a robbery of a social club. The 6–1 opinion, for which Judge Graffeo joined the majority, held that plea-bargaining provisions in the statute were unconstitutional because it discriminated against defendants who exercised their right to trial.<sup>132</sup>

Second, in 2003, *People v. Cahill*<sup>133</sup> involved a Syracuse man who beat his wife with a baseball bat and then poisoned her with cyanide.<sup>134</sup> The Court reduced the defendant's charge to second-degree murder because of a lack of aggravating factors and thus obviated the imposition of the death penalty statute.<sup>135</sup> Unlike *Harris* the year prior, this opinion was hotly contested and “the bitterly worded 4–2 decision did begin to reveal how the divided judges line up on the issue.”<sup>136</sup> Both Judge Graffeo and, her fellow pro-prosecutorial ally, Judge Read authored dissenting opinions. Both of their dissents were so fervent that former Court of Appeals judge, Stewart F. Hancock Jr. commented “[i]t looks to me as though you would have two votes favorable to upholding the death penalty on all grounds.”<sup>137</sup> Judge Graffeo employed her strict statutory interpretation and legislative deference in reading the criminal statutes, when she stated

[t]he majority's analysis is undeniably contrary to the language in the statute, produces irrational results and fails to give proper weight to the principled narrowing choices made by the Legislature. In my view, it is evident that the Legislature intended to apply the felony-murder rule to egregious cases like this. Even if I disagreed with that legislative determination, my personal belief as to whether this defendant is an appropriate candidate for first-degree murder would be irrelevant for one very basic reason—I am a judge, not a legislator.<sup>138</sup>

Third, in *People v. Mateo*<sup>139</sup> a twenty-seven year old man was sentenced to death for killing a mentally ill homeless man in

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<sup>131</sup> 98 N.Y.2d 452, 779 N.E.2d 705, 749 N.Y.S.2d 766 (2002).

<sup>132</sup> Stashenko, *Last Pending Death Case*, *supra* note 129.

<sup>133</sup> 2 N.Y.3d 14, 809 N.E.2d 561, 777 N.Y.S.2d 332 (2003)

<sup>134</sup> Stashenko, *Last Pending Death Case*, *supra* note 129.

<sup>135</sup> *Id.*

<sup>136</sup> Glaberson, *supra* note 127.

<sup>137</sup> *Id.*

<sup>138</sup> *Cahill*, 2 N.Y.3d at 107, 809 N.E.2d at 620, 777 N.Y.S.2d at 391.

<sup>139</sup> 2 N.Y.3d 383, 811 N.E.2d 1053, 779 N.Y.S.2d 399 (2004).

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Monroe County whom he had kidnapped.<sup>140</sup> The Court, in a majority opinion joined by Judge Graffeo, overturned the death sentence on a procedural technicality because the previously determined unconstitutional plea-bargain provision still remained in the statute when the death notice was filed against the defendant.<sup>141</sup>

Fourth and also in 2004, the Court again vacated a death sentence. In *People v. LaValle*<sup>142</sup> the defendant raped and murdered a Suffolk County school teacher with a screwdriver.<sup>143</sup> The Court rendered the death penalty statute to be unconstitutional because of its “deadlock provision,” which mandated that judges inform juries that if they (the jury) came to a deadlock over punishment, the judge would impose a parole-eligible sentence. Noting the provision’s coercive effect on juries and holding that the provision was not severable from the statute, the Court called on the legislature to take action.<sup>144</sup> In the 4–3 decision, Judge Graffeo joined Judges Smith and Read in dissenting, arguing that the majority was devising academic impediments to death penalty enforcement.<sup>145</sup>

Fifth, the Court in *People v. Shulman*<sup>146</sup> struck down the death penalty for a Suffolk County man who killed three prostitutes and then dismembered their bodies to conceal their identities. The unanimous decision was based on their previous decision in *LaValle*, which designated the death penalty statute as obsolete until the legislature removed the deadlock provision.

Sixth and finally in 2007, the Court invalidated the last remaining death sentence in New York. In *People v. Taylor*<sup>147</sup> the defendant murdered five employees at a Wendy’s restaurant during the course of a robbery.<sup>148</sup> Here, the Court again returned to the analysis in *LaValle*, stating that the death penalty statute was unconstitutional because of its inclusion of the non-severable deadlock provision. The three-Judge dissent, of which Judge Graffeo joined, argued that *Taylor* could be distinguished from

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<sup>140</sup> Stashenko, *Last Pending Death Case*, *supra* note 129.

<sup>141</sup> *Id.*

<sup>142</sup> 3 N.Y.3d 88, 817 N.E.2d 341, 783 N.Y.S.2d 485 (2004).

<sup>143</sup> Stashenko, *Last Pending Death Case*, *supra* note 129.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 6 N.Y.3d 1, 843 N.E.2d 125, 809 N.Y.S.2d 485 (2005).

<sup>147</sup> 9 N.Y.3d 129, 878 N.E.2d 969, 848 N.Y.S.2d 554 (2007).

<sup>148</sup> Paul Shectman, *Court Invalidated Death Penalty, Grappled with Evidence, Searches*, N.Y. L.J., Sept. 2, 2008, at S4.

*LaValle* because the trial judge specifically stated that if the jury deadlocked, he would impose consecutive sentences, making the defendant only eligible for parole after 175 years of incarceration.<sup>149</sup> For Judges Graffeo, Read, and Pigott, this jury instruction circumvented any coercive effect of the deadlock provision on the jury to render a death sentence, and thus satisfied constitutional standards.<sup>150</sup>

Despite Judge Graffeo's seemingly universal pro-prosecution record with respect to her dissenting opinions, criminal leave applications, and the death penalty statute interpretation, there are rare exceptions in which she voted pro-defendant. For example, in *People v. McIntosh*, she reversed a conviction based upon violations of the search and seizure law.<sup>151</sup> Writing for the majority, she held that without an articulable reasonable suspicion for a stop, questioning, and search of passengers on a bus, the police violated New York's common law precedent of *People v. De Bour*<sup>152</sup> and *People v. Hollman*,<sup>153</sup> and thus the evidence gained from this illegal search must be suppressed. Her reliance, however on common law, rather than the state's constitutional search and seizure protections allowed Judge Graffeo to take the "narrowest possible approach, thus stripping the decision of any precedential value."<sup>154</sup> Notably, former Judge George Bundy Smith, a liberal on the Court, concurred in a separate opinion for the reason that the police conduct violated the defendant's common law and constitutional rights.<sup>155</sup> But Judge Graffeo declined to go that far.

#### IV. CONCLUSION

Similar to most newly appointed judges, Judge Graffeo's anticipated impact on the court was relatively uncertain. Despite postulation, the truth is that no one really knew what role she would play on the Court of Appeals. But today we have a better understanding and appreciation for what she has brought to the state's highest court. We know, based upon her professional experience in the legislative and executive branches, that she chooses to defer to the legislature or executive rather than postulate

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 96 N.Y.2d 521, 755 N.E.2d 329, 730 N.Y.S.2d 265 (2001).

<sup>152</sup> 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

<sup>153</sup> 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992).

<sup>154</sup> Bonventre & Galligan, *supra* note 105 at 1116.

<sup>155</sup> *McIntosh*, 96 N.Y.2d at 531, 755 N.E.2d at 335, 730 N.Y.S.2d at 271.

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judicial policy. We know that she prefers the creation of bright-line rules to enable the bench and bar alike to better understand legal rules and high court precedent. We know that she has an affinity toward procedural nuance and will refuse to evaluate cases on the merits that fail to meet the prescribed procedural standards. And finally, we know that she is conservative and consistently votes in a pro-prosecutorial fashion. This is who she is today as an associate judge on the Court of Appeals.

Judges, irrespective of the court in which they serve, are more than their judicial trends and legal ideologies. Judges are human. Judges have personalities. And this author thinks it fitting to conclude by reflecting on Judge Graffeo's personal nature, as aptly stated by her former colleague on the Third Department, Presiding Justice Anthony V. Cardona, for whom this issue is dedicated. "When I think of Judge Graffeo, I think of commitment and caring. She is absolutely committed to the judicial process. She is very involved. She is very caring. She very much wants to do the right thing. And she is just a very nice person to have around."<sup>156</sup>

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<sup>156</sup> Presiding Justice Anthony V. Cardona offered these comments upon Judge Graffeo's nomination to the New York Court of Appeals. Caher, *supra* note 2 (quoting Presiding Justice Cardona). Notably, Presiding Justice Cardona served on the Third Department with Judge Graffeo for a brief period before her elevation to the high court. *Id.*