JONES LECTURE
MUSINGS ON STARE DECISIS IN NEW YORK'S COURT OF LAST RESORT

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My thanks to The Fund for Modern Courts and The Albany Law School for inviting me to deliver the 2018 Hugh R. Jones Memorial Lecture and for hosting this event. My acquaintance with Judge Jones derives from his writings and Chief Judge Judith Kaye's storytelling. Both portray a consummate judicial craftsman, blessed with a knack for the memorable turn of phrase—a powerful talent for a judge to possess—and dedicated to the best interests of the Court of Appeals and the clarity and stability of New York law.

Many judges have reflected on the craft and philosophy of appellate judging, but none more eloquently and astutely than Judge Jones in the Benjamin N. Cardozo Lecture that he delivered at the New York City Bar in 1979, entitled *Cogitations on Appellate Decision-Making*.[1] This lecture, required reading for new Judges of the New York Court of Appeals, predates the major statutory revision of the Court's jurisdiction in 1986, which created a predominantly certiorari court.[2] As a result, part of *Cogitations* is now outdated. Judge Jones's key messages still ring true, though; in particular, his discussion of practical and substantive considerations bearing on when to dissent, or, more precisely, how the best interests of the Court and the law often cut against the individual judge's personal interest or ego in dissenting.[3]

And although their time on the bench overlapped for less than a year and a half, Judge Kaye often talked about Judge Jones, always

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[1] Hon. Hugh R. Jones, Cogitations on Appellate Decision-Making, Address at the Thirty-Fifth Benjamin N. Cardozo Lecture (Nov. 28, 1979).

[2] *See generally* Luke Bierman, *When Less Is More: Changes to the New York Court of Appeals' Civil Jurisdiction*, 12 PACE L. REV. 61, 61 (1992) (discussing the change to the New York Court of Appeals' jurisdiction that took place in 1986).

[3] *See* Jones, *supra* note 1.

with evident admiration and affection.[4] My favorite of Judge Kaye's stories brings home Judge Jones's facility as a writer and his devotion above all to the Court of Appeals and its mission. Judge Kaye recounted leaving on Friday at the end of a session early on in her tenure with at least five assigned majority writings, only to be greeted the following Monday or Tuesday with an exquisitely written dissent from Judge Jones directed at one of her far-from-complete, yet-to-be circulated draft opinions for the Court. Judge Jones's dissent, Judge Kaye soon realized, was intended to sharpen her analysis with an eye toward improving the quality of her majority opinion. He later withdrew the dissent; its salutary purpose having been accomplished. And this was not a one-off event in aid of a rookie judge. In *Cogitations*, Judge Jones extols the practice of preparing internal dissents to strengthen the majority opinion, the work product of the Court as an institution.[5] Having begun with this brief appreciation of Judge Jones's judicial personality, I now turn my attention to stare decisis.

> [T]he questions of a judge's relationship to the past in the form of prior decisions, to the present in the form of the case at hand, and to the future in the form of the effect that [an] opinion will have as precedent are almost daily grist for the judge of a reviewing court.[6]

Why and whether stare decisis constrains decision making in a court of last resort is an intriguing and epic topic and the subject of this lecture, which focuses on the treatment of precedent at the New York Court of Appeals.[7] And I use the word "constrain" deliberately. After all, stare decisis is superfluous if a judge in the present agrees that a prior decision—the precedent—was rightly decided. Put another way:

> [I]f the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window, because no doctrine of

[4] *See* Steven C. Krane, *Judith Smith Kaye*, *in* THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 805, 807 (Albert M. Rosenblatt ed., 2007).

[5] *See* Jones, *supra* note 1.

[6] Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 3 (1966).

[7] Judges may disagree about the scope of a precedent, resulting in disputes about whether a precedent is distinguishable in a current case. *See, e.g.*, Rodriguez v. City of New York, 101 N.E.3d 366, 373 (N.Y. 2018); People v. Taylor, 878 N.E.2d 969, 971 (N.Y. 2007). Precedential scope is beyond the compass of this lecture, which deals with precedential strength.

> deference to precedent is needed to induce a court to follow the precedents that it agrees with; a court has no incentive to overrule them even if it is completely free to do so.[8]

Instead:

> [S]tare decisis 'imparts authority to a decision . . . merely by virtue of the authority of the rendering court and independently of the quality of its reasoning. The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases.'[9]

But why should courts follow prior rulings they consider to be wrong or undesirable? Certainly, the proposition is counterintuitive. Yet, stare decisis endures as a bedrock feature of Anglo-American jurisprudence.[10] Indeed, one of the first skills fledgling lawyers are taught in law school is how to winkle out the "holding" of a case and whether the "holding" or precedent has been followed, properly distinguished or justifiably overruled in subsequent cases.[11] And nominees to the United States Supreme Court are routinely quizzed during Senate confirmation hearings about the degree of respect they will pay to precedent if confirmed.[12] Of course, one might be forgiven for suspecting that the Senators' curiosity about a nominee's views on precedent is motivated by the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[13] which reaffirmed the "essential holding"[14] of *Roe v. Wade*[15] on the basis of stare decisis.[16]

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[8] Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582–83 (7th Cir. 2005).

[9] *Id.* at 583 (quoting Midlock v. Apple Vacations West, Inc., 406 F.3d 453, 457 (7th Cir. 2005)).

[10] *See* Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of A Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 877 (2001).

[11] *See* Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 417 (2011).

[12] *See* Michael Foust, *Roberts Refuses Comment on Roe but Gives Views on Precedent*, BAPTIST PRESS NEWS (Sept. 13, 2005), http://www.bpnews.net/21614/roberts-refuses-comment-on-roe-but-gives-views-on-precedent.

[13] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[14] *Id.* at 845–46.

[15] Roe v. Wade, 410 U.S. 113 (1973).

[16] *See Planned Parenthood*, 505 U.S. at 845–46. Justice Scalia famously chided the authors of the controlling joint opinion in *Casey* for what he called their "contrived" and "keep-what-you-want-and-throw-away-the-rest" approach to stare decisis. *See id.* at 993 (Scalia, J., concurring in part and dissenting in part).

Still, there is no doubt that stare decisis is a core structural attribute of our state common law and federal legal systems, and the question remains why this is or should be so. Several overlapping justifications for stare decisis have at one time or another been put forward with varying degrees of emphasis by courts and scholars.[17] They are equality and fairness, stability, predictability and reliance, which are interrelated values in this context; judicial efficiency or practical necessity; judicial humility; and public faith in the judiciary and the rule of law.[18]

Stare decisis tends to ensure that like cases are decided alike, a principle of equality and fairness that guards against arbitrary or discriminatory decisions. As Second Circuit Judge Pierre Leval explained in his Madison Lecture, *Judging Under the Constitution: Dicta About Dicta*:

> [I]t [is] not the purpose of stare decisis to *increase* court power. To the contrary, the rule [is] intended as a limitation on the courts. It [is] designed to keep courts principled and consistent—to prevent courts from acting arbitrarily or capriciously, deciding the same facts one way in Jones's case and another way in Smith's case. The idea behind it [is] that courts would better perform their assigned function of deciding cases if compelled to decide them consistently.[19]

Relatedly, the consistency fostered by stare decisis creates stability and encourages reliance. People develop expectations based on the

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[17] *See Planned Parenthood*, 505 U.S. at 854 (noting that the Court follows precedent for prudential and practical reasons); *see also* Christopher J. Peters, *Foolish Consistence: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2039–40 (1996) (explaining that justice-promoting interests such as advantageous predictability, maintaining the perception that law is stable and unchanging, judicial efficiency, and judicial restraint are used to justify stare decisis); Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 68–69, 70 (2018) (discussing how stare decisis is justified by: predictability, equality, judicial restraint, credibility, and judicial efficiency; courts also cite predictability, certainty, and reliance as some of the most important justifications); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012) (discussing how stability, respect for established expectations, decisional efficiency, fairness, integrity, judicial discipline and reduction of judicial activism, all work together to justify stare decisis.).

[18] *See* Peters, *supra* note 17, at 2039–40; Varsava, *supra* note 17, at 68–69, 70; Waldron, *supra* note 17, at 3.

[19] Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259 (2006). Judge Leval discusses what he perceives to be the failure of the federal courts to distinguish between dictum and holding, and why this matters. In so doing, he explores how to determine the scope of a precedent.

reasoning and results of past cases. If Smith knows how Jones's case turned out and the reasons for the result, he is empowered to plan and align his affairs in conformity with governing law; he is well-positioned to predict the legal consequences of his future conduct. In sum, stare decisis provides valuable guidance to bench and bar and to the public; adherence to precedent insures that a court's adjudications are not brought "into the same class as a restricted railroad ticket, good for this day and train only."[20]

The most complete expression of the Court of Appeals's historical practice of stare decisis is generally considered to reside in two major writings: then Judge and later Chief Judge Charles Breitel's majority opinion in *People v. Hobson*,[21] and Judge Richard Simons's concurrence in *People v. Damiano*.[22] On the importance of stability and predictability, Judge Simons observed in *Damiano* that:

> [F]ollowing precedent enhances stability in the law because the failure of a court to settle on a rule invites perpetual attack and reexamination, with the real possibility that governing rules will change whenever the composition of the Court changes. It is rare that all members of the Court fully agree on a particular subject and it is more important that there be a predictable rule to govern conduct than that the rule be "right."[23] Any other course can lead to anarchy as trial courts and intermediate appellate courts, who must apply the law as [the Court of Appeals] declare[s] it, speculate on what [the Court's] latest view on the subject will be. For this reason alone, Judges have an institutional obligation to respect the doctrine and abide by it. Moreover, the reiteration of arguments against the rule after they have been considered and rejected several times permits an unwarranted inference by the Bar and public that those rules remain open to debate.[24]

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[20] Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

[21] People v. Hobson, 348 N.E.2d 894 (N.Y. 1976).

[22] People v. Damiano 663 N.E.2d 607 (N.Y. 1996) (Simons, J., concurring).

[23] *Id.* at 614. Here, Judge Simons adverts to Justice Louis Brandeis's famous statement in his dissenting opinion in *Burnet v. Coronado Oil & Gas Co.* that "*[s]tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). In *Burnet* itself, though, Justice Brandeis would have overruled a constitutional precedent that he considered to have been wrongly decided and deleterious in operation because "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Id.* at 406–07.

[24] *Damiano*, 663 N.E.2d at 614 (Simons, J., concurring) (citing Robbins v. California, 453

Judicial efficiency and practical necessity also justify stare decisis. In Judge Simons's words in *Damiano*, "it cannot be seriously argued that a court should reexamine every relevant precedent that has gone before. It could hardly do its work if it did so."[25] This thought was expressed metaphorically by United States Supreme Court Justice (earlier Chief Judge) Benjamin Cardozo, when he cautioned that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[26]

Next, judicial humility counsels respect for precedent. Chief Judge Breitel in *Hobson* conceded the "humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors. Without this assumption there is jurisprudential anarchy."[27] Simply put, prudent appellate judges temper their certainty with modesty, especially when contemplating a rent in the fabric of the law.

The Court of Appeals's jurisdiction is generally restricted to finally decided questions of law that have been preserved in the trial court.[28] By contrast, the Appellate Division may in its discretion exercise "interest[] of justice" jurisdiction to reach and decide <u>any</u> issue of law, whether or not it was argued in the lower court.[29] But if the Appellate Division does this, I should add, the Court of Appeals has no power to review either the Appellate Division's exercise of its discretion or the legal issue that it decided.[30] Why? Because the Court's jurisdiction is limited to the review of preserved questions of law, as previously noted. And preserved questions of law are considered leaveworthy by the Court of Appeals when they "are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."[31] These factors virtually guarantee that cases on the Court's docket will routinely produce disagreement among the judges because the

U.S. 420, 436 n.4 (1981) (Powell, J., concurring)).

[25] *See Damiano*, 663 N.E.2d at 614.

[26] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

[27] *See* People v. Hobson, 348 N.E.2d 894, 901 (N.Y. 1976).

[28] *See* Feinberg v. Saks & Co., 436 N.E.2d 1279 (1982).

[29] Hecker v. State, 987 N.E.2d 636, 636 (N.Y. 2013) (citing Elezaj v. P.J. Carlin Constr. Co., 679 N.E.2d 638 (1997), Brown v. City of New York, 458 N.E.2d 1248 (1983), *Feinberg*, 436 N.E.2d at 1279, Domino v. Mercurio, 193 N.E.2d 893 (1963)).

[30] *See Hecker*, 987 N.E.2d at 636.

[31] *See* N.Y. COMP. CODES R. & REGS. tit.22, § 500.22(b)(4) (2018).

best outcome, legally and practically, is legitimately debatable: it is not as though there is routinely only one plainly "correct" answer to a legal question of the kind that reaches the Court of Appeals.

There were certainly times during my tenure as an Associate Judge when I believed that the majority's preferred approach was reasonable—or, as we lawyers like to say, "not unreasonable"—although I considered another outcome or line of analysis to be legally or practically better. This is why Judge Simons in *Damiano* said that "[i]t is rare that all members of the Court fully agree on a particular subject . . . ."[32] This is why Judge Jones devotes much of *Cogitations* to circumstances that a judge who disagrees with the majority should weigh before dissenting externally.[33] This is what Justice Walter Schaefer, the distinguished mid-20th-century jurist on the Illinois Supreme Court, was alluding to when he remarked that "the judge who writes an opinion must be at least 51 per cent convinced in the direction of the result he reaches. But with the other judges of the court[,] conviction may be less than 50 per cent, and the doubt will still go without expression."[34] Because the answers to the legal questions that the Court of Appeals decides are so often indeterminate, the Judge of today should pause a long time before concluding that an older decision was "wrong" or wrong enough to warrant the disruption and risk of unforeseen consequences inherent in overruling. This is why, as I noted at the outset, a conviction of prior error, no matter how firm, is never adequate reason in and of itself to depart from precedent.

Finally, stare decisis fosters public faith in the judiciary and the rule of law. Identifying stare decisis as a "rule of legitimacy," Judge Simons in *Damiano* explained that:

> Courts, unlike the other two branches of government, do not derive their authority by electoral mandate and they are not expected to respond to the popular will or public emotions. Indeed, their influence rests in large part upon the understanding that unelected Judges are motivated by principle and that they exercise their power evenhandedly, setting aside personal views and extraneous influences to follow precedents and develop the law in an ordered fashion. . . . A high court which uniformly adheres to its prior

[32] *See* People v. Damiano, 663 N.E.2d 607, 614 (N.Y. 1996) (Simons, J., concurring).
[33] *See* Jones, *supra* note 1.
[34] Schaefer, *supra* note 6, at 7.

> interpretation . . . in a line of cases only to reconsider those precedents and overrule them in a legally indistinguishable but factually egregious case will surely and deservedly lose its credibility and provoke serious questions about the legitimacy of is processes.[35]

Along the same lines, Judge Breitel pointed out in *Hobson* that "the accident of a change of personalities in the Judges of a court is a shallow basis"[36] for overruling precedent, citing his concurring opinion in *Simpson v. Loehmann*.[37] In *Simpson*, the defendant unsuccessfully implored the Court of Appeals to overrule its controversial decision in *Seider v. Roth,*[38] handed down less than two years previously. Judge Breitel, who had replaced one of the judges in the four-judge *Seider* majority, concurred in *Simpson* "on constraint of" *Seider*, which he roundly criticized "if only," he wrote "perhaps[] to hasten the day of its overruling or its annulment by legislation."[39] But even though he disagreed with *Seider*, Judge Breitel took the principled position in *Simpson* that "[o]nly a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of" *Seider*.[40] Relatedly, he cautioned in *Hobson* that "[t]he closeness of a vote in a precedential case is hardly determinative" of precedential strength because "[o]therwise, every precedent decided by a bare majority is a nonprecedent—one to be followed if a later court likes it, and not to be followed if it does not like it."[41] "The ultimate principle[,]" Judge Breitel continued:

> [I]s that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority

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[35] *Damiano*, 663 N.E.2d at 614.

[36] People v. Hobson, 348 N.E.2d 894, 903 (N.Y. 1976).

[37] *See* Simpson v. Loehmann, 234 N.E.2d 669, 674 (N.Y. 1967) (Breitel, J., concurring).

[38] *See id.* at 670, 671; Seider v. Roth, 216 N.E.2d 312, 313 (N.Y. 1966). *Seider* held that a New York court may exercise quasi-in rem jurisdiction over a non-resident insured whose liability insurance company does business in New York. *See id.* The defendant in *Simpson* asked the Court to reconsider and overrule *Seider* in light of Federal constitutional issues not raised in that case. *See Simpson*, 234 N.E.2d at 670.

[39] *Simpson*, 234 N.E. at 674. Judge Breitel did not reach the Federal constitutional issues raised in *Simpson*, opining that "[i]f the court was right in the *Seider* case, then there is no constitutional question." *Id.* at 675. The *Seider* rule was eventually negated by the United States Supreme Court's decision in Rush v. Savchuk, 444 U.S. 320, 332–33 (1980) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[40] *Simpson*, 234 N.E.2d at 674.

[41] *Hobson*, 348 N.E.2d at 902 (citing Semanchuck v. Fifth Ave. & Thirty-Seventh St. Corp., 49 N.E.2d 507, 509 (N.Y. 1943)).

> over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men.[42]

So far, I have discussed the theoretical and practical underpinnings of the doctrine of stare decisis. Stare decisis is not an immutable judicial policy, though, or "a procrustean bed,"[43] a system enforcing uniformity and conformity at all costs. The principal factors for a court to take into account when considering overruling a prior holding include whether the precedent has created significant reliance; whether the precedent is grounded in constitutional, statutory or common law; whether intervening changes in doctrine or facts have undermined the precedent; and whether it has proved unworkable in practice.[44]

In *Hobson*, Chief Judge Breitel identified the special necessity for courts to observe precedent in cases involving property rights and dispositions and contractual rights, where "those who engage in transactions based on the prevailing law [should] be able to rely on its stability."[45] Conversely, in tort and especially personal injury cases, where reliance interests are not present or as compelling:

> [C]ourts will, if necessary, more readily re-examine established precedent to achieve the ends of justice in a more modern context. [When], in these cases the line of precedent, although well established, [is] found to be analytically unacceptable, and, more important, out of step with the times and the reasonable expectations of members of society.[46]

Of course, reliance interests are protected if a precedent is

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[42] *Id.* at 903.

[43] BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 156 (2016). Befitting our times, *The Law of Judicial Precedent*, is, in effect, essentially crowd-sourced. As described in the hornbook's Preface, Garner developed a tentative working statement of blackletter principles and enlisted twelve distinguished appellate judges to draft individual sections. *Id.* at xiii. Once he pulled together a complete version from the discrete drafts, the twelve judicial coauthors reviewed the entire manuscript, and suggested edits and additional passages throughout. *See id.* The result is a 783-page doorstop.

[44] *See* Robinson v. City of Detroit, 613 N.W.2d 307, 320 (Mich. 2000) (citing Mitchell v. W. T. Grant Co., 416 U.S. 600, 627–28 (1974); Planned Parenthood v. Casey, 505 U.S. 833, 853–56 (1992)); *Planned Parenthood*, 505 U.S. at 854–55 (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

[45] *Hobson*, 348 N.E.2d at 901.

[46] *Id.*

overruled prospectively only.[47] Suffice it to say, though, that retroactive application of a new precedent remains the usual rule in New York; deviation is not impossible, but it is rare.[48]

Next, precedents involving statutory interpretation are stronger than a constitutional or common law decision.[49] In *Hobson*, Judge Breitel definitively stated that:

> Precedents involving statutory interpretation are entitled to great stability. After all, in such cases courts are interpreting legislative intention and *a sequential contradiction is a grossly arrogated legislative power*. Moreover, if the precedent or precedents have 'misinterpreted' the legislative intention, the Legislature's competency to correct the 'misinterpretation' is readily at hand.[50]

To the same effect, Judge Simons in *Damiano* observed that:

> There may be cases in which the Court has overruled its own prior interpretation of a statute, but I cannot recall any. The reason why such decisions are rare is obvious. If the Court is wrong in its interpretation of a legislative enactment, the Legislature can readily correct the statute to make its meaning clear.[51]

And, the New York State Legislature does not shy away from revisiting and revising a statute to address an interpretation rendered by the Court of Appeals. Some years ago, in connection with

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[47] *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1487 (2013).

[48] *See* Gager v. White, 425 N.E.2d 851, 853–54 (N.Y. 1981) (citing Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971); Great N. Ry v. Sunburst Co., 287 U.S. 358 (1932)) (discussing the factors bearing on potential prospective application of a new civil precedent); People v. Pepper, 423 N.E.2d 366, 368, 369 (N.Y. 1981) (citing Desist v. United States, 394 U.S. 244, 249 (1969)) (discussing the factors bearing on potential prospective application of a new criminal precedent).

[49] This proposition, not unique to New York, has its critics. *See generally* Frank H. Easterbrook, *The Crisis in Legal Theory and the Revival of Classical Jurisprudence: Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 427, 429 (1988) (discussing statutory interpretation, as well as constitutional and common law decisions).

[50] *Hobson*, 348 N.E.2d at 902 (citations omitted and emphasis added). Judge Breitel identifies a semi-exception for statutes that establish general and flexible standards, fully anticipating that the courts will fill in the gaps. *See id.* He cites the federal and state antitrust laws, which apply "rules of reason," as the classic example of this type of legislation where "the degree of flexibility in handling statutory precedents is that much the greater, but still not unlimited." *Id.*

[51] People v. Damiano, 663 N.E.2d 607, 615 (N.Y. 1996) (Simons, J., concurring).

an article that I wrote on the subject of statutory interpretation,[52] I took a look at how often this had occurred during an arbitrarily chosen snapshot of time, January 1, 2006 through July 2008. In this two and one-half year timeframe the Court handed down 436 full opinions, 195 of which—or just under half—interpreted one or more State statutes.[53] The Legislature followed up by enacting legislation directly related to or amending the statutes considered in seven of the 195 opinions.[54] Now, the skimpy information in the bill jackets for these seven statutes typically did not outright say that the Legislature was reacting to the Court's decision, but this is the logical inference, as anyone who has ever dealt first-hand with our Legislature would appreciate. And, of course, a basic tenet of statutory interpretation presumes that the Legislature enacts statutes with an awareness of relevant law. In *Damiano*, which involved a statutory precedent,[55] Judge Simons remarked that:

> Though some may disapprove of the statute [at issue,] . . . it remains in force without any apparent disposition by legislators to amend it. We may assume from this that the Legislature agrees with our interpretation. If it did not it could have amended the statute long ago. Certainly, that opportunity remains available now.[56]

The superior deference afforded to statutory precedents has always seemed particularly apt to me in those instances where the Court of Appeals has deliberately drawn the Legislature's attention to the problematic consequences of a statute's language. For example, in *People v. LaFontaine*[57] the Court construed a provision of the Criminal Procedure Law in a way that arguably cut against "sensible management" of litigation, and so invited the Legislature to take a look, noting that "[s]ince the anomaly rests on unavoidable statutory language, any modification would be for the Legislature to change, if

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[52] Susan Phillips Read, *Statutory Resolution*, 12 GREEN BAG 2D 85 (2008) (reviewing EINER ELHAUGE, STATUTORY DEFAULT RULES (2008)).

[53] *Id.* at 91.

[54] *Id.*

[55] The Court of Appeals in *Damiano* declined to overrule its precedent, grounded in an interpretation of provisions of the Criminal Procedure Law, that a trial judge may not furnish a deliberating jury with an annotated jury sheet without the parties' consent. *See Damiano*, 663 N.E.2d at 609.

[56] *Id.* at 614–15 (Simons, J., concurring).

[57] People v. LaFontaine, 705 N.E.2d 663 (N.Y. 1998).

it so wishes."[58] Thirteen years later in *People v. Concepcion*,[59] the People asked the Court to overrule *LaFontaine*.[60] The Court turned the People down, stating that "[l]egislative inaction (which just may, after all, signal satisfaction with [the statute] as interpreted in *LaFontaine*) is not a license for us, in effect, now to tell the Legislature 'Never mind,' and refashion the statute's settled meaning with the freedom we enjoy in matters of common law."[61]

While statutory precedents possess heightened stare decisis protection, the opposite is true for constitutional doctrine, which may only be changed through the cumbersome amendment process when the courts abstain.[62] Thus, the Court of Appeals in *Hobson* overruled a constitutional precedent where "[l]egislative correction" was, in Judge Breitel's words, "confined" and "the principle . . . well established that" courts will correct a constitutional error in a prior case so long as their conviction of prior error is "imperative."[63] Similarly, Judge Simons in *Damiano* stated that in cases involving constitutional issues "a court may more readily consider change, and in some cases must necessarily do so, because the judicial rules are immune from legislative correction."[64]

Next, significantly changed circumstances may supply good reason to overrule a precedent. Judge Breitel makes this point in *Hobson* when he refers to "the justifiable rejection of archaic and obsolete doctrine which has lost its touch with reality;"[65] and Judge Simons in *Damiano* adverts to the vulnerability of "rules long settled but not recently revisited[, which] are always open to reexamination if there is some evidence that the policy concerns underlying them are outdated . . . ."[66] The Court of Appeals's decision in *Bethel v. New York Transit Authority*[67] addresses just this situation, where a precedent's underlying policy assumptions are no longer considered valid and the precedent has fallen out of step with related doctrinal developments.[68]

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[58] *Id.* at 666.

[59] People v. Concepcion, 953 N.E.2d 779 (N.Y. 2011).

[60] *See id.* at 785 (Smith, J., dissenting).

[61] *Id.*

[62] *See* Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197, 1204 (2014).

[63] People v. Hobson, 348 N.E.2d 894, 901 (N.Y. 1976).

[64] People v. Damiano, 663 N.E.2d 607, 615 (N.Y. 1996) (Simons, J., concurring).

[65] *Hobson*, 348 N.E.2d at 900.

[66] *Damiano*, 663 N.E.2d at 614 (citing People v. Bing, 558 N.E.2d 1011 (N.Y. 1990); *Hobson*, 348 N.E.2d at 894 (N.Y. 1976)).

[67] Bethel v. N.Y.C. Transit Auth., 703 N.E.2d 1214 (N.Y. 1998).

[68] *See id.* at 1216, 1217.

Bethel reconsidered and overruled the standard requiring a common carrier to exercise the highest degree of care toward its passengers.[69] This duty of extraordinary care was, the Court of Appeals explained, a relic of a time in the 19th-century when steam railroads were in their infancy and "[t]heir primitive safety features resulted in a phenomenal growth in railroad accident injuries and with them, an explosion in personal injury litigation, significantly affecting the American tort system."[70] But technological advances and government regulation in the 20th-century had made these "public conveyances . . . at least as safe as private modes of travel."[71] Additionally, a duty of extraordinary care conflicted with the reasonable person standard of negligence, which had become the norm in common-law tort doctrine over the course of the 20th-century.[72]

Finally, sometimes a precedent proves to be unworkable in practice. Judge Simons in *Damiano* cites *Hobson* and *People v. Bing* as cases where the Court of Appeals overruled prior decisions on this ground. In *Hobson*, the Court overruled three cases that had strayed with little or no explanation from an earlier "elaborated" and "consciously evolved" statement of the applicable law.[73] The existence of two conflicting lines of precedent was unworkable, presenting, as it did, the potential for confusion and inconsistent decisions in the lower courts. Thus, the Court created a workable rule by overruling the three outlier cases and reaffirming its earlier decisions.[74]

Bing overruled *People v. Bartolomeo*,[75] which had held that a suspect, represented by an attorney on a prior pending charge, could not waive his rights in the absence of the attorney and answer questions on new, unrelated charges.[76] In sum, a right to counsel on the new, unrelated charge was derived from the existence of

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[69] *See id.* at 1218.

[70] *See id.* at 1216.

[71] *Id.* (quoting Adams v. N.Y.C. Transit Auth., 666 N.E.2d 216, 219 (N.Y. 1996)).

[72] *See Bethel*, 703 N.E.2d at 1216.

[73] People v. Hobson, 348 N.E.2d 894, 899 (N.Y. 1976) (citing People v. Di Biasi, 166 N.E.2d 825 (N.Y. 1960); People v. Spano, 150 N.E.2d 226, 231 (N.Y. 1958), *rev'd sub nom.* Spano v. New York, 360 U.S. 315 (1959) (Desmond, J., dissenting)).

[74] *Hobson* reaffirmed People v. Arthur, 23 N.E.2d 537 (N.Y. 1968), and its progeny, which hold that a defendant, in custody and represented by a lawyer in connection with the criminal charges under investigation, may only validly waive the right to counsel in the lawyer's presence. *See Hobson*, 348 N.E.2d at 896; *Arthur*, 239 N.E.2d at 539 (citing People v. Vella, 234 N.E.2d 422 (N.Y. 1967)).

[75] People v. Bartolomeo, 423 N.E.2d 371 (N.Y. 1981).

[76] *See id.* at 373.

representation on a prior charge, creating a so-called "fictional" attorney-client relationship on the new, unrelated charge.[77] Further, if the police were aware of the prior pending charge, they were held to possess the knowledge that a reasonable inquiry about representation on that charge would have revealed, and any statements the suspect made, not only about the prior charge but also about the new, unrelated charge, were suppressed.[78] Noting that in the nine years since the advent of *Bartolomeo* "scarcely a term of court ha[d] passed without a *Bartolomeo* issue being presented . . . in one form or another," the Court of Appeals in *Bing* determined that *Bartolomeo*'s derivative right-to-counsel "paradigm" was not a "workable predicate for the exclusionary rule."[79] The *Bartolomeo* rule was broadly stated and had proven difficult to integrate into existing law and to apply uniformly in dissimilar fact patterns; consequently, it had become riddled with exceptions, which undermined its rationale and rendered it unworkable.[80]

Here, I would like to take a minor detour to make a few observations about bright-line rules and the concept of "workability." A bright-line rule by definition is clearly delimited and composed of objective criteria; it is easy to understand and apply and produces consistent results. But a bright-line rule is also necessarily arbitrary and therefore inevitably generates a result now and again that seems unfair or unjust. This is not a flaw of the rule absent unfair and unjust results in a wide range of cases; rather, it is an inherent characteristic of every bright-line rule and does not make the rule unworkable or otherwise justify overruling it. Indeed, "workability" is the hallmark of every bright-line rule.

By this point, you may have noticed that the Court of Appeals's "precedent on precedent," as explained by Judges Breitel and Simons, by and large creates a series of flexible standards or principles by which to assess whether stare decisis should triumph or yield.[81] And the decisions that I have discussed—*Hobson*, *Damiano*, *Simpson*, *Concepcion*, *Bethel* and *Bing* — are, in my opinion, textbook examples of the correct application of those standards and principles. I will

[77] People v. Bing, 558 N.E.2d 1011, 1021 (N.Y. 1990).

[78] *See id.* at 1012.

[79] *See id.* at 1012, 1021.

[80] *See id.* at 1017–18 (citing People v. Robles, 72 N.Y.2d 689, 690, 533 N.E.2d 240 (N.Y. 1988); People v. Colwell, 482 N.E.2d 1214, 1215 (N.Y. 1985); People v. Rosa, 482 N.E.2d 21, 24 (N.Y. 1985); People v. Lucarano, 460 N.E.2d 1328 (N.Y. 1984); People v. Hauswirth, 458 N.E.2d 1260, 1260 (N.Y. 1983); People v. Hawkins, 435 N.E.2d 376, 381 (N.Y. 1982); People v. Smith, 429 N.E.2d 823, 823–24 (N.Y. 1981)).

[81] *See Bing*, 558 N.E.2d at 1014; People v. Hobson, 348 N.E.2d 894, 901 (N.Y. 1976).

next draw a thumbnail sketch of two of the Court of Appeals's more recent and controversial overrulings, each unusual in a distinctive way. My focus is on how the Court justified the decision to overrule and what the consequences have been to date, not the relative merits of the precedent overruled and its successor. I acknowledge, though, that in both instances, I prefer the discarded precedent on both legal and policy grounds.

First, there is the saga of the Court of Appeals's journey from *People v. Register*[82] to *People v. Feingold*[83] by way of *People v. Sanchez*[84] and a quartet of decisions handed down between 2003 and 2006. With apologies to Lemony Snicket, I have always thought of this progression as *a series of unfortunate events*.[85] *Register* involved the State's depraved mind murder statute, which requires that the accused cause the death of another person by "recklessly" engaging in conduct creating a "grave" risk of death "[u]nder circumstances evincing a depraved indifference to human life."[86] The Court held that recklessness, pure and simple, was the only mens rea required to be proven to establish depraved indifference murder, and that the "additional requirement"—namely, "under circumstances evincing a depraved indifference to human life"—"refer[red] to neither the *mens rea* not the *actus reus*," but instead centered on objective circumstances demonstrating that the defendant's reckless conduct presented an exceptionally high, unjustified risk of death.[87]

Register was a 4-3 decision authored by Judge Simons.[88] Judge Matthew Jasen's dissent expressed the view that "depraved indifference" was a mens rea; specifically, a culpable mental state "more vicious than recklessness but less so than intent."[89] He worried that the *Register* standard both "eviscerate[d] the distinction"[90] between reckless manslaughter and depraved indifference murder, and empowered prosecutors "to obtain murder convictions simply by proving that the defendant acted recklessly in killing another" because, he hypothesized:

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[82] People v. Register, 457 N.E.2d 704 (N.Y. 1983).

[83] People v. Feingold, 852 N.E.2d 1163 (N.Y. 2006).

[84] People v. Sanchez, 777 N.E.2d 204 (N.Y. 2002).

[85] *See generally* LEMONY SNICKET, A SERIES OF UNFORTUNATE EVENTS (1999–2006) (recounting in thirteen novels the unpleasant and unfortunate tales of the Baudelaire orphans).

[86] N.Y. PENAL LAW § 125.25(2) (McKinney 2018).

[87] *Register*, 457 N.E.2d at 707 (quoting PENAL § 125.25(2)).

[88] *Register*, 457 N.E.2d at 704.

[89] *Id.* at 711 (Jasen, J., dissenting).

[90] *Id.*

> [T]he simple fact that the defendant's conduct resulted in the victim's death [would], with 20/20 hindsight, be proof enough to a jury that the circumstances existing at the time and place of the killing presented a "grave risk" of death and that the defendant, therefore, acted with depraved indifference to human life.[91]

Now fast forward to 2002 and *People v. Sanchez*. Sanchez, who was acquitted of intentional murder and convicted of depraved indifference murder, argued that the trial evidence was consistent only with an intentional killing, and thus, he had been improperly found guilty of causing the victim's death recklessly.[92] The majority disagreed, deciding that the evidence was sufficient for a rational jury to harbor a reasonable doubt that Sanchez had intentionally caused the victim's death, and that, under the *Register* regime, there was sufficient evidence for a rational jury to conclude that Sanchez had acted recklessly and "under circumstances evincing a depraved indifference to human life."[93]

Sanchez, a 4-3 decision authored by Judge Howard Levine, featured lengthy dissents from Judges G.B. Smith and Albert Rosenblatt.[94] In a twist on the fears expressed in the *Register* dissent nearly twenty years earlier, Judge Rosenblatt was principally concerned about the way in which twin-count murder indictments—i.e., indictments charging both intentional and depraved indifference murder arising from the same facts—interacted with the *Register* standard to produce a situation where, as he saw it, there were "*no conceivable circumstances under which a charge of intentional murder [would] not be amenable to a conviction for depraved indifference murder*."[95]

Sanchez represented the high-water mark for *Register*. There then followed, in relatively quick succession, four cases in which the Court of Appeals threw out convictions of depraved indifference murder on the ground that the defendant's conduct could only have been intentional and, therefore, there was no record support for the jury's decision that the defendant had acted with a reckless mens rea.[96] In

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[91] *Id.* at 713.

[92] *See* People v. Sanchez, 777 N.E.2d 204, 205 (N.Y. 2002).

[93] *Id.* at 207, 212.

[94] *See id.* at 204, 213.

[95] *Id.* at 218 (Rosenblatt, J., dissenting).

[96] *See* People v. Suarez, 844 N.E.2d 721, 725–26, 728, 732 (N.Y. 2005); People v. Payne, 819 N.E.2d 634, 635, 636 (N.Y. 2004); People v. Gonzalez, 807 N.E.2d 273, 275, 277 (N.Y. 2004) (quoting People v. Hafeez, 792 N.E.2d 1060, 1063 (N.Y. 2003)); *Hafeez*, 792 N.E.2d at 1063

the first of these cases, *People v. Hafeez*, I wrote a solo dissent based on *Sanchez*.[97] The second case was *People v. Gonzalez*. There, the defendant in short order "shot the victim once in the chest, once in the face from 6 to 18 inches away, six times in the back of the head from approximately six inches away, and twice in the back."[98] Given these facts, the Court unanimously concluded that the evidence was legally insufficient to establish a reckless mens rea.[99] In *People v. Payne*, I again dissented, but this time on the ground that the defendant had not preserved a claim that his conviction of depraved mind murder was unsupported by legally sufficient evidence.[100] Finally, in *People v. Suarez*, I concurred with the result on constraint of *Payne*.[101]

Then, in *Feingold*[102] I supplied the fourth vote to overrule *Register*—a precedent that I agreed with—and declared that depraved indifference to human life was a culpable mental state.[103] Why, you might ask, did I cast this vote? I did so because I had reluctantly concluded that the Court of Appeals's evolving case law had eroded the underpinnings of *Register* and *Sanchez* to such an extent that the precedent expressed in those cases had been overruled in practice. Simply put, *Register*'s "objective circumstances" had gradually and perceptibly morphed over time into reasons why a defendant may have acted intentionally rather than recklessly. *Feingold* merely made explicit a change in the law which had already occurred, thereby clearing up any lingering confusion.

The negative fall-out from *Feingold* proved far more modest than might have reasonably been expected. Defendants whose convictions for depraved indifference murder were candidates for reversal on direct appeal had often not lodged a proper objection in the trial court, and the Appellate Division's judges were uniformly unwilling to

(citing *Sanchez*, 777 N.E.2d at 208).

97 *See Hafeez*, 792 N.E.2d at 1064, 1066 (Read, J., dissenting) (citing *Sanchez*, 777 N.E.2d at 205).

98 *Gonzalez*, 807 N.E.2d at 275.

99 *Id.* at 277.

100 *See Payne*, 819 N.E.2d at 638 (Read, J., dissenting).

101 *See Suarez*, 844 N.E.2d at 734 (Read, J., concurring).

102 Feingold was charged and convicted of first-degree reckless endangerment. People v. Feingold, 852 N.E.2d 1163, 1164 (N.Y. 2006). A person commits this crime "when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person." N.Y. PENAL LAW § 120.25 (McKinney 2018). The term "depraved indifference" has the same meaning in the reckless endangerment statute as it has in the depraved indifference murder statute. N.Y. PENAL LAW § 125.25(2) (McKinney 2018).

103 *See Feingold*, 852 N.E.2d at 1163, 1168.

exercise their interest of justice jurisdiction to reach the merits of any such unpreserved claims.[104] And the United States Court of Appeals for the Second Circuit threw the Court of Appeals a lifeline in the form of a certified question that allowed the Court to address whether post-*Sanchez* case law applied retroactively to defendants seeking collateral relief.[105] With a huge sigh of relief, the Court answered that it did not.[106]

As a further consequence of *Feingold*, the Legislature in 2007 amended the Penal Law to create the new crime of aggravated vehicular homicide, a class B felony, with a penalty of up to twenty-five years in prison.[107] New York's prosecutors had pleaded with the Legislature to enact a statute like this because, they argued, *Feingold* made it impossible for them to prosecute drunk drivers for depraved indifference murder.[108] Indeed, the Court of Appeals arguably resorted to resurrecting the *Register* standard in order to salvage depraved indifference murder convictions in three cases where intoxicated drivers killed innocent people before the new law took effect.[109] Additionally, the Court also engaged in a *Register*-type analysis in order to uphold a conviction of depraved indifference murder in a brutal child abuse case where the defendant severely beat a boy under eleven years old and did not summon medical assistance until after the child had died.[110] But by and large district attorneys, having gotten the hint, rarely charge depraved indifference murder and seem to have altogether abandoned twin-count second-degree murder indictments.

While New York's criminal law seems to have adjusted to *Feingold*, family law remains unsettled by the Court of Appeals's 2016 decision in *Brooke S.B. v. Elizabeth A.C.C.*[111] to overrule its 1991 decision in *Alison D. v. Virginia M.*[112] and its 2010 decision in *Debra H. v. Janice R.*,[113] which reaffirmed the core holding of *Alison D.* The fact pattern

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[104] *See, e.g.*, People v. Orcutt 854 N.Y.S.2d 247, 249–50 (App. Div. 2008); People v. Danielson, 832 N.Y.S.2d 546, 547–48 (App. Div. 2007) (citing People v. Gray, 652 N.E.2d 919 (N.Y. 1995); People v. Lisojo, 810 N.Y.S.2d 658 (App. Div. 2006)); People v. Casey, 829 N.Y.S.2d 309, 312 (App. Div. 2007); People v. Gutierrez, 790 N.Y.S.2d 493, 493–94 (App. Div. 2005) (citing People v. Payne, 819 N.E.2d 634 (N.Y. 2004)).

[105] Policano v. Herbert, 859 N.E.2d 484, 489 (N.Y. 2006).

[106] *See id.* at 495.

[107] *See* N.Y. PENAL LAW §§ 70.00, 125.14 (McKinney 2018); Katie Flynn's Law, ch. 345, sec. 2, § 125.14.

[108] People v. Heidgen, 3 N.E.3d 657, 673 (N.Y. 2013) (Read, J., dissenting).

[109] *See id.* at 659, 666, 667.

[110] *See* People v. Barboni, 994 N.E.2d 820, 821, 827 (N.Y. 2013).

[111] *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

[112] Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

[113] Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010).

alleged in *Alison D.* was repeated in *Brooke S.B.*[114] In both cases, two women established a romantic relationship and eventually began living together.[115] They agreed that one of them would be artificially inseminated with sperm from an anonymous donor and that they would jointly rear the child born of this assisted reproductive technique.[116] At some point after the child's birth, however, the romantic relationship soured and the biological mother cut off contact between her former lover and the child, with whom the former lover had allegedly forged a close and "parent-like" relationship.[117] In both cases, the biological mother was concededly a fit parent.[118] This is important because the Court's longstanding precedent of *Matter of Bennett v. Jeffreys*[119] forbids intervention by the state in the rights and responsibilities of "natural parents" to custody of their children unless "there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child."[120]

In *Alison D.*, a per curiam opinion, the former romantic partner sought visitation under Domestic Relations Law section 70, which permits "either parent" of a minor child residing in the state to apply to the Supreme Court for visitation or custody.[121] The Domestic Relations Law does not define "parent," but Alison D. was neither the child's biological nor adoptive parent, and there was no reason to suspect that the legislature had anything else in mind when it amended section 70 in 1964 to broaden the category of persons who might seek habeas corpus relief.[122] Alison D. argued, though, that she was a de facto or functional parent or a parent by estoppel and was therefore entitled to seek visitation under section 70.[123] The

[114] *See Brooke S.B.*, 61 N.E.3d at 490–91, 493.

[115] *See Brooke S.B.*, 61 N.E.3d at 491; *Alison D.*, 572 N.E.2d at 28.

[116] *See Brooke S.B.*, 61 N.E.3d at 491; *Alison D.*, 572 N.E.2d at 28.

[117] *See Brooke S.B.*, 61 N.E.3d at 491; *Alison D.*, 572 N.E.2d at 28.

[118] *See Brooke S.B.*, 61 N.E.3d at 491, 494; *Alison D.*, 572 N.E.2d at 28.

[119] *In re* Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976).

[120] *See id.* at 283; *see also* Troxel v. Granville, 530 U.S. 57, 68–69 (2000) ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."). The Court of Appeals presumably employed the term "natural parent" in *Bennett* because the case involved a biological parent. *See Bennett*, 356 N.E.2d at 280.

[121] *See Alison D.*, 572 N.E.2d at 29.

[122] *See id.* at 29, 31 (Kaye, J., dissenting).

[123] *See id.* at 29.

Court determined these claims to be "insufficient"[124] for two reasons: (1) the *Bennett* precedent that a court may not displace the choice made by a fit legal parent about what is in his or her child's best interests, which would include whom the child may associate with; and (2) an unwillingness to interpret the term "parent" in section 70 more broadly than the Legislature would have contemplated in 1964, especially since the legislature had subsequently specifically afforded only certain categories of third parties—namely, siblings and grandparents—standing under the Domestic Relations Law to seek visitation.[125] Judge Kaye, in her solo dissent, objected that "[w]hile the [per curiam] opinion spoke of biological *and legal* parenthood," the Court "ha[d] not yet passed on the legality of adoption by a second mother"[126] and that the Court's decision affected relationships (e.g., heterosexual stepparents) beyond the particular controversy and fell hardest on children by robbing the courts of the capacity to take a child's best interests into account. She emphasized that Alison D. was only seeking visitation, not custody.[127] Under these circumstances, Judge Kaye favored a court-fashioned test for "parental status" or "in loco parentis" and cited as examples judicial decisions in other states addressing visitation rights of stepparents.[128]

The question about who is a parent under section 70 did not reach the Court of Appeals again until 2010, nearly two decades after *Alison D.*[129] By that time, second-parent adoption was available in New York and many states (although not New York) had enacted civil union legislation or had legalized same-sex marriage, either by statute or judicial decision.[130] Indeed, in *Debra H.* the biological mother and her romantic partner had entered into a civil union in Vermont prior to the birth of the biological mother's child.[131] The couple subsequently separated and Janice R., the biological mother, cut off contact between her child and her former lover, Debra H., who sought joint legal and physical custody of the child and restoration of access and decision-making authority.[132]

Debra H. reconsidered *Alison D.* in four writings—a majority

[124] *See id.*
[125] *See id.* (citing *In re* Roland F. v. Brezenoff, 436 N.Y.S.2d 934, 935–36 (Fam. Ct. 1981)).
[126] *See id.* at 30 n.1 (Kaye, J., dissenting).
[127] *Id.*
[128] *See id.* at 32.
[129] *See* Debra H. v. Janice R., 930 N.E.2d 184, 188 (N.Y. 2010).
[130] *See id.* at 190, 195, 205 (quoting *In re* Jacob, 660 N.E.2d 397, 398, 399 (1995)).
[131] *Debra H.*, 930 N.E.2d at 186.
[132] *See id.*

opinion, which I wrote; separate concurrences by Judges Victoria Graffeo and Robert Smith; and a dissent authored by Judge Carmen Ciparick.[133] These writings collectively occupy thirty-seven pages in the official reports. The members of the Court all agreed that Debra H. had standing to seek custody under Domestic Relations Law section 70 because, in light of principles of comity, New York recognized her status as a parent under Vermont law, which flowed from the civil union of Debra H. and Janice R. in Vermont before the child's birth.[134]

The majority and both concurrences rejected Debra H.'s invitation to formulate a test to recast the definition of parent in section 70 to include a category of de facto or functional parents.[135] The majority stuck with a bright-line rule to define parent by biological or formal legal ties (adoption, identified in *Alison D.*, or, as in the case of *Debra H.*, civil union) for two reasons.[136] First, the bright-line rule furnished predictability and certainty for acknowledged parents and their children and reduced any risk of "disruptive . . . battle[s] over parentage as a prelude to further potential combat over custody and visitation."[137] Similarly, the flexible type of definition of parent championed by Debra H. and endorsed by the dissent:

> [T]hreaten[ed] to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party.[138]

In sum, the bright-line rule of *Alison D.* promoted certainty and thereby avoided embroiling single parents and their children in costly and intrusive litigation, which no one would consider to be in a child's best interest. Second, the majority concluded that any change in the meaning of "parent" in section 70 "should come by way of legislative enactment rather than judicial revamping of precedent."[139]

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[133] *Id.* at 186 (majority opinion); *id.* at 197 (Graffeo, J., concurring); *id.* at 201 (Ciparick, J., concurring in result); *id.* at 203 (Smith, J., concurring).

[134] *See id.* at 197, 200, 201, 203.

[135] *See id.* at 194, 199, 204.

[136] *See id.* at 191.

[137] *Id.* 191–92 (quoting *In re* Jacob, 660 N.E.2d 397, 399–400 (N.Y. 1995)) (internal quotation marks omitted).

[138] *Debra H.*, 930 N.E.2d at 193.

[139] *Id.*

Reviewing other states' statutes, the majority noted the variety of policies and approaches put in place and observed that the Legislature was much better situated than the courts to determine whether the definition of "parent" in section 70 "still fulfill[ed] the needs of New Yorkers."[140]

Judge Graffeo's concurrence emphasized both the importance to parents and their children of certainty and the availability of second-parent adoption to protect the interests of children born during a same-sex relationship.[141] The Legislature, she pointed out, had never acted to disturb the Court's precedent in *Alison D*.[142] Judge Smith in his concurrence added that "[t]here [were] few areas of the law where certainty is more important than in the rules governing who a child's parents are;"[143] he agreed with the majority that the "vague formulas" proposed by Debra H. and the dissent to establish de facto or functional parenthood amounted to "a recipe for endless litigation, which would mean endless misery for children and adults alike."[144] Judge Smith did, however, propose an exception to *Alison D.* to provide that "where a child is conceived through [anonymous donor artificial insemination] by one member of a same sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both."[145] Judge Ciparick in her dissent endorsed a "more flexible, multi-factored approach[] to determine whether a parental relationship exists, thus conferring . . . standing to seek custody or visitation;"[146] she cited with approval the four-prong test adopted by the Wisconsin Supreme Court in 1995 to establish standing to seek visitation.[147]

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[140] *Id.* at 194.

[141] *See id*. at 198 (Graffeo, J., concurring).

[142] *Id.* at 200.

[143] *Id.* at 204 (Smith, J., concurring).

[144] *Id.*

[145] *Id.* at 205.

[146] *Id.* at 203.

[147] *Id.* at 202 (Ciparick, J., concurring in result) (citing Holtzman v. Knott (*In re* H.S.H-K), 533 N.W.2d 419, 421 (Wis. 1995) [hereinafter *Matter of H.S.H-K*]*).* In *Matter of H.S.H-K.*, two women in a romantic relationship agreed to rear a child born to one of them by artificial insemination with anonymous donor sperm. N.W.2d at 421. After the child was born, the couple split up and the biological mother sought to restrain her former romantic partner from any contact with the child. *See id.* at 422. In short, the material facts were the same as in *Alison D.* and *Brooke S.B. Matter of H.S.H-K.* involved standing to seek visitation only; the Wisconsin Supreme Court agreed with the circuit court that the former romantic partner had not raised a triable issue of fact regarding the biological mother's fitness or ability to parent her child and had not shown compelling circumstances requiring a change of custody. *Id.* at 420.

Six years and six new judges later, the Court of Appeals overruled *Alison D.* and *Debra H.* in *Brooke S.B.*[148] In an opinion authored by Judge Sheila Abdus-Salaam, the Court stated that "in light of more recently delineated legal principles, the definition of 'parent' established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships."[149] This statement raises two questions: What are the "more recently delineated legal principles"?[150] And how have they made the bright-line rule of *Alison D.* "unworkable when applied to increasingly varied familial relationships"?[151]

The phrase "more recently delineated legal principles" presumably refers to New York's Marriage Equality Act, adopted in 2011,[152] and the United States Supreme Court's decision in 2015 in *Obergefell v. Hodges*,[153] which made same-sex marriage a right nationwide.[154] With respect to "workability," as I noted earlier, a bright-line rule by definition is never "unworkable" in the sense of being unclear or difficult to apply. But a bright-line rule will occasionally produce a harsh result on the margins. Advocacy groups reportedly identified *Brooke S.B.* as an excellent vehicle to attempt to persuade the Court to overrule *Alison D.* precisely because Brooke S.B. was an unusually sympathetic litigant; that is, hers was thought to be a case where the result dictated by the bright-line *Alison D./Debra H.* precedent would strike a judge as uncommonly unjust.[155]

The Court of Appeals in *Brooke S.B.* held that "[W]here a partner

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[148] *See Debra H.*, 930 N.E.2d at 185 (the judges on the bench consisted of Judges Read, Graffeo, Pigott, Jones, Ciparick, Lippman, and Smith); *see also In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 489 (N.Y. 2016) (the judges on the bench consisted of Judges Abdus-Salaam, DiFiore, Rivera, Stein, Garcia, Pigott, and Fahey).

[149] *Brooke S.B.*, 61 N.E.3d at 490.

[150] *Id.*

[151] *Id.*

[152] *See* Marriage Equality Act, ch. 95, § 3, 2011 N.Y. Sess. Laws 723, 723–24 (McKinney) (codified as N.Y. DOM. REL. LAW § 10-a (McKinney 2018)).

[153] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[154] *See id.* at 2607–08.

[155] *See* Ian Parker, *What Makes a Parent?*, NEW YORKER (May 22, 2017), https://www.newyorker.com/magazine/2017/05/22/what-makes-a-parent ("Lawyers [who hoped to see *Alison D.* overruled] were 'waiting and praying' for a case that looked something like Brooke S.B. . . . [T]he promise of Brooke S.B. derived in part from the fact that it involved . . . 'unsophisticated people from a rural small community.' A more typical litigant would live in the city, be 'very connected to the L.G.B.T.-rights community,' and be aware that adoption was the only way for an unmarried same-sex partner in New York to have unquestioned parental rights. Barone's misconceived certainty about being a mother was a legal asset.") (quoting one of Brooke S.B.'s attorneys). This article focuses on the facts underlying K. v. C., 51 N.Y.S.3d 838 (Sup. Ct. 2017), currently on appeal in the Appellate Division, First Department, after a lengthy hearing to determine standing, which took place intermittently over the course of five months. *See* K. v. C., 51 N.Y.S.3d 838, 838–39 (Sup. Ct. 2017); Parker, *supra*.

shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70."[156] Although declining to go beyond this "conception test" and "adopt a test that will apply in determining standing . . . for all non-biological, non-adoptive, non-marital 'parents' who are raising children],"[157] the Court clearly invited the development of additional approaches through litigation.

Four facets of this particular overruling strike me as especially interesting. First, the Court of Appeals did not so much overrule *Alison D.* and *Debra H.* as create another discrete path to achieve standing under section 70 in addition to biology and the existence of a formal legal tie—i.e., the conception test. But the conception test, while avowedly designed to be narrow, is still subjective; whether "clear and convincing evidence" of a pre-conception agreement exists will always require a likely lengthy hearing if disputed.[158] Additionally, as noted earlier, the Court left the door open to other ways to establish de facto parenthood which, if adopted, would necessarily deny acknowledged parents and their children the welcome certainty afforded by a bright-line rule.[159] Second, the conception test is essentially what Judge Smith unsuccessfully proposed in his concurrence in *Debra H.*, only arguably more tightly formulated.[160] Third, changes in the zeitgeist have caused the bright-line rule of *Alison D.* to become much more inclusive over time. In

[156] *Brooke S.B.*, 61 N.E.3d at 490. Judge Eugene Pigott, the only Judge remaining on the Court who had participated in *Debra H.*, concurred in the result, but not the reasoning, of *Brooke S.B.* *See id.* at 501–02 (Pigott, J., concurring). He would have "retain[ed] the rule that parental status under New York law derives from marriage, biology or adoption and [would have] decide[d] *Brooke S.B.* on the basis of extraordinary circumstances;" namely, the availability of same-sex marriage in New York and throughout the nation, which occurred after *Debra H.* was handed down and after Brooke S.B. and Elizabeth A.C.C. had already decided to form a family to rear a child conceived through artificial insemination. *See id.* at 502, 505. The term "extraordinary circumstances" contemplates situations that drastically and negatively affect a child's welfare, such as an unfit parent or persistent neglect. *See* Bennett v. Jeffreys, 356 N.E.2d 277, 283 (N.Y. 1976).

[157] *Brooke S.B.*, 61 N.E.3d at 500.

[158] *See, e.g.*, *K.*, 51 N.Y.S.3d at 839, 846. Of course, few women today should find themselves in the situation of Alison D. or Brooke S.B. Indeed, I would argue that the concept of de facto or functional parenthood is an artifact of the 1980s and 1990s, a time when a growing number of same-sex couples, principally lesbians who were taking advantage of newly popular and effective assisted reproductive techniques, began to form families to rear the biological offspring of one of them. Stated another way, de facto or functional parenthood may be looked upon as a stopgap idea that has become superannuated in light of the now universal availability of same-sex marriage and second-parent adoption.

[159] *See Brooke S.B.*, 61 N.E.3d at 501 ("[W]e do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement.").

[160] *See* Debra H. Janice R., 930 N.E.2d 184, 205 (N.Y. 2010) (Smith, J., concurring).

1991, the only avenue open for someone in Alison D.'s shoes to become a legal parent was second-parent adoption, which was not then clearly available in New York.[161] When *Debra H.* was handed down in 2010, there were three additional formal legal avenues: second-parent adoption in New York[162] and civil union and marriage in certain other states.[163] By the time *Brooke S.B.* was decided in 2016, same-sex marriage was legal throughout the United States.[164] And fourth, of the twenty Court of Appeals judges who have considered whether the Court should exercise its common-law and equitable powers to create a category of de facto or functional parent—only two, Judge Ciparick and Chief Judge Jonathan Lippman, who joined her dissent in *Debra H.*—have said yes.[165]

Finally, what happens next in this area of family law is a fascinating question. Several cases in the pipeline cite or purport to rely on *Brooke S.B.*[166] I count two cases presently pending in the Appellate Division, one case that has been decided by the Appellate Division, and another case in which leave to appeal to the Court of Appeals was denied.[167] These cases do not involve the fact pattern of

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[161] *See In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) (recognizing adoption rights of both heterosexual and homosexual couples).

[162] *Id.*

[163] *See* Edith Honan, *Factbox: List of States that Legalized Gay Marriage*, REUTERS (June 26, 2013), https://www.reuters.com/article/us-usa-court-gaymarriage-states-idUSBRE95P07A20130626.

[164] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[165] I do not include Chief Judge Kaye. When she dissented in *Alison D.* in 1991, the availability of second-parent adoption in New York was uncertain and civil unions and same-sex marriage were, at most, a blip on society's radar screen. *See In re Jacob*, 660 N.E.2d at 398; *Civil Unions and Domestic Partnership Statues*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx (last updated Nov. 18, 2014). Her dissent is hardly a full-throated endorsement of the concept of de facto or functional parenthood. *See* Alison D. v. Virginia M., 572 N.E.2d 27, 32–33 (N.Y. 1991) (Kaye, J., dissenting).

[166] *See In re* Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 893 (App. Div. 2018); K. v. C., 51 N.Y.S.3d 838, 838–39 (Sup. Ct. 2017); Dawn M. v. Michael M., 47 N.Y.S.3d 898, 902 (Sup. Ct. 2017); *In re* R.P.F. v. FG, 47 N.Y.S.3d 666, 669 (Fam. Ct. 2017).

[167] *See In re Christopher YY.*, 69 N.Y.S.3d at 889; *K.*, 51 N.Y.S.3d at 838; *Dawn M.*, 47 N.Y.S.3d at 899–900; *R.P.F.*, 47 N.Y.S.3d at 670. *In re Christopher YY.*, *Dawn M.*, and *In re R.P.F.* each involve (or have involved) two biological parents and a third-party vying for custody. *See In re Christopher YY.*, 69 N.Y.S.3d at 889, *Dawn M.*, 47 N.Y.S.3d at 899–900, *R.P.F.*, 47 N.Y.S.3d at 670. *K. v. C.* concerns a custody dispute between an adoptive parent and a former romantic partner. *See K.*, 51 N.Y.S.3d at 838. Only a fifth post-*Brooke S.B.* case, *In re* A.F. v. K.H., 57 N.Y.S.3d 352 (Fam. Ct. 2017), replicates the fact pattern of *Alison D.* and *Brooke S.B.* After *Brooke S.B.* was decided, K.H. and A.F. executed a stipulation resolving custody and access to two children born to K.H. via anonymous donor artificial insemination during the course of her romantic relationship with A.F.; however, K.H. would not agree that A.F. was entitled to an order of filiation. *See A.F.*, 57 N.Y.S.3d at 355. A.F. and K.H., registered domestic partners at the time the children were born, separated in July 2011, the same month and year New York legalized same-sex marriage. *See id.* at 353. The Family Court judge

Alison D. or *Brooke S.B.*, or the conception test. So where the overruling of *Alison D.* and *Debra H.* takes the Court in the future is presently up for grabs, and I cannot wait to see how it plays out. With that final observation, I thank you for your attention.

determined that she was empowered to issue an order of filiation in favor of a person, like A.F., whom *Brooke S.B.* entitled to seek visitation and custody. *See id.* at 358. K.H. took an appeal, which she subsequently withdrew.