

THE FIRST DEPARTMENT: AN EMPIRICAL STUDY OF THE COURT AT THE HEART OF NEW YORK CITY

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First and foremost, a dissenting opinion serves the interests of the truth.¹

I. INTRODUCTION

Attorneys and law students focus most of their study on majority opinions. Often, a dissenting opinion is quickly overlooked or ignored; however, these judicial opinions have great value, both during a court's decision-making process, and after the fact as an analytical tool. Dissents can provide insight into the inner-workings of a court and its individual justices.

Beyond this, there exists a distinct class of dissents of even greater importance—those that are written by an appellate court and later upheld as a valid analysis or rationale by a high court. Here in New York State, the four departments of the appellate division present justices with the opportunity to set forth a rationale in a dissenting opinion that the New York State Court of Appeals can later rely upon or adopt as its own on appeal.

This paper will analyze the dissents and dissenting justices of New York State's First Department. Part II will introduce the current composition of the First Department. Part III will analyze, in general terms, the dissenting opinions written by First Department justices. Part IV will present a more critical analysis of dissenting opinions in the First Department that are later upheld by the Court of Appeals on appeal. In Part V, the individual justices and their track records will be examined, followed by Part VI where the vindication records of each dissenting justice will be reviewed through case analysis. Part VII discusses the practical

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¹ Robert G. Flanders, *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 406 (1999).

value of identifying the dissenting justices. And, finally, Part VIII presents a brief conclusion, ultimately leaving the readers to draw their own inferences based upon the data and analysis provided.

This study does not purport perfection; in fact, it is quite likely that a few dissents escaped capture despite extensive research.² However, after reviewing 774 split opinions with dissents, and closely evaluating 103 decisions overturned by the Court of Appeals, some trends clearly emerged.

II. THE FIRST DEPARTMENT: OVERVIEW & PROCEDURE

The New York State Appellate Division of the Supreme Court, First Judicial Department (“the First Department”) is a truly metropolitan court, primarily due to its location,³ but also because of its character. The First Department has a vibrant history and has decided many pivotal cases.⁴ Stated succinctly in its centennial review, “the First Department has become a vital and creative partner of a vital and creative City.”⁵

The First Department justices are predominately tied to New York City, primarily through their education. Sixteen of the current twenty justices received their law school education in New York City; three additional justices went to a New York City college or university for a degree other than their law degree.⁶ Luis A. Gonzalez, a graduate of Columbia University School of Law, holds an impressive record of judicial service in New York City, and currently serves as the Presiding Justice of the First Department.⁷

² Parallel searches were performed in the LexisNexis and Westlaw databases for the time period studied.

³ APPELLATE DIV., FIRST JUD. DEPT., <http://www.courts.state.ny.us/courts/ad1/index.shtml> (last visited Dec. 10, 2010). The Court is located at 27 Madison Avenue, New York, New York.

⁴ See generally COMM. ON THE CENTENNIAL, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT: 1896–1996 (Appellate Division of the Supreme Court of New York, First Judicial Department, New York, NY) (a history of the First Department and highlights from decisions between 1896 and 1996) (available at Schaffer Law Library, Albany Law School).

⁵ *Id.* at 28.

⁶ See *Justices of the Court*, APPELLATE DIV., FIRST JUD. DEPT., <http://www.courts.state.ny.us/courts/ad1/justicesofthecourt/index.shtml> (last visited Dec. 10, 2010) (see profiles of individual justices). Only Justice John Buckley attended an undergraduate institution and law school outside of New York City. See *Justices of the Court: Associate Justice John T. Buckley*, APPELLATE DIV., FIRST JUD. DEPT., http://www.courts.state.ny.us/courts/ad1/justicesofthecourt/justices_BUCKLEY.shtml.

⁷ *Justices of the Court: Presiding Justice Luis A. Gonzalez*, APPELLATE DIV., FIRST JUD. DEPT., http://www.courts.state.ny.us/courts/ad1/justicesofthecourt/justices_gonzales.shtml (last visited Dec. 10, 2010).

Logistically, the First Department takes appeals as of right only from Manhattan (New York County) and the Bronx (Bronx County).⁸ Currently, there are twenty justices serving on the First Department.⁹ Notably, the New York State Constitution provides for seven permanent justices in the First Department, and the Governor may appoint additional justices in accordance with the Court's needs.¹⁰ A full bench consists of five justices, but four are necessary for a quorum, and only three are needed for a decision.¹¹ In the First Department, the clerk chooses a particular composition of justices, and the seatings seem to be the result of random scheduling; generally, the First Department justices do not sit two days in a row.¹²

On the day of a particular argument, one justice of the First Department will be assigned to report on the case in the justices' conference.¹³ The "reporting" justice will make an oral recommendation at the first conference and, after the justices vote, the reporting justice will write an opinion—either a dissent or the majority opinion, depending on which side of the vote the reporting justice falls on.¹⁴ The most junior member will typically write the opinion opposing the reporting justice's opinion.¹⁵ In the First Department, the dissenting justice will write his or her opinion first, and the majority opinion follows in response.¹⁶

The First Department is, quite clearly, a court that is home to a large group of New York City justices. It is located in the heart of New York City and hears appeals from New York City boroughs. It is, at its very core, the "New York City" appellate court.

⁸ *About the Court*, APPELLATE DIV., FIRST JUD. DEPT', <http://www.courts.state.ny.us/courts/ad1/courtinfo/AboutTheCourt.shtml> (last visited Dec. 10, 2010).

⁹ *See Justices of the Court*, *supra* note 6.

¹⁰ N.Y. CONST. art. VI, § 4(b), (e); ALAN D. SCHEINKMAN & DAVID D. SIEGEL, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE APPELLATE DIVISIONS OF THE STATE OF NEW YORK 4 (N.Y. State Bar Ass'n, 2d ed. 2005).

¹¹ SCHEINKMAN & SIEGEL, *supra* note 10, at 4.

¹² *Id.* at 6. The clerk consults with the Presiding Justice as to "the number of sittings needed for that term." *Id.* at 5–6.

¹³ *Id.* at 102.

¹⁴ SCHEINKMAN & SIEGEL, *supra* note 10, at 102.

¹⁵ *Id.*

¹⁶ *Id.*

III. DISSENTS IN THE FIRST DEPARTMENT

By its own estimates, the First Department decides 3000 appeals each year.¹⁷ This is likely an accurate estimate; searches performed on LexisNexis and Westlaw produced similar results, and Annual Reports from the New York State Unified Court System also confirmed these estimates. The First Department heard and decided an average of 3044 cases each year in the period from 2000 to 2004. Recently, however, it seems as if the Court's load has eased a bit, as there was an average of 2693 opinions each year from 2005 to 2009.¹⁸

Of all of the cases decided and opinions produced between 2000 and 2010, only 774 of these opinions contained an articulated dissenting opinion.¹⁹ This means that most of the time, the justices of the First Department are in agreement. It appears that when there is a written dissent, the dissenting justice felt strongly about the issue—at least strongly enough to diverge from his or her colleagues. “[A] dissenter should feel free to express the precise degree of his or her disagreement—or, if warranted, outrage—that he or she believes is appropriate given the substance and tenor of the majority's opinion in any given case.”²⁰ Writing a dissent only adds to an individual justice's workload, as the justice will be responsible for writing the dissent in addition to his or her regular caseload.²¹

It is important to note that the number of dissents written in the First Department has increased in recent years. From 2000 to 2004, there was an average of 46 dissents written each year, with a low of 41 in 2001, and a high of 59 in 2004.²² More recently, from 2005 to 2010, there was an average of 90 dissents authored—double the number written during the earlier period. Additionally, from 2005 to 2010, there was a low of 66 dissents written in 2005, and an astounding high of 127 dissents in 2007.²³

¹⁷ *About the Court*, *supra* note 8.

¹⁸ See Table 1. The more recent average number of cases per year was calculated to exclude 2010 because data cannot be collected for the entire year at this point.

¹⁹ See Table 1. Data for this study was collected on October 4, 2010; the numbers presented here do not reflect opinions decided after that date.

²⁰ Flanders, *supra* note 1, at 403–04.

²¹ *Id.* at 403.

²² See Table 1, Graph 1.

²³ *Id.*

TABLE 1: YEAR-BY-YEAR SUMMARY FOR 2000–2010

<i>Year</i>	<i>Total Number of Case Decided²⁴</i>	<i>Number of Divided Panels</i>	<i>Divided Cases Overturned by the Court of Appeals</i>	<i>Number of Vindicated Dissents</i>	<i>Number of Vindications in Criminal Cases</i>	<i>Number of Vindications in Civil Cases</i>
2010 ²⁵	1475	86	2	2	2	0
2009	2555	99	7	5	0	5
2008	2739	89	18	15	3	12
2007	2904	127	22	12	0	12
2006	2578	76	8	7	1	6
2005	2692	66	6	6	3	3
2004	2699	59	11	11	0	11
2003	2892	45	8	8	2	6
2002	3159	44	8	5	0	5
2001	3135	41	7	7	2	5
2000	3335	42	6	5	1	4
Total:	30,163	774	103	83	14	69

²⁴ The data for the “total number of cases in a year” was derived from Westlaw and Lexis searches when necessary (for 2010). However, reports published by the New York State Unified Court System were used when available for the years studied. The number was calculated by adding the “Total Dispositions” for both civil and criminal cases, and then subtracting the number of cases “Disposed of before argument or submission” for both civil and criminal cases. See N.Y. UNIFIED COURT SYS., ANNUAL REPORTS OF THE CHIEF ADMINISTRATOR, available at <http://www.courts.state.ny.us/reports/annual/index.shtml>. The 2000 and 2002 reports are on file with the *Albany Law Review*.

²⁵ As of October 4, 2010.

IV. THE COURT OF APPEALS' VINDICATION OF FIRST DEPARTMENT DISSENTING JUSTICES

Between 2000 and 2010, the First Department produced 774 opinions with dissents.²⁶ Of these, the New York Court of Appeals overturned 103 after disagreeing with the First Department majority opinion.

When overturning an appellate court, the Court of Appeals occasionally supplies its own reasoning, different from that articulated by the majority or the dissenter. But, sometimes the Court of Appeals agrees with the dissenting First Department justice and produces an opinion that essentially vindicates the dissenter below. The Court of Appeals will often decide an issue on the narrowest grounds possible,²⁷ upholding perhaps only one or two of the arguments articulated by the First Department dissenter. For the purposes of this study, such Court of Appeals decisions are considered "vindications," even though they were decided on the narrowest grounds possible and do not address every possible argument raised by the First Department's majority and dissenting opinions.

Of the 103 First Department opinions overturned by the Court of Appeals, the Court adopted the reasoning of the dissenting opinion below in 83 cases, in whole or in part.²⁸ In terms of percentages, this gives the First Department dissenting justices an 80.5% vindication rate. Stated more eloquently, it is more likely than not that when the Court of Appeals overturns the First Department and rejects the legal reasoning of the majority, the Court of Appeals will concur with the dissenter in the First Department. It seems that when a First Department justice breaks away from the majority and authors a dissent, he or she would most likely be correct in doing so.

However, looking at the numbers in a different light, there are so many dissents written in the First Department that its overall rate of vindication may not be as profound. As stated above, 774 dissenting opinions were written between 2000 and 2010. In comparing the overall number of dissents (774) with the later

²⁶ See Table 1.

²⁷ ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* 497–98 (Thomson West 3d ed. 2005); see also *Consol. Edison Co. of N.Y. v. Hoffman*, 43 N.Y.2d 598, 606, 374 N.E.2d 105, 108, 403 N.Y.S.2d 193, 196 (1978) (stating "we should not decide broad questions not necessary to the resolution of the present dispute but, rather, approach this case with a narrower focus").

²⁸ See Table 1.

number of dissents vindicated by the Court of Appeals (83), it only amounts to a 10.7% vindication rate. In other words, about 90% of the time, the Court of Appeals ignores or overlooks the dissenting justice and either agrees with the majority outright, or adopts its own reasoning. However, a variety of factors influence the Court of Appeals' decision, so the validity of the dissent in the appellate court does not necessarily factor into the higher court's determination.

V. A CLOSER LOOK AT THE DISSENTING JUSTICES

Looking at the past ten years in the First Department and its 774 dissenting opinions, one interesting fact stands out. The five justices who dissent most frequently still serve on the bench. Justice Tom racked up 74 dissents from 2000 to 2010. Following closely behind is Justice Andrias with a total of 71 dissents, and then Justice Catterson with an impressive 70 dissents during his short tenure at the First Department (from 2004 to 2010).²⁹ Justice Saxe authored 80 dissenting opinions from 2000 to 2010. However, the most frequent dissenter is Justice James M. McGuire, with an astounding 115 dissents written from 2005 to 2010, and a high of 41 dissents written in the year 2007.³⁰

This group of five stands in great contrast to some of their colleagues. At the opposite end of the spectrum are those justices who have authored the fewest number of dissents, including Justice Abdus-Salaam with 4 dissents, Justices Lippman and Roman, each with 2 dissents, and Justice Rosalyn Richter, who has not authored a single dissent.³¹ However, these rates must be viewed in the context of their respective tenures: Justices Abdus-Salaam, Roman, and Richter were only appointed to the First Department in 2009.³² It is also worthy of mention that Justice Lippman served as Chief Justice of the First Department from 2007 to 2009 before his

²⁹ See Table 2; see also *Justices of the Court (Historical)*, APPELLATE DIVISION, FIRST JUD. DEP'T, <http://www.courts.state.ny.us/courts/ad1/centennial/justices.shtml> (last visited Dec. 10, 2010).

³⁰ See Table 2. Following this group of five, the next "highest" is Justice Mazzaelli, who has authored forty dissents. *Id.*

³¹ *Id.* This includes only the current and those who have recently left the First Department. In the period from 2000 to 2010, Justice Wallach authored only three dissents; however, this project has only captured the tail end of Justice Wallach's term on the First Department, which began in 1986 and ended in 2003. The inclusion of such numbers would not fairly portray Justice Wallach's tenure and, hence, have not been included. See *Justices of the Court (Historical)*, *supra* note 29.

³² See *Justices of the Court (Historical)*, *supra* note 29.

appointment as Chief Judge of the Court of Appeals.³³ Chief Justice Lippman's low number of dissents can therefore be attributed to his short tenure at the First Department.

Looking beyond the extremes of the "most frequent" and "least frequent" dissenters, most justices are responsible for authoring anywhere from 7 to 40 dissents, with an overall average of 25 dissents per justice.³⁴

³³ *Id.*; see also *Profile of Jonathan Lippman*, APPELLATE DIV., FIRST JUD. DEP'T, <http://www.courts.state.ny.us/courts/ad1/centennial/Bios/jlippman2.shtml> (last visited Dec. 10, 2010).

³⁴ See Table 2.

TABLE 2: NUMBER OF DISSENTS & PERSONAL VINDICATION RATES
(2000–2010)

<i>Justice (in order of seniority)</i>	<i>Number of Dissents Authored</i>	<i>Number of Times Vindicated by Court of Appeals</i>	<i>Vindication Rate (%)</i>
Gonzalez	15	1	6%
Nardelli	31	2	6%
Tom	74	12	16%
Mazzarelli	40	2	5%
Andrias	71	10	14%
Saxe	80	5	6%
Friedman	32	12	37.5%
Buckley	23	0	0%
Sweeny	19	1	5%
Catterson	70	7	10%
McGuire	115	9	7.8%
Moskowitz	12	1	8%
Acosta	15	2	13%
Renwick	7	0	0%
DeGrasse	8	1	12.5%
Freedman	11	0	0%
Richter	0	0	0%
Abdus-Salaam	4	0	0%
Manzanet-Daniels	9	0	0%
Roman	2	0	0%

VI. VINDICATION—INDIVIDUAL JUSTICES

While one might predict that the justice who authors the highest number of dissents would also be the justice most frequently vindicated by the Court of Appeals, this assumption is not necessarily true. Justice McGuire was the overall champion with 115 dissents to his credit.³⁵ However, from 2000 to 2010, Justice McGuire was vindicated by the Court of Appeals only 9 times.³⁶

Looking back at the group of justices who dissent most frequently, Justice Saxe was vindicated only 5 times³⁷ out of the 80 dissents he authored, and Justice Catterson was vindicated only 7 times³⁸ out of

³⁵ *Id.*

³⁶ *Id.*; *People v. Kadarko*, 56 A.D.3d 102, 867 N.Y.S.2d 32 (App. Div. 1st Dep't 2008), *rev'd*, 14 N.Y.3d 426, 928 N.E.2d 1025, 902 N.Y.S.2d 828 (2010), *remitted* 73 A.D.3d 639, 901 N.Y.S.2d 612 (App. Div. 1st Dep't 2010) (conviction and sentence affirmed); *Callahan v. Carey*, 53 A.D.3d 404, 861 N.Y.S.2d 624 (App. Div. 1st Dep't 2008), *rev'd*, 12 N.Y.3d 496, 909 N.E.2d 1229, 882 N.Y.S.2d 392 (2009); *Okun v. Tanners*, 47 A.D.3d 475, 849 N.Y.S.2d 537 (App. Div. 1st Dep't), *rev'd*, 11 N.Y.3d 762, 896 N.E.2d 660, 867 N.Y.S.2d 25 (2008); *Landau, P.C. v. LaRossa, Mitchell & Ross*, 41 A.D.3d 371, 838 N.Y.S.2d 773 (App. Div. 1st Dep't 2007), *rev'd*, 11 N.Y.3d 8, 892 N.E.2d 380, 862 N.Y.S.2d 316 (2008), *remitted*, 27 Misc.3d 1207(A), 910 N.Y.S.2d 316 (Sup. Ct. N.Y. Cnty. 2010); *Worth Const. Co. v. Admiral Ins. Co.*, 40 A.D.3d 423, 836 N.Y.S.2d 155 (App. Div. 1st Dep't 2007), *rev'd*, 10 N.Y.3d 411, 888 N.E.2d 1043, 859 N.Y.S.2d 101 (2008); *Sanatass v. Consol. Investing Co.*, 38 A.D.3d 332, 833 N.Y.S.2d 12 (App. Div. 1st Dep't 2007), *rev'd*, 10 N.Y.3d 333, 887 N.E.2d 1125, 858 N.Y.S.2d 67 (2008), *remitted*, 23 Misc.3d 1110(A), 885 N.Y.S.2d 713 (Sup. Ct. N.Y. Cnty. 2009); *Smalley v. Dreyfus Corp.*, 40 A.D.3d 99, 832 N.Y.S.2d 157 (App. Div. 1st Dep't 2007), *rev'd*, 10 N.Y.3d 55, 882 N.E.2d 882, 853 N.Y.S.2d 270 (2008); *In re Victor M.*, 35 A.D.3d 180, 825 N.Y.S.2d 468 (App. Div. 1st Dep't 2006), *rev'd*, 9 N.Y.3d 84, 876 N.E.2d 1187, 845 N.Y.S.2d 771 (2007); *Homes for Homeless, Inc. v. Bd. of Stds. & Appeals*, 24 A.D.3d 340, 807 N.Y.S.2d 36 (App. Div. 1st Dep't 2005), *rev'd*, 7 N.Y.3d 822, 855 N.E.2d 1166, 822 N.Y.S.2d 752 (2006).

³⁷ *Hotel 71 Mezz Lender, LLC v. Falor*, 58 A.D.3d 270, 869 N.Y.S.2d 61 (App. Div. 1st Dep't 2008), *rev'd*, 14 N.Y.3d 303, 926 N.E.2d 1202, 900 N.Y.S.2d 698 (2010); *McCleery v. Consol. Edison*, 49 A.D.3d 312, 852 N.Y.S.2d 757 (App. Div. 1st Dep't 2008), *rev'd*, 11 N.Y.3d 778, 897 N.E.2d 1044, 868 N.Y.S.2d 563 (2008); *Lempert v. Steinberg & Pokoik Mgmt. Corp.*, 32 A.D.3d 215, 820 N.Y.S.2d 215 (App. Div. 1st Dep't 2006), *rev'd*, 7 N.Y.3d 917, 860 N.E.2d 987, 827 N.Y.S.2d 684 (2006); *People v. Devonish*, 17 A.D.3d 111, 792 N.Y.S.2d 438 (App. Div. 1st Dep't), *rev'd*, 6 N.Y.3d 727, 843 N.E.2d 1120, 810 N.Y.S.2d 380 (2005); *McNulty v. City of N.Y.*, 295 A.D.2d 42, 742 N.Y.S.2d 242 (App. Div. 1st Dep't 2002), *rev'd*, 100 N.Y.2d 227, 792 N.E.2d 162, 762 N.Y.S.2d 12 (2003).

³⁸ *American Transit Ins. Co. v. Brown*, 66 A.D.3d 447, 886 N.Y.S.2d 399 (App. Div. 1st Dep't 2009), *rev'd*, 14 N.Y.3d 809, 926 N.E.2d 255, 899 N.Y.S.2d 751 (2010); *Gallagher v. N.Y. Post*, 55 A.D.3d 488, 866 N.Y.S.2d 178 (App. Div. 1st Dep't 2008), *rev'd*, 14 N.Y.3d 83, 923 N.E.2d 1120, 896 N.Y.S.2d 732 (2010); *Khrapunskiy v. Doar*, 49 A.D.3d 201, 852 N.Y.S.2d 40 (App. Div. 1st Dep't 2008), *rev'd*, 12 N.Y.3d 478, 909 N.E.2d 70, 881 N.Y.S.2d 377 (2009); *Duffy v. Vogel*, 49 A.D.3d 22, 849 N.Y.S.2d 52 (App. Div. 1st Dep't 2007), *rev'd*, 12 N.Y.3d 169, 905 N.E.2d 1175, 878 N.Y.S.2d 246 (2009); *Kopsachilis v. 130 E. 18 Owners Corp.*, 43 A.D.3d 744, 841 N.Y.S.2d 449 (App. Div. 1st Dep't 2007), *rev'd*, 11 N.Y.3d 512, 901 N.E.2d 734, 873 N.Y.S.2d 241 (2008); *Sims v. Comprehensive Cmty. Dev. Corp.*, 40 A.D.3d 256, 853 N.Y.S.2d 163 (App. Div. 1st Dep't 2007), *abrogated by* *Ornstein v. N.Y.C. Health and Hosps. Corp.*, 10 N.Y.3d 1, 881 N.E.2d 1187, 852 N.Y.S.2d 1 (2008); *Ornstein v. N.Y.C. Health and Hosps. Corp.*, 27 A.D.3d 180, 806 N.Y.S.2d 566 (App. Div. 1st Dep't 2006), *rev'd*, 10 N.Y.3d 1, 881

his 70 dissents.³⁹ Justice Tom, responsible for 74 dissenting opinions, was vindicated 12 times,⁴⁰ giving him a 16% vindication rate.⁴¹ Similarly, Justice Andrias was vindicated 10 times,⁴² which, in comparison to his 71 dissents, gives him a 14% vindication rate.⁴³

Interestingly, the justice with the highest number of vindications was Justice David Friedman who has served as an associate justice since 1999.⁴⁴ Justice Friedman authored 12 dissents that were later

N.E.2d 1187, 852 N.Y.S.2d 1 (2008).

³⁹ See Table 2.

⁴⁰ *Kaur v. N.Y.S. Urban Dev. Corp.*, 72 A.D.3d 1, 892 N.Y.S.2d 8 (App. Div. 1st Dep't 2009), *rev'd*, 15 N.Y.3d 235, 933 N.E.2d 721, 907 N.Y.S.2d 122 (2010); *M Entm't Inc. v. Leydier*, 62 A.D.3d 627, 880 N.Y.S.2d 40 (App. Div. 1st Dep't 2009), *rev'd*, 13 N.Y.3d 827, 919 N.E.2d 177, 891 N.Y.S.2d 6 (2009), *remitted*, 71 A.D.3d 517, 897 N.Y.S.2d 402 (App. Div. 1st Dep't 2010); *47 Ave. B. E., Inc. v. N.Y.S. Liquor Auth.*, 65 A.D.3d 33, 880 N.Y.S.2d 22 (App. Div. 1st Dep't), *rev'd*, 13 N.Y.3d 820, 918 N.E.2d 949, 890 N.Y.S.2d 435 (2009); *Ferluckaj v. Goldman Sachs & Co.*, 53 A.D.3d 422, 862 N.Y.S.2d 473 (App. Div. 1st Dep't 2008), *rev'd*, 12 N.Y.3d 316, 908 N.E.2d 869, 880 N.Y.S.2d 879 (2009); *Smalls v. AJI Indus., Inc.*, 37 A.D.3d 324, 831 N.Y.S.2d 42 (App. Div. 1st Dep't 2007), *rev'd*, 10 N.Y.3d 733, 883 N.E.2d 350, 853 N.Y.S.2d 526 (2008); *People v. Hanley*, 2 A.D.3d 333, 770 N.Y.S.2d 62 (App. Div. 1st Dep't 2003), *rev'd*, 5 N.Y.3d 108, 833 N.E.2d 248, 800 N.Y.S.2d 105 (2005); *Waldon v. Little Flower Children's Serv.*, 308 A.D.2d 320, 764 N.Y.S.2d 49 (App. Div. 1st Dep't 2003), *rev'd*, 1 N.Y.3d 612, 808 N.E.2d 852, 776 N.Y.S.2d 532 (2004); *Hanford v. Plaza Packaging Corp.*, 305 A.D.2d 241, 760 N.Y.S.2d 31 (App. Div. 1st Dep't 2003), *rev'd*, 2 N.Y.3d 348, 811 N.E.2d 30, 778 N.Y.S.2d 768 (2004); *People v. Berroa*, 287 A.D.2d 88, 733 N.Y.S.2d 52 (App. Div. 1st Dep't 2001), *rev'd*, 99 N.Y.2d 134, 782 N.E.2d 1148, 753 N.Y.S.2d 12 (2002); *People v. Roche*, 286 A.D.2d 290, 729 N.Y.S.2d 722 (App. Div. 1st Dep't 2001), *rev'd*, 98 N.Y.2d 70, 772 N.E.2d 1133, 745 N.Y.S.2d 775 (2002); *Meis v. ELO Org., LLC*, 282 A.D.2d 247, 723 N.Y.S.2d 170 (App. Div. 1st Dep't 2001), *rev'd*, 97 N.Y.2d 714, 767 N.E.2d 146, 740 N.Y.S.2d 689 (2002); *Narducci v. Manhasset Bay Assocs.*, 270 A.D.2d 60, 704 N.Y.S.2d 233 (App. Div. 1st Dep't 2000), *rev'd*, 96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001).

⁴¹ See Table 2.

⁴² *Lehman Bros., Inc. v. Cox*, 43 A.D.3d 352, 841 N.Y.S.2d 265 (App. Div. 1st Dep't 2007), *rev'd*, 10 N.Y.3d 743, 883 N.E.2d 355, 853 N.Y.S.2d 530 (2008); *328 Owners Corp. v. 330 W. 86 Oaks Corp.*, 34 A.D.3d 108, 820 N.Y.S.2d 557 (App. Div. 1st Dep't 2006), *rev'd*, 8 N.Y.3d 372, 865 N.E.2d 1228, 834 N.Y.S.2d 62 (2007); *Williamson v. PricewaterhouseCoopers LLP*, 32 A.D.3d 179, 817 N.Y.S.2d 61 (App. Div. 1st Dep't 2006), *rev'd*, 9 N.Y.3d 1, 872 N.E.2d 842, 840 N.Y.S.2d 730 (2007); *Albanese v. City of N.Y.*, 10 A.D.3d 545, 782 N.Y.S.2d 37 (App. Div. 1st Dep't 2004), *rev'd*, 5 N.Y.3d 217, 833 N.E.2d 1213, 800 N.Y.S.2d 538 (2005); *City of N.Y. v. Verizon*, 5 A.D.3d 130, 773 N.Y.S.2d 31 (App. Div. 1st Dep't 2004), *rev'd*, 4 N.Y.3d 255, 827 N.E.2d 276, 794 N.Y.S.2d 293 (2005); *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 A.D.3d 236, 771 N.Y.S.2d 655 (App. Div. 1st Dep't), *rev'd*, 4 N.Y.3d 35, 823 N.E.2d 439, 790 N.Y.S.2d 74 (2004); *Fintzi v. N.J. YMHA-YWHA Camps*, 283 A.D.2d 358, 726 N.Y.S.2d 622 (App. Div. 1st Dep't), *rev'd*, 97 N.Y.2d 669, 765 N.E.2d 288, 739 N.Y.S.2d 85 (2001); *People v. Ali*, 277 A.D.2d 138, 717 N.Y.S.2d 114 (App. Div. 1st Dep't 2000), *rev'd*, 96 N.Y.2d 840, 754 N.E.2d 193, 729 N.Y.S.2d 434 (2001), *remitted*, 286 A.D.2d 204, 728 N.Y.S.2d 662 (App. Div. 1st Dep't 2001) (conviction affirmed); *5th Ave. Chocolatiere, Ltd. v. 540 Acquisition Co.*, 272 A.D.2d 23, 712 N.Y.S.2d 8 (App. Div. 1st Dep't 2000), *rev'd sub nom.*, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr. Inc., 96 N.Y.2d 280, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (2001); *532 Madison Ave. Gourmet Foods v. Finlandia Center, Inc.*, 271 A.D.2d 49, 711 N.Y.S.2d 391 (App. Div. 1st Dep't 2000), *rev'd*, 96 N.Y.2d 280, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (2001).

⁴³ See Table 2.

⁴⁴ *Id.* See also *Justices of the Court: Associate Justice David Friedman*, APPELLATE DIV.,

upheld by the Court of Appeals.⁴⁵ Between 2000 and 2010, Justice Friedman wrote a total of 32 dissents.⁴⁶ He can also be credited with the highest personal vindication rate of 37.5%—the highest percentage of the entire First Department.⁴⁷

On the opposite end of the spectrum, Justice Buckley was never vindicated by the Court of Appeals, although he authored 23 dissents.⁴⁸ Likewise, Justice Freedman was never vindicated by the Court of Appeals, though he only authored 11 dissenting opinions.⁴⁹ Justices Renwick, Abdus-Salaam, Manzanet-Daniels, Roman, Lippman, and Lerner were not vindicated by the Court of Appeals between 2000 and 2010, but each authored fewer than 10 dissents.⁵⁰

VII. THE VALUE OF A JUSTICE JOINING IN DISSENT

A. Numerical Analysis

Analyzing the dissents as a whole also provides a fair picture of the First Department. Beyond looking at the individual justice who

FIRST JUD. DEP'T, http://www.courts.state.ny.us/courts/ad1/justicesofthecourt/justices_friedman.shtml (last visited Dec. 10, 2010).

⁴⁵ *People v. Wrotten*, 60 A.D.3d 165, 871 N.Y.S.2d 28 (App. Div. 1st Dep't 2008), *rev'd*, 14 N.Y.3d 33, 923 N.E.2d 1099, 896 N.Y.S.2d 711 (2009), *cert. denied*, 130 S. Ct. 2520 (2010), *remanded*, 73 A.D.3d 637, 901 N.Y.S.2d 265 (App. Div. 1st Dep't 2010) (use of live two-way video was warranted); *Gotay v. Breitbart*, 58 A.D.3d 25, 866 N.Y.S.2d 638 (App. Div. 1st Dep't 2008), *rev'd*, 12 N.Y.3d 894, 912 N.E.2d 1056, 884 N.Y.S.2d 677 (2009); *Cohen v. Mem'l Sloan-Kettering Cancer Ctr.*, 50 A.D.3d 227, 850 N.Y.S.2d 435 (App. Div. 1st Dep't), *rev'd*, 11 N.Y.3d 823, 897 N.E.2d 1059, 868 N.Y.S.2d 578 (2008); *Ins. Co. of State of Pa. v. HSBC Bank USA*, 37 A.D.3d 251, 829 N.Y.S.2d 511 (App. Div. 1st Dep't 2007), *rev'd*, 10 N.Y.3d 32, 882 N.E.2d 381, 852 N.Y.S.2d 812 (2008); *People v. Redzeposki*, 21 A.D.3d 781, 801 N.Y.S.2d 267 (App. Div. 1st Dep't 2005), *rev'd*, 7 N.Y.3d 725, 850 N.E.2d 1157, 818 N.Y.S.2d 182 (2006), *remitted*, 33 A.D.3d 467, 822 N.Y.S.2d 444 (App. Div. 1st Dep't 2006) (conviction affirmed); *Mapp v. Burnham*, 23 A.D.3d 37, 800 N.Y.S.2d 137 (App. Div. 1st Dep't 2005), *rev'd*, 8 N.Y.3d 999, 870 N.E.2d 678, 839 N.Y.S.2d 439 (2007); *Slate v. Schiavone Const. Co.*, 10 A.D.3d 1, 780 N.Y.S.2d 567 (App. Div. 1st Dep't 2004), *rev'd*, 4 N.Y.3d 816, 829 N.E.2d 665, 796 N.Y.S.2d 573 (2005); *Rodriguez-Rivera v. Kelly*, 3 A.D.3d 379, 771 N.Y.S.2d 3 (App. Div. 1st Dep't), *rev'd*, 2 N.Y.3d 776, 812 N.E.2d 1251, 780 N.Y.S.2d 302 (2004); *Domen Holding Co. v. Aranovich*, 302 A.D.2d 132, 753 N.Y.S.2d 57 (App. Div. 1st Dep't), *modified*, 1 N.Y.3d 117, 802 N.E.2d 135, 769 N.Y.S.2d 785 (2003); *Marcano v. City of N.Y.*, 296 A.D.2d 43, 743 N.Y.S.2d 456 (App. Div. 1st Dep't), *rev'd*, 99 N.Y.2d 548, 784 N.E.2d 73, 754 N.Y.S.2d 200 (2002); *Plummer v. N.Y.C. Health and Hosps. Corp.*, 285 A.D.2d 374, 729 N.Y.S.2d 70 (App. Div. 1st Dep't 2001), *rev'd*, 98 N.Y.2d 263, 774 N.E.2d 712, 746 N.Y.S.2d 647 (2002); *Bloomfield v. Bloomfield*, 281 A.D.2d 301, 723 N.Y.S.2d 143 (App. Div. 1st Dep't), *rev'd*, 97 N.Y.2d 188, 764 N.E.2d 950, 738 N.Y.S.2d 650 (2001).

⁴⁶ See Table 2.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

authored the dissent, we also see trends among justices who join a dissenter.

The justice who joined the most dissenting opinions is Justice Angela Mazza, joining 43 dissents between 2000 and 2010.⁵¹ Justice Saxe, joining 33 times, and Justice Andrias, who joined 30 times between 2000 and 2010, follow her closely.⁵² Additionally, Justices Saxe and Andrias individually authored a high number of dissents in comparison to their colleagues.⁵³

Both Justice Nardelli and Justice Buckley joined a dissenter 28 times.⁵⁴ Presiding Justice Gonzalez joined 19 times as an Associate Justice, but only 3 times as Presiding Justice, for a total of 22 times.⁵⁵

Interestingly, Justice McGuire, responsible for authoring 115 dissents, only joined another justice's dissent 8 times.⁵⁶ Similarly, Justice Catterson, for the 70 dissents he authored, only joined another justice in dissent 16 times.⁵⁷ It seems that when these particular justices dissent, they will most likely be authoring the dissent.

B. Practical Value

Having a second appellate justice join in dissent can be invaluable. When two appellate justices dissent on a question of law, an automatic appeal as of right may be taken to the Court of Appeals.⁵⁸ Thus, a practical value exists for practitioners (specifically appellate attorneys) to identify those justices that dissent most often, regardless of whether they join in the dissent or author the dissenting opinion.

⁵¹ See Table 3.

⁵² See *id.*

⁵³ See *id.*; *cf.* Table 2.

⁵⁴ See Table 3.

⁵⁵ See *id.*

⁵⁶ See *id.*; *cf.* Table 2.

⁵⁷ See Table 3; *cf.* Table 2.

⁵⁸ N.Y. C.P.L.R. 5601(a) (McKinney 1995); see also SCHEINKMAN & SIEGEL, *supra* note 10, at 101.

TABLE 3: JUSTICES WITH THE MOST PARTICIPATION IN DISSENTS
(2000–2010)

<i>Justice</i>	<i>Number of Dissents Authored</i>	<i>Number of Times Joining</i>	<i>Total Number of Times Participating in the Dissent</i>
McGuire	115	8	123
Saxe	80	33	113
Andrias	71	30	100
Tom	74	24	98
Catterson	70	16	86
Mazzarelli	40	43	83
Nardelli	31	28	59
Buckley	23	28	51
Friedman	32	18	50
Gonzalez	15	22	37
Sweeny	19	13	32

The numerical data indicates that Justices McGuire, Saxe, and Andrias are most likely to dissent. Arguably, if an attorney's strategy calls for him or her to be heard by the Court of Appeals, that attorney will have the most potential success if his or her argument is made before these justices.

VIII. CONCLUSION

The courts of the appellate division are vibrant hubs of judicial activity that should not be ignored. The First Department in particular has a few adamant dissenting justices that both enliven the debate and provide a path to appeal when a second justice joins. While dissenting opinions are hardly perfect barometers or a crystal ball, they have immense value. Principally, a dissent provides a

valid basis for a potential legal argument. Dissents also supply insight into individual justices and their decision-making process. Finally, they illustrate a judge's judicial character because the dissenting judge has decided to break from the pack and speak either individually or with a colleague.