A SPECIAL TRIBUTE TO THE THIRD DEPARTMENT

THE ALBANY NINE: RECOGNIZING ALBANY LAW SCHOOL'S ALUMNI JUSTICES OF THE THIRD DEPARTMENT

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I. INTRODUCTION

In 1894, New York's Constitutional Convention set out to correct the inefficiencies of the state's intermediate appellate courts when it supplanted the general terms with the appellate division and its four judicial departments.[1] When the first cases were heard by the appellate division in January of 1896,[2] one of Albany Law School's own was a member of the Third Department's five justice panel.[3] D. Cady Herrick (pronounced D-Cady),[4] an Albany native and a former Albany County District Attorney and justice of the General Term, served as a Justice of the Appellate Division of the New York State Supreme Court, Third Judicial Department from 1896 to 1900.[5]

At a time when law was learned primarily through

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[1] DANIEL C. BRENNAN, THE HISTORY AND JUSTICES OF THE APPELLATE DIVISION, THIRD DEPARTMENT, 1896 TO THE PRESENT 2 (rev. ed. 2009), *available at* http://www.courts.state.ny.us/ad3/History.pdf.

[2] *Id.*

[3] *Id.*

[4] Brooklyn Daily Eagle, *How He Became "D." Cady Herrick*, N.Y. TIMES, Sept. 23, 1904, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9C01E3DA113DE633A25750C2A96F9C946597D6CF.

[5] BRENNAN, *supra* note 1, at 10.

apprenticeship and independent study, Justice Herrick bucked the trend—at least in part—by enrolling in a course at the law school before graduating in 1868.[6] One of his classmates there would become a prominent alumnus in his own right. This man was William McKinley, who would become the 25th President of the United States.[7] Interestingly enough, President McKinley was elected President in the same year that Justice Herrick was appointed to the Third Department bench.[8] Not a bad year for the class of 1868.

By this measure, then, Justice Herrick was the first Albany Law School alumnus to serve as a justice of the Third Judicial Department. History would find him to be in good company. In its 104 year history, 36 of the Third Department's 88 justices have graduated from Albany Law School.[9]

This number, as astonishing as it is in its own right, becomes

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[6] *Id.*

[7] *Id.*

[8] *McKinley Elected President United States,* N.Y. TIMES, Nov. 4, 1896, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9905E5DE1331E033A25757C0A9679D94679ED7CF.

[9] The following is a list of the Albany Law School alumni who have served as justices of the Appellate Division, Third Judicial Department. They are arranged in order of their appointment: D. Cady Herrick, Third District, 1896–1900; John M. Kellogg, Fourth District, 1905–1921, Presiding Justice 1915–1921; Albert H. Sewell, Sixth District, 1907–1912, 1917; Harold J. Hinman, Third District, 1922–1932; F. Walter Bliss, Third District, 1933–1944; Gilbert V. Schenck, Third District, 1939–1944; O. Byron Brewster, Fourth District, 1944–1952; Francis Bergan, Third District, 1949–1963, Presiding Justice, 1960–1963 (Court of Appeals, 1963–1972); Daniel F. Imrie, Fourth District, 1953–1955; James Gibson, Fourth District, 1956–1969, Presiding Justice, 1964–1969 (Court of Appeals, 1969–1972); J. Clarence Herlihy, Fourth District, 1958–1981, Presiding Justice, 1969–1975; Donald S. Taylor, Third District, 1961–1968; Felix J. Aulisi, Fourth District, 1964–1971; Ellis J. Staley, Jr., Third District, 1966–1980; Domenick L. Gabrielli, 1967–1968 (Court of Appeals, 1972–1982); Lawrence H. Cooke, Third District, 1969–1974 (Court of Appeals, 1974–1984; Chief Judge, 1979–1984); Michael E. Sweeney, Fourth District, 1969–1983; T. Paul Kane, Third District, 1972–1990; Robert G. Main, Fourth District, 1973–1987; John L. Larkin, Third District, 1974–1979; Harold E. Koreman, Third District, 1975–1977, Presiding Justice, 1976–1977; A. Franklin Mahoney, Third District, 1976–1993, Presiding Justice, 1978–1991; John T. Casey, Third District, 1979–1997; Leonard A. Weiss, Third District, 1981–1994, Presiding Justice, 1992–1993; D. Bruce Crew III, Sixth District, 1991–2007; Anthony V. Cardona, Third District, 1993–present, Presiding Justice, 1994–present; Edward O. Spain, Third District, 1994–present; Anthony J. Carpinello, Third District, 1996–2008; Victoria A. Graffeo, Third District, 1998–2000 (Court of Appeals, 2001–present); Robert S. Rose, Sixth District, 2000–present; John A. Lahtinen, Fourth District, 2000–present; Bernard J. Malone, Jr., Third District, 2008–present; Leslie E. Stein, Third District, 2008–present; William E. McCarthy, Third District, 2009–present; Elizabeth A. Garry, Sixth District, 2009–present; John C. Egan, Third District, 2010–present. BRENNAN, *supra* note 1, at 6–9. This number becomes all-the-more impressive when you consider the numbers from other law schools: "Cornell (8), Syracuse (4), Columbia (3), Harvard (3), Yale (3), Buffalo (2), New York University (2), Michigan (2), Villanova (1), and Georgetown (1)." STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION THIRD JUDICIAL DEPARTMENT 28 (2009).

even more impressive when you consider that the next most represented law school on the court has been Cornell Law School, which has graduated eight justices of the Third Department.[10] Moreover, when you take into account that twenty-three of the eighty-eight justices never attended law school to begin with, this means that Albany Law School graduates have comprised a majority among all law school alumni of the Third Department, with 36 out of 65 Justices, or, just over 55 percent of the Third Department's law school educated judiciary having matriculated from Albany Law.[11]

The significance of this achievement is more than merely numerical. While the high correlation may be in part attributable to certain geographical factors,[12] the sheer quantity of Albany Law alums has not been achieved for want of jurists of exceptional quality. Over the years, the justices who have traversed the Third Department by way of Albany Law School have arguably been among the finest in the court's history. From Presiding Justices A. Franklin Mahoney and Leonard A. Weiss—two men whose undergraduate studies were interrupted by service in the Marines and Army (respectively) during WWII, and both of whom would return and attend Albany Law School and thereafter enjoy long and distinguished careers in the judiciary[13]—to Judge Domenick L. Gabrielli[14] and Chief Judge Lawrence H. Cooke[15]—who both went on to serve as judges on the Court of Appeals, with Judge Cooke serving as the chief judge of New York's highest court from 1979–1984[16]—there is a tradition of excellence here that dates back to Justice Herrick's service on the very first court.

The respective career paths these justices have taken en route to the Third Department bench have been varied. These men and

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[10] STATE OF NEW YORK SUPREME COURT, *supra* note 9, at 28.

[11] *Id.*

[12] Namely, the fact that Albany Law School and Cornell Law School are the only law schools located within the territorial jurisdiction of the Third Department, coupled with the fact that many of the justices who attended Albany Law School were originally from upstate New York counties located within the Third Department's jurisdiction, and returned home to practice there after graduation, is certainly one likely explanation for the extremely high correlation between Albany Law graduates and Third Department justices.

[13] STATE OF NEW YORK SUPREME COURT, *supra* note 9, at 21.

[14] BRENNAN, *supra* note 1, at 43. Albany Law School's annual intra- and inter-school moot court oral advocacy competitions are named for the late Judge Gabrielli, who was instrumental in founding the competition at Albany Law.

[15] The *Albany Law Review*'s annual symposium and adjoining publication entitled "State Constitutional Commentary" are named in honor and loving memory of the late Chief Judge Lawrence H. Cooke.

[16] BRENNAN, *supra* note 1, at 43.

women have served as district attorneys, members of state and local government, FBI Special Agents,[17] newspapermen,[18] and law school professors[19] before making their way to the appellate bench. They have fought in the wars that defined their generations.[20] Some have even gone on to serve on the Court of Appeals.[21] Yet, in reviewing the careers of these thirty-six women and men, the common thread that seems to connect them all, from 1896 to the present day, is that they have each demonstrated dedication to their

[17] Presiding Justice Harold E. Koreman was a special agent of the FBI from 1941–1946. He graduated from Albany Law School in 1940. STATE OF NEW YORK SUPREME COURT, *supra* note 9, at 20.

[18] Presiding Justice Francis Bergan worked as a newspaperman in Albany before attending Albany Law School, from which he graduated in 1923. *Id.* at 19.

[19] Justice Ellis J. Staley, Jr., taught federal and state taxation at Albany Law School from 1945–1956. Justice Staley, Jr. was a 1932 graduate of Albany Academy, a 1936 graduate of Yale University, and a 1939 graduate of Albany Law School. BRENNAN, *supra* note 1, at 41–42. In addition to Justice Staley, Jr., Justice John T. Casey was a longtime Professor of Law at Albany Law School. He taught criminal practice and procedure from 1955–1977. Justice Casey graduated from Albany Law in 1949. *Id.* at 48.

[20] The following fifteen justices served in the military either before or after graduating from Albany Law. The date span following the justices' names are the years they served on the Third Department. Gilbert V. Schenck, 1939–1944, a 1906 graduate of Albany Law, served in the 10th Infantry, New York State National Guard, and during WWI, commanded the Third Anti-Aircraft Machine Gun Battalion, obtaining the rank of major; F. Walter Bliss, 1933–1944, a 1915 graduate of Albany Law, served as a first lieutenant in the Army Signal Corps during WWI; James Gibson, 1956–1969, Presiding Justice, 1964–1969 (Court of Appeals, 1969–1972), a 1926 graduate of Albany Law, served as a captain in the Army in Europe during WWII; Felix J. Aulisi, 1964–1971, admitted to practice in 1925, served for three years during WWII in the Army in North Africa, Sardinia, and Italy, and thereafter as a military judge with the occupation forces in Italy, obtaining the rank of captain and major; Michael E. Sweeney, 1969–1983, admitted to practice in 1939, served as a staff sergeant in the Army in the Asiatic-Pacific theatre during WWII; T. Paul Kane, a 1948 graduate of Albany Law, served on the destroyer *USS Paul Hamilton* for two-and-one-half years during WWII, as both a gunnery officer and later as an executive officer; Robert G. Main, 1973–1987, a 1946 graduate of Albany Law, whose law school career was interrupted by service in the U.S. Marine Corp. during WWII; John L. Larkin, 1974–1979, who served as an ensign in the United States Navy during WWII; A. Franklin Mahoney, 1976–1993, Presiding Justice 1978–1991, a 1950 graduate of Albany Law, served as an officer in the U.S. Marine Corp. during WWII; John T. Casey, 1979–1997, a 1949 graduate of Albany Law, served as an ensign in the United States Navy during WWII; Leonard A. Weiss, 1981–1994, Presiding Justice 1992–1993, a 1948 graduate of Albany Law, served in the Army during WWII; Anthony V. Cardona, 1993–present, Presiding Justice 1994–present, a 1970 graduate of Albany Law, served as an officer in the United States Navy from 1963–1967 during the Vietnam War; Edward O. Spain, 1994–present, a 1966 graduate of Albany Law, served in the United States Navy, Judge Advocate Corp., during the Vietnam War; Robert S. Rose, 2000–present, a 1968 graduate of Albany Law, served as a commanding officer of a military intelligence unit in West Germany before serving as a captain during the Vietnam War; and finally, Bernard J. Malone, Jr., 2008–present, admitted to practice in 1973, served as an officer in the United States Army during the Vietnam War, from 1965–1969. BRENNAN, *supra* note 1, *passim*.

[21] Five Albany Law grads have served on the Court of Appeals after serving on the Third Department. They are: Francis Bergan, 1963–1972; James Gibson, 1969–1972; Domenick L. Gabrielli, 1972–1982; Lawrence H. Cooke, 1974–1984; Chief Judge, 1979–1984; and finally, Victoria A. Graffeo, 2000–present. STATE OF NEW YORK SUPREME COURT, *supra* note 9, at 14.

country, state, and communities, and of course, to the judiciary as well.

There are currently twelve justices on the Third Department. Of the twelve, nine are Albany Law alumni. Today's alumni justices follow in the esteemed footsteps of their predecessors by exemplifying service in its finest form.

The purpose of this article is to recognize the nine Albany Law alumni justices who currently serve on the Third Department. Part II provides a short biography of each justice and details his or her path to the court.

Part III provides a sampling of the jurisprudence of the justices by broadly examining some of the decisions they have taken part in since being appointed to the Third Department. This analysis is particularly fitting, considering that the appellate divisions undertake the overwhelming majority of appellate review in the state.

Recent decisions were given preference to include opinions with as many of the nine as possible. Decisions from a wide spectrum of legal subjects are discussed and examined, focusing on cases under the disciplines of criminal procedure, New York Practice, commercial law, same-sex legal issues, and employment law. Some cases discussed are timely departmental splits and involve currently debated topics in the law, while others involve more general questions of statutory interpretation. All, though, are emblematic of the decisions the court renders on a routine basis.

Part IV of this article is entitled "Vindicated Dissenters." This section features three recent cases where one of the alumni justices dissented from his or her colleagues, and was later vindicated when the Court of Appeals reversed the majority's decision. Statistics detailing the frequency of this occurrence—or even the occurrence itself—are maintained or discussed by legal commentators infrequently. Yet, it is easy to see how interesting and telling such records could be when performing in-depth legal analysis of appellate division justices and cases.

Part V presents this author's hope that the legal analysis contained in this article, and in the *New York Appeals* edition of the *Albany Law Review*, will be a springboard for more in-depth analysis focusing on appellate division justices and the cases they decide.

II. THE JUSTICES

A. Presiding Justice Anthony V. Cardona

As currently the longest tenured member of the court, Presiding Justice Anthony V. Cardona has been a mainstay on the Third Department since his appointment to the bench September 8, 1993. Several months after his selection, and by virtue of the retirement of longtime Presiding Justice Leonard A. Weiss—himself an Albany law grad—Presiding Justice Cardona was appointed presiding justice of the Appellate Division, Third Department January 1, 1994.[22] He is the seventh consecutive presiding justice of the Third Department to also be an Albany Law alumnus, a successive string that dates back to Justice Bergan's designation to the post in 1960.[23]

Now in his seventeenth year at the helm of the court, Presiding Justice Cardona is the longest-serving presiding justice in the history of the Third Department, having eclipsed the tenure of former Presiding Justice James P. Hill, who served in this capacity from January 1, 1933 until December 31, 1948.[24] Only former Presiding Justice J. Clarence Herlihy has served on the Third Department longer than Presiding Justice Cardona. Justice Herlihy served on the Third Department bench for more than twenty-four years.[25]

Presiding Justice Cardona graduated from Manhattan College in 1962.[26] From 1963–1967, he served as a Naval Officer in the United States Navy during the Vietnam War. Following his honorable discharge, he attended Albany Law School, where he graduated in 1970. After graduation, Presiding Justice Cardona practiced law for fourteen years, during which time he served for two years as a part-time attorney with the Albany County Public Defender's office, and also as a Law Guardian in Albany County Family Court.[27]

His judicial career began when he was elected an Albany County Family Court judge in 1985. He would serve as a family court judge until 1991, when he was elected a supreme court justice for the

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[22] BRENNAN, *supra* note 1, at 51.

[23] STATE OF NEW YORK SUPREME COURT, *supra* note 9, at 19. Seven of the thirteen presiding justices have been Albany Law School alumni. *Id.* at 16–21. Five did not attend law school. *Id.*

[24] *Id.* at 21.

[25] *Id.*

[26] BRENNAN, *supra* note 1, at 51.

[27] *Id.*

Third Judicial District. In 1992, he was appointed an administrative judge for the Third Judicial District, where he served until his appointment to the Third Department in 1993. He was reelected as a supreme court justice in 2004.[28]

In addition to his prolific resume as a jurist, Presiding Justice Cardona has actively served on several committees throughout his career. From 1994–2005, he was a co-chair of the Family Violence Task Force established by former chief judge of the New York State Court of Appeals, Judith S. Kaye. Additionally, he has been a long-time member of the Council of Chief Judges of the American Bar Association, serving as the organization's president from 2002–2003.[29]

For all of his successes, Presiding Justice Cardona has remained a steadfast friend of his alma mater. He is a member of the Albany Law School Board of Trustees, and is a frequent guest at many of the law school's functions. Thanks to his efforts, the Third Department hears oral arguments once a year from the law school's Dean Alexander Moot Courtroom, providing students with an unparalleled opportunity to witness oral advocacy firsthand.

B. Justice Edward O. Spain

Justice Spain is a graduate of LaSalle Institute in Troy, New York, Boston College University in 1963, and Albany Law School in 1966, where he was a recipient of the Trustee's First Prize.[30] After graduation, he began his career practicing law alongside his father, John H. Spain, in Troy.[31] Thereafter, Justice Spain worked as an assistant district attorney for Rensselaer County, where he served until he was called into duty by the United States Navy, Judge Advocate General Corps., in 1967.[32] He was honorably discharged from the JAGC in 1972, having earned himself the rank of lieutenant. Following his military service, Justice Spain returned to his roots, becoming the deputy corporation counsel for the City of Troy. In 1977, he served as the deputy clerk of Rensselaer County Surrogate's Court. Thereafter he would hold a series of judicial

[28] *Id.*

[29] *Id.*

[30] Westlaw Judge Profiler, http://web2.westlaw.com/welcome/Westlaw/default (go to "Directory," enter "Judge Profiler," and input justice's name and state) (last visited Mar. 24, 2010).

[31] New York Unified Court System, 2005 Voter Guide, http://www.nycourts.gov/vote/2005/bios/Edward_Spain.shtml (last visited Mar. 24, 2010).

[32] BRENNAN, *supra* note 1, at 53.

positions eventually culminating in his appointment to the Third Department Dec. 30, 1994. These included justiceships with the Troy Police Court, Rensselaer Family Court in 1985, New York State Supreme Court in 1991, and an appointment as an administrative judge for the Third Judicial District in 1994.[33]

In addition, Justice Spain has served as an adjunct professor at Hudson Valley Community College's School of Criminal Justice, and has participated in the moot court programs at Albany Law School.[34] He has been on the Third Department for over fifteen years, making him the third-longest-tenured member of the current court after Presiding Justice Cardona and Justice Karen K. Peters.

C. Justice Robert S. Rose

Justice Rose became a member of the Third Department judiciary Mar. 2, 2000. He graduated from St. Lawrence University in 1965 and Albany Law School in 1968.[35] After completing law school, Justice Rose served in the United States Army as a commanding officer of a military intelligence unit in Munich, West Germany, from 1970–1971.[36] From 1971–1972, he served as a captain in South Vietnam.[37] Upon completing his military service, Justice Rose was admitted to the New York Bar in 1973, and began his legal career by serving as a Confidential Law Clerk to the late Supreme Court Justice Robert E. Fischer from 1974–1976. Notably, apart from being an extremely accomplished jurist and New York State deputy attorney general, Justice Fischer achieved significant recognition for his role as the lead investigator of the Attica prison uprisings.[38]

Following his clerkship, Justice Rose became an assistant district attorney for Broome County, a position he would hold from 1976–1978. Thereafter he engaged in private practice until 1987, when he was elected a supreme court justice for the Sixth Judicial District. In 1998, he was appointed an administrative judge for the Sixth Judicial District. He held this position until his appointment to the Third Department.[39]

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[33] *Id.*

[34] Westlaw Judge Profiler, *supra* note 30.

[35] *Id.*

[36] *Id.*

[37] BRENNAN, *supra* note 1, at 54.

[38] *Id.*; *see also* Wolfgang Saxon, *Robert E. Fischer, 88, Attica Investigator, Dies*, N.Y. TIMES, Feb. 24, 2006, at A21.

[39] BRENNAN, *supra* note 1, at 54.

Justice Rose has served as a moot court judge at Cornell Law School and a CLE lecturer for the Broome County Bar Association.[40] He is one of two current Third Department justices that represent the Sixth Judicial District, the other being Justice Elizabeth A. Garry. Justice Rose maintains close ties to his elective district, keeping his chambers in the city of Binghamton.

D. Justice John A. Lahtinen

Justice Lahtinen joined the Third Department March 6, 2000, four days after the appointment of fellow alumnus, Justice Rose. He completed his undergraduate studies at Colgate University, and subsequently attended Albany Law School.[41] Admitted to practice in 1971, he served as a law secretary to the late Justice Norman L. Harvey, who had served as a justice of the Third Department from January 1, 1984 until his retirement in 1993.[42] Following the clerkship, Justice Lahtinen was primarily engaged in private practice in Plattsburgh until his 1997 appointment and subsequent election to the supreme court for the Fourth Judicial District. In the years prior to his election, Justice Lahtinen had also served as a special acting district attorney for Clinton County, New York, and as a special acting city court judge for the City of Plattsburgh.[43]

Justice Lahtinen has the distinction of being the only justice from the Fourth Judicial District on the court today. He hails from the city of Plattsburgh, and the state's northern-most county, Clinton.[44] Coincidentally, he is one of only four justices from Plattsburgh to ever serve on the Third Department. The others were S. Alonzo Kellogg, who served from 1899–1903 and was a direct descendant of both the city's founder, Zephania Platt, as well as the Revolutionary War hero of the Battle of Ticonderoga, Elijah Kellogg;[45] Henry T. Kellogg, the son of Alonzo Kellogg who was appointed to the Third Department in 1918, and served as a presiding justice of the court from 1922–1923 and as an associate judge of the Court of Appeals from 1926–1934;[46] and Justice Norman L. Harvey, the same for whom Justice Lahtinen had

[40] Westlaw Judge Profiler, *supra* note 30.
[41] BRENNAN, *supra* note 1, at 55.
[42] *Id.* at 50.
[43] Westlaw Judge Profiler, *supra* note 30.
[44] BRENNAN, *supra* note 1, at 55.
[45] *Id.* at 14.
[46] *Id.* at 23.

clerked for earlier on in his career.[47]

E. Justice Bernard J. Malone, Jr.

Justice Malone, Jr. was appointed to the Third Department February 11, 2008. Prior to this appointment, he had served as justice of the First Judicial Department since August 2005.[48] A graduate of Niagara University and Albany Law School, he was in the United States Army from 1965–1969, and served as an officer during the Vietnam War, during which he earned a service medal and a bronze star.[49] Justice Malone, Jr. is one of five current justices who served in the military during the Vietnam War, with the others being Justice E. Michael Kavanagh, Justice Rose, Justice Spain, and Presiding Justice Cardona.[50]

In 1973, Justice Malone, Jr. was admitted to practice, and shortly thereafter became an assistant district attorney for Albany County. From 1974 until 1982, he engaged in private practice with an Albany law firm before returning to the public sector in 1982 as an Assistant United States Attorney for the Northern District of New York.[51] He would remain in that capacity until 1998, when he was elected a supreme court justice. Seven years later, Justice Malone, Jr. was appointed to the Appellate Division, First Judicial Department.[52]

Justice Malone, Jr. has remained in close contact with his alma mater throughout his career. He is a member of Albany Law School's Board of Trustees, and is an annual participant in the Dominick L. Gabrielli Appellate Advocacy Moot Court Competition, a tournament that was started by the late Court of Appeals judge and former Third Department jurist, Domenick L. Gabrielli. Affectionately known to his friends as "Bud," Justice Malone, Jr. is a routine guest and attendee of law-school-related symposia and events. He is immensely popular with both faculty and students for his keen sense of humor and down-to-earth demeanor.

F. Justice Leslie E. Stein

Justice Stein was appointed to the Third Department February

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[47] *Id.* at 50.
[48] *Id.* at 55.
[49] Westlaw Judge Profiler, *supra* note 30.
[50] BRENNAN, *supra* note 1, at 51, 53, 55–56.
[51] *Id.* at 55.
[52] *Id.*

11, 2008. A 1978 graduate of Macalester College and a 1981 graduate of Albany Law School, Justice Stein spent her pre-judicial career engaged in the practices of family and matrimonial law.[53]

After law school, Justice Stein served as a confidential law clerk to the Schenectady County Family Court judges from 1981 to 1983.[54] Following her clerkship, she used the experience she gained to secure a position practicing family law at an Albany law firm. She worked at this firm from 1983 until 1997, practicing exclusively family and matrimonial law, eventually becoming a shareholder of the firm.[55]

Justice Stein's judicial career began when she was elected an Albany City Court judge in 1997. She remained a judge at the city court level until 2001, when she was elected to the supreme court for the Third Judicial District. Thereafter, she was an administrative judge for the Rensselaer County Integrated Domestic Violence Part, serving in this capacity from January 2006 until her appointment to the Third Department in 2008.[56]

Like the other justices of the court, Justice Stein's professional affiliations are too numerous to mention here in detail. Yet, a cursory review of her background reveals that she is the director of the New York State Association of Women Judges, a founding member of the New York State Judicial Institute on Professionalism in the Law, a past chair of the Third Judicial District Gender Fairness Committee from 2001 to 2005, and an elected a fellow of the American Academy of Matrimonial Lawyers in 1991.[57]

In addition, Justice Stein continues to donate her time and energy to the students from her alma mater. She makes time every summer to discuss her legal career and answer questions for law student interns from the Albany office of the New York State Attorney General. Additionally, she also volunteers as a justice for Albany Law School's Domenick L. Gabrielli Family Law Moot Court Competition.

G. Justice William E. McCarthy

A 1985 graduate of the State University College of New York at Potsdam and a 1988 graduate of Albany Law School, Justice

[53] *Id.* at 56.
[54] *Id.*
[55] Westlaw Judge Profiler, *supra* note 30.
[56] BRENNAN, *supra* note 1, at 56.
[57] *Id.*

William E. McCarthy has devoted his entire career to public service.[58] His first three positions out of law school were all supreme court clerkships, beginning first with a confidential law clerkship to Supreme Court Justice Edward S. Conway from 1990–1993, then to New York State Supreme Court Justice Joseph Harris from 1994–1997, and finally to Court of Claims Judge/Acting Supreme Court Justice Edward A. Sheridan, from April 1997–January 1998.[59]

Subsequently, Justice McCarthy served as the senior assistant counsel to Governor George E. Pataki, from 1998–2004. His judicial career began following this post, when in 2004 he was elected to the Supreme Court for the Third Judicial District. In 2006, he was appointed a justice of the Second Judicial Department by Governor Pataki. He became a justice of the Third Department effective January 30, 2009.[60]

Justice McCarthy has taught at Siena College and is a former adjunct professor there.[61] He is also a member of the New York State CPLR article 81 Guardianship Committee.[62]

H. Justice Elizabeth A. Garry

Justice Elizabeth A. Garry was appointed by Governor David Paterson to the Third Department bench effective March 19, 2009. The appointment made her the first openly gay justice of the Third Department.[63]

Justice Garry graduated from Alfred University in 1984 and Albany Law School in 1990.[64] After graduation, she clerked for the Honorable Justice Irad S. Ingraham of the Sixth Judicial District from 1990–1994.[65] Justice Ingraham was a 1960 graduate of Albany Law School.[66]

Following her clerkship, Justice Garry engaged in private

[58] New York State Unified Court System, Appellate Division Second Judicial Department, Justices of the Court, http://www.nycourts.gov/courts/ad2/justice_mccarthy.shtml (last visited Apr. 14, 2010).

[59] *Id.*

[60] *Id.*

[61] BRENNAN, *supra* note 1, at 57.

[62] *Id.*

[63] Press Release, Governor David A. Paterson, Governor Paterson Announces Appellate Division Appointments and Court of Claims Nominations (Mar. 5, 2009), *available at* http://www.ny.gov/governor/press/press_0305096.html.

[64] *Id.*

[65] *Id.*

[66] Barrister Societies–Albany Law School, http://www.albanylaw.edu/sub.php?navigation_id=1481 (last visited Mar. 24, 2010).

practice, specializing in plaintiff's personal injury litigation with the Joyce Law Firm of Sherburne, N.Y. from 1995 to 2006.[67] Throughout her career in private practice, Justice Garry remained involved in public service. From 1999–2001, she served on the planning board for the Town of New Berlin, Chenango County.[68] Thereafter, from 2001 through 2006, she served as a New Berlin Town Justice.[69]

Justice Garry's career as a Supreme Court Justice began when she was elected to supreme court for the Sixth Judicial District in November 2006.[70] As mentioned earlier in this section, she is one of two current Third Department justices who hail from the Sixth Judicial District.

I. Justice John C. Egan

The newest member of the court, Justice Egan was appointed by Governor David Paterson January 28, 2010 to replace retiring longtime member of the Third Department, Justice Anthony T. Kane.[71] A 1976 graduate of Bryant College and a 1980 graduate of Albany Law School, Justice Egan engaged in private practice in the city of Albany from 1981–1996.[72] During this time, he remained actively involved in the public sector as well, working as an assistant corporation counsel for the City of Albany Department of Law from 1981–1996, and also as an Albany County Surrogate's Court accounting clerk and court attorney from 1983–1996.[73]

Justice Egan's judicial tenure began when he served as an Albany city court judge from 1997–2005.[74] In 2005, he was elected supreme court justice for the Third Judicial District, where he served until his recent appointment to the Third Department.[75]

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[67] Press Release, Governor Paterson Announces Appellate Division Appointments, *supra* note 63.

[68] BRENNAN, *supra* note 1, at 57.

[69] *Id.*

[70] *Id.*

[71] Press Release, Governor David A. Paterson, Governor Paterson Announces Judicial Appointments (Jan. 28, 2010), *available at* http://www.state.ny.us/governor/press/press_01281006.html.

[72] New York Unified Court System, 2005 Voter Guide, http://www.nycourts.gov/vote/2005/bios/John_Egan.shtml (last visited Mar. 24, 2010).

[73] *Id.*

[74] *Id.*

[75] *Id.*

J. Retired Justice Anthony J. Carpinello

Any discussion of current Albany Law alumni members of the Third Department would be incomplete without paying homage to recently retired Third Department Justice Anthony J. Carpinello. Justice Carpinello served on the Third Department from 1996–2008. Prior to his appointment to the Appellate Division, he served for two years as a supreme court justice (elected in 1994), for two years as an East Greenbush Town Justice, and for seven years as an East Greenbush Town Councilman.[76]

When he was appointed to the Third Department in 1996, Justice Carpinello's career in public service truly came full-circle considering that his first job out of law school was as a law clerk for the Third Department, where he worked from 1973–1974.[77] Following this position, he engaged in private practice for twenty years in Albany, specializing in the field of commercial litigation.[78]

A long admired and respected lawyer and jurist, Justice Carpinello's contributions to the state court system have been immense. On top of everything he accomplished during his tenure as a justice, he has proven time and again to be a great friend of his alma mater.

K. Michael J. Novack—Clerk of the Court

Lastly, the court could not function without the assistance it receives from a myriad of court attorneys and legal clerks. Remarkably, in the history of the Third Department, there have only been five clerks of the court. The present one is Michael J. Novack, who has served at the post since his appointment in 1983.

Mr. Novack graduated from Siena College in 1968 and received his law degree from Albany Law School in 1971. He has dedicated his entire professional career to serving the Third Department. Before being appointed clerk of the court, Mr. Novack served as a chief motion clerk, chief law assistant, and then deputy clerk. His employ at the court began in 1972. Mr. Novack is roughly four years shy of being the longest tenured clerk of the court in Third Department history.

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[76] BRENNAN, *supra* note 1, at 53.
[77] *Id.*
[78] *Id.*

III. THE CASES

A. Criminal Procedure

Criminal procedure cases are often the most prolific, and thus, typically garner the most attention from legal commentators—and for good reason. Even the most mundane criminal procedure issues ultimately implicate critical legal questions that affect not only the guilt or innocence of the accused, but in the broader scheme, how the courts balance the need to maintain order and prevent crime with the fundamental rights guaranteed to every person in the New York State and Federal Constitutions.

New York, in particular, has always zealously safeguarded the constitutional rights of its citizenry, historically choosing to interpret many of its own cognate constitutional provisions to provide greater protections than what is otherwise afforded by the Bill of Rights under the U.S. Constitution. In recognition of this fact, the court has at times struggled when faced with novel legal issues; specifically, whether to accept federal case precedent as its own constitutional standard, or keep with tradition and offer greater protections under state law.

Barring some split of authority between the judicial departments, many of these vital issues will face final resolution in an appellate division tribunal.

1. Ineffective Assistance of Counsel: *Hurrell-Harring v. State*[79]

Hurrell-Harring is an immensely important decision regarding the constitutional rights of indigent criminal defendants in New York State. The controversial case was decided by a split panel of the Third Department July 16, 2009.[80] Oral arguments were heard by the Court of Appeals March 23, and a decision is forthcoming.[81] With the potential to effect broad-sweeping changes to our criminal justice system, as well as significantly impact those of our sister states, *Hurrell* has been dubbed "one of the most important indigent legal defense case[s]" to ever be heard by New York's highest court.[82]

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[79] 66 A.D.3d 84, 883 N.Y.S.2d 349 (App. Div. 3d Dep't 2009) (before Justices Peters, Lahtinen, Kavanagh, Stein, and McCarthy).

[80] *Id.*

[81] Joel Stashenko, *Current and Former Prosecutors Clash on Suit over Indigent Defense,* N.Y. L.J., Feb. 9, 2010, at 1.

[82] *Id.*

Hurrell was commenced as a class action lawsuit by the NYCLU on behalf of more than twenty plaintiffs from five New York counties.[83] The plaintiffs' claim alleged that they were receiving, or had received, inadequate legal representation by appointed counsel, in violation of their state and federal constitutional rights.[84] What truly distinguished this unique case from other Sixth Amendment challenges was both the manner in which it was brought and the relief it sought.

The essence of the ineffective assistance of counsel claim, generally speaking, contemplates a situation where the petitioner uses the constitutional defense to seek the reversal of an existing criminal conviction. This was not the case here. Choosing to eschew the traditional legal remedies applicable for challenges to adverse criminal law decisions—i.e., "applications pursuant to CPL article 440, direct appeals from a conviction and writs of habeas corpus"[85]—the plaintiffs had more grandiose plans for their constitutional challenge. They (or more accurately, the NYCLU) saw a golden opportunity to consolidate a host of particularly egregious[86] potential Sixth Amendment violations into a single civil cause of action, in an effort to bring about substantial reform to New York's indigent criminal defense system. They had juice, too. In 2005, Chief Judge Judith S. Kaye of the New York State Court of Appeals commissioned a report to assess "the quality of representation that indigent defendants were being afforded throughout the state."[87] The report presented a bleak outlook of the future of the indigent defense system, concluding that "nothing short of major, far-reaching reform can insure that New York meets its constitutional and statutory obligations to provide quality representation to every indigent person accused of a crime or other offense."[88] The plaintiffs would rely extensively on the Kaye Commission Report to support many of their claims regarding the deficiencies of the indigent defense system.[89]

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[83] *Id.*

[84] *Hurrell-Harring*, 66 A.D.3d at 85, 883 N.Y.S.2d at 350.

[85] *Id.* at 91, 883 N.Y.S.2d at 355.

[86] The dissenting opinion cites several examples from the plaintiffs' complaint detailing the gross denial of their rights to effective assistance of counsel. *Id.* at 94–95, 98 n.3, 883 N.Y.S.2d at 357, 360 n.3.

[87] COMM'N ON THE FUTURE OF INDIGENT DEFENSE SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, at v (2006), *available at* http://courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

[88] *Id.* at 33.

[89] *Hurrell-Harring*, 66 A.D.3d at 90, 883 N.Y.S.2d at 354.

In the complaint itself, the plaintiffs requested prospective relief in two forms. First, they sought a declaration from the court that "the State's public defense system is systemically deficient and presents a grave and unacceptable risk that indigent criminal defendants are being or will be denied their constitutional right to meaningful and effective assistance of counsel."[90] Second, they sought an injunction from the court that would order the state to implement changes to the indigent defense system consistent with the court's declaration.[91]

As one might expect, the state made a motion to dismiss the claim, alleging, inter alia, that the complaint failed to state a cause of action. The motion was denied by Albany County Supreme Court Justice Thomas J. McNamara, and the state appealed.[92]

A divided Third Department panel held that the plaintiffs' claim "did not . . . implicate the constitutional right to counsel" and was therefore not justiciable.[93] Justice Kavanagh wrote the opinion for the majority, and was joined by Justices Lahtinen and McCarthy. Starkly opposed to the majority's holding was Justice Peters, who authored a determined dissent that was joined by Justice Stein.

According to the majority, the Plaintiffs' claim constituted a "general complaint as to the quality of legal services offered to indigent criminal defendants in this state," and the proper authority to address such issues was either the legislative or the executive branch, not the judiciary.[94] To rule otherwise, they noted, would create "obvious and ominous implications for the constitutional principle of separation of powers."[95]

Further, Justice Kavanagh noted that, even assuming that the claim was actionable, the plaintiffs failed to meet their burden of establishing the ineffective assistance of counsel claim under either federal or state constitutional law. To establish this claim, the petitioners needed to demonstrate more than flaws or deficiencies in the legal representation they received, but rather, "that the actual representation they received prejudiced their cases."[96] Here, the majority noted that none of the plaintiffs claimed that the

[90] *Id.* at 85, 883 N.Y.S.2d at 350.
[91] *Id.*
[92] *Id.* at 85–86, 883 N.Y.S.2d at 350.
[93] *Id.* at 86, 883 N.Y.S.2d at 352.
[94] *Id.* at 87, 883 N.Y.S.2d at 351.
[95] *Id.* at 89, 883 N.Y.S.2d at 353.
[96] *Id.* at 86, 883 N.Y.S.2d at 351 (citing *Id.* at 98, 883 N.Y.S.2d at 360 (Peters, J., dissenting)).

representation they received prejudiced their cases in any way.[97]

Next, the majority addressed the claim's potential to create collateral review of the issue raised. That is, if this civil claim was allowed to move forward, it would undoubtedly result in the court's review of the same Sixth Amendment issues that either may, or could be pending before the lower courts in the plaintiffs' own criminal defense cases.[98]

Finally, the majority noted that sound public policy required that the claim be dismissed. They accorded that criminal defendants should litigate the sum of their claims in criminal actions, and absent any showing that the traditional appellate methods of relief were not available, they should not be able to litigate their issues in civil complaints.[99]

The dissent took a completely opposing view of the issue. They criticized the majority for "misunderstanding the dimensions of the constitutional right to counsel."[100] Noting the "significant deficiencies alleged by plaintiffs," they firmly believed that "a justiciable cause of action ha[d] clearly been stated."[101]

Justice Peters began the opinion by recounting the importance of the Sixth Amendment right to counsel under New York State constitutional jurisprudence. This right, she noted, "may well be the most basic constitutional right of all," as New York has "'consistently exercised the highest degree of vigilance in safeguarding the right of an accused to have the assistance of an attorney *at every stage of the legal proceedings*."[102]

The dissent next addressed the justiciability argument that seemed to be at the core of the majority's holding. While acknowledging that such funding decisions are often better left to the discretion of the legislature, Justice Peters explained that this proposition only stands so long as the legislature's actions comply with the state constitution.[103] When an issue is presented before the court demonstrating that the legislature's actions have failed to comply with the state constitution, as here, then it is not just proper, but essential for the court to adjudicate the issue.[104]

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[97] *Id.*

[98] *Id.* at 90–91, 883 N.Y.S.2d at 354.

[99] *Id.* at 91, 883 N.Y.S.2d at 354–55.

[100] *Id.* at 95, 883 N.Y.S.2d at 357–58 (Peters, J., dissenting).

[101] *Id.*

[102] *Id.* at 93, 883 N.Y.S.2d at 356 (quoting People v. Cunningham, 49 N.Y.2d 203, 207, 400 N.E.2d 360, 363, 424 N.Y.S.2d 421, 423–24 (1980)).

[103] *Id.* at 95, 883 N.Y.S.2d at 358.

[104] *Id.* at 95–96, 883 N.Y.S.2d at 358–59.

Further, the dissent rejected the majority's contention that allowing the claim to continue would result in collateral review, and that the defendant's had adequate remedies at law and therefore did not need civil recourse. With respect to the collateral review issue, they noted that, whether either as plaintiffs here or as defendants in another action, the standard of prejudice they would need to demonstrate their Sixth Amendment claim would be exactly the same.[105] As for the public policy argument, the dissent noted that, contrary to the majority's determination, the plaintiffs here may not have had adequate legal remedies available. Accepting the plaintiffs' allegations as true, as the court is required to do on a motion to dismiss, the dissent emphasized that the complaint indicated the existence of wide-spread deficiencies in the criminal justice system that could not be fixed simply one appeal at a time.[106] It would take precisely the kind of action instituted here to rectify the situation, rendering the traditional remedies recommended by the majority wholly insufficient to provide the relief sought.[107]

Having therefore found that a justiciable constitutional claim existed—and, given the early stage in the litigation in which the challenge appeared—the dissent would have affirmed the lower court's order denying the motion to dismiss and, at a minimum, let the litigants' claim move forward.

Certainly these five justices will be among the many who eagerly await the Court of Appeals's resolution of the issue.

2. Legal Sufficiency of Evidence to Support Conviction: *People v. McDade*[108]

People v. McDade involved a fairly common legal challenge, but with a highly unusual fact pattern. The critical issue here was whether there was legally sufficient evidence of the element of "penetration" to support the defendant's conviction of second degree rape, where the evidence available was entirely circumstantial.[109]

The victim in *McDade* was male. He was described as "'handsome' and '"bubbly"' and by all appearances looked like an average 17-year-old, except that a childhood illness had caused him

[105] *Id.* at 98–99, 883 N.Y.S.2d at 359–60.

[106] *Id.* at 98, 883 N.Y.S.2d at 360.

[107] *Id.*

[108] 64 A.D.3d 884, 883 N.Y.S.2d 615 (App. Div. 3d Dep't 2009) (before Justices Peters, Rose, Lahtinen, Stein, and McCarthy), *aff'd per curiam*, No. 89 SSM 55, 2010 WL 605271 (N.Y. Feb. 23, 2010).

[109] *Id.* at 886, 883 N.Y.S.2d at 617.

to suffer a severe mental disability that left him with the cognitive abilities of a toddler.[110] The victim had no short-term memory, no concept of danger or safety, was unable to talk and feed himself, and required constant supervision. This supervision was in part provided by a home nursing service.[111]

On the morning of the incident, the victim's brother had returned home from work earlier than usual and went to check on the victim, as was his custom.[112] As he went to open the door to his brother's room, he heard what sounded like someone jumping off of a bed and landing on the floor.[113] When he entered the room, the victim was lying naked in his bed with an erection, and the defendant, who was the victim's nurse, was naked too, crouched on the floor on the side of the bed. [114] The defendant later told the police that she had just given the victim a shower, and, contrary to the eyewitness testimony of the victim's brother, claimed to have been wearing jeans and a t-shirt when the brother entered the room.[115] The reason she was on the floor, she said, was to get the victim's socks from under the bed.[116] The defendant had been the victim's nurse for several years.

A DNA swab was taken of the victim's penis and bed sheets, and another was taken of the defendant's vagina. The results revealed, "among other things, that the defendant was the major contributor of the DNA found on the penile swab,"[117] and upon the strength of these results, she was indicted on "various counts of rape, sexual abuse, sexual misconduct and endangering the welfare of an incompetent or physically disabled person."[118] All together, the charges totaled one felony count and two misdemeanors.

At the trial court, the defendant was found guilty of the charged crimes, and was sentenced to concurrent sentences of 1–3 years in prison for the felony offense and one year in jail for each misdemeanor.[119] The defendant appealed, claiming that there was insufficient evidence "to prove the element of 'penetration' to establish the rape count or 'sexual contact' to establish the sexual

[110] *Id.* at 884, 883 N.Y.S.2d at 616.
[111] *Id.*
[112] *Id.* at 885, 883 N.Y.S.2d at 617.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*

abuse and endangering counts."[120]

Justice McCarthy wrote the majority opinion for the court. He was joined by Justices Rose and Lahtinen. Here, because the victim was unable to testify due to his mental disability, the prosecutor's prima facie case relied entirely upon a series of inferences to be drawn from the DNA tests, the testimony of the victim's brother, and other pertinent information about the victim's cognition and behavior. Thus, given the lack of any direct evidence establishing the elements of the crimes charged, Justice McCarthy began his discussion by articulating the standard for determining the legal sufficiency of evidence in cases where the evidence proffered is entirely circumstantial. This standard, he explained, requires the court to "determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People."[121]

In this case, the determination came down to whether a rational person could believe, beyond a reasonable doubt, that the defendant committed all three of the charged crimes based on the inferences deduced from the circumstantial evidence. Justice McCarthy and the rest of the majority held that the circumstantial evidence was sufficient for a rational juror to believe that the defendant committed all three of the offenses beyond a reasonable doubt.[122]

Justice Stein, who dissented in part along with Justice Peters, concurred with the majority only with respect to the charges of sexual abuse in the second degree and endangering the welfare of an incompetent or physically disabled person.[123] Both justices found issue with the charge of rape in the second degree, having concluded that the evidence here was insufficient to establish this crime beyond a reasonable doubt.[124]

The crux of the dispute between the majority and the dissent over the rape charge came down to whether there was sufficient evidence to establish the rape element of "penetration," i.e., sexual intercourse. According to Justice McCarthy, there was "a valid line of reasoning and permissible inferences" that could lead the jury to conclude that the conduct between the defendant and the victim

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[120] *Id.*

[121] *Id.* (quoting People v. Williams, 84 N.Y.2d 925, 926, 644 N.E.2d 1367, 1367, 620 N.Y.S.2d 811, 811 (1994)).

[122] *Id.* at 887, 883 N.Y.S.2d at 619.

[123] *Id.* at 889, 883 N.Y.S.2d at 620 (Stein, J., dissenting).

[124] *Id.*

was in fact sexual intercourse and not some other sexual act.[125] The basis of this proof were the trial court's findings of

> forensic evidence establishing extended and non-casual contact between defendant and the victim's penis, forensic evidence that the source of defendant's DNA could have been vaginal secretions, the eyewitness evidence that *both* the victim and defendant were totally naked and the additional evidence that the victim did not understand sex and was not known to masturbate or ejaculate.[126]

Justices Stein and Peters, however, had their doubts. The dissent noted that, while it was clear that the defendant's DNA was on the victim's penis, it could not be determined whether the DNA had come from her mouth or her vagina, so there was no way of concluding whether penetration had occurred based on the DNA evidence.[127] Second, contrary to the majority's position, Justice Stein noted that simply because the victim was not known to masturbate did not mean that he did not, nor would not enjoy oral sex, nor that this fact would have prevented the defendant from performing the act on him.[128] Finally, as for the unquestionable smoking guns in the case—the defendant's and victim's complete nudity and the victim's erection—the dissent argued that one plausible explanation for this scene was that the defendant had engaged in oral sex with the victim with plans of thereafter engaging in sexual intercourse, only to have been interrupted by the victim's brother before any penetration occurred.[129] If true, the penetration element could not be met despite the defendant's intentions. In sum, the dissent was not convinced that the evidence in aggregate could support a guilty verdict of second degree rape beyond a reasonable doubt.

The issue went before the Court of Appeals, where in a per curiam opinion the court unanimously affirmed the majority's decision.[130] The opinion cited the same evidentiary factors relied on by the majority as establishing a valid line of inferences that proved that the contact engaged in was "sexual intercourse, rather than oral sex or penis-to-hand contact."[131] The defendant's full nudity

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[125] *See supra* note 121.
[126] *McDade*, 64 A.D.3d at 887, 883 N.Y.S.2d at 618.
[127] *Id.* at 889, 883 N.Y.S.2d at 620.
[128] *Id.* at 889–890, 883 N.Y.S.2d at 620–21.
[129] *Id.* at 890, 883 N.Y.S.2d at 620–21.
[130] People v. McDade, No. 89 SSM 55, 2010 WL 605271 (N.Y. Feb. 23, 2010).
[131] *Id.*

seemed to be the crucial piece of circumstantial evidence linking everything together. Moreover, in addressing (presumably) the contentions raised by the dissent, the court noted "[t]he fact that other inferences could have been drawn by the jury does not render the evidence legally insufficient."[132]

3. Canine Sniffs of Automobiles: *People v. Devone*[133]

Rounding out our review of some recent criminal procedure decisions is the case of *People v. Devone*. This case involved the lawfulness of evidence obtained via a canine sniff of a vehicle following a routine traffic stop.

The specific issue in *Devone* was "whether, under the N.Y. Constitution, reasonable suspicion of drug related criminal conduct is a minimum prerequisite to a canine sniff of the exterior of a car that has been stopped for a traffic violation."[134]

In this case, the defendant and a passenger were pulled over by a state trooper after the defendant was observed talking on a cell phone while driving. The trooper had been working in a high crime area, and had with him in his vehicle a narcotics-detecting dog. During the stop, the defendant was not able to provide a driver's license, the car's registration, or a "discernible response regarding where he was going."[135] The defendant later said the car was registered to his cousin; then said he did not know his cousin's name; and then, when asked where his cousin was, pointed to the person in the passenger seat. Following these "evasive and incorrect answers,"[136] the trooper and his partner determined that they should perform a short walk around the perimeter of the car with the drug-sniffing canine.[137] During this walk, the canine detected drugs, and when the trooper opened the car door to allow the canine to inspect further, the canine led them directly to the arm-charm console, where, upon further inspection by the troopers, cocaine was found.[138]

The defendants were indicted for "criminal possession of a controlled substance in the third degree and criminal possession of

[132] *Id.*

[133] 57 A.D.3d 1240, 870 N.Y.S.2d 513 (App. Div. 3d Dep't 2008) (before Presiding Justice Cardona and Justices Carpinello, Kane, Lahtinen, and Malone, Jr.).

[134] *Id.* at 1240, 870 N.Y.S.2d at 514.

[135] *Id.*

[136] *Id.* at 1241, 870 N.Y.S.2d at 515.

[137] *Id.*

[138] *Id.*

a controlled substance in the fourth degree," and moved to suppress the evidence by alleging that it was the product of an unlawful search.[139] A judicial hearing officer recommended suppressing the evidence under both state and federal constitutional grounds. This recommendation was adopted by the county court, which held that the use of the canine sniff around the car was unsupported by reasonable suspicion.[140]

Under federal constitutional law, the question is fairly straightforward thanks to an abundance of precedent. The propriety of a canine sniff of the outside of a vehicle rests solely upon determining whether the search unnecessarily prolonged the stop.[141] It would also seem that under New York law, there would be a whole body of law on the subject, since the use of drug-sniffing dogs is far from a novel development in New York law enforcement. Yet, there was no such precedent. The leading case on the issue was *People v. Estrella*, a 2008 decision from the Court of Appeals that affirmed a Fourth Department ruling that had upheld the use of a canine search following a lawful stop.[142] The Fourth Department's holding, however, did not articulate the standard for what level of suspicion, if any, law enforcement is required to have before ordering the canine sniff.[143] Neither did the Court of Appeals's affirmance, which altogether avoided the issue.[144] Where did that leave the Third Department? This silence could mean that there is no suspicion required before proceeding with the canine sniff, or it could mean nothing at all. The latter is probably closer to the truth.

Recognizing this, Justice Lahtinen and the majority staked out their position on the issue by applying past precedent involving canine searches of homes, with the common law right of a police officer to inquire as to the contents of a vehicle when there is a "founded suspicion" of criminal activity. The majority thus held that the canine search here was constitutional because the police officers had a "founded suspicion" that criminal activity was afoot before they proceeded with the canine sniff of the exterior of the

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[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] People v. Estrella, 48 A.D.3d 1283, 851 N.Y.S.2d 793 (App. Div. 4th Dep't 2008), *aff'd per curiam*, 10 N.Y.3d 945, 893 N.E.2d 134, 862 N.Y.S.2d 857 (2008).

[143] *Id.* at 1285, 851 N.Y.S.2d at 795 (discussing the constitutionality of the canine sniff without discussing the level of suspicion required to perform the search).

[144] *Estrella*, 10 N.Y.3d at 946, 893 N.E.2d at 135, 862 N.Y.S.2d at 857.

automobile.[145]

In its rationale, the majority noted that the Court of Appeals had previously held that a canine search outside of a person's home required reasonable suspicion.[146] They explained, however, that compared to a person in his home, occupants of a car have a less compelling expectation of privacy; therefore, the level of suspicion required before police may search the exterior of an automobile need not be as strong to search the exterior a home.[147] Nevertheless, in light of the greater protections that are afforded by the New York State Constitution, the majority concluded that some level of suspicion was required before allowing the canine sniff, but that the search was constitutional because such suspicion was present here.

It remains unclear if a "founded suspicion" is the lowest level of suspicion allowed to permit the canine search. The majority noted there was no reason to discuss that issue here, because the issue before them was simply whether, upon these facts, such a search was constitutionally permissible, not what the minimum level of suspicion required for canine sniffs following a lawful stop of an automobile should be.[148] One can take away from *Devone* and *Estella* that some level of suspicion is required; what that level is will likely be decided on a case-by-case basis absent any additional clarification from the Court of Appeals.

Leave to appeal was granted by the Court of Appeals May 26, 2009, but a search of Westlaw reveals that no briefs or any other supporting papers have been filed with the Court of Appeals since that time. The pendency of this appeal thus remains unclear. Therefore, it would appear that the Third Department's standard articulated in *Devone* is the clearest New York precedent available addressing this issue.

B. New York Practice

Given the preeminence that the subject of New York Practice has had at Albany Law School, thanks largely to the scholarship of Distinguished Professor Emeritus David D. Siegel, and the fact that several of the current justices likely learned the subject from Professor Siegel himself, it should come as no surprise to anyone

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[145] *Devone*, 57 A.D.3d at 1242, 870 N.Y.S.2d at 516 (App. Div. 3d Dep't 2008).
[146] *Id.* at 1242, 870 N.Y.S.2d at 515.
[147] *Id.*
[148] *Id.* at 1242–43, 870 N.Y.S.2d at 516.

familiar with Albany Law and its students that a New York Practice case would somehow find its way into the fray.

Moreover, ensuring that proper litigation practice and procedure is followed is an essential function of the appellate courts. To this end, the appellate division has also inherited the role of interpreting the many nuances and ambiguities laden in the CPLR. The next case deals with one such issue.

Son of Sam Laws: *New York State Crime Victims Board ex rel. Organek v. Harris*[149]

The issue in this case involved the availability of provisional remedies under New York's Son of Sam Law.[150] The Son of Sam Law, *inter alia*,[151] provides that victims of crimes are to be notified whenever a person convicted of the crime receives $10,000 or more.[152] Further, the statute extends the limitations period up to three years after the discovery of the receipt of funds, to allow the victim to sue the perpetrator in civil court for their crimes.[153] To comply with the statute, the victim must contact the New York State Crime Victims Board, which will alert other victims of the convict's receipt of funds, and thereafter apply for any legal remedies that may be available to the victim.[154]

The respondent in *Harris* committed various crimes, including second degree murder, and was serving an aggregate prison sentence in excess of twenty years. The petitioner was a victim of one of the defendant's crimes and one of several victims who had commenced a civil action against the defendant for monetary damages. After the respondent made a petition for the release of funds that were being held for his benefit in a guardianship account, the surrogate's court alerted the petitioner to this fact pursuant to the Son of Sam Law. Upon receiving this information, the crime victims board, on behalf of the petitioners, made a motion to the supreme court pursuant to section 632-a(4) of New York's Executive Law, seeking a preliminary injunction preventing the defendant from liquidating the account until the civil matter was

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[149] 68 A.D.3d 1269, 891 N.Y.S.2d 175 (App. Div. 3d Dep't 2009) (before Presiding Justice Cardona and Justices Kane, Lahtinen, Peters, and Stein).

[150] N.Y. EXEC. LAW § 632-a (McKinney 2005).

[151] The statute's more well-known function is to prevent a convicted criminal from profiting from his or her crimes. *See id.*

[152] § 632-a(2)(a).

[153] § 632-a(3).

[154] § 632-a(4), (5), (5)(a), (6).

resolved.

The specific provision at issue in this case was section 632-a(6)(a) of New York's Executive Law, which states in pertinent part that:

> The board, acting on behalf of the plaintiff and all other victims, shall have the right to apply for any and all provisional remedies that are also otherwise available to the plaintiff.
>
> (a) The provisional remedies of attachment, injunction, receivership and notice of pendency available to the plaintiff under the civil practice law and rules, shall also be available to the board in all actions under this section.[155]

The respondent in this case argued that pursuant to section 632-a(6)(a), the crime victims board could not use the preliminary injunction remedy because it was not available to the plaintiff under CPLR 6301,[156] the statute that governs the use of the preliminary injunction as a provisional remedy.[157] This is because, as a general rule, the preliminary injunction cannot be used in money actions.[158]

Justice Egan, at the time a supreme court justice, did not find merit in the respondent's argument and granted the preliminary injunction.[159] On appeal, Justice Stein and a unanimous Third Department bench affirmed Justice Egan's order. In the opinion, Justice Stein offered two principle reasons why the interpretation urged by the respondent was erroneous. First, she noted that the very intent of this provision was to allow crime victims to obtain relief from those responsible. Thus, by accepting the respondent's interpretation, the court would be undermining the very purpose the law was enacted to achieve.[160] Second, if this was not reason enough, Justice Stein cited a string of cases where justices within the jurisdiction have interpreted the statute to allow victims to use the preliminary injunction as a provisional remedy.[161] Therefore, the law on this issue is fairly certain; the civil action by or on behalf of a crime victim brought pursuant to section 632-a of New York's Executive Law is but one exception to the CPLR's general rule barring injunctive relief for money actions.

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[155] § 632-a(6)(a).

[156] N.Y. State Crime Victims Bd. *ex rel.* Organek v. Harris, 68 A.D.3d 1269, 1271, 891 N.Y.S.2d 175, 177 (App. Div. 3d Dep't 2009).

[157] N.Y. C.P.L.R. 6301 (McKinney 2008).

[158] DAVID D. SIEGEL, NEW YORK PRACTICE § 327, at 521–24 (4th ed. 2005).

[159] *Harris*, 68 A.D.3d at 1270, 891 N.Y.S.2d at 176.

[160] *Id.* at 1271, 891 N.Y.S.2d at 177.

[161] *Id.* at 1272, 891 N.Y.S.2d at 177.

C. Commercial Law

The Third Department routinely decides a plethora of issues that may never find their way into a first year law course, but are immensely important for the continued development of business and commerce. Thus, courts are often cognizant of the economic ramifications of the decisions they will render, and there is always an impetus to make legal decisions that are not only sound, but that will also make sound economic sense. The Third Department accomplished both in the following case.

Real Estate—Equitable Subrogation: *Elwood v. Hoffman*[162]

When most people purchase a home, they assume that the funds from the sale will be used to satisfy the seller's outstanding mortgage debt and, in tow, if the purchaser has obtained a mortgage herself, that the new mortgagee will step into the shoes of the prior mortgagee to obtain the same priority position the former had in the property. This presumption is due to the longstanding common law doctrine that stands for this proposition, known as equitable subrogation, which was formally adopted into New York case law by the Court of Appeals in the 1967 decision, *King v. Pelkowski*.[163] There, the Court cited the *Restatement on Restitution*[164] and held that that in order to avoid unjust enrichment that could befall the second mortgagee in such situations, the doctrine should be applied where "the funds of a mortgagee are used to satisfy the lien of an existing, known encumbrance [and], *unbeknown* to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds."[165]

Legal commentators have noted that the "unbeknown to the mortgagee" language in *King* means that the doctrine will be applied (assuming the other above factors are met) unless the new mortgagee had actual knowledge of the existence of a more senior lien.[166] This actual knowledge requirement was never explicitly stated by the court, but is evident both from the facts of the *King*

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[162] 61 A.D.3d 1073, 876 N.Y.S.2d 538 (App. Div. 3d Dep't 2009) (before Justices Mercure, Peters, Lahtinen, Kane, and Malone, Jr.).

[163] 20 N.Y.2d 326, 229 N.E.2d 435, 282 N.Y.S.2d 753 (1967) (per curiam).

[164] RESTATEMENT (FIRST) OF RESTITUTION § 162 (1937).

[165] *King*, 20 N.Y.2d at 333–34, 229 N.E.2d at 439, 282 N.Y.S.2d at 758.

[166] *See, e.g.*, Adam Leitman Bailey & Dov Treiman, *Split Between Departments Muddles Equitable Subrogation Doctrine,* N.Y. L.J. Feb. 2, 2010, at 5.

case—where mere constructive notice of a senior lien was implicitly recognized to be insufficient to prevent the doctrine's application—as well as from the fact that the court cited the Restatement, which requires an actual knowledge standard, as authority on the matter.[167] Thus, under *King,* the fact that a second mortgagee is put on constructive notice of a lien junior to the first mortgagee, but senior to hers, is still insufficient to preclude the use of the doctrine to protect the second mortgagee.

Against this backdrop, the Third Department decided the case *Elwood v. Hoffman* in 2009, and, in the process, created a surprising split between itself and the Second Department on the issue of what level of notice is required to preclude the use of the doctrine.[168] Of course, the resulting split was not surprising due to the infrequency with which appellate division departments disagree, but, as two Commentators put it, because "[t]he Third Department seem[ed] to have all authority on its side."[169]

In *Elwood,* the Third Department dealt with an analogous situation to the one faced by the Court of Appeals in *King.* Here, the plaintiff and defendant purchased a home together, obtaining a mortgage to finance the purchase.[170] While both parties split the costs of the property and were equally responsible for repaying the mortgage, the house remained solely in the name of the defendant.[171] When the relationship ended, the plaintiff vacated the premises and filed a notice of pendency to impose a constructive trust on the property in order to force the property's sale. Thereafter, the defendant obtained an additional mortgage on the property, using some of the funds from the new mortgage to satisfy what was left of the original.[172] The new mortgagees then moved to intervene in the action and sought equitable subrogation with respect to the original mortgage its funds had helped to pay off.[173] They argued that the title agent had missed the notice of pendency when it performed a title search of the property, and thus, there was no actual knowledge on their part to render the doctrine of equitable subrogation inapplicable.[174] The trial court judge granted

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[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] Elwood v. Hoffman, 61 A.D.3d 1073, 1074, 876 N.Y.S.2d 538, 539 (App. Div. 3d Dep't 2009).

[171] *Id.* at 1074, 876 N.Y.S.2d at 539.

[172] *Id.*

[173] *Id.* at 1074–1075, 876 N.Y.S.2d at 539.

[174] *Id.* at 1075, 876 N.Y.S.2d at 540.

judgment in favor of the plaintiff and struck the defendant's answer because it did not contest the constructive trust.[175]

Writing for the majority, Justice Malone, Jr. explained that the situation here was clearly within the well-established precedent from the *King* case. That is, mere constructive notice of the recording should not deny extending the protections of the doctrine absent a finding of actual knowledge on the part of the mortgagee.[176] Moreover, the majority noted that unjust enrichment would result if the doctrine was not used.[177] The plaintiff in this case would essentially receive a windfall, because not only had his share of the outstanding mortgage been repaid by the defendant, but the plaintiff would then have had a higher priority position in the property than the defendant.

Also noteworthy in the opinion was the clear statement of disagreement respecting the Second Department cases that have otherwise held that constructive notice is sufficient to dispel with the doctrine.[178] Avoiding any equivocation on the matter, the majority frankly noted, "[w]e decline to follow those cases . . . inasmuch as they depart from the Court of Appeals' decision in *King v. Pelkofski*."[179]

Given the tumultuous state of the real estate market, the soundness of the law articulated back in 1967 resonates even louder today. The actual knowledge standard has been said to "support an active real estate transfer industry as it makes secured transactions vastly more secure."[180] What remains lacking is a definitive word from either the Court of Appeals or the legislature—or the First and Fourth Departments, for that matter. As it currently stands, the status of the issue remains uncertain, but only insofar as a trial court beyond the jurisdiction of the Third Department is willing to disregard what seems to be clear-cut precedent established by *King* and upheld in *Elwood*.

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[175] *Id.* at 1075, 876 N.Y.S.2d at 539.

[176] *Id.* at 1075, 876 N.Y.S.2d at 540.

[177] *Id.* at 1076, 876 N.Y.S.2d at 540.

[178] *Id.* at 1076, 876 N.Y.S.2d at 540 (citing Bank One v. Mui, 38 A.D.3d 809, 835 N.Y.S.2d 585 (App. Div. 2d Dep't 2007); Roth v. Porush, 281 A.D.2d 612, 722 N.Y.S.2d 566 (App. Div. 2d Dep't 2001); R.C.P.S. Assocs. v. Karam Developers, 238 A.D.2d 492, 656 N.Y.S.2d 666 (App. Div. 2d Dep't 1997)).

[179] *Id.* at 1075–76, 876 N.Y.S.2d at 540.

[180] Bailey & Treiman, *supra* note 166.

D. Same-Sex Legal Issues

Questions regarding the status, rights, and obligations of same-sex couples appear before the court in a variety of contexts. Some cases invoke questions of fundamental liberty and fairness, and go right to the heart of the New York State Constitution and its cognate substantive due process and equal protection clauses. More often, though, these challenges arise simply from a denial (or even a grant, as one case here illustrates) of rights or benefits to same-sex couples pursuant to some statutory framework.

As the last word on many such issues, the appellate division has inherited the unenviable task of determining what the bulk of the law will be in this area. The Third Department has certainly bore its share of the responsibility. Below are three recent decisions that involve important determinations affecting the rights of same-sex individuals.

1. Recognition of Out-of-State Same-Sex Marriages: *Lewis v. New York State Department of Civil Services*[181]

According to the court's holding in *Lewis v. New York State Department of Civil Services*, New York's rule of recognition—acknowledging that an out-of-state marriage is valid in New York if it was valid where obtained—applies with equal force to same-sex marriages.[182]

In this case, the plaintiff taxpayers challenged a determination from the New York State Department of Civil Services that recognized same-sex marriages that had been validly entered into out of state.[183] The determination had made it possible for married same-sex couples to receive health and insurance benefits provided by the New York State Health Insurance Program.[184] The plaintiffs alleged that the recognition rule did not cover same-sex marriages, and moreover, that the state's action here was "illegal, unconstitutional and result[ed] in the unlawful disbursement of

[181] The *Lewis* case cites numerous New York cases that have applied this rule to recognize out-of-state marriages that could not have been validly entered into in New York. *See* Lewis v. N.Y. State Dep't of Civil Servs., 60 A.D.3d 216, 219–220, 872 N.Y.S.2d 578, 582 (App. Div. 3d Dep't 2009), *aff'd on other grounds sub nom.* Godfrey v. Spano, 13 N.Y.3d 358, 377, 920 N.E.2d 328, 337, 892 N.Y.S.2d 272, 281 (2009) (in the Third Department, before Justices Rose, Kane, Peters, Lahtinen, and Malone Jr.).

[182] *Id.* at 222–23, 872 N.Y.S.2d at 584.

[183] *Id.* at 218–19, 872 N.Y.S.2d at 581.

[184] *Id.*

public funds."[185] At the trial court level, Supreme Court Justice Thomas McNamara granted the state's motion for summary judgment dismissing the claim, and the plaintiffs appealed.[186]

Writing for the majority, which included Justices Kane and Peters, Justice Rose aptly applied longstanding precedent to an admittedly "novel"[187] legal question. The analysis began by rejecting plaintiffs' contentions that the recognition rule is inapplicable simply because gay marriage is not included in New York's statutory definition of marriage.[188] According to Justice Rose, every positive application of the rule naturally requires recognizing out-of-state marriages that "failed to meet New York's definition of a marriage in some respect."[189] The merits of this argument were disposed of quickly.

For the next issue, Justice Rose engaged in a lengthier discussion of whether same-sex marriage falls within one of the two common law exceptions when the courts have held that they need not recognize the out-of-state marriage. This is when either (1) a New York statute expressly makes recognition of the marriage illegal, or (2) the marriage in question is "abhorrent to New York's public policy."[190] The plaintiffs needed to establish only one exception to nullify the recognition rule. They established neither.

Addressing the statutory exception, the majority noted the Court of Appeals's holding in *Hernandez v. Robles*[191] that had previously held that the "Domestic Relations Law limits marriages solemnized in New York to persons of the opposite sex,"[192] but concluded that the Court did not specify that same-sex marriages solemnized out-of-state could not be recognized here. This precluded the court in *Lewis* from finding a statutory bar against recognition.

As for the second exception, the presence of convincing and unambiguous precedent made resolution of this issue crystalline. A century's worth of New York jurisprudence had limited abhorrent marriages to mean *only* polygamous or incestuous marriages.[193] In fact, one Court of Appeals case had even recognized a Rhode Island

[185] *Id.* at 219, N.Y.S.2d at 582.
[186] *Id.* at 219, N.Y.S.2d 581–82.
[187] *Id.* at 219, N.Y.S.2d at 582.
[188] *Id.* at 220, N.Y.S.2d at 583.
[189] *Id.*
[190] *Id.* at 220, N.Y.S.2d at 582.
[191] 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006).
[192] *Lewis*, 60 A.D.3d at 220–221, 872 N.Y.S.2d at 583 (citing Hernandez v. Robles, 7 N.Y.3d 338, 357, 855 N.E.2d 1, 5, 821 N.Y.S.2d 770, 774 (2006)).
[193] *Id.* at 219–220, 872 N.Y.S.2d at 582.

marriage between an uncle and his niece under the rule.[194] Thus, if the court was going to accept the plaintiffs' argument that same-sex marriage is abhorrent to New York's public policy, it was going to have to place same-sex marriages within the same category as polygamous or incestuous marriages. It declined to do so.[195]

Joining in a separate opinion were Justices Lahtinen and Malone Jr., who concurred with the result but would have decided the case on much narrower grounds.[196] To them, the discussion of marital recognition was avoidable. The case was about the deference owed to the legislature. The legislature provided the president of the Civil Service Commission with the authority to make decisions regarding the eligibility of healthcare benefits, and such decisions should be accorded deference. Justice Lahtinen further noted that the commission had already bestowed similar benefits to in-state domestic partners, minimizing the practical consequences of this determination.[197] The concurrence concluded that issues involving "th[e] emerging field" of same-sex marriage should be left to the legislature.[198]

The *Lewis* decision reinforced the precedent which held that New York's rule of recognition encompasses valid out-of-state same-sex marriages. In the same vein, it also bolstered what amounts to an effective end-run around New York's prohibition against in-state same-sex marriage. All same-sex couples need to do is marry in a state where same-sex marriage is legal, and New York must recognize the out-of-state marriage.

Lewis also achieved harmony within the judicial departments of the appellate division on this issue, with the majority reaching the same result as did the Fourth Department a year prior in *Martinez v. County of Monroe*, a case which had similarly used the rule to recognize an out-of-state same-sex marriage.[199] When presented

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[194] *In re* Mays, 305 N.Y. 486, 493, 114 N.E.2d 4, 7 (1953). The court reached the merits of the public policy exemption because the marriage of an uncle to his niece did not fall within New York's own statutory definition of an incestuous marriage at that time, which would have otherwise precluded recognition under the statutory exception. *Id.* at 492–93, 114 N.E.2d at 7.

[195] *Lewis*, 60 A.D.3d at 219–220, 872 N.Y.S.2d at 582.

[196] *Id.* at 224, 872 N.Y.S.2d at 586 (Lahtinen, J., concurring).

[197] *Id.* at 224–25, 872 N.Y.S.2d at 586 ("The practical effect of the determination here is to give an out-of-state document formalizing a same-sex relationship the same weight as the affidavit required to receive such benefits as a domestic partner, which is a narrow accommodation to state employees in an area where the Legislature has specifically accorded the Commission broad discretion.").

[198] *Id.* at 225, 872 N.Y.S.2d at 586.

[199] Martinez v. County of Monroe, 50 A.D.3d 189, 193, 850 N.Y.S.2d 740, 743 (App. Div. 4th Dep't 2008).

with the same question in *Godfrey v. Spano*, the Second Department avoided discussion of the recognition issue.[200]

Perhaps the only unanticipated consequence of this accord was that it conceivably allowed the Court of Appeals to sidestep the issue on appeal, in *Godfrey v. Spano*.[201] *Godfrey* may have ultimately affirmed *Lewis*, but it failed to rule on the Third Department's application of the rule to recognize an out-of-state same-sex marriage. A three-judge concurrence, however, written by Judge Beauchamp and joined by Chief Judge Lippman and Judge Jones, endorsed the position taken by the Third Department; that is, that New York's rule of recognition must be construed to recognize same-sex marriages validly solemnized in other states.[202]

2. Death Benefits for Civil Union Spouses: *Langan v. State Farm Fire & Casualty*[203]

The issue in *Langan* was whether a party to an out-of-state civil union qualifies as a surviving spouse under New York's Workers' Compensation Law.

Here, the plaintiff and the decedent entered into a civil union in Vermont in 2000.[204] In 2002, the decedent suffered fatal injuries while working, and the plaintiff commenced an action seeking death benefits as the decedent's "surviving spouse" pursuant to section 16(1-a) of the Workers' Compensation Law.[205] The Workers' Compensation Board denied the claim on the grounds that the plaintiff was not a surviving spouse, and therefore lacked standing to claim the benefits.[206]

The majority affirmed the board's determination, holding that a party to a civil union is not a surviving spouse under the statute.[207] Justice Kane wrote the opinion for the majority. Justices Crew III, Mugglin, and Lahtinen joined in the majority opinion.

The relevant statutes at issue defined the term "surviving spouse"

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[200] Godfrey v. Spano, 57 A.D.3d 941, 943, 871 N.Y.S.2d 296, 298 (App. Div. 2d Dep't 2008), *aff'd*, 13 N.Y.3d 358, 374, 920 N.E.2d 328, 335, 892 N.Y.S.2d 272, 279 (2009).

[201] 13 N.Y.3d 358, 377, 920 N.E.2d 328, 337, 829 N.Y.S.2d 272, 281 (2009).

[202] *Id.* at 377, 920 N.E.2d at 337, 829 N.Y.S.2d at 281 (Ciparick, J., concurring).

[203] 48 A.D.3d 76, 849 N.Y.S.2d 105 (App. Div. 3d Dep't 2007) (before Justices Kane, Crew III, Mugglin, Lahtinen, and Rose).

[204] *Id.* at 77, 849 N.Y.S.2d at 106.

[205] *Id.* at 77, 849 N.Y.S.2d at 106–107.

[206] *Id.* at 78, 849 N.Y.S.2d at 107.

[207] *Id.* at 79, 849 N.Y.S.2d at 107.

to mean only a "legal spouse."[208] Despite the relative ambiguity of this definition, Justice Kane noted that the specific meaning of the term surviving spouse could be derived by looking at the surrounding statutes, as the court had done previously in the case *Valentine v. American Airlines.*[209] The *Valentine* case similarly dealt with a challenge from a decedent's domestic partner requesting death benefits as a "surviving spouse." The distinguishable element between the two cases though, was that the parties in *Valentine* were not in a civil union.

The court concluded that the term "legal spouse" was intended to mean "'a husband or wife of a lawful marriage.'"[210] The majority cited scattered provisions of the Workers' Compensation Law that contained the word "remarriage" to support its interpretation.[211] Among them was a statute requiring a surviving spouse's death benefits to cease upon remarriage.[212] According to the majority, the use of the word remarriage suggested that the drafters of the statute only intended married persons to be covered.[213]

The majority attempted to buttress its statutory interpretation with a supplementary functionalist argument. They noted that the purpose of the benefit cessation provision was to prevent fraud or abuse: a situation where a surviving spouse has since remarried and found new financial support, yet continues to collect death benefits from the state. The majority reasoned that because parties to a civil union could never "remarry" within the technical meaning of the word, the support payments would never end, even if they entered into a new civil union.[214] Thus, the fact that the parties were not literally "married" proved to be the pivotal factor driving the majority's determination.

Lastly, the majority addressed the plaintiff's final argument that the civil union status conferred upon the parties by the State of Vermont should be recognized by New York as a matter of judicial comity. In response, the majority explained that while it could recognize their status as legal spouses under principles of judicial comity, they need not confer upon the parties all of the rights

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[208] N.Y. WORKERS' COMP. LAW § 16(1-a) (McKinney 2007) ("[T]he term surviving spouse shall be deemed to mean the legal spouse.").

[209] Valentine v. Am. Airlines, 17 A.D.3d 38, 791 N.Y.S.2d 217 (App. Div. 3d Dep't 2005).

[210] *Langan,* 48 A.D.3d at 79, 849 N.Y.S.2d at 107 (quoting *Valentine,* 17 A.D.3d at 40, 791 N.Y.S.2d at 218).

[211] *Id.* at 78, 849 N.Y.S.2d at 107.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 78–79, 849 N.Y.S.2d at 107.

afforded by Vermont, and moreover, there was nothing mandating them to recognize their status in the first place.[215] Here, the majority declined to recognize their legal status, determining that recognition would involve the extension of significant benefits to these parties and many other civil union couples, thereby implicating questions of "social and fiscal policy" that would be more appropriate for the legislature to decide.[216]

The lone dissenter in *Langan* was Justice Rose. His argument consisted of two main points. First, he argued that the majority's reliance on statutory interpretation was misplaced.[217] By virtue of their status as parties to a civil union, Vermont law had already conferred upon the parties the status of legal spouses, and there was no reason here like there was in *Valentine* for a New York court to construe the term "legal spouse" because all the court needed to do was apply "our doctrine of comity to give [the Vermont definition] effect."[218]

Next, Justice Rose criticized the majority's reliance on legislative intent that stemmed from its statutory interpretation argument. He noted that there was no way the legislature could have contemplated future complexities like civil union relationships when the statute was drafted, and as such, the word remarriage was consistently used because it was the only "conceivable event that could replace the support obligation."[219]

Further, he noted that the majority's purpose-based argument was similarly misguided, and that the hypothetical pitfall presented by the statute's use of the word "remarriage" could be rectified by simply construing the term to encompass any subsequent entry into a civil union arrangement as well. Such an interpretation, he noted, "would avoid the anomaly, not be unreasonable and . . . be preferable '[s]ince the Workers' Compensation Law must be liberally construed in favor of employees in order to achieve its humanitarian purpose.'"[220] The decision was not appealed.

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[215] *Id.* at 79, 849 N.Y.S.2d 107–108.
[216] *Id.* at 79, 849 N.Y.S.2d at 108.
[217] *Id.* at 82, 849 N.Y.S.2d at 110 (Rose, J., dissenting).
[218] *Id.*
[219] *Id.*
[220] *Id.* at 82–83, 849 N.Y.S.2d at 110.

3. Power to Dissolve an Out-of-State Civil Union: *Dickerson v. Thompson*[221]

Rounding out our review of same-sex decisions is the recently decided *Dickerson v. Thompson,* which holds that principles of comity provide New York courts with the power to dissolve an out-of-state civil union.[222]

In this case, two New York residents traveled to Vermont to enter into a civil union in that state. When the relationship ended, the plaintiff attempted to dissolve the relationship in New York State supreme court. It is worth noting that the civil union could not be dissolved in Vermont because of a state statute requiring that at least one of the parties to the civil union be a resident of the state for one year prior to termination.[223]

At the hearing before the New York State supreme court, the plaintiff moved ex parte for a default judgment after the defendant failed to appear. Instead of granting the motion though, the trial court justice raised the issue, sua sponte, that the court did not have subject matter over the dispute to allow for the dissolution of the civil union.[224]

On appeal, the plaintiff raised the issue that, "as a matter of comity, New York should recognize [the] Vermont civil union status for the limited purpose of adjudicating this action to dissolve it."[225] To determine whether New York should defer to the policy of another state, Justice Peters set forth that the pertinent test was whether the acts "are consistent with New York's public policy." A unanimous majority of the court held that they were.

What followed next was a strong declaration by the court that New York's public policy protects same-sex couples. This consisted of citations to New York's Public Health Law provisions guaranteeing visitation rights to same-sex couples,[226] executive orders from Governor Paterson to state agencies ordering them to recognize same-sex couples and extend benefits to them,[227] legislative enactment following September 11th to provide same-sex

[221] No. 507892, 2010 WL 959930 (App. Div. 3d Dep't Mar. 18, 2010) (before Presiding Justice Cardona and Justices Peters, Rose, Kavanagh, and McCarthy).

[222] *Id.* at *3.

[223] *Id.* at *1.

[224] *Id.*

[225] *Id.*

[226] *Id.* at *2.

[227] *Id.*

couples with death benefits,[228] and of course, case precedent from the Third Department.[229] Two of the cases mentioned are the very same discussed in this article. Justice Peters cited to the *Lewis* case for the proposition that the recognition of an out-of-state same-sex marriage is not contrary to New York's public policy. *Langan* was cited for the proposition that the court "may recognize, as a matter of comity, the civil union status of parties."[230]

In summary, both the *Dickerson* and *Lewis* decisions will likely become important precedent in the coming years as New York's same-sex populace continues to receive status and benefit conferrals from other states that they cannot receive here. Moreover, while *Langan* remains good law, *Dickerson* certainly suggests that the current Third Department court may be more apt to recognize same-sex legal arrangements and perhaps benefit conferrals than it has in the past.

E. Employment

Employment law issues appear before the court in many forms, and run the gamut from discrimination and wrongful termination issues to legal questions that arise via CPLR Article 78 proceedings. Stripped of all their factual nuances, many cases often come down to the justices' own interpretation of a particular statutory provision that lies at the center of the contest. These two cases illustrate this very fact. In both cases, Justice Garry wrote the opinion for a unanimous majority.

1. Provisional Employees: *Lee v. Albany-Schoharie-Schenectady-Saratoga Board of Cooperative Educational Services*[231]

In *Lee v. Albany-Schoharie-Schenectady-Saratoga Board of Cooperative Education Services*, the court held that one's status as a provisional employee does not ripen into a permanent position merely by the expiration of the provisional statutory term.[232]

In this case, a provisional employee had held her position with the Board of Cooperative Educational Services ("BOCES") for twelve years, much longer than the nine-month limitation period for

[228] *Id.*

[229] *Id.*

[230] *Id.* at *3.

[231] 69 A.D.3d 1289, 893 N.Y.S.2d 383 (App. Div. 3d Dep't 2010) (before Presiding Justice Cardona and Justices Lahtinen, Kavanagh, McCarthy, and Garry).

[232] *Id.* at 1290–91, 893 N.Y.S.2d at 386.

provisional employment set forth under section 65(2) of New York's Civil Service Law.[233] When BOCES was audited and instructed to reclassify their positions, the petitioner was required to take a civil service exam to determine her eligibility for a permanent position. The petitioner failed the exam and was subsequently terminated.[234]

The petitioner here alleged that the termination violated section 22 and other provisions of New York's Civil Service Law.[235] In order for BOCES to have violated these provisions that govern the treatment of permanent employees, the petitioner needed to establish that she was in fact a permanent employee herself at the time of the termination. She tried to accomplish this by arguing that her provisional employment status had ripened into permanency because the statutory time limit for provisional employment had expired, but she had nevertheless remained employed for twelve years.[236]

In the majority opinion, Justice Garry explained that article V, section 6 of the New York Constitution provides that civil service appointments "'shall be made according to merit and fitness,'" and thus, a provisional employee may become a permanent employee "only as a result of a civil service exam and eligibility."[237] Accordingly, the majority held that neither the mere passage of time nor the violation of a statute could merit the elevation of employment status, since such a finding would result in abuse of the constitutional standard that civil service positions only be filled based on merit and fitness.[238]

2. Accidental Benefits for State Employees: *Stymiloski v. DiNapoli*[239]

At issue in *Stymiloski v. DiNapoli* was whether injuries suffered by a police officer responding to a fire were outside the scope of his ordinary employment duties entitling him to accidental disability benefits pursuant to section 363 of New York's Retirement and Social Security Law.[240]

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[233] *Id.*

[234] *Id.* at 1289, 893 N.Y.S.2d at 385.

[235] *Id.* at 1290, 893 N.Y.S.2d at 385.

[236] *Id.* at 1290–91, 893 N.Y.S.2d at 386.

[237] *Id.* at 1291, 893 N.Y.S.2d at 386 (citing N.Y. CONST. art V, § 6).

[238] *Id.*

[239] 64 A.D.3d 865, 881 N.Y.S.2d 677 (App. Div. 3d Dep't 2009) (before Presiding Justice Cardona and Justices Spain, Rose, Kane, and Garry).

[240] N.Y. RETIRE. & SOC. SEC. LAW § 363 (McKinney 2007).

In this case, a police officer was on duty when he observed an automobile on fire outside of a store in the early morning of December 20, 2005.[241] He attempted to push the burning automobile to prevent further damage to the store, and after attempting to extinguish the fire himself, called for assistance from a local fire department, which extinguished the flames.[242] The fire chief on site then ordered the police officer and fire fighters to push the automobile further away from the store in case the fire flared up again. During this process, the police officer slipped and fell on ice that had formed during the fire's dousing.[243]

Having sustained injuries to his left shoulder, the police officer filed for and received performance of duty disability and retirement benefits. He also filed for accidental disability benefits, but this request was denied by the state comptroller and affirmed by a hearing officer, because the police officer had not sustained an accident within the meaning of section 363 of New York's Retirement and Social Security Law.[244] The police officer then commenced a CPLR Article 78 proceeding.

In the unanimous opinion, which was joined by Presiding Justice Cardona and Justices Spain, Rose, and Kane, Justice Garry set forth that in order for the petitioner to recover for accidental injury benefits, the injury must have been sustained outside the course of performing ordinary employment duties.[245] Thus, the analysis here focused on whether the duties performed by the police officer during that fire were within the course of his normal employment duties. The unanimous court held that it was, and that the officer was therefore not entitled to such benefits.

The majority noted that the police officer's own testimony before the hearing officer revealed that "moving the car following the direction of a fire chief at the scene of a fire [was] within the realm of his normal responsibilities."[246] Having established further that the police officer had testified to knowing the temperature was nineteen degrees and had seen the firefighters douse the car with water, the court held that the accident "resulted 'from an expected or foreseeable event arising during the performance of routine employment duties,' which does not merit an award of benefits

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241 *Stymiloski*, 64 A.D.3d at 866, 881 N.Y.S.2d at 677.
242 *Id.* at 866, 881 N.Y.S.2d at 677–678.
243 *Id.* at 866, 881 N.Y.S.2d at 678.
244 *Id.*
245 *Id.*
246 *Id.*

based upon this provision [of section 363 of New York's Retirement and Social Security Law]."[247]

3. Worker's Compensation: *Marotta*, *Kontogiannis*, and *Bond*

In May 2008, the Third Department published two opinions within the same week that reversed determinations of the workers' compensation board and extended benefits to employees who had been injured during routine breaks from work. In the process, they helped elucidate what can often be a murky area for lawyers tasked with determining whether an injury has arisen out of the course of employment.

In *Marotta v. Town & Country Electric Inc.*,[248] after an electrician had met with his partner and loaded up his truck for the day's assignment, he stopped en route to the work site to get a cup of coffee from a drive-through coffee shop. While reaching into his back pocket for his wallet, he experienced a sharp pain in his back that extended down into his legs and left his right leg paralyzed. He was diagnosed with herniated disks, and after an emergency procedure to remove the disk fragments, the claimant was told that he would be unable to work for seven months.[249] Thereafter the claimant filed for worker's compensation benefits. A workers' compensation judge awarded the claimant benefits on the basis that the injury was "work-related," but the decision was reversed by the Workers' Compensation Board and this appeal followed.[250]

In a unanimous decision, Justice Spain began by noting that it was undisputed that the injury occurred during the course of the claimant's employment.[251] It seems odd, however, that the workers' compensation board chose not to dispute this point, as one could certainly make an argument that the actual employment had not yet begun. This became an important point too, because of the presumption that attaches once it has been determined that the injuries occurred during the course of the employment.

Justice Spain explained that in order for an employee to recover workers' compensation benefits, the injury suffered must have arisen out of the employment.[252] Further, he explained that there is

[247] *Id.* (quoting O'Brien v. Hevesi, 12 A.D.3d 895, 896, 784 N.Y.S.2d 701 (quoting O'Brien v. Hevesi, 12 A.D.3d 895, 896, 784 N.Y.S.2d 701 (App. Div. 3d Dep't 2004)).

[248] 51 A.D.3d 1126, 857 N.Y.S.2d 340 (App. Div. 3d Dep't 2008).

[249] *Id.* at 1126, 857 N.Y.S.2d at 341.

[250] *Id.*

[251] *Id.* at 1126–1127, 857 N.Y.S.2d at 341–42.

[252] *Id.* at 1126, 857 N.Y.S.2d at 341.

a presumption that any injuries that occur during the course of the employment also arise out of the employment unless there is substantial evidence to refute this point.[253] There was no substantial evidence to refute the presumption here.

The court noted that the coffee shop was directly on the way to the employee's job site and had become part of the claimant's daily routine. This routine stop, the majority held, "constituted a momentary and customary break which did not interrupt his employment and which can only be classified as reasonable and work-related under the circumstances."[254] Furthermore, because the presumption was in the employee's favor, and substantial evidence had not been produced to demonstrate that the injury did not arise out of the employment, the court held that the injuries arose out of the employment, and ordered that the workers' compensation benefits be extended to the employee.[255]

One week later, the Third Department extended the same latitude for routine breaks that occur within the course of employment.

In *Kontogiannis v. Nationwide PC*,[256] a woman was on an authorized break from her job when she injured herself while walking on the sidewalk outside of her office. The specific issue raised on appeal was whether the walk had turned into a "personal mission," i.e., a departure from the employer's constructive control, which would have meant that the injury did not occur during the course of employment, making the injury non-compensable.[257]

Justice Malone, Jr., writing for a unanimous majority, held that the routine break was part of her employment, and that therefore, the injury suffered arose out of the course of her employment.[258] Justice Malone, Jr. noted that employees in this corporation were allowed to leave the building for routine breaks and that the fall occurred only a few feet from the building's main entrance. In light of these facts, the majority held that the claimant was still under the constructive control of her employer during the break, and because the injury occurred during her employment, she was therefore entitled to workers' compensation benefits.

Thus, under *Marotta* and *Kontogiannis*, the Third Department

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253 *Id.* at 1127, 857 N.Y.S.2d at 342.
254 *Id.* at 1128, 857 N.Y.S.2d at 342.
255 *Id.* at 1128, 857 N.Y.S.2d at 342–43.
256 51 A.D.3d 1180, 857 N.Y.S.2d 803 (App. Div. 3d Dep't 2008).
257 *Id.* at 1181, 857 N.Y.S.2d at 804.
258 *Id.* at 1181–82, 857 N.Y.S.2d at 804.

holds that an employer who is injured during a routine, reasonable break from employment may receive workers' compensation benefits because the injury still occurs during the course of employment. One year later, though, in the case of *Bond v. Suffolk Transportation Service*,[259] the court provided an example of when a break period lasts too long to still be considered within the ordinary course of employment.

In *Bond*, the claimant was a school bus driver who injured herself when she slipped and fell exiting the bus outside of her home. As part of her arrangement with her employer, the claimant was permitted to drive the bus to her home in between her morning and afternoon bus runs. This period, which lasted several hours, was referred to by the claimant as her "'break' period."[260] Whether or not she actually believed it was a work break, as opposed to a full stoppage, was irrelevant. It was a strategic move on her part to pursue this argument, because if she could establish that she was acting within the course of her employment when the injury occurred, this would enable her to receive the favorable presumption that the injury arose out of the employment. Unfortunately for her, though, neither the Workers' Compensation Board nor the Third Department accepted this line of reasoning.

Writing for the unanimous panel, Justice Spain explained that there was no evidence "that the employer retained any control or authority over the claimant in the period between the bus runs or that her use of the bus had any relationship to her employment or benefit to her employer."[261] Unlike the other cases discussed here, where the employer still maintained "constructive control" over the employee during short, authorized breaks, the long interim in between bus shifts, coupled with the fact that no discernible benefit could be found to have been achieved by the employer during such breaks, proved to be distinguishable factors in this case.[262] Thus, the majority affirmed the decision of the Worker's Compensation Board, denying the injury benefits.

IV. VINDICATED DISSENTERS

When one considers the hours of discussion, deliberation, and negotiation that inevitably occur behind the scenes of any appellate

[259] 68 A.D.3d 1341, 889 N.Y.S.2d 497 (App. Div. 3d Dep't 2009).
[260] *Id.* at 1342, 889 N.Y.S.2d at 498.
[261] *Id.*
[262] *Id.*

bench, one thing is for certain: it must take a lot of moxie for a justice to stand up to his or her colleagues, and say, "I disagree." Of course, it takes even more to express your disapproval in a separate, contradictory opinion.

It is with this image in mind that the dissenter becomes that much more of a respectable figure—or a despised one, depending on which side of the issue you are on. Seldom, if ever, though, do legal commentators write on appellate division dissenters; how many times judges dissent; who they dissent against; who joins with them; and whether, if the case was heard on appeal, the judge's decision was rewarded with a reversal from the state's highest court.

This section does not examine all of these questions, but does provide some recognition for the justices who were willing to stand up to the majority, and were proven right—at least in the eyes of the Court of Appeals.

A. People v. Weaver[263]

People v. Weaver helped refine the scope of the Fourth Amendment of the New York State Constitution in an era when modern technology often blurs the boundaries.

The issue in this case was whether a GPS tracking device that was placed inside a defendant's vehicle "constitute[d] a violation of the vehicle owner's constitutionally protected reasonable expectation of privacy."[264] The case was one of first impression; the issue had arisen in two Supreme Court cases, but *People v. Weaver* marked the first time that the appellate division would decide the issue.[265] Ultimately, four justices of the Third Department held that a person has no reasonable expectation of privacy in the outside movements of his vehicle, such that the "use of the GPS device did not infringe on any reasonable expectation of privacy and did not violate defendant's Fourth Amendment protections."[266]

Justice Stein was the lone dissenter. To her, the police's use of the GPS system to follow the defendant's movements crossed the

[263] People v. Weaver, 52 A.D.3d 138, 141, 860 N.Y.S.2d 223, 225 (App. Div. 3d Dep't 2008), *rev'd*, 12 N.Y.3d 433, 447, 909 N.E.2d 1195, 1203, 882 N.Y.S.2d 357, 365 (2009) (vindicated dissenter: Justice Stein).

[264] *Id.* at 141, 860 N.Y.S.2d at 225, *rev'd*, 12 N.Y.3d at 447, 909 N.E.2d at 1203, 882 N.Y.S.2d at 365.

[265] *Id.* at 141, 860 N.Y.S.2d at 225.

[266] *Id.* at 142, 860 N.Y.S.2d at 225.

line into an unconstitutional search.[267] While agreeing with the majority that people do not have a reasonable expectation of privacy in public places, and particularly their movements therein, Justice Stein nevertheless noted that "they do have a reasonable expectation that their every move will not be continuously and indefinitely monitored by a technical device without their knowledge, except where a warrant has been issued based on probable cause."[268] Moreover, Justice Stein noted that "at some point, the enhancement of our ability to observe by the use of technological advances compels us to view differently the circumstances in which an expectation of privacy is reasonable."[269]

In a narrow 4–3 decision, the Court of Appeals agreed with Justice Stein. Although they did not explicitly cite her dissenting opinion, much of the same legal analysis and policy concerns that were raised in her dissent were similarly addressed by Chief Judge Lippman in the Court's majority opinion.[270]

B. New York City Transit Authority v. Transportation Workers Union of America[271]

This decision took place when Justice McCarthy was still a supreme court justice of the Second Judicial Department. At issue was whether an arbitrator exceeded the scope of his authority under a contract between an employer and a workers' union when he acted pursuant to the contractual provision to reduce a penalty imposed by the employer on the employee. The pertinent provision stated,

> the action by the [Transit Authority], based thereon, shall be affirmed and sustained by the [arbitrator] *except* if there is presented to the [arbitrator] *credible evidence* that the action by the [Transit Authority] is *clearly excessive in light of the employee's record and past precedent* in similar cases. It is understood by the parties that *this exception will be used*

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[267] *Id.* at 145, 860 N.Y.S.2d at 228 (Stein, J., dissenting).

[268] *Id.*

[269] *Id.*

[270] People v. Weaver, 12 N.Y.3d 433, 444, 909 N.E.2d 1195, 1201, 882 N.Y.S.2d 357, 363 (2009) ("The residual privacy expectation defendant retained in his vehicle, while perhaps small, was at least adequate to support his claim of a violation of his constitutional right to be free of unreasonable searches and seizures. The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy.").

[271] 60 A.D.3d 1, 871 N.Y.S.2d 276 (App. Div. 2d Dep't 2008), *rev'd*, 14 N.Y.3d 119 (2010) (vindicated dissenter: Justice McCarthy).

rarely and only to prevent a clear injustice.[272]

In this case, after the arbitrator determined that an employee had committed an assault, the arbitrator reduced the disciplinary penalty imposed, based on the existence of what he concluded was evidence in the employee's record suggesting that the penalty was clearly excessive.[273] The Transit Authority moved to set aside this determination as an impermissible use of the rare exception provision.[274]

Three justices of the New York State Supreme Court, Second Department held that the arbitrator acted beyond the scope of his authority because, in their opinion, he failed adequately to cite in his own opinion how the punishment imposed was "clearly excessive" in light of the employee's record.[275] Thus, the majority concluded that the arbitrator failed to meet the stated requirements of the contract governing when he could apply the rare exception to reduce a penalty imposed.

Justice McCarthy and Justice Spolzino disagreed and held that the arbitrator properly applied the exception based on his findings of the existence of credible evidence that demonstrated the penalty was "'clearly excessive.'"[276] In fact, to Justice McCarthy, the issue of whether the arbitrator had properly applied the exception was such a foregone conclusion that he spent most of his dissent arguing why the arbitrator's determination was not irrational, a distinct legal argument altogether.[277] Finally, he concluded by noting precedent which holds that even if the court had determined that the arbitrator had exceeded the scope of his authority pursuant to the agreement, the vacatur remedy sought here by the employer was not the proper remedy to resolve this issue.[278]

The Court of Appeals agreed with the McCarthy dissent. In the majority opinion, Chief Judge Lippman noted that the arbitrator's opinion evidenced that he clearly understood the terms governing his authority, and whether the application of the exception here was warranted or not was irrelevant because it was within the arbitrator's power to make this determination.[279]

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[272] *Id.* at 9, 871 N.Y.S.2d at 282.
[273] *Id.* at 4, 871 N.Y.S.2d at 278.
[274] *Id.* at 4–5, 871 N.Y.S.2d at 278–79.
[275] *Id.* at 6, 871 N.Y.S.2d at 279–80.
[276] *Id.* at 10, N.Y.S.2d at 282.
[277] *Id.* at 11, N.Y.S.2d at 283.
[278] *Id.* at 12, N.Y.S.2d at 284–85.
[279] N.Y. City Transit Auth. v. Transp. Workers Union of Am., 14 N.Y.3d 119 (2010).

C. New York Charter Schools Association v. DiNapoli[280]

The overarching issue in this case was the constitutionality of two statutes that in part authorized the state comptroller to audit charter schools. The real crux of the case, though, hinged on whether a series of performance and other audits of charter schools could be considered incidental to the regulation of public school districts by the comptroller.

Four justices of the Third Department concluded that "audits of charter schools are incidental to the Comptroller's authority to supervise the accounts of public school districts,"[281] and therefore, the statutes providing for auditing of the charter schools did not violate article V, section 1 of the New York Constitution. The majority supported its position by noting, inter alia, that charter schools receive substantial public funding, which they believed "implicate[d] the comptroller's fundamental duty to supervise [them as part of] state fiscal matters."[282] Further, they cited the "statutorily close relationship they share with public school districts" and the fact that even though "they have been permitted to be different," they still share many of the same "characteristics of public school districts" and "serve an important public function," which made incidental regulation permissible.[283]

Justice Rose was the lone dissenter. He began his opinion by establishing that, despite the similarities between charter schools and public school districts, the two entities are distinct and, moreover, charter schools are not "political subdivisions" like public school districts.[284] Thus, the only way the legislature could direct the comptroller to regulate charter schools without violating the New York Constitution was if regulating charter schools was incidental to the regulation of the public school districts.[285] Justice Rose explained that this was not the case. The purpose of the audits created by the legislature was to determine whether school districts were paying only for services actually rendered. The statutes at issue, however, gave the comptroller the authority to perform on both public and charter schools, "audits of the

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[280] 60 A.D.3d 119, 121, 871 N.Y.S.2d 497, 499 (App. Div. 3d Dep't 2009), *rev'd*, 13 N.Y.3d 120, 914 N.E.2d 991, 886 N.Y.S.2d 74 (2009) (vindicated dissenter: Justice Rose).

[281] *Id.* at 121, 871 N.Y.S.2d at 499.

[282] *Id.* at 125, 871 N.Y.S.2d at 502.

[283] *Id.* at 124, 871 N.Y.S.2d at 502.

[284] *Id.* at 125–26, 871 N.Y.S.2d at 502, 503 (Rose, J., dissenting).

[285] *Id.* at 126, 871 N.Y.S.2d at 503.

educational merit of the services rendered," and "their financial dealings with entities other than public schools."[286] Thus, Justice Rose determined that because the extensive scope of the audits went well beyond fiscal matters to include performance audits, they had greatly exceeded what could reasonably be considered "incidental" under article V, section 1 of the New York Constitution.[287]

Judge Ciparick wrote the majority opinion for the Court of Appeals, holding that the auditing power assigned by the legislature to the comptroller under the statutes at issue did in fact violate article V, section 1 of the New York Constitution.[288]

Chief Judge Lippman wrote separately to underscore his belief that the court was only determining that the Legislature did not have the power pursuant to article V, section 1 of the constitution to "direct the Comptroller to perform both fiscal and programmatic audits of entities that are neither political subdivisions of the State nor so intertwined with political subdivisions that their audit would be reasonably incidental to a political subdivision audit."[289] The chief judge was careful to note, however, that this did not mean the comptroller could not regulate charter schools pursuant to some other source of his power.[290]

Also writing a separate concurrence was Judge Graffeo, who expressed her belief that purely financial audits of charter schools could be constitutional under article V, section 1.[291]

V. CONCLUSION

In addition to recognizing the nine men and women who have graduated from Albany Law School and currently serve as justices of the Third Department, this article has attempted to accomplish two things. First, this article has provided some additional perspective on the achievements of these nine by placing them within the greater context of distinguished Albany Law grads who have served on the Third Department judiciary. As stated in the introduction, there is a strong nexus between the Third Department and Albany Law dating back to the inception of the court. These

[286] *Id.*

[287] *Id.* at 127, 871 N.Y.S.2d at 503.

[288] N.Y. Charter Sch. Ass'n v. DiNapoli, 13 N.Y.3d 120, 133, 914 N.E.2d 991, 999, 886 N.Y.S.2d 74, 82 (2009).

[289] *Id.* at 134, 914 N.E.2d at 999, 886 N.Y.S.2d at 82 (Lippman, C.J., concurring).

[290] *Id.* at 134, 914 N.E.2d at 1000, 886 N.Y.S.2d at 83.

[291] *Id.* at 135, 914 N.E.2d at 1000, 886 N.Y.S.2d at 83 (Graffeo, J., concurring).

nine justices evidence that Albany Law graduates continue to maintain a stalwart presence on the Third Department bench.

The second aim has been to highlight and discuss some of the decisions in which these justices have taken part, both to examine and review their jurisprudence, but also to draw attention to a body of work that should be analyzed in far greater detail then it is currently.

With the Court of Appeals's functioning primarily as a certiorari court, the bulk of appellate review is conducted by the appellate divisions. They therefore play an instrumental role in shaping much of the law in New York State. Yet, coverage of their decisions is often limited to case digests and practice reviews. Seldom, if ever, does one see the same sort of justice-specific analysis typically reserved for high court commentary applied to the appellate division. The individual tendencies and voting patterns of appellate division justices are, however, just as ripe for discussion as they are for their high court colleagues. Plus, considering that the majority of New York attorneys' only interaction with state appellate courts in New York will be before the appellate division, commentators would be wise to expand their focus to include appellate division justices and cases, and lawyers—particularly appellate attorneys—would be wise to take heed, as well.

It is my sincere hope that this article realizes both of its aims and generates increased scholarship of the justices of, and the decisions rendered by, the four judicial departments of the appellate division.