DEDICATION

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Suppose three law clerks were asked to write a dedication for retiring Judge Robert S. Smith of the New York Court of Appeals, a jurist famous for the hypotheticals he poses at oral argument. (And don't say, "That's not this case." As the judge would reply, "It's a hypothetical, and this is the Court of Appeals. We do those here.") So the question is, what would they write?

They could, of course, describe the distinguished legal career that brought him to the court. A native New Yorker raised in New England, in 1968 Judge Smith received an L.L.B, magna cum laude, from *Columbia Law School*, where he graduated first in his class and was the editor-in-chief of the *Columbia Law Review*. He practiced law at the New York City firm of Paul, Weiss, Rifkind, Wharton & Garrison from 1968 through 2003, becoming a partner in 1976, and also served as a lecturer-in-law and visiting professor at Columbia Law School. His tenure as individual practitioner and Special Counsel to the firm of Kornstein Veisz Wexler & Pollard was cut short when Governor George E. Pataki nominated him to the Court of Appeals in November 2003. The State Senate confirmed his appointment in January 2004, and he has served with great distinction since then.

During his more than thirty years in private practice before taking the bench, Judge Smith handled a wide variety of complex commercial cases for clients ranging from an insurance industry trade association that objected to the State's diversion of assets from a special fund to cover a budget shortfall,[1] to an airline pilots union that challenged anti-takeover provisions inserted into a collective bargaining agreement as violative of federal law.[2] He tried numerous cases and argued some forty appeals before more

* The authors served as law clerks to Judge Smith during his final years on the New York Court of Appeals.

[1] *See* Alliance of Am. Insurers v. Chu, 77 N.Y.2d 573, 577–78, 571 N.E.2d 672, 673–74, 569 N.Y.S.2d 364, 365–66 (1991).

[2] *See* Air Line Pilots Ass'n, Int'l v. UAL Corp., 874 F.2d 439, 440–41 (7th Cir. 1989).

than a dozen courts, including the U.S. Supreme Court, six different federal courts of appeals, and the appellate courts of several states, including the court on which he later served.

Although commercial litigation was the focus of Judge Smith's practice, he also volunteered for a community law center and took on numerous pro bono cases, with a focus on death penalty appeals. He won accolades for his handling of two death penalty cases that reached the U.S. Supreme Court.[3] In one of those cases, *Penry v. Johnson*, he succeeded in overturning a death sentence for a mentally retarded man, arguing that the jury had not been properly instructed to consider evidence regarding the defendant's mental condition.[4] His decades of litigation experience have helped him to serve on the court with great distinction for the past eleven years.

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The judge's clerks might also offer their (humble) observations of Judge Smith as a jurist. First, there is the extraordinary amount of preparation he devoted to each and every case the court heard during his tenure. Judge Smith is every bit as interested in the facts as the law and often seemed to have read every page of the record on appeal. No matter how thoroughly a clerk might have read the same record and how exhaustive his or her "bench memo" might have been, the judge invariably picked up on something—part of a witness's testimony, a clause in a contract—that was missed. During an especially busy session, Judge Smith would sometimes joke that he would "take the bench 'cold,' just this once." But he never did—each case was too important to him.

At oral argument, Judge Smith's legendary "hypos" confounded even experienced oral advocates. For example, in one case, the respondent insurer argued that a construction company's excavation on a neighboring lot that undermined a house was not within the policy's coverage for "vandalism" because the company had not acted with malice against the insured homeowner.[5] In response, Judge Smith posed the following hypo:

> JUDGE SMITH: Suppose - - - suppose a kid digs a hole in your front yard because he likes to dig holes and he knows it

[3] *See* Penry v. Johnson, 532 U.S. 782 (2001); O'Dell v. Netherland, 521 U.S. 151 (1997).

[4] *See Penry*, 532 U.S. at 801–04. Judge Smith lost O'Dell in a five to four decision, with the Supreme Court concluding that the Court's own rule, whose application he urged, was "new" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and therefore could not be applied retroactively to his client's case. *See O'Dell*, 521 U.S. at 159–67.

[5] *See* Georgitsi Realty, LLC v. Penn-Star Ins. Co., 21 N.Y.3d 606, 608, 999 N.E.2d 520, 521, 977 N.Y.S.2d 157, 158 (2013).

> might cause your building to cave in, but he doesn't care. He doesn't have anything against you. He just likes to dig holes. And your building caves in. Vandalism?
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> [RESPONDENT'S COUNSEL]: I honestly don't know. I don't know what that - - -
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> . . . .
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> JUDGE SMITH: - - - you say excavation is not vandalism. But you can imagine that digging holes might be vandalism?
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> [RESPONDENT'S COUNSEL]: Digging holes, especially on your property, that goes underneath, I guess, the foundation of your property, if I take the hypothetical . . . to I guess its logical consequences, would be something where you're actually doing something to the property. . . . So I guess it's much closer.
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> JUDGE SMITH: - - - I guess what I'm really saying, isn't "excavation" a word that means digging a hole?[6]

Attorneys who appeared before the court rarely seemed happy to hear the inevitable "Suppose . . ." but Judge Smith's hypos were never meant to confound or entrap counsel, or as a mere academic exercise. Their purpose was to test the boundaries of a legal theory and to determine the implications of a particular decision by the court.

Perhaps the best example is the hypo that led Judge Smith to cast the deciding vote against the death penalty in *People v. Taylor*.[7] *Taylor* followed the court's decision in *People v. LaValle*,[8] in which the court struck down a provision of New York's death penalty statute that required the judge in a capital murder trial to inform the jury that the defendant would receive a parole-eligible sentence if it deadlocked.[9] The court reasoned that the deadlock instruction could coerce the jury into deciding in favor of the death penalty,[10] and Judge Smith dissented, arguing that the instruction was "not unconstitutionally coercive."[11] *LaValle* also held that the statute required some sort of deadlock instruction but deferred to the legislature to rewrite one that worked, leaving the death penalty

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[6] Transcript of Oral Argument at 31–33, *Georgitsi*, 21 N.Y.3d 606, 999 N.E.2d 520, 977 N.Y.S.2d 157 (No. 156).

[7] People v. Taylor, 9 N.Y.3d 129, 878 N.E.2d 969, 848 N.Y.S.2d 554 (2007).

[8] People v. LaValle, 3 N.Y.3d 88, 817 N.E.2d 341, 783 N.Y.S.2d 485 (2004).

[9] *Id.* at 99, 817 N.E.2d at 344, 783 N.Y.S.2d at 488.

[10] *Id.* at 127–28, 817 N.E.2d at 365, 783 N.Y.S.2d at 509.

[11] *See id.* at 133–34 , 817 N.E.2d at 369–70, 783 N.Y.S.2d at 513–14 (Smith, J., dissenting).

statute itself unenforceable.[12] On appeal after *LaValle*, the People argued in *Taylor*—and the dissent agreed—that the death penalty could be enforced because the defendant would only be parole-eligible in 125 years, and the jury had been told as much, so there was no possibility of coercion.

Judge Smith based his decision to cast the deciding vote against the death penalty, which he has said was the hardest decision he has had to make under the state constitution,[13] on the following hypo:

> No doubt there will be few 70-year-old first degree murderers, but what about 36 year olds? John Taylor was 36 at the time of the . . . murders. If he had killed only two people instead of five, he might, in the event of a jury deadlock, have faced a maximum sentence of 50 years. Would that, under the dissent's proposed rule, be enough to make him eligible for the death penalty? What if he were 42? Certainly, on some hypothetical but plausible scenario, Taylor could be executed while, under *LaValle*, a 20 year old who committed the exact same crime could not be. This does not make sense.[14]

That hypo clarified in the judge's mind that the People were arguing that the death penalty could be imposed based on life expectancy, which he concluded, "is not the right way to decide life or death."[15]

After the parties have had their say, Judge Smith brings his extraordinary gifts as a jurist to bear in deciding the case. His views are, of course, shaped by a mastery of and respect for the court's precedents. At the same time, he is deeply concerned with the case before him, asking himself—and his clerks—whether deciding it in a particular way makes sense and reaches a just result. As a consequence, Judge Smith is always willing to question the presumptions on which the parties' arguments are based, and even to revisit the rationales underpinning seemingly well-settled principles of law. For example, in *People v. Rosario*,[16] the majority found that a prior consistent statement of a child abuse victim made some years after the abuse should not have been admitted at trial

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[12] *See id.* at 99, 817 N.E.2d at 344, 783 N.Y.S.2d at 488 (majority opinion).

[13] *See* Robert S. Smith, *My Perspective on Recent New York Death Penalty Cases*, 72 ALB. L. REV. 625, 625 (2009).

[14] People v. Taylor, 9 N.Y.3d 129, 159, 878 N.E.2d 969, 986, 848 N.Y.S.2d 554, 571 (2007) (Smith, J., concurring) (citation omitted).

[15] Smith, *supra* note 13, at 631.

[16] People v. Rosario, 17 N.Y.3d 501, 958 N.E.2d 93, 934 N.Y.S.2d 59 (2011).

because the "prompt outcry" hearsay exception did not apply.[17] In his dissenting/concurring opinion, the judge did not argue that the conclusion was wrong based on the facts of the case. Rather, he traced the origins of the prompt outcry hearsay exception to a nineteenth century view that a sexual assault represented such an "outrage" upon a "virtuous female" that there would be "a natural presumption that at the first suitable opportunity she would make disclosure of it."[18] Judge Smith felt that the prompt outcry requirement for the admissibility of prior consistent statements rested "on shaky ground in the first place,"[19] but that it was particularly suspect in a case where a child had been sexually abused.[20] As a result, he proposed a "simple" solution:

> When a victim testifies to an act of rape or sexual abuse, every disclosure of the alleged crime by the victim before it was reported to the authorities should be admissible, subject of course to a trial court's normal power to exclude evidence that is repetitive, unnecessarily inflammatory or otherwise prejudicial. To me, the good that such a rule can do is obvious, and I do not see how it can do any harm.[21]

In an era in which judges are criticized for their judicial (i.e., political) "activism," Judge Smith is also first and foremost a "lawyer, not [an] ideologue."[22] Perhaps that is a function of his personal evolution from a member of the Stanford Young Democrats (who cast his first vote in a presidential race for Hubert H. Humphrey) to a Republican member of the Federalist Society. More likely, it is the manifestation of his judicial philosophy. As Judge Smith has written:

> It is not my view of a judge's function that he should try to advance his personal preferences through the court, although I do not claim to the illusion that a judge's preferences have no impact on his decisions. I may not even say that they should have no impact, but I do not like the idea that a judge should approach either a case or series of cases with an agenda in an attempt to remake the law or

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[17] *See id.* at 512, 958 N.E.2d at 100, 934 N.Y.S.2d at 66.

[18] *See id.* at 518, 958 N.E.2d at 104, 934 N.Y.S.2d at 70 (quoting People v. O'Sullivan, 104 N.Y. 481, 486, 10 N.E. 880, 882 (1887)).

[19] *See* Robert S. Smith, *How the Prompt Outcry Rule Protects the Guilty*, 76 ALB. L. REV. 1445, 1450 (2012/2013).

[20] *Rosario*, 17 N.Y.3d at 518, 958 N.E.2d at 104, 934 N.Y.S.2d at 70.

[21] *Id.* at 520, 958 N.E.2d at 105, 934 N.Y.S.2d at 71.

[22] *See* Al Baker, *Lawyer, Not Ideologue: Robert Sherlock Smith*, N.Y. TIMES, Nov. 5, 2003, at B5.

society as he would prefer it to be.[23]

As a result, he approaches each case in the hope that, when asked what relevance his personal views had to his decision, "the answer is none at all."[24]

The judge's faithfulness to that view of the judicial function is perhaps most evident in his opinions challenging the civil confinement of convicted sex offenders under the Sex Offender Management and Treatment Act (SOMTA)[25] when they have already completed their prison sentences. Explaining his fear that a broad construction of SOMTA could lead to the incarceration of "every sex offender a judge or jury thinks likely to offend again,"[26] Judge Smith has written:

> Some will intuitively respond: Not a bad idea. But it is a very bad idea because not even a concern for public safety should be allowed to trump certain fundamental rules. Among them are that criminals can be confined only for crimes they have committed, after their guilt is proved beyond a reasonable doubt in a procedure in which they receive the many protections that our Constitution gives to those accused of crime, and that even when convicted they can be incarcerated for no more than the term of the maximum sentence provided by law. If the present sentences for sex offenders are too short, the Legislature should make them longer, but it should not, and constitutionally cannot, simply substitute civil for criminal proceedings as a means of keeping dangerous criminals off the streets.[27]

Consistent with that view, Judge Smith has also argued that a civil commitment order may not be based solely on a diagnosis of antisocial personality disorder because the State could otherwise have "locked up half of those now in prison without bothering with the complexities of the criminal law."[28] The judge has also argued that certain criminal procedural rights, for example, the right to

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[23] Smith, *supra* note 13, at 626.

[24] *Id.*

[25] N.Y. MENTAL HYG. LAW § 10.01–10.17 (McKinney 2014).

[26] *See* State v. Shannon S., 20 N.Y.3d 99, 109, 980 N.E.2d 510, 515, 956 N.Y.S.2d 462, 467 (2012) (Smith, J., dissenting).

[27] *Id.* at 109, 980 N.E.2d at 515–16, 956 N.Y.S.2d at 467–68 (Smith, J., dissenting) (citing Kansas v. Hendricks, 521 U.S. 346, 372–73 (1997) (Kennedy, J., concurring)).

[28] *See* State v. John S., 23 N.Y.3d 326, 354, 15 N.E.3d 287, 307, 991 N.Y.S.2d 532, 552 (2014) (Smith, J., dissenting) (quoting *Shannon S.*, 20 N.Y.3d at 110, 980 N.E.2d at 516, 956 N.Y.S.2d at 468 (Smith, J., dissenting)).

confrontation, should apply to SOMTA proceedings because "[h]istory has shown that once a person is committed as a sexually violent predator, it's unlikely that he will ever be released" and the liberty interests at stake are therefore significant.[29] The judge's SOMTA opinions show his commitment to the rule of law, even where it causes the State or witnesses "inconvenience or unpleasantness."[30]

Judge Smith's opinions also demonstrate his conviction that the court must enforce the clear text of the New York State Constitution. For example, the judge dissented from a decision which held that the state legislature's authority could give or loan funds to private corporations (including IBM) for "economic development."[31] The judge argued that the court could not ignore what he viewed as an outright constitutional prohibition on that use of taxpayer funds:

> I seem to remember a time when IBM could make money by selling its products for more than it cost to produce them. I would have thought semiconductor manufacturers could do the same. If they cannot, a bail-out for their shareholders is not a prudent use of more than a billion dollars in taxpayer funds.
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> Of course, the New York Legislature, so long as it stays within constitutional limits, is free to disregard both received economic teachings and common sense. I have defended before, and will no doubt defend again, the right of elected legislators to commit folly if they choose. But when our Legislature commits the precise folly that a provision of our Constitution was written to prevent, and this Court responds by judicially repealing the constitutional provision, I think I am entitled to be annoyed.[32]

When it comes time to write an opinion, Judge Smith is a firm

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[29] *See* State v. Floyd Y., 22 N.Y.3d 95, 119, 2 N.E.3d 204, 220, 979 N.Y.S.2d 240, 256 (2013) (Smith, J., concurring) (quoting Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 114 U. PA. J. CONST. L. 391, 411 (2011)) (internal quotation marks omitted).

[30] *See Floyd Y.*, 22 N.Y.3d at 118, 2 N.E.3d at 219–20, 979 N.Y.S.2d at 255–56 (Smith, J., concurring).

[31] Bordeleau v. State, 18 N.Y.3d 305, 960 N.E.2d 917, 937 N.Y.S.2d 126 (2011) (Smith, J., dissenting); *see also* N.Y. CONST. art. VII § 8.1 ("The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking . . . .").

[32] *Bordeleau*, 18 N.Y.3d at 323, 960 N.E.2d at 927, 937 N.Y.S.2d at 136 (Smith, J., dissenting).

believer in answering only the question that actually decides the case and leaving other theories offered by the parties for another day. The judge's view of the purpose of a judicial opinion is reflected in a passage from a letter from Supreme Court Justice Benjamin N. Cardozo, a former chief judge of the Court of Appeals, which hung on the wall of Judge Smith's Albany chambers. In answering to a letter apparently critical of the narrowness of one of his opinions, Justice Cardozo wrote:

> Perhaps I may add that it would not be easy to answer your question categorically even if I felt free to do so. An opinion, as you know, must deal with a special situation, and its implications not infrequently must be left to be developed in the future.[33]

Accordingly, Judge Smith does not feel the need to address all of the parties' arguments, or indeed, any of their arguments, if the posture of the case does not require the court to do so. For example, the appellate briefs in *People v. Greenberg*,[34] a decade-long civil fraud action against two former insurance company executives, ran several hundred pages. Judge Smith upheld the denial of defendants' summary judgment motion without much discussion of the parties' voluminous arguments, relying instead on the wisdom of previous fact-finders:

> Much of the relevant evidence is summarized in other decisions, including the opinion of the Court of Appeals for the Second Circuit in *United States v. Ferguson*, which held, among other things, that there was sufficient evidence to support a jury finding—in a criminal case, beyond a reasonable doubt—that a fraudulent conspiracy had its inception in a telephone call from Greenberg to GenRe's chief executive officer. We have no difficulty in concluding that, in this civil case, there is evidence sufficient for trial that both Greenberg and Smith participated in a fraud. The credibility of their denials is for a fact finder to decide.[35]

Or consider this passage from a concurring opinion Judge Smith wrote in a tort case in which a child slid down and fell from a bannister and the appellate division denied defendant's motion to amend their answer to assert assumption of risk as a defense:

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[33] Letter from Benjamin N. Cardozo, Associate Justice, U.S. Supreme Court, to Carl Wheaton, Professor, St. Louis University School of Law (June 4, 1934) (on file with authors).

[34] People v. Greenberg, 21 N.Y.3d 439, 994 N.E.2d 838, 971 N.Y.S.2d 747 (2013).

[35] *Id.* at 447, 994 N.E.2d at 841, 971 N.Y.S.2d at 750 (citation omitted).

> This seems to me an extremely easy case. Assumption of risk cannot possibly be a defense here, because it is absurd to say that a 12-year-old boy "assumed the risk" that his teachers would fail to supervise him. . . .
>
> The majority makes this point, which is enough to dispose of the case, near the end of its opinion. The rest of the majority opinion is, in my view, an extended dictum, which seems to say that the assumption of risk defense is largely if not entirely limited to cases involving "athletic and recreative activities."[36]

Because "[a]ssumption of risk in tort law is a hard idea to understand," Judge Smith counseled against making "sweeping pronouncements in a case that does not require it, while ignoring the questions those sweeping pronouncements raise."[37]

That same restraint is apparent in the judge's writing style. As the son of a novelist and a literary critic,[38] Judge Smith cares deeply about his written work product. At a time when appellate opinions are known for their verbosity, the judge's opinions are refreshingly brief and to the point. He provides only as much factual background as a reader would need to understand the case. Take this passage reciting the facts of *People v. Oddone*,[39] a manslaughter case whose record on appeal ran to many volumes:

> The victim, Andrew Reister, was a bouncer in a bar. On the night in question, defendant and a young woman were in the bar, dancing on a table. Reister asked defendant to get off the table, defendant refused, and Reister pushed him off. There followed a fight. In short order, defendant got behind Reister and put his arms around his neck; one of defendant's hands was grasping the other. After an interval, Reister fell to the floor and defendant fell on top of him, not releasing his grip, though Reister seemed to onlookers to be unconscious. Several people screamed at defendant to let Reister go, and some tried without success to pull defendant away. Finally, defendant let go and ran out of the bar, leaving Reister unconscious on the floor. Reister was declared brain dead

[36] Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 397, 927 N.E.2d 547, 550, 901 N.Y.S.2d 127, 130 (2010) (Smith, J., concurring) (citations omitted).

[37] *Id.* at 397–98, 927 N.E.2d at 550–51, 901 N.Y.S.2d at 130–31.

[38] The judge's middle name is "Sherlock," although it was his grandmother's maiden name rather than a tribute to Sir Arthur Conan Doyle's famous literary creation.

[39] People v. Oddone, 22 N.Y.3d 369, 3 N.E.3d 1160, 980 N.Y.S.2d 912 (2013).

two days later.[40]

We doubt if Ernest Hemingway could have narrated the tragic scene with greater precision, impact, and economy.

While Judge Smith's mastery of New York law is unquestionable, his legal reasoning is often simple, straightforward, and based in no small part on common sense. For example, the judge dissented from a decision in which the court deferred to the Public Employment Relations Board (PERB) when it invalidated restrictions the New York City Transit Authority (NYCTA) placed on the ability of its train operators to work a second job, for the simple reason that:[41]

> The majority here faults the NYCTA for failing to put forward "particular safety studies" to support its new standards. But why are studies needed to demonstrate that an employee driving a train full of people should have eight full hours of rest between jobs? Why cannot that matter be left to the NYCTA's common-sense judgment? The majority finds an "insufficient basis to disturb PERB's determination," but an agency responsible for public employment relations should not be determining a question like this at all. Here, . . . the issue is "the relative weight to be given to competing policies"—in this case, the competing policies of protecting employees' bargaining rights and protecting the public safety. We, not PERB, should be determining that question, and should decide that the interest in public safety is the weightier one.[42]

Although set forth in a considerably longer opinion, Judge Smith's argument upholding the constitutionality of state statutes limiting marriage to opposite-sex couples in *Hernandez v. Robles*[43] is equally straightforward. Writing for the majority, Judge Smith argued simply that there could be a rational basis for the statutory definition of marriage, so that it did not violate the due process and equal protection clauses of the state constitution, and that any change had to come from the Legislature, as it did a few years later.[44]

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[40] *Id.* at 373–74, 3 N.E.3d at1162, 980 N.Y.S.2d at 914.

[41] *See* N.Y.C. Transit Auth. v. N.Y. State Pub. Emp't Relations Bd., 19 N.Y.3d 876, 880, 972 N.E.2d 83, 85, 948 N.Y.S.2d 842, 844 (2012).

[42] *Id.* at 881, 972 N.E.2d at 86, 948 N.Y.S.2d at 845 (Smith, J., dissenting) (citations omitted).

[43] Hernandez v. Robles, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S. 770 (2006).

[44] *See id.* at 356, 361, 855 N.E.2d at 5, 9, 821 N.Y.S. at 774, 778 (construing articles 2 and

The Judge's writing is also leavened with wit—and of course the occasional hypothetical. Here is Judge Smith attempting to cabin the majority's articulation of the doctrine of assumption of risk in the "bannister slider" case:

> The majority's dictum invites a number of questions that the majority makes no attempt to answer. Most obvious among them: What exactly is "athletic or recreative" activity? Indeed, why was Luke Trupia's chosen activity—sliding down a banister—not "recreative"? He was obviously doing it for fun. The majority says that "athletic and recreative activities possess enormous social value"—a value that presumably does not inhere in banister sliding. But why exactly is sliding down a banister (supposing it to be done by an adult with a taste for such amusement) of less "social value" than sliding down a ski slope or bobsled run? And if the latter activities are more socially valuable than the former, why is the banister slider, who chose the less desirable form of amusement, in a *better* position to recover damages than the skier or bobsledder?[45]

The writing and humor—and the incisive reasoning—are vintage Judge Smith.

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Perhaps it would be most fitting for the judge's clerks to attempt to assess Judge Smith's legacy from his years on the court. In addition to the thousands of decisions authored by other judges that he has helped to shape, Judge Smith has written some two hundred majority opinions and another two hundred concurrences and dissents. Judge Smith has written for the court in decisions that articulate the standards to be applied when legislation is challenged under the free exercise clause of the state constitution,[46] define the limits of the state legislature's authority to alter appropriations bills submitted by the governor,[47] permit members of a limited liability company to bring derivative suits on the LLC's behalf,[48] and invalidate discriminatory zoning.[49] Judge Smith has also

3 of the New York Domestic Relations Law).

[45] Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 397, 927 N.E.2d 547, 550, 901 N.Y.S.2d 127, 130 (2010) (Smith, J., concurring) (citations omitted).

[46] Catholic Charities of the Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459, 825 N.Y.S.2d 653 (2006).

[47] Pataki v. N.Y. State Assembly, 4 N.Y.3d 75, 824 N.E.2d 898, 791 N.Y.S.2d 458 (2004).

[48] *See* Tzolis v. Wolff, 10 N.Y.3d 100, 884 N.E.2d 1005, 855 N.Y.S.2d 6 (2008).

[49] *See* Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead, 20 N.Y.3d 481, 986 N.E.2d 898, 964 N.Y.S.2d 64 (2013).

spoken for the court in numerous criminal appeals on issues ranging from the extent to which evidence corroborating accomplice testimony must be independent of that testimony,[50] to the proper application of the 2009 Drug Law Reform Act (DLRA).[51]

Notwithstanding his significant number of majority opinions, it is Judge Smith's dissents that have attracted the attention of court observers.[52] The sheer volume of those dissents—close to one hundred fifty—and their content are noteworthy.[53] The judge once wrote that, when asked why he dissents as often as he does, he generally gives "a wise-guy answer along the lines of 'because my colleagues make mistakes.'"[54] Of course, nothing could be farther from the truth. Judge Smith is keenly aware that, when he dissents, he risks lessening the "credibility—the air of infallibility" that helps the Court of Appeals preserve its role as "the final arbiter[] of hotly-disputed questions."[55] Rather, he dissents because:

> [W]hen you do it you help everyone—the majority, the litigants and their lawyers, present and future readers of the opinions, even yourself—to understand the case better.
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> I have seen that effect at work again and again during the process of exchanging drafts. The majority circulates a draft; a draft dissent pokes holes in it; the majority tries to fix the holes—by explaining itself more clearly, backing off some language that went a bit too far, and abandoning a weak rationale for a more defensible one. The result is a better majority decision (i.e., a court doing a better job). Occasionally, this process will be so effective that the dissenters decide not to dissent; it has happened, more than once, that an opinion that turns out to be unanimous owes a good part of its strength to a dissent that no one outside the court ever saw.[56]

In Judge Smith's view, even when a dissent does not ultimately

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[50] *See* People v. Reome, 15 N.Y.3d 188, 933 N.E.2d 186, 906 N.Y.S.2d 788 (2010).

[51] *See* People v. Santiago, 17 N.Y.3d 246, 952 N.E.2d 481, 928 N.Y.S.2d 665 (2011).

[52] *See* Peter A. Mancuso, *The Independent Jurist: An Analysis of Judge Robert S. Smith's Dissenting Opinions*, 73 ALB. L. REV. 1019 (2010).

[53] Judge Smith's dissents contribute to his status as one of the most prolific members of the court in terms of the number of opinions authored. *See* Vincent M. Bonventre, *Thomas, Ginsburg, Breyer & Alito—Smith & Pigott (Part 4 of Supremes vs NY Court of Appeals: Judicial Output [with Charts!])*, N.Y. CT. WATCHER (Sept. 27, 2013), http://www.newyorkcourtwatcher.com/2013/09/thomas-ginsburg-breyer-alito-smith.html.

[54] Robert S. Smith, *Dissenting: Why Do It?*, 74 ALB. L. REV. 869, 869 (2011).

[55] *Id.* at 869–70.

[56] *Id.* at 872.

lead to a unanimous decision, it helps the reader to understand "what the majority really decided, and what it rejected—what it would have decided had it gone the other way."[57]

Whether writing for or concurring with the majority, or in dissent, Judge Smith has developed the court's jurisprudence in so many areas that it is difficult to identify those in which he has the greatest impact. However, at least one common theme runs through those opinions: a belief that the court should consider the underlying purpose of a legal rule before deciding to apply it in a particular case. The judge's opinions concerning three seemingly unrelated issues—preservation of arguments for appellate review, proper application of the hearsay rule, and suppression of evidence in criminal trials—are illustrative.

The Court of Appeals' complex "preservation" doctrine essentially requires that counsel adequately raise an issue or argument at trial in order for it to be considered on appeal. Because the preservation requirement potentially applies to every issue raised on appeal, it is perhaps the most frequently considered issue of New York appellate procedure. Recognizing that an appellate court should not reject an appeal without good reason, Judge Smith's preservation opinions have argued that a party's failure to preserve an issue below should not bar review when it "caused no prejudice to the [other party] and no interference with the swift and orderly course of justice."[58] Because rejecting an argument on preservation grounds could potentially cause an innocent person to suffer wrongful incarceration, the judge's most recent preservation opinion for the court emphasized that "procedural rules should . . . keep unjust results to a minimum."[59] On the other hand, Judge Smith has also required preservation where counsel's omission of an objection may have been a strategic decision.[60] Judge Smith's preservation opinions thus work from the premise that appellate courts should not "elevate preservation to a formality" but should instead apply

[57] *Id.*

[58] People v. Finch, 23 N.Y.3d 408, 414, 15 N.E.3d 307, 312, 991 N.Y.S.2d 552, 557 (2014).

[59] *Id.* at 416, 15 N.E.3d at 312–13, 991 N.Y.S.2d at 557–58; *see* People v. Prado, 4 N.Y.3d 725, 726–27, 823 N.E.2d 824, 824–25, 790 N.Y.S.2d 418–19 (2004) (R.S. Smith, J., dissenting in part).

[60] *See* People v. Walston, 23 N.Y.3d 986, 990–91, 14 N.E.3d 377, 380–81, 991 N.Y.S.2d 24, 27–28 (2014) (Smith, J., concurring) (involving an unpreserved objection to judge's paraphrasing or summarizing a jury note); People v. Becoats, 17 N.Y.3d 643, 651, 958 N.E.2d 865, 868, 934 N.Y.S.2d 737, 740 (2011) (involving an unpreserved objection that count in an indictment was duplicitous).

preservation rules when there is a legitimate interest in doing so.[61]

Judge Smith's preservation opinions also suggest that the court should not use the rule to avoid "difficult and important" questions of law that are appropriate for appellate review.[62] In particular, he has argued that the preservation requirement is not a jurisdictional rule, so that it need not apply "when common sense and practical necessity" support reaching the merits of an appeal.[63] For example, in *Misicki v. Caradonna*, a personal injury action based on alleged regulatory violations, Judge Smith made a "compelling argument" that the safety regulation that was the basis of the suit was inapplicable.[64] The majority refused to consider that dispositive issue because the parties had not raised it below or on appeal. Quoting the leading treatise on Court of Appeals procedure—a book he has kept on his desk in chambers since he first joined the court—Judge Smith argued for the application of a recognized exception to the preservation requirement for a "newly raised point of law . . . decisive [to] the appeal . . . which could not have been obviated [or cured] by factual showings or legal countersteps if it had been raised below."[65] He also reminded the court that "appellate [courts do not] sit as automatons, merely to register their reactions to the arguments which counsel had made [in the lower courts]," because if they did, "[t]he fortunes of litigation might then turn, not on the merits of a case, but on the skill or prescience of counsel in the court of first instance."[66]

Judge Smith has also challenged the rule that the Court of Appeals lacks the power to review an unpreserved issue that the appellate division reached "in the interests of justice."[67] In *Hecker v. State*,[68] Judge Smith's concurring opinion explained that the rule

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[61] *See Finch*, 23 N.Y.3d at 433, 15 N.E.3d at 326, 991 N.Y.S.2d at 571 (quoting People v. Payne, 3 N.Y.3d 266, 273, 819 N.E.2d 634, 638, 786 N.Y.S.2d 116, 120 (2004)).

[62] *See Prado*, 4 N.Y.3d at 726–27, 823 N.E.2d at 824–25, 790 N.Y.S.2d at 418–19 (R.S. Smith, J., dissenting in part).

[63] Misicki v. Caradonna, 12 N.Y.3d 511, 525, 909 N.E.2d 1213, 1223, 882 N.Y.S.2d 375, 385 (2009) (Smith, J., dissenting).

[64] *Id.* at 524, 909 N.E.2d at 1222, 882 N.Y.S.2d at 384 (Graffeo, J., dissenting).

[65] *Id.* at 525, 909 N.E.2d at 1222, 882 N.Y.S.2d at 385 (Smith, J., dissenting) (quoting ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 17:1, at 591–92 (3d ed., rev. 2005)) (internal quotation marks omitted); *see* Rivera v. Smith, 63 N.Y.2d 501, 516 n.5, 472 N.E.2d 1015, 1023 n.5, 483 N.Y.S.2d 187, 195 n.5 (1984).

[66] *Misicki*, 12 N.Y.3d at 525, 909 N.E.2d at 1222, 882 N.Y.S.2d at 385 (Smith, J., dissenting) (quoting KARGER, *supra* note 65, § 17.1, at 591) (internal quotation marks omitted).

[67] *See* Domino v. Mercurio, 13 N.Y.2d 922, 923, 193 N.E.2d 893, 893, 244 N.Y.S.2d 69, 70 (1963).

[68] Hecker v. State, 20 N.Y.3d 1087, 987 N.E.2d 636, 965 N.Y.S.2d 75 (2013).

produces the "bizarre result" that a party "loses the case" because of his opposing party's failure to preserve the argument that the appellate division accepted.[69] He pointed out that "[t]his result is so counterintuitive—and the cases that we find to compel that result so little known—that the parties [in *Hecker*] not only failed to anticipate it, but assumed the rule to be the opposite," so that "[c]ounsel [would] understandably scratch their heads when they read [the] decision."[70]

Judge Smith has also made an important contribution to the court's hearsay jurisprudence, taking a "fresh look" at the justifications of the hearsay doctrine and moving it in a "sensible direction."[71] As a former trial lawyer, Judge Smith has a keen understanding of the always vexing question of whether a statement is offered for its truth.[72] In *People v Goldstein*,[73] for example, the judge wrote for the majority in deciding that statements to a psychiatrist about the defendant, recounted as part of the psychiatrist's expert testimony as so-called basis evidence, were inadmissible hearsay. The judge rejected the People's contention that the statements were offered only to help the jury to evaluate the expert opinion, reasoning that the jury could not do so "without accepting as a premise either that the statements were true or that they were false."[74] A majority of the U.S. Supreme Court subsequently adopted Judge Smith's reasoning in *Goldstein*, arguing that to pretend that "basis evidence" is "not being introduced for the truth of its contents strains credibility."[75]

Judge Smith has also advocated a common sense approach to the court's application of the hearsay bar. For example, the judge has argued that a party should be permitted to impeach its own witness with prior inconsistent statements. As he put it: "[I]t [is] simply unfair to let the jury hear . . . testimony damaging to the defense, from a defense witness's own lips—while allowing the defense to make no use at all of an earlier, much more favorable, answer to the

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[69] *See id.* at 1089, 987 N.E.2d at 637, 965 N.Y.S.2d at 76 (Smith, J., concurring).

[70] *Id.* at 1089, 987 N.E.2d at 637, 965 N.Y.S.2d at 76–77.

[71] *See* Nathaniel Marmur, Judge Robert Smith's Fresh Look at Hearsay, N.Y.L.J., Sept. 2, 2014, at 6.

[72] *See generally* People v. Ludwig, 24 N.E.3d 221 (N.Y. 2014) (Smith, J., concurring); State v. Floyd Y., 22 N.Y.3d. 95, 111, 2 N.E.3d 204, 215–16, 979 N.Y.S.2d 240, 251–52 (2013) (Smith, J., concurring).

[73] People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (2005).

[74] *See id.* at 127, 843 N.E.2d at 732, 810 N.Y.S.2d at 105.

[75] *See* Williams v. Illinois, 132 S. Ct. 2221, 2269 (2012) (Kagan, J., dissenting) (citation omitted) (internal quotation marks omitted); *see also id.* at 2256–64 (Thomas, J., concurring) (agreeing that the basis evidence at issue was offered for its truth).

same question."[76] Similarly, Judge Smith has argued for a "made for the purposes of medical diagnosis" exception to the hearsay rule because "only a foolish person would lie to his or her own doctor when seeking medical help,"[77] an exception that the court has since applied.[78] And, as noted above, the judge has criticized treating child witnesses' prior consistent statements as inadmissible hearsay in cases involving child sexual abuse.[79] As in many of Judge Smith's hearsay decisions, the judge's support for a broadening of the "prompt outcry" exception in such cases is based on his conclusion that there is "no common sense reason for keeping this evidence from the jury."[80]

Judge Smith's belief in common sense rule making is also evident in his opinions, often as the lone dissenter, in cases involving the suppression of evidence. As Judge Smith is fond of saying, the exclusionary rule is "a blunt instrument" that, to paraphrase then-Chief Judge Cardozo, "set[s] the criminal free because the constable has blundered."[81] As a matter of course, Judge Smith would decline to suppress evidence as punishment for errors by law enforcement officers that do not infringe upon the core constitutional rights of suspects.[82]

Judge Smith grounds his suppression opinions in practical considerations, foremost among them the need for rules that can be readily understood and applied by reasonable police officers in real-life situations. For example, in *People v. Weaver*, the court held that evidence gained by placing a GPS tracking device on the underside

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[76] *See* People v. Oddone, 22 N.Y.3d 369, 377, 3 N.E.3d 1160, 1164, 980 N.Y.S.2d 912, 916 (N.Y. 2013).

[77] *See* People v. Ortega, 15 N.Y.3d 610, 621, 942 N.E.2d 210, 217, 917 N.Y.S.2d 1, 8 (2010) (Smith, J., concurring).

[78] *See* People v. Spicola, 16 N.Y.3d 441, 451, 947 N.E.2d 620, 625, 922 N.Y.S.2d 846, 851 (2011) ("To the extent that the boy's responses to the nurse's inquiries . . . were germane to diagnosis and treatment—and she testified that they were—these responses were properly admitted as an exception to the hearsay rule.").

[79] *See* People v. Rosario, 17 N.Y.3d 501, 515–16, 958 N.E.2d 93, 102, 934 N.Y.S.2d 59, 68 (2011) (Smith, J., dissenting).

[80] *Id.* at 516, 958 N.E.2d at 103, 934 N.Y.S.2d at 70.

[81] People v. Weaver, 12 N.Y.3d 433, 451, 909 N.E.2d 1195, 1206, 882 N.Y.S.2d 357, 368 (2009) (Smith, J., dissenting) (citing People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926)); *see* People v. Gavazzi, 20 N.Y.3d 907, 910, 981 N.E.2d 256, 258, 957 N.Y.S.2d 660, 662 (2012) (Smith, J., dissenting) (quoting *Defore*, 242 N.Y. at 21, 150 N.E. at 587).

[82] *See, e.g.*, *Gavazzi*, 20 N.Y.3d at 911, 981 N.E.2d at 259, 957 N.Y.S.2d at 663 (Smith, J., dissenting) (arguing that the requirement that the judge issuing a warrant be named "is essentially formal, and sloppiness in complying with it, while regrettable, endangers no one's liberty"); People v. Greene, 9 N.Y.3d 277, 279, 879 N.E.2d 1280, 1280, 849 N.Y.S.2d 461, 461 (2007) (holding that violation of the statutory physician-patient privilege does not require suppression).

of a suspect's car should have been suppressed because placement of the device constituted an unconstitutional search and seizure.[83] Judge Smith disagreed, pointing out that the majority faulted the police for accomplishing with a GPS what would undoubtedly be constitutional had they assigned a team of officers to follow the defendant.[84] He criticized the majority's attempt to distinguish the two surveillance methods on the basis that GPS is "vastly more efficient than the investigative tools that preceded it" as logically and practically unsound:

> The proposition that some devices are too modern and sophisticated to be used freely in police investigation is not a defensible rule of constitutional law. As technology improves, investigation becomes more efficient—and, as long as the investigation does not invade anyone's privacy, that may be a good thing. It bears remembering that criminals can, and will, use the most modern and efficient tools available to them, and will not get warrants before doing so. To limit police use of the same tools is to guarantee that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers.[85]

Judge Smith has also urged the court to be mindful of practical considerations in the context of the court's case law governing street encounters between police and citizens. The judge has argued that it is impossible to create a "utopian" society in which judges can eliminate the coercion inherent in police interactions with citizens and still promote "reasonably efficient law enforcement" through unyielding exclusionary rules.[86] Therefore, he would decline to extend the "*De Bour* framework" to traffic stops, because "[a]s a general rule, police officers who are not using or threatening force against citizens should be allowed to do their jobs without interference from the courts."[87] Judge Smith is especially critical of the application of the exclusionary rule when he feels that the court has lost sight of the underlying purpose of suppression, which is to

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[83] *Weaver*, 12 N.Y.3d at 436, 444, 909 N.E.2d at 1194, 1201, 882 N.Y.S.2d at 357, 363.

[84] *See Weaver*, 12 N.Y.3d at 448, 909 N.E.2d at 1204, 882 N.Y.S.2d at 366 (Smith, J., dissenting).

[85] *Id.*

[86] *See* People v. Garcia, 20 N.Y.3d 317, 326, 983 N.E.2d 259, 264, 959 N.Y.S.2d 464, 469 (2012) (Smith, J., dissenting).

[87] *Id.* at 326, 983 N.E.2d at 264–65, 959 N.Y.S.2d at 469–70; *see also* People v De Bour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976) (establishing four levels of police-citizen encounters (requests for information, common-law inquiries, detentions, and arrests), and holding that each "level" requires a distinct quantum of evidence).

protect the constitutional rights of citizens. In a recent case concerning a controversial *Miranda* waiver procedure, Judge Smith observed that the primary purpose of the waiver procedure was not to protect the innocent defendant, as the People had suggested at oral argument, but to obtain evidence that would convict a guilty one.[88] The judge reasoned that the collection of incriminating evidence was a laudable goal, so long as the defendant was properly informed of his rights. He argued that nothing required law enforcement "to repress, or forbid them to encourage, the tendency of criminals to talk too much. That tendency greatly contributes to the efficiency of law enforcement; many more crimes would go unpunished if it did not exist."[89]

The casual observer might consider the judge's philosophy on suppression at odds with his preservation jurisprudence. Mistakes by law enforcement in collecting evidence often lead to appellate reversals in the defendant's favor, while the People typically benefit from a defense lawyer's failure to preserve an issue for appellate review. But Judge Smith's writings in both areas argue that rules must be tempered by practical considerations, and that the court must be willing to reconsider their application in cases in which they do not make sense.

That may be Judge Smith's most important legacy: a body of opinions that demonstrate that rules should make sense, should be applied when they advance the interests that they were designed to protect, and should be discarded when they no longer serve those interests. His opinions concerning preservation, hearsay, suppression, and many other issues demonstrate his commitment to the development of a body of New York law that is clear, sensible, and that works both inside and outside the courtroom.

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Ultimately (we suppose) it would be fitting to mention what the privilege of serving as Judge Smith's clerks has meant to us and to those who came before us. It goes without saying that we have benefitted both personally and professionally from working with a truly great legal mind. Judge Smith has taught us to be respectful of precedent, but also to ask whether an outcome makes sense under the facts of a particular case and is fair to the parties—whether it does justice. The opportunity to serve under such a distinguished jurist has been a unique experience for us as new

[88] *See* People v. Dunbar, 2014 WL 5430564 (N.Y. Oct. 28, 2014) (Smith, J., dissenting).
[89] *Id.*

lawyers, and the lessons we have learned will serve us for our entire careers.

As a person, Judge Smith is generous, kind, and very funny. We have enjoyed the judge's vast reserve of war stories from his years in private practice, his humorous anecdotes and jokes, and his occasional recitations of long passages of poetry from memory. We will always remember the discussions (sometimes heated) about politics, history, and culture that took place over Friday evening cocktails, a Smith Chambers' tradition. We are incredibly grateful to have had the opportunity to know and to work for Judge Smith.

When Governor Pataki nominated Robert S. Smith to the Court of Appeals a decade ago, he predicted that his "character, wisdom and intelligence" would make him "one of those outstanding legal minds and judges who people a long time from now are going to say, 'Thank God he is on the Court of Appeals.'"[90] It hasn't taken very long for people to say that, and we have no doubt they will be saying it for many years to come.

[90] James C. McKinley, Jr., *Pataki Puts Nonjudge on Court of Appeals*, N.Y. TIMES, Nov. 5, 2003, at B5 (internal quotation marks omitted).