THE INDEPENDENT JURIST: AN ANALYSIS OF JUDGE ROBERT S. SMITH’S DISSENTING OPINIONS

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Independent and professional judges are the foundation of a fair, impartial, and constitutionally guaranteed system of courts of law known as the judiciary. This independence does not imply judges can make decisions based on personal preferences but rather that they are free to make lawful decisions—even if those decisions contradict the government or powerful parties involved in a case.¹

INTRODUCTION

An independent judiciary is at the heart of our democratic society. Without such a judicial system, the government as well as powerful private parties could run rough-shod over weaker and less numerous factions. Within this judicial system, however, it is important that the judges themselves remain independent. Failure to do so can obviate the entire system if one judge, or a small group of judges, can control the entire panel. No single jurist exemplifies this principle more than Judge Robert S. Smith of the New York Court of Appeals. In six years on the bench of New York’s highest court—from January 2004 to January 2010—Judge Smith wrote over sixty-five dissenting opinions covering numerous areas of New York law. In fact, in this article alone, eleven areas of law were studied, and each one tells a different story about Judge Smith’s jurisprudence.

Dissenting opinions hold a unique place in our legal system. Practically speaking, they mean nothing. They are not the law, they hold no binding precedents, and rarely have any impact.

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Occasionally, a dissenting opinion will become vindicated by a future majority of the same court when attitudes or societal norms shift, however, this is rare. For the most part, they go unnoticed.

Nevertheless, dissenting opinions can be very useful to the practitioner. Although a judge should go into every case with an open mind, it would be naïve to believe that a judge’s preferences do not impact his or her decisions. Indeed, a judge’s dissenting opinions are the best places to find such preferences. A dissenting opinion can reveal a judge’s true beliefs since it is a public statement—that holds no precedential value—expressing what the individual judge believes the correct result to be. Furthermore, unlike a majority opinion, a dissenting judge need not appease his colleagues and therefore, this opinion is a truly accurate reflection of his or her philosophy. According to Professor Bonventre, dissenting opinions expose a judge’s genuine jurisprudence. In a recent blog posting he asserted:

[Dissenting opinions] are the disagreements with his colleagues’ rulings where he felt strongly enough that he chose to go public. Strongly enough that he chose to spend his time and use his staff and resources to compose a personal statement to say that his colleagues are wrong. The personal statement does not change the outcome of a case. It only serves to make public the author’s disagreements, criticisms, and deeply held beliefs that the majority of his colleagues have made a mistake. A mistake that is so big and so bad that he cannot in good conscience be silent and just go along.

... In short, a dissenting opinion is usually the authoring Justice’s personal tongue-lashing (pen-lashing?) of his colleagues. And it’s one that is so ardently felt that the Justice feels compelled to go public.

From this personalized statement of a judge’s philosophy, a practitioner can learn a great deal, and put this knowledge to use when appearing next before that judge’s court. Luckily for New York lawyers, Judge Smith often dissents.

Robert Sherlock Smith was born in New York City in 1944. After receiving his undergraduate education from Stanford University, he attended Columbia Law School, where he was the editor-in-chief of

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the Law Review; he graduated in 1968. After graduation he went to work for the New York City firm of Paul, Weiss, Rifkind, Wharton & Garrison where he stayed until 2003. During his tenure at Paul, Weiss he handled complex civil litigation and twice successfully defended convicted murderers before the United States Supreme Court who were sentenced to death. In 2003, he became an individual practitioner and special counsel to the firm of Kornstein, Veisz, Wexler & Pollard. And finally, on November 4, 2003 he was nominated by Governor Pataki to ascend to the bench of the New York Court of Appeals. Much ado was made of his nomination since he had no prior judicial experience; however, on January 12, 2004 he was confirmed by the senate and became an associate judge.

This past January marks Judge Smith’s sixth year as a judge on the Court of Appeals. During those six years, he has emerged as the court’s most vigorous questioner from the bench as well as the most independent. Since 2004, Judge Smith has written over sixty-five dissenting opinions. Clearly he has no qualms about going against the grain. Moreover, twenty-five times he wrote a dissenting opinion that no other member of the court joined, further demonstrating his independence. And when he is joined by a member of the court, it is usually Judge Read—twenty times. Frankly, Judge Smith does not care one way or the other if anyone agrees with him—he writes his opinions based on what he believes to be the correct result.

Such independence is admirable, especially when the result that Judge Smith champions is not aligned with popular opinion, on the court or in the public at large. In fact, not only does this unpopularity fail to faze Judge Smith, but rather he revels in it. At times he can be the (self-declared) villain of the court, and this is nowhere more apparent than when reading his dissenting opinions. In his dissents, not only does he disagree with other members of the court, but his rhetoric can be harsh at times, scolding the majority for what he believes to be the incorrect result. This rigid language, however, often is comical. Indeed, while conducting this study, many times this author laughed-out-loud in response to Judge

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3 See Robert S. Smith, My Perspective on the Recent New York Death Penalty Cases, 72 ALB. L. REV. 625, 625 (2009) (“And if I were to discuss it I am sure I would make quite a few enemies in this room, which I do enjoy doing—I like courting unpopularity . . . . [A]nd I am sorry to say, I will probably wind up being a good guy. It undermines my contrarian tendencies, but I think when I get to the end of the story, I will be able to make myself the hero.”).
Smith’s expressions. As demonstrated below, Judge Smith’s dissenting opinions can be unkind as well as humorous; however, they are always well-reasoned and persuasive.

This article is organized into two main sections: Civil Actions and Criminal Appeals. Within those two sections, eleven subtopics are discussed. Each subtopic covers a different area of law that Judge Smith has written dissenting opinions concerning. The purpose of this study is to give the reader an accurate representation of Judge Smith’s philosophy—through his dissenting opinions of course—on each area of law treated. Hopefully, this article will give the scholar a precise depiction of Judge Smith’s jurisprudence and the practitioner a concrete guide to winning his vote.

I. CIVIL ACTIONS

In the realm of civil actions, Judge Smith is relatively predictable. Indeed, when analyzing his dissents categorically—by area of law—Judge Smith’s philosophy and viewpoint becomes apparent. This section attempts to give a fair and accurate examination of Judge Smith’s jurisprudential philosophy on specific areas of civil law through his dissenting opinions. In six years on the Court, Judge Smith authored forty-seven dissenting opinions in civil cases. For the purposes of this article those opinions have been classified into seven distinct categories of law and analyzed accordingly. These categories include: Workers’ Rights; Tax Law; Commercial Law; Insurance Law; Landlord-Tenant Law; Tort Law; and New York Practice.5 This study reveals Judge Smith’s perspective within each specific area of law scrutinized and hopefully will give the practitioner an accurate representation of how these topics will be treated in the future.

A. Workers’ Rights

Judge Smith favors protecting employers and wishes to reduce

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4 See, e.g., 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) (“Yet, because defendant did not raise that point, the majority feels compelled to decide whether, if the regulation were applicable to hand tools, it would be specific enough to support plaintiff’s claim—an exercise akin to deciding whether I would be a bicycle if I had wheels.”).

5 Within the first five topics—workers’ right, tax law, commercial law, insurance law, and landlord-tenant law—Judge Smith’s philosophy proves to be rather evident, and therefore they are treated consecutively. On the other hand, Judge Smith’s stance in regards to tort law and New York practice cannot be so easily classified. Accordingly, these topics are discussed at the end.
the heavy burden placed on them by the New York State Labor Law. To be more specific, he detests the expansion of Labor Law section 240 because it places an enormous burden on employers and therefore should be read as narrowly as possible. Labor Law section 240(1), commonly referred to as the “scaffold law,” provides in relevant part:

All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.6

Labor Law section 240(1) “imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury.”7 In many applications, Judge Smith believes the strict liability imposed by this statute to be draconian in nature and in his dissenting opinions he seeks to narrow the scope of its reach and restrict its application to new fact patterns. Consequently, his judicial philosophy regarding worker’s rights is apparent and consistent throughout his opinions.

For example, in Walls v. Turn Construction Co.,8 the Court deals with the issue of whether a construction manager can be held vicariously liable for a violation of Labor Law section 240(1) in the absence of a general contractor. Finding that in the absence of a general contractor a construction manager is responsible for monitoring unsafe practices, the Court held that the defendant was a statutory “agent” for the purposes of Labor Law section 240(1) and therefore vicariously liable.9 Judge Smith, however, disagrees because a statutory “agent” is one that has authority to supervise and control the work.10 Indeed, a construction manager serves in merely an advisory role, where a general contractor has “decision-making authority.”11 Thus, the choice by the owner to appoint defendant as a construction manager is enough for Judge Smith to absolve defendant of the enormous liability carried by Labor Law

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6 N.Y. LABOR LAW § 240(1) (McKinney 2009).
9 Id. at 864, 831 N.E.2d at 410, 798 N.Y.S.2d at 353.
10 Id. at 865, 831 N.E.2d at 411, 798 N.Y.S.2d at 354 (Smith, J., dissenting).
11 Id., 831 N.E.2d at 412, 798 N.Y.S.2d at 355.
section 240(1). In closing, Judge Smith explains that:

The burdens that the statute places on owners, contractors and their agents are severe; a defendant may be liable to a worker who may have been primarily at fault, even where the defendant itself had no role in supervising the task at issue, and thus was not at fault at all. It is fair to allow owners and those with whom they contract to determine . . . on whom to confer the decision-making authority that carries with it this kind of exposure.12

Clearly, Judge Smith believes the application of this burden should be circumscribed.

Additionally, in Sanatass v. Consolidated Investing Co.,13 Judge Smith takes a similar approach by attempting to limit the applications of section 240(1). At issue in Sanatass is whether an owner of property is liable for a violation of section 240(1) when a tenant contracts to do work in violation of the lease and without the owner’s permission. The majority, answering in the affirmative, found that an owner’s lack of notice or control is immaterial since section 240(1) “exists sole for the benefit of workers.”14 On the other hand, Judge Smith sees this application as expanding the “already heavy burden” of section 240(1) on New York property owners.15 He opines that this holding undermines the purpose of section 240(1) because it penalizes the property owner that retained in the lease the power to provide protection for workers, only to have the tenant violate the lease.16 The statute should be applied sparingly, he claims, “rather than expand our already draconian rules of Labor Law § 240(1) liability.”17

Finally, in a peculiar application of section 240(1), the Court is asked in Balbuena v IDR Realty LLC,18 to decide whether illegal aliens—not authorized to work in the United States—may recover

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12 Id. at 866, 831 N.E.2d at 412, 798 N.Y.S.2d at 355.
14 Id. at 340–42, 887 N.E.2d at 1130–31, 858 N.Y.S.2d at 72–73 (explaining that “precedents make clear that so long as a violation of the statute proximately results in injury, the owner’s lack of notice or control over the work is not conclusive—this is precisely what is meant by absolute or strict liability in this context”).
15 Id. (Smith, J., dissenting).
16 Id. at 343, 887 N.E.2d at 1132, 858 N.Y.S.2d at 74 (“I do not see how the statutory goal of preventing workplace accidents is advanced by holding a landlord liable in a situation like this. What could anyone expect the landlord to do to prevent the accident, other than what it did? The point of Labor Law § 240(1) is to compel . . . owners to comply with the law, not to penalize them when they have done so.”).
17 Id.
under the labor law. Leaving the federal preemption issue aside, the majority holds that illegal aliens may recover under section 240(1) because the labor law was designed to place the burden of safety on property owners rather than on employees—this policy apparently controls regardless of the employees immigration status. Judge Smith, unsurprisingly, finds this decision blasphemous to the rule of law. Essentially, the majority decision, as he sees it, is aiding in the achievement of an “illegal transaction” and “award[ing] damages to compensate a plaintiff for the loss of an opportunity to work illegally.”

Citing case law, Judge Smith asserts that it is the long held policy of New York to refuse to “award a plaintiff the benefit of an illegal bargain.” Working illegally and suing for the loss of this opportunity is doing just that—additionally, as to make matters worse, the decision of the Court promotes illegality. Needless to say, Judge Smith is disappointed with the majority’s decision—on multiple levels.

It is clear from Judge Smith’s consistency that, if it were up to him, the expansion of Labor Law section 240(1) would be curtailed. It would be superficial, however, to label Judge Smith as diametrically opposed to section 240(1) and its progeny. This is true since—as will be seen below in the tort law section—Judge Smith is a firm believer in just compensation for those who are negligently injured by others. Therefore, the correct characterization of Judge Smith’s sentiment towards section 240(1) is that its application should be restricted to those situations specifically intended by the legislature; namely, holding liable negligent owners and those that they delegate control to, and benefiting only those who may legally work in the first instance. Nevertheless, it is worthy of note, that Judge Smith is not particularly sympathetic in other workers’ rights cases.

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19 Id. at 358, 845 N.E.2d at 1257, 812 N.Y.S.2d at 427.
20 Id. at 363, 845 N.E.2d at 1260, 812 N.Y.S.2d at 430 (Smith, J., dissenting).
21 Id. at 364, 845 N.E.2d at 1261, 812 N.Y.S.2d at 431.
22 Id. at 365, 845 N.E.2d at 1261, 812 N.Y.S.2d at 432 (“Their claims thus put at risk the duty of courts in our legal system to avoid the promotion of illegality.”).
B. New York State Tax Law

Similar to Judge Smith’s dissenting opinions on workers’ rights, his jurisprudence in respect to the New York State tax law is evident. In all dissenting opinions surveyed, Judge Smith finds in favor of the taxpayer. Whether the petitioner is a private citizen, corporate entity, or political subdivision, the results are the same. Furthermore, not only does he interpret the statutory provisions against the state, but he believes that the state’s actions are manipulative of the tax laws, using “loopholes” to effectively accomplish a windfall in its favor. There are two focuses of this discussion: General Taxation and Real Property Tax Law.

1. General Taxation

In two dissenting opinions about general taxation principles, Judge Smith finds for the taxpayer and faults the majority for deferring to the New York State tax commissioner without scrutinizing his rationale. For example, in General Electric Capital Corp. v. New York State Division of Tax Appeals, the regulation at issue prevented vendors’ successors in interest from recovering sales tax paid in advance to the state when payment for goods sold was never recovered. Under the same regulation, however, vendors were permitted to recover sales tax paid in advance but not collected from the purchaser. The majority, finding in favor of the state, held that withholding this benefit from third parties (i.e., successors in interest) is permissible since it is consistent with the sales tax statutory and regulatory scheme. Judge Smith, on the other hand, would invalidate this regulation because taxing a successor in interest on goods where the purchase price is never received would be contrary to the main thrust of the tax law; that sales tax is to be borne by the purchaser. Consequently, he believes that the result endorsed by the majority produces a windfall for the state, since the regulation at issue accomplishes “no discernable purpose except the enrichment of the State.” In closing, he reiterates frankly, “Indeed, I can think of only one
reason for the regulation: it effectively transfers money from private firms to the State.”

Furthermore, in *Huckaby v. New York State Division of Tax Appeals*, Judge Smith finds that the majority is excessively deferential to the tax commissioner when it allows application of the “convenience of the employer” test to an individual that is a resident of Tennessee and works primarily outside of New York. As Judge Smith sees it, the justification for the application of the “convenience” test in the past is the prevention of fraud and evasion. In this instance, however, when an employee is already living out of the state and is recruited to work for a New York employer, the risks of fraud and evasion are simply not present. Thus, the commissioner must present an alternative justification. Providing none, Judge Smith opines that the majority’s blind deference to the commissioner’s decision is unwarranted and produces another windfall for the state.

2. Real Property Tax Law

Two additional opinions further illustrate Judge Smith’s sentiment toward the executive powers of taxation. Both cases regard assessments and revaluations of real property under the Real Property Tax Law (“RPTL”). And in either case, the majority interprets the RPTL in favor of the assessing board (i.e., the state) to allow for revaluation, thus raising the value of real property and generating higher taxes. Judge Smith is not deceived by this construction, and he candidly states that the actions of the government and the interpretations given by the majority take

30 Id. at 267, 810 N.E.2d at 876, 778 N.Y.S.2d at 424.
32 Id. at 445, 829 N.E.2d at 288, 796 N.Y.S.2d at 324. The “convenience of the employer” test “provides that when a nonresident is employed by a New York employer, income derived from work in another state is taxable by New York unless performed out of state for the necessity of the employer.” Id. at 430, 829 N.E.2d at 277, 796 N.Y.S.2d at 313. In this case, the petitioner was a resident of Tennessee, was recruited by a New York employer, and works from Tennessee 75% of the time. Id. The effect of the “convenience” test is that 100% of the petitioner’s income will be taxed by New York.
34 Id. at 444, 829 N.E.2d at 286, 796 N.Y.S.2d at 324.
35 Id. at 445, 829 N.E.2d at 286, 796 N.Y.S.2d at 324 (“The majority’s sole ground for holding that Huckaby’s income is ‘New York source income’ is that the Commissioner says it is.”).
advantage of “loopholes” in the RPTL that were not intended by the legislature.\textsuperscript{36}

For instance, in \textit{Malta Town Centre I, Ltd. v. Malta Board of Assessment Review},\textsuperscript{37} the court deals with the issue of whether a yearly “reassessment” of real property qualifies as a “revaluation,” which would permit the assessment board to deny the town its statutorily mandated respite from change in valuation.\textsuperscript{38} RPTL section 727 “provides a three-year respite from any change in the assessed valuation of property” when a prior assessment is found improper by a court, unless there has been “a revaluation or update of all real property on the assessment roll.”\textsuperscript{39} A court had previously found an assessment to be improper, and therefore the town expected its respite from litigation, nevertheless, the assessment board maintained that a “reassessment”—which was conducted yearly to receive state aid under RPTL section 1573—qualified for the exception. Comparing definitions of “reassessment” and “revaluation,” the majority concludes the legislature intended them to mean the same thing, and therefore the town is not entitled to the respite.\textsuperscript{40}

On the one hand, Judge Smith disagrees with the majority’s interpretation because it “creates a loophole in section 727 that the Legislature did not intend and that will undermine the purpose of the statute.”\textsuperscript{41} Reading RPTL section 1573 completely, Judge Smith finds that it reveals another aid provision—which is tri-annual rather than annual—that more closely resembles the exception in RPTL section 727.\textsuperscript{42} To Judge Smith, the “systematic analysis” required for annual aid is “something different from, and less momentous than” the “revaluation or update” required for tri-annual aid and therefore insufficient to constitute the “revaluation or update” required for the exception to the three-year respite of


\textsuperscript{38} See \textit{N.Y. REAL PROP. TAX LAW § 727(2)(a)} (McKinney 2000).

\textsuperscript{39} \textit{Id.}; \textit{Malta Town Ctr. I, Ltd.}, 3 N.Y.3d at 568, 822 N.E.2d at 333, 789 N.Y.S.2d at 82.

\textsuperscript{40} \textit{Malta Town Ctr. I, Ltd.}, 3 N.Y.3d at 569, 822 N.E.2d at 334, 789 N.Y.S.2d at 83 (“The language of these provisions makes clear that reassessment, revaluation and update have the same meaning for the purposes of both 727 and 1573.”)

\textsuperscript{41} \textit{Id.} at 572, 822 N.E.2d at 336, 789 N.Y.S.2d at 85 (Smith, J., dissenting).

\textsuperscript{42} The exception to RPTL section 727 requires “a revaluation or update of all real property” and the tri-annual aid provision calls for “a revaluation or update . . . of all locally assessed properties.” \textit{N.Y. REAL PROP. TAX LAW § 1573(2)(a)} (McKinney 2000). Conversely, the annual aid provision calls for “a systematic analysis of all locally assessed properties.” \textit{Id.} at 1573(2)(b)(ii)(B).
RPTL section 727(2)(a).43

Furthermore, “[t]he conclusion derived from this exercise in verbal logic” is supported by the policy behind the statutes.44 The purpose of RPTL section 727 is to “provide some respite from litigation” for a reasonable time when a valuation has been resolved, however, the exception to the respite operates to prevent unfairness if “every other taxpayer in town is being subjected to a reexamination of the value of his or her property.”45 Viewing the relevant statutes together, it is consistent with the purpose of the exception to section 727 when it is triggered by the tri-annual revaluation since it does not interfere with the three-year respite.46 But if the assessment board can escape the respite through the annual assessment, then the respite is rendered meaningless since it can be circumvented by a mere “systematic analysis;” preventing it from ever truly coming to fruition.47 Although Judge Smith does not explicitly state this, it appears that the majority interprets the statutes in a vacuum, without considering their underlying purpose or greater context.

Another example is O’Shea v. Board of Assessors,48 where the court wrestles with the permissibility of fractional assessments that drove property values in Nassau County beyond the statutory maximums permitted by RPTL section 1805. RPTL section 1805 provides that an “assessment” shall not increase “in any one year . . . by more than six percent.”49 Nevertheless, in 2003 the county began fractional assessments of limited properties to comply with a settlement decree meant to readjust the relative tax burden between low-income areas and more affluent ones.50 By decreasing the “fractional multiplier” applied to poor properties, while allowing others to remain constant, the “assessed value” of the more affluent properties rose by more than six percent, thus producing higher tax yields while keeping the tax rate uniform.51 Although the actual value of the property increased by more than six percent, the

43 Malta Town Ctr. I, Ltd., 3 N.Y.3d at 573, 822 N.E.2d at 337, 789 N.Y.S.2d at 86.
44 Id.
45 Id.
46 Id. at 574, 822 N.E.2d at 337, 789 N.Y.S.2d at 86.
47 Id.
49 N.Y. REAL PROP. TAX LAW § 1805(1) (McKinney 2000).
50 The decree was in response to a civil rights suit alleging that since the assessments of property were completely divorced from the current market value, low-income areas were forced to shoulder a disproportionate tax burden. See O'Shea, 8 N.Y.3d at 256–57, 864 N.E.2d at 1264–65, 832 N.Y.S.2d at 865–66.
51 Id. at 259, 864 N.E.2d at 1266, 832 N.Y.S.2d at 867.
“fractional assessments” did not, therefore allowing the majority to justify the county’s action under this expansive interpretation.52

Judge Smith, however, views the actions of the county as circumventing the intent of the legislature through “loopholes” in the statutory provisions that eviscerate the purpose of RPTL section 1805. Summing up his disenchantment, Judge Smith ponders the motivations of the county and the frustration of legislative purpose:

The purpose of the statute could not be clearer: It is to protect property owners from tax increases by limiting increases in their assessments. . . .

That, at least, is what the Legislature evidently thought when it enacted section 1805(1). But Nassau County thinks it has discovered a way around the statute: Just leave Mrs. Jones’s assessment the same, cut everyone else’s assessment in half, and double the tax rate. Now everyone pays the same tax as last year except Mrs. Jones, who pays double. Incredibly, the majority today holds that this gimmick works. Section 1805(1) is as useless as if it had never been passed.53

Furthermore, even if “assessment” refers to the “fractional assessment” rather than the “actual assessment,” section 1805(1) is rendered meaningless if the percentage used to determine the fractional assessment is changed year-to-year.54 “To hold otherwise is to license blatant evasion.”55 And in a rather comical analogy, Judge Smith complains: “It is as though a statute provided that Nassau County’s budget could not increase by more than six percent from year to year, and Nassau County had sought to comply by stating the first year’s budget in dollars and the second year’s in British pounds.”56

Additionally, Judge Smith suggests that the majority is acting with an intended result in mind. He understands the majority’s reluctance to find illegal a settlement that produced a reassessment of 368,043 parcels at a cost of over $35 million.57 But Judge Smith, honest as always, will “not accept Nassau County’s invitation to pull it out of the hole it has dug for itself. If it needs rescuing, it should

52 Id.
53 Id. at 261, 864 N.E.2d at 1268, 832 N.Y.S.2d at 869 (Smith, J., dissenting).
54 Id. at 262, 864 N.E.2d at 1269, 832 N.Y.S.2d at 870.
55 Id.
56 Id.
57 Id. at 264, 864 N.E.2d at 1270, 832 N.Y.S.2d at 871.
turn to the legislature.” Clearly, Judge Smith is opposed to the unchecked power of the executive and that if deference should be awarded to any decision, it should be to that of the legislature.

C. Commercial Law

If Judge Smith ruled the court, when deciding commercial law cases he would take the approach popularized by Frenchman Vincent de Gournay: Laissez-faire. “Leave it alone,” Judge Smith believes; complex agreements entered into by experienced counsel should not be tampered with by the courts. In all four dissenting opinions on commercial law, Judge Smith implores the court to give a narrow interpretation to contract terms and limit the scope of applicable statutes as to leave commercial negotiations by litigants undisturbed. In this area of law, Judge Smith sees judicial restraint as a necessity in order to avoid decisions that “becloud the clarity and predictability that the authors” of contracts and statutes have adopted.

For example, in Beal Savings Bank v. Sommer, the issue is whether one lender in a syndicated loan arrangement has standing to sue for a breach of contract, when the other thirty-six lenders have implicitly expressed a will to forebear from taking action. Although the majority concedes that the contract does not contain “an explicit provision stating that a Lender may—or may not—take individual action in the event of default,” it nevertheless finds that the contract, when read as a whole, evinces an intent to solely allow action at the consent of a supermajority in order to protect individual lenders from legal action that may injure them.

Judge Smith disagrees. In his opening sentence, with his usual bluntness, he asserts: “A bank that lends money to a borrower and is not repaid is entitled to sue to get its money back. That is, at least, the assumption that most banks surely make when they enter into loan agreements.” Notwithstanding this general proposition, if an agreement is made otherwise—requiring majority or supermajority approval before action is taken—it is certainly

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58 Id.
61 Id. at 326, 332, 865 N.E.2d at 1215, 1219, 834 N.Y.S.2d at 49, 52 (“Here, the supermajority vote is meant to protect all Lenders in the consortium from a disaffected Lender seeking financial benefit perhaps at the expense of other debtholders.”).
62 Id. at 332, 865 N.E.2d at 1219, 834 N.Y.S.2d at 53 (Smith, J., dissenting).
enforceable. According to Judge Smith, however, “[n]o such language, or anything that can fairly be read as its equivalent,” appears in this contract and therefore, he refuses to read it in.63 Furthermore, Judge Smith finds the majority’s reliance upon a provision appointing an “Administrative Agent” to act at the behest of a supermajority to be misplaced. “A statement that an agent may act on a principal’s behalf does not mean that the principal has disabled itself from acting on its own.”64 In the absence of explicit language—which would not have been difficult to include—Judge Smith refuses to speculate as to the possible intent of the parties and would defer to the plain meaning of the agreement. Summing up his discontent, he states:

Thus the majority’s decision, while reaching a pragmatically appealing result, essentially reads into the loan documents language that would compel results far less appealing. These agreements are complex, and were no doubt negotiated by experienced counsel. Fairness to these parties, and the confidence with which future parties enter similar transactions, would be better served by reading the agreements as they are written.65

Additionally, when interpreting statutory provisions that govern commercial transactions, Judge Smith takes a similar approach: Avoid reading terms into the statutory text in order to produce desired results. This is evident from analyzing two of Judge Smith’s dissenting opinions regarding the Uniform Commercial Code (“UCC”) and the New York Partnership Law.

For instance, in Highland Capital Management LP v. Schneider,66 the Court grapples with the issue of whether a promissory note is a security within the meaning of the UCC, since finding in the affirmative removes the transaction from the scope of the statute of frauds and renders an oral promise to sell enforceable.67 Under the UCC definition of “security,” the determination of the character of the promissory note turns on whether it meets the “registrability” requirement. The UCC dictates that a “security” can be an obligation “the transfer of which may be registered upon books

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63 Id.
64 Id. at 333, 865 N.E.2d at 1219, 834 N.Y.S.2d at 54.
65 Id. at 335–36, 865 N.E.2d at 1221, 834 N.Y.S.2d at 55.
67 Under the UCC, a promise to sell “personal property in excess of $5,000” must be reduced to writing, unless the contract is for the sale or purchase of a “security.” N.Y. U.C.C. § 1-206(1) (McKinney 2001); N.Y. U.C.C. § 8-113 (McKinney 2002).
maintained for that purpose.” Although the promissor in this case did not register the promissory note because he maintained no books for that purpose, the majority finds the “may be registered” language broad enough to cover this instrument since the promissor “would have been required to register the transfer of the notes to a third party at the [promisee’s] request.”

Judge Smith disagrees. He believes that the majority’s broad reading of the registrability requirement effectively renders it meaningless. The majority’s overemphasis of the words “may be”—while ignoring “upon books maintained for that purpose”—results in an interpretation “that the notes are registrable if any books could possibly exist in which transfers of the notes could be registered.” This reading allows almost anything to be a security because it is “always theoretically possible [that] there could be books on which transfers of anything could be registered.” But the “upon books maintained for that purpose” language should operate to constrain such a broad reading since it necessarily requires the books to exist. Therefore, the requirement will be “met whether transfers are actually registered on the books or not, but not if there are no books ‘maintained for that purpose’ on which registration could occur.” In sum, Judge Smith theorizes that based on the majority’s reading of the statute, “it is hard to imagine any transferable obligation of any issuer that would not be registrable.”

Finally, in *Ederer v. Gursky*, the Court decided whether New York Partnership Law section 26(b) shields a general partner from personal liability to a former partner for a breach of partnership obligations. Section 26(b) creates an exception to the traditional vicarious liability applicable to partnerships, by providing that “no partner of a partnership which is a registered limited liability partnership is liable . . . for any debts, obligations or liabilities of . . . the registered limited liability partnership or each other,

69 *Highland Capital Mgmt.*, 8 N.Y.3d at 414, 866 N.E.2d at 1026, 834 N.Y.S.2d at 698.
70 *Id.* at 417, 866 N.E.2d at 1027, 834 N.Y.S.2d at 699 (Smith, J., dissenting) (“Today, the majority effectively undoes the work of the UCC’s authors, by reading this registrability requirement in so broad a way as to make it meaningless.”).
71 *Id.* at 419, 866 N.E.2d at 1029, 834 N.Y.S.2d at 701.
72 *Id.*
73 *Id.* at 420, 866 N.E.2d at 1029, 834 N.Y.S.2d at 701.
74 *Id.* at 420, 866 N.E.2d at 1029–30, 834 N.Y.S.2d at 701–02.
whether arising in tort, contract or otherwise.”76 The majority finds that this section “has always governed only a partner’s liability to third parties,” not relations among partners.77 Therefore, the majority’s logical interpretation of “any debts” “refers to any debts owed to a third party.”78

Judge Smith sees the majority’s interpretation as creating an exception to section 26(b) that was not intended by the legislature.

[Section 26(b)] contains two specific exceptions, applicable when a partner acts wrongfully or when partners agree to vary the liability scheme, but there is no exception for liabilities to former partners claiming a share of the partnership’s net assets. We should not create an exception that the Legislature did not.79

Furthermore, he views the distinction drawn by the majority between liabilities to third parties and liabilities to former partners as mere semantics because “a former partner is a third party where the partnership is concerned, and there is no good reason to treat him more favorably than any other third party.”80 Ultimately, Judge Smith believes this interpretation will produce a perverse result by giving a former partner preferred creditor status and allowing him to “pierce” the limited liability shield.

Obviously, Judge Smith believes that the commercial law is no place for judicial meddling. Private negotiations and agreements among parties should be left alone and any additional input should be that of the legislature. And if in fact the legislature must interject, the interpretation given to the statutory text should be as narrow as possible in order to affect its true purpose and give the parties what they bargained for.

D. Insurance Law

In Judge Smith’s dissenting opinions concerning insurance law, his ideology is similar to that of the areas of law previously discussed: consistent. Out of five dissents since his ascension to the bench, four of them have been in favor of insurance companies. The major theme of his dissenting opinions is that reducing the burden on insurance companies will drive down premiums. This

76 N.Y. P’SHIP LAW § 26(b) (McKinney 2005).
77 Ederer, 9 N.Y.3d at 524, 881 N.E.2d at 211, 851 N.Y.S.2d at 115.
78 Id.
79 Id. at 526, 881 N.E.2d at 212, 851 N.Y.S.2d at 116 (Smith, J., dissenting).
80 Id.
economically orientated attitude is echoed in his opinions in other areas of law as well, such as tax law and workers’ rights. Furthermore, within this overarching theme, Judge Smith believes that the Court should err on the side of caution so as to prevent fraud and abuse, which is prevalent in the insurance business, especially in a no-fault state. According to Judge Smith, preventing fraud and abuse will necessarily reduce insurance premiums, thereby achieving his economically appealing result.

For example, in *New York Central Mutual Fire Insurance Co. v. Aguirre*, the Court decided the issue of whether the insured’s failure to submit a proof of claim form “as soon as practicable” will toll the insurer’s obligation to disclaim coverage “as soon as reasonably possible.” The majority holds that it does not, based on the juxtaposition of the following two requirements. First, the insured’s policy was conditioned on returning a “proof of claim form” “as soon as practicable after written request.” Second, New York Insurance Law section 3420(d)(2) requires an insurer to give notice of disclaimer “as soon as reasonably possible.” The result is that an “insurer’s failure to provide notice as soon as is reasonably possible precludes effective disclaimer” even when the insured’s notice is untimely. This is so, holds the majority, because the insurer knew of its basis for disclaimer—when a proof of claim form was never received—long before it actually disclaimed.

Judge Smith believes that this holding places an unreasonable and unnecessary burden on the insurer. He sees the majority’s decision as a “Catch-22” since the insured’s obligation to send notice “as soon as practicable” is “nullified because the [insurer] did not, as soon as possible after as soon as practicable, send claimants a notice that they had failed to send a notice.” Judge Smith asserts that the purpose of the proof of claim form is to allow “an insurance company to investigate a claim and to decide whether it is legitimate or not,” i.e., whether a disclaimer is warranted. But if the insured does not timely return the proof of claim form, the insurer has no notice of a reason to disclaim. Therefore, Judge Smith believes that the “as soon as reasonably possible”

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84 *Id.* at 775, 854 N.E.2d at 148, 820 N.Y.S.2d at 850.
85 *Id.* (Smith, J., dissenting).
86 *Id.* at 776, 854 N.E.2d at 149, 820 N.Y.S.2d at 851.
requirement should not begin to run until proof of claim is submitted. To hold otherwise, and allow “claimants who have never submitted proof of their claim to recover” would “open the door to claims that are spurious or fraudulent.”

Additionally, in *Fair Price Medical Supply Corp. v. Travelers Indemnity Co.*, the Court dealt with another case about timeliness of disclaimer. At issue was whether the insured’s failure to fully complete a proof of claim form tolls the insurer’s time limit to disclaim coverage under the no-fault law. It does not, finds the majority, since the sole exception to the thirty day time limit—measured from receipt of the proof of claim form—on an insurer’s obligation to pay or disclaim under the no-fault law is for a defense based on lack of coverage. The majority finds that this “narrow” exception is not applicable since the insurer disclaimed two years after the proof of claim form was submitted. The injured party claimed to have never received any medical supplies. Nevertheless, holds the majority, “a defense that the billed-for services were never rendered” is a normal defense, rather than one based on lack of coverage.

Judge Smith, however, views this defense as one that fits the “narrow” exception, because if the basis for the claim is nonexistent—the medical supplies were never received—then the “claims are outside the coverage of the policy.” Citing precedents, Judge Smith asserts that certain defenses, e.g. lack of coverage, are “of such fundamental importance that, unlike most defenses, they should not be subject to waiver by insurance company inaction.” He finds this principle applicable here since the defense “[t]hat no medical supplies were provided to the insured is an equally fundamental objection to a claim, and should be treated as a defense based on lack of coverage.” This interpretation, he believes, “is consistent with the plain meaning of the words ‘lack of coverage.’ Neither the insurance policy at issue here nor any other covers wholly fabricated claims.” Additionally, Judge Smith warns that
permitting this claim to persist “would countenance a particularly gross form of fraud.” 96 In sum, he expresses his discontent with the majority’s decision and its adverse economic consequences that it will have on New Yorkers:

The impact of fraud on this State’s no-fault system is notorious . . . . [T]he Appellate Term referred to “the steep increase in fraudulent no-fault benefits claims arising . . . from provider claims where services or supplies were . . . never rendered”; the Appellate Division said that “the fraud and abuse that plagues the no-fault insurance system is a serious problem with widespread consequences.” Today’s decision, I believe, unjustifiably hinders insurers’ efforts to keep that problem within bounds. 97

Finally, in two decisions handed down simultaneously, the Court contemplated the availability of “consequential” damages; specifically, whether an insured may assert a claim for such damages beyond the scope of the policy limits. In Bi-Economy Market, Inc. v. Harleysville Insurance Co., 98 the insured owned a business insured with “business interruption coverage” and when destroyed by fire, the insurer failed to provide coverage for “building and contents damage” and “lost business income.” 99 As a result, the insured’s business collapsed. In Panasia Estates, Inc. v. Hudson Insurance Co., 100 the insured purchased “builders risk coverage” to cover any potential damages during renovations, and when rain caused water damage, the insurer failed to investigate and disclaimed liability. 101

The majority, basing its decision in both cases on the same principles, finds consequential damages appropriate where “[t]he party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made.” 102 In this case, the insured bought “business interruption coverage” to avoid collapse of or damages to business in the event of a catastrophe. 103 Indeed, it was foreseeable for the insurer to expect that failure to provide coverage would result in such collapse or

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96 Id.
97 Id. at 567–68, 890 N.E.2d at 239, 860 N.Y.S.2d at 477.
99 Id. at 191, 886 N.E.2d at 129, 856 N.Y.S.2d at 507. This coverage was included under “business interruption insurance.” See id.
101 Id. at 202, 886 N.E.2d at 136, 856 N.Y.S.2d at 514.
102 Bi-Economy Market, Inc., 10 N.Y.3d at 192–93, 886 N.E.2d at 130, 856 N.Y.S.2d at 508.
103 Id. at 195, 886 N.E.2d at 132, 856 N.Y.S.2d at 510.
damage. Therefore, the majority holds, the insured may assert a claim for the damages sustained due to this failure to provide coverage.\textsuperscript{104}

Judge Smith sees the assertion of consequential damages as a disguise for unjustifiable punitive damages and fears that this application will have grave economic consequences. First, Judge Smith emphasizes, while citing precedent, that “a bad faith failure by an insurer to pay a claim could [not], without more, justify a punitive damages award.”\textsuperscript{105} He believes that the insurer’s actions here did not rise to the level that would warrant such damages. Furthermore, although the majority couches their holding in terms of “consequential damages,” Judge Smith believes that “though remedial in form, [they] are punitive in fact” because “the purposes of the damages the majority authorizes can only be to punish wrongdoers and deter future wrongdoing.”\textsuperscript{106} Additionally, in addressing the majority’s argument that the damages here were foreseeable, Judge Smith engages in a hypothetical conversation between the insurer and insured, which would cause even the most ardent detractor (possibly former Chief Judge Kaye?) to crack a smile:

Can anyone seriously believe that the parties in these cases would, if they had “considered the subject,” have contracted for the results reached here? Imagine the dialogue. Applicant for insurance: “Suppose you refuse, in bad faith, to pay a claim. Will you agree to be liable for the consequences, including lost business, without regard to the policy limits?” Insurance company: “Oh, sure. Sorry, we forgot to put that in the policy.”\textsuperscript{107}

Second, Judge Smith is concerned about the economic consequences that may result from the expansion of punitive damages through the guise of consequential damages. Contemplating the policy implications of the majority’s holding, he finds that:

Punitive damages will sometimes serve to deter insurer wrongdoing and thus protect insureds from injustice, but they will do so at too great a cost. Insurers will fear that juries will view even legitimate claim denials

\textsuperscript{104} Id. at 196, 886 N.E.2d at 132, 856 N.Y.S.2d at 510.

\textsuperscript{105} Id. at 196, 886 N.E.2d at 133, 856 N.Y.S.2d at 511 (Smith, J., dissenting).

\textsuperscript{106} Id. at 197, 886 N.E.2d at 133, 856 N.Y.S.2d at 511.

\textsuperscript{107} Id. at 198, 886 N.E.2d at 134, 856 N.Y.S.2d at 512.
unsympathetically, and that insurers will thus be exposed to
damages without any predictable limit. This fear will
inevitably lead insurers to increase their premiums—and so
will inflict a burden on every New Yorker who buys
insurance.\footnote{Id. at 197, 886 N.E.2d at 133, 856 N.Y.S.2d at 511.}

In closing, Judge Smith fears that the majority’s policy decision to
place this discretion in the hands of the jury will lead to increased
costs of insurance throughout New York. He opines:

All these very difficult, often nearly unanswerable, questions
will be put to jurors who will usually know little of the
realities of either the insured’s or the insurer’s business.
The jurors will no doubt do their best, but it is not hard to
predict where their sympathies will lie.

The result of the uncertainty and error that the majority’s
opinion will generate can only be an increase in insurance
premiums. That is the real “consequential damage” flowing
from today’s holdings.\footnote{Id. at 199, 886 N.E.2d at 135, 856 N.Y.S.2d at 513.}

In sum, Judge Smith’s ideology in regards to the insurance law is
quite clear: the prevention of fraud and abuse, as well as limiting
jury discretion will reduce the burden on insurance companies and
ultimately drive insurance premiums down. For the vast majority
of New Yorkers, this is a desirable result. Many spend tens of
thousands of dollars in a lifetime on insurance coverage and never
make a single claim. Judge Smith’s dogma would resonate well
with these people. Those unfortunate few, however, who must
manage through a crisis, may be more at ease knowing that Judge
Smith does not have many allies who subscribe to these beliefs.

As discussed above, the next three sections—Landlord-Tenant
Law, New York Practice, and Torts—treat areas of law where Judge
Smith’s philosophy is not as easily defined as previous topics. As
displayed by the previous discussion, Judge Smith’s philosophy
typically favors a particular side of an argument, depending on the
area of law involved. On the other hand, the following discussion
will show that this is not necessarily true with all topics. Although
there are discernible themes that can be deduced from Judge
Smith’s dissenting opinions within the following areas of law, his
philosophy is not as rigid as in the aforementioned discussion.
E. Landlord-Tenant Law

In his six years on the bench, Judge Smith has dissented in two cases involving a landlord-tenant dispute. In both cases he found in favor of the landlord. At first blush this result would appear to display a sentiment similar to those previously discussed, but that conclusion would be superficial. Although both opinions favor the landlord, the substance of Judge Smith’s dissents are not anti-tenant’s rights, but rather a strict construction of the law through determining underlying purpose, notwithstanding the results produced.

For instance, in Thornton v. Baron, the landlord and tenant colluded to take advantage of the non-primary resident exception to the rent stabilization law in New York City. The issue presented to the Court was from what point the regulated rent should be measured when assessing an overcharge suit. Here, a subtenant brought suit in 2000 for rent overcharges; however, the Rent Stabilization Law of 1969 includes a statute of limitations that limits “examination of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint” for the purpose of determining appropriate rent. Under this statutory scheme, the examination would be limited to rent paid in 1996 when the original lease was signed, which, in this case, was similarly in excess of the rent stabilization laws. Nevertheless, the majority ignores the statute of limitations because “an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York” voids the 1996 lease at its inception. Therefore, the rent would be calculated according to a “fixed base on the default formula used by the Division of Housing and Community Renewal.”

Judge Smith, however, sees the holding of the majority to be in derogation of the purpose of the statute. He believes that the “true basis for the majority’s holding is the outrageousness of the landlord’s conduct.” He agrees with the majority’s description of the landlord’s actions as being “fraudulent,” “willful,” and “egregious,” nevertheless, Judge Smith does not believe that these
actions “justify ignoring the statute.”\textsuperscript{115} Holding otherwise, would nullify the purpose of the statute of limitations since “statutes of limitations . . . by their very nature, sometimes protect outrageous conduct. Many wrongs greater than the one done in this case have gone unremedied because the victim did not seek a remedy promptly enough.”\textsuperscript{116} Furthermore, the majority’s holding “destroys the effectiveness of the four-year time limitation, which has no point unless it protects illegal rents against challenge. If a rent is not illegal, a challenge will fail anyway and the four-year limit is unnecessary.”\textsuperscript{117} Considering the rationale behind Judge Smith’s opinion, it is rather obvious that he is not adverse to the tenant’s rights, but rather seeks to apply the underlying purpose of the law while avoiding judicial activism.

Another relevant example can be found in \textit{P.A. Building Co. v. City of New York},\textsuperscript{118} where the Court dealt with the issue of whether asbestos abatement—compelled by a regulatory change—is covered by an escalation clause in a commercial lease. The lease in issue provided for contribution from the tenant for increases in operating expenses, which are defined as “services, materials and supplies furnished in connection with the operation, repair and maintenance of . . . the Building.”\textsuperscript{119} The majority, finding for the tenant, held that asbestos abatement is not covered by the provision because it was not foreseeable at the time the lease was entered into and it is “not a condition in need of ‘repair’ in the normal sense of the word, meaning ‘fix’ or ‘mend.’”\textsuperscript{120} Therefore, the cost of removal cannot be shifted to the tenant.

Judge Smith views it differently because of the underlying purpose of an escalation clause. Indeed, the very essence of the escalation clause “is to shift some landlord expenses to tenants, so that increases in these expenses do not consume the landlord’s profit.”\textsuperscript{121} Furthermore, foreseeability is immaterial in this context since escalation clauses are “supposed to protect against unforeseen developments that make running a building more expensive—including regulatory changes.”\textsuperscript{122} Moreover, the majority seems directed in their decision by the enormous cost of the asbestos

\textsuperscript{115} Id.
\textsuperscript{116} Id. at 182–83, 833 N.E.2d at 266, 800 N.Y.S.2d at 123.
\textsuperscript{117} Id. at 182, 833 N.E.2d at 265, 800 N.Y.S.2d at 122.
\textsuperscript{119} Id. at 433, 889 N.E.2d 984, 860 N.Y.S.2d 2.
\textsuperscript{120} Id. at 440, 889 N.E.2d 989, 860 N.Y.S.2d 7.
\textsuperscript{121} Id. at 442–43, 889 N.E.2d 991, 860 N.Y.S.2d 9 (Smith, J., dissenting).
\textsuperscript{122} Id. at 443, 889 N.E.2d 991, 860 N.Y.S.2d 9.
abatement, since they characterized the project as beyond “normal.” Irrespective of cost, however, Judge Smith explains that “[i]f a regulatory change had required the landlord to install window guards, or to pay higher wages, the increased cost would not, under this lease provision, have been borne by the landlord alone.”¹²³ These rather persuasive examples seem to reveal the majority’s true agenda, which may be to protect tenants from the burden of cost shifting.

In sum, although Judge Smith’s jurisprudential philosophy within landlord-tenant relations would not be classified as pro-tenant, it would be incorrect to label him as unsympathetic to tenant’s right. His decisions in this area of law do not hinge on positioning of the parties, but rather upon the underlying purpose of the law. Whether it is the statute of limitations or an escalation clause, Judge Smith believes that its application is hollow unless the true rationale is realized. According to Judge Smith, this consequence eludes the majority, or in the alternative, is ignored in order to produce a desired result.

**F. New York Civil Procedure**

When deciding procedural issues, Judge Smith’s philosophy is unique compared to his opinions in other areas of substantive law. Here, he is rather results-orientated. Although Judge Smith does not display a particular agenda, there are themes within his dissenting opinions that are evident. First, he favors deciding cases on the merits. In three out of four cases that involved a procedural issue where the majority disposed of the case prior to testing the merits, Judge Smith would have preferred a decision on the merits. Second, Judge Smith believes that civil procedure is an area of law where the application of logic is at its greatest need. In two cases where interpretation is at issue, Judge Smith opts for applying common sense in order to produce a logical and clear answer; one that results in sound public policy.

For instance, in *New York State Association of Nurse Anesthetists v. Novello*,¹²⁴ the Court dealt with the issue of whether certified registered nurse anesthetists (“CRNA”) have standing to challenge an administrative regulation requiring an anesthesiologist to be present while a CRNA administers anesthetic. The CRNA argued

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¹²³ *Id.*
that they are economically harmed because requiring the presence of an anesthesiologist will render their employment cost prohibitive since no doctor would elect to hire both—CRNA and anesthesiologist—when hiring an anesthesiologist is all that is necessary to comply with the regulation. The majority, however, found that the CRNA’s claim lacks “concreteness” required for the “injury in fact” prong of New York’s standing test because the assertion of an injury is merely speculative in this situation since the regulation “might, or might not, actually affect the employment of CRNAs in physicians’ offices.” Therefore, the claim is dismissed without reaching the merits.

Judge Smith, alternatively, argues that there is a sufficient basis in evidence to support “injury in fact” because requiring anesthesiologists to be present will necessarily adversely impact the employment opportunity of CRNAs. Furthermore, he sees the majority’s application of “injury in fact” as altering the standard typically used. He claims that by finding the injury to be speculative, “[t]he majority’s reasoning seems to suggest that any doubt about the existence of plaintiff’s injury is a sufficient reason to deny standing.” This, Judge Smith argues, has never been the law. Furthermore, he accuses the majority, albeit in other words, of “punting” on the underlying issue by disposing of this case based on standing. In a final appeal, Judge Smith warns of judicial chicanery and chides the majority for allowing it, if not engaging in it:

Standing is a complicated subject at best, and there is always the danger that it will become a black box, from which a judicial conjurer can extract the desired result at will. I do not say that any such thing has happened in this case; but I do say that such things have happened before, and will probably happen again. Today’s decision can only increase that unfortunate likelihood.

Another example of Judge Smith’s preference to decide cases on the merits can be found in Johna M.S. v. Russell E.S. Here, the issue at hand is whether family court has subject matter jurisdiction to entertain a wife’s application for increased spousal maintenance under a separation agreement. The majority, basing

125 Id. at 212, 810 N.E.2d at 407, 778 N.Y.S.2d at 125.
126 Id. at 213–14, 810 N.E.2d at 408, 778 N.Y.S.2d at 128.
127 Id. at 218–19, 810 N.E.2d at 413, 778 N.Y.S.2d at 131–32 (Smith, J., dissenting).
128 Id. at 221, 810 N.E.2d at 414, 778 N.Y.S.2d at 132.
129 Id. at 222, 810 N.E.2d at 415, 778 N.Y.S.2d at 133.
its decision on case law providing that the family court lacks equity jurisdiction, holds that the family court cannot entertain this application because it “has no subject matter jurisdiction to reform, set aside or modify the terms of a valid separation agreement.”131

Judge Smith believes that the majority is reading too deeply into the case law and thus, ignores the purpose of the enabling statute. Under Family Court Act section 411, the family court “has exclusive original jurisdiction over proceedings for support or maintenance.”132 The majority, according to Judge Smith, bases its decision on precedent that precludes the family court from invoking equitable powers to alter an agreement.133 Nevertheless, the agreement here does not require equity jurisdiction but rather an award of maintenance, which is permitted by the statute. Judge Smith sees the problem as one of imprecise drafting. The parties unwisely chose the word “modification”—which led the majority to believe that equity was required—when, in fact, “modification” in the agreement was intended to allow for flexibility and increases of the wife’s maintenance, rather than an alteration of the agreement.134 In a rare sympathetic moment, Judge Smith acknowledges the purpose of the separation agreement—the wife had a severe disability and her future needs could not be determined at the time of execution—and believes that by “focusing on the word ‘modification’ and not on the substance of the agreement, the majority reaches a completely unjust result.”135 Therefore, under the majority’s decision, the wife is “permanently bound to the $100 a week of maintenance payments that the parties chose to meet her ‘present’ needs” and her only other remedy is to bring an action for separation or divorce in the supreme court.136 Judge Smith sees this result as not only unjust, but unnecessary and illogical.

Finally, in Duffy v. Vogel,137 Judge Smith finds that the exercise of logic and common sense would easily resolve a problem that is over complicated by the majority. In Duffy, the issue was whether the trial court’s denial of a jury poll in a civil case can amount to

131 Id. at 366, 889 N.E.2d at 471, 859 N.Y.S.2d at 594.
132 Id. at 367, 889 N.E.2d at 472, 859 N.Y.S.2d at 595 (Smith, J., dissenting).
133 Id. at 368, 889 N.E.2d at 472–73, 859 N.Y.S.2d at 595–96.
134 Id. at 368, 889 N.E.2d at 473, 859 N.Y.S.2d at 596 (explaining that the agreement stated that “the wife shall not be foreclosed from . . . filing in a court of appropriate jurisdiction for a modification of present provisions”).
135 Id. at 368–69, 889 N.E.2d at 473–74, 859 N.Y.S.2d at 596–97.
136 Id. at 369, 889 N.E.2d at 474, 859 N.Y.S.2d at 597.
harmless error. The majority, in an opinion by newly appointed Chief Judge Lippman, finds that it cannot. In a long-winded opinion tracing the history of the right, the majority finds that the right to poll the jury is absolute, even in a civil case, since it is rooted in the common law and it is done to affirm the individual juror's belief in the verdict.138

Judge Smith finds that “[t]his result is compelled by no statute and supported by no binding precedent. It results in a gross injustice in this case, and will no doubt do so in some future cases. And it is highly unlikely to do any practical good.”139 Not only does he disagree with the result, but Judge Smith's opinion seems to evince a frustration with the time it took to generate this decision. One can almost imagine Judge Smith in his chambers reading the majority's opinion, droning on about the history and significance of this sacred right, and screaming to himself: “This makes no sense!” “It changes nothing!” “Just apply some logic!” Nevertheless, his frustrations result in a typical outcome—a 6–1 decision. It seems that Judge Smith's biggest qualm with the majority's decision is that it is an exercise in formalism, which has no bearing on the actual consequences.

I will make a prediction: In almost every case, the poll will confirm the verdict as announced by the foreperson. There are experienced trial lawyers who have never seen a verdict upset by a jury poll—and others who have seen it once, and tell the story to the end of their days.140

Furthermore, he finds this especially true when there is no reason to doubt the veracity of the verdict, which is based on sufficient evidence.141 No doubt, the refusal to permit a jury poll was error; nonetheless, it was harmless since it was not likely to change anything.142 Perplexed, Judge Smith ponders the majority's decision to afford “a sacrosanct status never before conferred on any right of a civil litigant to the quasi-medieval ritual of the jury poll.”143 The result of this decision, Judge Smith finds, is a waste of time and judicial resources, since the defendants will be forced to withstand scrutiny again, “running the risk that the second jury

139 Id. at 178, 905 N.E.2d at 1179, 878 N.Y.S.2d at 250 (Smith, J., dissenting).
140 Id. at 179, 905 N.E.2d at 1180–81, 878 N.Y.S.2d at 251–52.
141 Id. at 180, 905 N.E.2d at 1181, 878 N.Y.S.2d at 252.
142 Id.
143 Id.
will disagree with the first.”

In addition to preferring that decisions reach the merits, Judge Smith also has an affinity for producing sound public policy in procedural decisions by using common sense and logic to derive conclusions. For example, in *Wyly v. Milberg Weiss Bershad & Schulman, LLP*, the Court wrestled with the issue of client access to attorney work product. In *Wyly*, the specific issue was whether an absent class member, with a substantial financial interest, in a class action has a right to review attorney work product. Holding in the negative, the majority found that the class action client is unique and therefore not entitled to the presumptive access usually given to clients, rather, access should be granted on a case-by-case basis.

Furthermore, the majority finds that although the absent class member had a “substantial financial interest in the class action’s outcome” this showing is only one prong of a two part test. The other prong, finds the majority, is whether the “absent class member has demonstrated a legitimate need for the requested documents.” And here, even after the client was granted access to twenty-three boxes of files, he was still unable to convince the trial court of the existence of fraud. Therefore, the majority refuses to say that the “Appellate Division abused its discretion by . . . declining to second-guess” the trial court’s judgment.

Judge Smith believes that the client should be entitled to the presumptive right of access, and in a class action case—for policy reasons—this entitlement is even stronger. Initially, Judge Smith deems the client entitled to access based on his financial interest alone. Indeed, class action litigation is unique and many class members have nominal interest in, and contribute little to, the litigation. “To allow all of them access to lawyers’ work product would be impractical, and would invite abuse.” The client’s interest here, however, was more than de minimis since the client had contributed over $400,000 in stock options. Moreover, Judge Smith believes that the uniqueness of the class action law suit

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144 Id. at 178, 905 N.E.2d at 1179, 878 N.Y.S.2d at 250.
146 Id. at 409, 908 N.E.2d at 894, 880 N.Y.S.2d at 904.
147 Id. at 413, 908 N.E.2d at 897, 880 N.Y.S.2d at 907.
148 Id.
149 Id.
150 Id. at 178, 905 N.E.2d at 1179, 878 N.Y.S.2d at 250 (Smith, J., dissenting).
151 Id.
152 Id.
153 Id.
makes a presumptive right of access all the more necessary. He believes that it would be a wise policy decision to allow this entitlement of access to clients who contribute substantially to attorney's fees:

A recurrent danger in class action practice—a danger all too often realized—is that the lawyers' interests and those of the class members will not be well aligned. Affording a [presumptive] right to a class member who has paid more than a de minimis amount of the lawyers' fees could help to overcome that problem. It would be a good thing, I think, if the lawyer for a class were always aware that class members with weighty interest were entitled to scrutinize their work.154

Clearly, Judge Smith had public policy in mind when writing this opinion.

Another example where Judge Smith has an eye towards sound public policy is in Koehler v. Bank of Bermuda Ltd.155 The complex issue that the court dealt with was whether a New York court may compel a bank (the garnishee), over which New York has personal jurisdiction, to deliver stocks owned by a judgment debtor (“JD”) to a judgment creditor (“JC”), when the stocks are located outside of New York. In Koehler, JC had obtained an out of state judgment against JD, which JC transferred to a New York docket.156 Once on the New York docket, JC sought to enforce a “turnover” order against the bank, which was located in New York—therefore giving New York personal jurisdiction over it—and had on deposit certain stocks owned by JD that were physically located in Bermuda.157 Under CPLR 5225(b), the majority finds that this maneuver is permissible. Although unprecedented, the Court had previously permitted such action under CPLR 5225(a) when New York had personal jurisdiction over the judgment debtor, and here, by simple extension holds that “the principle that a New York court may issue a judgment ordering the turnover of out-of-state assets is not limited to judgment debtors, but applies equally to garnishees.”158

Judge Smith believes that the majority’s expansive view of the garnishment statute spells trouble for New York. According to Judge Smith, New York courts have no business enforcing a

154 Id.
156 Id. at 536, 911 N.E.2d at 827, 883 N.Y.S.2d at 765.
157 Id.
158 Id. at 541, 911 N.E.2d at 831, 883 N.Y.S.2d at 769.
judgment in New York against a garnishee “subject to New York jurisdiction, [when] the judgment creditor, the judgment debtor and the property that the judgment creditor is trying to seize are all elsewhere.” First, Judge Smith believes that this expansive view will lead to forum shopping “for any judgment creditor trying to reach an asset of any judgment debtor held by a bank anywhere in the world.” This problem will be exacerbated by the fact that almost every bank has a branch or subsidiary located in New York. Thus, the majority’s decision will make New York—in the words of Professor Siegel—a “mecca” for judgment creditors.

Furthermore, Judge Smith sees the majority’s decision as encouraging problems with competing claims since a New York court can adjudicate a judgment against an asset not in the forum where the asset is located. Therefore, “[i]f any court with power over the garnishee can order the garnishee to change the asset’s location, significant disruption in the process of deciding whose rights are superior seems inevitable.” Additionally, although Judge Smith is deeply concerned with sound policy through reasoned decision-making, he readily concedes that “[i]t would not matter, of course, whether the majority’s rule were wise or unwise if our Legislature had enacted it.” Judge Smith, however, does not believe that this result is compelled by the CPLR, and that it is a mistake to extend it this far. Finally, on top of all the practical problems caused by the majority’s decision, Judge Smith sees this expansion as ultimately being rendered unconstitutional under the Supreme Court’s decisions in Shaffer v. Heitner and International Shoe Co. v. Washington since New York has no relationship to the judgment creditor, the judgment debtor, or the judgment. In sum, to Judge Smith, this decision is nothing but a “recipe for

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159 Id. (Smith, J., dissenting).
160 Id. at 542, 911 N.E.2d at 831, 883 N.Y.S.2d at 769.
162 Kohler, 12 N.Y.3d at 542, 911 N.E.2d at 831, 883 N.Y.S.2d at 771 (Smith, J., dissenting).
163 Id.
164 Id. at 542, 911 N.E.2d at 832, 883 N.Y.S.2d at 770.
166 326 U.S. 310 (1945).
167 Kohler, 12 N.Y.3d 545, 911 N.E.2d 833, 883 N.Y.S.2d 771 (“In this case . . . the record discloses no New York contact with the parties or the dispute, except the amenability of the Bank of Bermuda, the garnishee, to personal jurisdiction in this state. I have serious doubt that that is enough contact under International Shoe to justify the enforcement of a non-New York judgment by a non-New York creditor against a non-New York debtor, to recover an asset that is located in Bermuda.”).
Ultimately, for Judge Smith, the law of civil procedure in New York should be governed by common sense reasoning and the application of logic. Doing so will produce just results and allow courts to adjudicate controversies on the merits, rather than on technicalities. Furthermore, the Court should not decide procedural issues in a vacuum, since doing so will fail to realize the greater consequences that those decisions produce. Failure to do so will result in unsound public policy that will impact more parties than those involved in the particular dispute.

G. Tort Law

Judge Smith’s dissenting opinions in tort cases are discussed last for the sole reason that his jurisprudence in this area of law is irregular as compared to those previously discussed. In tort law, Judge Smith’s dissenting opinions demonstrate no particular agenda and certainly do not favor one side or the other. At best, what can be gleaned from his opinions about tort law is that the Court should strive to produce sound public policy by following precedent, thereby developing a predictable body of tort law. Judge Smith is definitely not pro-plaintiff or pro-defendant, which makes his vote on the bench a bit of a “wild card.” His philosophy may be best described as cynical: those who deserve a remedy—plaintiffs who are injured by another’s negligence—should be duly compensated, however, those who take advantage of the tort law—plaintiffs whose injuries are caused by their own carelessness—should not be afforded such compensation. Although he believes that there are many shortcomings in tort law, he believes that following precedent will overcome this by at least producing predictability.

For example, in Bard v. Jahnke, the issue the Court faced was whether an animal owner—with no knowledge of that animal’s vicious propensities—may be held liable in ordinary negligence for injuries caused by that animal. No, holds the majority, and for the first time the Court restricts causes of action in animal attack cases to the standard of strict liability, which requires that the owner know of the animal’s vicious propensities.

168 Id. at 542, 911 N.E.2d at 831, 883 N.Y.S.2d at 771.
In *Bard*, plaintiff was hired to conduct repairs in defendant’s barn, and unbeknownst to him, defendant’s breeding bull was lurking in the shadows.\(^\text{170}\) As a result, plaintiff was charged by the bull—leading to serious injuries—but is prevented from recovering since he could not prove that the owner knew or should have known of the bull’s prior vicious propensities.\(^\text{171}\) Furthermore, the majority refuses to permit a cause of action predicated in ordinary negligence under the second restatement of torts since claiming that the owner was negligent in failing to restrain [a breeding bull], or to warn non-farm personnel of his presence . . . is no different from arguing that [the owner] was negligent in that he *should have known* of [the bull’s] vicious propensities because . . . “bulls, in particular breeding bulls, are generally dangerous and vicious animals.”\(^\text{172}\)

The majority opines that doing so would “dilute our traditional rule under the guise of a companion common-law cause of action for negligence.”\(^\text{173}\) The Court unequivocally states, for the first time, that “when harm is caused by a domestic animal, its owner’s liability is determined solely by application of the rule articulated in *Collier*,” i.e., strict liability based on knowledge of vicious propensities.\(^\text{174}\)

Judge Smith sees the majority’s decision as contrary to precedent and nonsensical since “[i]t leaves New York with an archaic, rigid rule, contrary to fairness and common sense, that will probably be eroded by ad hoc exceptions.”\(^\text{175}\) First, Judge Smith finds it preposterous that the owner should be absolved of liability through summary judgment. To him, a jury could have easily found the owner negligent for failing to warn the plaintiff of the bull’s presence based solely on the expert’s “unsurprising information that all breeding bulls are dangerous” because of their “high libido” and aggressive tendencies.\(^\text{176}\) Furthermore, Judge Smith believes that restricting the viable cause of action to strict liability is contrary to precedent. *Collier*—which states the strict liability standard—did

\(^{170}\) *Id.* at 594, 848 N.E.2d at 465, 815 N.Y.S.2d at 18.

\(^{171}\) *Id.* at 597, 848 N.E.2d at 467, 815 N.Y.S.2d at 20.

\(^{172}\) *Id.* at 598–99, 848 N.E.2d at 468, 815 N.Y.S.2d at 21. For the codification of the common-law cause of action for negligence, see RESTATEMENT (SECOND) OF TORTS § 518, cmts. g., h.

\(^{173}\) *Bard*, 6 N.Y.3d at 599, 848 N.E.2d at 468, 815 N.Y.S.2d at 21.


\(^{175}\) *Bard*, 6 N.Y.3d at 599, 848 N.E.2d at 468, 815 N.Y.S.2d at 21 (Smith, J., dissenting).

\(^{176}\) *Id.* at 599–600, 848 N.E.2d at 468–69, 815 N.Y.S.2d at 21–22.
not address the issue of whether general negligence principles apply to such a situation. According to Judge Smith:

No opinion of our Court before today announced the rule, now adopted by the majority, that the strict liability involved in Collier is the only kind of liability the owner of a domestic animal may face—that, in other words, there is no such thing as negligence liability where harm done by domestic animals is concerned. 177

Finally, irrespective of precedent, Judge Smith warns that the rule adopted by the majority is illogical, unfair, and unworkable; destined to lead to ad hoc exceptions that may eventually swallow the rule.

For all the faults of modern tort law, and they are many, I do not think that this attempt to cling to the certainties of a distant era will work out well [referring to long since overruled Dickson v. McCoy178]. The rule the majority adopts is contrary to simple fairness. Why should a person who is negligent in managing an automobile or a child be subject to liability, and not one who is negligent in managing a horse or bull? Why should a person hit by a subway train be able to recover and one hit by a breeding bull be left without a remedy? I think there are no good answers to these questions, and it is possible to image future cases that will put the rule adopted by the majority under strain. Suppose, for example, a variation of the facts of Collier: What if defendant there had encouraged a child to play not with a grown dog, but with a litter of puppies, thus predictably provoking an otherwise gentle mother dog to rage? Or suppose . . . a bull was stirred to attack because his owner negligently caused him to be driven through an area where fresh blood was on the ground? In such a case, we could either deny recovery to a deserving plaintiff, despite negligence more blatant than what [the owner] is accused of here, or we could invent a “mother dog” exception or a “fresh blood” exception to the rule adopted in this case. 179

For Judge Smith, it would make more sense to simply follow the Restatement rule.

Nevertheless, Judge Smith’s deep respect for precedent and his

177 Id. at 601, 848 N.E.2d at 470, 815 N.Y.S.2d at 23.
178 39 N.Y. 400 (1868).
179 Bard, 6 N.Y.3d at 602–03, 848 N.E.2d at 470–71, 815 N.Y.S.2d at 23–24.
aim to produce predictability led him to reaffirm *Bard* three years later in *Petrone v. Fernandez*. In *Petrone*, the majority once again failed to recognize negligence as a viable cause of action for an animal attack, this time the owner being in violation of a local leash law. Joining Judge Pigott’s concurrence, Judge Smith refrains from even commenting, as if to concede defeat, knowing that any resistance would be futile. The concurrence reaffirms the restriction of the strict liability only rule, however, not on the soundness of *Bard*, but rather on the constraint of stare decisis.

In my view, and for the reasons stated in Judge R.S. Smith’s dissent in *Bard*, it was wrong to reject negligence altogether as a basis for the liability of an animal owner. . . . Nevertheless, because I believe that the majority of this Court in *Bard* intended to restrict liability for animal-induced injuries to circumstances where there is strict liability . . . . I must, on constraint of that decision, concur in the majority’s opinion in the present case.

Although Judge Smith’s sympathies lie with the plaintiff in *Bard*, he is a firm believer that those whose carelessness causes their own injuries should not be awarded compensation. For example, in *Soto v. New York City Transit Authority*, the Court wrestled with the issue of whether plaintiff’s extreme recklessness should operate as a superseding cause so as to completely bar recovery. In *Soto*, plaintiff was injured when he attempted to travel (drunkenly!) between subway stations by walking on the catwalk next to the tracks. A jury found the transit authority twenty-five percent responsible for the driver’s failure to stop the train, and the majority affirmed this decision. Finding the plaintiff’s conduct “a substantial factor in causing the accident,” the majority refuses to hold that his actions were “so egregious or unforeseeable that it must be deemed a superseding cause of the accident absolving defendant of liability.” Furthermore, the Court found that there was sufficient evidence in the record whereby a rationale jury could have found that the driver of the train was negligent for failing to avoid the accident. Therefore, according to the majority, it was

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181 Id. at 550, 910 N.E.2d at 996, 883 N.Y.S.2d at 167.
182 Id. at 552, 910 N.E.2d at 997, 883 N.Y.S.2d at 168 (Pigott, J., concurring).
184 Id. at 491–92, 846 N.E.2d at 1214, 813 N.Y.S.2d at 704.
185 Id. at 492, 846 N.E.2d at 1214, 813 N.Y.S.2d at 704.
186 Id. at 493, 846 N.E.2d at 1215, 813 N.Y.S.2d at 705.
not an abuse of discretion for the trial court judge to refuse a directed verdict.

Judge Smith, writing for a three judge dissent, believes that plaintiff’s fault is “so egregious in comparison to the defendant’s that it supersedes defendants’ conduct” and therefore he should be barred from recovery.\textsuperscript{187} According to Judge Smith, the plaintiff was not only reckless once—by attempting to traverse the catwalk while drunk—but a second time by failing to do what “minimal common sense would require—stand still, as far as [he] could get from the tracks, and let the train pass by. Instead, [he] chose to race the train to the next station.”\textsuperscript{188} Judge Smith sees the resulting injuries as entirely plaintiff’s fault. Furthermore, Judge Smith views the majority’s reliance on foreseeability as misplaced. Rather, he asserts, the focus should be on proximate cause. Citing precedent, he believes that proximate cause is the crux of the issue since he “would not hesitate to uphold an award if this plaintiff had been pushed by someone else into the path of the train, rather than recklessly placing himself there, though there is not much difference in the foreseeability of the two events.”\textsuperscript{189} Although his stance seems unsympathetic, Judge Smith’s opinion evinces his desire to produce sound public policy and maintain the integrity of the tort system. In closing, he remarks:

The principle we have applied in previous cases, and should apply here, is that people whose failure to take care of themselves is extreme may not shift any of the consequences to others. Anyone of normal human compassion will sympathize with plaintiff; he is not the only 18 year old who ever acted recklessly, and he has paid a much higher price for it than most. But I do not think it consistent with law or wise policy to hold, as the majority does, that the New York City Transit Authority must compensate him in part for his loss.\textsuperscript{190}

It is clear from this discussion that Judge Smith’s philosophy on tort law recovery cannot necessarily be gauged. He avoids results-based decisions by resisting sympathy. Nevertheless, he has no qualms about awarding damages when he believes them justified as a result of another’s negligent behavior. Indeed, a practitioner must

\begin{footnotesize}
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\item \textsuperscript{187} Id. at 494, 846 N.E.2d at 1216, 813 N.Y.S.2d at 706 (Smith, J., dissenting).
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id. at 495, 846 N.E.2d at 1216, 813 N.Y.S.2d at 706.
\item \textsuperscript{190} Id. at 495, 846 N.E.2d at 1216–17, 813 N.Y.S.2d at 706–07.
\end{itemize}
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be cautious when applying to the Court of Appeals for relief in a tort case, since Judge Smith’s vote is not predetermined solely based on what side of the “v.” a party’s name lies. An argument must be carefully crafted to suit his liking, since his vote may be the difference between sinking and swimming.

II. CRIMINAL APPEALS

During his first six years on the court, Judge Smith has written significantly less dissenting opinions regarding criminal matters than civil actions—eighteen to forty-nine, respectively. Not only does he dissent less, but when he does, his passion is subdued. The scathing, and at times comical, rhetoric that characterizes his dissenting opinions in civil actions is simply not present when he dissents from the Court’s decisions in criminal matters. Perhaps, his prolonged tenure as a civil practitioner—some thirty-five years—has cemented his understanding in certain areas of civil law, leading him to disagree with the majority. Nevertheless, an analysis of his criminal dissents is extremely important because his philosophy is not as rigid as one may have previously believed.

Although, ideally, judges have no political leanings, Judge Smith was a conservative Republican before he ascended to the bench and was nominated to the Court of Appeals by Republican Governor George Pataki. This affiliation would lead some to believe that Judge Smith would be particularly pro-prosecution in his decisions and rather unconcerned with the rights of individual defendants. This presumption, however, is off the mark since six out of the twelve opinions studied in this analysis result in a decision in favor of the defendant. Furthermore, in most of the opinions favoring the defendant, Judge Smith agrees with the majority’s affirmance of guilt, but he dissents based on what he perceives as the majority’s failure to recognize the legislature’s true intent or a defendant’s proper constitutional protections at trial. These opinions—especially finding in favor of a criminal defendant based on a statutory “technicality”—are uncharacteristic of a typically conservative Republican judge, and are quite telling about Judge Smith’s reverence to the law. In many circumstances, it would have been easier for him to simply join the majority opinion, but his dedication to the rule of law prohibited such, which makes his jurisprudence an intriguing study. On the other hand, in strict

191 Smith, supra note 2, at 625.
criminal procedure cases, Judge Smith fits the bill of a conservative Republican jurist. He favors reducing the burden on law enforcement by narrowly interpreting the Fourth Amendment. Nevertheless, his decisions are well reasoned, persuasive, and do not necessarily evince an agenda.

By far, Judge Smith’s most famous (or infamous) criminal dissent during his six years on the bench occurred in *People v. LaValle*, where he wrote for a three judge dissent holding that the deadlock instruction required by New York’s death penalty statute is not unconstitutionally coercive. The majority found that this portion of the statute was unconstitutional, and therefore rendered the entire death penalty a nullity. Judge Smith’s dissent in *LaValle*, however, was rendered moot when he reaffirmed the unconstitutionality of New York’s death penalty statute—based on stare decisis—three years later in *People v. Taylor*. In *Taylor*, Judge Smith concurred with the majority as the swing vote based on *LaValle* and struck down the statute. Thus, Judge Smith’s dissent in *LaValle* and his concurrence in *Taylor* are outside the scope of this article since his dissent in the former was nullified by his concurrence in the latter.

Nevertheless, the *LaValle-Taylor* legacy is a testament to Judge Smith’s respect for the law—which takes precedence over his personal beliefs—since it would have been quite simple for him to vote with the three dissenting judges in *Taylor* to reinstate the death penalty as he would have done in 2003. Furthermore, much to his dismay, Judge Smith’s concurrence in *Taylor* diminished his status as a villain and caused “all [his] liberal friends to come up and congratulate ... and embrace him.” This adherence to the rule of law is something that can be traced through his dissenting opinions in criminal cases.

This section is organized into four distinct parts—criminal procedure, pretrial rights, trial rights, and statutory interpretation—and each part analyzes Judge Smith’s respective dissenting opinions. Although some trends do arise, they are not as definite as those that exist in Judge Smith’s civil jurisprudence, and reveal, if anything, that he cannot be pigeon-holed as easily as one might think.

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193  *Id.* at 99, 817 N.E.2d at 344, 783 N.Y.S.2d at 488.
195  *Id.* at 156, 878 N.E.2d at 984, 848 N.Y.S.2d at 569 (Smith, J., concurring).
196  Smith, supra note 2, at 631.
Surprisingly, during Judge Smith’s first two years on the bench he never wrote a dissenting opinion in a criminal procedure case. This may be more than a coincidence due to the composition of the Court of Appeals early in his career. Since then, however, Judge Smith has written three dissenting opinions in very important cases. All three decisions deal with the Fourth Amendment, specifically search issues. And in all three cases the Court was divided with Judge Smith writing a dissenting opinion in favor of the prosecution. Within these opinions Judge Smith is very critical of the majority’s definition of a search. To him, the meaning of search should be limited to instances where there is an actual intrusion into a person’s expectation of privacy.

Furthermore, his narrow interpretation of the Fourth Amendment is due to his desire to avoid limiting police officer discretion to the point of debilitating effective law enforcement. Finally, although Judge Smith respects reasoned policy decisions, he believes that common sense should be applied when dealing with the Fourth Amendment. More than any other topic in this criminal section, Judge Smith’s jurisprudential philosophy is obvious in regard to the Fourth Amendment: narrow the interpretation in order to reduce the already heavy burden on law enforcement.

For example, in People v. Moore the Court dealt with the issue of whether an anonymous tip accompanied by avoidance of police contact can amount to reasonable suspicion in order to justify a stop and frisk. In Moore, the police were alerted by an anonymous tip that the defendant was armed with a weapon. When the suspect was approached by the police, he began to walk away. Without asking any questions, the police drew their weapons and forcibly seized him. Once seized, the officers told the defendant to put his hands up, and while doing so he made a movement toward his waistband. One of the officers patted down the defendant and recovered a gun. Citing the four-level De Bour test, the

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198 Id. at 497, 847 N.E.2d at 1142, 814 N.Y.S.2d at 568.
199 Id. at 498, 847 N.E.2d at 1142, 814 N.Y.S.2d at 568.
200 People v. De Bour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976); see Moore, 6 N.Y.3d at 498, 847 N.E.2d at 1142, 814 N.Y.S.2d at 568 (“In De Bour, [the Court] set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion...”)
majority—in suppressing the weapon—explained that the anonymous tip justified the police officer’s right to inquire, but that the officers did not possess reasonable suspicion until the defendant reached for his waistband, which was well after he was forcibly seized.\textsuperscript{201} Therefore, any fruits of that seizure—i.e., the gun—must be suppressed. The majority goes on to further explain that “[a]n anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains predictive information . . . so that the police can test the reliability of the tip.”\textsuperscript{202}

Additionally, avoidance of police contact merely justifies the common-law right of inquiry—and not a forcible seizure—since the defendant is entitled to “the right to be let alone.”\textsuperscript{203} Indeed, “[i]f merely walking away from the police were sufficient to raise the level of suspicion to reasonable suspicion—and a suspect who attempted to move could be required to remain in place at the risk of forcible detention—the common-law right to inquiry would be tantamount to the right to conduct a forcible stop and the suspect would be effectively seized whenever only a common-law right of inquiry was justified.”\textsuperscript{204}

Judge Smith believes that the combination of an anonymous tip and avoidance of contact with the police is enough to establish reasonable suspicion, since failing to do so “limits too strictly the ability of police officers to make the common sense, spur-of-the-moment judgments that street encounters demand and that are essential to achieving a proper balance between individual rights and law enforcement.”\textsuperscript{205} In reaching this conclusion, Judge Smith agrees with the majority (and a long line of precedents) that “neither an anonymous tip nor the avoidance of police officers can alone create reasonable suspicion.”\textsuperscript{206} This is so because of legitimate policy concerns that “compete with society’s interest in efficient law enforcement,” such as the desire to avoid harassment and abridge the right to be let alone.\textsuperscript{207} For Judge Smith it is not

\begin{itemize}
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id. at 499, 847 N.E.2d at 1143, 814 N.Y.S.2d at 569.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 500, 847 N.E.2d at 1143–44, 814 N.Y.S.2d at 569–70.
\item \textsuperscript{205} Id. at 501, 847 N.E.2d at 1144, 814 N.Y.S.2d at 570–71 (Smith, J., dissenting).
\item \textsuperscript{206} Id. at 501, 847 N.E.2d at 1145, 814 N.Y.S.2d at 571.
\item \textsuperscript{207} Id. at 502, 847 N.E.2d at 1145, 814 N.Y.S.2d at 571.
\end{itemize}
entirely intuitive that a police officer should not become suspicious when he receives an anonymous tip that someone has committed a crime or when a person, upon seeing the police officer, promptly decides to walk the other way. Nevertheless, he accepts the artificial definition of reasonable suspicion in favor of public policy. For Judge Smith, though, it is too far of a stretch to assert that no reasonable suspicion is present when both grounds exists—i.e., anonymous tip and avoidance of contact with the police. “At that point . . . the reasons to be suspicious are powerful enough that society’s interest in efficient law enforcement should prevail.”

Therefore, in this case when the police officers observed both that [the] defendant matched the description the anonymous caller had given of a man with a gun, and that he began to walk away at the sight of the police, the possibility that he did indeed have a gun deserved to be investigated, even at the cost of a temporary interference with his liberty.

Thus, if it were up to Judge Smith, the weapon would not have been suppressed since the police had reasonable suspicion to pat down the defendant.

In the next two cases the court deals with search and seizure issues of first impression, and in both, the majority finds that the police have overstepped their bounds and violated the Fourth Amendment. Judge Smith, however, finds the actions of law enforcement to be valid essentially because the police lawfully observed the areas in question and did not invade privacy, therefore any search did not run afoul of the constitution.

For instance, in People v. Hall, the Court decided whether it is constitutionally permissible for the police to subject an arrested defendant to a warrantless visual body inspection followed by a body cavity search. The majority, in a two part decision, found that the visual inspection was permissible since the police had reasonable suspicion to believe that the defendant was concealing drugs in his body, but the body cavity search was not—even though probable cause was present—since no warrant was obtained.

In Hall, the defendant was arrested for suspicion of a drug sale,
and when a clothing search produced no contraband, the police asked him to remove his clothing. After doing so the police “observed a string or piece of plastic hanging out of defendant’s rectum.”214 Once the defendant refused to voluntarily remove the object, the police pulled on the string revealing crack-cocaine. Writing for the majority, Judge Graffeo explained that based on federal precedents “the Fourth Amendment does not prohibit a visual cavity inspection if the police have at least a reasonable suspicion to believe that contraband . . . is hidden inside the arrestee’s body.”215 Conversely, however, the Court found that without exigent circumstances, a warrant is required before the police can conduct a manual body cavity search—which includes an intrusion into defendant’s body—because it “is more intrusive and gives rise to heightened privacy and health concerns.”216 Therefore, the recovered contraband must be suppressed.

Judge Smith, however, believes that the removal of the bag was constitutionally permissible because there was no intrusion into the defendant’s body.217 He sees the warrant requirement as a useless exercise since the general rule “is that a person arrested can be searched without a warrant.”218 This rule is circumscribed when the search intrudes into the human body. Nevertheless, unlike the state and federal precedents that the majority relies on, there was no intrusion here because “[t]here is no evidence that any hand or implement was inserted, or that the officers’ actions had any significant internal effect on defendant.”219 The officer merely pulled on a string that they had a right to observe since the visual body inspection was permissible. Thus, for Judge Smith, it is not “unreasonable for the officers to take, with minimal force, what they have already lawfully seen.”220 Otherwise, “[t]he majority’s contrary holding will . . . add unnecessarily to the many problems faced by police officers trying to make headway against street drug dealers.”221

Finally, in People v. Weaver,222 the Court dealt with the issue of whether the warrantless attachment of a global positioning system

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214 Id. at 306, 886 N.E.2d at 164, 856 N.Y.S.2d at 542.
215 Id. at 309, 886 N.E.2d at 166, 856 N.Y.S.2d at 544.
216 Id. at 311, 886 N.E.2d at 168, 856 N.Y.S.2d at 546.
217 Id. at 322, 886 N.E.2d at 177, 856 N.Y.S.2d at 555 (Smith, J., dissenting).
218 Id. at 323, 886 N.E.2d at 177, 856 N.Y.S.2d at 555.
219 Id.
220 Id. at 325, 886 N.E.2d at 177, 856 N.Y.S.2d at 555.
221 Id.
(“GPS”) device to a defendant’s car to monitor his whereabouts in public places runs afoul of the Fourth Amendment. Chief Judge Lippman—in a case that will prove to be seminal for years to come—writes for a slim majority holding that attaching such a device to monitor the defendant’s every move for sixty-five days is a violation of the Fourth Amendment since it is a “massive invasion...inconsistent with even the slightest reasonable expectation of privacy.”

Without applying the usual reasonable expectation of privacy analytical framework, Chief Judge Lippman tracks the history of the Fourth Amendment—especially in regard to electronic surveillance—concluding that even though a defendant’s privacy expectation is diminished in a car traveling on public thoroughfares and (at least in theory) GPS tracking is similar to visual observation by the police (which would require no warrant), GPS is so sophisticated and precise that allowing such unfettered use is “[in]compatible with any reasonable notion of personal privacy or ordered liberty.”

GPS technology—which the Court distinguishes from the use of a mere “beeper” that was validated by the Supreme Court in United States v. Knotts—can relay such detailed information that a comprehensive profile of a person’s public and private life can be determined. Concluding, the majority finds that “[w]ithout judicial oversight, the use of [GPS] presents a significant and...unacceptable risk of abuse. Under [the] State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual’s whereabouts requires a warrant supported by probable cause.”

Judge Smith believes that the advance of technology should not change the constitutional analysis and, even if it did, the real issue

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223 Id. at 444, 909 N.E.2d at 1201, 882 N.Y.S.2d at 363.
224 Id. at 441, 909 N.E.2d at 1199, 882 N.Y.S.2d at 361.
225 40 U.S. 276, 281 (1983) (permitting the warrantless use of a “beeper” to track a drum of chloroform because “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another”).
226 Weaver, 12 N.Y.3d at 441–42, 909 N.E.2d at 1199, 882 N.Y.S.2d at 361–62 (“Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and vocational pursuits.”).
227 Id. at 447, 909 N.E.2d at 1203, 882 N.Y.S.2d at 365.
in this case is whether the attachment of the GPS to defendant’s car constituted an unlawful search. First, Judge Smith sees no difference between the use of GPS and assigning a team of police officers to visually track and observe the defendant, which would require no warrant.\footnote{Id. at 448, 909 N.E.2d at 1204, 882 N.Y.S.2d at 366 (Smith, J., dissenting).}

It is beyond any question that the police could, without a warrant and without any basis other than a hunch that defendant was up to no good, have assigned an officer, or a team of officers, to follow him everywhere he went, so long as he remained in public places. He could have been followed in a car or a helicopter; he could have been photographed, filmed or recorded on videotape; his movements could have been reported by a cellular telephone or two-way radio. These means could have been used to observe, record and report any trips he made to all the places the majority calls “indisputably private,” from the psychiatrist’s office to the gay bar. One who travels on the public streets to such destinations takes the chance that he or she will be observed.\footnote{Id.}

Furthermore, he is unconvinced that the mere fact that GPS is “new, and vastly more efficient that the investigative tools that preceded it” make any difference.\footnote{Id.} To him, the use of a “beeper” was a new technology when it was approved in\textit{ Knotts} twenty-five years ago, and in all likelihood, will “seem primitive a quarter of a century from now.”\footnote{Id.} Moreover, the distinction between the levels of technology used in\textit{ Knotts} as opposed to this case is nothing more than an ad hoc, arbitrary distinction that will present “future courts with the essentially impossible task of deciding which investigative tools are so efficient and modern that they are subject to the same prohibition.”\footnote{Id.}

Additionally, what Judge Smith believes to be the real issue here is whether the “surreptitious attachment of the device to the car, without the car owner’s consent” constituted an unlawful search.\footnote{Id. at 447, 909 N.E.2d at 1204, 882 N.Y.S.2d at 366.} Nevertheless, he finds that there was not an unconstitutional search since the government did not invade the defendant’s reasonable expectation of privacy. For Judge Smith, the fact that
the device was attached to the outside of defendant’s car while it was parked on the public street eliminated any expectation of privacy because surely “[n]o one who chooses to park in such a location can reasonably think that the outside—even the underside—if the car is in a place of privacy.” Therefore, the motion to suppress the evidence obtained from the GPS should denied “[b]ecause no one invaded defendant’s privacy.”

Clearly, it is evident from these three cases that Judge Smith favors a narrow interpretation of the Fourth Amendment. His opinions clearly show that he strives to reduce the burden on law enforcement, especially when requiring a warrant would result in a superfluous exercise of formality, standing only to place a straitjacket on police officer discretion. This is not to say, however, that Judge Smith is unsympathetic to a defendant’s constitutional protections, because as will be shown below, he is quite keen on upholding a criminal defendant’s rights. Nevertheless, Judge Smith desires to maintain an even balance between valid societal concerns of privacy and efficient law enforcement. Subsequently, he believes that the three cases previously discussed strike the balance too far in favor of individual privacy, thus stymieing legitimate law enforcement objectives.

B. Pretrial Rights

When the fate of a criminal defendant depends on the enforcement of a pretrial right, Judge Smith, uncharacteristically, is not particularly consistent in his reasoning. In three decisions—all decided in a little over a year—Judge Smith twice dissented in favor of the prosecution. In those two pro-prosecution opinions—People v. Hill and People v. Boyer—Judge Smith displays a conviction that inconsequential procedural errors should be deemed harmless in order to relieve the already heavy burden on law enforcement. On the other hand, in People v. Seeber, he flips his rationale and votes to reverse a conviction based on what appears to be a very technical ground. In fact, his opinion seems to be one based on semantics. Nevertheless, this inconsistency is significant because it demonstrates the lack of uniformity in his dissenting criminal opinions, which is a considerable fact in itself.

For example, in People v. Hill, the Court dealt with the issue of

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234 Id. at 450, 909 N.E.2d at 1206, 882 N.Y.S.2d at 368.
235 Id. at 451, 909 N.E.2d at 1206, 882 N.Y.S.2d at 368.
whether the prosecution’s failure to alert the grand jury that defendant’s witnesses would testify to his alibi undermined the integrity of the grand jury thus prejudicing the defendant. In Hill, the defendant requested that the grand jury hear testimony from eight witnesses. The grand jury asked for information regarding the witnesses’ testimony and the prosecutor—knowing that the witnesses would produce alibi testimony—responded that he was unable to divulge such information. Based on this lack of knowledge, the grand jury “voted not to hear them and ultimately returned a true bill against defendant.” In a rather terse memorandum opinion, the majority found that the omitted information did undermine the integrity of the grand jury thus prejudicing the defendant since “the prosecutor gave an inaccurate and misleading answer to the grand jury’s legitimate inquiry.”

Although the state was granted leave to represent, Judge Smith dissented, agreeing that the prosecutor erred, but that this error did not impair the grand jury’s integrity. After a recitation of the facts—something that the majority failed to do, and which proves to be important since one of the witnesses recanted her testimony—Judge Smith asserts that this case is governed by two statutes. The first is CPL section 190.50(6) which provides that “[a] defendant . . . may request the grand jury . . . to cause a person designated by him to be called as a witness in such proceeding.” The second, CPL section 210.35(5), requires dismissal of the indictment where “[t]he proceeding otherwise fails to conform to the requirements of [CPL section 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result.” Read together, these two statutes assert that the “defendant is entitled to have the indictment dismissed . . . only if he can show both a violation of CPL 190.50(6) and a resulting impairment of the proceeding’s integrity.” According to Judge Smith, defendant “clears the first hurdle but not the second” because the prosecutor should have answered the questions, but this was not an intentional attempt to mislead the grand jury. It was nothing more than a good faith misjudgment by the prosecutor who was placed in a “sticky

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237 Id. at 773, 835 N.E.2d at 655, 801 N.Y.S.2d at 795.
238 Id.
239 Id.
240 Id. (Smith, J., dissenting.)
241 N.Y. CRIM. PROC. LAW § 190.50(6) (McKinney 2007).
243 Hill, 5 N.Y.3d at 775, 835 N.E.2d at 656, 801 N.Y.S.2d at 796.
244 Id. at 776, 835 N.E.2d at 656–57, 801 N.Y.S.2d at 796–97.
situation” since his statements could have given an improper impression to the jury due to the recanted testimony.245

It is interesting, however, that this analysis was never conducted by the majority; the opinion was brief with no discussion. Furthermore, Judge Smith points out that this case comes to the Court based on a motion to dismiss the indictment; defendant had not been tried and convicted yet. He suggests that the majority “might be more reluctant to dismiss an indictment on grounds like this after a conviction has already been obtained.”246 The defendant was indicted for second degree murder, and Judge Smith proposes that the result may have been different if the case had gone to verdict. Then again, should this really make a difference? In a system of justice where the law is supposed to be blind, is there any room for results-based decisions? For Judge Smith, the answer is no, the law is the law and should be applied equally without regard for the result. Nevertheless, he alludes to the fact that the majority may not feel the same way.

Moreover, People v. Boyer247 is another example in which Judge Smith believes that inconsequential procedural errors should be disregarded in light of easing the burden on law enforcement. In Boyer, a responding police officer viewed the suspect fleeing on a fire escape from forty to fifty feet away and once apprehended, identified him as such.248 The problem, however, was that the prosecution failed to serve notice to the defense of the identification procedure.249 CPL section 710.30 mandates that “within 15 days of arraignment, the prosecution must serve upon the defendant notice of its intention to introduce at trial ‘testimony regarding an observation of the defendant . . . to be given by a witness who has previously identified him as such.’”250 This provision allows the defendant, through a Wade hearing, to test the reliability of the identification procedure, ensuring that the identification is not the product of undue suggestiveness and therefore reducing the possibility of misidentification. If notice is not served, the out-of-court identification must be suppressed.

This rule, however, is not without exceptions, and the one relevant here is the Wharton exception. Under Wharton, an

245 Id. at 776, 835 N.E.2d at 657, 801 N.Y.S.2d at 797.
246 Id. at 777, 835 N.E.2d at 658, 801 N.Y.S.2d at 798.
248 Id. at 429–30, 846 N.E.2d at 462, 813 N.Y.S.2d at 32.
249 Id. at 430, 846 N.E.2d at 462, 813 N.Y.S.2d at 32.
250 N.Y. CRIM. PROC. LAW § 710.30 (McKinney 1995).
identification by a police officer is merely “confirmatory” if it takes place after a planned encounter (a buy-and-bust situation for example) and “occurred at a place and time sufficiently connected and contemporaneous to the arrest itself as to constitute the ordinary and proper completion of an integral police procedure.”

Accordingly, the issue in Boyer is whether the “confirmatory identification” exception should be extended to situations “where a police officer’s initial encounter with a suspect and subsequent identification of that suspect are temporally related, such that the two might be considered part of a single police procedure.” The majority answers this question in the negative, citing to the quality of the police officer’s initial identification as critical to avoid undue suggestiveness. Here, the police officer’s viewing of the suspect was not of the quality to satisfy the Wharton exception since it was “for a few seconds on a fire escape some 40 to 50 feet above ground [which] stands in stark contrast to the face-to-face viewing in Wharton.”

Therefore, the initial identification did not obviate the possibility of undue suggestiveness and misidentification.

Judge Smith, on the other hand, sees the prosecution’s failure to serve notice as an inconsequential error. He uses a balancing test to determine that “the procedure followed here was so obviously a desirable one, and the risk of suggestiveness so small, that . . . a Wade hearing was unnecessary.” To Judge Smith, it is desirable that after an initial identification by a police officer the same officer be shown the suspect as soon as possible since this will reduce the opportunity for misidentification. Additionally, the risk of suggestiveness is minimal because a police officer—as opposed to a civilian—“is much less likely . . . to be swayed by the assumption that a suspect who is in police custody must be guilty.”

Furthermore, Judge Smith takes issue with the majority’s holding, which essentially (according to Judge Smith) narrows the Wharton exception “to the situation where the officer’s ‘identification could

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251 Boyer, 6 N.Y.3d at 432, 846 N.E.2d at 464, 813 N.Y.S.2d at 34 (citation omitted). If there is, in fact, a confirmatory identification, the opportunity for undue suggestiveness is not present since the police officer’s “participation in the criminal apprehension operation at issue was planned, and he was experienced to observe carefully the defendant for purposes of later identification and for completion of his official duties.” Id. (citation omitted).

252 Id. at 429, 846 N.E.2d at 461–62, 813 N.Y.S.2d at 31–32.

253 Id. at 433, 846 N.E.2d at 465, 813 N.Y.S.2d at 35.

254 Id. at 433, 846 N.E.2d at 464–65, 813 N.Y.S.2d at 34–35.

255 Id. at 435, 846 N.E.2d at 466, 813 N.Y.S.2d at 36 (Smith, J., dissenting).

256 Id. at 434, 846 N.E.2d at 467, 813 N.Y.S.2d at 35.

257 Id. at 435, 846 N.E.2d at 466, 813 N.Y.S.2d at 36.
not be mistaken.” The risk of mistake, however, is not what the Wade hearing tests:

The issue to be decided at a Wade hearing is not whether the officer made a mistake; that is for the jury to decide at trial. The issue is whether the postarrest identification was unduly suggestive—i.e., whether the circumstances of the identification increased the risk that the officer might err. A prompt postarrest viewing of a suspect by a police officer who saw the crime is virtually guaranteed to diminish the risk of error, not increase it.

This reasoning limits Wharton beyond what was originally intended “thus making the system more complicated and cumbersome than it needs to be, and adding unnecessarily to the number of cases in which an offender walks free because police or prosecutors have slipped up in complying with a procedural rule.”

For Judge Smith, this procedural miscue was inconsequential because a constitutional violation was not present since the opportunity for undue suggestiveness was de minimis. According to Judge Smith, such miscues should not result in suppression or acquittal.

Finally, in People v. Seeber, Judge Smith interestingly switches his position away from his “harmless error” approach demonstrated above and rather takes a hyper-technical stance in an attempt to invalidate a guilty plea allocution. The issue was whether a defendant’s guilty plea can be withdrawn even though she never acknowledged every element of the pleaded-to offense. In another terse memorandum opinion, the majority found in the negative since the Court has “never held that a plea is effective only if a defendant acknowledges committing every element of the pleaded-to offense or provides a factual exposition for each element of the pleaded-to offense.” For the majority, this case boils down to the simple fact that “nothing that defendant said or failed to say in her allocution negated any element of the offense to which she pleaded or otherwise called into question her admitted guilt or the voluntariness of her plead.” Thus, withdrawal will not be permitted.

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258 Id.
259 Id.
260 Id. at 436, 846 N.E.2d at 466, 813 N.Y.S.2d at 36.
262 Id. at 781, 826 N.E.2d at 799, 793 N.Y.S.2d at 828.
263 Id.
Not so fast, claims Judge Smith. This two page opinion glosses over the fact that defendant could not have admitted to felony murder since she never committed the requisite felony. According to the facts—which the majority fails to recite—defendant committed larceny because she stole from the victim by stealth, however, she did not commit robbery since force was not used nor did she commit burglary because defendant did not “remain unlawfully.”

Larceny, however, is not a crime that will satisfy the “felony” portion of the felony murder statute. Judge Smith surmises that the defendant killed the victim after stealing her property. This, he exclaims, “is an appalling crime, but it is intentional murder, not felony murder.” When asked if she “remained unlawfully,” defendant readily answered in the affirmative, however, Judge Smith believes that she was unaware of the legal meaning of “remains unlawfully” since she was admitted into the home of the victim and never asked to leave. According to Judge Smith, the prosecutor used a loophole to get the defendant to admit to felony murder when “there was in fact no robbery, no burglary and no felony murder.”

Furthermore, he is disturbed by the fact that the prosecutor chose to ask for a legal conclusion—“Did you remain unlawfully?”—rather than a factual one—“Did you stay in [the victim’s] house after being asked to leave?” Additionally, Judge Smith becomes enraged—which is uncharacteristic in his criminal dissents—in response to the majority’s assurance that this question was legitimate because it came after an “off-the-record conference” called to determine the appropriate question. In his typical mocking tone, he exclaims:

Why was the best the prosecutor could do, after this brainstorming session, a legalistic question that seems designed to produce an incorrect answer? Why did no one suggest, in the off-the-record conference, that defendant be asked to state the facts supporting a robbery or burglary charge? Probably because no such facts existed.

In closing, Judge Smith concedes that the defendant is deserving of whatever punishment she receives—that in fact, the results do

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264 Id. at 783, 826 N.E.2d at 800, 793 N.Y.S.2d at 829 (Smith, J., dissenting).
265 N.Y. PENAL LAW § 125.25(3) (McKinney 2009).
266 Seeber, 4 N.Y.3d at 783, 826 N.E.2d at 800, 793 N.Y.S.2d at 829 (Smith, J., dissenting).
267 Id. at 783–84, 826 N.E.2d at 800–01, 793 N.Y.S.2d at 829–30.
268 Id. at 784, 826 N.E.2d at 801, 793 N.Y.S.2d at 830.
269 Id.
270 Id.
271 Id.
not “offend any sense of fairness.” He surmises that the parties cut a deal with a plea to felony murder, rather than intentional murder, “while trying to walk delicately around the difficult fact that no felony murder occurred.” Nevertheless, “the law does not authorize this sort of shortcut to an equitable result. . . . To tolerate a contrived ‘admission’ to a crime that probably never happened . . . may produce an attractive result in a particular case, but invites abuse in the future.”

What we learn when juxtaposing these three cases is that Judge Smith does not believe that the Court should get bogged down in procedural technicalities just for the sake of procedure. In other words, if the infraction would not drastically alter the results of the case or heavily impact the future of criminal law in New York, then it should be disregarded as inconsequential—this will prevent further burdening of the criminal justice system. We see this in Hill and Boyer. On the other hand, as evidenced from Seeber, when the infraction has the potential to detrimentally impact criminal proceedings in the future, Judge Smith is less tolerant.

C. Trial Rights

When Judge Smith dissents in cases regarding a criminal defendant’s rights at trial, he is slightly more conservative than when dealing with pretrial rights. In three opinions during his tenure, two of them have been in favor of protecting the trial rights of the defendant. What this section will focus on, however, is the two opinions where an ineffective assistance of counsel claim is at issue; specifically, one based on a conflict of interest. Interestingly, Judge Smith finds in favor of the prosecution in one, and in favor of the defendant in the other. Comparing the two opinions shows that in criminal cases, Judge Smith cannot really be pegged one way or the other. He has little to no agenda, and truly attempts to follow the law. It is interesting to see how in both cases, he applies the same standard and the same reasoning, but comes to a different result.

For instance, in People v. Lewis, the Court was asked to decide whether the mere fact that defense counsel testified at the defendant’s Sirios hearing amounted to ineffective assistance of counsel. The case is significant because it illustrates the complexities of determining when counsel’s conduct amounts to ineffective assistance of counsel. The court must consider the nature of the testimony, the circumstances under which it was given, and the impact on the defendant’s case. This section provides insights into Judge Smith’s approach to such cases, highlighting his conservative stance on procedural technicalities while being less tolerant when the infraction has potential to detrimentally impact future criminal proceedings.

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272 Id. at 785, 826 N.E.2d at 801, 793 N.Y.S.2d at 830.
273 Id.
274 Id. at 785, 826 N.E.2d at 801–02, 793 N.Y.S.2d at 830–31.
counsel based on a conflict of interest. Answering this question in
the affirmative, the majority essentially draws a bright-line rule
that whenever “defense counsel’s testimony [is] in conflict with
defendant’s position, defendant [is] denied effective
representation.”276 In Lewis, the defendant was accused of
threatening a prosecution witness after the witness’s implicating
statement was disclosed to defense counsel. In order to support the
assertion that defendant forfeited his right to confrontation, the
prosecution was required to prove this at a Sirios hearing.277
During the hearing, the prosecution elicited testimony from defense
counsel that he disclosed the contents of the witness’s statement to
none other than the defendant in an effort to prove—
circumstantially—that no one else could have made this threat.
This, holds the majority, amounts to ineffective assistance of
counsel because “defendant’s attorney testified adversely to his
client and thereby transformed himself from defendant’s advocate
into his adversary.”278 Citing People v. Berroa279 in support, the
majority draws this bright-line rule and would require defense
counsel to withdraw to avoid this insurmountable conflict.280 Since
withdrawal did not take place, the majority orders a new trial.

Judge Smith disagrees since “[w]hat occurred here does not come
close to ‘ineffective assistance’ in the ordinary sense.281 Unlike the
majority, Judge Smith, relies on the standard for determining
ineffective assistance of counsel when a conflict is present. That is,
“counsel ‘actively represented conflicting interests’ and that ‘an
actual conflict of interest adversely affected his lawyer’s
performance.’”282 In other words, there must be a conflict of interest
and it must operate on the defense. Rather than applying this
standard, the majority relies on Berroa, which is easily
distinguishable as a more egregious conflict of interest.283

Nevertheless, to Judge Smith, the crux of this case is the second
prong of the ineffective assistance standard. He agrees with the
majority that defense counsel’s adverse testimony presented a
conflict, but it did not operate upon the defense.

The testimony defense counsel gave was out of the jury’s

276 Id. at 228, 809 N.E.2d at 1108, 777 N.Y.S.2d at 800.
277 Id. at 227, 809 N.E.2d at 1107, 777 N.Y.S.2d at 799.
278 Id. at 228, 809 N.E.2d at 1108, 777 N.Y.S.2d at 800.
280 Lewis, 2 N.Y.3d at 228, 809 N.E.2d at 1108, 777 N.Y.S.2d at 800.
281 Id. at 232, 809 N.E.2d at 1111, 777 N.Y.S.2d at 803 (Smith, J., dissenting).
282 Id. (citation omitted).
283 Id. at 232–33, 809 N.E.2d at 1111, 777 N.Y.S.2d at 803.
presence and had nothing to do with any issue the jury considered. The jury presumably never knew that defense counsel had taken the stand. I find nothing in the record to suggest that defense counsel became a less effective advocate after his testimony.284

Therefore, for Judge Smith, the majority is without justification for invalidating the entire trial. If anything, a new Sirios hearing should be ordered.

On the other hand, in People v. Konstantinides285 once again Judge Smith finds that the second prong of the two-part test is what is at issue, but this time he concludes that the conflict did operate on the defense. In Konstantinides, the Court wrestled with the issue of whether defense counsel’s attempt to suborn perjury on behalf of the defendant constitutes ineffective assistance of counsel due to a conflict of interest. In this case, one of defendant’s attorneys attempted to convince a witness to give false testimony in order to clear the defendant’s name.286 After defendant was acquitted of one charge and convicted of another, he appealed based on ineffective assistance of counsel because the attorney was conflicted by his participation in procuring perjury. Judge Read, writing for the majority, finds that in fact a conflict did exist, but it did not operate on the representation.287

In Konstantinides, unlike Lewis, the majority actually articulates the standard for ineffective assistance based on a conflict. Nevertheless, much deference is given to the appellate division’s holding since the majority finds that “whether a conflict of interest operates on the defendant is a mixed question of law and fact.”288 Finding support in the record for the appellate division’s holding, the majority cites four reasons—as found in the record—why the conflict did not operate on the defense: (1) defendant knew of the potential conflict—since it was revealed at pretrial hearings—and did not object; (2) defendant’s other (conflict-free) attorney conducted half of the trial; (3) the conflict had no affect on the charges defendant was convicted of because the perjury was in regard to the acquitted charge; and (4) the fact that the trial court never inquired, on the record, as to the affect that the conflict had on the defense, does not relieve the defendant’s burden of proving

284 Id. at 233, 809 N.E.2d at 1111–12, 777 N.Y.S.2d at 803–04.
286 Id. at 6, 896 N.Y.S.2d at 286.
287 Id. at 10, 896 N.Y.S.2d at 289.
288 Id.
Judge Smith, however, opines that whether the conflict operated on the defense—the issue that the majority finds support in the record to deny—is a question that cannot be passed on because there is in fact no support in the record. According to Judge Smith, once the trial court determined that there was indeed a conflict, it was required to determine whether the conflict operated on the defense—this, he claims, is something the trial court never did.\textsuperscript{290} To Judge Smith, the fact that the lawyer had a personal interest in the application of this defense—i.e., saving his reputation, license, and freedom—may have skewed his ability to zealously advocate for his client. But since the trial court never inquired into this area, “the record before [the court] is silent as to whether there are witnesses who might have been called, questions that might have been asked, or strategies that might have been pursued if defendant’s lawyer’s personal interests had not been threatened.”\textsuperscript{291}

Furthermore, Judge Smith is astonished that “the majority makes the absence from the record of necessary information . . . a basis for \textit{affirming} defendant’s conviction.”\textsuperscript{292} He questions, in his typical rhetoric: “How was the defendant supposed to meet that burden [demonstrating that the conflict operated on the defense] while represented by the very counsel who was subject to the conflict?”\textsuperscript{293} Placing the blame on defendant for the silence in the record is too much for Judge Smith. Reversing the conviction and granting the defendant a new trial is not something that Judge Smith is not prepared to do, however, he cannot conceive how the majority offers no remedy, if only to grant “a hearing on the issue of how, if at all, the apparent conflict affected his representation.”\textsuperscript{294}

It is clear from these two cases that the second prong of the two-part analysis is of the utmost importance for Judge Smith. Once it is determined that a conflict exists, Judge Smith would have the Court carefully analyze whether it did, in fact, operate upon the representation. Judge Smith, in both cases, faults the majority for ending the inquiry prematurely. In \textit{Lewis}, without further investigation, the Court finds that when an attorney testifies adversely to his client, this constitutes automatic ineffective

\textsuperscript{289} Id. at 6–13, 896 N.Y.S.2d at 286–91.
\textsuperscript{290} Id. at 16, 896 N.Y.S.2d at 293 (Smith, J., dissenting).
\textsuperscript{291} Id. at 16–17, 896 N.Y.S.2d at 294.
\textsuperscript{292} Id. at 17, 896 N.Y.S.2d at 294.
\textsuperscript{293} Id.
\textsuperscript{294} Id. at 18, 896 N.Y.S.2d at 295.
assistance, without really inquiring as to whether the representation was affected. Conversely, in Konstantinides, the Court quickly dismisses defendant’s claim without making sure the record is fully developed in order to accurately assess whether the established conflict could operate on the defense. For Judge Smith, the second prong of the test is what is most important since it is the gravamen of the entitlement to competent counsel and therefore should be scrutinized carefully. In this area of law, there is no room for knee-jerk reactions, but rather, each situation should be analyzed on a case-by-case basis in order to make sure that the conflict at issue actually does, or does not, operate upon the representation.

D. Statutory Interpretation

When the decision to affirm or reverse the conviction of a criminal defendant hinges on the interpretation of a statutory provision, Judge Smith believes that clarity in interpretation should be the hallmark. To achieve such clarity, his philosophy is to give a “common sense” interpretation to statutes, which, according to Judge Smith, will achieve the true intent of the legislature. It is interesting to note that in all three decisions treated here Judge Smith would find in favor of the criminal defendant. These findings, however, are not based on the apparent innocence of the defendant, or the lack of evidence against him. Rather, Judge Smith believes that the statute in question simply does not cover the conduct that the defendant engaged in, and thus, the conviction must be reversed. Another interesting point is that Judge Smith believes that these defendants are deserving of punishment, but that the language and intent chosen by the legislature merely does not encompass their conduct. And although it would be easier and probably more pleasant for Judge Smith to agree with the majority, his reverence to the rule of law prohibits him from doing so. Therefore, it is obvious that Judge Smith lacks an agenda when deciding cases of this nature.

For instance, in People v. Duggins,295 the Court dealt with the issue of whether “criminal transaction” should be defined by ordinary meaning or that given by another statute in the CPL. In this case, the defendant killed two rival gang members in a ninety minute time period, which if tried separately, would amount to two
counts of second-degree murder. Nevertheless, defendant stood trial on two counts of first-degree “same transaction” murder as defined by Penal Law section 125.27(1)(a)(viii).\footnote{Id. at 527, 821 N.E.2d at 944, 788 N.Y.S.2d at 640. “Same transaction” murder is one of thirteen aggravating factions that can convert second-degree murder to first-degree murder.} According to PL section 125.27(1)(a)(viii)

[a] person is guilty of murder in the first degree when [w]ith intent to cause the death of another person, he causes the death of such person or of a third person; and . . . as part of the same criminal transaction, the defendant, with intent to cause . . . death of an additional person or persons, causes the death of an additional person or persons.\footnote{N.Y. PENAL LAW § 125.27(1)(a)(viii) (McKinney 2009).}

Defendant requested that “criminal transaction” be defined according to its dictionary definition. But the trial court relied on CPL section 40.10(2) for the definition of criminal transaction.\footnote{Duggins, 3 N.Y.3d at 527, 821 N.E.2d at 945, 788 N.Y.S.2d at 641.}

Under CPL section 40.10(2)

“Criminal transaction” means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.\footnote{N.Y. CRIM. PROC. LAW § 40.10(2) (McKinney 2003).}

Thus, when read together, defendant’s actions amount to a criminal transaction subjecting him to first-degree murder. In affirming this construction by the trial court, the majority finds that “[w]ords of technical or special meaning are construed according to their technical sense, in the absence of anything to indicate a contrary legislative intent.”\footnote{Duggins, 3 N.Y.3d at 528, 821 N.E.2d at 945, 788 N.Y.S.2d at 641.} And furthermore, applying a generic dictionary definition to “criminal transaction” would render section 125.27(1)(a)(viii) vague, which is “something the Legislature surely did not intend for a statute drafted to ‘narrow’ the potential class of intentional murderers exposed to capital punishment.”\footnote{Id. at 529, 821 N.E.2d at 946, 788 N.Y.S.2d at 642.}

Therefore, defendant’s acts of committing two separate and distinct murders ultimately subjected him to penalties attributable to first-degree murder.

Judge Smith takes a more global view when interpreting this
statute. He agrees with the majority that the evidence was sufficient to convict the defendant of first-degree murder, however, he believes that the interpretation given to section 125.27(1)(a)(viii) unnecessarily broadens its scope while limiting the scope of another important part of the very same statute—namely, the “common scheme or plan” branch of the serial murder statute.\textsuperscript{302} According to Judge Smith, the definition of “criminal transaction” operates on both statutes in opposite ways since the aggravating circumstances that defines the “common scheme or plan” statute is where “the defendant intentionally caused the death of two or more persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan.”\textsuperscript{303} Therefore, “to expand or contract the definition . . . is a zero sum game: the more cases the definition includes, the more cases will fit within [the same transaction subparagraph] and the fewer within [the common scheme or plan subparagraph].”\textsuperscript{304}

This result is unattractive to Judge Smith, since the “Legislature left it to the courts to select a definition” and therefore “criminal transaction should “be defined in a way that gives meaningful scope to both subparagraphs.”\textsuperscript{305} If Judge Smith had his way, he would adopt the first portion (section (a)) of the CPL section 40.10(2) “criminal transaction” definition, thereby omitting the “so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture” since including it (the way the majority does) would produce “a result that is strange at best.”\textsuperscript{306} “Under the definition the majority adopts, this must mean crimes that are not ‘so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture’ and yet are part of a ‘common scheme or plan.’”\textsuperscript{307}

To Judge Smith, this language is in direct contradiction. It is interesting to note, however, that under Judge Smith’s purposed definition, the defendant’s conduct would still be covered and he would be guilty of first-degree murder. Nevertheless, he dissents and votes to reverse the conviction. To many, this game of
semantics would seem to amount to “six one way, half a dozen another,” but not to Judge Smith, who values the rule of law and intent of the legislature. Furthermore, he sees the majority’s definition as disrupting the statutory scheme since it will render section 125.27(1)(a)(xi) a nullity. In closing, he remarks that “[w]hen the Legislature added the words ‘or pursuant to a common scheme or plan’ it was apparently wasting its breath.”

Another example where Judge Smith strives to produce a common sense clarification of a statute can be found in *People v. Cagle*, where the Court decided whether a defendant’s time spent in a day reporting program constitutes incarceration for the tolling purposes of the ten year statute of limitations of the second felony offender statute. The second felony offender statute enhances the punishment of “one whose sentence for a prior felony has been imposed not more than [ten] years before the commission of the felony for which that person presently stands convicted; excluded from the [ten] years are any periods during which the individual has been incarcerated.” Here, the majority found that time spent in a day reporting program is the equivalent of incarceration because the defendant “remains in the custody of DOCS” and is under restrictions common to a limited release program. According to the majority, incarcerated does not necessarily entail being “behind bars.” Therefore, the defendant was subject to the enhanced penalties of the second felony offender statute since his time in the day release program caused the statute of limitations to toll.

Judge Smith, however, does not buy this interpretation and opens his dissent with his usual frankness. “‘Incarceration’ is not an ambiguous word. It means locked in prison.” To Judge Smith, the restrictions placed on defendant’s freedom does not amount to incarceration since he “worked outside the prison walls” and “ate and slept” in his family’s home. What is most interesting about Judge Smith’s dissent—and where he and the majority “apparently” disagree—is the purpose behind the tolling provision. According to Judge Smith:

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308 Id.
310 Id. at 648, 860 N.E.2d at 52, 826 N.Y.S.2d at 590 (citing N.Y. PENAL LAW § 70.06 (McKinney 2009)).
311 Id. at 650, 860 N.E.2d at 53, 826 N.Y.S.2d at 591.
312 Id. at 651, 860 N.E.2d at 53, 826 N.Y.S.2d at 591.
313 Id. at 651, 860 N.E.2d at 54, 826 N.Y.S.2d at 592 (Smith, J., dissenting).
314 Id.
The point of the exclusion is obvious: People who are incarcerated have little opportunity to commit felonies, and so do not get credit for the time in which they did not do so. The opportunities for criminal conduct by a person no longer incarcerated—even if he is required to report daily to a specified location—are incomparably greater. Defendant’s situation during his time in the day reporting program was not greatly different from that of someone on probation or parole—who, it is undisputed, is not “incarcerated” within the meaning of this statute.315

On the other hand, compare this with the majority’s derived purpose that “[t]o avoid enhanced punishment, prior felons must demonstrate their ability to live within the norms of civil society for [ten] years. Plainly, time spent serving a sentence of imprisonment does not satisfy this requirement.”316 This reasoning evinces a difference without a distinction since in substance it is exactly the same: those who are in prison cannot get credit for leading law abiding lives because they have no opportunity to commit crimes. The majority, however, sees defendant’s time spent in a day reporting program as similarly lacking that opportunity. Judge Smith, however, uses common sense to reach a different result.

Finally, in People v. Kozlow,317 Judge Smith uses a combination of the two tactics he used in the previous cases treated—scrutinizing the statutory scheme as a whole and common sense interpretation—to arrive at an appropriate result. In Kozlow, the defendant was convicted of felony dissemination of indecent material to minors after he had described sexual situations to a young boy.318 The statute he was prosecuted under, however, merely references “depicting” nudity or sexual acts as the criminal conduct.319 Therefore, the issue the Court grappled with was whether oral representations of sexual acts were covered by a statute prohibiting communication that depicts nudity or sexual act. The majority answered this question in the affirmative for two reasons. First, citing to the dictionary (something the majority refused to do in Duggins or Cagle) the Court found that the word “depict” has a standard meaning of “represent or portray in words.”320 Second, the

315 Id. at 652, 860 N.E.2d at 54, 826 N.Y.S.2d at 592.
316 Id. at 651, 860 N.E.2d at 53, 826 N.Y.S.2d at 591.
318 Id. at 556–57, 870 N.E.2d at 119, 838 N.Y.S.2d at 801.
320 Kozlow, 8 N.Y.3d at 558, 870 N.E.2d at 120, 838 N.Y.S.2d at 802.
majority believes that the legislature intended to target sexual communication because communication is often used by predators to gain the trust of minors and ultimately lure them in.321 This reasoning, according to the majority, allows for the expansion of the definition to encompass defendant’s conduct.

Judge Smith’s dissent is an interesting one, since he believes that defendant’s conduct should be a felony. Reluctantly, however, he admits that the “Legislature did not make it one until it amended the statute in 2007.”322 He reaches this result by interpreting the statute in the context of the statutory scheme as a whole. While conceding that “depict” can be used as a synonym for “describe,” Judge Smith makes an excellent point that if the legislature intended to include both picture and words it would have used the language “depicts and describes.”323 The simple reason being that “[e]lsewhere in article 235 of the Penal Law, the Legislature used ‘depicts’ alone when it was referring only to visual representations; ‘descriptions’ when it referred to purely verbal material; and ‘depicts or describes’...when it referred to both.”324 To Judge Smith at least, it seems fairly clear that when reading the article as a whole, the legislature intended to use “depicts” in its normal, narrow sense.325 It is interesting to note that by no means does Judge Smith sympathize with the defendant, or condone his conduct. He simply refuses to rewrite legislation in order to produce a desired result. To him, the failures of the legislature are no business of the Court to remedy. In closing he explains such: “I do not know why the 1996 Legislature chose to use the same narrow language in defining the first-degree crime that it did in defining the lesser one. But I do not believe that language reaches the admittedly heinous behavior of defendant in this case.”326

Clearly, the true intent of the legislature is paramount to Judge Smith, and he tries to effectuate this by using a common sense approach to his statutory interpretation. By relying on the plain meaning, while reading the statutes in context, Judge Smith appears to reach a proper—although maybe not desirable—result. But is this not what a judge is supposed to do? Blindly apply the law with the results as a non-factor. It seems that the majority may

321 Id. at 559, 870 N.E.2d at 120, 838 N.Y.S.2d at 802.
322 Id. at 561, 870 N.E.2d at 122, 838 N.Y.S.2d at 804 (Smith, J., dissenting).
323 Id.
324 Id. at 561–62, 870 N.E.2d at 122, 838 N.Y.S.2d at 804.
325 Id. at 562, 870 N.E.2d at 122, 838 N.Y.S.2d at 804.
326 Id. at 563, 870 N.E.2d at 124, 838 N.Y.S.2d at 806.
be guilty of just the opposite. It appears that, at times, they bend over backwards in order to affirm a conviction, using every possible avenue to interpret the statute to fit the results desired. Judge Smith, on the other hand, consistently interprets these statutes according to their plain meaning and in these three cases favors reversal of the conviction. Whether Judge Smith is favoring the defendants or simply interpreting statutes logically, we shall never know. But it seems apparent that he is not the one who is attempting to court popularity.

**CONCLUSION**

The independence of Judge Robert S. Smith cannot be questioned. During his first six years as a judge of the Court of Appeals he has written over sixty-five dissenting opinions—a third of which were not joined by any other member of the Court—on a wide range of legal topics. Each topic, unique in itself, tells a different story about Judge Smith’s jurisprudence.

This article attempted to do two things: give the legal scholar an accurate depiction of Judge Smith’s philosophy while on the Court of Appeals and give the practitioner an invaluable tool to use when preparing to argue before the Court. Indeed, Judge Smith’s vote is not guaranteed, but by studying his personal philosophy one can tailor arguments to suit his liking.

In sum, common trends are evident from a study of Judge Smith’s dissenting opinions. When deciding civil cases, Judge Smith stays true to his conservative roots and is easily predictable. For example, in workers’ rights cases he favors the employer and detests Labor Law section 240(1). In tax cases Judge Smith refuses to give any deference to the state and favors the taxpayer consistently. Furthermore, in commercial law cases he implores the Court to exercise judicial restraint by allowing parties to create private law through contractual negotiations. Also, in insurance law cases, Judge Smith generally favors the insurer and is particularly attentive to economic consequence. To him, reducing the burden on insurers by reducing fraud will ultimately result in lower premiums. Finally, in landlord-tenant cases, Judge Smith favors landlords by strictly construing statutory provisions and giving deference to the legislature.

On the other hand, consistency and predictability are not apparent in Judge Smith’s dissenting opinions in New York civil procedure and tort law. In New York practice, Judge Smith favors
deciding cases on the merits, and when doing so, employing common
sense to produce sound public policy. In regard to the tort law—
which Judge Smith believes to be inadequate—he is very cynical.
He believes that those who are truly injured by another’s negligent
behavior should be duly compensated; however, those whose
careless behavior contributed to their injuries should be left without
a remedy.

Conversely, Judge Smith is unpredictable when dissenting in
criminal cases. He is certainly not a tried and true conservative
Republican, and his jurisprudence—when studied at large—may be
surprising to many. With the exception of criminal procedure, what
can only be gleaned from his criminal dissents are trends in his
decision-making. But in no way is he pro-prosecution or pro-
defense. In criminal procedure cases, specifically Fourth
Amendment, Judge Smith seeks to limit what he believes to be an
unreasonable search. He believes that the burden on law
enforcement is heavy, and should be reduced whenever possible.

Furthermore, when dealing with pretrial rights, he feels that
inconsequential errors should be disregarded; however, only if they
do not set a dangerous precedence. And when deciding an
ineffective assistance of counsel case—specifically a conflict of
interest—Judge Smith believes that the crux of the issue is not
whether a conflict exists, but rather whether it operated upon the
defense. Finally, when interpreting New York’s criminal statutes,
Judge Smith’s record is most surprising. He favors using common
sense and plain meaning to achieve the correct result. He avoids
result-based decisions, often voting to reverse a conviction based on
a statute’s failure to cover a defendant’s conduct—even when the
defendant’s actions are truly heinous. Consequently, Judge Smith’s
criminal jurisprudence is a bit of a “crap-shoot.”

January of 2010 marked Judge Smith’s sixth year on the bench
and sixty-sixth year on this earth. Due to the New York
Constitution’s requirement that Court of Appeals judges retire by
age seventy, Judge Smith will necessarily retire by 2014. By then,
he will have spent ten years on the Court, and probably will have
written close to 150 dissenting opinions. Whether the trends
identified in this study will continue is unknown. Nevertheless, it is
certain that Judge Smith is one of the most independent judges the
Court of Appeals has even seen. This author is certain that he will
continue to dissent when he believes the majority is mistaken and
consistently let his opinions be known. To some, Judge Smith’s
dissents are superfluous banter that hold no authority. Possibly;
however, if nothing else they remind us of the importance of an independent judiciary that is essential to our liberty and democratic society.