

NEW YORK STATE CONSTITUTIONAL LAW—TODAY
UNQUESTIONABLY ACCEPTED AND APPLIED AS A VITAL
AND ESSENTIAL PART OF NEW YORK JURISPRUDENCE

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In 1993, when my article *The State Constitution, A Criminal Lawyer's First Line of Defense*¹ was published, reliance on New York State constitutional law to protect individual rights not adequately protected by the United States Supreme Court was still a recently emerging doctrine.² As pointed out in *First Line of Defense*, state constitutionalism of the so-called “new judicial federalism”³ was given its most widespread recognition and acceptance as a result of a seminal article by Supreme Court Justice William Brennan.⁴

This renewed reliance on state constitutionalism was by no means unanimously embraced by the judges of the New York State Court of Appeals. In some of the court's decisions at that time, even the thought of applying state constitutional law triggered vigorous,

* Judge Hancock, 91, died at his home in Cazenovia, New York, on February 11, 2014. This article is his final project. Indeed, even in his last few days he was reviewing edits in preparation for publication with Professor Bonventre, his former—and always—law clerk.

Judge Hancock gratefully acknowledges the significant assistance in preparing this article from Ivan Pavanko, one of his law students at Syracuse Law School and currently a clerk at the New York Court of Appeals.

¹ See Stewart F. Hancock, Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271 (1993).

² See Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1196–1205 (1994); Vincent Martin Bonventre, *The New York Court of Appeals: An Old Tradition Struggles*, 22 PERSP. ON POL. SCI. 149 (1993). State constitutionalism began to reemerge in state courts nationwide as a reaction to the United States Supreme Court's retrenchment on rights and liberties in the post-Warren Court era. See generally A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 *passim* (1976) (arguing this point).

³ Hans A. Linde, *Does the “New Federalism” Have a Future?*, 4 EMERGING ISSUES ST. CONST. L. 251 (1991); Ronald K. L. Collins, *The Once “New Judicial Federalism” and its Critics*, 64 WASH L. REV. 5, 5–6 (1989).

⁴ Hancock, *supra* note 1, at 272; see generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (noting that state courts interpreted state constitutions to provide greater protections than the Supreme Court's interpretation of the Federal Bill of Rights).

and sometimes incredibly harshly worded, dissents.⁵ Moreover, in this earlier period of renewed state constitutionalism in New York, there were unresolved and complex questions about the methods of determining whether and how state constitutional law should be applied in a given case.⁶

State constitutionalism in 2013–2014 is no longer regarded as some arcane methodology requiring an initial selection of the “interpretivist” or “noninterpretivist” approach⁷ or some other approach before it may be determined whether the state constitution affords greater protection than the federal in a given case.⁸ Rather, it is simply the logical and imminently fair doctrine that when a New York court concludes that an individual has rights that are not protected under the federal Constitution, but should be under the New York Constitution, the court will afford that person the greater protection as a matter of state constitutional law. It is simply a matter of fairness and common sense. As Judge Kaye noted in her concurring opinion in *People v. Scott*—responding to the arguments raised in the dissent against giving a defendant the protection of the state constitution for rights not covered under the federal Constitution—such independent state constitutionalism in no way demeans the Supreme Court as the nation’s highest court, or challenges the authority of its decisions as the supreme law of the United States, or offends the Justices.⁹ Today, New York courts accept and routinely apply state constitutionalism when necessary to effectively safeguard individual rights and liberties.

In short, independent state constitutional law is no longer considered novel or unusual. It is now routinely accepted and applied as a matter of course.¹⁰

What is worthy of note is the variety and in some instances the

⁵ See, e.g., *People v. Scott*, 593 N.E.2d 1328, 1348–56 (N.Y. 1992) (Bellacosa, J., dissenting); *People v. Harris*, 570 N.E.2d 1051, 1056–59 (N.Y. 1991) (Bellacosa, J., dissenting).

⁶ See Hancock, *supra* note 1, at 283–84 (discussing the dichotomy of interpretivist and noninterpretivist decision making); see also *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270, 1277–80 (N.Y. 1991) (affording greater protection in libel action under the state constitution than that provided by the First Amendment of the federal Constitution).

⁷ See *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 560 (N.Y. 1986); Hancock, *supra* note 1, at 285–86.

⁸ See *People v. Weaver*, 909 N.E.2d 1195, 1207–08 (N.Y. 2009) (Read, J., dissenting).

⁹ See *Scott*, 593 N.E.2d at 1346–48 (Kaye, J., concurring).

¹⁰ See, e.g., *Holmes v. Winter*, 3 N.E.3d 694, 698–99, 701 (N.Y. 2013); *People v. Oliveras*, 993 N.E.2d 1241, 1245–47 (N.Y. 2013); *People v. Oathout*, 989 N.E.2d 936, 939–40 (N.Y. 2013).

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unquestioned significance of the cases in which state constitutionalism has been employed. In the balance of this article, I will discuss in depth some of these cases.

PEOPLE V. WEAVER

Consider *Weaver*, a case involving the constant tracking of the defendant via secret police installation of a Global Positioning System (GPS) under the fender of his minivan.¹¹ A Court of Appeals majority held that this use of the GPS device constituted an unconstitutional search in violation of privacy rights under article I, section 12 of the New York Constitution.¹²

The *Weaver* case is significant for several reasons. It is virtually certain to be cited and its applicability questioned in future cases involving the use by police of newer and more sophisticated electronic devices to track a defendant's movements and whereabouts.¹³ As stated in a recent front page *New York Times* article: "Once, only hairdressers and bartenders knew people's secrets. Now, smartphones know everything—where people go, what they search for, what they buy, what they do for fun and when they go to bed."¹⁴

The dissenting opinion at the Third Department by Justice Leslie Stein and Chief Judge Jonathan Lippman's majority opinion for the Court of Appeals both contain significant discussions of state constitutional law.¹⁵ Finally—and of most interest—about three years after the New York decision in *Weaver*, the Supreme Court in an almost identical case and applying solely federal law reached the same conclusion in *United States v. Jones*.¹⁶ Finally, the Court of

¹¹ *Weaver*, 909 N.E.2d at 1195–96.

¹² *Id.* at 1200–03.

¹³ *See, e.g.*, *Commonwealth v. Connolly*, 913 N.E.2d 356, 377 (Mass. 2009) (Gants, J., concurring) (citing *Weaver*, 909 N.E.2d at 1199–1200).

¹⁴ Claire Cain Miller & Somini Sengupta, *Selling Secrets of Phone Users to Advertisers*, N.Y. TIMES, Oct. 6, 2013, at A1.

¹⁵ *See Weaver*, 909 N.E.2d at 1202–03; *People v. Weaver*, 860 N.Y.S.2d 223, 227 (App. Div. 3d Dep't 2008) (Stein, J., dissenting), *rev'd* 909 N.E.2d 1195 (N.Y. 2009) ("[P]rinciples of federalism secure to a State the right to afford its citizens greater insulation from governmental intrusion than is provided under the Fourth Amendment' . . . 'State courts may not circumscribe rights guaranteed by the Federal Constitution, [but] they may interpret their own law to supplement or expand them.' Moreover, the Court of Appeals has 'frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties . . .'" (citations omitted)).

¹⁶ *United States v. Jones*, 132 S. Ct. 945, 949, 954 (2012).

Appeals majority opinion in *Weaver*, in disagreeing with Judge Susan Read's dissenting opinion, seems to clearly reject as outmoded and unnecessary the "interpretive-noninterpretive" methodology advocated by Judge Read.¹⁷

In *Weaver*, the defendant had been convicted in Supreme Court, Albany County of charges relating to the burglary of a K-Mart store in Latham.¹⁸ The evidence supporting the conviction was that supplied by the GPS tracking device which the police had secretly placed without a warrant under the fender of defendant's van.¹⁹ The device remained in place for sixty-five days and constantly monitored the position of his vehicle.²⁰ The GPS device placed the defendant's vehicle in the parking lot of the K-Mart at the time of the crime.²¹

The Appellate Division, Third Department affirmed with a lone dissent by Justice Stein.²² The majority—while acknowledging the greater protection against illegal searches and seizures afforded as a matter of independent New York constitutional law—held that there had been no violation because the police had not intruded "into the passenger compartment of a vehicle without appropriate justification."²³ The majority did not address the question of whether the secret, warrantless tracking of the defendant by the police through use of the GPS was an invasion of the defendant's state constitutional right of privacy.²⁴

Dissenting Justice Stein focused on the issue ignored by the majority: "whether the N.Y. Constitution prohibits constant surveillance of an individual's whereabouts by means of a global positioning system . . . device without a search warrant," an issue which "has far-reaching implications and has never been addressed by any appellate court of this state."²⁵ Justice Stein argued that the police in their secret placement of the GPS without a warrant, and their use of it in the continuous tracking of defendant had committed an unreasonable search and seizure in violation of

¹⁷ See *Weaver*, 909 N.E.2d at 1202–03.

¹⁸ *Id.* at 1196.

¹⁹ See *id.* at 1195–96.

²⁰ *Id.*

²¹ *Id.* at 1196.

²² See *id.* at 1196–97; see *People v. Weaver*, 860 N.Y.S.2d 223, 227 (App. Div. 3d Dep't 2008) (Stein, J., dissenting), *rev'd* 909 N.E.2d 1195 (N.Y. 2009).

²³ *Weaver*, 860 N.Y.S.2d at 226 (majority opinion).

²⁴ See *id.* at 227 (Stein, J., dissenting).

²⁵ *Id.*

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defendant's state constitutional search and seizure rights.²⁶ Notably, Justice Stein added that her "conclusion is not inconsistent with the jurisprudence of this state, which includes an expansive view of individual rights under the N.Y. Constitution."²⁷

Chief Judge Lippman, in his opinion for the court, in which Judges Carmen Ciparick, Eugene Pigott, and Theodore Jones concurred, observed that the question of the use of a GPS device for constant tracking had not been addressed by the Supreme Court and, moreover, declined to decide the case on the basis of federal law.²⁸ The majority noted that the Court of Appeals had "on many occasions interpreted [New York's] own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure."²⁹

Chief Judge Lippman's opinion for the majority concluded that "the use of these powerful devices presents a significant and, to our minds, unacceptable risk of abuse. Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause."³⁰

The basis of Judge Robert Smith's dissent, in which Judges Victoria Graffeo and Susan Read concurred, was his conviction that the majority's holding imposed an unwarranted limitation on legitimate and necessary police investigations.³¹ As Judge Smith put it:

If the majority is holding—as it apparently is—that police may never, in the absence of exigent circumstances or probable cause, track a suspect with a GPS device, it has imposed a totally unjustified limitation on law enforcement. It has also presented future courts with the essentially

²⁶ *Id.* at 228.

²⁷ *Id.* at 228 (citing *People v. Scott*, 593 N.E.2d 1328, 1336 (N.Y. 1992); *People v. Torres*, 543 N.E.2d 61, 63–64 (N.Y. 1989); *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 561 (N.Y. 1986)).

²⁸ *Weaver*, 909 N.E.2d at 1202 ("In reaching this conclusion, we acknowledge that the determinative issue remains open as a matter of federal constitutional law, since the United States Supreme Court has not yet ruled upon whether the use of GPS by the state for the purpose of criminal investigation constitutes a search under the Fourth Amendment, and, indeed, the issue has not yet been addressed by the vast majority of the Federal Circuit Courts. Thus, we do not presume to decide the question as a matter of federal law.")

²⁹ *Id.* (citing *Scott*, 593 N.E.2d at 1336; *People v. Harris*, 570 N.E.2d 1051, 1053–54 (N.Y. 1991); *People v. Dunn*, 564 N.E.2d 1054, 1057 (N.Y. 1990); *Torres*, 543 N.E.2d at 63).

³⁰ *Weaver*, 909 N.E.2d at 1203.

³¹ *Id.* at 1204 (Smith, J., dissenting).

impossible task of deciding which investigative tools are so efficient and modern that they are subject to the same prohibition.³²

Judge Read, in her dissent in which Judge Graffeo concurred, concluded that the majority had improperly failed to employ the now largely outmoded and seldom applied “interpretive-noninterpretive” method of state constitutional analysis presumably still required by Judge Richard Simons’ 1986 opinion in *P.J. Video*.³³ Judge Read explained that

the majority has not come close to justifying its holding as a matter of State constitutional law in the way called for by *P.J. Video*. First, the majority states that “we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of State law in the area of search and seizure.” This is the assertion of a truism—i.e., that we can and have interpreted article I, section 12 more broadly than the Supreme Court has interpreted the Fourth Amendment. The majority does not identify, much less discuss, the “circumstances” requiring a departure from the federal approach here.³⁴

The Supreme Court addressed the issue of tracking through use of a GPS device in 2012 in *United States v. Jones*, three years after the New York Court of Appeals’ decision in *Weaver*. What some may consider surprising is that the Supreme Court—although in separate opinions and for different reasons—concluded unanimously that the warrantless installation of the GPS device to the defendant’s wife’s vehicle and the use of the GPS to track the vehicle’s movements constituted an unlawful search under the Fourth Amendment.³⁵

In his opinion for the Supreme Court, Justice Antonin Scalia—adopting a literalistic application of the Fourth Amendment—stated that the “Fourth Amendment provides in relevant part that ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.’ It is beyond dispute that a vehicle is an ‘effect’ as that

³² *Id.* at 1205.

³³ *See id.* at 1207–08 (Read, J., dissenting).

³⁴ *Id.* at 1208 (citations omitted).

³⁵ *See United States v. Jones*, 132 S. Ct. 945, 949, 954, 964 (2012).

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term is used in the Amendment.”³⁶ Justice Scalia concluded “that the Government’s [trespassory] installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”³⁷

In her concurrence, Justice Sotomayor stated:

Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property. Rather, even in the absence of a trespass, “a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” In *Katz*, this Court enlarged its then-prevailing focus on property rights by announcing that the reach of the Fourth Amendment does not “turn upon the presence or absence of a physical intrusion.”³⁸

Justice Sotomayor’s non-trespassory analysis of the issue in *Jones* is essentially the same as that of the New York Court of Appeals in *Weaver*. In fact, she quoted from *Weaver* as seen in the following excerpt from her concurrence:

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. *See, e.g., People v. Weaver*, 12 N.Y.3d 433, 441–442, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1199 (2009) (“Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on”).³⁹

Justice Samuel Alito, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan in his concurring opinion, categorically rejected as “unwise” Justice Scalia’s holding that the

³⁶ *Id.* at 949 (2012) (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)).

³⁷ *Jones*, 132 S. Ct. at 949 (footnote omitted).

³⁸ *Id.* at 954–55 (Sotomayor, J., concurring) (citations omitted).

³⁹ *Id.* at 955.

trespassory installation of the GPS device to the vehicle is what constituted a Fourth Amendment violation.⁴⁰ In Justice Alito's view the question presented in the case was "whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."⁴¹ The presence or absence of a trespass on private property was not dispositive.⁴²

Under Justice Alito's approach, whether the use of a GPS device to track a defendant constitutes a Fourth Amendment violation depends on whether it "involved a degree of intrusion that a reasonable person would not have anticipated."⁴³ Under this approach, Justice Alito concluded that:

[a] relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not secretly monitor and catalogue every single movement of an individual's car for a very long period.⁴⁴

For several reasons, the New York Court of Appeals decision in *Weaver* is regarded as one of the most significant recent applications of state constitutional law.⁴⁵ First, of course, New York, applying its own constitution, set the pace. It was the leader. The Court of Appeals—applying solely the New York Constitution—decided the GPS secret tracking issue essentially the way the majority of the Supreme Court Justices—applying the federal constitution in the opinions of Justices Sotomayor and Alito—decided it three years later in *Jones*.

The importance of *Weaver* as a ground-breaking decision is reflected in the number of times it has been cited as a precedent.⁴⁶

⁴⁰ *Id.* at 957–58 (Alito, J., concurring).

⁴¹ *Id.* at 958.

⁴² *See id.*

⁴³ *Id.* at 964.

⁴⁴ *Id.* (citing *United States v. Knotts*, 460 U.S. 276, 281–82 (1983)).

⁴⁵ Joel Stashenko, *Divided Panel Requires Warrant for Use of GPS to Track Suspects*, N.Y.L.J., May 13, 2009, at 1, col. 4.; see Vincent Martin Bonventre, *New York's Court of Appeals: Toward the Lippman Court: Flux and Transition at New York's Court of Appeals*, 73 ALB. L. REV. 889, 916 (2010).

⁴⁶ As of October 15, 2014, *Weaver* has been cited by fifty-two cases. Citing References—

It was followed most recently in a decision by the New York Court of Appeals in *Cunningham v. New York State Department of Labor*⁴⁷ decided this past year. In *Cunningham*, the court—citing both *Weaver* and *Jones*—unanimously disapproved as unreasonable the use of a secretly implanted GPS device in an investigation relating to petitioner’s unauthorized absences from duty and a falsification of records to conceal the absences.⁴⁸ The court, in an opinion by Judge Smith, held unlawful the Department’s use of the GPS device as excessively intrusive in that it examined the petitioner’s

activity with which the State had no legitimate concern—i.e., it tracked petitioner on all evenings, on all weekends and on vacations. Perhaps it would be impossible, or unreasonably difficult, so to limit a GPS search of an employee’s car as to eliminate all surveillance of private activity—especially when the employee chooses to go home in the middle of the day, and to conceal this from his employer. But surely it would have been possible to stop short of seven-day, twenty-four hour surveillance for a full month.⁴⁹

The *Cunningham* court, citing *Weaver*, concluded:

we hold that rule to be inapplicable to GPS searches like the present one, in light of the extraordinary capacity of a GPS device to permit “[c]onstant, relentless tracking of anything.” Where an employer conducts a GPS search without making a reasonable effort to avoid tracking an employee outside of business hours, the search as a whole must be considered unreasonable.⁵⁰

With so many new and more sophisticated electronic devices being developed which are capable of secretly tracking a person’s whereabouts without any attachment to or invasion of the person’s property, it is likely that the police or others in authority may find ever less need for use of a GPS. As pointed out in a recent editorial in the *New York Times* entitled *Monitoring Your Every Move*: “By connecting information from these devices [like computers, tablets, and cellular phones], database companies that collect information

People v. Weaver—WestlawNext, Westlaw, <http://www.westlawnext.com> (search “People v. Weaver, 909 N.E.2d 1195”) (last visited Oct. 15, 2014).

⁴⁷ *Cunningham v. N.Y. State Dep’t of Labor*, 997 N.E.2d 468 (N.Y. 2013).

⁴⁸ *Id.* at 470.

⁴⁹ *Id.* at 473.

⁵⁰ *Id.* (first citations omitted) (quoting *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009)).

can know a lot more about individuals than previously thought possible, including, for instance, their physical location and the identity of family members, friends and colleagues.”⁵¹

It seems certain, however, that the *Weaver* decision will always stand as a remarkable example of state constitutionalism. The Court of Appeals—relying solely on New York State law and concluding that the New York Constitution had been violated—reached a decision in an opinion that was later followed and, in one of the opinions, quoted in the Supreme Court’s decision in *Jones*.

PEOPLE V. HARRIS

It may seem surprising that I have selected *People v. Harris* as my second case for detailed comment. *Harris* was one of New York’s early state constitutional decisions in the “re-emergence” era. The majority opinion in *Harris* was written by Judge Richard Simons, the author of a seminal opinion in the Court of Appeals’s modern era of state constitutional law, *People v. P.J. Video*. Not surprisingly, Judge Simons’s opinion in *Harris* refers to the now largely outmoded process of choosing between the “interpretive” and “noninterpretive” methods of analysis prescribed in *P.J. Video*.⁵²

But *Harris* is a strong, determined, and even defiant assertion of New York’s right to rely on its own constitution to protect an individual’s rights where the Supreme Court, in exactly the same case, had said it would not do so.

In *Harris*, the defendant had been convicted of murder in the second degree.⁵³ The central question on appeal concerned the admissibility of a signed statement given by the defendant at the police station house.⁵⁴ One hour earlier, he had given an identical statement at his home, without counsel, after the police had illegally entered his home, in violation of his rights under *Payton v. New York*.⁵⁵ Although the police had probable cause for an arrest and could have obtained a warrant, they chose not to do so.⁵⁶ Instead, they elected to enter the defendant’s home without a warrant, they questioned him in the absence of counsel, and they

⁵¹ Editorial, *Monitoring Your Every Move*, N.Y. TIMES, Oct. 10, 2013, at A30.

⁵² *People v. Harris*, 570 N.E.2d 1051, 1053 (N.Y. 1991).

⁵³ *Id.* at 1051.

⁵⁴ *Id.* at 1052.

⁵⁵ *Id.* at 1051–52 (citing *Payton v. New York*, 445 U.S. 573 (1980)).

⁵⁶ *Harris*, 570 N.E.2d at 1051.

took his un-counseled written statement.⁵⁷ These police actions were all outright violations of the defendant's Fourth Amendment rights under *Payton*.⁵⁸

The issue in the case was whether the one hour interval between the *Payton* violation at the defendant's home and the taking of the signed statement at the police headquarters sufficiently attenuated the *Payton* violation, thereby allowing admission of the signed statement.⁵⁹

In the initial appeal to the Court of Appeals, Judge Simons, writing for the majority, held that the signed police station statement was inadmissible under federal law. As he put it:

In this case, the short time period and the continuous police presence with defendant from the time he was arrested until the time he gave his statement, without any legally significant intervening event, indicate that the station house statement was no less a product of the Fourth Amendment violation than was the statement defendant made in his apartment which the courts below suppressed.⁶⁰

The Supreme Court granted certiorari and, in a five to four decision, it reversed and remanded the matter to the Court of Appeals.⁶¹ In his opinion for the Supreme Court majority, Justice Byron White explained:

Nothing in the reasoning of . . . [*Payton*] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest. Nor is there any claim that the warrantless arrest required the police to release Harris or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed

⁵⁷ *Id.* at 1051–52.

⁵⁸ *Id.*

⁵⁹ *See id.* at 1052–53.

⁶⁰ *People v. Harris*, 532 N.E.2d 1229, 1233 (N.Y. 1988), *rev'd*, *New York v. Harris*, 495 U.S. 14 (1990).

⁶¹ *See Harris*, 495 U.S. at 17, 21.

to talk.⁶²

On remand to Court of Appeals, the majority opinion of that court was again written by Judge Simons. In his second opinion for the court in this case, Judge Simons adhered to his original position. As he wrote:

When we previously reviewed the question, we found the station house statement was tainted by the prior illegality and unredeemed by attenuation. Accordingly, we suppressed it on Fourth Amendment grounds. The holding represented our view of what the Federal Constitution required and was consistent with an earlier decision in this Court on the subject.

The Supreme Court subsequently granted certiorari and reversed. It held that the police illegality was in the entry, not the arrest, and that exit from the apartment necessarily broke any causal connection between the wrong and the later statement.⁶³

The Court of Appeals, speaking through Judge Simons, concluded:

[W]e are now obliged to consider on remand . . . whether the State Constitution requires suppression of the station house statement. We conclude that the Supreme Court's rule does not adequately protect the search and seizure rights of citizens of New York. Accordingly, we hold that our State Constitution requires that statements obtained from an accused following a *Payton* violation must be suppressed unless the taint resulting from the violation has been attenuated.⁶⁴

Judge Bellacosa, joined by Chief Judge Wachtler, dissented.⁶⁵ The dissenters expressed their continued and determined refusal to accept the basic concept of state constitutionalism—that a person may have greater protection for certain rights as a matter of state constitutional law than under corresponding federal constitutional law, and that a state court should not hesitate to accord that greater protection when dictated by fundamental fairness and justice.

⁶² *Id.* at 18 (citation omitted).

⁶³ *Harris*, 570 N.E.2d at 1052 (citations omitted).

⁶⁴ *Id.* at 1052–53 (footnote omitted).

⁶⁵ *Id.* at 1056 (Bellacosa, J., dissenting).

Again, I have included *People v. Harris* for discussion because it is such emphatic illustration of the Court of Appeals's determination to protect a defendant's constitutional rights, despite contrary federal case law. Believing at first that the rights of the accused in question were protected under federal constitutional law, the New York court so held in *People v. Harris*.⁶⁶ When the Supreme Court disagreed with the Court of Appeals's federal-based decision and remanded the case, the Court of Appeals on remand said, in effect, "Well, okay. We'll adhere to what we believe is the fair and just result, but do so under our own state constitution."⁶⁷

Harris is one of the most significant cases in the modern reemergence of state constitutionalism in New York for two reasons: First, of course, there could not be a more emphatic reassertion of a state's right and, indeed, obligation to protect an individual's basic rights independently under its own constitution. In *Harris*, the Supreme Court had refused to protect these very same rights under the United States Constitution. Second, *Harris* marks the end of the period in which there were still dissents, questions, and uncertainties about the very legitimacy, propriety, and wisdom of adopting independent state constitutionalism as an important, necessary, and just method of protecting fundamental rights where they are otherwise left unprotected by the Supreme Court as a matter of federal constitutional law. State constitutionalism was here to stay.

SOME ADDITIONAL STATE CONSTITUTIONAL LAW CASES WORTHY OF
NOTE

People v. Torres

In *Torres*, the police lawfully stopped a car driven by a homicide suspect.⁶⁸ They ordered the driver and his companion out of the car. The police inquired about the existence of any weapons, and they were assured that there were none.⁶⁹ The question before the Court

⁶⁶ See *People v. Harris*, 532 N.E.2d 1229, 1234–35 (N.Y. 1988), *rev'd*, *New York v. Harris*, 495 U.S. 14 (1990).

⁶⁷ See *Harris*, 570 N.E.2d at 1054 ("We . . . conclude that although attenuation may not be necessary to deter *Payton* violations under Federal law or in the Nation generally, the Supreme Court's rule is not adequate to protect New York citizens from *Payton* violations because of our right to counsel rule.").

⁶⁸ *People v. Torres*, 543 N.E.2d 61, 62 (N.Y. 1989).

⁶⁹ *Id.*

of Appeals was whether, in light of concern for their own safety, the police were justified in removing a shoulder bag from inside the vehicle's passenger compartment and inspecting it.⁷⁰ The court, in a majority opinion by Judge Vito Titone (with Judge Bellacosa dissenting alone), explicitly rejected the Supreme Court's decision in *Michigan v. Long*⁷¹ and concluded that extracting and examining the bag constituted an unlawful search as a matter of state constitutional law.⁷²

*O'Neill v. Oakgrove Construction*⁷³

The case involved the state constitution's protection of news reporters, preventing the coerced disclosure of materials obtained in the course of their newsgathering.⁷⁴ The specific question was whether the so-called "reporters' privilege" extends to "nonconfidential photographs then at the scene of an automobile accident."⁷⁵ Compelled disclosure of a reporter's photographs were sought in connection with litigation that arose from the accident.⁷⁶ The Court of Appeals concluded that journalists were protected from forced disclosure of their photographs, in an opinion which I authored, on adequate and independent state grounds.⁷⁷ Non-essential interference with newsgathering was deemed prohibited under article 1, section 8 of the New York Constitution.⁷⁸ The court added that, in its opinion, the same result should be reached as a matter of the federal constitutional law under the First Amendment—apparently despite Supreme Court case law to the contrary.⁷⁹ Judge Kaye concurred with respect to the applicability

⁷⁰ *Id.* at 62–63.

⁷¹ *Michigan v. Long*, 463 U.S. 1032 (1983).

⁷² *Torres*, 543 N.E.2d at 65–66.

⁷³ *O'Neill v. Oakgrove Constr. Inc.*, 523 N.E.2d 277 (N.Y. 1988).

⁷⁴ *Id.* at 277; see N.Y. CONST. art. I, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.").

⁷⁵ *O'Neill*, 523 N.E.2d at 277–78.

⁷⁶ *Id.* at 278.

⁷⁷ *Id.* at 280–81.

⁷⁸ *Id.* at 277–78.

⁷⁹ *Id.* at 280 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

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of the state constitution only.⁸⁰

*Sharrock v. Dell Buick-Cadillac*⁸¹

In *Sharrock*, the Court of Appeals held that provisions of the New York Lien Law that empowered a garageman to conduct an ex parte sale of a bailed vehicle violated the due process clause under the state constitution.⁸² In an opinion by Chief Judge Lawrence H. Cooke, the court explained that the law in question failed to provide the owner of a vehicle with an opportunity to be heard prior to the permanent deprivation of a significant property interest.⁸³

Holmes v. Winter

In *Holmes*, the Court of Appeals held that New York courts cannot order New York-based journalists to divulge the names of confidential news sources, even pursuant to certification from another state's court that such information is material and necessary in a criminal proceeding in that state.⁸⁴ Relying on both the New York Shield Law,⁸⁵ which immunizes reporters for their refusal to divulge confidential news sources, and article I, section 8 of the New York Constitution, the court's majority, in an opinion by Judge Victoria Graffeo, relied on New York's expansive protection for journalists that created "a common-law, statutory and constitutional tradition that has played a significant role in this State becoming the media capital of the country if not the world."⁸⁶ The court therefore concluded that the courts of New York are precluded from "directing a reporter to appear in another state where, as here, there is a substantial likelihood that she will be compelled to identify sources who have been promised confidentiality."⁸⁷

CONCLUSION

Since its modern "re-emergence" in decisions such as *People v.*

⁸⁰ *Id.* at 282 (Kaye, J., concurring).

⁸¹ *Sharrock v. Dell Buick-Cadillac, Inc.*, 379 N.E.2d 1169 (N.Y. 1978).

⁸² *Id.* at 1171.

⁸³ *Id.* at 1178–79.

⁸⁴ *Holmes v. Winter*, 3 N.E.3d 694 (N.Y. 2013).

⁸⁵ N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2014).

⁸⁶ *Holmes*, 3 N.E.3d at 705.

⁸⁷ *Id.*

P.J. Video, People v. Harris, O'Neill v. Oakgrove Construction, People v. Torres, and others, state constitutionalism has been unquestionably accepted and is now a frequently and routinely applied approach to resolving issues of fundamental rights in New York. State constitutional law—and especially its reestablished legitimacy and unhesitating use by judges at all levels of New York judiciary—have helped make the New York judicial system the leading and, in my opinion, the best in the nation.