

LECTURE

MINING TREASURES: A DECADE OF HUGH R. JONES MEMORIAL LECTURES AT ALBANY LAW SCHOOL

HONORABLE HUGH R. JONES MEMORIAL LECTURE

ALBANY LAW SCHOOL
Dean Alexander Moot Courtroom
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*Judith S. Kaye**

I begin with thanks to the Albany Law School (as well as its fabulous new Dean, Penny Andrews), to the Fund for Modern Courts (as well as its fabulous Chair Milton Williams and Executive Director Dennis Hawkins), and to all of you for the privilege of delivering the Hugh R. Jones Memorial Lecture.

Thank you also for the gift of Chief Judge Jonathan Lippman's introduction—that's an experience I wish for all of you—and for the joy of reliving a bit of my own very special relationship with an extraordinary gentleman, Hugh R. Jones, and an extraordinary court, the Court of Appeals of the State of New York.

Hugh described his pre-Court life as "prologue," meaning from March 19, 1914 (his birthday) up to January 1, 1973 (his first official day as a member of the Court of Appeals). And he described his post-Court life as "epilogue," meaning every day after December 31, 1984 (his age-mandated retirement) to the end of his life. His nearly twelve years on the Court of Appeals he called "the climaxing happiness of [his] professional life," a sentiment I most heartily affirm. Indeed, I refer to my own Court years as Lawyer Heaven, the years since January 1, 2009 as my "after-life."

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Utterly unforgettable was Hugh's hearty welcome to the Court of Appeals when I officially arrived on Tuesday, September 12, 1983; the many, many lessons learned during my treasured fifteen months of service alongside him; in his words (I have his two handwritten notes) "camaraderie, joys, satisfactions and achievements"; and our fierce bond of friendship every day until Hugh's death on March 3, 2001, two weeks before his eighty-seventh birthday. Those days, months and years are truly a standout for me, but the world should know as well what a unique experience it is to serve as a judge of the Court of Appeals of the State of New York, as each of us knows.

That very first day—September 12, 1983—Hugh greeted me by observing that we were the only two of seven who had not come up through the "black shroud" of prior judicial service. We had both come to the Court directly from private practice. For me, that was a comforting message as I contemplated a terrifying transition to a new world; I had a great precedent close at hand. And day one ended with Hugh some fourteen hours later, after my public oath of office, a reception at the State Bar, oral arguments in seven cases, six p.m. dinner at the University Club, and return to chambers to prepare for Conference the following morning. A fourteen-hour workday, by the way, is not unusual at the Court of Appeals. Hugh even added to his day a very early morning workout on the stationary bicycle he kept in his chambers, outfitted with a reading stand, where he studied motions for leave to appeal. This is all very serious business.

Naturally, back in 1983, I had prepared for Albany in more ways than one, studying meticulously of course, but also purchasing memorable attire for a memorable day, a beautiful light taupe suit with matching shoes. At dinner that evening, gathered around a table, as we talked excitedly about everything but the cases—a continuing tradition, by the way (both the nightly dinner and not discussing the cases outside the conference room)—the judges all watched as a lettuce leaf drenched in salad dressing drifted down from my fork to the tip of my shoe, leaving a large, ugly stain on the most expensive shoe I had ever owned. Judge Jones broke the silence by saying, "If you come to my chambers later, Judith, I will remove that stain for you." And guess what. About 10:30 or so, my shoe and I meekly made our way down to his chambers (at that time, pre-renovation, Judge Simons and I, the two Junior Judges, were on the third floor, the other five on the second floor at Court of Appeals Hall. Today all seven chambers are on the second floor). I

watched with horror as Judge Jones sprayed the front of my shoe with a heavy coat of Goddard's Dry Clean Spot Remover (he could never have imagined the cost of that shoe!), let it dry, then gently blew and wiped it off. A miraculous salvage.

That is how the first official day ended for the first woman judge of the Court of Appeals of the State of New York. Given that the stated objective of the Jones Lecture is both to promote research and writing on issues affecting the judiciary and to engage Albany Law students in the history of the Court, I thought you all needed to have these facts.

Actually, the Lecture's stated objectives do provide a great framework for my remarks today. The nine prior Jones Lectures are alone a trove of learning about the Court of Appeals and issues affecting our judiciary. So I will boldly suggest that every tenth lecture—as this one is, spanning 2002 to 2012—be dedicated to mining the teachings of the prior lectures Hugh has inspired. And that is my plan for today, to reflect on what you have heard before in this great lecture series, and to establish beyond all doubt that we are today focused on an extraordinary gentleman and an extraordinary Court.

The first three Jones Lectures—by Judges Richard C. Wesley,¹ Howard Levine,² and Stewart Hancock³—together are an amazing triptych, meaning a set of three tablets hinged to one another. The triptych is constructed on the foundation of Hugh's own magnificent *Cogitations on Appellate Decision-Making*.⁴ Those cogitations were, as you no doubt know, the thirty-fifth Benjamin N. Cardozo Lecture, honoring another great Court of Appeals judge and hero of the American judiciary. For me, the picture includes as well Cardozo's *Nature of the Judicial Process*,⁵ delivered over four sessions at Yale Law School in February 1921, seven years after Cardozo's own appointment to the Court of Appeals. Together,

¹ Hon. Richard C. Wesley, *Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now*, 65 ALB. L. REV. 1123 (2002).

² Howard A. Levine, *Hugh R. Jones Lecture at Albany Law School*, 67 ALB. L. REV. 1 (2003).

³ Stewart F. Hancock, Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 ALB. L. REV. 81 (2004).

⁴ Hon. Hugh R. Jones, *Cogitations on Appellate Decision Making*, 3 Benjamin N. Cardozo Memorial Lectures Delivered at the Ass'n of the Bar of the City of N.Y. 1223 (1979).

⁵ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103 (1921). The lectures "address[] . . . the role of creativity in the judicial process." Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1554 (2007)

those writings by Court of Appeals Judges comprise an unmatched source of learning about our great common law system, enriched and illustrated by decades of their own experience. Just think: the Jones lecturers thus far, along with Judges Cardozo and Jones, total more than one hundred and forty two years of actual service on the Court of Appeals of the State of New York!

Hugh's beautifully crafted Cardozo Lecture was, of course, a primer for so many of us. In his Jones Lecture, Judge Wesley notes that he received a copy his first day on the Appellate Division bench from his former Fourth Department colleague Judge Sam Green. Mine was a gift from Hugh himself, hard covered in red and autographed, presented on my arrival in Albany and worn thin over my twenty-five years, three months, nineteen days and twelve hours on the Court.

Though *Cogitations* authoritatively addresses the subject of appellate decision-making from the perspective of Hugh's own seven years of actual service on the Court of Appeals, like Cardozo's, there must be something magical about that seventh year on the Court of Appeals—I can't help but think of his own first real-life major encounter with the process, just one month after his arrival on the Court from private practice, in *Codling v. Paglia*.⁶

Codling was among his very first writings, to this day a watershed, widely cited case in American product liability law. As Hugh classically states in his very first sentence—he was President of the Say-It-All-In-The-First-Paragraph Club—*Codling* established that “the manufacturer of a defective product may be held liable to an innocent bystander, without proof of negligence, for damages sustained in consequence of the defect.”⁷ Period. Or more accurately, exclamation point. That was a significant assault on the citadel of privity. Division within the Court at the conference table is evidenced not only by the three-month delay between argument and release of the decision—unusual for the Court of Appeals—but even more, by the separate concurrence of Judges Jasen and Wachtler urging an even broader rule than the circumscribed assault articulated in Hugh's writing. I can only imagine the many Court conferences that were required to work that all out.

Rereading *Codling v. Paglia* brought to mind my own early brush with the reality of common-law appellate judging, *Bousun v.*

⁶ *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

⁷ *Id.* at 335, 298 N.E.2d at 624, 345 N.Y.S.2d at 463.

Sanpieri,⁸ argued soon after my own arrival on the Court from the world of private practice. Central to the appeal in our Court was the question whether plaintiff-mother, herself not physically harmed in an automobile collision, could recover damages for emotional distress as a result of seeing catastrophic injury to the infant daughter she held in her lap. Our Court had in the past steadfastly declined to allow such damages, fearful that emotional distress damages suffered by a bystander, un-tethered to any physical injury, could precipitate unlimited recoveries—the “floodgates” would be opened. There were lots of precedents stating exactly that.

I vividly recall the Court’s conference the morning following oral argument, December 14, 1983. The morning following oral argument is the first time a case is discussed by the judges. The case most often is voted on, resolved, and assigned for writing right then and there. Better believe it: the judges hearing argument are a “hot bench.”

At the close of oral argument, each judge in order of seniority selects an index card turned face down, which becomes that judge’s case for reporting at the conference the next morning, a genuinely random case assignment system. There are no “vest-pocket specialists” at the Court of Appeals. As Reporting Judge in *Bovsun*, Hugh spoke first at the conference table. I was taken aback when he reported to reverse and allow the mother’s cause of action to go forward, adopting what he called a “zone-of-danger” rule that would allow close family members (not bystanders generally) to recover simply for emotional harm. That was not then “the law” in the State of New York.

After the Reporting Judge, the Junior Judge speaks next and the discussion proceeds around the conference table to the more senior colleagues—a truly great system. I remember like yesterday very confidently reporting to affirm the dismissal of the mother’s claim, reciting each of the Court’s precedents denying emotional distress damages to bystanders who had themselves suffered no physical injury. Hugh responded “with due respect” (that’s a tipoff) that he knew the law. Of course he did. In his view, however, the question before the Court was whether the time had come to change the law, and he underscored the careful lines he proposed to draw in sustaining the new cause of action. Breathtaking! In my own diligent preparation, I had not factored in that perhaps the time

⁸ *Bovsun v. Sanpieri*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).

had come for the Court of Appeals to modify its established rule, just as Cardozo had done in so many instances that trip off a law student's tongue. It's why we're there!

After my exchange with Hugh, the case proceeded around the table for the other votes. Imagine my surprise when the "old fogies" (Chief Judge Cooke, and Judges Jasen and Meyer) stood with Judge Jones, allowing the mother's claim to proceed and leaving the three "juniors" (Judges Wachtler, Simons and me) mired in the dust of the past. I wrote a vigorous dissent predicting runaway damages, the end of the world, which never came.

Cogitations and the initial triptych of Jones Lectures it inspired on the common law process go well beyond the familiar sort of line-drawing in tort cases typified by *Codling* and *Bovsun* to line-drawing in a boundless array of cases, including statutory and constitutional, civil and criminal, all beautifully illustrated by these masters of the art. Judge Jones began his lecture by acknowledging that the actual difference between his lawyer and judge roles was far greater than he had foreseen, and he identified two respects that hit very close to my heart. First was the realization that people have to live by the Court's result; it's not a mere academic exercise. Even more, the Court's decisions reach long and far beyond the litigants, to the very fabric of law—"ramification," "ripple," stare decisis—requiring rigorous, painstaking effort to assure and articulate the correct result in each case. Zealous advocates don't appreciate how heavily both of those factors weigh on judges.

The writing of opinions, articulation of the law, was also a special concern for Hugh; he was a very facile writer. Indeed, the subject of opinion writing consumed the major portion of his *Cogitations*, the subject of dissents half or more of his lecture. Hugh had strong opinions about the importance of unanimous writings and said so in many ways, most impressively for me during our precious months together by circulating powerful dissents not for publication but for the benefit of the judge drafting what would then be a unanimous opinion if that could be achieved, as often—but surely not always—it was. I got a heavy dose of that right at the start—an unforgettable Hugh R. Jones dissent I had on my desk in New York City the very day after we returned from my second or third Albany session. It was a restitution case, and Hugh was (among other things) an active advisor to the American Law Institute's Restatement on Restitution. The subject was new to me. I was infuriated that Hugh had not even extended me the courtesy of awaiting my draft majority writing, until I learned that he had no

intention of publishing that dissent so long as I could accommodate his concerns. I worked hard to do that, and the Court's opinion was indeed unanimous. I grew up in that Court tradition.

Judges Wesley, Levine and Hancock, in their first three Jones Lectures, brought all of those lessons about the Court and common-law appellate decision-making solidly into the twenty-first century.

Echoing much of what Judges Jones and Cardozo had expressed about the genius of the process, Judge Wesley noted the positive benefit of the very exercise of preparing his remarks, urging "we appellate judges should spend more time thinking about how we do our work."⁹ In Judge Wesley's words and examples, "[e]ach case is in a way an artifact—a mirror of our daily lives—the organization of our society."¹⁰

He also carried Hugh's core message about the process of change in the law to meet the fact of change in our evolving society beyond appellate court decision-making. Hugh had, after all, also been President of the New York State Bar Association (among innumerable other pro bono activities). And "[j]ust as the citadel of privity would meet its demise as underlying economic and social forces changed,"¹¹ Judge Wesley challenged us all to seek out better responses to "[t]he felt necessities of our time."¹² A particularly pertinent reminder today for judges and lawyers to think rigorously, analytically, but also creatively about how best courts can help meet societal needs in our rapidly evolving world; a lesson Chief Judge Lippman has very much taken to heart in both of his Chief Judge roles. Again, that's what we're there for.

In Judge Levine's view, the qualities of an ideal common-law judge—utter neutrality, institutional loyalty, rigorous, objective analysis and the gradual incremental development of the law through case-by-case evolution and refinement—were never better expressed than by Judge Jones in his *Cogitations*. That is a monumental compliment, from a monumental scholar of the law. Even more, Judge Levine proves his conclusion beyond doubt in careful, copiously annotated comparisons with Justice Antonin Scalia's "textualism" approach and Judge Richard Posner's instrumental or economic approach, balancing benefits against costs. Having carefully studied Judge Levine's evidence, my thoroughly unbiased conclusion is that our common law approach

⁹ Wesley, *supra* note 1, at 1130.

¹⁰ *Id.* at 1128.

¹¹ *Id.* at 1132.

¹² *Id.* (internal quotation marks omitted).

wins hands down over the other two. All in all, Judge Levine leaves us with a thoroughly convincing message about a tradition that has served our society well, working itself purer through centuries of evolution.

Judge Hancock next took some of his own cogitations about the common law back into the classroom. In his after-life, he returned to Syracuse Law School, teaching a seminar called “Case and Appellate Advocacy.” Lucky students—though I doubt they had the privilege I did of seeing Judge Hancock stand on his head, literally, and I don’t mean by that taking a wacky position on a case. Judge Hancock was an avid daily exerciser, even once after his retirement bungee jumping in New Zealand. Judge Hancock’s cogitations centered on one particular facet of the appellate decision-making process—in a word, fairness.

Judge Hancock’s reflections over the decade after his term on the Court led him to conclude that the most influential factor in deciding on a legal rule is fundamental fairness, a notion embedded in our Western culture, most especially principles of morality and common sense: a human dimension. Judge Hancock was fond of telling a story—repeated in the lecture—of his five-year-old granddaughter’s response to his question, what would she expect of a judge asked to resolve a dispute between her and her younger sister. “Be fair, Grandpa?” came the answer. He had those words made into a plaque proudly displayed on a wall behind his desk. Interesting that my own granddaughter in first grade seized on that same word—fair—in writing that when she grew up she aspired to be a chief judge, which required that she be “fare [sic] and smart.” I too have that framed on my wall. Would that all the world were as perceptive as our granddaughters, and held that view of judges!

To be fair to Judge Hancock, he makes clear in his Jones Lecture that he does not have in mind “misty-eyed do-gooders” searching for opportunities to apply their own imprecise concepts of fairness and justice. All of this humanity Judge Hancock fits neatly within the setting of Judge Jones’s objective, rigorous analysis, which gives the law coherence and stability, while permitting it to evolve with the times. Within this structure, always the Court’s result must be tested for fairness—both fairness to the people who have to live by it, and fairness to the fabric of the law in an evolving society. An exquisitely delicate balance, highly challenging to maintain, I assure you.

I’ll step ahead just a bit to add reference to the seventh Jones

Lecture, by Judge George Bundy Smith,¹³ because he too focuses on an aspect of the appellate decision-making process, captured in the title of his talk, “Hon. Hugh R. Jones: A Man for All Seasons.” With Sir Thomas More in mind, Judge Smith is plainly fixed on the moral element, drawing on Judge Jones’s significant extra-court affiliations that evidence the person he was, among them Chancellor of the Episcopal Diocese of Central New York. Hugh’s service to the church was a prominent, lifelong dedication. No doubt about it: along with independence and integrity, we all inevitably bring our own backgrounds and life experiences to the bench. As the Court’s first woman judge—women ultimately reaching four of the seven judges—for me that theme had special resonance.

Judge Smith illustrated his theme by reference to Hugh’s writing in *People v. Onofre*,¹⁴ a split decision of the Court of Appeals that ended New York State’s criminalization of homosexual activity, a subject reaching deep into our personal moral core as well as the laws that govern society. Again, Judge Jones demonstrated his superb leadership of the First Paragraph Club in opening with the following two sentences: “These appeals . . . present a common question—[viz.], whether the provision of our State’s Penal Law that makes consensual sodomy a crime is violative of rights protected by the United States Constitution. We hold that it is.”¹⁵ It took the Supreme Court of the United States a full twenty-five years, and many more words, to reach that conclusion.¹⁶

Judge Jones’s writing in *Onofre* for me represents a zenith in appellate decision-making and opinion-crafting, bringing together every element, every single factor we have been discussing. *Cogitations* in a nutshell.

Judge Joseph Bellacosa’s fifth Jones Lecture broke the mold of cogitations fixed on process, centering instead on a substantive law subject—the stormy subject of special and independent prosecutors.¹⁷ Judge Bellacosa’s subtitle, “Is the Cure Worse Than the Disease?”, is a dead giveaway as to Judge Bellacosa’s answer to that question. Surely Judge Jones would have enjoyed these astute

¹³ Judge Smith’s and Judge Rosenblatt’s are the only two of the lectures that are unpublished in the *Albany Law Review*.

¹⁴ *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

¹⁵ *Id.* at 483, 415 N.E.2d at 937, 434 N.Y.S. at 948.

¹⁶ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷ Joseph W. Bellacosa, *Cogitations Concerning the Special Prosecutor Paradigm: Is the Cure Worse Than the Disease?*, 71 ALB. L. REV. 1 (2008).

reflections on the separation of powers that is at the foundation of our government, and the abuses represented by special prosecutorial machinations in our state and nation's history.

Judge Bellacosa's remarks stand as a striking example of the critical role of the courts in our great democracy in maintaining the separation—or to use Judge Jones's preferred word "distribution"—of powers, the Court of Appeals itself several times having had a part in assuring the appropriate allocation of power. Ironically, my own very first trip to Court of Appeals Hall in 1983 was in August, when I was in Albany for Senate confirmation and the Court, for its Election Session, heard oral argument in *Schumer v. Holtzman*,¹⁸ a challenge to the District Attorney's special investigation of then-Assemblyman Charles Schumer. Over the years, I saw many more examples of the Court's role in assuring the proper allocation of powers among the three branches, not the least among them our recurring cases involving state budgeting and school financing.

Judge, Chief Administrator of the Courts, Dean, lawyer, friend Richard Bartlett—a virtual judge of the Court of Appeals—in his sixth Jones Lecture carried the theme of the Court's role to another arena, recounting the massive efforts led by Chief Judge Breitel that in 1977 resulted in major structural reform of the New York State court system.¹⁹ Judge Bartlett's message? Go for it! Still there is need for fundamental change throughout our court system, and he offers a slew of excellent examples to be pursued. Happily, our own remarkable Chief Judge is devotedly pursuing that message, leading the way for reform in so many areas vital to a just society.

Judge Rosenblatt in his eighth Jones Lecture took us on a voyage into another area of interest for those researching and writing on issues affecting the judiciary: "Dutch Influences on New York Law and Governance in Nineteenth Century New York." Again, a delightful journey, pausing at—for example—the indictment of eight seamen for setting Henry Hudson adrift, a forerunner of depraved indifference murder as articulated in *People v. Kibbe*²⁰ (during Judge Jones's time), and a bevy of precedents that continue to this very day.²¹ I was reminded of the many times the Court has

¹⁸ *Schumer v. Holtzman*, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983).

¹⁹ Richard J. Bartlett, *Courting Court Reform: Looking Back, Moving Forward*, 71 ALB. L. REV. 457 (2008).

²⁰ *People v. Kibbe*, 35 N.Y.2d 407, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974).

²¹ The Second Circuit on August 31, 2012, in *Gutierrez v. Smith*, sought certification saying that federal judges are "in doubt as to what New York law really is." *Gutierrez v.*

explored historical antecedents, to give proper grounding and context to its decisions.

Just last year, Chief Judge Wachtler explored yet another universe, in remarks entitled “Federalism is Alive and Well and Living in New York,” recounting the history of certified questions that have become so pivotal on the Court of Appeals docket.²² While I treasure, and recommend, every word of Sol’s superb talk, I affirm with special gusto the concluding thought that certification “was an idea whose time had come, and New York courts, both state and federal, are much the better for it.”²³ I sense this in the law, as well as in the valued state-federal personal camaraderie that has evolved with certification process. Some years ago, we welcomed the Second Circuit Judges to Court of Appeals Hall and presented them with T-shirts reading “Court of Appeals of the State of New York for the Second Circuit.” Definitely an idea whose time had come.

It pleased me to no end to chat with a Skadden colleague the other day, now teaching legal writing at Fordham Law School. The program centered on a case involving recovery of stolen art, at its core a state law question decided on its own by the Second Circuit—pre-certification—the law some years later “clarified” by the Court of Appeals. Thankfully, that doesn’t have to happen any more. Important New York state law questions can be directly sent by the federal circuit or state high court for ultimate resolution to the ultimate authority, the Court of Appeals.²⁴ As Sol’s lecture makes clear, with the perspective of nearly twenty years of experience, at least in New York, the system works beautifully.

Some of you may have noticed—some of you may not have noticed—that I skipped the fourth Jones Lecture, delivered by Judge Richard Simons.²⁵ That was no accident. I saved Judge Simons’s lecture for last because his subject—judicial selection—is so especially timely today as the selection process proceeds to fill the year-end vacancy precipitated by the retirement of our cherished colleague, Judge Carmen Ciparick. Plainly, the Governor has an important, and very difficult, task ahead filling Judge

Smith, 692 F.3d 256, 266 (2d Cir. 2012).

²² Sol Wachtler, *Federalism Is Alive and Well and Living in New York*, 75 ALB. L. REV. 659 (2012).

²³ *Id.* at 670.

²⁴ N.Y. CONST. art. VI, § 3(b)(9); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27 (2012).

²⁵ Richard D. Simons, *The Role of Ideology in the Selection of Appellate Judges*, 70 ALB. L. REV. 855 (2007).

Ciparick's shoes (wholly unstained by the way).

Though Judge Simons was addressing the subject of vacancies on the Supreme Court of the United States at the time, equally his observations apply to judges of the Court of Appeals of the State of New York. Indeed, I believe they reflect and encapsulate his own decade of experience on the Court.

Topping Judge Simons's list is the judge's understanding of the Court and the responsibilities involved, including the historical mission of the Court and its relationship to the other branches of government, whether the process of the appellate decision-making, or the distribution of powers, or the necessity for reform in our structure and in our substantive law to meet the needs of an evolving society.

Second is each judge's understanding that we are part of a coherent system of justice, and knowing and understanding our appropriate place in it. Third, Judge Simons identifies a judge's relationship to the Court and to the colleagues, recognizing that a judge assumes an institutional obligation, and is bound to protect and advance the work of the Court. And finally, above all other qualities, Judge Simons places high principle. Citizens accept court decisions because they believe they have been reached by a neutral process of principled analysis, free of outside or political influence.

These are the fundamental values that are the bedrock of our judicial system: an understanding of the mission of the judiciary and its place in our governmental structure, an understanding of the court's powers and responsibilities, and sensitivity to the requirements of constitutional legitimacy. What flashed through my mind as I read Judge Simons's remarks was the headline on a cover story about the Court of Appeals in *Capital* magazine some years ago: "The Supreme Court Should Be This Good."

So I end as I began, with thanks to all of you for the joy of delivering the tenth Hugh R. Jones Memorial Lecture. Judge Wesley was right: it's good—especially for former appellate judges—to spend time thinking about how the courts do their work. Above all, I appreciate the personal opportunity to be with you in a place, even a room, where the members of court (including Judge Jones) have assembled many times, and to reminisce about a person I genuinely revered, and from whom I learned so much. I remember observing Hugh one evening back in February 1984 stealthily tiptoe-ing into my Albany chambers to leave an anonymous Valentine's Day card on my desk. This is my Valentine to him.

I am reminded too of the unique personal feeling that prevails all

through the Court of Appeals. There could not be another court in the universe where people (though sometimes bitterly divided on the law) have such genuine caring feeling for one another. Now, more than three years after my own departure, I assure you that not a week goes by without some interchange with a former colleague or judge or staff member of the Court of Appeals. Our lives are thoroughly intertwined as we together seek to maintain the excellence of this extraordinary institution and our relationships with one another.

Finally, I boldly impose on next decade's Jones Lecture "summer-upper"—in the year 2022—the obligation to add something new.

I decided that my new contribution should be just a word or two about my "after-life" back in the world of private practice, in many ways wholly unfamiliar to me after a quarter-century on the Court of Appeals. Particularly fascinating for me today is the prominence of international arbitration as a preferred means of dispute resolution, hardly surprising in today's global world—as your great Dean, having taught in Germany, Australia, the Netherlands, Scotland, Canada and South Africa, I am sure would affirm. Parties, wherever they may be located on the planet, need assurance that their awards will be recognized—a real challenge given our widely disparate legal systems. What a pleasure it is for me to see, in massive commercial contracts among worldwide entities, that the parties specify the choice of the law that will govern any later dispute between them is New York, because the law of the State of New York is held in high regard. Decisions of the Court of Appeals have played a significant part in that perception.

Coincidentally, as I was preparing these remarks, I ran across a decision bringing my two post-Court of Appeals worlds together—arbitration and litigation. It's an August 30, 2012 decision of the United States District Court for the District of Delaware, brought by the Delaware Coalition for Open Government against the Delaware Chancery Court Judges.²⁶ In that decision, United States District Court Judge Mary McLaughlin struck down as a First Amendment violation a 2009 Delaware law permitting Chancery Court judges additionally to serve as private arbitrators in major commercial matters, with the proceedings completely out of public view. The stated intention of the Delaware law was "to preserve Delaware's pre-eminence in offering cost-effective options for

²⁶ Delaware Coal. for Open Gov't v. Strine, CIV. A. No. 1:11-1015, 2012 WL 3744718 (D. Del. Aug. 30, 2012).

resolving disputes, particularly those involving commercial, corporate, and technology matters.”²⁷ Sound and articulate though the District Judge’s writing seems to me, I assure you it is not the last word on the issue, and it bears your attention. The case is indeed at this moment on appeal to the Court of Appeals for the Third Circuit.

For me, the particular relevance of the decision to the Jones Lecture is not so much the holding, and not so much to tell you about my “after-life” in arbitration, but rather to underscore the Delaware Court’s analysis of the role of the Judiciary—its perceptions about the unique place of courts and judges in the American justice system. As Judge McLaughlin makes clear, the openness of the courts is critical to its function—informing the public about the importance of the justice system, advancing the acceptance of court rulings, and promoting public confidence in the fairness and integrity of the judicial system. The Delaware Court contrasted the role of arbitrators, who serve the parties, with the role of judges, who serve the public. In her words, “[a] judge bears a special responsibility to serve the public interest.”²⁸ That really hit home. It is that “special responsibility to serve the public interest” that has been the theme of the Jones Lectures, whether centered on the decision-making process, or the distribution of powers, historical roots, certified questions, court reform or judicial selection.

In so many ways, including this lecture series “honoring the work—the magic—that judges do” (to quote your Dean), Hugh R. Jones has left us a great legacy.

²⁷ *Id.* at *1 (citation omitted).

²⁸ *Id.* at *9.