

THE PERT PERPENDER: ASSOCIATE JUDGE EUGENE F.
PIGOTT, JR.'S JOURNEY FROM BUFFALO TO ROCHESTER
AND ALBANY

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When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence becomes a business to find out when this danger is to be feared. The object of our study, then, is *prediction*, the prediction of the incidence of the public force through the instrumentality of the courts.¹

I. INTRODUCTION

At the outset, it is important to note that the title of this article is somewhat of a misnomer. While Eugene Pigott is largely known as western New York's—really Buffalo's—voice on New York's highest Court, his story actually begins in Rush, New York, a suburb of Rochester.² Setting aside the title and its explanation for a moment, the purpose of this article is to offer the reader insight to Court of Appeals of New York Associate Judge Eugene F. Pigott—not only as a judge, but also as a lawyer and person.

The story begins in *Buffalo*, the city where Pigott attended law school and began his legal and judicial careers,³ continues through *Rochester*, where he spent eight years as a justice with the Appellate Division, Fourth Department (six of them as presiding

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¹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) (emphasis added).

² Tara E. Buck, *Q&A With Judge Eugene F. Pigott, Jr., Recently Appointed to NY States Court of Appeals*, DAILY REC. (Rochester, N.Y.), Sept. 19, 2006, available at 2006 WLNR 24526418. To be fair, Rush (and the greater Rochester area) is clearly part of western New York, but is not as emblematic of that region as Buffalo.

³ *Id.*

justice⁴), and ends in *Albany*, where he currently sits as an associate judge at the Court of Appeals. A portion of the information contained in this article is personal background⁵—the who, what, where, why, and how—but later sections focus on quantifying Judge Pigott’s voting behavior, identifying trends, and examining vindication rates of his dissents.⁶

II. BIOGRAPHICAL BACKGROUND

As explained above, contrary to the title of this work, Pigott’s journey to the Court of Appeals bench really began in Rochester, not Buffalo. He was born in September of 1946⁷ and grew up in Rush, where he attended Rush-Henrietta schools and graduated from McQuaid Jesuit High School.⁸ He went on to attend LeMoyne College in Syracuse (which, like his high school, is also a Jesuit institution⁹) where he graduated with a B.A. in 1968.¹⁰ Soon after commencement, Pigott was drafted into the U.S. Army where he served as an interpreter in Vietnam.¹¹ After his service overseas, Pigott returned to New York to attend law school at the State University of New York at Buffalo. He graduated from western

⁴ Biographies of Former Justices of the Appellate Division, Fourth Department, <http://www.nycourts.gov/ad4/court/Bios/FormerJustices.htm> (last visited Apr. 14, 2010) [hereinafter Biographies of Former Justices].

⁵ Unlike all but Chief Judge Jonathan Lippman and Judge Theodore T. Jones, there is very little biographical information available about Judge Pigott. A recent publication compiled by retired Associate Judge Albert M. Rosenblatt chronicles all of the judges of the Court—past and present—but was assembled just prior to Pigott’s arrival in Albany. See *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY* (Albert M. Rosenblatt ed., 2007) [hereinafter *JUDGES OF THE COURT OF APPEALS*]. Largely for this reason, an expanded biographical section is included in this article.

⁶ “Vindication,” refers to how often a reviewing court agreed with Pigott as a dissenter. Essentially, how often the New York Court of Appeals reversed the appellate division where Pigott dissented, or where the Supreme Court of the United States reversed the Court of Appeals when Pigott dissented. See generally Jason A. Cherna, Jessica Blain-Lewis & Vincent Martin Bonventre, *Appellate Division on Appeal: The Justices’ Rates of Agreement, Rejection, and Vindication by the Court of Appeals*, 70 ALB. L. REV. 983, 983–84 (2007) (discussing vindication).

⁷ This necessarily means he can only serve as a judge with the Court of Appeals until 2016 when he will reach seventy, the mandatory retirement age. See N.Y. CONST. art. VI, § 25(b).

⁸ Buck, *supra* note 2. Hon. Eugene F. Pigott, <http://www.nycourts.gov/ctapps/efp.htm> (last visited Apr. 14, 2010).

⁹ See LeMoyne. Spirit. Inquiry. Leadership. Jesuit, <http://www.lemoyne.edu> (last visited Mar. 12, 2010).

¹⁰ Hon. Eugene F. Pigott, *supra* note 8.

¹¹ Buck, *supra* note 2. Pigott was selected to be trained as an interpreter in an intensive thirty-six week course in Fort Bliss, Texas after scoring highly on an exam during basic training in Fort Dix, New Jersey. *Id.* Though he was once proficient in writing and speaking Vietnamese, Pigott has confessed that he does not speak it very well anymore. *Id.*

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New York's only law school in 1973.¹²

A. *Buffalo Lawyer*

Eugene Pigott took his first legal job with the law offices of Offermann, Fallon, Mahoney & Adner, a small yet elite¹³ Buffalo law firm.¹⁴ He worked there as a clerk throughout law school.¹⁵ Judge Pigott has recounted his first day on the job as a somewhat uncomfortable experience. He explained:

I showed up for my first day and nobody knew who I was. The secretary informed one of the partners, Leo Fallon, that I was waiting to meet with him, but he didn't remember me—he had forgotten that months earlier he had hired me to clerk for the summer. Leo Fallon threw me a Sports Illustrated magazine and told me to read it until he could find some work for me.

Not because the judge's story needed to be "fact-checked," but out of curiosity, I later had the opportunity to question Leo Fallon (who went on to a successful career on the bench himself¹⁶) about the incident. His response, after I implied that he "might have forgotten" in the most tactful way I could, was a short chuckle. "It wasn't that I may have forgotten, I certainly forgot," he said.

After graduating from the University at Buffalo Law School,

¹² Hon. Eugene F. Pigott, *supra* note 8.

¹³ Now Offermann, Cassano, Greco, Slisz & Adams, LLP, the firm has employed six lawyers who have become New York State judges, including William B. Lawless (Erie County Supreme Court 1960–1968 and Dean of the University of Notre Dame School of Law), John H. Doerr (Erie County Supreme Court 1968–1979, Fourth Department 1979–1997, and New York State Senator from 1964–1966), Leo J. Fallon (Erie County Supreme Court 1986–1992, Fourth Department 1992–1998), Dave Mahoney (Erie County Supreme Court 1993–2004), Gerald J. Whalen (Erie County Supreme Court 2005–present), and of course, Eugene Pigott. THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT: 1896–1996, http://www.courts.state.ny.us/history/pdf/Library/Courts/App_Div_Fourth_Dept_100th_Anniv.pdf [hereinafter APPELLATE DIVISION]; Dennis Hevesi, *William B. Lawless Jr., 84, Former Justice and Law Dean*, N.Y. TIMES, Apr. 27, 2007, at C11; *NY State Supreme Court, Erie County Judges to Retire*, DAILY REC. (Rochester, N.Y.), Dec. 20, 2004, available at <http://www.accessmylibrary.com/article-1G1-126332771/ny-state-supreme-court.html>; Erie County, N.Y.—Board of Elections, <http://www.erieboe.com/content.aspx?id=58> (last visited Apr. 14, 2010) (showing that Justice Gerald J. Whalen's fourteen-year term will expire in 2019); Biographies of Former Justices, *supra* note 4. More impressive is the fact that so many judges have come out of a practice that has never had more than ten lawyers at one time. Buck, *supra* note 2.

¹⁴ Buck, *supra* note 2.

¹⁵ *Id.*

¹⁶ See *supra* note 13 and accompanying text. Leo J. Fallon also served as the Town Supervisor of Hamburg, New York from 1972 to 1981. Biographies of Former Justices, *supra* note 4.

Pigott began his career as an associate with the same firm he had clerked for during law school.¹⁷ In 1978 he became a partner, but left in 1982 for government work after being appointed as Erie County Attorney.¹⁸ During that same time, Pigott joined the Board of Directors of the Legal Aid Society of Buffalo, and became president of the organization in 1986—a position he held until 1988.¹⁹

Fulfilling his lifelong dream of becoming a trial lawyer, in 1986, Pigott returned to Offermann, Cassano, Pigott & Greco as chief trial counsel after gaining substantial experience as the County Attorney.²⁰ During his career, Pigott tried hundreds of civil cases. Aside from a handful of juvenile delinquency matters²¹ and one habeas corpus proceeding²² as county attorney (at least from those that made the official New York Reports), Eugene Pigott's career focused almost exclusively on civil matters.

As for Judge Pigott's family life, he has been married to his wife Peggy for thirty-four years.²³ His son David, a twenty-eight-year-old graduate of West Point, has served multiple tours of duty in Iraq with the 101st Airborne Division.²⁴ Martha, the Pigott's daughter, is a *Phi Beta Kappa* graduate of Hobart and William Smith Colleges, where she majored in public policy.²⁵ After graduating in 2006, Martha joined the Peace Corps, and currently works in a health clinic in Dzoole, Malawi.²⁶ Judge Pigott certainly instilled in his family the principle "that you owe your country something . . . [and that] you really should do something to pay back everything you get."²⁷

¹⁷ Buck, *supra* note 2.

¹⁸ Hon. Eugene F. Pigott, *supra* note 8.

¹⁹ *Id.* (joining Legal Aid's Board of Directors in 1980); see *Justice Pigott Nominated to New York State Court of Appeals*, DAILY REC. (Rochester, N.Y.), Aug. 22, 2006, available at 2006 WLNR 24457331.

²⁰ Buck, *supra* note 2 ("I always wanted to be a trial lawyer and I always thought, and still do, that trial lawyers are the jet pilots of the profession.")

²¹ See *In re Brian J.C.*, 119 A.D.2d 996, 500 N.Y.S.2d 887 (App. Div. 4th Dep't 1986); *In re Glenn F.*, 117 A.D.2d 1013, 499 N.Y.S.2d 557 (App. Div. 4th Dep't 1986); *In re Ronald Maurice J.*, 112 A.D.2d 747, 492 N.Y.S.2d 245 (App. Div. 4th Dep't 1985); *In re Samuel E.L.*, 109 A.D.2d 1092, 487 N.Y.S.2d 236 (App. Div. 4th Dep't 1985); *In re Ronald C.*, 107 A.D.2d 1053, 486 N.Y.S.2d 575 (App. Div. 4th Dep't 1985).

²² See *People ex rel. Cope v. Pauley*, 128 Misc. 2d 319, 489 N.Y.S.2d 971 (Sup. Ct. 1985).

²³ Buck, *supra* note 2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Hobart and William Smith Colleges, Alum's Peace Corps Dream a Reality, <http://www.hws.edu/dailyUpdate/NewsDetails.aspx?aid=12075> (last visited Apr. 14, 2010).

²⁷ Buck, *supra* note 2.

B. Rochester Appellate Court Justice

On February 4, 1997, Eugene Pigott was appointed by Republican Governor George E. Pataki—for the first time—to fill a vacancy at the Erie County Supreme Court.²⁸ Judge Pigott successfully ran for a full fourteen-year term as a supreme court justice in the Eighth Judicial District in November of 1997.²⁹ But Pigott's days as a trial court justice were short-lived. In 1998, Pataki—for the second time—showed his approval of Pigott by designating him to the Supreme Court, Appellate Division, Fourth Department in Rochester—a natural fit for the Rochester native.³⁰

Pigott served the Appellate Division, Fourth Department for the next two years as an associate justice, but got the nod from the governor again in 2000 to replace the late M. Dolores Denman—who resigned three days before she lost her battle with cancer—as the seventeenth presiding justice.³¹ Judge Pigott served the Fourth Department as presiding justice for six years until late 2006.³²

Judge Pigott's career at the Fourth Department was marked by his centrist temperament. In reviewing the data³³ from the time Judge Pigott was at the Fourth Department, he was fairly balanced in civil and criminal cases, showing no real favor to plaintiffs or defendants; and in criminal matters, no clear bias toward either the prosecution or accused. Commentators have explained Pigott's

²⁸ Biographies of Former Justices, *supra* note 4.

²⁹ *Id.*; see Hon. Eugene F. Pigott, *supra* note 8.

³⁰ Hon. Eugene F. Pigott, *supra* note 8.

³¹ *Id.*; see APPELLATE DIVISION, *supra* note 13; *M. Dolores Denman, 68, Pioneering Judge*, N.Y. TIMES, Jan. 29, 2000, at B7; Biographies of Former Justices, *supra* note 4. It is worth noting that Presiding Justice Denman was the first woman to serve as such in any of the Appellate Divisions of New York. *M. Dolores Denman, 68, Pioneering Judge, supra*. Additionally, Denman was instrumental in the construction of the Appellate Division, Fourth Department Courthouse, a facility that has been named in her honor. Biographies of Former Justices, *supra* note 4.

³² Hon. Eugene F. Pigott, *supra* note 8.

³³ The statistics used in this portion of the study came from the cases in which Pigott authored a dissent while at the Fourth Department. The traditional wisdom among judicial process scholars is that divided cases—the difficult cases—are much more revealing of a judge's views, predilections, and tendencies. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 237 (7th ed. 1998); COURTS, JUDGES & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 557 (Walter F. Murphy & C. Herman Pritchett eds., 4th ed. 1986); DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 245 (8th ed. 2008); Alpheus Thomas Mason, *Eavesdropping on Justice, in* COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS, *supra*, at 583, 585; Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 38–39 (2005). The research used in this portion of the study takes that logic one step further. To narrow the research to a workable sample size, the divided cases were reduced to only those where Pigott authored the dissent—showing that he felt strongly enough about his decision to publicly disagree with his comrades on the court.

demeanor while he served in Rochester as “not rigidly law and order . . . [and that i]n criminal cases he certainly doesn’t have the record that some of Pataki’s other choices for the court have. Nor does he seem to be rigidly conservative in the civil realm.”³⁴ The judge has been described on other occasions as “evenly balanced” and “not always predictable.”³⁵ Later in this article, Pigott’s judicial philosophy and voting patterns while serving as an associate and presiding justice of the Fourth Department will be discussed more fully.

As a final background note on his time in Rochester with the Fourth Department, Pigott was the recipient of both the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare, an honor bestowed by the New York State Bar Association for “commitment to protecting and promoting the rights of children in New York,”³⁶ and the Champion of Diversity Award, given to Pigott by the Rochester Black Bar Association for “his work to recruit minority law clerks to the Appellate Division.”³⁷

C. *The Governor Calls—Once More*

In 2006, Associate Judge George Bundy Smith’s fourteen-year term at the Court of Appeals was set to expire.³⁸ Smith’s unfortunate problem was that he was sixty-nine years old—merely one year away from mandatory retirement³⁹—and that Governor Pataki, because he had decided he would not run again, would be making his final appointment to the Court of Appeals at the expiration of Smith’s term.⁴⁰ This combination of events, along with the fact that Smith was typically a liberal voter who had been appointed by Governor Cuomo in 1992, did not bode well for a pat-on-the-back appointment for a judge who could serve only one more year anyway.⁴¹

³⁴ Michael Cooper, *With New Pick, Pataki Puts Mark on Highest Court*, N.Y. TIMES, Aug. 19, 2006, at A1 (internal quotation marks omitted).

³⁵ Elizabeth Benjamin, *Pataki Opts for a New Judge*, TIMES UNION (Albany, N.Y.), Aug. 19, 2006, at A1.

³⁶ *Judge Pigott Receives NY State Bar Association Award*, DAILY REC. (Rochester, N.Y.), June 13, 2005, available at 2005 WLNR 25942736.

³⁷ Buck, *supra* note 2.

³⁸ Hon. George Bundy Smith, <http://www.courts.state.ny.us/ctapps/gbs.htm> (last visited Apr. 14, 2010).

³⁹ Yancey Roy, *Pataki Urged to Keep Judge*, TIMES UNION (Albany, N.Y.), Aug. 17, 2006, at A3; see N.Y. CONST. art. VI, § 25 (b).

⁴⁰ See Benjamin, *supra* note 35.

⁴¹ Hon. George Bundy Smith, *supra* note 38; John Caher, *Smith’s Last Session Offers Intriguing Menu of Issues*, N.Y. L.J., Sept. 5, 2006, at 1.

1. The Short List

Deciding who to fill Smith's former post, Pataki's short list of candidates included four appellate division justices: Associate Justice Richard T. Andrias, First Department; Associate Justice James M. Catterson, First Department; Associate Justice Steven W. Fisher, Second Department; Associate Justice Thomas E. Mercure, Third Department; and two appellate division presiding justices: Presiding Justice Eugene F. Pigott Jr. of the Fourth Department; and Presiding Justice A. Gail Prudenti of the Second Department.⁴² The New York State Bar Association rated every candidate "well qualified" with the exception of Justice Catterson, who was rated only as "qualified."⁴³

Despite concerns regarding a lack of diversity on the bench (all of the above mentioned candidates were white), Pataki appointed Eugene Pigott—in what amounted to be the fourth and final time Pataki would show Pigott his favor—to fill the opening created by Smith's departure.⁴⁴ In defense of his pick the governor said:

Presiding Justice Pigott is an outstanding jurist who has consistently distinguished himself throughout his career, most recently as the Presiding Justice of the Appellate Division, Fourth Department. . . . I am confident that his breadth of knowledge and experience, unwavering commitment to the rule of law and keen intellect will enable him to make an enduring contribution to the Court of Appeals and the people of New York.⁴⁵

The governor's sentiments were exactly what one would expect from the man who had just selected a new judge for the state's highest court, but there was also a great deal of truth to the

⁴² Carol DeMare, *Pataki Urged to Factor Diversity in Court Pick*, TIMES UNION (Albany, N.Y.), Aug. 19, 2006, at B6; *NY Court of Appeals Nominees Announced*, DAILY REC. (Rochester, N.Y.), July 25, 2006, available at 2006 WLNR 24391385 ("[Pigott] was recommended by the commission previously in 2002 and 2003.").

⁴³ *Id.*

⁴⁴ DeMare, *supra* note 42; see Michele Morgan Bolton & Rick Karlin, *A Voice of Justice Bids Farewell: George Bundy Smith Hears Last Cases After 14 Years on Court of Appeals*, TIMES UNION (Albany, N.Y.) Sept. 15, 2006, at A3; Michael Cooper, *Governor Chided Over State Court Nominees*, N.Y. TIMES, Sept. 15, 2006, at B6; Tom Percious, *Pigott Sails Through Senate Hearing*, BUFFALO NEWS, Sept. 15, 2006, at D6; James M. Odat, *Pataki Leaving Legacy of Posts: New Court of Appeals Judge Among 60 Appointment Approved by State Senate*, TIMES UNION (Albany, N.Y.), Sept. 16, 2009, at A3.

⁴⁵ Press Release, Governor George E. Pataki, Governor Nominates Hon. Eugene F. Pigott, Jr. to Court of Appeals (Aug. 18, 2006), <http://worldcat.org/arcviewer/1/AO%23/2007/01/12/0000057321/viewer/file3491.html>.

governor's comments. Although Pataki's appointment was undoubtedly a political move—used to shore up the Court of Appeals with conservative voters—it was also a safe choice for Pataki's sixth and final pick for the Court.⁴⁶ Pigott was a proven judge who had served in New York courts for nearly ten years, had excelled at the Fourth Department as presiding justice, and was not a rigid ideologue that might have been met by disapproval for political reasons by politicians or the general public.

2. Confirmation

On September 14, 2006, the New York State Senate Judiciary Committee held a hearing to consider Pigott's nomination.⁴⁷ In what amounted to be smooth sailing,⁴⁸ Pigott was given an opportunity to explain his judicial temperament, discuss diversity on the bench, and address his passion for the law and lawyers.⁴⁹

Judge Pigott went into some detail about deciding cases. Specifically, when asked about judicial restraint and legislative deference he said:

My general philosophy with respect to that, it's an old saying among some judges, is, read the statute, read the statute, read the statute. And I've found in my experience, particularly as an appellate judge where you have, in my case, four other jurists working on a case with you, quite often the litigant overlooks that and you find yourself in a case where there's been a jump to a conclusion or proposition that doesn't have a sound basis. So I approach each case, I like to say, with a great deal of humility, because I don't think I'm much smarter than, for example, this body or the governor or another court, frankly, and I therefore like to start at the very basic statute that is being interpreted and

⁴⁶ The previous appointments made by Pataki were Albert Rosenblatt, Richard Wesley, Victoria Graffeo, Susan Phillips Read, and Robert S. Smith—all of whom were (and those who are still on the Court or some other) more often conservative voters. See Benjamin, *supra* note 35 (“The governor's stamp on the court has been particularly great because he has been so deliberate with his picks in terms of ideology.”).

⁴⁷ *Hearing to Consider the Nomination of: the Honorable Eugene F. Pigott, Jr. of Grand Island as an Associate Judge of the Court of Appeals Before the S. Judiciary Comm.*, 2006 Leg., 229th Sess. (N.Y. 2006) [hereinafter *Hearing*].

⁴⁸ *But cf. id.* at 38–45 (statement of Elena Ruth Sassower, Center for Judicial Accountability, Inc.) (claiming impropriety on the part of Judge Pigott in his participation on the Temporary Judicial Screening Committee in 1995 and 1996).

⁴⁹ See *id.* at 46–47, 55, 56–58 (statement of Eugene F. Pigott, Jr., Associate J., State of New York Court of Appeals).

work from there and see where the case goes, and that has led me, as Judge Pine pointed out so well, I had forgotten one or two of those cases, and not wander away from it. Because what is your providence as legislators in drafting these and the Governor in approving them, has got to be the basis, and to do what you intended when you passed that statute.⁵⁰

When pressed about legislative intent and whether judges should go beyond the language of a statute, Pigott explained:

That's where you begin [with the text], and if the statute is clear, obviously that's where it ends. That's what the statute says. Good. That's what, at least in my belief in most decisions I've been on, where we end up.

If there's some ambiguity in the statute, there would be intent, but if it's not, you don't go that far.⁵¹

One can gather that Judge Pigott is content with deciding the easy cases based on the text (showing deference to the legislature) and when it becomes more difficult, to look to legislative intent or some other consideration (i.e., policy, common sense, history, etc.). In this sense, Pigott has described himself as a restrained judge who will defer to the democratic process when possible. Pigott was more candid than most candidates for judicial office who are either "unwilling or unable to offer anything but a grade school account of what judges do."⁵² Pigott's statements were not exactly shocking, either. They were safe. But at least he admitted that in easy cases, judges apply facts to the law, and when it gets more difficult, judges look elsewhere.

On the topic of diversity, Pigott recounted his experience with Legal Aid in Buffalo and his commitment to seeking justice for minorities:

[W]hen I was a young lawyer and then when I was with legal aid, one of the things that scared me, that I was most concerned about in dealing in local criminal court in Erie County where the practice was in the city of Buffalo, was the fear that someone of minority descent, whether they be Arabic, African-American, Hispanic, would be arrested by a white policeman, taken in front of a white judge with a white

⁵⁰ *Id.* at 46–47.

⁵¹ *Id.* at 47.

⁵² Posting of Vincent Martin Bonventre to New York Court Watcher, *Sotomayor—Let's Put the Cards on the Table (More on the Dreadful Success: SS on Judging)*, <http://www.newyorkcourtwatcher.com/2009/07/sotomayor-lets-put-cards-on-table-more.html> (July 20, 2009, 12:22 EST).

district attorney, white defense lawyer and tried in front of a white jury and have any sense of participation in the society that was now going to impose a sanction, should that person have been convicted of a crime or violation.⁵³

As mentioned above, Pigott received the Champion of Diversity award in late 2006 for his efforts on hiring African-Americans to work at the appellate division and in the greater Rochester area.⁵⁴ Additionally, spending time with the Legal Aid Society demonstrates that Pigott was serious about rectifying the mistreatment of minorities in the justice system, whether as an advocate on their behalf or from the bench by creating opportunities for young lawyers to work in the court system as clerks.⁵⁵

Finally, at the confirmation hearings, Pigott spoke about his love for the law and lawyers.⁵⁶ For example, in the summer of 2006, Pigott sat in the Sixth Judicial District⁵⁷ in Chemung County to hear cases from the trial court bench—all of this while serving as presiding justice of the Appellate Division, Fourth Department. Pigott's explanation for taking on more work and hearing cases as a trial court justice in Chemung County was that "I wanted to know what is going on in those courts, [to] be with lawyers because I'm just such a fan of law and lawyers."⁵⁸ Pigott has said at other times how much he respects trial lawyers. "I always wanted to be a trial lawyer and I always thought, and still do, that trial lawyers are the jet pilots of the profession."⁵⁹ Jeremiah J. McCarthy, then an attorney with Phillips Lytle LLP, now magistrate judge with the United States District Court for the Western District of New York, said of Judge Pigott:

From the days he was in private practice, I always thought of Justice Pigott as [a] lawyer's lawyer, somebody who I, and every practicing lawyer, should try to emulate, and once he took the bench, first as a supreme court justice and then as an appellate justice, he's become a lawyer's judge. He remembers what it's like to practice law. He remembers what it's like when your witness goes south on you or doesn't

⁵³ *Hearings*, *supra* note 47, at 56.

⁵⁴ *Id.* at 57.

⁵⁵ *See infra* pp. 1096–97.

⁵⁶ *Id.* at 55 ("I'm just such a fan of law and lawyers.").

⁵⁷ Judge Pigott sat in the Sixth District, a district within the appellate jurisdiction of the Appellate Division, Third Department, because of the possibility of a conflict arising if a case that Pigott heard as a special trial court justice was later appealed to the Fourth Department.

⁵⁸ *Id.*

⁵⁹ Buck, *supra* note 2.

show up at all, the things that don't happen on Court TV that makes our lives very difficult from time to time. He doesn't show favoritism to anyone, but he has a lot of common sense and empathy, both for lawyers and for their clients.⁶⁰

3. Arrival in Albany

The day following Pigott's hearing, the Senate unanimously confirmed the governor's selection of Eugene Pigott.⁶¹ Although he officially became a member of the Court at the moment of his confirmation, Pigott arrived in Albany in October and for the first time, on October 10, 2006,⁶² heard oral argument. Cases in which he voted were first handed down on November 16.⁶³ Little can be gleaned from the decisions so far as Pigott's voting philosophy is concerned because he voted with the majority in every decision, and only one of the cases divided the Court.⁶⁴ Unanimous decisions are generally poor barometers of the judicial process.⁶⁵

III. THE STUDY

The second half of this article is concentrated on Judge Pigott's judicial behavior. The focal point is identifying patterns and common threads, if any, and examining vindication rates. The data used in this study was limited to divided cases, and in some instances where the data was too cumbersome to make any sense of

⁶⁰ *Hearings, supra* note 47, at 33–34 (statement of Jeremiah J. McCarthy, Phillips Lytle).

⁶¹ *New York State Senate Stenographic Record*, 2006 Leg., 229th Sess. (N.Y. Sept. 15, 2006).

⁶² *Campaign for Fiscal Equity, Inc. v. New York*, 8 N.Y.3d 14, 861 N.E.2d 50, 828 N.Y.S.2d 235 (2006).

⁶³ *Reckless v. N.Y. State Comm'n on Quality of Care for the Mentally Disabled*, 7 N.Y.3d 555, 858 N.E.2d 772, 825 N.Y.S.2d 178 (2006); *Ne. Wine Dev., LLC v. Service-Universal Distribs., Inc.*, 7 N.Y.3d 871, 859 N.E.2d 913, 826 N.Y.S.2d 173 (2006); *Policano v. Herbert*, 7 N.Y.3d 588, 859 N.E.2d 484, 825 N.Y.S. 678 (2006); *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 859 N.E.2d 480, 825 N.Y.S.2d 674 (2006); *Putter v. N. Shore Univ. Hosp.*, 7 N.Y.3d 548, 858 N.E.2d 1140, 825 N.Y.S.2d 435 (2006).

⁶⁴ *See Policano*, 7 N.Y.3d 588, 859 N.E.2d 484, 825 N.Y.S. 678 (Kaye, C.J., dissenting).

⁶⁵ *See ABRAHAM, supra* note 33 ("By far the most important fact revealed by this glimpse into the Supreme Court's inner sanctum is that many, if not all, of the Court's opinions, though ostensibly the work of one person, are really the product of many minds, in the sense that the Justice who writes the opinion often has to add to, delete, or modify the original draft in order to be able to retain the support of his colleagues, many of whom are far from agreeing with him or with each other."). Unanimous decisions do not reveal the behind-the-scenes bargaining that takes place. Additionally, divided courts—courts reaching anything other than a unanimous decision—are more honest, usually because the issues are difficult and the tribunal cannot agree on the outcome, reasoning, or both.

it, to divided cases where Pigott himself authored a dissenting opinion.

A. *General Tendencies*⁶⁶

Examining his entire career as an appellate court judge, a notable trend that continues to this day is that Judge Pigott dissents much more frequently than almost all of his peers.⁶⁷ It is no secret that Judge Pigott is not afraid to disagree with the Court—from March to July 2009, he wrote eight dissenting opinions and voted in dissent ten times.⁶⁸ Only Judge Robert S. Smith dissented more often (nine opinions and thirteen votes) in the same period.⁶⁹ During the three years that Pigott has been a member of the Court, he has dissented thirty-eight times in split decisions, or in other words, in thirty-eight of ninety-three divided cases (41%).⁷⁰ In the

⁶⁶ The statistics used for this study were compiled from divided cases at the Court of Appeals between November 20, 2006 (the first divided cases handed down with Pigott's participation) and October 22, 2009 (the date the research for this article was completed). The ninety-three cases included in the study are compiled in the Appendix.

⁶⁷ See Posting of Vincent Martin Bonventre to New York Court Watcher, *NY Court of Appeals: Dissents up with CJ Lippman*, <http://www.newyorkcourtwatcher.com/2009/08/blog-post.html> (Aug. 17, 2009, 18:21 EST).

⁶⁸ Judges Dissenting at the Court of Appeals, http://2.bp.blogspot.com/_3q5uE-hgtH4/SooBQA4JovI/AAAAAAAAAXc/1P-I8-SuzRE/s1600-h/LippmnErlyDssnts2.gif (last visited Apr. 14, 2010). In 2008, all seven judges of the Court of Appeals participated in a symposium hosted by the Albany Law Review—*Judges on Judges*—in which each judge chose their favorite deceased former member of the Court (Cardozo was off limits), and gave some brief remarks about their pick. Vincent Martin Bonventre, *Editor's Foreword*, 71 ALB. L. REV. 1041, 1041 (2008). When it came time for Pigott to speak, he discussed Matthew J. Jasen, another western New Yorker, and the contribution he made to the Court. Judge Eugene F. Pigott, Jr., *Judge Matthew J. Jasen*, 71 ALB. L. REV. 1081 (2008). Interestingly, in Judge Pigott's explanation of his choice, he discussed Judge Jasen's sense of principle. *Id.* at 1085. Pigott revered Judge Jasen's conviction and willingness to dissent in controversial cases—setting aside the Court's consternation and voting for what he thought was the right outcome. *Id.* (“In the case of *People v. P.J. Video*, which I think showed really how principled [Judge Jasen] sometimes was and how he wasn't shy about showing it, the issue there was whether or not the affidavits in support of a search warrant for movies and obscene material at P.J. Videos were sufficient to sustain the search. And he dissented again from this Court's decision which says that a higher standard needs to be applied in determining whether or not a search warrant, which affects freedom of speech, is to be, the determination was to be enforced or not. And he dissented very strongly about that.”). It is not astonishing that Pigott would choose his Buffalo predecessor. First, Jasen came from the same place where Pigott cut his own teeth. But the similarities do not end there. Both men served their country at war, are Catholics, graduates of the University at Buffalo Law School, and neither has ever hesitated to dissent. *Id.* at 1082, 1083, 1085. In fact, Judge Jasen has often been referred to as a “great dissenter.” Michael B. Powers, *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 23, 24 (1986); John J. Halloran, Jr., *The Honorable Matthew J. Jasen*, 69 ALB. L. REV. 395, 400 (2006).

⁶⁹ *Id.*

⁷⁰ See tbl.1.

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same period, Robert Smith dissented forty-six times (49%), Susan Phillips Read, twenty-three (25%), Carmen Ciparick, nineteen (19%), and Victoria Graffeo, eighteen (18%). Theodore Jones dissented eighteen times in eighty-two divided cases (22%).⁷¹ Finally, Judith Kaye, who served as chief judge for slightly more than two years while Pigott was on the Court (from late 2006 through 2008), dissented in just eleven of sixty-five divided cases (17%) during that time, while the current Chief, Jonathan Lippman, has already cast dissenting votes nine times in twenty-eight cases (32%) since coming to the Court in 2009.⁷²

TABLE 1

	Ciparick	Graffeo	Jones	Kaye	Lippman	Pigott	Read	Smith
<i>Number of Divided Cases</i>	93	93	82	65	28	93	93	93
<i>Dissenting Votes</i>	19 (20%)	18 (19%)	18 (22%)	11 (17%)	9 (32%)	38 (41%)	23 (25%)	46 (49%)

Although Pigott dissents regularly, he is largely a balanced voter. There are, however, some very subtle patterns that surface upon a review of his decisions. Where some judges overwhelmingly vote a particular way in civil or criminal matters (meaning they consistently vote for either the plaintiff or defendant in civil cases, or for the prosecution or accused in criminal cases) usually aligned with a particular political leaning, Pigott is hard to predict. Examining the statistics from divided cases at the Court of Appeals during his tenure, Pigott has shown some favor to plaintiffs in civil cases, voting pro-plaintiff 58% of the time, as compared with the Court that voted pro-plaintiff in 47% of the same cases.⁷³

⁷¹ *See id.*

⁷² *Id.* It appears that Chief Judge Lippman will not shy away from dissenting, either. While he is just finishing his first full year as Chief, the statistics show that the Court as whole is dissenting more with Smith, Pigott, and Lippman as members. *See* Posting of Vincent Martin Bonventre, *supra* note 67.

⁷³ *See* tbl.2.

TABLE 2		
	Pigott in Divided Civil Cases	The Court
Total	59	59
<i>Pro-Plaintiff</i>	34 (58%)	28 (47%)
<i>Pro-Defendant</i>	25 (42%)	31 (53%)

TABLE 3		
	Pigott in Divided Criminal Cases	The Court
Total	29	29
<i>Pro-Prosecution</i>	19 (66%)	15 (52%)
<i>Pro-Rights of the Accused</i>	10 (34%)	14 (48%)
Due Process	24	24
<i>Pro-Prosecution</i>	17 (71%)	12 (50%)
<i>Pro-Rights of the Accused</i>	7 (29%)	12 (50%)
Search and Seizure	2	2
<i>Pro-Prosecution</i>	1 (50%)	0 (0%)
<i>Pro-Rights of the Accused</i>	1 (50%)	2 (100%)
Effective Assistance of Counsel	1	1
<i>Pro-Prosecution</i>	0 (0%)	1(100%)
<i>Pro-Rights of the Accused</i>	1 (100%)	0 (0%)
Self-Incrimination	2	2
<i>Pro-Prosecution</i>	1 (50%)	2 (100%)
<i>Pro-Rights of the Accused</i>	1 (50%)	(0%)

1. Civil Matters

The above-mentioned statistics give the reader the general sense that Pigott is not too far from the Court as a whole, but only in a very generic sense. In order to make the data more digestible, this study will examine a few particular areas of civil law that may be revealing given Pigott's background—personal injury and cases where Legal Aid was a participant.

In personal injury cases—regardless of the theory underlying the cause of action—the Court voted pro-plaintiff 33% of the time.⁷⁴ Judge Pigott was slightly more favorable to plaintiffs—voting pro-plaintiff on 50% of those occasions. And twice in six cases, Pigott was the lone dissenter. In one of them he stood alone for a position favorable to the plaintiff;⁷⁵ and in the other, he disagreed with the Court in support of the defendant.⁷⁶

Arons v. Jutkowitz presented the issue of “whether an attorney may interview an adverse party’s treating physician privately when the adverse party has affirmatively placed his or her medical condition in controversy.”⁷⁷ The Court answered the question in the affirmative.⁷⁸ Judge Pigott, voting alone, railed against the majority, explaining that “[o]ur holding today grants defense counsel the unprecedented ability to compel a plaintiff . . . to execute authorizations allowing defense counsel to speak to his or her treating physician outside the formal discovery process and without plaintiff being present.”⁷⁹ Judge Pigott took quite a protective stance behind medical privacy for the plaintiff’s bar in his dissent, and he was clearly uneasy granting defense counsel a disclosure device that it did not have before.

In *Wilson v. Galicia Contracting & Restoration, Corp.*, the defendant failed to comply with discovery demands and the terms of a pretrial conference order, and the court therefore struck the defendant’s answer, leaving the plaintiff’s complaint unrebutted.⁸⁰ The Court held that the defendant’s late attempt to nullify the

⁷⁴ See tbl.2.

⁷⁵ *Arons v. Jutkowitz*, 9 N.Y.3d 393, 416–20, 880 N.E.2d 831, 843–45, 850 N.Y.S.2d 345, 357–59 (2007) (Pigott, J., dissenting).

⁷⁶ *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 831–34, 890 N.E.2d 179, 181–84, 860 N.Y.S.2d 417 (2008) (Pigott, J., dissenting).

⁷⁷ 9 N.Y.3d at 393, 880 N.E.2d at 832, 850 N.Y.S.2d at 346 (majority opinion). *Arons* came to the Court with two companion cases: *Webb v. N.Y. Methodist Hospital* and *Kish v. Graham*.

⁷⁸ *Id.*

⁷⁹ *Id.* at 416, 880 N.E.2d at 843, 850 N.Y.S.2d at 356–57 (Pigott, J., dissenting).

⁸⁰ *Wilson*, 10 N.Y.3d at 828–29, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

default judgment based on the plaintiff's fraud was impermissible because the defendant failed to raise it on appeal.⁸¹ Pigott again dissented—without being joined by any other member of the Court—and explained that he would grant summary judgment even though the argument was not preserved for review because “courts have a fundamental duty to ensure that judgments are not procured by fraud.”⁸²

When Legal Aid, an organization to which Pigott belonged in the 1980s, was involved in a case before the Court of Appeals,⁸³ he voted for its position 60% of the time, or in three out of five cases.⁸⁴ Notably, in two of the three times Pigott voted in favor of the position represented by Legal Aid, he authored an opinion—once for the majority⁸⁵ and once as a lone dissenter.⁸⁶

TABLE 4		
	Pigott in Divided Case Involving Legal Aid	The Court
Total	5	5
<i>Pro-Legal Aid</i>	3 (60%)	2 (40%)

In *People v. Jackson*, the Court's brief memorandum opinion held that the trial court's admission of a prior uncharged sexual assault in the form of an out-of-court statement was harmless error and upheld a rape conviction.⁸⁷ Pigott, willing to publicly disagree with the Court, found the evidence “probative only of defendant's propensity to commit rape” and in contravention of earlier rulings that required more in sex offense crimes; accordingly he would have reversed and overturned the conviction.⁸⁸

⁸¹ *Id.* at 829–30, 890 N.E.2d at 180, 860 N.Y.S.2d at 418–19.

⁸² *Id.* at 833, 890 N.E.2d at 183, 860 N.Y.S.2d at 421 (Pigott, J., dissenting).

⁸³ In some instances, Legal Aid represented the litigants, and, in others, appeared as amicus curiae.

⁸⁴ *See supra* tbl.4. Although Legal Aid represents parties in both civil and criminal matters (and in the sample of cases studied, three cases were civil and two criminal), the information pertaining to Pigott's voting in Legal Aid cases was placed here, with the civil matters.

⁸⁵ *Walton v. N.Y. State Dep't of Corr. Servs.*, 8 N.Y.3d 186, 863 N.E.2d 1001, 831 N.Y.S.2d 749 (2007).

⁸⁶ *People v. Jackson*, 8 N.Y.3d 869, 864 N.E.2d 607, 832 N.Y.S.2d 477 (2007).

⁸⁷ *Id.* at 870, 864 N.E.2d at 608, 832 N.Y.S.2d at 478–79.

⁸⁸ *Id.* at 872–73, 864 N.E.2d at 610–11, 832 N.Y.S.2d at 481 (Pigott, J., dissenting).

2. Criminal Matters

Parsing the data further in criminal cases, this section examines Pigott's voting in certain criminal sub-categories: due process, search and seizure, effective assistance of counsel, and the right against compulsory self-incrimination. The frequency with which Pigott grants criminal leave applications is also discussed below.

Where some sort of due process issue arose (e.g., fair trial, sufficiency of evidence or charging instruments, consequences of plea bargains, etc.) during the period of this study, Pigott voted pro-prosecution 71% of the time (or 29% pro-rights of the accused). The Court voted for the prosecution and defendants' rights twelve times apiece in the same sample of cases.⁸⁹

For the two cases in which search and seizure rights were at issue, the Court declared the search unconstitutional and held in favor of the accused; Pigott, on the other hand, upheld one search⁹⁰ and declared the other unconstitutional.⁹¹

In the sole case decided on the issue of effective assistance of counsel, the Court, in an opinion authored by Chief Judge Lippman, held that the representation of the defendant had been "constitutionally adequate," and that, accordingly, the defendant's application for a writ of error *coram nobis* should be denied.⁹² As the lone dissenter in *People v. Borrell*, Pigott argued that the record supported the appellate division's finding of ineffective assistance of counsel, although he ultimately found error in the relief granted by the lower court.⁹³

Finally, in cases concerning the right against compulsory self-incrimination, Pigott voted once in favor of the prosecution's position and once for the rights of the accused.⁹⁴ In both cases, the majority of the Court voted pro-prosecution. Interestingly, in *People v. White*, Pigott was again the lone dissenter, and he articulated that "post-*Miranda* statements . . . were part of a single custodial police interrogation that began before warnings were administered

⁸⁹ See *supra* tbl.3.

⁹⁰ See *People v. Hall*, 10 N.Y.3d 303, 322–25, 886 N.E.2d 162, 176–79, 856 N.Y.S.2d 540, 554–57 (2008) (Pigott, J., dissenting in part) (joining Judge Smith's dissent, which would have suppressed the evidence).

⁹¹ See *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009) (joining the majority opinion).

⁹² *People v. Borrell*, 12 N.Y.3d 365, 370, 909 N.E.2d 559, 561, 881 N.Y.S.2d 637, 639 (2009).

⁹³ *Id.* at 370, 909 N.E.2d at 562, 881 N.Y.S.2d at 640 (Pigott, J., dissenting).

⁹⁴ See *People v. Naradzay*, 11 N.Y.3d 460, 900 N.E.2d 924, 872 N.Y.S.2d 373 (2008); *People v. White*, 10 N.Y.3d 286, 886 N.E.2d 156, 856 N.Y.S.2d 534 (2008).

and continued without a pronounced break.”⁹⁵ As a result of finding that there was no “break” between the initial confession and later statements, Pigott would have overturned the conviction because of the lower court’s failure to suppress the statements made by the defendant.

Aside from his actual voting in criminal cases, Pigott also granted more criminal leave applications than any other judge on the Court through 2008.⁹⁶ According to a recent study by Vincent Bonventre, Pigott has, on average, granted eleven leave applications in each of the two full years he has been a member of the Court.⁹⁷ As compared with the other judges, only Jones (8.0 per year), Rosenblatt (8.3 per year), and Robert Smith (8.8 per year) came close to Pigott.⁹⁸

This data demonstrates two things. First, Pigott’s actions reflect the statements he made during his confirmation hearing about the treatment of minorities in the criminal justice system.⁹⁹ By granting leave, Pigott affords criminal defendants—who are often minorities—the opportunity to have their case reviewed by the state’s highest tribunal.¹⁰⁰ Second, granting more criminal leave applications solidifies that the judge is not rigidly conservative. One would expect that Pigott, a Pataki appointee, would be

⁹⁵ *White*, 10 N.Y.3d at 293, 886 N.E.2d at 160, 856 N.Y.S.2d at 538 (Pigott, J., dissenting).

⁹⁶ Criminal leave applications are the steadiest source of the judges’ work load. Though the research for this article was current through 2008, Chief Judge Lippman has been granting leave applications with greater frequency than Pigott since he came to the Court in 2009. See Court of Appeals: Criminal Appeals Granted by Judge, http://4.bp.blogspot.com/_3q5uE-hgtH4/S1305fdncPI/AAAAAAAAAjw/Am7xMSzKEtw/s1600-h/cia44.gif (last visited Apr. 14, 2010); See generally Alan J. Pierce, *If the System Is Not Working Let’s Fix It: Why Seven Judges Are Better Than One for Deciding Criminal Leave Applications at the Court of Appeals*, 73 ALB. L. REV. 765 (2010) (discussing Chief Judge Lippman’s initiatives to review the criminal leave application process).

⁹⁷ Court of Appeals: Criminal Appeals Granted by Judge, *supra* note 96 (showing that Pigott granted seven leave applications in 2007, and fifteen in 2008, for an average of eleven per year).

⁹⁸ *See id.*

⁹⁹ *See supra* note 53 and accompanying text.

¹⁰⁰ See CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 37–38 tbl.2-1 (1993) (“[M]inority groups are overrepresented in . . . arrests compared to their respective proportions in the U.S. population.”); ANTHONY WALSH & CRAIG HEMMENS, LAW, JUSTICE, AND SOCIETY: A SOCIOLOGICAL INTRODUCTION 316 (2008) (“African American are arrested in numbers far exceeding what we would expect given their percentage of the general population. Comprising about 12.8% of the population, they consistently constitute about one third of all arrests for the FBI’s index crimes.”); Gary LaFree et al., *Is the Gap Between Black and White Arrest Rates Narrowing?*, in THE MANY COLORS OF CRIME: INEQUALITIES OF RACE, ETHNICITY, AND CRIME IN AMERICA 179, 188–89 fig.10.1 (Ruth D. Peterson et al. eds., 2006) (depicting that, although the ratio of black to white arrests has generally fallen since 1960, blacks are arrested at a rate consistently higher than whites for homicide, robbery, rape, and aggravated assault).

conservative in his voting, or in this case, conservative in granting criminal leave applications like the Republican governor who appointed him. But Pigott has shown that he is much more liberal in this context. As compared to other Pataki appointees on the Court (Rosenblatt, Graffeo, Read, and Robert S. Smith¹⁰¹), who granted a combined average of only 6.3 criminal leave applications per year, Pigott is granting nearly five more annually. Even compared with the judges appointed by Democratic governors (George Bundy Smith, Kaye, Ciparick, and Jones¹⁰²), Pigott still accepts more criminal appeals. The average for the liberal appointees is 7.2 applications granted per year, but again, Pigott grants almost four more criminal leave applications per year.¹⁰³

B. Vindication

Because Pigott sat on the Appellate Division, Fourth Department for nearly a decade, there are several cases he decided as an associate or presiding justice that were ultimately reviewed by the Court of Appeals. Accompanying the review and subsequent affirmation or reversal of the lower court, the Court of Appeals at times agrees with justices who dissented below—either expressly by mentioning a dissenting justice’s opinion or implicitly by adopting the same outcome, short of similar logic and reasoning.¹⁰⁴ There is

¹⁰¹ George D. Marlow, *Albert Martin Rosenblatt*, in JUDGES OF THE COURT OF APPEALS, *supra* note 5, at 945, 955; Victoria A. Graffeo, *Victoria Ann Graffeo*, in JUDGES OF THE COURT OF APPEALS, *supra* note 5, at 967, 976; Susan Phillips Read, *Susan Phillips Read*, in JUDGES OF THE COURT OF APPEALS, *supra* note 5, at 983, 984; Rosemary F. Smith, *Robert Sherlock Smith*, in JUDGES OF THE COURT OF APPEALS, *supra* note 5, at 987, 991.

¹⁰² George Bundy Smith was appointed in 1992 by Mario Cuomo. Sandra Jefferson Grannom et al., *George Bundy Smith*, in JUDGES OF THE COURT OF APPEALS, *supra* note 5, at 883, 886. Judith Kaye was appointed in 1993 by Mario Cuomo. Steven C. Crane, *Judith Smith Kaye*, in JUDGES OF THE COURT OF APPEALS, *supra* note 5, at 806, 807. Carmen Ciparick was appointed in 1993 by Mario Cuomo. Antonio E. Galvão, *Carmen Beauchamp Ciparick*, in JUDGES OF THE COURT OF APPEALS, *supra* note 5, at 945, 967. Lastly, Theodore Jones was appointed in 2007 by Eliot Spitzer. State of New York Court of Appeals, Hon. Theodore J. Jones, <http://www.courts.state.ny.us/ctapps/ttj.htm> (last visited Apr. 14, 2010).

¹⁰³ Court of Appeals: Criminal Appeals Granted by Judge, *supra* note 96.

¹⁰⁴ The New York Court of Appeals is a court of limited jurisdiction that accepts civil cases for review under the following circumstances: as of right where two justices of the appellate division dissent, N.Y. C.P.L.R. 5601(a) (McKinney 2009); where there are constitutional (either New York or federal) questions, N.Y. C.P.L.R. 5601(b); from an order granting a new trial or hearing, upon stipulation for judgment absolute, N.Y. C.P.L.R. 5601(c); based upon non-final determination of the appellate division in certain circumstances involving administrative agencies or arbitration awards, N.Y. C.P.L.R. 5601(d); by permission of either the Court of Appeals or appellate division, N.Y. C.P.L.R. 5602(a); or by permission of the appellate division alone, N.Y. C.P.L.R. 5602(b). As for criminal appeals, criminal leave applications are reviewed by one judge—either an appellate division justice or a judge of the Court of Appeals—who then issues a certificate granting leave to appeal. N.Y. CRIM. PROC.

no immense value, for the purposes of determining how wise, foolish, right, or wrong a judge might be, in studying how often he or she is vindicated—that is, how often the Court of Appeals agrees with a justice who has dissented below by reversing the lower court’s decision. Nevertheless, it is still interesting to see how often the reviewing court agrees with a particular justice.

A 2007 study examined vindication rates, among other things, and found that between January 1, 2000 and December 31, 2005, Pigott was vindicated 63% of the time at the Fourth Department.¹⁰⁵ The research presented here goes further by reaching back to the beginning of Pigott’s tenure with the Fourth Department and extending to the fall of 2006, when Pigott left for the Court of Appeals. There is one other notable difference between the earlier work on vindication and this study: here, the data was limited to cases where Pigott authored the dissent at the Appellate Division, Fourth Department, as opposed to when he merely cast a vote in dissent.

TABLE 5: VINDICATION OF PIGOTT	
Authored Dissents	11
<i>Vindicated</i>	6 (55%)
<i>Not Vindicated</i>	5 (45%)

This study found that Pigott was vindicated by the Court of Appeals in 55% of the cases in which he authored a dissent.¹⁰⁶ While the figure is lower than that of the earlier study, 55% is still remarkable for a couple of reasons. First, it shows that in cases

LAW § 460.20 (McKinney 2005).

¹⁰⁵ Cherna et al., *supra* note 6, at 991.

¹⁰⁶ See tbl.5; *In re* Judicial Settlement of the Final Account of the Chase Manhattan Bank, 21 A.D.3d 162, 798 N.Y.S.2d 615 (App. Div. 4th Dep’t 2005); *Wende C. v. United Methodist Church*, 6 A.D.3d 1047, 776 N.Y.S.2d 390 (App. Div. 4th Dep’t 2004); *Kamens v. Utica Mut. Ins. Co.*, 6 A.D.3d 1237, 776 N.Y.S.2d 671 (App. Div. 4th Dep’t 2004); *Reed v. Gowanda Nursing Home*, 5 A.D.3d 987, 773 N.Y.S.2d 311 (App. Div. 4th Dep’t. 2004); *Scahill v. Greece Cent. Sch. Dist.*, 1 A.D.3d 909, 768 N.Y.S.2d 63 (App. Div. 4th Dep’t 2003); *Pfister v. Watertown City Sch. Dist.*, 306 A.D.2d 826, 762 N.Y.S.2d 210 (App. Div. 4th Dep’t 2003); *Nestorowich v. Ricotta*, 281 A.D.2d 870, 727 N.Y.S.2d 833 (App. Div. 4th Dep’t 2001); *People ex rel. Matthews v. N.Y. State Div. of Parole*, 272 A.D.2d 860, 706 N.Y.S.2d 810 (App. Div. 4th Dep’t 2000); *Master Cars, Inc. v. Walters*, 267 A.D.2d 942, 700 N.Y.S.2d 630 (App. Div. 4th Dep’t 1999); *Marzec v. DeBuono*, 266 A.D.2d 820, 697 N.Y.S.2d 788 (App. Div. 4th Dep’t 1999); *Lane v. Sec. Mut. Ins. Co.*, 256 A.D.2d 1100, 682 N.Y.S.2d 777 (App. Div. 4th Dep’t 1998).

where Pigott felt strongly enough to publicly disagree with his comrades, his conclusion prevailed more than half the time.¹⁰⁷ Also interesting is that in all eleven of the cases that were heard by the Court of Appeals when Pigott authored the dissent, one other justice of the appellate division joined his opinion.¹⁰⁸ In three of those eleven cases, then-Justice (now Presiding Justice of the Fourth Department) Henry Scudder joined Pigott's dissent (according to the 2007 study, Scudder was vindicated about 43% of the time in the period of that study¹⁰⁹); three more times he was joined by Justice Robert Hurlbutt (50%¹¹⁰); twice by Justice Leo Hayes (8%¹¹¹); once by Justice L. Paul Kehoe (75%¹¹²); once by Justice Donald Wisner (66%¹¹³); and finally, once by Justice Samuel Green (28%¹¹⁴). The second reason the percentage is impressive is that it would still measure up as among the highest rates of vindication according to the previous study that considered every appellate division justice during the time studied.¹¹⁵

In addition to having a high vindication rate while a member of the Fourth Department, Judge Pigott was vindicated in the sole case reviewed by the Supreme Court of the United States since his tenure with the Court of Appeals. That case, *Haywood v. Drown*,¹¹⁶ involved a question about the jurisdiction of New York courts to hear federal claims.¹¹⁷ The Court of Appeals upheld a state statute that prevented anyone other than the attorney general from bringing suit in a state court

on behalf of the state, against any officer or employee of the department [of correctional services], in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such

¹⁰⁷ Again, the emphasis is not on right or wrong, wise or foolish. The only positive conclusion that can be drawn from vindication is the Court of Appeals's agreement with Pigott's outcome, reasoning, or both.

¹⁰⁸ See *supra* note 106.

¹⁰⁹ Cherna et al., *supra* note 6, at 1001 tbl.7.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 991 tbl.2.

¹¹⁶ 9 N.Y.3d 481, 881 N.E.2d 180, 851 N.Y.S.2d 84 (2007), *rev'd*, *Haywood II*, 129 S. Ct. 2108 (2009).

¹¹⁷ *Id.* at 491–500, 881 N.E.2d at 186–93, 851 N.Y.S.2d at 90–97.

officer or employee.¹¹⁸

The Supreme Court disagreed and cited Judge Jones' dissent, which Pigott joined.¹¹⁹

C. *Partial Vindication*

While Pigott was vindicated at a rate of 55% during his time at the Appellate Division, Fourth Department, a more careful examination of the data also reveals that when Pigott was not vindicated, he was still able to obtain votes of judges at the Court of Appeals. In the five cases in which he was not vindicated, the Court of Appeals was divided two times, i.e., a judge, albeit in vain, agreed with Pigott.¹²⁰ Both times, the sole dissenting vote came from George Bundy Smith, the judge that Pigott replaced (who was *supposed* to be at the other end of the ideological/political spectrum). Considering the addition of Bundy Smith's "quasi-vindication," Pigott's rate rises to 73%. It is also somewhat surprising, and telling, that Bundy Smith agreed with Pigott twice when the Court of Appeals did not. Suspected differences in politics and ideology would lead one to believe that Pigott and Bundy Smith would often disagree in the difficult cases—the kind that would divide the appellate division and Court of Appeals—but Bundy Smith was willing to openly disagree with his Court to take the same position as his eventual successor.

IV. CONCLUSION

Associate Judge Eugene F. Pigott is little more than three years into his tenure with the New York Court of Appeals. In that time, he has established himself as a frequent dissenter and ideological wildcard—sometimes voting along politically conservative lines, and at other times from a more liberal perspective, but never too far from the midway point. What can be gathered from his very middle-of-the-road voting behavior? Judge Pigott's vote is difficult to predict.

There are, however, some trends that can be identified including

¹¹⁸ N.Y. CORRECT. LAW § 24(1) (McKinney 2009); see *Haywood*, 9 N.Y.3d at 486, 881 N.E.2d at 182, 851 N.Y.S.2d at 86.

¹¹⁹ *Haywood II*, 129 S. Ct. at 2112–13.

¹²⁰ See *Wende C. v. United Methodist Church*, 6 A.D.3d 1047, 776 N.Y.S.2d 390 (App. Div. 4th Dep't 2004), *aff'd*, 4 N.Y.3d 293, 827 N.E.2d 265, 794 N.Y.S.2d 282 (2005); *Nestorowich v. Ricotta*, 281 A.D.2d 870, 727 N.Y.S.2d 833 (App. Div. 4th Dep't 2001), *aff'd*, 97 N.Y.2d 393, 767 N.E.2d 125, 740 N.Y.S.2d 668 (2002).

a slight preference for plaintiffs in civil cases and the prosecution in criminal matters. In cases involving issues that may strike a chord with Pigott—for example, those in which Legal Aid has some interest—he is more likely to cast a vote in support of that interest, though not overwhelmingly so. In personal injury matters, Pigott voted pro-plaintiff half of the time. Cases involving criminal due process rights saw Pigott vote for the prosecution’s position 71% of the time. When search and seizure was at issue, he voted pro-prosecution with 50% regularity. In the only case where effective assistance of counsel was at issue, Judge Pigott voted with the criminal defendant’s position. Finally, when the right against compulsory self-incrimination presented itself to the Court, Pigott voted pro-prosecution half of the time.

There are two important final points to be made. First, this study was intended to yield no particular results. After review of the data, all of which came from divided cases and some only where Pigott authored a dissenting opinion, it points to no clear answers or results—and it was never the author’s intention to find any such “answers.”

Finally, and most crucially, the findings presented here do not speak to the wisdom of Judge Pigott as a jurist. The study presents observations over time and nothing more. As Benjamin Cardozo has so aptly explained:

More subtle are the forces so far beneath the surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another. . . . There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in William James’s phrase of “the total push of the cosmos,” which, when reasons are nicely balanced, must determine where choices shall fall.¹²¹

The author’s intention was merely to shine a light onto those

¹²¹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 11–12 (1921) (citation omitted).

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subconscious forces by showing who Judge Pigott is, where he has come from, and what he has done, in an effort to borrow from Justice Oliver Wendell Holmes, to *predict* how he may decide cases in the future.

APPENDIX OF CASES

1. *People v. Arafet*, No. 142, 2009 N.Y. LEXIS 3954 (N.Y. Oct. 20, 2009);
2. *Roberts v. Tishman Speyer Props., L.P.*, No. 131, 2009 N.Y. LEXIS 3953 (N.Y. Oct. 22, 2009);
3. *Crucible Materials Corp. v. N.Y. Power Auth.*, No. 124, 2009 N.Y. LEXIS 3912 (N.Y. Oct. 20, 2009);
4. *Skelos v. Paterson*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009);
5. *People v. Buchanan*, 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337 (2009);
6. *Buffalo Crushed Stone v. Town of Cheektowaga*, 13 N.Y.3d 88, 913 N.E.2d 394, 885 N.Y.S.2d 8 (2009);
7. *Bazakos v. Lewis*, 12 N.Y.3d 631, 911 N.E.2d 847, 883 N.Y.S.2d 785 (2009);
8. *Peaslee v. GMAC, LLC*, 13 N.Y.3d 75, 913 N.E.2d 387, 885 N.Y.S.2d 1 (2009);
9. *People v. Davis*, 13 N.Y.3d 17, 912 N.E.2d 1044, 884 N.Y.S.2d 665 (2009);
10. *People v. Bailey*, 13 N.Y.3d 67, 915 N.E.2d 611, 886 N.Y.S.2d 666 (2009);
11. *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 915 N.E.2d 593, 886 N.Y.S.2d 648 (2009); *Koehler v. Bank of Berm.*, 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009);
12. *Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 911 N.E.2d 817, 883 N.Y.S.2d 755 (2009);
13. *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009);
14. *Misicki v. Caradonna*, 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (2009);
15. *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 909 N.E.2d 70, 881 N.Y.S.2d 377 (2009);
16. *Wyly v. Milber Weiss Bershad & Schulman, LLP*, 12 N.Y.3d 400, 908 N.E.2d 888, 880 N.Y.S.2d 898 (2009);
17. *People v. Boyd*, 12 N.Y.3d 390, 908 N.E.2d 898, 880 N.Y.S.2d 908 (2009);
18. *In re Elvin G.*, 12 N.Y.3d 834, 910 N.E.2d 419, 882 N.Y.S.2d 671 (2009);
19. *People v. Borrell*, 12 N.Y.3d 365, 909 N.E.2d 559, 881 N.Y.S.2d 637 (2009);
20. *Passante v. Agway Consumer Prods., Inc.*, 12 N.Y.3d 372, 909 N.E.2d 563, 881 N.Y.S.2d 641 (2009);
21. *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 912 N.E.2d 26, 884 N.Y.S.2d 194 (2009);
22. *Gorman v. Town of Huntington*, 12 N.Y.3d, 907 N.E.2d 292, 879 N.Y.S.2d 379 (2009);
23. *People v. Fuentes*, 12 N.Y.3d 259, 907 N.E.2d 286, 879 N.Y.S.2d 373 (2009);
24. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009);
25. *Duffy v. Vogel*, 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246 (2009);
26. *People v. Kalin*, 12 N.Y.3d 225, 906 N.E.2d 381, 878 N.Y.S.2d 653 (2009);
27. *People v. Bauman*, 12 N.Y.3d 152, 905 N.E.2d 1164, 878 N.Y.S.2d 235 (2009);
28. *D'Onofrio v. City of N.Y.*, 11 N.Y.3d 581, 901 N.E.2d 744, 873 N.Y.S.2d 251 (2008);
29. *People v. Ford*, 11 N.Y.3d 875, 903 N.E.2d 256, 874 N.Y.S.2d 859 (2008);
30. *Adamo v. Brown & Williamson Tobacco Co.*, 11 N.Y.3d 545, 900 N.E.2d 966, 872 N.Y.S.2d 415 (2008);
31. *Rivera v. Firetog*, 11 N.Y.3d 501, 900 N.E.2d 952, 872 N.Y.S.2d 401 (2008);

32. *People v. Naradzay*, 11 N.Y.3d 460, 900 N.E.2d 924, 872 N.Y.S.2d 373 (2008);
33. *Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 900 N.E.2d 934, 872 N.Y.S.2d 383 (2008);
34. *In re Abraham*, 11 N.Y.3d 429, 900 N.E.2d 136, 871 N.Y.S.2d 599 (2008);
35. *Brooklyn Assembly Halls of Jehova's Witnesses, Inc. v. Dep't of Env'tl. Pro.*, 11 N.Y.3d 327, 898 N.E.2d 921, 869 N.Y.S.2d 878 (2008);
36. *People v. Jenkins*, 11 N.Y.3d 282, 898 N.E.2d 553, 869 N.Y.S.2d 370 (2008);
37. *Farkas v. Farkas*, 11 N.Y.3d 300, 898 N.E.2d 563, 869 N.Y.S.2d 380 (2008);
38. *Graev v. Graev*, 11 N.Y.3d 262, 898 N.E.2d 909, 869 N.Y.S.2d 866 (2008);
39. *Reddington v. Staten Island Univ. Hosp.*, 11 N.Y.3d 80, 893 N.E.2d 120, 862 N.Y.S.2d 842 (2008);
40. *Ramroop v. Flexo-Craft Printing, Inc.*, 11 N.Y.3d 160, 896 N.E.2d 69, 866 N.Y.S.2d 586 (2008);
41. *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 894 N.E.2d 1, 863 N.Y.S.2d 615 (2008);
42. *People v. Baret*, 11 N.Y.3d 31, 892 N.E.2d 839, 862 N.Y.S.2d 446 (2008);
43. *Giaquinto v. Comm'r of N.Y. State Dep't of Health*, 11 N.Y.3d 179, 897 N.E.2d 116, 867 N.Y.S.2d 716 (2008);
44. *People v. Finley*, 10 N.Y.3d 647, 891 N.E.2d 1165, 862 N.Y.S.2d 1 (2008);
45. *Feola v. Carroll*, 10 N.Y.3d 569, 890 N.E.2d 219, 860 N.Y.S.2d 457 (2008);
46. *Fair Price Med. Supply Corp. v. Travelers Indemnity Co.*, 10 N.Y.3d 556, 890 N.E.2d 233, 860 N.Y.S.2d 471 (2008);
47. *IG Second Generation Partners L.P. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 10 N.Y.3d 474, 889 N.E.2d 475, 859 N.Y.S.2d 598 (2008);
48. *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 890 N.E.2d 184, 860 N.Y.S.2d 422 (2008);
49. *People v. Cabrera*, 10 N.Y.3d 370, 887 N.E.2d 1132, 858 N.Y.S.2d 74 (2008);
50. *P.A. Bldg. Co. v. City of N.Y.*, 10 N.Y.3d 430, 889 N.E.2d 983, 860 N.Y.S.2d 1 (2008);
51. *Johna M.S. v. Russell E.S.*, 10 N.Y.3d 364, 889 N.E.2d 471, 859 N.Y.S.2d 594 (2008);
52. *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 890 N.E.2d 179, 869 N.Y.S.2d 417 (2008);
53. *Sanatass v. Consol. Investing Co.*, 10 N.Y.3d 333, 887 N.E.2d 1125, 858 N.Y.S.2d 67 (2008);
54. *People v. Hall*, 10 N.Y.3d 303, 886 N.E.2d 162, 856 N.Y.S.2d 540 (2008);
55. *People v. White*, 10 N.Y.3d 286, 886 N.E.2d 156, 856 N.Y.S.2d 534 (2008);
56. *Appleton Acquisition, LLC v. Nat'l Housing P'ship*, 10 N.Y.3d 250, 886 N.E.2d 144, 856 N.Y.S.2d 522 (2008);
57. *Ramos v. Howard Indus., Inc.*, 10 N.Y.3d 218, 885 N.E.2d 176, 855 N.Y.S.2d 412 (2008);
58. *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co.*, 10 N.Y.3d 187, 886 N.E.2d 127, 856 N.Y.S.2d 505 (2008);
59. *Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200, 886 N.E.2d 135, 856 N.Y.S.2d 513 (2008);
60. *Tzolis v. Wolff*, 10 N.Y.3d 100, 884 N.E.2d 1005, 855 N.Y.S.2d 1005 (2008);
61. *Am. Comm. for the Weizmann Inst. of Sci. v. Dunn*, 10 N.Y.3d 82, 883 N.E.2d 996, 854 N.Y.S.2d 996 (2008);
62. *Ederer v. Gursky*, 9 N.Y.3d 514, 881 N.E.2d 204, 851 N.Y.S.2d 108 (2007);
63. *People v. Gajadhar*, 9 N.Y.3d 438, 880 N.E.2d 863, 850 N.Y.S.2d 377 (2007);
64. *People v. Zimmerman*, 9 N.Y.3d 421, 881 N.E.2d 193, 851 N.Y.S.2d 97

- (2007);
65. *Arons v. Jutkowitz*, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 345 (2007);
 66. *333 E. 49th Assocs., L.P. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 9 N.Y.3d 982, 879 N.E.2d 158, 849 N.Y.S.2d 19 (2007);
 67. *Haywood v. Drown*, 9 N.Y.3d 481, 881 N.E.2d 180, 851 N.Y.S.2d 84 (2007);
 68. *Hosp. for Joint Diseases v. Travelers Prop. Cas. Ins. Co.*, 9 N.Y.3d 312, 879 N.E.2d 1291, 849 N.Y.S.2d 473 (2007);
 69. *Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 879 N.E.2d 1282, 849 N.Y.S.2d 463 (2007);
 70. *People v. Hill*, 9 N.Y.3d 189, 879 N.E.2d 152, 849 N.Y.S.2d 13 (2007);
 71. *People v. Taylor*, 9 N.Y.3d 129, 878 N.E.2d 969, 848 N.Y.S.2d 554 (2007);
 72. *Mayor of N.Y. v. Council of N.Y.*, 9 N.Y.3d 23, 874 N.E.2d 706, 842 N.Y.S.2d 742 (2007);
 73. *Cubas v. Martinez*, 8 N.Y.3d 611, 870 N.E.2d 133, 838 N.Y.S.2d 815 (2007);
 74. *People v. Louree*, 8 N.Y.3d 541, 869 N.E.2d 18, 838 N.Y.S.2d 18 (2007);
 75. *People v. Rosas*, 8 N.Y.3d 493, 868 N.E.2d 199, 836 N.Y.S.2d 518 (2007);
 76. *Long Beach v. Civil Serv.*, 8 N.Y.3d 465, 867 N.E.2d 389, 835 N.Y.S.2d 538 (2007);
 77. *People v. Kozlow*, 8 N.Y.3d 554, 870 N.E.2d 118, 838 N.Y.S.2d 800 (2007);
 78. *328 Owners Corp. v. 330 W. 86 Oaks Corp.*, 8 N.Y.3d 372, 865 N.E.2d 1228, 834 N.Y.S.2d 62 (2007);
 79. *Highland Capital Mgmt. LP v. Schneider*, 8 N.Y.3d 406, 866 N.E.2d 1020, 834 N.Y.S.2d 692 (2007);
 80. *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 866 N.E.2d 439, 834 N.Y.S.2d 494 (2007);
 81. *People v. Rowland*, 8 N.Y.3d, 865 N.E.2d 1224, 834 N.Y.S.2d 58 (2007);
 82. *Beal Savs. Bank v. Sommer*, 8 N.Y.3d 318, 865 N.E.2d 1210, 834 N.Y.S.2d 44 (2007);
 83. *People v. Jackson*, 8 N.Y.3d 869, 864 N.E.2d 607, 832 N.Y.S.2d 477 (2007);
 84. *N.Y. City Trans Auth. v. N.Y. State Pub. Employment Relations Bd.*, 8 N.Y.3d 226, 864 N.E.2d 56, 832 N.Y.S.2d 132 (2007);
 85. *People v. Grajales*, 8 N.Y.3d 861, 864 N.E.2d 596, 832 N.Y.S.2d 466 (2007);
 86. *Walton v. N.Y. Dep't of Corr. Servs.*, 8 N.Y.3d 186, 863 N.E.2d 1001, 831 N.Y.S.2d 749 (2007);
 87. *People v. Tzitzikalakis*, 8 N.Y.3d 217, 864 N.E.2d 44, 832 N.Y.S.2d 120 (2007);
 88. *Bingham v. N.Y. City Trans. Auth.*, 8 N.Y.3d 176, 864 N.E.2d 49, 832 N.Y.S.2d 125 (2007);
 89. *O'Shea v. Bd. of Assessors of Nassau County*, 8 N.Y.3d 249, 864 N.E.2d 1261, 832 N.Y.S.2d 862 (2007);
 90. *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 861 N.E.2d 81, 828 N.Y.S.2d 266 (2006);
 91. *Campaign for Fiscal Equity, Inc. v. New York*, 8 N.Y.3d 14, 861 N.E.2d 50, 828 N.Y.S.2d 235 (2006);
 92. *Policano v. Herbert*, 7 N.Y.3d 588, 859 N.E.2d 484, 825 N.Y.S.2d 678 (2006).