NEW YORK'S APPELLATE DIVISION

DISSENT & VINDICATION IN THE DEPARTMENTS: AN EMPIRICAL STUDY

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Last year's inaugural issue of New York Appeals featured a section devoted to the New York State Court of Appeals. Beginning with a comparison between the Chief Judge Kaye and the Chief Judge Lippman courts, the section then profiled each judge of the Court by examining particular aspects of their decision-making processes and jurisprudence. As a follow-up, this year we thought it would be fitting to delve deeper into the New York State Supreme Court, Appellate Division, and each of its four departments. Realizing the magnitude of such a task, we determined that we would have to limit our examination to a particular aspect of the Appellate Division. To this end, in the fall of 2010, the Albany Law Review conducted a study of the dissents produced by each department from 2000 to 2010. Dissenting opinions may seem like

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1 Vincent Martin Bonventre, Toward the Lippman Court: Flux and Transition at New York's Court of Appeals, 73 ALB. L. REV. 889 (2010).


an unusual lens through which to gather observations about a court, however we found that dissenting opinions served as an interesting conduit into each of the departments. Our dissection of dissents unveiled an interesting viewpoint of each department, revealing perspectives which would not have surfaced through examining other trends.

We are delighted to have Judge Robert S. Smith of the New York Court of Appeals begin this special section by sharing his thoughts on why he dissents, and detailing the importance and value of dissenting opinions. As Judge Smith avers, dissents are important because, for judges, "[t]here is a moral obligation to say what you think—not an absolute obligation, of course; certainly, there are times when the right thing to do is keep silent. But the duty to say what you think is, itself, entitled to some weight." Through its dissenting opinions, we found that the personality and character of each department really surfaces.

This special section includes four student-authored research studies, one for each department, which provide a profile of each department and a brief analysis of the data we collected. Together, these articles also provide a detailed examination of the concept of "vindication"—situations where a dissenting opinion issued at the appellate level is later affirmed on appeal, in outcome and reasoning, by the Court of Appeals. The study also examines how the departments differ in their dissent rates, and identifies patterns that emerge regarding dissent vindication and the tendencies of individual judges.

METHODOLOGY

The time period under investigation was January 1, 2000 to October 1, 2010; only published decisions handed down during that date range were included in the study. To determine the total number of cases decided in each department every year, we looked to the annual official reports from the Chief Administrator of the Courts. As to further data collection, parallel searches were


5 Id. at 874.

conducted in the LexisNexis and Westlaw databases in order to determine the number of decisions with dissenting opinions. In LexisNexis, the sub-database for each specific department within the New York database was used. Within each department’s sub-database, a search was performed by restricting the date by each calendar year, and evaluating the cases with dissents year by year.\(^7\) In Westlaw, the “NY-CS” database was used, within which a number of search terms were deployed.\(^8\)

After each search, each case resulting from the search was accessed and examined. The case names, author of the majority opinion, concurring justices, and dissenting justices were recorded, and it was noted whether the case was civil or criminal. After this initial phase of data collection, each of the cases from the four departments was closely examined. At this stage, the substance of the decision was more closely scrutinized in order to determine, among other things, whether or not the dissenting justice below was later vindicated by the Court of Appeals. The opinions that fell within the “vindicated” category were examined even closer to identify the subject matter and the areas of law involved. Of particular note, we looked at the number of times a particular justice dissented, if that justice dissented more frequently when certain areas of law were involved, and identified which justices dissent most frequently.

**GENERAL OBSERVATIONS**

Not surprisingly, the four departments within New York State’s Appellate Division vary greatly in terms of the number of dissents they generate, as well as their rates of vindication. Of course, the most obvious difference between the four departments is the sheer quantity of opinions produced by certain departments, most especially, the First and Second Departments.\(^9\)

For each of the four departments, the author used the dissent and

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\(^7\) To replicate our study in LexisNexis, navigate to the New York database. There is a sub-database available for each of the four departments. Within each department, restrict the date to “01/01/year” to 12/31/year.” This will yield all of the available decisions for that year. We then tallied the opinions, and identified and evaluated those opinions with dissents.

\(^8\) To replicate our study in Westlaw, selected the “NY-CS” database and run searches using the following search terms, as modified for each year and department: “pr(first/2 department) & da(2009)”; “co(1dept) & op(dissent)”; “pr(1st) & da (2009)”; “co(1dept) PR("supreme court" /2 “appellate division” & “first department”) & da(2009).” We found the first set of search terms to be the most accurate.

\(^9\) See Vigars, supra note 3, at 879; Ostrander, supra note 3, at 895.
vindication data as a means to reveal other characteristics of the departments. The First Department study takes a closer look at the individual dissenting justices and their vindication rates, and discusses the value of having another justice join in a dissent.\textsuperscript{10} The vindication rate of individual justices is also discussed in the Second Department study, which takes a closer look at the “dynamics of decision-making” within that department, in terms of both individual and group trends, and explores the various factors that may affect the decision-making processes of the department.\textsuperscript{11} It also provides a broader discussion of caseload management in the department, which is identified as a major issue for the Second Department. The Third Department is identified as the most “agreeable” department, and the study for that department uses specific cases to conjecture as to the reasons for this unanimity, and to explore other decisional tendencies in criminal versus civil cases.\textsuperscript{12} Finally, the Fourth Department study examines the voting trends of individual justices, and provides a bifurcated analysis of the vindication data by dividing the examination into criminal and civil cases.\textsuperscript{13}

\textbf{CONCLUSION}

This study is by no means intended as an exhaustive and statistically-precise recitation of dissent and vindication rates. Indeed, we are aware that some opinions may have evaded the net of our search terms. However, our systematic approach to data collection for all four departments provides an interesting framework within which to examine the four departments, and to draw comparisons between them. As such, the four studies on the following pages are meant to serve as snapshots of each department. The studies were intended to be read as a whole, in the context of one another, to facilitate a comparative reading.

As revealed by the four studies, dissents illustrate the variations in judicial process between the individual departments, as well as between the individual justices within the same department. While dissenting opinions are the voice of diversity of thought, analysis, and reasoning, ensuring the rigorous analysis and application of law, a study of such opinions reveals the diversity of judicial process within the expansive Appellate Division of New York State.

\textsuperscript{10} See Vigars, supra note 3, at 879.
\textsuperscript{11} See Ostrander, supra note 3, at 895.
\textsuperscript{12} See Stevens, supra note 3, at 913.
\textsuperscript{13} See Gross, supra note 3, at 931.