THE LEGISLATURE'S POWER TO CORRECT THE ANOMALY OF BENEFITTING FROM A FAILURE TO PRESERVE AN ARGUMENT FOR APPELLATE REVIEW

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ABSTRACT

This article examines an arcane and counterintuitive wrinkle of practice in New York's Court of Appeals: the rule that allows a party to *benefit* from his or her failure to properly preserve the winning claim or argument for appellate review. I address below whether the legislature has the power to correct the anomaly, and ultimately conclude that it does.

I. THE BENEFITS OF NON-PRESERVATION

We all learn, starting sometime in law school, how critical it is to preserve one's arguments and objections in the *nisi prius* court. Yet, there is an arcane area of New York practice in which a party benefits from having *not* preserved his or her winning argument for appellate review and may even prevail on that ground. Such is what occurred in *Hecker v. State*,[1] a ruling that surprised much of the appellate bar.

Hecker was a personal injury action that concerned the defendant's alleged violation of section 241(6) of the Labor Law of the State of New York.[2] "Claimant's employer had contracted . . . to perform rehabilitation work on an historic lift bridge[.]"[3] Some months after the completion of the work, it was "necessary to replace defective components in a lift mechanism [thirty] feet below the ground."[4] Claimant was shoveling snow in order to access the pit when he slipped and sustained injury.[5]

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1 Hecker v. State, 937 N.Y.S.2d 815 (App. Div. 2012), *aff'd*, 987 N.E.2d 636 (N.Y. 2013).

2 *See Hecker*, 937 N.Y.S.2d at 816.

3 *Id.*

4 *Id.*

5 *Id.*

Claimant's Labor Law claim was premised on the defendant's alleged violation of 12 NYCRR 23-1.7(d).[6] That regulation stated that an employer "shall not suffer or permit any employee to use a floor, passageway, [or] walkway . . . [that] is in a slippery condition. Ice, snow, [and] water . . . [that] may cause slippery footing shall be removed, sanded or covered to provide safe footing."[7] Claimant's theory was that the condition that caused him to slip violated the regulation and that he thereby had a valid claim under Labor Law section 241(6).[8]

Defendant moved for summary judgment, arguing that since "snow removal was an integral part of [the] claimant's work[,]" claimant should not be permitted to charge defendant with a regulatory violation that was, in essence, the very condition that claimant had been tasked to ameliorate.[9] The Court of Claims agreed and dismissed the complaint on that ground.[10]

Claimant appealed to the Appellate Division, Fourth Department.[11] All five judges who heard the case agreed that the argument advanced for dismissal in the Court of Claims lacked merit.[12] The appellate division nonetheless affirmed by a 3-2 vote on a different ground.[13] Although the argument had not been made below or even in the appellate division itself, the appellate division majority *sua sponte* ruled that the regulation was inapplicable on the ground that the claimant was not using the area in issue as "a floor, passageway or walkway at the time of his fall[.]"[14]

The two appellate division dissenters disagreed both with the ruling itself and with the majority's very decision to reach and address the unpreserved argument for dismissal.[15] As to the former, the dissenters felt that "[i]nasmuch as the pit door was located on the sidewalk and was the only way to access the underground work site, . . . claimant was using a passageway or

[6] *See id.*

[7] N.Y. COMP. CODES R. & REGS. tit. 12, § 23-1.7(d) (2016).

[8] *See Hecker*, 937 N.Y.S.2d at 816.

[9] *See id.*

[10] *See* Hecker v. State, No. 116642, 2010-031-050 (N.Y. Ct. Cl. Sept. 20, 2010) (MacLaw).

[11] *See Hecker*, 937 N.Y.S.2d at 816.

[12] *See id.* at 815–16 (citation omitted); *id.* at 817 (Centra & Carni, JJ., dissenting).

[13] *See id.* at 816 (majority opinion).

[14] *See id.* at 816–17 (citing Hertel v. Hueber-Breuer Constr. Co., 850 N.Y.S.2d 806, 807 (App. Div. 2008); Bale v. Pyron Corp., 684 N.Y.S.2d 393, 394 (App. Div. 1998); Sullivan v. RGS Energy Group, Inc., 910 N.Y.S.2d 776, 777 (App. Div. 2010)).

[15] *See Hecker*, 937 N.Y.S.2d at 817 (Centra & Carni, JJ., dissenting) (first citing Woods v. Design Ctr., LLC, 839 N.Y.S.2d 880, 882 (App. Div. 2007); then quoting Misicki v. Caradonna, 909 N.E.2d 1213, 1218 (N.Y. 2009)).

walkway within the meaning of the regulation[.]"[16] As to the latter, the dissenters, quoting from the Court of Appeals' 2009 ruling in *Misicki v. Caradonna*, opined: "We should not be 'in the business of [blindsiding] litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made.'"[17]

Having lost by a 3-2 vote in the appellate division on what was plainly an issue of law (i.e., whether the area in issue was a "floor, passageway[,] or walkway" within the meaning of the regulation), claimant appealed as of right to the Court of Appeals.[18] It was there that the curious anomaly that is the subject of this article split the Court of Appeals. However, before proceeding further with our tale of Mr. Hecker's very bad litigation experience, it is necessary to first consider the general rules concerning unpreserved issues of law, and, more particularly, the distinction between appellate division review and Court of Appeals review of unpreserved issues of law.

Even in the appellate division, the familiar rule on an appeal in a civil case is that the appellate court will generally consider only those arguments and claims that were preserved for appellate review by timely assertion or objection in the *nisi prius* court.[19] In some instances—including, for example, alleged error in the giving or failure to give a particular jury instruction—the preservation prerequisite is statutory.[20] Yet, the very statement that the

[16] *Hecker*, 937 N.Y.S.2d at 817 (citing Fassett v. Wegmans Food Mkts., Inc., 888 N.Y.S.2d 635, 637–38 (App. Div. 2009); Whalen v. City of N.Y., 704 N.Y.S.2d 305, 308 (App. Div. 2000)).

[17] *Hecker*, 937 N.Y.S.2d at 817 (quoting *Misicki*, 909 N.E.2d at 1218). *Misicki* was the case in which the Court of Appeals famously and colorfully split 4-3 on whether it should hold that 12 NYCRR 23-9.2(a) was inapplicable on grounds that had not been argued by the defendant therein. *See Misicki*, 909 N.E.2d at 1215, 1218. Dissenting from the result therein, Judge Smith wrote that he was mindful of the rules generally limiting Court of Appeals' review to preserved issues of law but that he would nonetheless deem the regulation to be "plainly inapplicable[.]" *Id.* at 1222 (Smith, J., dissenting). He added that having to decide whether the regulation *would be* specific enough to support a Labor Law claim *if it were applicable* to the facts was "an exercise akin to deciding whether I would be a bicycle if I had wheels." *Id.* Writing for the majority, Judge Read answered that "[w]hile appellate judges . . . do not 'sit as automatons,' . . . they are not freelance lawyers either." *Id.* at 1218 (majority opinion) (quoting *id.* at 1222 (Smith, J., dissenting)). In the *Misicki* majority's view: "For us now to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play." *Id.* at 1218 (majority opinion).

[18] *See Hecker*, 937 N.Y.S.2d at 817 (citing Hertel v. Hueber-Breuer Constr. Co., 850 N.Y.S.2d 806, 807 (App. Div. 2008); Bale v. Pyron Corp., 684 N.Y.S.2d 393, 394 (App. Div. 1998); Sullivan v. RGS Energy Group, Inc., 910 N.Y.S.2d 776, 777 (App. Div. 2010)); *see also* N.Y. C.P.L.R. 5601(a) (McKinney 1962).

[19] *See, e.g.*, *In re* Shiner v. SUNY at Buffalo, 41 N.Y.S.3d 330, 332 (App. Div. 2016) (citing *In re* Duncan v. John Wiley & Sons, Inc., 27 N.Y.S.3d 286, 288 (App. Div. 2016)); *In re* Thomas-Fletcher v. New York City Dept. of Corr., 990 N.Y.S.2d 420, 421 (App. Div. 2014); *In re* Stewart v. N.Y.C. Tr. Auth., 981 N.Y.S.2d 630 (N.Y. App. Div. 2014)).

[20] *See, e.g.*, C.P.L.R. 5501(a)(3) (1962).

appellate division will "generally" consider those arguments and claims that were preserved for appellate review implies that there are also exceptions in which the appellate division can and will consider unpreserved arguments and claims. Such is indeed the case.

Although the appellate division's discretion to consider unpreserved issues is apparently not limitless,[21] it is long settled that the appellate division may in its *discretion* consider unpreserved issues.[22] The preservation prerequisite is, in other words, a rule of practice from which the appellate division can, and sometimes does, depart for reasons such as the unpreserved error was so significant that it was "fundamental,"[23] or of such nature

[21] *See* Parkin v. Cornell Univ., Inc., 583 N.E.2d 939, 943 (N.Y. 1991) (citation omitted) ("[T]his issue was not properly before the appellate division and could not serve as a predicate for dismissing the abuse of process cause of action. . . . Defendants never claimed at trial or in their posttrial motion that plaintiffs' proof was deficient because it failed to establish improper conduct after process was issued. . . . Under these circumstances, defendants cannot be heard to argue on appeal nor can the appellate division or this court determine that plaintiffs were required to prove more."); Phelps-Stokes Estates, Inc., v. Nixon, 118 N.E. 241, 242 (N.Y. 1917) ("The action was not to recover damages for breach of contract, but was to recover the purchase price of the stock. . . . This being so, neither may the appellate division adopt a new theory for the parties nor may we affirm their action on the ground that if the parties had adopted some other theory the judgment of the trial term would not have been sustained by the findings.").

[22] Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC, 995 N.E.2d 110, 114 n.4 (N.Y. 2013) (citations omitted) ("[T]he appellate division may, in the exercise of its 'interests of justice' jurisdiction, always reach an issue not preserved at supreme court. The Court of Appeals, by contrast, generally lacks power to review unpreserved issues even where the appellate division has chosen to do so."); *see also* Merrill v. Albany Med. Ctr. Hosp., 524 N.E.2d 873 (N.Y. 1988) ("While the appellate division has jurisdiction to address unpreserved issues in the interest of justice, the Court of Appeals may not address such issues in the absence of objection in the trial court."). Further, "[t]he [Court of Appeals'] power of review is further limited by the requirement that a claim of error of law on the part of the courts below must, in general, have been duly preserved for review by appropriate motion, objection or other action in the *nisi prius* court in order to be reviewable as a question of law. In that respect, the review power of the Court of Appeals differs from that of the appellate division, which has broad discretionary authority to grant certain relief 'in the interest of justice' even on unpreserved claims of error." ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 14:1 (3d ed. 2016).

[23] Peguero v. 601 Realty Corp., 873 N.Y.S.2d 17, 25 (App. Div. 2009) ("[W]here [an] error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded, the court may, in the interests of justice, proceed to review the issue even in the absence of objection or request [to charge]." (quoting Pivar v. Graduate Sch. of Figurative Art of the N.Y. Acad. of Art, 735 N.Y.S.2d 522, 524 (App. Div. 2002))); *see also* Gallagher v. Samples, 776 N.Y.S.2d 585, 586 (App. Div. 2004) ("The supreme court erroneously charged the jury that it could only award future damages upon a finding that she sustained a permanent injury . . . . Although the plaintiff failed to object to the charge, the error was fundamental under the circumstances of the case. Therefore, we reach the issue in the exercise of discretion[.]"); Rudolph v. Khan, 771 N.Y.S.2d 370, 370–71 (App. Div. 2004) (citations omitted) ("Although the plaintiff did not properly preserve for appellate review his challenges to the jury charge pertaining to the Vehicle and Traffic Law . . . , [t]he erroneous charge was a fundamental error requiring a new trial because it affected the jury's

that it could not have been obviated by timely objection,[24] or that review is warranted in the interests of justice,[25] or, in at least one

consideration of the plaintiff's liability if the jury determined that the plaintiff was in the crosswalk when he was hit."); Breitung v. Cazano, 660 N.Y.S.2d 765, 766–67 (App. Div. 1997) (citations omitted) ("[W]hen the error is so fundamental that it precludes consideration of the central issue upon which the action is founded, this court has the power to reverse for 'fundamental error' even in the absence of an objection . . . . Because the error in the jury charge was so fundamental that it precluded proper resolution of the central issue in the case, we reverse the judgment and grant a new trial.").

[24] Olivieri Constr. Corp. v. WN Weaver St., LLC, 41 N.Y.S.3d 59, 61 (App. Div. 2016) (citations omitted) ("[W]e note that the defendants' contention that New York does not recognize a separate cause of action to pierce the corporate veil . . . is improperly raised for the first time on appeal. However, we may reach the issue since it involves a question of law which appears on the face of the record and which could not have been avoided if raised at the proper juncture."); Berlin v. Jakobson, 26 N.Y.S.3d 863, 864 (App. Div. 2016) (citations omitted) ("While defendants assert certain releases as a bar to the fiduciary duty claims asserted on behalf of Waverly Properties and 27-37 Management for the first time on appeal, we can consider the argument because it cannot be avoided, turns on a question of law, and can be resolved on the face of the record."); Velazquez v. 795 Columbus LLC, 959 N.Y.S.2d 491, 492–93 (App. Div. 2013) (citations omitted) ("Plaintiff did not raise the applicability of 12 NYCRR 23-1.7(d) in his summary judgment motion (although he asserted it in his complaint and verified bill of particulars), but we reach the issue because it is a legal issue that is apparent on the record, and the determination could not have been avoided if the issue had been brought to defendants' attention on the motion[.]"); Pipinias v. J. Sackaris & Sons, Inc., 983 N.Y.S.2d 587, 589 (App. Div. 2014) (citations omitted) ("The plaintiff correctly asserts that since the late filing of proof of service as to Mirro was a nullity and Mirro's time to answer never began to run, the plaintiff therefore could not have previously obtained a default judgment against Mirro and the provisions of CPLR 3215(c) do not apply as to Mirro . . . . Although the plaintiff raises this issue for the first time on appeal, it involves a question of law that appears on the face of the record which could not have been avoided if brought to the attention of the supreme court at the appropriate juncture[.]"); Mills v. Mills, 974 N.Y.S.2d 717, 718–19 (App. Div. 2013) ("Defendant's further contention that the court was required to appoint a guardian *ad litem* for him is raised for the first time on appeal and therefore is not properly before us . . . . We nevertheless review that contention inasmuch as it involves [a] question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to that party's attention in a timely manner." (citation omitted)).

[25] *See In re* Turner v. Valdespino, 34 N.Y.S.3d 124, 125 (App. Div. 2016) (citations omitted) ("The family court violated the mother's fundamental due process rights when it instructed her not to consult with her attorney during recesses, which resulted in her being unable to speak to her attorney over extended periods of time . . . . Although this issue is unpreserved for appellate review, we exercise our power to reach it in the interest of justice because the family court's conduct deprived the mother of due process."); *In re* Hill v. Trojnor, 28 N.Y.S.3d 749, 750 (App. Div. 2016) (citations omitted) ("[R]espondent mother appeals from a two-year order of protection . . . [and] correctly concedes that her challenges to the order are not preserved for our review . . . but we exercise our power to review those challenges as a matter of discretion in the interest of justice."); Schembre v. Atomic Spring & Alignment Co., 722 N.Y.S.2d 64, 66 (App. Div. 2001) (citations omitted) ("We agree with the plaintiff that the trial court erred in allowing defense counsel to question the police officer about the alleged connection between the position of the plaintiff's vehicle after the accident and the skid marks depicted in the photograph. . . . Contrary to the defendant's contention, the plaintiff's argument on this score is at least partially preserved for appellate review, as the plaintiff's attorney registered an objection based on the officer's lack of expertise as soon as defense counsel began to address this subject. In any event, this error must be considered fundamental since it created a basis upon which the jury might have concluded that the

case, the legal argument that prevailed at *nisi prius* was "patently" lacking in merit.[26]

By contrast, while the Court of Appeals considers unpreserved arguments and claims in certain discrete circumstances that we will soon explore in some detail, it has repeatedly been said that it does not share the appellate division's capacity to consider unpreserved claims or arguments based upon a simple exercise of its discretion.[27] The Court of Appeals does not (at least not expressly) consider unpreserved issues in the "interest of justice."[28]

With that necessary preamble, we now return to the case of Kenneth Hecker, who slipped while shoveling snow.[29] As noted above, the appellate division affirmed the dismissal of the complaint, but did so on a ground that had not been argued at *nisi prius* or even in the appellate division itself.[30] As we now know from the case law noted above, the appellate division has the authority to consider unpreserved arguments and claims even though it does not generally choose to do so. Plaintiff appealed as of right to the Court of Appeals based upon the two-judge dissent in the appellate division.[31] It was here that precedent and circumstances combined to bring about a result that confounded policy and surprised even the parties themselves.

Can the Court of Appeals consider an argument or claim that was not preserved in the *nisi prius* court but was nonetheless considered in the appellate division and in fact served as the basis for the appellate division's ruling in the case? I think that most attorneys,

brakes of the plaintiff's car did not fail, a hypothesis for which there is otherwise no support in the record. Given the fundamental nature of this error, review in the interest of justice is warranted."); Guariglia v. Price Chopper Operating Co., 787 N.Y.S.2d 451, 453–54 (App. Div. 2004) (citations omitted) ("[Defendant] contends that the awards, particularly the punitive damages amount, are unduly excessive. Significantly, defendant failed to raise that issue before supreme court. . . . Nevertheless, defendant has requested that we review the matter in the interest of justice and, in doing so, we note that courts have inherent power to review issues addressed to the excessiveness or appropriateness of awards granted upon default[.]").

[26] Allen v. Matthews, 699 N.Y.S.2d 166, 169 (App. Div. 1999) (citations omitted) ("[D]efendant invokes the well-settled rule that appellate review will not extend to a claim or argument not raised in the court below. . . . We decline to apply this rule to plaintiff's failure to respond to an argument so patently lacking in merit.").

[27] *See Altshuler Shaham Provident Funds, Ltd*., 995 N.E.2d at 114 n.4 (citations omitted); People v. Turriago, 681 N.E.2d 350, 351 (N.Y. 1997); Elezaj v. P.J. Carlin Constr. Co., 89 N.Y.2d 992, 994–95 (N.Y. 1997) (quoting Feinburg v. Saks & Co., 436 N.E.2d 1279, 1280 (N.Y. 1982)); People v. Cona, 399 N.E.2d 1167, 1168–69 (N.Y. 1979) (citations omitted); KARGER, *supra* note 22, § 14:1.

[28] *Turriago*, 681 N.E.2d at 354 (citations omitted).

[29] Hecker v. New York, 937 N.Y.S.2d 815, 816 (App. Div. 2012).

[30] *Id.*; KARGER, *supra* note 22, § 14:1.

[31] *See Hecker*, 937 N.Y.S.2d at 817 (Centra & Carni, JJ., dissenting); *see also* N.Y. C.P.L.R. 5601 (McKinney 1962).

including those generally familiar with the principles of appellate preservation, would assume that the answer is "yes." Even acknowledging that the appellate division could have refused to consider the unpreserved argument, and even supposing that the Court of Appeals would not consider the unpreserved argument if the appellate division had not done so first, the very fact that the appellate division *had* chosen to consider the matter and had then premised its ruling on the unpreserved argument should, one would think, make the issue of law reviewable in the Court of Appeals.[32]

That was exactly what the litigants in *Hecker* thought. As was noted in these pages a couple of years ago,[33] the defendant (who had benefitted from the appellate division ruling) urged that the issue had been preserved for appellate review, obviously assuming that such was necessary for affirmance.[34] Meanwhile, the claimant argued that the issue had not been preserved for appellate review, evidently assuming that such contention, if credited, would dictate reversal of the appellate division ruling.[35]

But the *Hecker* court figured differently. Without reaching whether the appellate division's ruling was correct or erroneous, the Court of Appeals majority ruled that the legal argument concerning whether the:

> [A]rea in which plaintiff suffered his injury was a 'floor, passageway [or] walkway' within the meaning of 12 NYCRR 23-1.7(d) was not preserved in the Court of Claims, and the appellate division's ruling must be deemed an exercise of its interests of justice jurisdiction[, and thus, w]e have no power to review either the appellate division's exercise of its discretion to reach that issue, or the issue itself.[36]

Judge Smith, joined by Judge Pigott, concurred on the different ground that the appellate division majority was correct on the merits.[37] In doing so, they added that the rule on which the majority had relied—the rule to the effect that the Court of Appeals lacked the "power" to consider the unpreserved issue on its merits—

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[32] *But see Altshuler Shaham Provident Funds, Ltd.*, 995 N.E.2d at 114 n.4 (noting that generally the Court of Appeals does not have the authority to review unpreserved issues even where the appellate division has opted to do so).

[33] *See* Richard J. Montes & David A. Beatty, *The Preservation Rule in the New York Court of Appeals: How Recent Decisions and Characterizations of the Rule Inform Advocacy*, 78 ALB. L. REV. 119, 144–45 (2015).

[34] *Id.*

[35] Transcript of Oral Argument at 8:4–25, 11:6–19, Hecker v. State, 987 N.E.2d 636 (N.Y. 2013) (No. 38); *see Hecker,* 987 N.E.2d at 636 (citations omitted).

[36] *See Hecker,* 987 N.E.2d at 636 (citations omitted).

[37] *Id.* at 636–37, 638 (Smith, J., concurring).

was "a bad one" that the court "should be prepared to reconsider . . . in a future case."[38] In their view, the matter in issue, whether preserved or unpreserved, was still an issue *of law*,[39] stating: "The appellate division's unreviewable, discretionary choice to reach the issue [did] not make the issue itself any less one of law."[40]

In thus criticizing the grounds on which the majority affirmed the result below, Judge Smith fully acknowledged that long settled Court of Appeals practice evidenced a disinclination to consider unpreserved issues, and also that the disinclination to consider unpreserved issues had sometimes been loosely characterized as the product of a *jurisdictional* limitation.[41] However, he felt that the rule was, at bottom, nothing more than a rule of practice and, in fact, a rule of practice to which the court had not adhered "with any consistency."[42] Citing Judge Pigott's dissent in *People v. Knowles*,[43] Judge Smith attributed the confusion to the misapplication of "a statute limited to criminal cases"—a charge we shall examine more closely below.[44]

Judge Smith's concurrence in *Hecker* even more pointedly criticized the effect of the majority's ruling and the policy implications of the ruling.[45] The majority's refusal to consider the merits of the issue on which the defendant had prevailed meant that the "claimant loses the case—whether he is right or wrong on the merits—because of *defendant's* neglect."[46]

We thus reach the anomaly that is the subject of this article. It is hardly unusual for a party to prevail on appeal *in spite* of his or her failure to properly preserve for appellate review the ultimately winning argument or issue. But it is a very different thing for a party to prevail *because* he or she failed to properly preserve for appellate review the ultimately winning argument or issue. Yet that is what happened in *Hecker*.

[38] *Id.* at 636–37.
[39] *Id.* at 637.
[40] *Id.*
[41] *Id.*
[42] *Id.* (citations omitted).
[43] People v. Knowles, 673 N.E.2d 902 (N.Y. 1996) (Simmons, J., dissenting).
[44] Hecker v. State, 987 N.E.2d 636, 637 (N.Y. 2013) (Smith, J., concurring) (citing *Knowles*, 673 N.E.2d at 908–10 (Simmons, J., dissenting)).
[45] *Hecker*, 987 N.E.2d at 636–37 (Smith, J., concurring).
[46] *Id.* at 637.

II. THE *HECKER* RULE: PERHAPS MISGUIDED, BUT NOT ABERRATIONAL

Although *Hecker* captured the appellate bar's attention by virtue of its strong concurring opinion, it was actually not the first ruling of its kind. The Court of Appeals had said on at least four prior occasions that unpreserved issues of law were not reviewable in the Court of Appeals merely because the appellate division had reviewed the issues in the exercise of its discretion.

Two of those cases, *Domino v. Mercurio*[47] and *Elezaj v. P.J. Carlin Construction Company*, decided in 1963 and 1997, respectively, were not true *Hecker* rulings inasmuch as the appellate division considered but then *rejected* the unpreserved arguments.[48] This is, I believe, a significant distinction that I address at some length below. The Court of Appeals has historically been more solicitous of new arguments asserted for purposes of sustaining the judgment below than of new arguments made for the purposes of reversing the judgment below.[49] Such is also consistent with the now entrenched rule that a two-judge dissent in the appellate division does not provide basis for an appeal as of right if the dissent was premised on an unpreserved issue of law (i.e., an unpreserved argument that the majority either rejected, deemed unavailing, or declined to consider).[50]

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[47] Domino v. Mercurio, 193 N.E.2d 893 (N.Y. 1963).

[48] *See id.*; *see also* Elezaj v. P.J. Carlin Const. Co., 679 N.E.2d 638, 638 (N.Y. 1997). In *Domino*, the appellate division considered the defendant's alleged entitlement to judgment as a matter of law notwithstanding the defendant's failure to timely move for that relief in trial term, but then ruled that the argument failed on its merits. *Domino*, 193 N.E.2d at 893. In *Elezaj*, the appellate division considered the defendant's unpreserved argument that the regulation cited by plaintiff was too general to support a cause of action under Labor Law section 241(6), but then ruled that the regulation support was sufficient for purposes of the statute. *Elezaj*, 679 N.E.2d at 638.

[49] State v. Green, 754 N.E.2d 179, 181, 183 n.2 (N.Y. 2001) (citing White v. Long, 650 N.E.2d 836, 838 (N.Y. 1995) (noting that the state supreme court had held the landowner liable for cleanup costs and the landlord had then appealed, the court would take judicial notice of statutes that were not cited below but were now cited to buttress the state's liability argument); *see* Persky v. Bank of Am. Nat'l. Ass'n, 185 N.E. 77, 79 (N.Y. 1933) (distinguishing between new questions raised to reverse a judgment from new arguments made to sustain a judgment); KARGER, *supra* note 22, § 17:2 ("[T]here are statements in some early cases that the Court of Appeals may consider a newly raised question, where otherwise allowable, for purposes only of affirmance and may not do so for purposes of reversal. . . . [T]here appears to be no sound basis of logic or policy for any such distinction[.]").

[50] Merrill v. Albany Med. Ctr. Hosp., 524 N.E.2d 873, 873 (N.Y. 1988) (citing Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp., 468 N.E.2d 53, 53 (N.Y. 1984); Guaspari v. Gorsky, 278 N.E.2d 913, 913 (N.Y. 1972)) ("Although the dissent in the present case purports to address questions of law, an examination of the full record reveals that the arguments upon which the dissent is predicated were not raised by appellant in the trial court. While the appellate division has jurisdiction to address unpreserved issues in the interest of justice, the Court of

However, there were also two pre-*Hecker* cases in which the appellate division reversed on the basis of an unpreserved issue and the Court of Appeals afterwards said that it lacked "power" to review the issue. Such was the situation in *Feinberg v. Saks & Co.*, a 1982 ruling.[51] There, where the appellate division set aside a verdict on the unpreserved ground that the jury's finding in the defendant's favor on the false arrest cause of action was inconsistent with its finding in the plaintiff's favor on the malicious prosecution cause of action, the Court of Appeals said that it had "no power to review either the unpreserved error or the appellate division's exercise of discretion in reaching that issue."[52] The court ruled the same way a year later, also with respect to a purportedly inconsistent verdict, in *Brown v. City of New York*.[53]

Hecker was also not the last or most recent of its line. The court "doubled down" on *Hecker*, albeit in dictum, in its 2013 ruling in *Eujoy Realty Corp. v. Van Wagner Communications, LLC*,[54] and in its 2015 ruling in *Bennett v. St. John's Home*.[55]

Eujoy Realty arose from a landlord-tenant dispute concerning a commercial lease.[56] The two appellate division dissenters charged that the plaintiff-landlord "abandoned the theory of recovery advanced before [state] supreme court [and had been permitted to prevail in the appellate division on a] new argument."[57] However, the appellate division majority ruled that the charge was "unfounded" and that the defendant-tenant had not even asserted there had been a change of theory.[58] The Court of Appeals ultimately agreed with the latter view, stating that "[t]he principal issues of law decided by the appellate division [were in fact] preserved for appellate review."[59] Although that observation was sufficient to end the preservation concern, the majority, citing *Hecker*, went on to observe that agreement with the tenant's Court

Appeals may not address such issues in the absence of objection in the trial court. Accordingly, the dissent was not on a question of law which would be reviewable by the Court of Appeals and the appeal must be dismissed[.]").

[51] Feinberg v. Saks & Co., 436 N.E.2d 1279, 1280 (N.Y. 1982) (citations omitted).

[52] *Id.*

[53] *See* Brown v. City of N.Y., 458 N.E.2d 1248, 1249 (N.Y. 1983).

[54] *See* Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC, 4 N.E.3d 336, 343 (2013) (citing Hecker v. State, 987 N.E.2d 636, 636 (2013)).

[55] Bennett v. St. John's Home, 43 N.E.2d 372, 372 (N.Y. 2015) (citing *Hecker*, 987 N.E.2d at 636).

[56] *Eujoy Realty Corp.,* 4 N.E.3d at 338.

[57] Eujoy Realty Corp. v. Van Wormer Commc'ns, LLC, 901 N.Y.S.2d 227, 230 (2010) (Tom & Freedman, JJ., dissenting).

[58] *Id.* at 229 (majority opinion).

[59] *Eujoy Realty Corp.*, 4 N.E.3d at 342.

of Appeals argument that the critical issue was unpreserved would in any event result in an affirmance, not a reversal, inasmuch as the Court of Appeals would in that circumstance "have no power to review [these decisions on the merits]."[60]

Judge Smith, again joined by Judge Pigott, wrote separately in *Eujoy Realty* to characterize the majority's ruling on preservation as "a very odd rule [that was] without justification[.]"[61] But that was the minority view.[62] Although the majority's statement was now dictum rather than holding, the court once again: (a) characterized its limitation to preserved issues of law as *jurisdictional* in nature, and (b) said that the rule precluded consideration of an argument or issue not preserved in the *nisi prius* court *even when* the appellate division had elected to consider the issue.[63]

Bennett was a case in which the plaintiff consented to the timing of the defendant's summary judgment but then urged on appeal to the appellate division that the motion should have been denied as untimely.[64] The appellate division majority rejected the unpreserved argument, holding that the plaintiff was bound by the stipulation.[65] On further appeal, the Court of Appeals said that it lacked "power" to review the issue.[66] In contrast to *Hecker* and *Eujoy Realty*, there was no concurring or dissenting opinion that took issue with the statement.[67]

Thus, it is true that most of the cases in which the Court of Appeals voiced what I shall hereinafter call the "*Hecker* rule" were cases in which the appellate division considered but rejected the new argument.[68] Yet, it remains that the court has stated the rule at least seven different times and in at least three cases (*Feinberg*, *Brown,* and *Hecker* itself) in which the appellate division reversed on the basis of the new argument.[69] Well-reasoned or otherwise,

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[60] *Id.* (quoting *Hecker*, 987 N.E.2d at 636).

[61] *Id.* at 427 (Smith, J., concurring) (citing *Hecker*, 987 N.E.2d at 636–37 (Smith, J., concurring)).

[62] *See Hecker*, 987 N.E.2d at 637 (Smith, J., concurring) (citing Misicki v. Caradonna, 909 N.E.2d 1213, 1223 (N.Y. 2009) (Smith, J., dissenting)).

[63] *Eujoy Realty*, 4 N.E.3d at 342 (quoting *Hecker*, 987 N.E.2d at 636).

[64] Bennett v. St. John's Home, 8 N.Y.S.3d 774, 775 (N.Y. App. Div. 2015).

[65] *Id.*

[66] Bennett v. St. John's Home, 43 N.E.3d 372, 372 (N.Y. 2015) (citing *Hecker*, 987 N.E.2d at 636).

[67] *Compare Bennett*, 43 N.E.3d at 372, *and Hecker*, 987 N.E.2d at 638, *and Eujoy Realty*, 4 N.E.3d at 345 (noting concurring opinions and votes by the judges in each decision).

[68] *See, e.g.*, *Bennett*, 8 N.Y.S.3d at 775, *aff'd*, 43 N.E.3d 372 (N.Y. 2015); Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC, 995 N.E.2d 110, 114 (N.Y. 2013).

[69] Feinberg v. Saks & Co., 436 N.E.2d 1279, 1280 (N.Y. 1982); Brown v. City of N.Y., 458 N.E.2d 1248, 1249 (N.Y. 1983) (citing *Feinberg*, 436 N.E.2d at 1280); *Hecker*, 987 N.E.2d at

Hecker was not an aberration.

III. THE QUESTIONS CONCERNING THE FEASIBILITY OF A "LEGISLATIVE FIX"

In light of the above, I make two assumptions for the purposes of this article. First, even if Judges Smith and Pigott were correct in concluding that the Court of Appeals' limitation to preserved issues of law is a product of court-made policy and does not constitute a true jurisdictional defect, it is highly unlikely that the court will overturn *Hecker* in the foreseeable future inasmuch as: (a) the court has characterized the limitation as jurisdictional at least seven different times,[70] and (b) by the time this article is published, both of the Court of Appeals judges who advocated for change will have left the bench.[71]

Second, strictly in terms of policy, it surely cannot be doubted that the view advocated by Judges Smith and Pigott was the sounder, fairer, and more sensible rule.[72] It makes no sense that a party should profit from his or her failure to preserve an issue. Nor is it fair for a party to lose simply because his or her adversary's ultimately winning argument was *not* preserved for appellate review.

Accepting that the rule is bad policy and that the Court of Appeals is not likely to change it, the critical question then becomes whether the legislature itself has the power to change the rule. Obviously, if there were some constitutional provision that in words or substance precluded the Court of Appeals from considering unpreserved issues of law, that constitutional infirmity could not be cured by the legislature.[73] Nothing less than a constitutional

636 (citing Elezaj v. P.J. Carlin Const. Co., 679 N.E.2d 638, 638 (N.Y. 1997); *Brown*, 458 N.E.2d at 1249; *Feinberg*, 436 N.E.2d at 1280; Domino v. Mercurio, 193 N.E.2d 893, 893 (N.Y. 1963)).

[70] *See, e.g.*, *Hecker*, 987 N.E.2d at 636 (citing *Elezaj*, 679 N.E.2d at 638; *Brown*, 458 N.E.2d at 1249; *Feinberg*, 436 N.E.2d at 1280; *Domino*, 193 N.E.2d at 893); *Bennett*, 43 N.E.3d at 372 (citing *Hecker*, 987 N.E.2d at 636); *Eujoy Realty*, 4 N.E.3d at 342 (citing *Hecker*, 987 N.E.2d at 636).

[71] Jesse McKinley, *Down Two Judges, New York's Court of Appeals Carries On*, N.Y. TIMES (Jan. 18, 2015), https://www.nytimes.com/2015/01/19/nyregion/down-two-judges-new-yorks-court-of-appeals-carries-on.html; *Pigott Seeks Return to Trial Bench Following Court of Appeals Retirement*, BUFFALO NEWS (Oct. 27, 2016), http://buffalonews.com/2016/10/27/pigott-seeks-return-trial-bench-following-court-appeals-retirement/.

[72] *E.g.*, *Hecker*, 987 N.E.2d at 637–38 (Smith, J., concurring).

[73] Charles W. Sommer & Bro., Inc. v. Albert Lorsch & Co., 172 N.E. 271, 272 (N.Y. 1930) ("While the legislature may further *restrict* the jurisdiction of the Court of Appeals and the right of appeal thereto[,] it may not enlarge such right of appeal." (internal citation omitted)); *but see* Duryea v. Vosburgh, 24 N.E. 308 (N.Y. 1890). In *Duryea*, the Court of Appeals

amendment would in such instance suffice to alter the status quo.[74] But I do not believe such is the case here.

As is demonstrated below, there is nothing in the Constitution or even in the statutes governing the Court of Appeals' jurisdiction that even arguably limits the court to preserved issues of law. Moreover, close review of the court's history and pronouncements concerning its general disinclination to address unpreserved issues of law in civil cases, also expanded upon below, reveals that:

(1) The rule generally limiting Court of Appeals review to *preserved* issues of law was from the outset founded upon policy concerns, not upon perceived lack of power to address unpreserved issues;

(2) There are a variety of circumstances in which the court has considered and will consider unpreserved issues of law, and those exceptions are also court-made exceptions that cannot be found in any governing statute;

(3) The relatively recent notion that the court lacks the "power" to consider unpreserved issues of law appears to arise from (a) an illogical conflation of the unpreserved substantive issue itself with the appellate division's discretionary determination to consider the issue, and/or (b) the carryover, noted in Judge Smith's concurring opinion in *Hecker*, from rulings that were made in criminal cases that were governed by a provision of the Criminal Procedure Law that is by its terms inapplicable to civil cases;

declined to exercise jurisdiction, stating:

> We do not think that section [1337 of the code of Civil Procedure] enlarges the jurisdiction of this court so as to permit us to review upon appeal from its judgment the decision of the general term upon appeal from an order denying a motion for a new trial on the judge's minutes in an action tried by a jury.

Id. at 31. This may have suggested, however, that it was within the legislature's power to enlarge the court's jurisdiction. *Id.*

[74] Interestingly enough, the legislature *can* expand the appellate division's jurisdiction. The New York State Constitution provides: "The appellate divisions of the supreme court shall have all the jurisdiction possessed by them on the effective date of this article *and such additional jurisdiction as may be prescribed by law*, provided, however, that the right to appeal to the appellate divisions from a judgment or order which does not finally determine an action or special proceeding may be limited or conditioned by law." N.Y. CONST. art. VI, § 4, cl. (k) (emphasis added). The provision thus "granted the appellate divisions all the jurisdiction possessed by them by statute as of September 1, 1962," *and* such further jurisdiction that the legislature chose to grant. *See* People v. Lopez, 844 N.E.2d 1145, 1152 (N.Y. 2006) (Smith, J., concurring) (citing N.Y. CRIM. PROC. LAW §§ 470.15, 470.20 (McKinney 2017); People v. Pollenz, 493 N.E.2d 541, 542 (N.Y. 1986)).

and

(4) The legislature has in the past intervened in analogous circumstances in which a series of ill-advised high court rulings had unduly and unfairly restricted the scope of Court of Appeals review.

IV. THE COURT OF APPEALS' CONSTITUTIONALLY-BASED LIMITATION IN CIVIL CASES TO ISSUES OF LAW, THE WELL-SETTLED EXCEPTION TO THAT RESTRICTION, AND PAST EXPANSIONS OF THE COURT'S JURISDICTION

Our analysis necessarily begins with the Court of Appeals' powers under the state Constitution, and more specifically with its constitutionally based role as a court *of law*. Article VI, section 3(a) of the Constitution of the State of New York provides:

> The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.[75]

That grant of authority is effectuated in the first sentence of CPLR 5501(b), which states: "The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."[76]

It is thus immediately apparent that the governing provisions rest upon a dichotomy between "questions of law" and "questions of fact[,]" though the latter term appears as such only in the CPLR provision.[77] Yet, while the Court of Appeals' jurisdiction is with certain noted exceptions limited to "questions of law," there is no limitation or restriction either in the Constitution or in CPLR 5501(b) as to the *nature* or *kinds* of "questions of law" it may

[75] N.Y. CONST. art. VI, § 3, cl. (a) (1961). Section 3(b) of the provision defines "the classes of cases" in which an appeal may be taken, for example, "[i]n civil cases . . . [a]s of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him or her." *Id.* at § 3, cl. (b)(3).

[76] N.Y. C.P.L.R. 5501(b) (McKinney 1962).

[77] N.Y. CONST. art. VI, § 3, cl. (a); N.Y. C.P.L.R. 5501(b).

entertain.[78] For instance, while the Court of Appeals is the court of last resort with respect to matters of New York law, its jurisdiction is not limited to *questions of New York law*, as opposed to questions of federal or foreign law.[79]

As is noted in Karger's treatise on Court of Appeals practice, a treatise that Judge Smith once termed "[t]he authoritative work on practice in our court,"[80] "[t]he provisions relating to the power of the Court of Appeals to review questions of fact have had a somewhat chaotic history."[81] A closer examination of that "chaotic" history concerning the court's powers to review questions of fact reveals a not uninteresting irony.

According to Karger, "[t]here were no constitutional provisions on the subject [that is, addressing jurisdiction to review questions of fact] until the 1894 Constitution, and the germ of the existing scheme was first adopted by amendments to the Judiciary Article of the state Constitution approved in 1925."[82] The 1925 constitutional amendments thereafter "authorized the court to review questions of fact, not only in criminal capital cases, but also where the appellate division, on reversing or modifying a final judgment or order, made new findings of fact and rendered a final judgment or order thereon."[83] The 1925 constitutional amendment gave rise to a 1926 enactment of the Civil Practice Act.[84] The provisions thereafter remained essentially unchanged until 1942.[85]

The *Eighth Annual Report of the Judicial Council of the State of New York*, issued in 1942, urged what was there termed "a long overdue revision of the provisions of Article 38 and related sections of the Civil Practice Act governing the jurisdiction and practice of the Court of Appeals in civil cases."[86] Apart from numerous changes that were intended solely to enhance clarity or eliminate anachronisms, the council therein advised two substantive changes in the Court of Appeals' jurisdiction.[87]

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[78] *See* N.Y. CONST. art. VI, § 3, cl. (a), (b)(3); *see also* N.Y. C.P.L.R. 5501(b).

[79] *See* JOHN P. ASIELLO, COURT OF APPEALS OF THE STATE OF NEW YORK: 2015 ANNUAL REPORT OF THE CLERK OF THE COURT 3 (2015). Nor is the court's jurisdiction limited to "questions of law" that were "preserved for appellate review," but we are now jumping the gun a bit. *See* N.Y. C.P.L.R. 5501(b); *see also Eujoy Realty Corp.*, 4 N.E.3d at 342.

[80] Misicki v. Caradonna, 909 N.E.2d 1213, 1222 (N.Y. 2009) (Smith, J., dissenting).

[81] KARGER, *supra* note 22, § 13:7.

[82] *Id.*

[83] *Id.*

[84] *See id.* § 13:10.

[85] *See id.*

[86] STATE OF N.Y., EIGHTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, NO. 16, at 51 (1942) [hereinafter JUDICIAL COUNCIL REP. NO. 16].

[87] *See id.* The council had this to say concerning the overall organization and clarity of the

One substantive change that the council recommended and the legislature thereafter enacted concerned the court's powers to review questions of fact.[88] Up until the 1942 amendment, "the well settled interpretation of existing sections 602 and 620 [of the Civil Practice Act was that] the appellate division must be deemed to have reviewed and affirmed the findings of fact made below[,]" where it said nothing at all on the subject, thus placing review of the facts beyond the Court of Appeals' purview.[89] The council believed that that presumption was "often unreasonable in operation [in that] the truth more often is that the appellate division did not review the findings of fact at all, or indeed would have reversed, or actually intended to reverse, the determination on the facts as well as on the law."[90] The result of the unwarranted presumption was "either to deprive the respondent in the Court of Appeals of a review on the facts by the appellate division, or worse, to reinstate a decision based on findings of fact [that] the appellate division would or intended to reject, with a consequent miscarriage of justice."[91]

The council accordingly recommended that the statutes be amended to state that "the court of appeals shall presume that the questions of fact were not considered by the appellate division" in a case in which the appellate division order did not state otherwise.[92]

provisions governing Court of Appeals practice:

> The existing provisions are haphazardly arranged. They are in many respects ambiguous and misleading, and enveloped in unnecessary and confusing detail. They neglect to set forth many features of the practice, which can only be gathered after painstaking search for and study of the decisions of the court. In addition, the court itself is bound by long established, inflexible rulings prescribing rigid interpretations of the statutes of which their language does not seem to give warning. The result has been to produce various pitfalls in the practice, and numerous appeals have been lost through some procedural misstep.

Id. The council's views were echoed in a 1942 memorandum that was prepared at the Chief Judge's behest and sent to the Governor's counsel. The memorandum reported:

> The present statutory provisions are a patchwork of disconnected, often amended, legislation. Anachronisms persist; some provisions are repetitious, others entirely inconsistent. The practice of the Court of Appeals has become so complex that no term of the court is without its quota of cases foundering on some point of practice. The consequent hardship affects not only parties and attorneys but results as well in an increased burden for the court.

Governor's Bill Jacket, L. 1942, c. 297, at 12–19. The reader can judge for him or herself whether the 1942 amendments, now for the most part incorporated in the pertinent provisions of the Civil Practice Law and Rules, provided the "clear," "simple," and "logical" statutory framework promised by its proponents.

[88] JUDICIAL COUNCIL REP. NO. 16, *supra* note 86, at 53.

[89] *Id*.

[90] *Id*.

[91] *Id.*

[92] *Id.* at 53–54.

The underlying rationale of the amendment, according to the great and greatly missed Professor David D. Siegel, "is that there may be at least one appellate review of the facts," and when it is the appellate division that finds the new facts and "uses them as a basis for a final judgment, the only court in which a review of the new findings can be made is the Court of Appeals."[93]

We thus reach the irony I promised. The Court of Appeals is, first and foremost, a court of law.[94] That notwithstanding, it can review issues of fact when the appellate division makes and relies upon new findings of fact, and it can review the facts in such a case *because* they are new findings that were first made on appeal.[95] Yet, as a result of the Court of Appeals' own rulings, it generally will not review true issues of law where the appellate division entertains an unpreserved issue, makes a new finding of law, and then premises its ruling upon the new finding of law.[96]

The second substantive change effected by the 1942 amendments was "intended to overturn a line of decisions [that] create an idiosyncrasy of practice of which the statutes give no warning."[97] The "idiosyncrasy" was analogous to that now presented by the *Hecker* line of cases.

Prior to 1942, the Court of Appeals had "repeatedly held that if the appellate division should reverse an order setting aside a verdict and ordering a new trial, and should reinstate the verdict, the judgment then entered upon the verdict must not be regarded as a judgment of reversal but is a judgment of affirmance."[98] The council believed that the decisions probably had "their origin in the irrelevant dictates of jurisdictional limitations long since repealed."[99] Whatever the source of the rule, the point was that it affected an unreasonable and undesirable limit on the court's jurisdiction.

Because the Court of Appeals regarded the appellate division reversal as an "affirmance," that meant that an appeal would not lie as of right unless there had been a dissent.[100] The council concluded that, illogical as the rule was, the court was nonetheless "committed

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[93] Richard C. Reilly, *Practice Commentaries*, C5501:9, N.Y. C.P.L.R. 5501 (McKinney 2015).

[94] *See* N.Y. CONST. art. VI, § 3, cl. (a).

[95] *See id.*

[96] *See* JUDICIAL COUNCIL REP. NO. 16, *supra* note 86, at 53–54.

[97] STATE OF N.Y., SEVENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, NO. 23, at 503 (1941) [hereinafter JUDICIAL COUNCIL REP. NO. 23].

[98] *Id.*

[99] *Id.*

[100] *See id.*

to the doctrine, and any change can now be effected only by legislation."[101]

In recommending an amendment that would effectively expand the Court of Appeals' jurisdiction as compared to what the court itself had previously set as its jurisdictional boundary, the council acknowledged that "[a]n argument remains, of course, that the Constitution will not admit this interpretation of its own language."[102] However, it was evidently not much impressed with that argument, stating: "The answer seems again, that the decisions have not fixed so irrevocable a gloss upon those words as to bar the legislature from furthering the constitutional intent."[103]

History thus shows that the legislature acted back in 1941 to overturn a line of precedent that unduly restricted Court of Appeals review and that the Seventh Judicial Council believed that the amendment was not beyond the legislature's purview.[104]

V. THE SOURCE AND NATURE OF THE COURT OF APPEALS' HISTORICAL DISINCLINATION TO CONSIDER *UNPRESERVED* ISSUES OF LAW IN CIVIL CASES

I now focus on the Court of Appeals' power, or lack thereof, to consider *unpreserved* questions of law. The Court of Appeals stated in *Feinberg* that where the defendant had failed to preserve a legal claim that the appellate division had nonetheless reached, the Court of Appeals had "no power to review either the unpreserved error or the appellate division's exercise of discretion in reaching that issue."[105] It said the same thing in *Hecker* and in the other above-cited cases decided prior to and after *Hecker*.[106]

However, as the Court of Appeals recently observed in a different context, "the word 'jurisdiction' is often loosely used."[107] The question thus arises as to whether the court's reticence to entertain unpreserved issues of law is truly of constitutional origin and thereby not susceptible to any legislative fix,[108] or whether, like the

[101] *Id.* at 504.

[102] *Id.*

[103] *Id.*

[104] *See id.* at 503–04.

[105] Feinberg v. Saks & Co., 436 N.E.2d 1279, 1280 (N.Y. 2013).

[106] Hecker v. State, 987 N.E.2d 636, 636 (N.Y. 2013) (citing Elezaj v. Carlin Constr. Co., 679 N.E.2d 638, 638 (N.Y. 1997); Brown v. City of N.Y., 458 N.E.2d 1248, 1249 (N.Y. 1983); *Feinberg*, 436 N.E.2d at 1280; Domino v. Mercurio, 193 N.E.2d 893, 893 (N.Y. 1963)).

[107] Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 991 N.E.2d 198, 199 (N.Y. 2013) (citing Lacks v. Lacks, 359 N.E.2d 384, 386 (N.Y. 1976)).

[108] *See* JUDICIAL COUNCIL REP. NO. 23, *supra* note 97, at 503–04.

series of pre-1941 decisions that disowned jurisdiction with respect to reversals that reinstated jury verdicts (on the theory that the reversals were "affirmances"), the rule is a court-made doctrine and therefore subject to legislative change.[109] I think the latter is clearly the case.

First, there neither is nor ever was any express constitutional limitation to *preserved* issues of law. The Constitution speaks only of "questions of law."[110] As Judge Smith noted in his concurring opinion in *Hecker*: "The appellate division's unreviewable, discretionary choice to reach the issue does not make the issue itself any less one of law."[111] Put differently, an unpreserved question of law is, by definition, a question of law that is not preserved.

Second, the court does in fact consider and resolve unpreserved issues of law in circumstances in which its own precedent approved that course.[112] If the practice were otherwise, then, as Karger observes, the rule "would often be stultifying [and] might require appellate judges to sit as automatons, merely to register their reactions to the arguments which counsel had made below."[113]

The Court of Appeals has expressly reviewed unpreserved issues of law on the grounds that: the objection could not have been obviated if it had been made in the court of original jurisdiction, or relatedly, that the issue appeared on the face of the record and could not have been avoided if raised earlier;[114] the litigant was *pro se* and the point not raised in the *nisi prius* court was particularly intended for the protection of such litigants;[115] failure to consider

[109] *See id.* at 504; *see also Hecker*, 987 N.E.2d at 636 (citing *Elezaj*, 679 N.E.2d at 638; *Brown*, 458 N.E.2d at 1249; *Feinberg*, 436 N.E.2d at 1280; *Domino*, 193 N.E.2d at 893).

[110] N.Y. CONST. art. VI, § 3, cl. (a).

[111] *Hecker*, 987 N.E.2d at 637 (Smith, J., concurring).

[112] *See* KARGER, *supra* note 22, § 17:1.

[113] *Id.*

[114] *See, e.g.*, Rivera v. Smith, 472 N.E.2d 1015, 1023 n.5 (N.Y. 1984) ("Although respondents did not raise this issue [duty to obey] in the courts below, a new argument may be raised for the first time in the Court of Appeals if it could not have been obviated or cured by factual showings or legal countersteps in the court of first instance."); De Sapio v. Kohlmeyer, 321 N.E.2d 770, 772 n.2 (N.Y. 1974) ("[D]efendant's contention that we may not consider the waiver argument because it was not raised below is incorrect. Had the waiver issue been raised below defendant would not have been able to cure or answer it."); *In re* Kaplan, 168 N.E.2d 660, 662 (N.Y. 1960) ("[The] lack of a subpoena was not raised by appellant in the courts below but, being jurisdictional and conclusive, it may be acted on by us especially since the omission was not one which could have been supplied if attention had been called to it below[.]").

[115] Moray v. Koven & Krause, 938 N.E.2d 980, 983–84 (N.Y. 2010) ("While we do not as a general rule resolve cases on grounds not raised in the trial court, the context here is unusual. We are dealing with a statute intended to protect litigants faced with the unexpected loss of legal representation. . . . As a general rule, unrepresented litigants should not be penalized for failing to alert a trial court to the existence of an automatic stay created

the issue would prejudice third parties who had no opportunity to preserve the issue;[116] the new argument was that a contractual provision offended public policy;[117] the issue related to a "fundamental constitutional right[;]"[118] the issue involved statutes of which the court could take judicial notice;[119] or a party can offer new *arguments* for the purpose of *sustaining* a judgment so long as he or she does not raise new *questions*, the latter on the theory that it was the duty of the judges below to correctly ascertain the law with or without the parties' assistance.[120]

The court has even said that while the appellant could not raise in an appeal taken as of right an argument that was first raised on the appeal to the appellate division, the appellant could do so *if the court granted leave to appeal even where*, as actually occurred in the case, the application for leave to appeal was made *during oral argument* of the appeal.[121]

for the very purpose of safeguarding them against adverse consequences while they are unrepresented.").

[116] Grand Jury Subpoena Duces Tecum v. Kuriansky, 505 N.E.2d 925, 928 n.1 (N.Y. 1987) ("Contrary to the dissent, the question of the subpoenas' overbreadth may be considered on the merits in this court. . . . The fact that the petitioners did not raise this point in the trial court does not preclude us from considering it here because the rights of third parties not before the court would be affected by the disclosure."); Johnson Newspaper Corp. v. Stainkamp, 463 N.E.2d 613 (N.Y. 1984) ("Appellant, for the first time in our court, raises contentions under CPL 160.50 which, for that reason, would not normally be available to it. Inasmuch, however, as the rights of third parties not now before us are implicated we modify the order of the appellate division to exempt from the records permitted to be examined, any records which have been sealed pursuant to the provisions of CPL 160.50.").

[117] Niagara Wheatfield Adm'rs Ass'n v. Niagara Wheatfield Cent. School Dist., 375 N.E.2d 37, 39 (N.Y. 1978) ("The threshold question raised by the association is whether the school board may raise, for the first time on appeal to the appellate division, the issue of unenforceability of the contract upon the ground that it contravenes public policy. We believe that it can. Where a contract provision is arguably void as against public policy, that issue may be raised for the first time at the appellate division by a party, or by the court on its own motion.").

[118] People v. Arthur, 239 N.E.2d 537, 539 (N.Y. 1968) (citations omitted) ("The failure to object to the admissions on right to counsel grounds is not fatal since we are concerned with the deprivation of a fundamental constitutional right[.]").

[119] State v. Green, 754 N.E.2d 179, 183 n.2 (N.Y. 2001) (citations omitted) ("Although the state did not rely below on the environmental lien provisions, we may take judicial notice of these provisions and their legislative history[.]").

[120] *See* Persky v. Bank of Am. Nat'l Ass'n, 185 N.E. 77, 79 (N.Y. 1933) ("It [was] . . . true that 'as general rule a party who has obtained a judgment will not be allowed in this court to sustain that judgment upon grounds which were not considered in the courts below,' [but the Court of Appeals was] confined to the *questions* raised or argued at the trial but not to the arguments there presented [inasmuch as] '[i]t was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such [a] judgment as they ought to have given.'" (quoting Wright v. Wright, 123 N.E. 71, 71 (N.Y. 1919); Oneida Bank v. Ontario Bank, 21 N.Y. 490, 504 (N.Y. 1860))).

[121] *See In re* Shannon B., 517 N.E.2d 203, 205 (N.Y. 1987) ("The record reveals that this argument was first raised on the appeal to the appellate division. The issue is therefore not preserved for our review and the appeal as of right must be dismissed on the ground that no

Indeed, while the court declined to decide the appeal in *Misicki* "on a distinct ground that we winkled out wholly on our own" due to the "obvious problem of fair play[,]"[122] it has on occasion resolved appeals on *sua sponte* grounds—in one instance adding: "We, of course, are not bound by the parties' formulation of the issues[.]"[123]

That view was forcefully urged in *Rentways v. O'Neill Milk & Cream Co., Inc.*, which I suspect was the original source for Karger's statement, quoted in *Hecker*, that appellate judges do not sit as "automatons."[124] *Rentways* involved a contractual dispute that arose from the lease of six milk trucks.[125] Plaintiff, the lessor, was supposed to deliver all six trucks within ninety days from the date the contract was signed.[126] It instead "did not furnish any trucks until some four and a half months later" and then furnished only four trucks.[127] The vehicles were leased for a three-year term, but the question was when, in the circumstances, the term began.[128]

Plaintiff in *Rentways* urged that the contract was indivisible and began on one date.[129] Defendant argued that the contract was indivisible and began on a different date.[130] The appellate division instead adopted a view urged by neither party: "that the lease term commenced separately for each group of trucks on the date of its delivery to defendant" and that defendant had breached only as to the two larger trucks.[131] On further appeal, the Court of Appeals said that neither it nor the appellate division was limited to the arguments made by the parties:

> It is urged, however, that, since plaintiff argued at the trial that the lease term commenced for all six trucks on October 22, and defendant, that it began on June 1, the appellate division had, and this court has, no alternative but to accept either the one construction or the other. To say that appellate courts must decide between two constructions

substantial constitutional question is directly involved. Anticipating this development, however, appellant moved at oral argument for leave to appeal, relief which we grant to consider the important issue of the scope of police authority in these circumstances.").

[122] Misicki v. Caradonna, 909 N.E.2d 1213, 1218 (N.Y. 2009).

[123] Geneseo Cent. School v. Perfetto & Whalen Const. Corp., 423 N.E.2d 1058, 1060 n.2 (N.Y. 1981) (citing Wiley v. Altman, 420 N.E.2d 371, 373 n.6 (N.Y. 1981); Rentways, Inc. v. O'Neill Milk & Cream Co., 126 N.E.2d 271, 274 (N.Y. 1955)).

[124] *Rentways*, 126 N.E.2d at 274.

[125] *Id.* at 272.

[126] *Id.*

[127] *Id.*

[128] *See id.*

[129] *Id.* at 274.

[130] *Id.*

[131] *Id.*

> proffered by the parties, no matter how erroneous both may be, would be to render automatons of judges, forcing them merely to register their reactions to the arguments of counsel at the trial level. It is quite true that an appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial. But, quite obviously, the present is not such a case.[132]

None of this, I should note, is intended to criticize any of the many Court of Appeals rulings that turned on express consideration of unpreserved issues. On the contrary, I take issue neither with the general disinclination to consider unpreserved issues nor with the wisdom of any of the above-noted exceptions to that general rule. My point is only that none of those exceptions can be found anywhere in the Constitution and that none of those exceptions, however reasonable they may be, could exist if the Court of Appeals truly lacked "power" or "jurisdiction" to consider unpreserved issues of law.

Finally, the thesis that the court lacks "jurisdiction" to consider unpreserved issues is one of relatively recent vintage. That is, while it has always been the case that the court will not *generally* consider unpreserved issues, that rule was expressly premised on grounds of fairness (to the other parties) and policy, the latter including the desirability of having the lower court's views on the matter in issue.[133]

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[132] *Id.* (emphasis added) (citing Lindlots Realty Corp. v. Suffolk Cty., 15 N.E.2d 393, 395 (N.Y. 1938); Daley v. Brown, 60 N.E. 752, 754 (N.Y. 1901); Osgood v. Toole, 60 N.Y. 475, 479 (N.Y. 1875)).

[133] *See* Wilson v. Galicia Contr. & Restoration Corp., 890 N.E.2d 179, 181 (N.Y. 2008) ("*The objectives of honesty and integrity are not furthered* when the court goes outside applicable law to itself raise arguments not preserved in the trial court." (emphasis added)); Saratoga Cty. Chamber of Commerce v. Pataki, 798 N.E.2d 1047, 1061, 1062 (N.Y. 2003) ("Neither the trial court nor the appellate division addressed the antigambling provision, [so the majority ruled that it was] *unwise for us—as a court of last resort—to initiate the discussion*. . . . The question of the compact's compatibility with the Constitution's antigambling provision is *far too important for us to address in this legal vacuum*." (emphasis added)); Farr v. Newman, 199 N.E.2d 369, 371, 372 (N.Y. 1964) ("[D]efendant's contention that his attorney's conflict of interest precludes the imputation of knowledge to him is made for the first time in this court. . . . On this state of the record it would be manifestly improper to now look at the evidence in a new light, draw an inference of duplicity therefrom, and then invoke the reasoning of the cases relieving a principal on that ground. The well-settled rule is that this court will not consider new arguments, whether of law or fact, or both, where *it appears that if they had been raised at the trial an adequate defense might have been adduced by the other party*. Quite obviously, the assertion of faithlessness comes within the above description of arguments that may not be made for the first time in this court." (emphasis added)); Porter v. Mun. Gas Co., 115 N.E. 457, 459 (N.Y. 1917) ("*[I]t would be unfair to defendant upon this appeal to adopt some other theory*." (emphasis added)); Sterrett v. Third Nat'l Bank, 25 N.E.

In other words, the Court of Appeals generally declined to consider unpreserved issues because it generally deemed that to be the best and most fair course, not because it deemed itself powerless to act differently.[134] And it sometimes chose to consider the unpreserved issue on its merits—for example, on the stated ground that the new argument could not have been obviated if made earlier[135]—because it concluded that the circumstances there warranted an exception to the general rule.[136]

VI. THE GENESIS OF THE NOTION THAT THE DISINCLINATION TO CONSIDER UNPRESERVED ISSUES WAS JURISDICTIONAL

Given the Court of Appeals' many statements to the effect that its reluctance to consider unpreserved issues was premised upon understandable policy concerns (e.g., fairness to the adversary or third parties), the obvious question is how the court's "jurisdiction" and "power" ever entered the discussion. There seem to be two answers.

First, there is some indication of an unfortunate conflation of two distinct matters: *whether* the appellate division chooses to consider an unpreserved issue in the "interests of justice" and the *manner* in which the appellate division resolves such issues *when* it chooses to reach them.[137]

913, 914 (N.Y. 1890) ("If the learned counsel for the defendant intended to raise [a new defense] at the circuit, he should, *in fairness to the court and to the counsel for the plaintiffs*, have said something about it so that his position could have been understood. If he did not intend to raise it there he should not be allowed to take advantage of it here. . . . No suggestion was made as to the form of the action, and a long trial was had upon the theory that it was properly brought and that the plaintiffs could succeed, provided the question of fact was decided in their favor." (emphasis added)).

[134] *See* Bingham v. N.Y. City Transit Auth., 786 N.E.2d 28, 30, 31 (N.Y. 2003) (citing Telaro v. Telaro, 255 N.E.2d 158, 160 (N.Y. 1969)) ("[W]e lack jurisdiction to review unpreserved issues in the interest of justice [but *could* consider an unpreserved issue] if it could not have been avoided by factual showings or legal countersteps had it been raised below. . . . [S]ound policy reasons underlie this principle. . . . Had defendants' new argument been presented below, plaintiff would have had the opportunity to make a factual showing or legal argument that might have undermined defendants' position. Additionally, this court . . . would have benefitted from the wisdom of the trial court and appellate division.").

[135] Rivera v. Smith, 472 N.E.2d 1015, 1023 n.5 (citing Am. Sugar Ref. Co. v. Waterfront Comm'n of N.Y. Harbor, 432 N.E.2d 578, 584 (N.Y. 1982); N.Y. Shipping Ass'n v. Waterfront Comm'n of N.Y. Harbor, 458 U.S. 1101, 1101 (1982); *Telaro*, 255 N.E.2d at 160)).

[136] *See, e.g.*, *Bingham*, 786 N.E.2d at 30, 31 (citing *Telaro*, 255 N.E.2d at 160); *see also Rivera*, 472 N.E.2d at 1023 n.5 (citing *Am. Sugar Ref. Co.*, 432 N.E.2d at 584; *N.Y. Shipping Ass'n*, 458 U.S. at 1101; *Telaro*, 255 N.E.2d at 160)).

[137] *See, e.g.,* Hecker v. State, 987 N.E.2d 636 (N.Y. 2013) (citing Elezaj v. P.J. Carlin Const. Co., 679 N.E.2d 638, 638 (N.Y. 1997); Brown v. City of N.Y., 458 N.E.2d 1248, 1249 (N.Y. 1983); Feinberg v. Saks & Co., 436 N.E.2d 1279, 1280 (N.Y. 1982); Domino v. Mercurio, 193 N.E.2d 893, 893 (N.Y. 1963)).

As has already been shown, long settled law holds that the appellate division may consider unpreserved issues and arguments simply because it chooses to do so in the "interests of justice." It is equally clear that the Court of Appeals cannot review discretionary determinations except for abuses of discretion.[138] This appears to have led to the notion that the discretionary nature of the decision to consider the issue of law renders the issue itself discretionary and unreviewable.[139] Yet, that is simply illogical. The fact that the decision to consider the argument in the first instance was discretionary cannot logically transform a substantive legal ruling into a discretionary ruling.[140]

By way of example, while the CPLR does not recognize any such animal as a "surreply affidavit" and familiar case law holds that a court should not consider new arguments raised in the reply papers, settled law entitles state supreme court, in its discretion, to permit the responding party to submit surreply papers and to thereafter consider the new arguments first made in reply (since the prejudice to the answering party has been thus mitigated).[141] Supreme court

[138] *See* KARGER, *supra* note 22, § 16:1 ("[T]he doctrine is well established that an exercise by the courts below of discretion vested in them, with respect to a matter not controlled by some binding principle or rule of law, is generally not reviewable in the Court of Appeals. That doctrine had its origin in early decisions of the Court of Appeals, and it has been described as being in keeping with that court's 'character as a tribunal in which questions of law only are to be considered, save in [certain] excepted cases.'" (citation omitted)).

[139] *See Hecker*, 987 N.E.2d at 636 (alteration in original) (citing *Elezaj*, 679 N.E.2d at 638; *Brown*, 458 N.E.2d at 1249; *Feinberg*, 436 N.E.2d at 1280; *Domino*, 193 N.E.2d at 893) ("The issue decided by the appellate division—whether the area in which plaintiff suffered his injury was a 'floor, passageway[, or] walkway' within the meaning of 12 NYCRR 23-1.7(d)—was not preserved in the Court of Claims, and the appellate division's ruling must be deemed an exercise of its interests of justice jurisdiction. We have no power to review either the appellate division's exercise of its discretion to reach that issue, or the issue itself."); *Brown*, 458 N.E.2d at 1249 ("Although the appellate division denominated its reversal as 'on the law,' inasmuch as the unpreserved error was reviewed by the appellate division, this court construes the reversal as an exercise of discretion which is beyond this court's power to review." (citation omitted)); *Feinberg*, 436 N.E.2d at 1280 ("[I]n reaching the unpreserved legal issue as to whether the verdicts were inconsistent, the appellate division exercised its broad discretionary powers of review. . . . This court has no power to review either the unpreserved error or the appellate division's exercise of discretion in reaching that issue.").

[140] *See generally* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1489 (1983) ("[While] not logically or even empirically true that all informal . . . actions are exercises of discretion, courts will typically label informal actions discretionary because the standard by which the actions are reviewed uses that label.").

[141] *See, e.g.,* Pena-Vazquez v. Beharry, 919 N.Y.S.2d 336 (App. Div. 2011) ("The court providently exercised its discretion in considering defendants' surreply."); Ennis-Short v. Ostapeck, 890 N.Y.S.2d 215, 217 (App. Div. 2009) ("Supreme court did not abuse its discretion in considering the surreply affidavit submitted by plaintiffs' counsel."); Gastaldi v. Chen, 866 N.Y.S.2d 750, 751 (App. Div. 2008) ("Supreme court providently exercised its discretion in considering the surreply of the plaintiffs, which was in response to the gap-in-treatment argument raised in the defendants' reply papers for the first time.").

may, in the alternative, decline to permit submission of surreply papers.[142] The decision whether to accept surreply papers is thus wholly discretionary.[143]

Yet, if the *nisi prius* court exercises its discretion to allow surreply papers, that surely does not render the rulings thus reached discretionary as well.[144] If, for instance, the defendant-municipality first contended in its reply papers that it was imbued with governmental immunity as to the claims in issue and the *nisi prius* court authorized the plaintiff to interpose surreply papers and then considered the defense on its merits, I doubt anyone would seriously suggest that the resultant dismissal, if that is the *nisi prius* ruling, thus becomes an unreviewable exercise of discretion.[145]

Or to take a more common example, CPLR 3211(c) states that "the court, after adequate notice to the parties, may treat the [CPLR 3211] motion [to dismiss] as a [CPLR 3212] motion for summary judgment."[146] While the court must afford the parties adequate notice in order to do so,[147] the case law establishes that the decision to convert a 3211 motion into a summary judgment motion is purely discretionary.[148] However, that the *nisi prius* court was *not obliged*

[142] *See In re* Hudson Prop. Owners' Coal., Inc. v. Slocum, 939 N.Y.S.2d 177, 180 (App. Div. 2012) ("Supreme court did not abuse its discretion in disregarding petitioners' surreply, which was submitted without permission from the court and contained new factual information[.]"); 430 E. 86th St. Tenants Comm'n v. New York Div. of Hous. & Cmty. Renewal, 678 N.Y.S.2d 322, 323 (App. Div. 1998) ("There is no right to sur-reply and there is no reason for compelling DHCR's consideration of any further response by the tenants absent a showing of prejudice.").

[143] *See* David D. Siegel, *"Sur-Reply" on Motion?: While in Motion Practice There's Just Motion Papers, Answering Papers, and Reply Papers, "Sur-Reply" Can Be Accepted by Court in Its Discretion*, 220 SIEGEL'S PRAC. REV. 4 (2010).

[144] *See generally* Held v. Kaufman, 694 N.E.2d 430, 432–33 (N.Y. 1998) (considering the merits of a defense first raised in a *nisi prius* reply and then addressed in a *nisi prius* surreply).

[145] *See* Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 577 N.Y.S.2d 974, 975 (App. Div. 1992) (permitting a filing of a surreply affidavit where the matter in issue was whether the defendants, consisting of the St. Regis Mohawk Tribe and a related not-for-profit corporation, were entitled to sovereign immunity).

[146] N.Y. C.P.L.R. 3211(c) (McKinney 1962).

[147] *See* Rich v. Lefkovits, 437 N.E.2d 260, 263 (N.Y. 1982).

[148] *See, e.g.*, Paolicelli v. Fieldbridge Assoc., LLC, 992 N.Y.S.2d 60, 66 (App. Div. 2014) ("Supreme court did not improvidently exercise its discretion in denying the defendant's application pursuant to CPLR 3211(c) to convert the motion to one for summary judgment."); Lerner v. Prince, 987 N.Y.S.2d 19, 26 (App. Div. 2014) ("[W]e find that the IAS court providently exercised its discretion in refusing to convert the dismissal motions into summary judgment motions[.]"); Wadiak v. Pond Mgmt., LLC, 955 N.Y.S.2d 51, 52 (App. Div. 2012) ("We reject defendants' argument, that the IAS court improvidently exercised its discretion, by refusing, at oral argument, to convert that branch of their motion to dismiss plaintiff's defamation claim to a motion for summary judgment."); TAMMY E. HINSHAW & RACHEL M. KANE, 6A CARMODY-WAIT § 38:166 (2d ed. 2016) ("A court properly treats a motion to dismiss as one for summary judgment under statute where all the parties lay bare their proof and submit extensive affidavits, giving the plaintiff sufficient opportunity to make an appropriate

to convert the motion into one for summary judgment does not make the court's grant (or denial) of summary judgment into a discretionary ruling that is itself reviewable only for abuse of discretion.[149]

Thus, to the extent that the *Hecker* notion that the Court of Appeals lacks "power" or "jurisdiction" to entertain unpreserved legal issues reached by the appellate division flows from the fact that the appellate division's decision to reach those issues was discretionary, the causal connection fails.

The second possible source of the *Hecker* rule is that which was noted in Judge Smith's concurrence therein. The statements may have been a carryover from the rule followed in criminal cases that were governed by a statute that specifically directed the result.[150] Whereas there is no statute applicable to standard civil appeals that: (a) generally requires that the issue raised on appeal has been preserved in the *nisi prius* court, or (b) effectively defines "question of law" as a *preserved* issue of law,[151] the situation is different on the criminal side of the docket. Section 470.05(2) of the Criminal Procedure Law, which was enacted in 1970,[152] provides that:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same.[153]

Of course, strictly speaking, the statute does not say that the

record and it is clear that both sides deliberately chart the summary judgment course. Conversely, the trial court does not abuse its considerable discretion in declining to convert a motion to dismiss to a motion for summary judgment, where the movant specifically denotes the motion as one to dismiss, neither party indicates that they seek summary judgment, and the parties' supporting affidavits do not manifest an intent to chart a summary judgment course.").

[149] *See* Lightman v. Flaum, 761 N.E.2d 1027, 1029–30, 1032 (N.Y. 2001); *see also* Wein v. City of N.Y., 331 N.E.2d 514, 520 (N.Y. 1975) (showing that the court had no problem addressing the merits presented in motions that had been converted pursuant to CPLR 3211(c)).

[150] *See generally* People v. Riley, 973 N.E.2d 1280, 1282–83 (N.Y. 2012) (Pigott, J., dissenting); *see also* Hecker v. State, 987 N.E.2d 636, 637 (N.Y. 2013) (Smith, J., concurring).

[151] *Cf.* N.Y. C.P.L.R. 4401 (McKinney 1962). The text reference to the absence of a statute that "*generally* requires" preservation allows for exceptions. There are, as I have already noted, some requirements as to certain *specific issues* that may be raised on the civil side only when preserved by timely objection during a trial. *See id.* (discussing alleged entitlement to a direct verdict); C.P.L.R. 4110-b (regarding objection to the court's charge to the jury); C.P.L.R. 5501(a)(3) (concerning rulings on the admission or exclusion of proof).

[152] N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 1970).

[153] *Id.*

absence of timely objection regarding a question of law means that the question is thereby not one "of law." Rather, it says that the matter is thereby not "a question of law" with regard to "purposes of appeal."[154] Be that as it may, it is hardly surprising that the Court of Appeals has repeatedly ruled on the criminal side of the docket that, with certain exceptions,[155] section 470.05(2) precludes Court of Appeals review of unpreserved issues even in those instances in which the appellate division reverses on the basis of an unpreserved issue.[156]

The key for present purposes is that section 470.05(2) does not apply to civil cases.[157] Even more to the point of whether there is a *constitutional* impediment to a statutory overrule of *Hecker*, the very fact that the limitation recognized on the criminal side of the docket arises from and has been attributed to a statute (i.e., section 470.05(2)) connotes that the limitation can also be modified or eradicated by statute, should the legislature elect to do so.[158]

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[154] *See id.*

[155] *See, e.g.,* People v. Samms, 731 N.E.2d 1118, 1120–21 (N.Y. 2000). While the subject is beyond the scope of this article, I should note that as in civil appeals there are a host of court-made exceptions in which the Court of Appeals will consider unpreserved issues on the criminal side of the docket notwithstanding the provisions of section 470.05(2). *See id.* at 1120–21 (involving an issue of an unauthorized sentence); *see also* People v. Walston, 14 N.E.2d 377, 380 (N.Y. 2014) (involving an issue of a mode of proceeding error that tainted the trial); People v. Mack, 55 N.E.3d 1041, 1043, 1044 (N.Y. 2016) ("A trial court's failure to fulfill its first responsibility—meaningful notice to counsel—falls within the narrow class of mode of proceedings errors for which preservation is not required[, but holding that the alleged error in question did not] constitute a mode of proceedings error[.]").

[156] *See* People v. Riley, 973 N.E.2d 1280, 1281 (N.Y. 2012) ("[Dissenters'] novel [thesis] flies in the face of the Criminal Procedure Law and thus four decades' worth of our precedent[.]"); People v. Baumann & Sons Buses, Inc., 846 N.E.2d 457, 459 (N.Y. 2006) (citations omitted) ("As the intermediate appellate court reversed the conviction on the basis of an unpreserved error, and therefore as a matter of discretion in the interest of justice, its order is not appealable to this court."); People v. Cona, 399 N.E.2d 1167, 1169 (N.Y. 1979) (citations omitted) ("Where the appellate division exercises this discretion, however, and reverses a conviction on the basis of an issue not preserved, its order is then grounded at least in part upon the exercise of that discretion and is thus not appealable to this court."); *see also* People v. Turriago, 681 N.E.2d 350, 351, 353 (N.Y. 1997) (citations omitted) ("[T]he requirement of a founded suspicion of criminal activity does not apply when the police seek consent to search a vehicle following a stop for a traffic violation, [involves a] purely legal question[.]"). The court in *Turriago* nonetheless held that section 470.05(2) precluded review inasmuch as the matter arose from an unpreserved issue. *See id.* at 354; *but see* People v. Ermo, 392 N.E.2d 1248, 1250 (N.Y. 1979) (Jasen, J., concurring) (citation omitted) ("Were it not for the disposition at the appellate division, the error with respect to denial of the right to counsel would not have been preserved for our review. It is only because the appellate division had jurisdiction to consider the contention, even though the error was not raised at the suppression hearing, and because the appellate division predicated its reversal on this error, that defendant may urge the correctness of the appellate division's determination of the question of law involved in support of an affirmance.").

[157] *See* CRIM. PROC. LAW § 470.50(2).

[158] *See generally* David Rossman, *Criminal Law: "Were There No Appeal": The History of*

VII. THE CASE FOR MEASURED LEGISLATIVE ACTION

For the reasons stated above, I think the following conclusions are clear:

(1) There is no *constitutional* impediment that prevents the Court of Appeals from considering unpreserved issues of law or that prevents the legislature from specifically authorizing the court to do so. Far from it, the Court of Appeals even now considers unpreserved issues in a variety of court-defined circumstances and the legislature has in the past intervened to effectively free the court from precedent that unduly restricted reviewability of issues (e.g., the old rule that reinstatement of a jury's verdict was an "affirmance" and therefore not reviewable as a reversal);

(2) The court's relatively recent view that it lacks "power" to consider unpreserved issues (except, of course, when it *does* consider unpreserved issues) appears to have arisen from: (a) an unfortunate conflation of the appellate division's discretionary determination to consider the legal issue with the issue itself, and/or (b) a carryover from criminal cases that were governed by a restrictive statute with no analog on the civil side; and

(3) My views notwithstanding, the Court of Appeals is not likely to change the rule any time in the foreseeable future given its current entrenchment in the case law.

In light of all the above, I advocate for legislative action, but more importantly, *measured* legislative action.

First, for the reasons stated above, CPLR 5501(b) should be amended so as to specifically authorize review of unpreserved issues of law where: (a) the appellate division reverses or modifies on the basis of the unpreserved issue, and (b) the case is appealable as of right or by permission under current law.

I emphasize that such would not in any way alter the prerequisites for *appealability*. Except for those exceptions that currently exist (e.g., constitutional issues and orders granting a new

Review in American Criminal Courts, 81 J. CRIM. L. & CRIMINOLOGY 518, 519 & n.2 (1990) ("[It is within the states' power to elect the ability to, and the means of, review for criminal cases, as] the Constitution requires neither the states nor the federal government to review their own criminal convictions.").

trial where the appellant proceeds with the risk that affirmance will result in judgment absolute against him or her), the would-be appellant would still generally need two dissents on an issue of law or court permission.[159] The amendment would relate solely to *reviewability* in that subset of cases in which the appellate division: (a) elects to consider an unpreserved issue of law on its merits, and (b) reverses or modifies on the basis of that issue.

Second, I submit that it makes good sense to confine the change to those cases in which the appellate division reverses or modifies on the basis of the unpreserved issue, thus excluding those cases in which the appellate division either rejects the new argument on its merits or otherwise deems it unavailing. This follows from weighing of the competing policy concerns.

Consider, if you will, all of the cogent policy concerns that *generally* weigh against the consideration of unpreserved issues of law.[160] Among other considerations, such may be unfair to the proponent's adversary, especially if the issue could have been obviated if raised earlier.[161] The prerequisite of preservation also makes appeals more manageable and predictable—this as compared to a system in which the issues and arguments raised on appeal may routinely differ from those asserted in the court of original jurisdiction.

There is, in addition, the central point that an appellate court is supposed to pass on the wisdom and propriety of the lower court's ruling—this as opposed to sitting as a higher-level *nisi prius* court.[162] Also, when the Court of Appeals passes on a legal issue that was previously addressed by the *nisi prius* court and the appellate division, it has the benefit of those rulings.[163] That benefit would be lost were the court to routinely consider unpreserved issues of law.

Now consider the policy considerations that weigh against review where the appellate division exercised its discretion to hear an unpreserved issue but then went on to reject the unpreserved argument or deem it unavailing. Except for the last stated concern (the absence of lower courts' rulings as to the unpreserved issue),

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[159] *See* CLERK'S OFFICE, N.Y. COURT OF APPEALS, THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE 3, 5, 6, http://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last visited Feb. 13, 2017).

[160] *See* Dustin D. Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. MIAMI L. REV. 521, 531 (2013).

[161] *See* United States v. Atkinson, 297 U.S. 157, 159 (1936) (citations omitted).

[162] *See* Bingham v. New York City Transit Auth., 786 N.E.2d 28, 30–31 (N.Y. 2003).

[163] *See* N.Y. CONST. art. VI, § 3, cl. (a), (b)(4), (b)(7).

the concerns that weigh against review of the unpreserved issue are *exactly the same* as in the instance in which the appellate division declined to exercise jurisdiction in the first place. That the appellate division considered and rejected the new argument would neither make the Court of Appeals' decision to review the matter any less unfair to the adversary, or any less harmful to the predictability of appeals, or any less inconsistent with the core principles of appellate review. Even with respect to the one policy concern that has been mitigated—that the Court of Appeals would have the benefit of the appellate division's view on the substantive matter in issue—the court would still not have the benefit of a *nisi prius* ruling.

Equally important, in the instance in which the appellate division considers but rejects the new argument or deems it unavailing, the reasons that weigh in *favor* of Court of Appeals consideration of the new argument are no greater than they would have been had the appellate division instead declined to consider the argument. At bottom, the only argument in favor of consideration of the unpreserved issue is that a party who deserves to prevail should not lose because of his or her counsel's failure to timely raise the winning issue. Regardless of whether one feels that such is a significant consideration or that it is merely the inevitable consequence of an adversarial system, the point is that the appellate division's determination to consider the new argument on its merits does not in and of itself make the losing party's plea for Court of Appeals' review any stronger or more sympathetic than it would have been had the appellate division not considered the issue at all. Indeed, if anything, the underlying concern that the party who lost may have deserved to win is *less* compelling by virtue of the fact that the one court that considered the new argument rejected it or deemed it unavailing.

Now, let us consider the competing policy concerns that exist when the appellate division reverses on the basis of an unpreserved issue of law. There are, as compared to the situation in which the new argument was deemed unavailing, at least three distinct differences:

> (1) There is here no concern that consideration of the issue would be unfair to the Court of Appeals respondent. It was, after all, the respondent who failed to preserve the issue;[164]

[164] Hecker v. State, 987 N.E.2d 636, 637 (N.Y. 2013).

(2) There is, at least to me, something distinctly disturbing with the circumstance that a party who may deserve to win should nonetheless lose solely because *his or her adversary* failed to preserve a legal argument; and

(3) In a system that is based on the assumption that the availability of appellate review furthers the provision of justice and the perception that justice is being provided, we have a class of legal rulings—appellate division rulings as to unpreserved issues—that are with the exceptions noted above not reviewable at all.

As to the last factor, there is no acceptable reason why the Court of Appeals should have explicit statutory authority to review new factual findings made by the appellate division, as it now does under CPLR 5501(b), but no such authority to review new findings of law made by the appellate division.

Finally, I think it is important that the amendment clearly signify that it is not intended to alter any other rules that the Court of Appeals has enunciated or may in the future articulate concerning the reviewability of unpreserved issues of law. As has been shown, while the Court of Appeals has as of late repeatedly said that it lacks the "power" to consider unpreserved issues of law, it has a long history of nonetheless doing so in specified circumstances. Those standards have grown and changed over the course of many decades and have done so, as far as I can tell, without any significant criticism. Accordingly, it would, I believe, be a mistake to attempt to codify all of the circumstances in which preservation is required or to in any way inhibit the court from continuing to develop such rules, as it has always done, on a case-by-case basis.