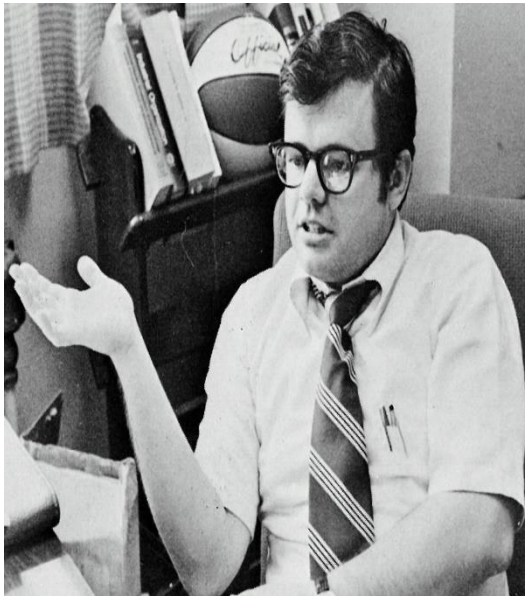


EDITOR'S FOREWORD

PROFESSOR MICHAEL J. HUTTER

IN THIS ISSUE

*Vincent Martin Bonventre**



I knew Michael Hutter before I knew Michael Hutter. Yogi Berra would have said it better. Some politicians would have said it worse. But my point is that I have known Albany Law School's Professor Michael J. Hutter at different times, in different contexts.

As a law clerk for New York State Court of Appeals Judges Matthew J. Jasen and then Stewart F. Hancock, Jr., I became familiar with Michael as an appellate advocate. His briefs to the Court always made the Judges' and their clerks' work so much easier. His briefs were always so clear, his analysis of the law so insightful and forthright, and his arguments so lucid and logical, that we were always pleased to see Michael's name as one of the

* Justice Robert H. Jackson Distinguished Professor of Law, Albany Law School; Editor, *State Constitutional Commentary*, Faculty Advisor, Albany Law Review; Ph.D., M.A.P.A., University of Virginia; J.D., Brooklyn Law School; B.S., Union College; Blog: New York Court Watcher

lawyers on an appeal.

Beyond that, and in no small measure because of that, Michael was a source of pride to the Jasen chambers. He had clerked for Judge Jasen several years before me. The Judge was especially proud of him, and we clerks delighted in the reflected glory of one of our own doing so well—not only as an advocate, but as a law professor as well. Appropriately, the Jasen family gave Michael the honor of representing the law clerks with a eulogy at the Judge's funeral.

Years after my joining Michael in the family of Judge Jasen law clerks, I joined him on the faculty of Albany Law School as his junior colleague. For nearly thirty years, I have been the beneficiary of Michael's good counsel, support, and camaraderie. He has been a wise mentor and dependable friend. I owe Michael a great deal for all his assistance, encouragement, and loyalty throughout the years.

So I could not be more pleased that we dedicate this issue of the *Albany Law Review* to Michael. The members of the *Law Review*, like so many students throughout the law school over the years since 1976, have been the beneficiaries of his teaching and advising and they hold him in the highest esteem. Indeed, Michael has long been one of the students' very favorite professors, whose classes are among the most sought after in the curriculum.

As Michael's junior colleague, as well as a junior member of the Jasen law clerk family of which he is the veritable Dean, I extend my heartiest congratulations to Professor Hutter on this occasion of the *Albany Law Review's* tribute to him.



In this issue—the twenty-third annual edition of *State Constitutional Commentary* and ninth annual of *New York Appeals*—we continue the tradition of the *Albany Law Review* and Albany Law School of serving as the premiere forum for the examination of developments in New York appellate case law and in state courts and state public law nationwide.

The *Anthony V. Cardona New York Appeals* half of this issue presents a diverse array of topics with which the state's appellate courts have recently been wrestling. Colleen Duffy and Ivy Ozer examine the concepts of “physical injury” and “serious physical injury” in assault cases. As delimited in Court of Appeals and Appellate Division decisions, the ultimate determination depends upon specific facts and circumstances concerning the degree of pain and impairment involved.

Michael Nolan analyzes a proposal to amend the CPLR (Civil Practice Law and Rules) to provide an understandable definition of “finality” that renders judgments reviewable on appeal. Unfortunately, according to the authors, that definition may, among other things, contravene the Court of Appeals' interpretation of the state constitution's finality requirement. In the next article, Eric Greenberg explores the so-called “mere change exemption” to New York's real estate transfer tax. The author proposes a solution to the unintended burden and other consequences imposed by a series of unhelpful decisions in several New York courts. Irene Byhovsky tackles the problem of financial crimes against the elderly and explores possible measures to prevent them. The author proposes treating the illegal financial exploitation of the elderly as an aged-based hate crime.

Finally, the *New York Appeals* closes with eight student-authored judicial profiles of the seven current Judges on the state's highest court and of one recently deceased member. These profiles, based on studying the opinions and voting of individual Court of Appeals Judges, reveal patterns and principles that underlie each Judge's decision-making.

The *State Constitutional Commentary* half of this issue opens with a compelling account of “wrongful liberty.” The co-authors—Frank Baumgartner, Amanda Grigg, Rachele Rameriz, and Sawyer Lucy—explore the profound ramifications of violent criminals remaining free whenever the wrong person is convicted and incarcerated. That article is followed by a transcript of the Twelfth Annual Chief Judge Lawrence H. Cooke Symposium: *Reconsidering the Right to Die: The Debate over Assisted Suicide*. Judge Eugene Fahey, who openly

wrestled with the issue in his concurring opinion in the Court of Appeals' recent decision in *Myers v. Schneiderman*, presented the keynote address that thoughtfully and candidly dealt with the competing interests involved and with his own views and vote in the case. An enlightening and heartfelt discussion and debate on the aid-in-dying issue, by a panel representing diverse perspectives, filled the remainder of the program.

That transcript is complemented with an article by Edward Mechmann and Alexis Carra addressing the legal and ethical concerns with any judicial or statutory recognition of a right to die. The authors hail the Courts of Appeals' refusal to recognize such a right. Taking the opposite position, Edwin Schallert and Kathryn Tucker criticize the reasoning and implications of that *Myers* decision, but they remain optimistic that aid-in-dying is gaining recognition elsewhere across the country.

Next are transcripts of presentations delivered at a symposium honoring the contributions of the late Chief Judge Judith S. Kaye to state constitutional law, sponsored by the State-Federal Judicial Council and held once in Manhattan and again in Albany. Three panelists who presented at the symposium—Kaye's successor as Chief Judge, Jonathan Lippman; her colleague, Victoria Graffeo; and myself, another admirer whose clerkship at the Court of Appeals overlapped with Kaye's tenure—discuss Kaye's judicial philosophy of independent state law based decision-making.

Two student-authored contributions complete this year's *State Constitutional Commentary*. Eric Weinhold, Executive Editor for Notes and Comments at the *Law Review* this past year, makes the argument for state-appointed counsel to represent students whose state guaranteed right to a "sound basic education" may be lost in school disciplinary proceedings. Then, Michele Inman, who graduated from Oklahoma City University School of Law while publication of this issue was pending, makes the case for requiring the ranching and farming industries to demonstrate how their interests outweigh environmental, animal welfare, and other concerns before those industries are granted "carve-outs" to health and wellness regulations.


Finally, I must express gratitude for the efforts of Eric O' Bryan and Charlotte Rehfuss, the *Law Review's* executive editors for *New York Appeals* and *State Constitutional Commentary* respectively. They solicited, selected, and organized the offerings in this joint issue. Additionally, Eric oversaw the preparation of the student-authored notes on the Court of Appeals Judges, and Charlotte

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coordinated all administrative matters for this year's Cooke Symposium. The *Law Review* is extremely proud of their successful efforts. Mention must also be made of the extraordinary dedication and ability of Emma Tiner, the Editor-in-Chief for Volume 81, who not only completed the publications of a few issues for the previous volume, but is primarily responsible for making the *Law Review* entirely current with this issue. Additionally, Stephen Maier, our Editor-in-Chief for this academic year, has assisted admirably and conscientiously with all the editorial and publication responsibilities for this issue; it is completed because of him. Lastly, as has been true for many years now, it has been my distinct privilege to work with these exceptional students and the entire membership of the *Albany Law Review* this past year as their faculty advisor.



ALBANY LAW REVIEW PRESENTS
THE TWELFTH ANNUAL
CHIEF JUDGE LAWRENCE H. COOKE
STATE CONSTITUTIONAL COMMENTARY SYMPOSIUM
Part of the Edward C. Sobota '79 Memorial Lecture Series

**“Reconsidering the
Right to Die: The Debate
over Assisted Suicide”**

THURSDAY, MARCH 22, 2018
5:30 P.M. - 8:00 P.M.

Albany Law School
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**Special thank you to the
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For more information contact:
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KEYNOTE ADDRESS

Honorable Eugene M. Fahey
Court of Appeals, N.Y. State

PANELISTS

Stephanie Woodward
Director of Advocacy, Center for Disability Rights

Edward Mechmann
Director, Public Policy at Archdiocese of New York


Kathryn Tucker
Executive Director, End of Life Liberty Project

Peter Strauss
Of Counsel, Drinker, Biddle & Reath LLP; Board of Directors member, End of Life Choices of New York

MODERATOR

Professor Vincent Bonventre
*Albany Law School, Justice Robert H. Jackson
Distinguished Professor of Law*

**RECEPTION IN THE EAST FOYER
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