

A PERIODICAL OF NEW YORK COURT HISTORY

JUDICIAL NOTICE

ISSUE 7  SUMMER 2011



People v. Croswell  Paul McGrath

Ballot Reform and the Election of 1891  David Sheridan

Charles David Breitel  W.B. Benkard

TABLE *of* CONTENTS

ISSUE 7

SUMMER 2011



pg 3



pg 5



pg 21



pg 39

FEATURED ARTICLES

Pg 5 People v. Croswell
by Paul McGrath

Pg 21 Ballot Reform and the Election of 1891
by David Sheridan

Pg 39 Charles David Breitel
by James W.B. Benkard

DEPARTMENTS

Pg 2 From the Editor-in-Chief

Pg 3 A Gala Opening Statement

Pg 49 The David A. Garfinkel Essay Contest

Pg 58 A Look Back

Pg 61 Society Officers and Trustees

Pg 61 Society Membership

Pg 64 Become a Member

Pg 66 Courthouse Art



Dear Members

In 2003, on the occasion of the inaugural issue of this publication, the Society's founders, Judith S. Kaye and Albert M. Rosenblatt, declared that our mission was to "cast the net" for historical "riches" about New York's courts. I am pleased to say that the issue of Judicial Notice you now hold in your hands lives up to that standard.

In the pages that follow, you will find original scholarship about significant moments, figures and symbols in New York history.

While the riches you will read about in these pages are largely centered on scholarly history, we are privileged as well, as members of the Society, to enjoy a remarkable personal collegiality; we begin this issue with a review of our Galas, honoring three pillars of our court system: the judges, the lawyers, and the court staff.

Paul McGrath gives us a fresh look at *People v. Croswell* (1804) — a seminal case in the evolution of defamation law, and the forum for one of Alexander Hamilton's finest courtroom performances.

David Sheridan tells the story of the most consequential election law cases in New York history, stemming from the 1891 state senatorial election. The stakes were high, as the litigation's outcome determined which of the two major political parties held majority control of the upper house of the Legislature.

We also feature a biography about New York's 30th Chief Judge, Charles D. Breitel. Written by a former law clerk, James W.B. Benkard, this piece provides new insights into the life and career of one of our most distinguished jurists.

A few years ago, in an effort to reach out to young New Yorkers, the Society launched, with the support of Barry and Gloria Garfinkel, an essay contest for community college students across the State. We are happy to present the winning essays for 2009 and 2010: *The Evolution of Justice Along the Erie Canal* and *The New Netherland Legal System and Law in 21st Century New York*.

We thank all of our authors for sharing their love of legal history. We are confident that you will be enlightened and entertained by their efforts.

Henry M. Greenberg, Editor-in-Chief

140 GRAND STREET, SUITE 701, WHITE PLAINS, N.Y. 10601

PHONE 914-824-5717

E-MAIL: The_Historical_Society@nycourts.gov

WEB SITE: www.nycourts.gov/history

BOARD OF EDITORS

Judith S. Kaye

Albert M. Rosenblatt

Leon B. Polsky

Frances Murray

EDITOR-IN-CHIEF

Henry M. Greenberg

MANAGING EDITOR

Marilyn Marcus

ASSOCIATE EDITORS

Michael Benowitz

Jacqueline Guidarelli-Wu

DESIGN

Teodors Ermansons

Patricia Everson Ryan

Elizabeth Wiorowski

A Gala Opening Statement

This issue opens on a light note by recounting history of another sort—the history of our five gala dinners, honoring pillars of the New York State court system: the judges, the lawyers, and the court staff.

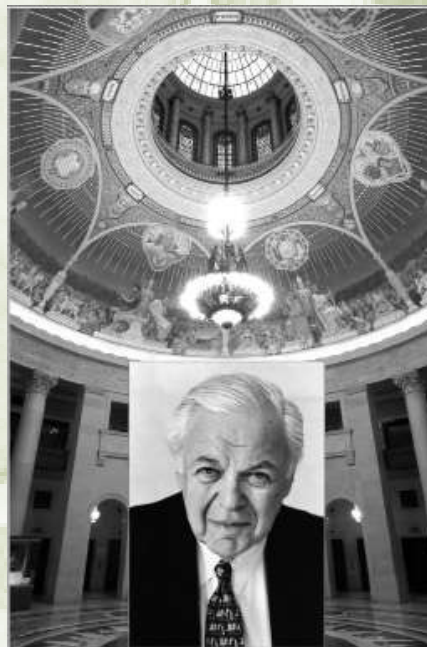
The by now well-established tradition of gathering several hundred in a magnificent New York City venue to reflect on, and honor, the State court system actually began in Spring 2007, at historic downtown Banking Hall, with all of the then-former Court of Appeals Judges: Joseph W. Bellacosa, Stewart F. Hancock, Jr., Howard A. Levine, Albert M. Rosenblatt, Richard D. Simons, George Bundy Smith, Sol Wachtler, and Richard C. Wesley.

The judiciary was also the subject of the Spring 2009 gala honoring former Chief Judge Judith S. Kaye, at Gotham Hall, when she recounted the history of Lady Justice, including the uniqueness of New York, among the original 13 states, in adopting Lady Justice, as well as Lady Liberty, as part of its official seal. In Spring 2010, at the New York Public Library, we toasted our great new Chief Judge, Jonathan Lippman, and were treated not only to his observations about his new role but also to lessons in the art of “Lippmanizing,” his colleagues’ description of his gentle, effective powers of persuasion.

In Spring 2011, again at the New York Public Library, we saluted the extraordinary New York Bar through the guest of honor Roy L. Reardon (of Simpson, Thatcher & Bartlett), “A Man for all Seasons.” That title indeed captures what is best about the New



2007, left to right: Hon. Stewart F. Hancock, Hon. Richard D. Simons, Hon. George Bundy Smith, Hon. Richard C. Wesley, Hon. Judith S. Kaye, Hon. Albert M. Rosenblatt, Hon. Howard A. Levine, Hon. Sol Wachtler and Hon. Joseph W. Bellacosa.



2008, New York County Clerk Norman Goodman and New York County Courthouse.

York Bar, as Roy Reardon does, bringing together the qualities of a first-rate profes-

sional, whether by effective representation of the interests of clients or by leadership in efforts to assure high professional standards and the betterment of society. As with the other galas, the participation of family—most especially the loving tributes of Roy's wife (Pat Hynes) and granddaughter—reminded us of the essential support of our families in all that we do.

The same glow of pride in the New York courts prevailed at midtown Cipriani in Spring 2008, when the Historical Society celebrated the fortieth anniversary of our remarkable New York County Clerk, Norman Goodman, and the eightieth anniversary of our remarkable New York County Courthouse. As we honor those who administer justice in the State of New York, we are every day reminded of the wisdom of the words inscribed on the Courthouse façade: "The true administration of justice is the firmest pillar of good government."

Delightful as it is to attend and to describe these galas (in words and photos), in fact they provide the bedrock funding—along with Member support—for the many terrific programs and publications the Society sponsors throughout the year.



2009, Chief Judge Judith S. Kaye



2011, Roy L. Reardon



2010, Chief Judge Jonathan Lippman

People v. Croswell:

ALEXANDER HAMILTON AND THE TRANSFORMATION OF THE COMMON LAW OF LIBEL

PAUL McGRATH

IT IS JANUARY 1803 and the young United States, now in its third presidential administration, is in the throes of major partisan political intrigue. The recently-elected administration of Thomas Jefferson seeks to exact some revenge upon the Federalists for their prosecution of Republican journalists under the notorious Sedition Act of 1798. Sentiments are running high and Jefferson sends out the word that “a few prosecutions” in the states under the common law of seditious libel might help certain obnoxious newspaper editors behave and strike a blow against the Federalists.¹ Armed with their orders, the New York State Republican Party, led by George and DeWitt Clinton, looks for a local target to prosecute. In the bustling Columbia County City of Hudson, the Republicans find their man: Harry Croswell, the young editor of the upstart weekly Federalist newspaper, *The Wasp*. The ensuing criminal proceeding, *People v. Croswell*, would become a seminal case in the development of the law of seditious libel in America, provide the vehicle for Alexander Hamilton to make his last stirring argument in favor of individual liberty and journalistic candor and, perhaps indirectly, help involve Hamilton in his fatal duel with Aaron Burr.

The Political Environment

A full appreciation of the *Croswell* prosecution requires some familiarity with the formation of the political party system in America. Although Americans had come together to defeat the British Empire in the Revolutionary War, it was not long after the war that these patriots began lining up on different sides of

fundamental questions—e.g., what did the Revolution mean? And what should the new America look like? Although the key players would never have conceded



Harry Croswell (1778-1858) by Henry Inman, 1839

Courtesy of Mead Art Museum, Amherst College

Bequest of Herbert L. Pratt (Class of 1895), AC 1945.12

that they belonged to political parties, every informed citizen knew that, as early as George Washington's first term of office as President, two factions had arisen:

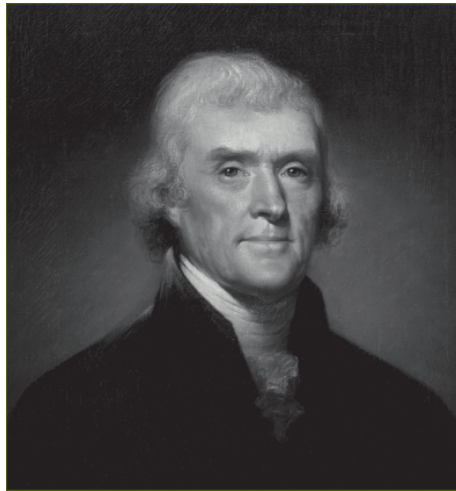
Paul McGrath is the Chief Court Attorney of the New York Court of Appeals in Albany where he supervises the Court's Central Legal Research Staff. Prior to his promotion to Chief Court Attorney, Mr. McGrath worked as the Deputy Chief Court Attorney of the Court of Appeals and as a Law Clerk to Associate Judge Richard D. Simons. Mr. McGrath earned his J.D., magna cum laude, from the State University of New York at Buffalo School of Law and his B.A., magna cum laude, from the State University of New York College at Geneseo.

the Federalists, led by Alexander Hamilton, and the Anti-Federalists, later to be known as the Democratic-Republicans or just Republicans, led by the principal author of the Declaration of Independence, Thomas Jefferson.

It is dangerous to oversimplify the points of contention, but it is fair to say that the two factions had differing ideas of what America should look like and how it should behave. Hamilton's Federalists believed in an active national government and sought to achieve this end by giving a loose construction to the limited powers ceded to the federal government by the U.S. Constitution. Federalists also believed in a standing army and their policies tended to support commercial interests. In furtherance of these interests, Hamilton created the first national bank. Federalists believed that it was permissible to align with Britain, America's major trading partner, when necessary. Federalists also took a position of accommodation between the First Amendment's religion clauses and the religious aspects familiar to post-revolutionary American life.

The Republicans, in contrast, believed in a limited national government and favored policies tending to support states' rights. To defend the new nation, the Republicans favored the states' well-regulated militias over a standing national army, and their policies promoted agrarian interests at the expense of commercial endeavors. Above all, the Republicans detested the idea of a national bank. Although the Republicans agreed with the Federalists that it was best to avoid foreign alliances, their sympathies lay with France, which had been America's ally during our War for Independence and, after 1789, was part of the class of revolutionary nations. The Republicans also believed in a solid wall between church and state.

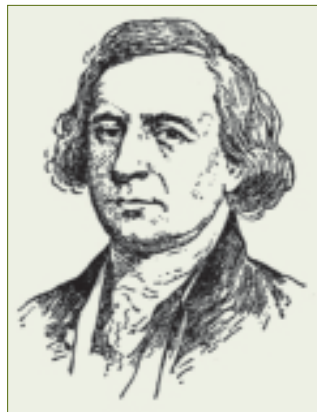
Although a member of Washington's cabinet during his first term, Jefferson gave at least tacit encour-



Thomas Jefferson by Rembrandt Peale, 1800
Available at: http://upload.wikimedia.org/wikipedia/commons/1/1e/Thomas_Jefferson_by_Rembrandt_Peale,_1800.jpg The White House Historical Association
(White House Collection)

agement to Republican newspapers to deflate and discredit the Washington administration which, in Jefferson's opinion, was "galloping fast into a monarchy."² Two of the leading journalists of the era were Philip Freneau and Benjamin Franklin Bache. They took aim at President Washington but, by the time he left office in March of 1797, he was approaching a kind of canonization in the public mind, and they turned their attention against the alleged monarchist Hamilton, the *de facto* creator of the Federalist party, and against the nation's second President, John Adams of Massachusetts.

A notch in class below Freneau and Bache were William Duane and Scottish-born James Callender. Duane once published an editorial stating that Washington had "discharged the loathings of a sick mind."³ In the *Richmond Examiner*, newspaper reporter Callender declared that "Mr. Washington has been twice a traitor" and called John Adams "a hoary headed incendiary."⁴ In 1797, Callender publicly exposed Hamilton's extramarital affair with Maria Reynolds, which had occurred in 1791-1792.⁵



Philip Freneau, Engraving by Fredrick W. Halpin, 1865 Available at: http://en.wikipedia.org/wiki/File:Philip_freneau.jpg

Fed up with the attacks on the private and public character of their leaders, the Federalists responded aggressively by passing the Alien and Sedition Acts of 1798. These Acts (actually four pieces of legislation) further incensed the Republicans and may have been the principal cause of the Federalist defeat in the national election of 1800. The first of these laws, The

Naturalization Act, extended the time a foreigner had to live in the United States before he or she could apply for citizenship.⁶ The two Alien Acts, commonly known as the Alien Friends Act and the Alien Enemies Act, gave the national government the power to expel any foreign-born person who was suspected of disloyalty.⁷ The Sedition Act empowered federal attorneys to arrest and prosecute for libel anyone who publicly criticized the President or any other official of the government.⁸ If convicted, the offender could be severely fined and imprisoned for up to two years. The Republicans opposed these laws because of their pernicious effects on civil liberties, but their main objection was that the laws had been passed by the federal government. Seizing on the literal wording of the First Amendment, "Congress shall make no law," Jefferson, Madison, and other Republicans went so far as to persuade the states of Virginia and Kentucky to enact legislation purporting to "nullify" any law of Congress which the states considered to be unconstitutional.

By May of 1800, Hamilton's long-time nemesis, Aaron Burr, had galvanized New York City voters to elect Republicans. This shifted the balance of power to a Republican majority in the New York State Legislature, the body that sent New York's presidential electors to the Electoral College. The New England states were solidly for Adams and the southern states for Jefferson, and as New York went, so went the nation. New York's electoral votes propelled Jefferson to victory over Adams in the presidential election of 1800, the first seriously contested election in American history.⁹

James Callender Turns On Jefferson

Now it was the turn of the Federalist journalists to go on the offensive. Again to the forefront appeared James Callender. Once a loyal Jeffersonian, Callender did an abrupt about-face when Jefferson turned him down for the job of Federal Postal Inspector for Richmond, Virginia. In the *Richmond Recorder*, Callender wrote several damaging stories about the private and public character of the third President. First, Callender alleged, in the accepted vitriolic prose of the time, that Jefferson had fathered five mulatto children by his slave, Sally Hemings, at Monticello.¹⁰ Although DNA evidence now suggests



Mad Tom in a Rage, Henry F. Huntington Library and Art Gallery, Courtesy of American Heritage magazine for use in this publication only

that much of this allegation was true, it obviously could not be proven at the time. Second, Callender recounted a juicy tale of how Jefferson, before his marriage, had attempted to seduce Mrs. John Walker, the wife of a close friend.¹¹ Finally, Callender attacked Jefferson's public character by questioning his loyalty to George Washington. Callender revealed in print that, while he had been working on a pamphlet called *The Prospect Before Us*, he had been paid \$100 by Jefferson to attack Washington, and that Jefferson had even read part of the manuscript before publication, returning it with a declaration that

"such papers cannot fail to produce the best effect; they inform the thinking part of the nation."¹²

Jefferson never responded directly to the claims about Hemings and Walker. However, because the allegation of double dealing against Washington was sure to cause political damage, Jefferson responded, perhaps somewhat lamely, that he had indeed sent \$100 to Callender, but well after Callender had published the pamphlet. Jefferson claimed that he had felt sorry for the journalist, who had been a victim of a prosecution under the Sedition Act.

The New York Response

Several other Federalist journalists repeated the Callender accusation that Jefferson had been disloyal to Washington, including William Coleman, editor of the *New York Evening Post* (which had been founded chiefly by Alexander Hamilton), and the young Harry Croswell. Croswell had set up a weekly and extremely partisan Federalist newspaper in the attic of *The Balance*, the other, more moderate Federalist newspaper in Hudson. Croswell called his paper *The Wasp*, and emblazoned on its masthead was the motto: "To lash the Rascals naked through the world."¹³ Writing under the editorial pseudonym of "Robert Rusticoat," Croswell took savage aim at Jefferson's purported explanation for the payment of the \$100 to Callender:

*[I]t amounts to this then. He [Jefferson] read the book [actually the pamphlet *The Prospect Before Us*] and from that book inferred that Callender was an object of charity. Why! One who presented a face bloated with vices, a heart black as hell—one who could be guilty of such foul falsehoods, such vile aspersions of the best and greatest man the world has yet known—he an object of charity! No! He is the very man, that an aspiring mean and hallow hypocrite would press into the service of crime. He is precisely qualified to become a tool—to spit the venom and scatter the malicious, poisonous slanders of his employer. He, in short, is the very man that a disassembling patriot, pretended 'man of the people' would employ to plunge for him the dagger or administer the arsenic.¹⁴*

Croswell did not stop at targeting Jefferson. In the September 9, 1802 issue of *The Wasp*, Croswell published the following poem about New York Attorney General Ambrose Spencer of Columbia County, who had once been a Federalist, but had gone over to the Clinton/Jefferson camp:

*Th' attorney general chanc'd one day to meet
A dirt, ragged fellow in the street
A noisy swaggering beast
with rum half drunk at least
Th' attorney, too, was drunk—but not with grog,
Power and pride had set his head agog.¹⁵*

The Prosecution Gets Underway

Attorney General Spencer was not ready to accept without response this defamatory comment and other vicious lampooning of other local characters. In January 1803, Spencer, with Columbia County District Attorney Ebenezer Foote serving as his assistant, secured two indictments against Croswell for seditious libel, a criminal offense under the common law. The first indictment was based on statements Croswell had made in the fourth issue of *The Wasp*, published on August 12, 1802, in which he had listed "a few 'squally' facts"—five executive acts by President Jefferson that, Croswell maintained, grossly violated the United States Constitution.¹⁶ The second, and far more serious, indictment was based on a paragraph that had appeared in *The Wasp* on September 9, 1802 in which Croswell had responded to comments of Charles Holt, editor of *The Bee*, the Republican newspaper in Hudson. Croswell had written:

Holt says, the burden of the Federal song is, that Mr. Jefferson paid Callender for writing against the late administration. This is wholly false. The charge is explicitly this—Jefferson paid Callender for calling Washington a traitor, a robber, and a perjurer—; for calling Adams a hoary headed incendiary; and for most grossly slandering the private characters of men, who he well knew were virtuous. These charges, not a democratic editor, has yet dared, or will dare to meet in an open and manly discussion.¹⁷



Ambrose Spencer, Chief Justice, New York Supreme Court, 1819–1823 Courtesy of the NYS Court of Appeals Collection

The twin indictments were returned before three judges of the Court of General Sessions sitting in Claverack, then the shire of Columbia County.

At this point in the proceedings, Alexander Hamilton had yet to make a formal appearance. Nevertheless,

Croswell was well represented by three outstanding Federalist attorneys, Elisha Williams, Jacob Rutsen Van Rensselaer, and William W. Van Ness. The defense attorneys' first motion was to demand copies of the indictments. The Attorney General objected and his point was sustained by the all-Republican bench. The defense team then moved to postpone the trial until the next session of the Circuit Court. They argued that a case as legally complex as one involving the alleged libel of a prominent public figure should be heard by a Supreme Court Justice, trained in the law, who would be "riding Circuit." Prosecutor Spencer opposed the motion, and he was promptly upheld.

Defense counsel then made the most significant motion in the entire trial, a request for a postponement in order to bring from Virginia James Callender who, the defense asserted, would testify to the truth of the allegedly defamatory statements. Spencer immediately objected, arguing that, because the case was being tried under the common law of New York, the truth or falsity of the libel was irrelevant. According to Spencer, all he had to prove was that Croswell had published these statements and that they defamed the character of Jefferson.

On its face Spencer's "truth is no defense" argument seems to have been the biggest irony of the entire case. Here, the Jeffersonians, the self-professed party of the People, were vociferously advocating for

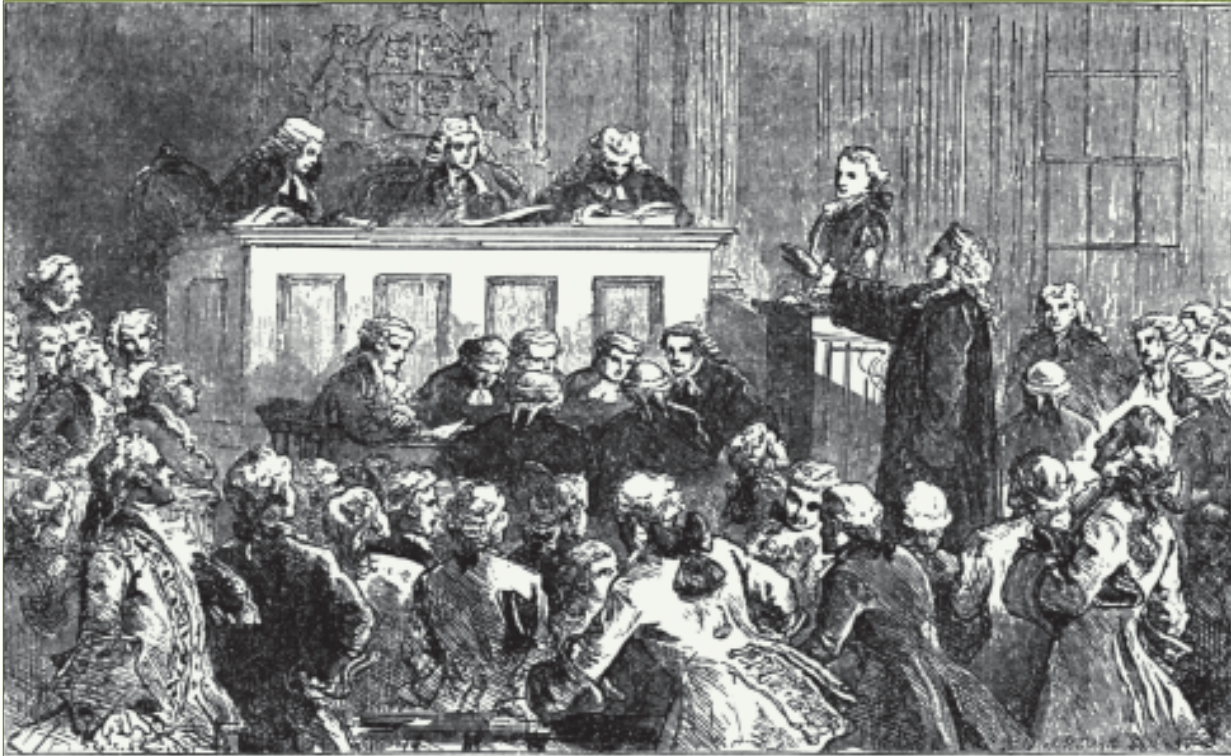
the Royalist doctrine that the Crown had brought to bear against John Peter Zenger in his famous free press trial of 1753. Perhaps, however, the Republican position was not quite as hypocritical as it now seems. From our vantage point in the 21st century, it is hard to appreciate that what most colonial and post-revolutionary liberals meant by Freedom of the Press was the prevalent Blackstonian notion of a press free from government licensing and prior restraint. Most Americans of the time did not think that the American Revolution had overthrown the common law of seditious libel. This notion is congruent with the Jeffersonians' main objection to the Alien and Sedition Acts: not that they muzzled that party's press or chilled civil liberties, but that the literal wording of the First and Tenth Amendments prevented the national government from enacting any legislation of that type.

We also perhaps fail to appreciate that William Blackstone was probably more revered by that generation than is any commentator of our time. In his famed *Commentaries*, Blackstone wrote:

*[T]he liberty of the Press is indeed essential to the nature of a free state, but this consists in laying no prior restraints upon publication and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press—but if he publishes what is improper, mischievous or illegal [note the important "or" rather than "and"] he must take the consequences of his own temerity.*¹⁸

According to Blackstone, "where blasphemous, immoral, treasonable, schismatic, seditious or scandalous libels are punished by the English law . . . , the liberty of the press is by no means violated."¹⁹ Therefore, from an early 19th century perspective, the inconsistency between Jeffersonian rhetoric and that party's prosecution of Harry Croswell was not as sharp or dramatic, at least from a legal perspective, as it might seem now.

Nevertheless, Attorney General Spencer's argument that the truth is no defense—and therefore that evidence seeking to prove the truth was inadmissible

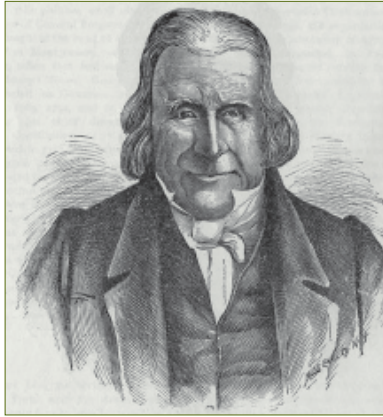


Andrew Hamilton addressing the bench at the 1735 trial of John Peter Zenger

Culver Images, Courtesy of American Heritage magazine for use in this publication only

—gave Elisha Williams and the other members of the Croswell defense team ample political ammunition with which to wage a counter-attack. That afternoon, Williams and Spencer debated the point, with Williams relying on the supposed tenet that the Constitution gave the People sovereignty over the government. But how could the People really be sovereign, and how could the People turn a corrupt government out of office, Williams asked, if a newspaper editor could be punished simply for informing the electorate of the truth? Almost immediately, Spencer began to rethink his position. Initially, he agreed to postpone the trial of the first indictment, which was based on *The Wasp's* claim that Jefferson's executive acts had violated the Constitution. But he insisted that the second indictment, the charge concerning Jefferson's payment to Callender, be tried forthwith. However, on the evening of January

11, 1803, Croswell's attorneys appeared in court and filed a formal affidavit stating that their client expected to prove the truth of the facts stated in *The Wasp* concerning the Callender charge. At this point, Spencer shifted his stance and allowed for a postponement of the trial on the second indictment until the appearance of the next Court of General Sessions. As a condition, however, Spencer wanted Croswell bound with \$500 bail on each indictment, not merely for the purpose of securing his appearance, but also "to keep the peace and be of good behavior."²⁰ Croswell's attorneys vehemently objected; this bail condition, they argued, was a classic prior restraint, arguably unlawful even under the common law interpretation of the freedom of the press. Although they were all Republicans the members of the court denied Spencer's bold request.



Governor Morgan Lewis
From the 1892 New York Red Book
Courtesy of the New York State Archives

The Transfer to Circuit Court

Meanwhile, Croswell's attorneys went back to work. In June 1803, they applied in Supreme Court for a writ of certiorari in an attempt to get the case transferred over to the next meeting of the Circuit

Court in July at Claverack. Although Spencer initially opposed the request for a transfer, on June 14, 1803, he and the defense team reached an agreement that both indictments could be tried before a Supreme Court Justice, who would shortly be convening a Circuit Court in Columbia County.

The *Croswell* trial actually began on July 11, 1803 with Morgan Lewis, Chief Justice of the Supreme Court of Judicature, presiding. The first defense motion was for another adjournment, in an attempt to put the case over to the next sitting of the Circuit. In support, they introduced an affidavit indicating their intent to call Callender as a witness. Alternatively, the defense sought a commission to have Callender swear out an affidavit in Virginia. Attorney General Spencer objected. Chief Justice Lewis ultimately ruled that no adjournment was appropriate because the evidence to be obtained during the adjournment merely concerned the truth of the charge for which the defendant had been indicted and, in his opinion, the law was settled that the truth could not be given in evidence to the jury as a "justification in a criminal prosecution for a libel."²¹

Croswell's attorneys did all they could during the trial to argue against what was essentially a prejudgment. Nothing substantial was left for the jury to decide because Croswell admitted that he had published the statement at issue. The only point that really mattered was the Chief Justice's charge to the jury.

For all practical purposes, the Chief Justice charged the jury that they had only two things to decide: whether Croswell had published the scurrilous statements in *The Wasp* and whether the readers believed that the statements defamed Jefferson. It was up to the court in determining the sentence, ruled Lewis, to weigh the truth or falsity of the statements and Croswell's malice or lack thereof. The court charged:

*[I]t was no part of the province of a jury to inquire or decide on the intent of the defendant; or whether the publication in question was true, or false, or malicious; that the only questions for their consideration and decision were, first, whether the defendant was the publisher of the piece charged in the indictment; and, second, as to the truth of the innuendoes; that if they were satisfied as to these two points, it was their duty to find him guilty; that the intent of the publisher, and whether the publication in question was libellous or not, was, upon the return of the postea, to be decided exclusively by the court, and, therefore, it was not his duty to give any opinion to them, on these points; and accordingly no opinion was given.*²²

The passage in this excerpt from the charge about the "truth of the innuendoes" may be somewhat misunderstood by modern readers. What this phrase would have been then understood to mean was that the jury must determine whether President Jefferson was the man referred to in the article and whether the words Croswell used attacked Jefferson's character.²³ It did not mean that the jury could determine the truth or falsity of the statements made by Callender and repeated by Croswell.

The jury retired at sunset with basically nothing to debate. Still, the jurors remained out the whole night and returned at eight o'clock the next morning with a verdict of guilty.²⁴

The Motion For a New Trial

Before judgment could be pronounced, Croswell's attorneys quickly moved for a new trial, arguing initially (1) that the truth should be permitted in



James Kent Chief Judge, New York Supreme Court, 1804-1814, Chancellor of the Court of Chancery, 1814-1823
Courtesy of the NYS Court of Appeals Collection

evidence as a justification and thus that Chief Justice Lewis had erred in denying the motion for a further adjournment, and (2) that the court had misdirected the jury. Following accepted practice of the time, the motion for a new trial would be heard by the entire five-justice Supreme Court—somewhat like an appeal of the judgment in modern

practice. The defense attorneys would employ a legal device called the “case stated.” By “making a case,” essentially a set of facts to which the prosecution and defense stipulated, all objectionable matters, including any not in the record proper such as the jury charge which at the time was a matter outside the record, could be considered by the full Court.²⁵ Following certain adjournments, the case was finally heard in February 1804 with the Supreme Court sitting in Albany. In accord with the practice of the day, the parties would not exchange briefs before the argument.²⁶

The defense team used the time to regroup. The Federalists sought out Alexander Hamilton who, according to Justice (later Chancellor) James Kent, was “universally conceded” to be the preeminent lawyer of the era.²⁷ As early as June 23, 1803, they had persuaded General Philip Schuyler, Hamilton’s father-in-law, to write the former Secretary of the Treasury for help. The rabid Federalist Schuyler described the case as “a libel against that Jefferson, who disgraces not only the place he fills but produces Immorality by his pernicious example.”²⁸ Although there is some evidence that Hamilton played an advisory role in the *Croswell* trial in the Circuit Court, other matters had precluded his appearing there. Now he was ready to enter the proceedings in person, gratis.

To a modest degree, Hamilton’s strategy was affected by recent events that had occurred in Virginia. On July 17, 1803, Croswell’s potential star witness, James Callender, apparently in the midst of a drinking spree, fell (or perhaps was pushed) out of a boat and found a final resting place, as one contemporary put it, “in congenial mud,” at the bottom of the James River.²⁹ But Callender did leave behind his papers, including letters Jefferson had written expressing his approval of *The Prospect Before Us*, evidence that could potentially be used by Hamilton if the Court were to grant a new trial. Indeed, theoretically at least, at any retrial Hamilton might try to subpoena Jefferson himself, or at least to secure Jefferson’s affidavit on the truth of the Callender matter. Any retrial might prove embarrassing to the President.

Hamilton’s Opportunity

For Hamilton, the *Croswell* case was an opportunity not to be missed. First, and perhaps foremost, it gave him a chance to strike back at Jefferson, his old rival in the Washington administration. Second, it provided Hamilton with a means to further his view of American constitutionalism. Although far from a populist, Hamilton did understand that a free press was more critical in America than in Britain, and that freedom of the press was a great issue on which to win back to the Federalist cause the favor of the electorate. Hamilton could argue for a cautious view of freedom of the press, in which the motive of the author would be the critical component in assessing liability.

The *Croswell* case also gave Hamilton an opportunity to highlight his brilliance as a thinker and orator in a case that was far more understandable to the general public than his typical practice of maritime insurance cases or land grant disputes. Hamilton was “skilled in the rhetoric of dress and behavior” and this asset only enhanced the persuasiveness of his legal argument.³⁰ Finally, for Hamilton—who was now known as General Hamilton, for his service as acting commander of the American army between 1798 and 1800 in the so-called Quasi-War with France—a big victory in *Croswell* might restore a portion of his lost reputation. Hamilton expected, and even desired, a war with Napoleon’s France—a

real possibility in 1804—and the press coverage of *Croswell* could only raise his stature in the minds of the Federalist leaders.

Hamilton assembled a formidable defense team. He retained the services of William W. Van Ness, who had appeared for Croswell in the Circuit Court. Hamilton also recruited his old friend and fellow Federalist Richard Harison, who had served as an Assistant Attorney General during the Washington administration.

Anticipating the Bench

As he took a horse-drawn sleigh up to Albany to argue the matter in early February 1804, Hamilton had to know his chances for success were not good. The five-member Supreme Court of Judicature would be missing one member. Recently, the prosecutor in the case, Attorney General Spencer, had been appointed to the Court and he would not sit on the case.³¹ Instead, in what we can only find shocking by today's ethical standards, Spencer, although a member of the Court, would actually continue to prosecute the case for the State. With him, Spencer would enlist the services of George Caines, the country's first official reporter and a loyal Jeffersonian.³² Although he had been the trial justice whose charge and rulings were the subject of the new trial application, Chief Justice Morgan Lewis would be sitting, as would fellow Republican jurists Brockholst Livingston and Smith Thompson. The only Federalist on the Bench was James Kent, who would later become a luminary in American law.

Contrary to some accounts, no stenographic record was made of the oral arguments before the Supreme Court of Judicature.³³ George Caines is responsible for a document known as *The*

Speeches at Full Length of Mr. Van Ness, Mr. Caines, The Attorney General, Mr. Harison, and General Hamilton in the Great Cause of People v Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States (hereinafter cited as *The Complete Speeches*), but many commentators note that this presentation was biased and, its title notwithstanding, incomplete.³⁴

For example, according to Kent's notes and newspaper accounts from the period, Hamilton spoke for over six hours over parts of two days, yet only 16 typewritten pages were devoted to his presentation in the Caines publication.³⁵

Oral arguments began on February 13, 1804. William W. Van Ness argued that the truth cannot be a libel. He relied on ancient British statutes and claimed that the law had been "polluted" by the decisions of England's notorious Star Chamber, a court that had heard most of the political libel and treason cases in that nation from 1487 to 1641. Van Ness noted that the indictments and informations at issue in the precedents of England always charged libelous



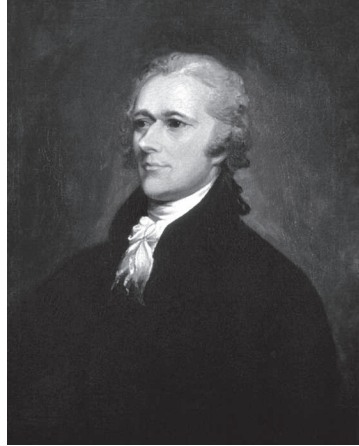
The Old Capitol Building where the Supreme Court of Judicature sat when it heard the oral argument in Croswell. Photograph from negative no. 8002, Series A0421, Division of Visual Instruction Lantern

Slides, State Education Department, Courtesy of the New York State Archives

matter to be false. Finally, he argued that the principle “truth cannot be a libel” was essential to any country having a free elective system.

Van Ness then embarked on the defense’s next point: that the Chief Justice had erred in charging the jury that it was required to convict Croswell upon mere proof of the publication. The defense contended that the jury’s right to decide on both the law and the facts was absolute and “inherent” in every criminal case and that the charge had been erroneous because it had not permitted the jury to consider the circumstances of what had been said. Van Ness and Harison went so far as to rely on the Federal Sedition Act of 1798. Section three of that law, they noted, allowed the truth in evidence and allowed the jury to determine the malice or lack thereof of the speaker. According to the defense, the Sedition Act was declaratory of the common law at the time.

George Caines spoke first for the People. He defended the jury charge by noting that nothing could be improper in a direction that the jury decides the facts and the court decides the law. Caines attempted to distinguish between the powers and the rights of the jury. Essentially, Caines urged that the jury does have the power, but not the right, to nullify the law, but that the charge given to the jury should properly dissuade the jurors from exercising that illegitimate power. Relying on a slew of English citations, Caines noted that Croswell’s intent was irrelevant because the tendency of the statement to breach the peace was the essence of the libel and that tendency existed irrespective of the intent of the publisher or the truth or falsity of the allegations.³⁶ Indeed, Caines alluded to the often-quoted maxim: “the greater the truth the greater the libel,” for a truthful libel “has an increased tendency to a breach of the peace.”³⁷ It must have seemed ironic to the Justices on the bench to hear Caines, the Jeffersonian, relying on the court’s charge in the Zenger case as representative of New York law.



Alexander Hamilton

John Trumbull, 1806

Available at: [http://commons.wikimedia.org/wiki/](http://commons.wikimedia.org/wiki/File:Alexander_Hamilton_portrait_by_John_Trumbull_1806.jpg)

File:Alexander_Hamilton_portrait_by_John_Trumbull_1806.jpg

Attorney General Spencer followed Caines and noted that he was arguing the case on the authority of what the law was, not what perhaps it ought to be. Spencer first rejected the defense claim that Chief Justice Lewis had erred in granting an adjournment of the trial to the next Circuit. He pointed out that the defendant had shown no due diligence in trying to secure Callender for the July sitting of the Circuit Court. Moreover, he insisted that Chief Justice Lewis had been correct when he had ruled that the truth is irrelevant. According to the Attorney General, the cases cited by the defendant for the proposition that intent and truth were matters for the jury were either incorrect statements

of the common law or not on point. Spencer also insisted that it was not the speaker’s subjective intent that constituted the punishable nature of the libel, rather, it was the tendency of the statement to breach the peace. He argued that Great Britain’s passage of Fox’s Libel Act of 1792 and Congress’s passage of the Sedition Act of 1798—both acts making the truth admissible—were not declaratory of the common law.

The skillful oratorical presentations of these four lawyers, impressive as they were, really ended in a stalemate. First, the precedents in England were difficult to interpret; much depended upon how far back the Justices wanted to go and what weight should be given to the Star Chamber decisions, which favored the prosecution. Moreover, even if English common law was as settled as the prosecution would have it, the question still remained whether literal adherence to these particular aspects of the common law could be squared with the New York Constitution of 1777. It almost seemed as if the first day and a half of legal argument primarily served to set the stage for Alexander Hamilton.

Hamilton’s Argument

By the afternoon of February 14, 1803, the crowd overflowed in the Supreme Court chamber in Albany.

According to Charles Holt's *The Bee*, almost the entire State Senate and Assembly poured into the courtroom to hear the climax of the arguments. The legislators were there for more than the pleasure of seeing the great orator Hamilton in action. Already, a legislator had presented a bill that would permit the truth to be considered by the jury in a criminal libel case.

The Role of Truth

Hamilton's arguments were much more than a rebuttal of the arguments of Caines and Spencer. From the court reporter's case report, Caines's account in *The Complete Speeches*, Justice Kent's notes, and the accounts taken from newspapers of the time, a fair approximation of his argument can be attempted. After begging the court's indulgence for beginning the argument so late in the day, Hamilton emphasized the importance of the case and what he called the "two great questions": the admissibility of the truth as evidence and the right of the jury to examine the publisher's intent.³⁸ Hamilton insisted that he was not arguing for the "pestilential doctrine of an unchecked press" because he had seen the "best character of our country" (Washington) marred by such a press.³⁹ Rather, Hamilton advocated for "the right of publishing truth, with good motives, although censure might light upon the government, magistrates or individuals."⁴⁰ Hamilton insisted that the jury, not the magistrate appointed by the executive branch, should provide the check on the government and the press. He noted that the judicial branch in America was not as independent from the legislative and executive branches as it was in England. He was aware of the dark side of human nature and would not trust a judiciary, often placed into power by the prevailing political party of the day, to provide the critical check on the press and an overzealous prosecutor.

Hamilton then skillfully blended into his argument what are really two distinct concepts: the truth or falsity of the statement as a defense to the libel and the question of who should determine the intent of the speaker. By taking a little bit from each concept, Hamilton could argue forcefully, but not overstate, his position in the fine common law tradition of taking one incremental step at a time in the development of the law. According to Hamilton, it was the speaker's

intent that determined the crime of libel and the jury must be empowered to determine the intent of the publisher. Hamilton insisted that "truth is a material element" in the evidence of intent.⁴¹ "In the whole system of law," he insisted, "there is no other case in which the truth cannot be shown."⁴² In other words, Hamilton was not going so far as to say that the truth should always be an ironclad defense. A malicious intent, he observed, might constitute a libel even though the charge was true. The jury, however, should be able to consider the truth as evidence of intent.

Hamilton also dipped into the English common law and directly addressed the Star Chamber decisions that purportedly declared that the questions of truth and intent were not relevant in libel cases. Although professing great admiration for Lord Mansfield, the author of the *Dean of St. Asaph's* case—the decision on which the *Croswell* jury charge had been patterned—Hamilton insisted that the learned judge "might have [had] some biases on his mind, not extremely favorable to liberty."⁴³ In an attempt to show that the defendant's malicious intent was central to the definition of a libel, Hamilton observed that in this case, "when the counsel for the defendant objected to the Attorney General's reading of passages from the prospectus of *The Wasp*, and from other numbers [apart from the issue where the allegedly libelous statements were contained], he expressly avowed that he thus acted in order that the Jury might see it to be 'manifest that the intent of the defendant was malicious.'"⁴⁴ This evidence, Hamilton observed, should, under the prosecution's own theory of the case, have been ruled inadmissible if the jury was to have no role in determining the speaker's intent.

Hamilton's Oratory

Throughout the afternoon, Hamilton impressed his audience with his oratory. Kent observed that Hamilton was "sublimely eloquent" and—in writing to Hamilton's widow, Elizabeth, years after the event—declared that he "always considered General Hamilton's argument in that cause the greatest forensic effort he had ever made."⁴⁵ According to Kent,

there was an unusual solemnity and earnestness on the part of General Hamilton

*in this discussion. He was at times highly impassioned and pathetic. His whole soul was enlisted in the cause and in contending for the rights of the jury and a free press he considered he was establishing the finest refuge against oppression.*⁴⁶

The next morning Hamilton took up the argument again. He claimed that truth

*cannot be dangerous to government, though it may work partial difficulties. . . . It is evident that if you cannot apply this mitigated doctrine for which I speak, to the cases of libels here, you must for ever remain ignorant of what your rulers do. I never can think this ought to be; I never did think the truth was a crime; I am glad the day is come in which it is to be decided; for my soul has ever abhorred the thought, that a free man dared not speak the truth; I have for ever rejoiced when this question has been brought forward.*⁴⁷

Hamilton, too, relied upon the Sedition Act of 1798, a law which, he noted, had been “branded with epithets the most odious, which will one day be pronounced a valuable feature in our national character.”⁴⁸ He asserted that under that Act, “we find not only the intent, but the truth may be submitted to the jury, and that even in a justificatory manner.”⁴⁹ He noted that these facets were inserted into the law upon “common law principles.” In a passage not included by Caines, but recorded by Kent in his notes, Hamilton

*digress[ed] into a pathetic, impassioned & most eloquent address on the Danger to our Liberties, not from a few provisional armies, but from dependent Judges from selected Juries, from stiffling (sic) the Press & the voice of leaders and patriots. We ought to resist -- resist -- resist til (sic) we hurl the Demagogues & Tyrants from their imagined thrones.*⁵⁰

This argument led Hamilton into a eulogy of the late George Washington that, according to Kent, “was never surpassed—never equalled.”⁵¹

Deliberations, Decision and Aftermath

On February 15, 1804, the case was submitted, and the Court began its deliberations. Little is officially known about how the Justices voted during their initial conferences. But from the papers of Justice Kent, what has been revealed, if believed, is nothing less than shocking.⁵²

According to Kent, an early vote was 3-1 for a reversal and a new trial. Kent and Justice Thompson were for a new trial on both of the main points raised by the defense. Justice Livingston also declared himself for the motion on the “first ground” raised by the defense—the right of the jury to determine intent—and he proposed that the Court should quickly write an opinion for a reversal on this ground. Kent stated that he wanted to go further and examine the points more fully and give his reasons in a lengthy opinion.

Released on Bail

Early in the April term of the Court, Croswell, who was still out on bail since judgment had not been entered despite the verdict, began to attend court every day awaiting word of his fate. One day, when Chief Justice Lewis was absent, Justice Livingston spoke up from the bench and asked Justice Kent and Justice Thompson if they were for a new trial. Kent and Thompson stated that they were, on both points. Livingston then said that he was for a new trial on the first point and therefore that the defendant should “be released from attending Court as it was useless to detain him.”⁵³ Thus, the three Justices released Croswell on \$500 bail and directed him to appear for the new trial at the next Circuit Court to be held in Columbia County.

However, toward the end of the term in May 1804, Justice Livingston switched his tentative vote and joined with the Chief Justice in denying the motion for a new trial. On the last day of the term, Chief Justice Lewis announced that the Court had split 2-2 on the motion for a new trial and that, in accord with then-settled law, the motion for a new trial failed. The People were entitled to move for an immediate judgment on the verdict. Justice Livingston did not have the nerve to appear in court that day, complaining he was sick.⁵⁴ Indeed, again according to

Kent, Justice Livingston never even bothered to read Kent's opinion in the case.⁵⁵

Justice Kent wanted to read his opinion from the bench, but the Chief Justice and Justice Thompson did not think it was necessary. Thus, the *Croswell* case ended with little immediate public attention.

Perhaps realizing that they had won the legal battle but were in danger of losing the political war, the prosecution never moved for judgment enforcing the verdict nor sought to obtain pronouncement of a sentence. It was not until much later—after Hamilton's death in the duel with Burr—that the two opinions in the case were published, one by Kent and one by Lewis. Yet the *Croswell* prosecution did have an immediate impact. Indeed, at the very time that the Justices of the Court were taking the case under advisement and for several months after the decision was handed down, the Justices of the Supreme Court of Judicature were also acting in their role as members of the Council of Revision in considering the constitutionality and wisdom of a bill entitled "An Act Relative to Governing Libels." Although there is no evidence that the deliberations of the Justices in *Croswell* were influenced by their role as Revisers on the Council, this fact does illustrate just how far we have come in the development of the separation of powers principle since 1804.

The sequel to *People v. Croswell* was actually written in the Legislature. After the Council on Revision expressed objections to the original bill in the fall of 1804, the Assembly voted to reject it. In 1805, William W. Van Ness, the only member of the *Croswell* defense team who participated in all phases of the litigation and who was then a member of the Assembly, introduced a new bill modeled on the points that Hamilton had orally advanced and had summarized in his written document entitled "15 Propositions on the Law of Libel."⁵⁶ Passed in 1805, the new act respecting libels contained four key features. First, the law allowed the jury to determine the intent of the speaker "as in any other criminal case."⁵⁷ To this end, it prevented the court from charging the jury that it was required to find "the defendant guilty, merely on the proof of the publication by the defendant, of the matter charged to be libellous, and of the sense ascribed thereto."⁵⁸ Second, it allowed



Duel of Alexander Hamilton and Aaron Burr

Culver Images, Courtesy of American Heritage magazine for use in this publication only

the defendant "to give evidence, in his defence, [of] the truth of the matter contained in the publication charged as libellous: *provided always* [,] that such evidence shall not be a justification, unless, on the trial, it shall further be made satisfactorily to appear, that the matter charged as libellous, was published with good motives and for justifiable ends."⁵⁹ Third, the statute limited the punishment for anyone convicted of libel to a fine not exceeding \$5000 and imprisonment for not more than 18 months. Finally, the provision prohibited a prosecution for libel by information rather than indictment. The key features of this legislation were inserted into the 1821 State Constitution as then - Article VII, § 8. The provision now appears as Article I, § 8 of the current Constitution of the State of New York.

Because the prosecution never moved for judgment in *Croswell*, on the Governor's signing of the 1805 act concerning libels, the Supreme Court, in the August 1805 Term, unanimously awarded Croswell a new trial. The prosecution never attempted to retry Croswell on the criminal charges, though the pros-

ecutor, Ambrose Spencer, returned to Hudson and brought a civil suit against Croswell for libels against himself. Croswell refused to back down from the scathing comments he had made about both Spencer and Assistant District Attorney Ebenezer Foote in the farewell issue of *The Wasp*, which first appeared on January 26, 1803. Foote commenced a lawsuit of his own. Spencer recovered \$126.00 in damages.⁶⁰ Foote, attempting to prove he was not a swindler, was ambushed by a host of witnesses who swore that they had seen him cheat at cards, among other things. The jury awarded Foote six cents.⁶¹

Fate of the Major Players

What then happened to the major players in the *Croswell* case? On February 21, six days after the Court heard the final round of oral argument in *Croswell*, Chief Justice Lewis replaced John Lansing as the nominee of the Republican party for the office of Governor of the State of New York. (In the general election held in late April of that year, he went on to defeat then-Vice President Aaron Burr after Hamilton urged his fellow Federalists not to support Burr.) Did the acceptance of the nomination for the office of Governor influence Lewis's vote in the *Croswell* case? One can only speculate. In 1807, President Thomas Jefferson appointed Justice Brockholst Livingston to the Supreme Court of the United States. Could Jefferson have been rewarding Livingston for the switch of his vote in *Croswell*? Again, one is tempted to speculate. We know that James Kent later served as the Chief Justice of the Supreme Court of Judicature and as Chancellor of the State of New York, the latter title being probably the most significant legal position of the time. He also gained national fame as the author of *Kent's Commentaries*. His portrait commands a distinguished place in the New York Court of Appeals Richardson Courtroom and is accompanied by an impressive bronze plaque affixed to the wall just outside the Courtroom's anteroom.

In April of 1804, George Caines became the official Reporter of New York State and served in that position until November 1805, when then-Chief Justice Kent appointed his personal and professional friend, William Johnson, to the post. Attorney General Ambrose Spencer served on the New York Supreme Court for almost two full decades, including as the

Chief Justice from 1819 to 1823. After leaving the Court, Spencer served as Mayor of Albany, resumed private practice, and later served one term in Congress.

Harry Croswell became senior editor of *The Balance* in Hudson until 1809, when he moved his paper to Albany. By that time, however, the Federalists in that city were in serious disarray. Croswell's debts soon piled up and, in 1811, when a leading Federalist who had loaned him money obtained a judgment against him, Croswell ended up serving time in debtor's prison. By then, thoroughly disenchanted with politics, Croswell left news reporting altogether. He took Episcopal orders and served as rector of the Trinity Church in New Haven, Connecticut for 43 years.

Many know the story of how Hamilton met his fate. While in Albany for the February 1804 Supreme Court term that included the argument in *Croswell*, Hamilton dined with Justice Kent and Judge John Taylor. Taylor's son-in-law, Dr. Charles D. Cooper, also happened to be in attendance. At this dinner, Hamilton made some unsavory remarks about Colonel Aaron Burr, whose future as Vice President or in any role in the Jefferson Administration had been sealed, and who was wooing Federalist support for his contemplated run for Governor of New York. According to Cooper's account in an Albany newspaper, Hamilton said at this dinner that he "looked upon Mr. Burr to be a dangerous man, and one who ought not to be trusted" with the reins of government.⁶² Cooper later added that he could cite instances in which Hamilton had expressed "a still more despicable opinion of Burr."⁶³ Hamilton probably thought that his comments were "off the record" and for the individuals in the room only but—like a modern e-mailer who realizes it is too late to retract a rash thought once the "send" button is pushed—Hamilton had gone beyond the point of no return. When this conversation with friends made it into the newspapers, it incensed Aaron Burr to the point of challenging Hamilton to a duel. Although he had experienced the trauma of losing his eldest son, Philip, to a fatal duel, Hamilton could not back down.

Did the acclaim Hamilton won at the *Croswell* oral argument before the Supreme Court play a part in persuading him to accept Burr's challenge in spite of his professed detestation of dueling? Perhaps, but whatever the predominant reason for accepting the challenge, Hamilton paid for it with his life. 🐉

ENDNOTES

1. Thomas J. Fleming, *Duel: Alexander Hamilton, Aaron Burr and the Future of America* 44 (Basic Books 1999) (quoting Jefferson's letter to Pennsylvania Governor Thomas McKean).
2. Thomas J. Fleming, *Verdicts of History IV: "a scandalous, malicious, and seditious libel,"* 19 *American Heritage* No. 1, at 23, December 1967. Website version available at http://www.americanheritage.com/articles/magazine/ah/1967/1/1967_1_22.shtml.
3. *Id.*
4. *Id.* at 23, 101.
5. See Fleming, *supra* note 1, at 15.
6. The Naturalization Act, 1798 Laws, ch. 54, 1 Stat. 566 (1798).
7. The Alien Friends Act, 1798 Laws, ch. 58, 1 Stat. 570 (1798); The Alien Enemies Act, 1798 Laws ch. 66, 1 Stat. 577 (1798). The Alien Enemies Act is still in effect.
8. The Sedition Act, 1798 Laws, ch. 74, 1 Stat. 596 (1798). The Alien and Sedition Acts are usually considered together because they were passed by the same Congress during the same year, and so many of the allegedly offensive journalists were of foreign birth.
9. Fleming, *supra* note 1, at 88-89.
10. See Noble Cunningham, *The United States in 1800: Henry Adams Revisited* 47-48 (University of Virginia Press 1988).
11. See Fleming, *supra* note 1, at 44.
12. *Id.* at 167.
13. Fleming, *supra* note 2, at 26.
14. Fleming, *supra* note 1, at 167 (quoting *The Wasp*, August 23, 1802).
15. Fleming, *supra* note 2, at 27. This attack on Spencer may also explain why an obscure printer like Croswell was singled out for prosecution rather than a more influential Federalist editor.
16. *Id.* at 100, 101.
17. *Id.* (quoting *The Wasp*, September 9, 1802).
18. 4 William Blackstone, *Commentaries* 151-52 (Dawsons of Pall Mall 1966) (1766).
19. *Id.* at 151.
20. 1 Julius Goebel & Joseph Smith, *The Law Practice of Alexander Hamilton* 782 (Columbia Univ. Press 1964).
21. *People v. Croswell*, 3 Johns. Cas. 336, 395 (1804) (Lewis, Ch. J.).
22. *Id.* at 342.
23. See Morris D. Forkosch, *Freedom of the Press: Croswell's Case*, 33 *Fordham L. Rev.* 415, 429 (1965); see also Kyu Ho Youm, *Truth As A Libel Defense In The United States: Its Judicial Origins and Statutory Status*, 16 *Anglo-Am. L. Rev.* 38, 44 (1987).
24. Fleming, *supra* note 2, at 103.
25. 1 Goebel & Smith, *supra* note 20, at 789-90.
26. *Id.* at 796.
27. William Kent, *Memoirs of Chancellor Kent* 32 (Lawbook Exchange 2001) (1898).
28. Goebel & Smith, *supra* note 20, at 784-85.
29. Fleming, *supra* note 1, at 166.
30. Roger Kennedy, *Burr, Hamilton and Jefferson, A Study in Character* 19 (Oxford Univ. Press 1999).
31. According to Goebel & Smith, *supra* note 20, the exact date of Spencer's appointment was February 3, 1804.
32. See New York State Law Reporting Bureau, Gary D. Spivey, former State Reporter, *But How Are Their Decisions To Be Known: Celebrating 200 Years of New York State Official Law Reporting* 13 (booklet on file with the author).
33. Fleming, *supra* note 2, at 105.
34. The Caines publication was first published by G.R. Waite in 1804. It is available on microfilm at the New York State Library and in the library of the Association of the Bar of the City of New York. The charge of incompleteness is documented in 1 Goebel & Smith, *supra* note 20, at 793-94.
35. Goebel & Smith, *supra* note 20, at 795.
36. Indeed, Blackstone could not have been clearer on this point. See 4 Blackstone, *supra* note 18, at 150.
37. *People v. Croswell*, 3 Johns. Cas. 336, 349 (1804).
38. *Id.* at 352.
39. *Id.*
40. *Id.* at 353.
41. *Id.* at 356.

42. *Id.*
43. *The Complete Speeches*, reprinted in 1 Goebel & Smith, *supra* note 20, at 815.
44. *Id.* at 817.
45. Kent, *supra* note 27, at 323.
46. *Id.*
47. *The Complete Speeches*, *supra* note 43, at 822.
48. *Id.* at 829.
49. *Id.*
50. James Kent's Notes on Hamilton's Argument, reprinted in Goebel & Smith, *supra* note 20, at 838.
51. *Id.*
52. James Kent's Notes on the Judicial Deliberations in *People v. Croswell*, reprinted in Goebel & Smith, *supra* note 20, at 843.
53. *Id.* at 843.
54. *Id.*
55. *Id.*
56. See Goebel & Smith, *supra* note 20, at 840-42. These points are also reprinted in Johnson's report of the case, see *People v Croswell*, 3 Johns. Cas. 337, 359-61 (1804).
57. N.Y. Laws 1805, ch. 90.
58. *Id.*
59. *Id.*
60. Fleming, *supra* note 2, at 106.
61. *Id.*
62. Fleming, *supra* note 1, at 231.
63. *Id.* at 233.



Ballot Reform AND THE Election of 1891

GOOD LAW, UNINTENDED CONSEQUENCES

DAVID SHERIDAN

IN THE NEW YORK STATE senatorial elections of 1891, two great forces converged: the urge for reform and the lust for power. That clash has shaped New York's approach to election law for more than a century.

New York State's Ballot Reform Law of 1890¹ was intended to eradicate what was then widespread vote-buying. The proponents of the legislation reasoned that no one would try to bribe a voter without some way to verify that the bribe-taker (by definition dishonest)² had actually carried out his part of the bargain.³ The law was intended to make this verification impossible. Before the Ballot Reform Law, ballots had been printed by the parties.⁴ Not coincidentally, it was frequently possible to determine for whom a voter was casting his ballot by observing the exterior of the folded ballot as it was



Governor David B. Hill

(unknown data) Available at: <http://upload.wikimedia.org/wikipedia/commons/4/41/DavidBHill.jpg>

being cast, or the interior of the ballot when it had been unfolded and was being counted. The Ballot Reform Law provided that all ballots were to be printed by the government with identical ink on paper of identical size, shape, and color. Each ballot listed only one party's candidates. Under the Ballot Reform Law, before a voter entered the voting booth, the ballot clerks gave him one ballot for each party that had nominated candidates. In the booth, the voter selected the ballot he wished to cast, then folded all of the ballots in the same manner, so that the only mark visible was the pre-printed official "indorsement," which consisted only of the name of the town or city and the number of

the election district where the ballot was used, and a facsimile signature of the county clerk. Upon leaving the booth, the voter deposited his chosen ballot in the ballot box and the remaining ballots in a box for unvoted ballots. Since the ballot that was cast looked

David Sheridan is a graduate of Cornell University and University of Buffalo Law School. He is a solo practitioner in Delmar, NY. Previous publications include "Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet," 61 Albany L. Rev. 147 (1997).

identical to the ballots that were discarded, no observer at a polling place could determine the candidates for whom the voter had cast his ballot.⁵ No election inspector was permitted to allow a voter to place in the ballot box a ballot that did not bear the proper, official indorsement, unless official ballots were unavailable.⁶ If official ballots were unavailable, the inspectors or the voters were to prepare substitutes as similar to the official ballots as possible, but without the indorsement.⁷

When the ballot boxes were opened, if an election inspector were to declare his belief that a particular ballot had been marked with the intent that it be identified, the ballot would be counted, but it would be preserved for a possible challenge.⁸ A ballot marked by a voter, or by any other person to the knowledge of the voter, with the intent that it be identified as the one cast by the voter, was void.⁹

Absolute control of New York State government was the goal of the Democrats in 1891. Going into the election, the Democrats controlled the Assembly by six seats, and the Republicans had only a two-seat margin in the State Senate. Democrat David B. Hill, in his last year as Governor, could cap his career in state office by leaving the Democrats in control of not only the governorship, but also both houses of the legislature.

Hill had strenuously opposed the idea that all ballots should be printed by the government. He had vetoed an act requiring a "blanket ballot"—that is, a ballot bearing the names of all candidates for all offices, on which a voter would have indicated his choice by a mark.¹⁰ He finally signed the 1890 law only because it allowed voters to use "pasters;" these were strips of paper bearing the names of the voter's chosen candidates, which were prepared in advance, brought by the voter to the polls, and pasted inside a government-printed ballot. Pastors, Hill said, were "especially dear to old men, to independent voters, to naturalized citizens, who read, speak, and write the English language very imperfectly, to poor men or others who are so unfortunate as to be illiterate, but who do not desire to expose their illiteracy to others than their own families, and to many electors who desire more than a few brief moments in which to prepare their ballots."¹¹ Moreover, Hill distrusted those who would be in charge of officially printed ballots. Such persons were, after all, partisans; the "crime, fraud,

negligence, or mere inadvertence of a single officer" could, he said, determine the outcome of an election.¹²

In 1891, the 25th Senatorial District comprised Onondaga and Cortland Counties. The Republican candidate was Rufus Peck; the Democrat was John H. Nichols. Some days before the election, as prescribed by law, the official ballots arrived at the Onondaga County Clerk's Office, where, again as prescribed by law, they were inspected, sorted, and sent to the offices of the various town clerks, whence, on election day, they were delivered to the polling places for each election district. By crime, fraud, negligence, or mere inadvertence, some election districts in Onondaga County received Republican ballots that were intended for another election district in the same town. Since, pursuant to the Ballot Reform Law, each ballot was indorsed with the name of the town and the number of the election district in which it was to be used, and since only Republican ballots were delivered to the wrong districts, an observer who knew of the mixup and who saw a voter casting a ballot indorsed with the number of the wrong election district would know that the voter had cast a Republican ballot.¹³

If anyone at the polling places noticed the problem no record was made of it before the votes were cast, during the voting, or when the votes were counted. None of the Republican ballots that were counted was preserved for a challenge, although, as required by law, a sample of each ballot was attached to the election officials' report for each election district. The Republican sample ballot in each district at issue bore the wrong district number. The attorney for Peck later said that the mistake was not discovered until the morning of Election Day and that the ballots could not be exchanged to correct the error because of the "long distance between the polling places."¹⁴

As luck would have it, if the Republican ballots bearing the wrong district number were counted, then Peck, the Republican, would win. If not, then Nichols would win and, moreover, the Democrats would control the Senate. On November 17, Peck obtained an order from Onondaga County Supreme Court Justice George N. Kennedy, a Republican, requiring the Onondaga County Board of Canvassers, which the Democrats controlled, to show cause why it should not be directed to issue a certificate in accordance

Ballot Reform AND THE Election of 1891

with the returns from the towns and wards, which would give Peck the victory. The order was returnable "immediately after service." Justice Kennedy heard argument on November 17 and, on November 18, granted the Republicans the requested relief. The certificate was filed on November 19 with the Onondaga County Clerk.¹⁵

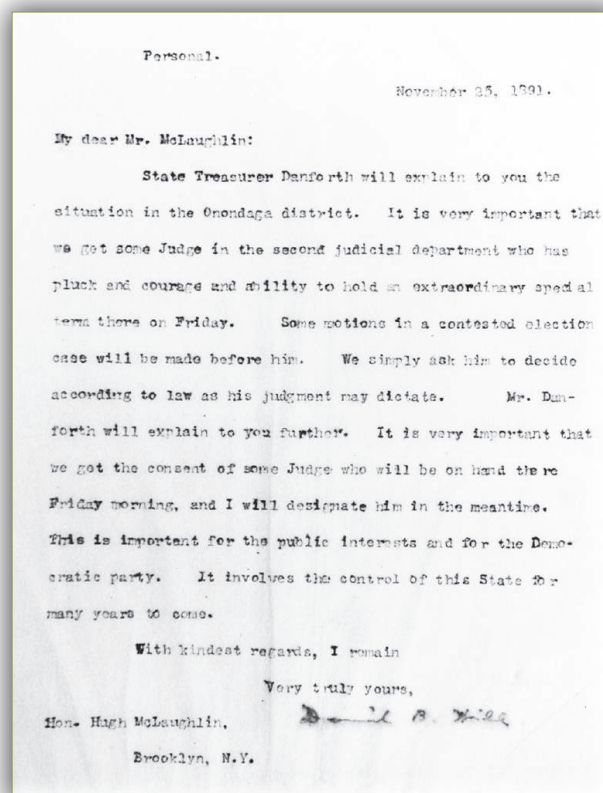
The New York Times report of Justice Kennedy's order anticipated that the next battle would be fought in the Senate in Albany where, the paper surmised, the Democrats would assert, among other things, that Peck had forfeited his United States citizenship by voting in a Canadian election while living in Canada during the Civil War.¹⁶ Governor Hill, however, had not given up on Onondaga County justice, although he wanted no more of Onondaga County Justices. In a letter dated November 25, 1891, Hill asked Brooklyn Democratic boss Hugh McLaughlin to find a Supreme Court Justice in the Second Judicial Department "who has the pluck and courage and ability to hold an extraordinary special term [in Onondaga County] on Friday." As Governor, Hill could designate the lucky, plucky justice to hear some election motions. Hill wrote:

*We simply ask him to decide according to law as his judgment may dictate. . . This is important for the public interest and for the interest of the Democratic party. It involves the control of this State for many years to come.*¹⁷

In addition to writing McLaughlin, Hill met on November 25 with Brooklyn District Attorney James W. Ridgway. That evening, Ridgway met with McLaughlin (presumably delivering Hill's letter), and wired Hill that the two should be able to give Hill the name of a judge that same night.¹⁸ (It is not clear from the letter whether the judge referred to by Ridgway in the telegram was for Onondaga County or for one of the other legislative election cases. At the time, in addition to the Onondaga Senate race, Hill was directing Democratic strategy with regard to an Assembly seat in Onondaga and Cortland Counties¹⁹ and Senate seats in Dutchess, Columbia, and Putnam Counties,²⁰ Rensselaer and Washington Counties,²¹ and Steuben, Chemung, and Allegany Counties.²²)

However, Ridgway and McLaughlin seem not to have been able to immediately locate a Supreme Court justice willing and able to meet their needs. Justice Pratt, one of the judges under consideration, was hunting on Long Island, and Justice Dykeman was in such bad condition that his physician would not permit him to travel even to White Plains. When Justice Pratt returned he, too, proved to be too sick to travel; he was "having to use an instrument to draw off his water every two hours," Ridgway reported to Hill.²³

In a letter dated November 28 to William Kirk of Syracuse, one of Hill's operatives, Hill seemed uncertain that he could find a downstate justice to hear the Senate case in Onondaga County, although he hoped to get one for Tuesday, December 1. He directed Kirk to have the Onondaga County Democrats bring a



Gov. David B. Hill to Hon. Hugh McLaughlin, Nov. 25, 1891

Courtesy of the NYS Library/Manuscripts & Special Collections Unit (See n. 17)

proceeding before a judge other than Justice Kennedy for a writ requiring the Onondaga County canvassers to reconvene and report the results without counting the Peck votes at issue. Hill anticipated that Special Term and an extraordinary General Term might deny him relief, but believed that the Court of Appeals would find in his favor. Hill feared that if the application were brought before Justice Kennedy, he would “hold the case for delay.” Hill wrote:

Any other fair judge will deny it promptly, in case he does not decide in our favor. It is useless to argue the case at special term or at general term. Let those arguments be merely pro forma. . . . I hope to get an extraordinary Special Term next Tuesday for Syracuse. Will advise you as soon as it is arranged. Our Democratic judges seem to be busy, sick or timid; but I hope to get one with sufficient backbone to decide according to law.²⁴

Hill was confident of getting “justice” from the Court of Appeals, as long as the case was decided before January 5, when the Senate would organize.²⁵

Hill’s plan to litigate the issue regarding the ballots in Onondaga County was not met with immediate enthusiasm by the attorneys for the Democrats. Nichols was represented by, among others, Louis Marshall, one of the finest lawyers of the day. In a letter to Hill dated November 30, 1891, O.U. Kellogg, one of Marshall’s associates, gave three reasons why they doubted their chances of success.²⁶ First, although Section 31 of the Ballot Reform Law laid down the rule that ballots lacking the official indorsement should not be counted, the ballots in question did bear an official (albeit incorrect) indorsement.²⁷ Second, although Section 31 provided that if an election official declared at or immediately after the canvass of the votes his belief that a ballot had been marked with the intent to be identifiable, the ballot should be preserved for review in a mandamus

proceeding, no official had so declared, nor had the questioned ballots been preserved. Third, although Section 35 voided a ballot marked by a voter, or by any person with the knowledge of the voter, with the intent that it afterwards be identified as one voted by him, establishing a voter’s knowledge and intent would be difficult. Kellogg suggested that Hill consider having the State Board of Canvassers, which was completely under the control of the Governor, issue a certificate of election to Nichols. This would give the Governor (through a Democratic majority) control over organization of the Senate, “and then let Peck come in and contest.” However, if, before the State Board met, the courts ruled against the Democrats, then “the State Board of Canvassers could not with good grace ignore the decision or the Senate reject [Peck].”²⁸ Hill, confident of success in the Court of Appeals if nowhere else, opted for litigation.²⁹

Meanwhile, Hill had found his judge. He appointed Supreme Court Justice Morgan J. O’Brien, a New York City Democrat, to an extraordinary special term in Onondaga County, and it was to O’Brien that the Democrats brought their case.³⁰ Justice O’Brien was only 39 years old and had been on the bench for less than four years.³¹ On Tuesday, December 1, O’Brien granted Nichols an order requiring the County Board of Canvassers to show cause why they should not be required to report a canvass without the votes cast for Peck.³² Nichols alleged, among other things, that “improper endorsements were placed on said ballots” with the intent that they be identifiable, but he offered no evidence to back up this assertion.³³ The Board had 17 Democratic members and 16 Republican members. In the answer on behalf of the Board, the Democrats admitted the essential facts alleged in Nichols’s papers and asked the court to determine whether the Board should have included the Republican votes at issue.³⁴ In a separate answer, the Republican members of the Board admitted the ballot mixup, denied fraud or intent that the ballots be identifiable, asserted

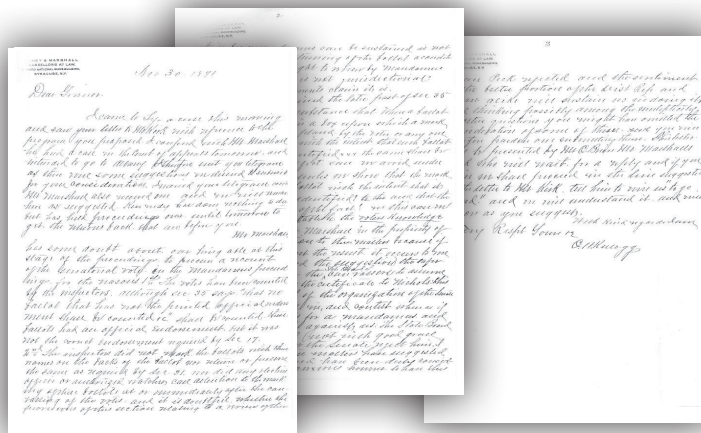
Ballot Reform AND THE Election of 1891

that the ballots could not be challenged because they had not been treated as invalid and had not been preserved, and asserted that the November 18 writ by Justice Kennedy was res judicata as to the issues raised by Nichols.³⁵

The Republicans also submitted affidavits from election inspectors (presumably Republicans) in each district in question, each of which stated that on Election Day, no official Republican ballots bearing the official indorsement had been delivered to the polling place, nor had there been delivered to the polling place ballots prepared by the Town Clerk in a format as close as possible to the official ballots, together with an affidavit by the Town Clerk of the circumstances. So, the election inspectors averred, they had given the voters ballots as similar in form as possible to the official ballots; those ballots had been identical to the official ballots, except that the wrong election district was indorsed, and no one objected.³⁶ This description by the Republicans of what they did tracked the language of Section 21 that allowed the use of unofficial ballots if official ballots were not available. There was also an affidavit from the County Clerk saying that any mixup had been inadvertent.³⁷

The case was argued before Justice O'Brien on December 3.³⁸ On behalf of Nichols, Attorney David McClure conceded that the voters who had cast the ballots in question had thought that they were voting a legal ticket, but contended that in fact they had been wrong. He implied that the misdelivery of the ballots had been "a mistake made on purpose," the "mistake" apparently having been made by someone in the County Clerk's Office, and the purpose having been to enable Republican leaders to "see if a man was bribed if he delivered the goods." In response, William

"...It occurs to me (if I may be pardoned the suggestion) the safer course would be for the State Board of Canvassers to assume the responsibility [and] issue the certificate to Nichols: This will give you control of the organization of the senate and there let Peck come in, and contest. Where as if in resort to the courts for a mandamus and it should be decided against us: the State Board of Canvassers could not with good grace ignore the decision or the senate reject him..."



O.U. Kellogg to Gov. David B. Hill, Nov. 30, 1891
Courtesy of the NYS Library/Manuscripts & Special Collections Unit

Nottingham noted that the law provided that in certain contingencies written ballots could be used. Had they been used, he asked, would there have been any problem in identifying them; if not, then what became of the claim in this case that the ballots were illegal because they could be identified? On December 4, 1891, Justice O'Brien ruled for the Democrats.³⁹

In an interview, Justice O'Brien described his appointment to the extraordinary special term as "personally . . . embarrassing and displeasing [but] obligatory."⁴⁰ When he arrived in Syracuse, he had found the situation "delicate," but he consulted immediately with Justice Kennedy to avoid conflict.⁴¹ The judges and the lawyers got on well enough that the night before Justice O'Brien returned to New York City, they all enjoyed a dinner at the Vanderbilt Hotel in Syracuse.⁴²

The General Term of the Third Department convened as promised by Hill.⁴³ The parties submitted on the papers below, and the General Term affirmed without opinion. The case then went to the Court of Appeals.



Ballot Reform AND THE Election of 1891

In his brief to the Court of Appeals, Nottingham, on behalf of Peck, argued that “the only conclusion at which a rational mind can arrive is that if any ballots [bearing the number of the wrong election district] were voted, it came about from an inadvertent mistake in the distribution of the official ballots by the County and Town Clerks . . .”⁴⁴ Nottingham stated correctly that it was not disputed that the ballots had been official, the voters who had used them had been without fault, no other ballots had been available, and the voters who had used the ballots had intended in good faith to vote for Rufus Peck for Senate.⁴⁵ The practical question, asserted Nottingham, is “whether these twelve hundred and eighteen electors shall be disenfranchised by a trivial mistake . . . to which the inspectors of election were in no manner parties, and of which these electors were the innocent victims.”⁴⁶

Nottingham pointed out that each contested ballot complied with the literal terms of the legal requirement that each ballot bear “the designation of

the polling-place for which the ballot is prepared.”⁴⁷ The delivery of a ballot to a polling place other than the one for which it had been prepared did not alter this fact. Therefore, he concluded, the ballots were within the letter of the law.

Nottingham noted that Section 21 of the Ballot Reform Law provided that if the official ballots were not available at the polling

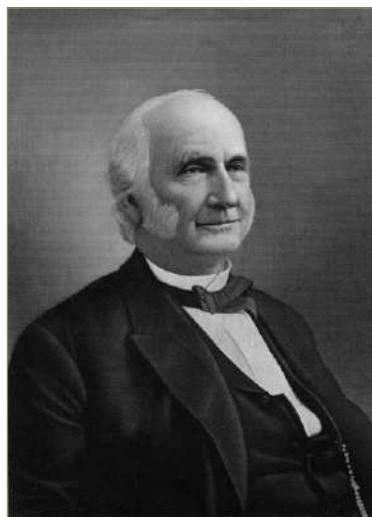
place, voters could use unofficial ballots, printed or written, “made nearly as possible in the form of the official ballots . . .” If one considered the Republican ballots bearing the wrong district number not to be the “official ballots” for that district then, under the circumstances, they had certainly been made “as nearly as possible” in the form of the official ballots. Therefore, he argued, Section 21 authorized their use as unofficial ballots. Of course, he said, if the election inspectors had noticed that the wrong ballots had been delivered, then instead of allowing voters to use the wrongly labeled official ballots as unofficial ballots, they could have directed the voters to sit down and write out ballots “as nearly as possible in the form of the official ballots,” but bearing the correct number of the election district. However, to have done so with the official (albeit misdelivered) ballots at hand, Nottingham argued, would have put the voters “in great peril of being committed to some institution for the care of the mentally enfeebled without the intervention of a jury or physician.”⁴⁸ As Marshall had anticipated, Nottingham argued that only an intentional marking for purpose of identification was prohibited by the law.⁴⁹

Finally, Nottingham argued that the right to vote was as venerable as constitutional government, but the secrecy of the vote “has not been considered an inseparable incident in any age or country.”⁵⁰ Since the key objective of the Ballot Reform Law had been to ensure the secrecy of the vote, Nottingham wisely placed this argument near the end of the brief, and made it summarily.

Marshall, (With O.U. Kellogg also on the brief) on behalf of Nichols, established his theme on page 10 of his brief:

*The purpose of the [Ballot Reform] [A]ct is clearly stated in its title, which is a fair index of its contents. It is to promote the independence of voters and to enforce the secrecy of the ballot.*⁵¹

He explicitly disclaimed two of the three arguments recited in Kellogg’s letter to Hill, and relied only on the argument that the ballots should not



Geo. N. Kennedy
Justice George N. Kennedy
Engraving by E.G. Williams & Brother.
Image courtesy of the Onondaga
Historical Association

be counted because they did not bear the proper indorsement.⁵² He argued that “[t]he provisions, with reference to indorsement, were carefully worded and designed to maintain, at all hazards, as a profound secret, the contents of the ballot.” If those provisions were not followed, “it would be a matter of utmost simplicity for poll workers, watchers, and inspectors to learn, to an absolute certainty, the contents of every ballot voted, and in this manner to mark each ballot as effectually as though it had been labeled by the voter himself.” This, Marshall argued, was why under Section 29 of the Act an improperly indorsed ballot, like an intentionally marked ballot, could not be deposited in the ballot box, and why Section 31 provided that no ballot without the proper indorsement was to be counted.⁵³

Marshall noted that Section 21 of the Ballot Reform Law applied only if the official ballots did not arrive, or were destroyed. In those circumstances, Section 21 directed the town or city clerk to prepare ballots as nearly in form as possible to the official ballots, but without the indorsement, plus a sworn statement that the ballots had been prepared by the clerk, in which case the ballots could be used at the polling place.⁵⁴ However, Marshall pointed out, the ballots in question purported to be official ballots, bearing an official indorsement. They were, he said, calculated to mislead the voter into thinking that he was voting an official ballot. (This argument was a little dicey, since Point I of Marshall’s brief was that the ballots were invalid because they did not bear the official indorsement.)⁵⁵ For substitute ballots to be used, they had to bear no indorsement, and the facts had to be established by affidavit. Marshall asserted, regarding the appellant’s position (and respondent’s response to it), as follows:

The position taken by the appellants is, therefore, virtually this: Official ballots were furnished by the proper officers, bearing an improper indorsement. Because they were thus improperly indorsed, it is claimed that such official ballots might, under the pretense that they are unofficial ballots, be employed for the purpose of working the very mischief which the act seeks to prevent. For, if the indorsement is improper, in which it does not designate the polling place at which the ballot is

*to be used, and cannot, therefore, be received or counted, how is it possible that such ballot can be received and counted as an unofficial ballot, because it does not bear the correct indorsement?*⁵⁶

Further (and more to Marshall’s principal point), there was no attempt to create uniformity between the Republican ballots, on the one hand, and those of the Democratic, Prohibition, and Socialist candidates on the other. This lack of uniformity breached the secrecy of the ballot.

The case was argued before the Court of Appeals on December 15, 1891.⁵⁷ Nottingham, on behalf of Peck, posed and answered what he perceived to be the key question in the case:

*The practical question upon this branch of the case is whether these 1,218 electors shall be disenfranchised by a trivial mistake, not in the printing but in the mere manual functions of distributing the official ballots to the several election districts of a town, and of which they were the innocent victims? . . . If there was any mistake [in distributing the ballots] it was an inadvertence. The voters should not be deprived of their votes because of that. . . I submit that it is more important that a man should vote than that it would be a secret ballot. These arguments would make a subordinate feature of voting to the chief one. [sic] Would you disenfranchise 1,100 voters?*⁵⁸

On Nichols’s behalf, Marshall staked his case on the importance of adhering to the letter of the law, even when doing so might work a seemingly inequitable result in a particular case, and on the importance of the secret ballot. He began:

The question is as to the efficiency of the ballot-reform law. . . . What was the intention of the ballot reform law? It was to promote the importance of the vote and ensure the secrecy of the ballot. . . .

*Frequently, the rights of individual voters have to give way to the general good. The intent of the law is to have a uniform ballot.*⁵⁹

Ballot Reform AND THE Election of 1891



The 1890 Court of Appeals

From left: Judges Finch, Gray, Andrews, Chief Judge Ruger, Judges Earl, O'Brien and Peckham
Courtesy of the New York Court of Appeals Collection

At the close of argument, Judge Gray noted that “the trouble really arose from the fact that a separate ballot must be provided for each political party.” (Governor Hill had consistently opposed a “blanket” ballot, and had vetoed a ballot reform measure that had mandated it.⁶⁰ In any event, Florida’s experience in the 2000 Presidential election shows that having the names of all candidates on one ballot does not necessarily prevent ballot controversies.⁶¹)

On December 29, 1891, the Court of Appeals handed down its decision in *Nichols*. No party to the case had credibly contended that the voters who cast their ballots in favor of Peck had been at fault. Nonetheless, the majority opinion of the Court of Appeals, by Judge O’Brien, cast the question posed by the case as follows:

The question now before us is whether those citizens of Onondaga county, who used the ballots, which the canvassers in this case have

been ordered by the Supreme Court to reject, have so far neglected to observe the forms and regulations prescribed by law for voting at elections, that their votes so cast must be held to be void. . . . [I]t is the duty of this court to declare the law as it finds it; and if a fair consideration of the language used in the statute, and its general policy, should result in the exclusion of the ballots in question, it may be said that it was not the first time that a citizen attempted to exercise a right, and either through neglect, mistake, or ignorance, failed in the accomplishment of his object.⁶²

The Court correctly noted that the Ballot Reform Law had been a matter of great public interest and debate, and capably described its purpose and method:

[T]he principal mischief which the statute was intended to suppress, was the bribery of voters

*at elections, which had become an intolerable evil, and this was to be accomplished by so framing the law as to enable, if not compel, the voter to exercise his privilege in absolute secrecy. When it was made impossible for the briber to know how his needy neighbor voted, the law makers reasoned that bribery would cease.*⁶³

The Court reasoned that “any construction of this statute which would permit ballots to be cast and counted that would reveal the way the voter using them voted, should be avoided as contrary to the true policy and intent of the law.”⁶⁴ The court noted that the indorsement was to be the only mark visible on a ballot when it was being deposited in the ballot box, and emphasized the requirement that indorsements be uniform. It continued:

*The ballots in question were cast in utter disregard of this important provision of the statute . . . The indorsement upon them differed from the regular indorsement on all the other ballots used or voted at the same polling place, and, as they were used or voted by but one of the parties that had made nominations . . . , the voters who used them necessarily disclosed to the election officers, watchers, and such of the bystanders as could and desired to observe, the candidates voted for, and thus not only the letter of the statute was disregarded, but its very purpose and intent defeated.*⁶⁵

The Court stated, albeit without any support in the record, that “it is scarcely possible that the means of distinguishing them from all the other ballots used were not known to . . . many of the voters who used them.”⁶⁶ Even if the voters did not know, the Court concluded that:

*[t]he plain words of the statute . . . made it the duty of the election officers, when offered one of these ballots, . . . to refuse it. This would not defeat the right of the elector to vote, because he could still prepare and tender a ballot with the proper indorsement.*⁶⁷

To the contention that its decision would disenfranchise voters who had cast their ballot in good faith, the Court answered that the law could not help them, and they should be more careful next time. “The law,” the Court explained, “contemplates that the elector will not blindly rely upon anyone, not even the election officers, in the preparation of the ballot.”⁶⁸ (Actually, by abolishing all but official ballots, the Ballot Reform Law in fact required voters for the first time to rely upon the government in the preparation of the ballot.) It was the duty of the voters to see that “so important a part of the ballot as the indorsement” conformed to the statute.⁶⁹

Once the voters were aware of the improper indorsement, those desiring to vote Republican could have used paster ballots on the Democratic, Socialist, or Prohibition ballots.⁷⁰ (There is no evidence in the record that any such pasters had been prepared or were available in the districts in question. Since the government was preparing the ballots and since, under Section 25, a voter could write in a name on an official ballot, there was little incentive for a voter to bring a “paster.”) However, the Court concluded, even if the voters did not know and had no way of knowing that the ballots were improperly indorsed, it was still better that their vote be deemed ineffectual than that the fundamental purpose of an important public statute be disserved and the door thrown open to a revival of the evils that the statute sought to prevent.

In a concurring opinion, Chief Judge Ruger, joined by Judge Gray, smelled a rat. He contended that the Republicans in Onondaga County had intentionally mixed up the ballots so that they could determine who had voted for whom, and could enforce party discipline.⁷¹ Since the law made revealing one’s vote to anyone in a polling place a misdemeanor, the Republican voters were, in Judge Ruger’s view, criminals. Judge Ruger also twisted the law’s knife into the bleeding hearts of those who had advocated for the Ballot Reform Law. He said:

But it is urged that a strict construction of the law must result in disfranchisement. This is true, but the law plainly contemplates such a result, and who can complain, except those

*who are opposed to any restrictions whatsoever upon the action of an elector? No advocate of the Reform Ballot Law can justly criticize a result which was in the minds of its authors when the law was drafted and enacted.*⁷²

Regardless of one's view of the outcome of the case, the Court majority's decision to blame the voters was unseemly, at best. The record did not support any contention that any of the voters had known of the problem with the indorsements. Even if they had, it is highly unlikely that they would have known the correct action to take. According to the Court's decision, each Republican voter apparently had to conclude that there were at the polls neither official ballots nor ballots that had been prepared by local officials but that were "unofficial" in the sense that they did not bear the official indorsement, so that the correct procedure was for each Republican voter to prepare his own ballot, which presumably would have borne the names of the same candidates as the government-printed ballots that were not being used.⁷³

As a practical matter, as McClure pointed out in Onondaga County Supreme Court, these hand-made ballots would not have been identical to the official ballots cast for Democrats and minor party candidates, so an observer would have been able to determine who had voted for the Republicans. An alternative would have been for the Republican voter to make a "paster," and paste it into another party's ballot. Since a "paster" had to be printed in the same type face as the regular ballots, a paster could not be made on the spot.⁷⁴ Since, by law, a voter was to receive an official ballot, there was no incentive for a Republican voter to prepare a Republican paster in advance.

A question addressed by neither the parties nor the courts was what the Democratic voters should have done, and what the courts should have done with the Democratic votes. A voter who, in the districts in question, had cast a ballot with the correct indorsement was, in effect, telling those present that he was not voting a Republican ballot. Given the small number of votes for the Socialist and Prohibitionist candidates, he was all but telling those present that he was voting Democratic. But would it

be fair to punish a Democratic voter when the error was on the Republican ballot? Recall that, before entering the voting booth, each voter was given one ballot for each party, and that the voter had the duty of folding each ballot so that all looked identical. One ballot was placed in the ballot box and the others were placed in the discard box. If the consequence of the incorrect indorsement of the ballot of one party was that the secrecy of the ballot was breached, then would it not be fair to require all voters--Democratic and Republican--to determine that all ballots were properly indorsed? If the Democratic voters breached this duty, should they not have suffered the same fate as the Republican voters? If both the Republican and Democratic votes in the districts in question had been voided, then Peck would have been elected by a margin of 248 votes.⁷⁵ However, the text of the law did not support this approach. Section 31 of the Ballot Reform Law said plainly, "No ballot that has not the printed official indorsement shall be counted . . ." The text of the law refers to ballots that are counted and not ballots that are discarded.

In a separate concurrence, Judge Gray took a more forthright view of the case. Even if, as "it may be conceded," the misdelivery of the ballots had been a mistake, and even if the voters had been blameless, the Ballot Reform Law, by its plain terms, required that the ballots in question be held invalid.⁷⁶ He reluctantly concluded that the Court should not bend, break or ignore the terms of the Law in order to save the ballots that plainly had been intended to be cast for Peck and that would have changed the results of the election, for to do so would eviscerate the Law. He said:

This is not a case for the court to strain after explanation, in order to remedy an apparent hardship; when to do so simply results in emasculating a provision of the law, the existence of which is calculated to exclude all attempts at fraudulent or corrupt practices at the polls. It will not do to break down any of the provisions of this law framed against a possible corrupt vote, lest in so doing the way be left open for a more radical destruction. The people are supremely interested in protecting the citizen

Ballot Reform AND THE Election of 1891

voter against the prostitution of his character in the casting of a venal ballot.⁷⁷

Judges Andrews and Peckham wrote in dissent. (Judge Finch also dissented, without opinion.) Judge Andrews wrote that not only was there nothing in the record to support fraud, but that the parties had stipulated it out of the case.⁷⁸ He dismissed as contrary to the record any idea that the mixup had been discovered at any polling place by any voter or bystander.⁷⁹

He said that it was "[in]conceivable that it was the intention of the legislature . . . to place upon the voter the responsibility of ascertaining whether an official ballot delivered to him corresponds in every particular, in form, size, and indorsement, with the description in the statute at the peril, in case of misjudgment, of a forfeiture of his vote."⁸⁰ He argued that the purpose of Section 31 of the Ballot Reform Law, which provided that ballots not bearing the official indorsement should not be counted, was to prevent the use of unofficial ballots, a situation not relevant to the case at hand, since the ballots that had been used had in fact been official. He said that the purpose of putting the number of the election district on a ballot was to ensure that the county clerk prepared and distributed enough ballots to each district, as required by law, not to identify a ballot as official. Since the ballots had been official, he said, nothing in the law gave the election inspectors the right to reject them. He opined that the Court's decision would cause more fraud than it prevented, since "[c]orrupt officials can, with reasonable safety, tamper with the distribution of ballots and allege mistake, which it will be hard to disprove."⁸¹

In dissent, Judge Peckham started with the position that "[w]here any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction and that such an end was never intended or suspected by the framers of the act," and found the majority's construction one which "certainly tends to bring the law itself into contempt."⁸² Like Andrews, he offered a number of constructions of the Law that would not have required the invalidation of the votes at issue.

Nichols was one of two decisions handed down by the Court of Appeals on the same day that resulted in a state Senate seat going to a Democrat who undoubtedly had received fewer votes than his Republican opponent. In the other case, *People ex rel. Sherwood v. State Board of Canvassers*,⁸³ the Court held that the victorious Republican candidate in the 27th senatorial district, who early in 1891 had been appointed a park commissioner in Hornellsville, was an "officer under a city government" and, therefore, under Article 3, Section 8, of the State Constitution, ineligible for state legislative office. The Democratic candidate was seated by the Senate. The judgment of the



"How to Vote"

The Evening Herald, February 2, 1891, Page 1
Permission of NewspaperARCHIVE.com.



Republicans in nominating their candidate is difficult to fathom and the outcome of the case is difficult to fault, even if, during his campaign, the Democrat had pledged not to contest the Republican's eligibility if the Republican won the election.

An even more notorious case decided that day also went in favor of the Democrats. In *People ex rel. Daley v. Rice*,⁸⁴ also decided on December 29, 1891, the Court issued what the State Board of Canvassers perceived as (or persuaded themselves to interpret as) an order that did not effectively prevent the State Board from awarding the Senate seat in the 15th district to a Democrat based upon what was widely regarded as a fraudulent canvass of votes in Dutchess County.⁸⁵

At the end of the day, Hill had slain the reformers with their own sword, gaining control of the state Senate. He went off in triumph, more or less, to the United States Senate. Deputy Attorney General Isaac Maynard, who had represented the State Board of Canvassers in *Nichols*, *Sherwood* and *Derby*, and had both advised the Democrats and appeared for the State Board of Canvassers in *Daley*, had done his boss's bidding well. He was named by Hill to the Court of Appeals in January 1892.

Their glory proved transitory, however. On March 23, 1892, the New York City Bar Association issued a scathing report condemning Maynard's conduct in the *Daley* case.⁸⁶ When Maynard ran for election to the Court of Appeals in 1893, he lost by more than 100,000 votes, "a staggering margin at the time."⁸⁷ His defeat was said to have been "the turn of the tide that was to give the Republicans sixteen unbroken years of complete control of the State government."⁸⁸

The Democrats were so unpopular following the events of 1891, and Hill was deemed so much at fault, that the Democratic party insisted that he run for Governor in 1894, in part because no one else would.⁸⁹ He lost by more than 150,000 votes. Having regained control of the State, the Republicans, not surprisingly, declined to re-elect Hill to the Senate in 1896. He was never again a candidate for public office.⁹⁰

The court session of December 29, 1891, was the last public appearance of Chief Judge Ruger, who died January 14, 1892, at his home in Syracuse.⁹¹

Judge O'Brien, who decided the *Nichols* case at special term, went on to have a distinguished career.⁹² He was, among other things, a trustee of the New York City public schools, Corporation Counsel of the City of New York, and Presiding Justice of the Appellate Division. For his considerable charitable and civic work, he was, among other honors, knighted by the Pope and named a Chevalier of the Legion of Honor by the French Government. Upon his death in 1937, the *New York Times* remarked that the most important work of his early career was the *Nichols* case.⁹³

The Ballot Reform Law was repealed in 1892, but its replacement, a codification of the Election Law, included the former law's most important provisions, and added a new one: The official indorsement on a ballot was no longer to include the number of the election district.⁹⁴ The year 1892 saw another important development: In a municipal election in Lockport, New York, voters first used a lever-operated voting machine.⁹⁵

The Ballot Reform Law of 1890 was the culmination of a long struggle by reformers in New York State against what they perceived as widespread corruption of the electoral process by machine politicians. The great change that the Law wrought in New York is evidenced by the fact that no opinion in *Nichols* cited a New York case in support of its construction of the law. The majority opinion cited nine cases from five states in support of its holding that the letter of the law should be enforced, even if, in the specific case before the court, the law would seem to thwart the will of the majority of the electorate.⁹⁶ The outcome of *Nichols* therefore was very much in step with other states' interpretation of their election reform laws.

Although *Nichols* was last cited in an election context in 1909, its core principle endures. As the Court of Appeals said in *Gross v. Albany County Board of Elections*⁹⁷ more than 100 years after *Nichols*, "Broad policy considerations weigh in favor of requiring strict compliance with the Election Law . . . [for] a too-liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process."⁹⁸ But the contrary urge also endures. In *Gross*, 27 absentee voters did exactly what they had been told to do by election officials of both parties,

but their ballots were nonetheless invalidated because the election officials had been wrong. The dissent in Gross urged flexibility:


Experience has shown that too many elections have been touched, if not infused, by fraud, and that we need rules to keep the process honest. To be sure, some rules require the most stringent enforcement if the system is to function. Others, however, can and should tolerate some flexibility. This is particularly so when, as here, the strict application of the rule does not further the Election Law's objectives. We have, at times, construed the Election Law's rules to disenfranchise voters. When we did, it was because we felt that on balance a more permissive interpretation would threaten the process or future elections. Thus, while I do not see the majority's opinion as grudging or as evincing a hidebound, technical character, the scales here tip in favor of the voter.⁹⁹

The majority in Gross replied as follows:

The dissent suggests that the challenged absentee ballots should be canvassed despite the Board's departure from the qualification process because the voters who cast the ballots were innocent of any wrongdoing. This is certainly true in the sense that the voters' reliance on the Board's mistake was understandable—but this same rationale could be applied virtually any time a board fails to comply with statutory directives governing voting. Reliance on board actions or directives will almost always be reasonable since few voters have sufficient familiarity with the Election Law to catch an error and most have little reason to question voting procedures. Thus, an exception predicated on voter innocence would swallow the

rule, effectively relieving election officials of their obligation to adhere to the law. For these reasons, we agree with the Appellate Division majority that to overlook a substantive error of this magnitude would invite future impermissible deviation from statutory requirements that have been devised to ensure fair elections.¹⁰⁰

Over the years, legal reforms such as the Ballot Reform Law, have been largely successful in eradicating bribery of individual voters. Legal reform and technological advances have resulted in retail vote purchases being replaced by media buys. Campaign spending has increased greatly, while any direct financial benefit to individual voters has largely disappeared.¹⁰¹ The apparent economic inefficiency and, at least arguably, unfairness of this system are plausibly justified on grounds of morality and public policy.¹⁰² The recent decision of the United States Supreme Court in *Citizens United v. Federal Election Commission*,¹⁰³ freeing corporations from certain restrictions on campaign spending, seems likely to further this trend.

Meanwhile, at least in New York State, the actual balloting process has for the most part remained mired in the 19th-century technology of the lever-operated voting machine.¹⁰⁴ However, the advent of electronic voting systems, hastened by the Help America Vote Act of 2002¹⁰⁵ and other laws viewed by some as reforms, promises to usher in an era in which votes may be miscast or miscounted by the megabyte rather than merely by the bushel. In the brave new world of free spending and electronic voting, the unanticipated consequences of the Ballot Reform Law may serve to remind us that reform comes at a price and that, as the late Charlie Torche would remind patrons of the bar of the University Club in Albany, "Honesty is no substitute for experience."¹⁰⁶ 

ENDNOTES

1. N.Y. Laws 1890, ch. 262, as amended in many important respects by N.Y. Laws 1891, ch. 296.
2. A voter who kept a promise to vote as the briber wished was dishonest as to the voting process; a voter who breached his promise was dishonest toward the briber.
3. *Cf. Hill Explains His Views*, N.Y. Times, January 8, 1890: "It is wholly unlikely that the briber will accept the word of the voter as to what ticket the latter voted. There is little mutual confidence in such cases" (All citations to the New York Times are to the Times's archive available on the internet. The archive does not give the edition, section, or column, and in most cases does not give the page.)
4. Early efforts to require parties to print identical-looking ballots were not viewed as a success. *See* N.Y. Laws 1880, ch. 366, § 1.
5. N.Y. Laws 1890, ch. 262, §§ 1, 16, 17, 24, & 25, as amended by N.Y. Laws 1891, ch. 296, §§ 5, 6, 11, & 12.
6. N.Y. Laws 1890, ch. 262, § 29, as amended by N.Y. Laws 1891, ch. 296, § 15.
7. N.Y. Laws 1890, ch. 262, § 21.
8. *Id.*, as amended by N.Y. Laws 1891, ch. 296, § 16. A voter could identify a ballot as his own, and thereby earn his bribe, by, for example, writing in his own name as a candidate in an uncontested or lightly contested race. *See infra* note 33.
9. N.Y. Laws 1890, ch. 262, § 35, as amended by N.Y. Laws 1891, ch. 296, § 18.
10. Governor Hill had vetoed an act under which each ballot would have borne the names of all of the candidates for each office. The voter would have marked the names of the candidates for whom he intended to vote. Hill noted that the when the state constitution was enacted, guaranteeing election by "ballot," a "ballot" was, by statute, "a paper ticket, which shall contain written or printed, or partially written and partially printed, the names of the persons for whom the elector intends to vote, and shall designate the office to which each person so named is intended by him to be chosen." Hill argued that this form of "ballot" therefore was guaranteed by the constitution, and that under the statute, a "ballot" contained only the names of those persons for whom the voter intended to vote. *Hill Explains His Views*, N.Y. Times, January 8, 1890.
11. *Hill Explains His Views*, N.Y. Times, January 8, 1890. To belabor the obvious, "pasters" were also dear to machine politicians because a party worker could ensure that an illiterate elector voted properly by giving the elector a "paster," some glue, and whatever inducement the worker thought appropriate under the circumstances. At the polling place, a voter wishing to use a "paster" was given one ballot for each party with a candidate. The voter glued his "paster" inside one of those ballots, folded all of the ballots, deposited the ballot with the "paster" in the ballot box, and deposited the other ballots in the discard box. Laws 1890, ch. 262, § 25, as amended by Laws 1891, ch. 296, § 12. The Ballot Reform Law also provided for write-ins.
12. *Id.*
13. Given the relatively small number of votes cast for third party candidates, it was also possible after the fact to tell with near certainty who voted for the Democrat. For example, in the first district of Camillus, Peck received 159 votes, Nichols received 147 votes, and the third party candidate received 19 votes. If an observer saw a voter cast a ballot bearing the correct district number, the chances were 147 out of 166 that he had voted for Nichols. This circumstance was not relied upon by the Republicans in arguing their case, which is described hereafter. *See* Record on Appeal at 89-90, *People ex rel. Nichols v. Board of County Canvassers of Onondaga County*, 129 N.Y. 395 (1891), which is available in the New York State Library/Manuscripts & Special Collections Unit.
14. *The Onondaga Mistake*, N.Y. Times, December 16, 1891.
15. *Peck's Certificate Filed*, N.Y. Times, November 20, 1891.
16. *Id.*
17. Letter dated November 25, 1891, from David B. Hill to Hon. Hugh McLaughlin. Hill papers, Box 56, volume 4. (Citations are to the David Bennett Hill Papers, 1872-1926, which are available in the NYS Library/Manuscripts & Special Collections Unit.)
18. Letter dated November 26, 1891, from James W. Ridgway to David B. Hill. Box 4, folder 3. (*See* n.17 for italics full citation)

Ballot Reform AND THE Election of 1891

19. *People ex rel. Munro v. Board of County Canvassers of Onondaga County*, 129 N.Y.469 (1891); *People ex rel. Ryan v. Board of County Canvassers of Onondaga County*, 129 N.Y. 652 (1891).
20. *People ex rel. Daley v. Rice*, 129 N.Y. 449 (1891).
21. *People ex rel. Derby v. Rice*, 129 N.Y. 461 (1891).
22. *People ex rel. Sherwood v. State Board of Canvassers*, 129 N.Y. 360 (1891). A succinct summary of the entire election litigation is available at www.archive.org/details/davidbhillleadin01newy (visited 2/6/10).
23. Letter dated November 26, 1891, from James W. Ridgway to David B. Hill. Box 4, folder 3. (See n.17 for full citation)
24. Letter dated November 28, 1891, to State Committeeman William B. Kirk of Syracuse. Box 56, volume 4. (See n.17 for full citation)
25. *Preparing for the Struggle*, N.Y. Times, January 5, 1892.
26. Letter of O.H. Kellogg to Hill, dated November 30, 1891, Box 56, volume 4. Kellogg was associated in the case with Marshall, and stated that he had consulted with Marshall before reporting to Hill. (See n.17 for full citation)
27. Kellogg in fact referred to "§ 35," but he clearly intended to refer to Section 31.
28. As it turned out, the State Board of Canvassers had no such scruples. In another case arising from the Senatorial races of 1891, *People ex rel. Daley v. Rice*, 129 N.Y. 449 (1891), the Court of Appeals noted that there were uncontradicted allegations that a return from the Dutchess County Board of Canvassers, which resulted in a majority for the Democratic candidate, was based upon an illegal action by the County Board. The Court of Appeals held that the trial court "would have the power to command the state canvassers to canvass without regard to such a return," and that "the court should not permit it to be canvassed." *Id.* at 460. The Court of Appeals handed down its decision December 29, 1891. Later that day, the State Board of Canvassers nonetheless declared the Democratic candidate the winner on the basis, in part, of the Dutchess County canvass. See W. Brookfield et al., *The Theft of the Senate*, N.Y. Times, January 5, 1892. See also David B. Hill and the 'Steal of the Senate', 1891, New York History at 299 ff. Far too late for it to change the results, the State Board of Canvassers was held in contempt and fined \$831.28, which was the amount of the complainants' costs and expenses in the contempt proceeding--a small price to pay for complete control of the government of the State of New York. See *People ex rel. Platt v. Rice*, 144 N.Y. 249 (1894).
29. The letter from Kellogg concluded by saying that it would be delivered to Hill by Mr. Marshall's clerk, "who will wait for a reply and if you desire we shall proceed in the line suggested in the letter to Mr. Kirk, tell him to wire us 'to go ahead,' and we will understand it and will go on as you suggested." Although Hill's telegram is not in the archives, it apparently gave the "go ahead," because the Democrats sued the next day.
30. *A Talk With Justice O'Brien*, N.Y. Times, December 6, 1891.
31. *Morgan J. O'Brien Dead at Age of 85*, N.Y. Times, June 17, 1937, at 23.
32. See Record on Appeal at 1 in Nichols, *supra* note 13.
33. Record on Appeal at 8 *People ex rel. Nichols v. Board of County Canvassers of Onondaga County*, 129 N.Y. 395 (1891). By contrast, in bitterly contested litigation in Dutchess County, the Democrats submitted allegations that, on a number of pasters, a Republican party official had crossed out the name of a candidate for judge, and had substituted the name of a voter, and that these pasters then appeared on ballots that had been cast and canvassed. The Democrats alleged that pasters were intended to identify the person who cast the ballot (which was used to vote for a number of offices in addition to the judgeship), so that the voter could be paid for his vote. See Record on Appeal at 104-106, *People ex. rel Daley v. Rice*, 129 N.Y. 449 (1891).
34. Record on Appeal at 17-20 in Nichols, *supra* note 33.
35. *Supra* at 21-29.
36. *Supra* at 35-63.
37. *Supra* at 63.
38. *Takes The Papers*, Syracuse Evening Herald, December 3, 1891, at 1 (4th ed.).
39. See Record on Appeal at 108 in Nichols, *supra* note 33.
40. *A Talk With Justice O'Brien*, N.Y. Times, December 6, 1891.
41. *Id.*
42. *Id.* See also *Reacting on the Democrats*, N.Y. Times, December 6, 1891, which names Democratic State Committeeman William Kirk as the sponsor of the dinner, and attributes his sponsorship to his pleasure at O'Brien's decision. Forty-five years later, in O'Brien's obituary, the Times reported that the dinner was given in Justice O'Brien's honor by the Republican lawyers. See *Morgan J. O'Brien Dead at Age 85*, N.Y. Times, June 17, 1937, at 23.
43. The parties stipulated to submit the case to the General Term of the Third Department in Albany on December 8, 1891, with the same force and effect as if submitted to the General Term of the Fourth Department. See Record on Appeal at 117 in Nichols, *supra* note 33.
44. Brief for Appellant at 7, *People ex rel. Nichols v Board of County of Canvassers of Onondaga County*, *supra*, 129 N.Y. 395.



45. *Id.* at 8.
46. *Id.* at 8-9.
47. *Id.* at 27.
48. *Id.* at 29.
49. *Id.* at 30.
50. *Id.* at 31.
51. Brief for Respondent at 10 in Nichols, *supra* note 44. The full title of the act is: "An act to promote the independence of voters at public elections, enforce the secrecy of the ballot, and provide for the printing and distribution of ballots at public expense."
52. *Id.* at 37.
53. *Id.* at 13.
54. *Id.* at 34.
55. *Id.* at 9.
56. *Id.* at 35-36.
57. The report of the argument of the Nichols case is from *The Onondaga Mistake*, N.Y. Times, December 16, 1891. The Official Report of the case lists the date of argument as December 11, whereas the dateline on the article indicates that the case was argued December 15. Other election cases were argued before the Court of Appeals on December 11. The Onondaga County case was on the calendar for Friday, December 11, but was not reached that day, and was argued when the court reconvened the following Tuesday. *Election Cases*, Syracuse Evening Herald, December 11, 1891, at 1 (4th ed.). 1
58. *The Onondaga Mistake*, The New York Times, December 16, 1891
59. At oral argument, Marshall also opined that the County Clerk had intentionally mixed up the ballots, and contended that the voters "must have noticed that the Republican ballots were different from the others given him." There was, however, no direct evidence for either contention.
60. *The Ballot Reform Veto*, N.Y. Times, April 1, 1890. See *supra* notes 10-11.
61. *Bush v. Gore*, 531 U.S. 98 (2000).
62. 129 N.Y. at 401-02.
63. *Id.* at 403.
64. *Id.*
65. *Id.* at 405.
66. *Id.* at 406.
67. *Id.* at 407. This argument was somewhat disingenuous since the Court did not address what a voter who did not know that he was casting a distinguishable ballot was supposed to do if the election officer did not refuse it. Presumably, the voter who did not know would do what the voters in the case did, which was leave the polling place under the erroneous belief that they had cast a valid ballot.
68. *Id.* at 408.
69. *Id.*
70. *Id.* at 409.
71. *Id.* at 420-21.
72. *Id.* at 426.
73. N.Y. Laws 1890, ch. 262, § 21: If the ballots to be furnished to any town or city clerk, as herein provided, shall not be delivered at the time above mentioned, or if after delivery they shall be destroyed or stolen, it shall be the duty of the said clerk of such town or city to cause other ballots to be prepared as nearly in the form prescribed in section seventeen as practicable, but without the indorsement, and upon receipt of ballots thus prepared from said clerk, accompanied by a statement under oath that the same have been so prepared and furnished by him, and that the original ballots have so failed to be received, or have been so destroyed or stolen, the inspectors of election shall cause the ballots so substituted to be used at the election. If from any cause, neither the official ballot nor ballots prepared by the town or city clerk as herein prescribed shall be ready for distribution at any polling place, or if the supply of ballots shall be exhausted before the polls are closed, unofficial ballots, printed or written, made as nearly as possible in the form of the official ballots, may be used. . . .
74. N.Y. Laws 1890, ch. 262, § 25.
75. Peck won Cortland County by 770 votes. See Record on Appeal at 66 in Nichols, *supra* note 33. Before the Republican votes at issue were discarded, Nichols won Onondaga County by 388 votes, See *id.* at 85-86, giving Peck a margin of victory in the Senatorial district of 382 votes. The Court's decision cost Peck 1,252 votes. *Id.* at 89-104. Voiding Nichols's votes in the election districts in question would have cost Nichols 1,118 votes, giving Peck a margin of victory of 248 votes in the Senatorial district.
76. 129 N.Y. at 428.
77. *Id.* at 432.
78. *Id.* The parties in Nichols stipulated that "in the event of fraudulent intent in the distribution of the ballots being deemed material by the appellate courts, then the relators shall have the right to waive such question of fact, and no objection to their waiving such question of fact shall be raised by the respondents in the cases." This was done "for the purpose of having the questions of law involved in these proceedings referred to speedily decided by the courts" Record on appeal at 114, *People ex rel. Nichols v Board of County Canvassers of Onondaga County*, 129 NY 395 (1891).

- Both Nichols and Peck had brought a proceeding, so each was both a relator and a respondent.
79. 129 N.Y. at 435.
 80. *Id.* at 439. The opinion as reported uses the word “conceivable,” but the context makes clear that the judge intended “inconceivable.”
 81. *Id.* at 443-444.
 82. *Id.* at 445.
 83. 129 N.Y. 360 (1891).
 84. 129 N.Y. 449 (1891).
 85. *Supra* note 28 for a discussion of Daley. In Sherwood it was clear that more voters had cast ballots for the Republican, and in Nichols it was clear that more voters tried to cast ballots (valid or invalid) for the Republican. If one believes the Republicans’ allegations in *Daley*, then it appears that more voters cast ballots for the Republican in that election as well. However, since the State Board of Canvassers certified the Democrat the winner before any judicial decision as to the facts, and the Senate seated him, there was no conclusive proof either way.
 86. The Bar Association’s report is bound with the record in Daley in volume 862, case 10 of the bound records and briefs of the Court of Appeals in the New York State Library. That volume also contains a record of the contempt proceedings against Dutchess County Clerk Storm Emans in connection with the election involved in Daley.
 87. Jason C. Rubinstein, *Isaac Horton Maynard* in *The Judges of the New Court of Appeals: A Biographical History* 258 (Albert M. Rosenblatt ed., Historical Society of the Courts of New York 2007).
 88. Francis Bergan, *The History of the New York Court of Appeals 1847-1932* at 144 (Columbia Univ. Press 1985), quoting Roscoe C.E. Brown, *Political and Governmental History of New York State* 3:365, 375 (Ray Smith 1922).
 89. Herbert J. Bass, *I am a Democrat: The Political Career of David Bennett Hill* 242-43 (Syracuse Univ. Press 1961).
 90. *Id.* at 245.
 91. Suzanne Aiardo, *William Crawford Ruger* in *The Judges of the New York Court of Appeals: A Biographical History*, *supra* note 87, at 229.
 92. The description of his career is from *Morgan J. O’Brien Dead at Age of 85*, N.Y. Times, June 17, 1937, at 23.
 93. *Id.*
 94. N.Y. Laws. 1892, ch. 680, § 81.
 95. *Republicans Carry Lockport*, N.Y. Times, April 13, 1892. See also Mary Wittenburg, *A Better Ballot ?*, Christian Science Monitor, November 3, 2003.
 96. *Reynolds v. Snow*, 67 Cal 497 (1885)(voter crossed out office and name on printed ballot, and wrote in name but no office; write-in vote not counted); *Fields v. Osborne*, 60 Conn. 544 (1891)(ballots which contained office, and name of candidate for that office, which was not part of that election invalid as to all offices and candidates); *Talcott v. Philbrick*, 59 Conn. 472 (1890)(ballots issued by Republican Party, labeled “Citizens Party,” but bearing the names of the same candidates as on the Republican Party ballot, invalid because the law requires the ballot to bear the name of the party that issued it); *Perkins v. Caraway*, 59 Miss. 222 (1881)(ballot on which names of candidates for legislature were less than 1/5 inch apart were invalid as to all candidates for all offices); *Oglesby v. Sigman*, 58 Miss. 502 (1880)(ballots with marks on inside invalid); *Steele v. Calhoun*, 61 Miss. 556 (1894)(ballots with dotted line across face invalid as bearing an illegal “distinguishing mark”); *Ledbetter v. Hall*, 62 Mo. 422 (1876)(same as West) *West v. Ross*, 53 Mo. 350 (1873)(statute required election judges at polling place to number ballots; ballots inadvertently not numbered were invalid); *State ex rel Mahoney v. McKinnon*, 8 Ore. 493 (1880)(voter-prepared ballot on colored paper invalid because ballots are to be on white paper).
 97. 3 N.Y.3d 251 (2004).
 98. *Id.* at 258 (2004), quoting *Matter of Staber v. Fidler*, 65 N.Y.2d 529, 534 (1985).
 99. 3 N.Y.3d at 261 (Rosenblatt, J. dissenting)
 100. 3 N.Y.3d at 260.
 101. See, e.g., Charles Lewis, *The Buying of the President* 2004 (Perennial 2004).
 102. As a general proposition, it seems unfair that so many—the media, consultants, pollsters, paid canvassers, etc.—feast on the campaign expenditure pie, yet it is a crime for a voter to take even the tiniest bite. See N.Y. Election Law 7-102(7) & (9), 7-142, 7-144. It is particularly unfair that office holders and candidates are allowed to solicit and accept hundreds of thousands of dollars from individuals, corporations, and political action committees, and to say with as straight a face as they can muster that the money will not influence their votes, while a citizen who openly sought cash contributions from candidates would undoubtedly be considered to be prostituting his franchise, regardless of what he said. Law and society thus treat politicians as more moral than the average citizen. Does this distinction comport with experience? Recall that the premise of the Ballot Reform Law and the rationale of the *Nichols* decision was that ballot secrecy would remove any incentive for bribery. If one truly believes that technology renders a ballot secret, then the prohibition against payment to voters is unnecessary.

Retention of the current prohibition against a potential voter promising to vote in exchange for payment would remove any moral obligation that a voter might feel. A requirement that payment to a voter be made before the election day would further ensure that a candidate retained no leverage as a voter was actually casting his ballot.

103. *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

104. *Supra* textual discussion herein preceding endnote 95.

105. Pub. L. No. 107-252, 116 Stat. 1666, codified at 42 USC §§ 15301 et seq.

106. Kenneth Salzmänn, Albany Scrapbook 42 (Aurania 1985). Charlie Torche was an “Albany lawyer, pol, mingler-extraordinaire, and living legend.” *Id.* at 41.





CHARLES DAVID BREITEL

(1908–1991)

COURT OF APPEALS, 1967–1978

CHIEF JUDGE, 1974–1978

BY JAMES W. B. BENKARD

CHARLES BREITEL,¹ THE 30TH CHIEF JUDGE OF THE NEW YORK STATE COURT OF APPEALS was a brilliant, complex, energetic, and quietly ambitious man whose modesty and rigorous standards never allowed him to quite appreciate what a remarkable life he led. His was a wonderful American story: offspring of immigrant parents; a scholarship student at the finest educational institutions who learned his trade while enduring the harshest years of the Great Depression; a 64-year marriage that started with an elopement; a close relationship with Thomas Dewey that nearly led him to a seat on the Supreme Court of the United States;

*This biography of Charles D. Breitel appears in **The Judges of the New York Court of Appeals: A Biographical History**, edited by Albert M. Rosenblatt, and published in 2007 by Fordham University Press. The book features original biographies of 106 chief and associate judges of the New York Court of Appeals and is a unique resource. It is available for purchase from major book retailers, directly from Fordham University Press (800.996.6987), and on our website.*



Judge Breitel, circa 1910–1911.

and almost 30 years as a judge—at nisi prius, the Appellate Division, and finally, the Court of Appeals where he initiated and helped implement significant reforms that shaped our modern system of justice. Along the way, he served as husband, parent, teacher, counselor, and friend to legions who remember him with respect, occasional trepidation, and great affection.

Judge Breitel really did “love the law”; indeed, he once wrote that he “love[d] the court system,” not a commonly expressed view.² He cared deeply for the Court of Appeals, which he unabashedly described as the “greatest Court in the nation . . . surpass[ing] the Supreme Court by far.”³ And, this was a man who knew his neighborhood. After all, he had participated at all levels of the New York legal system, from a clerk at a small law firm to the highest judicial office in the state. He had pride and affection in his city, the

“greatest megalopolis of the western hemisphere,”⁴ and his early immersion in that commercial cauldron laid the groundwork for many of the most sophisticated, yet practical “business” decisions ever issued by any court. Perhaps most of all, he reveled in the elegant interaction of the three branches of government, a structure that he believed actually works even if, from time to time, stalwart guardians such as himself had to take unpopular, even courageous, stands, to ensure that none of the three bodies overstepped its bounds. But, to truly understand this fascinating and significant man, we have to start at the beginning.

As a Youth

Judge Breitel’s mother and father, Herman and Regina Breitel, emigrated with their three daughters, from Lwow (now in Ukraine) to the United States in the early days of the 20th century. Judge Breitel was born in New York on December 12, 1908. Two years later, his father died.

A forceful woman (she obtained her driver’s license in 1907), Mrs. Breitel supported her four young children by selling hats at a Lower East Side store. Judge Breitel attended the Evander Childs High School in the Bronx and then went, on a scholarship, to the University of Michigan where he earned what money he could by working as tutor, and as a cashier in a movie theater.⁵ In his sophomore year, he met a costudent, Jeanne Hollander, and they dated for a week. They broke up, after a disagreement over a tie she had given him, but, six weeks later, they “made up” and eloped, marrying in Howell, Michigan, on April 9, 1927. He was 18; she was 19. Judge Breitel later explained he had married his wife for her “lecture notes.”

Both Breitels started at Michigan Law School; Jeanne graduated from there while the judge spent his last two years at Columbia Law School.⁶ The rigors of the Depression marred their early years together in New York City; indeed, his daughter, Eleanor, recalls the judge telling her that food was so scarce that, on one occasion, he actually fainted in the street from hunger. On his graduation from law school in 1933, Judge Breitel was able to secure a job as a clerk in a small firm, which, not long thereafter, failed.

As a Young Man

At the age of 26, Judge Breitel's life took a decided turn for the better when he came to the attention of District Attorney Thomas E. Dewey. As is well known, during the 1930s, Dewey forged a reputation in New York City as the prototype "crusading District Attorney and gang-buster." By his side, holding a succession of jobs with increasing responsibility, was the young Breitel, moving from the Special Rackets Investigation Bureau to assistant chief of the Indictment Bureau and then chief of that bureau. Along the way, protégés gathered and coalesced into a group known as "Dewey's Dozen," consisting of such eminent figures as (among others) Stanley Fuld, Whitman Knapp, Murray Gurfein, Frank Hogan, and, of course, Charles Breitel. Thurston Greene, alive and well at 99, is their last survivor.

As Charles Beeching, a former clerk for the judge, once observed, the 1930s were an era when "crusading law enforcement officers were public heroes, and the exclusionary rules of evidence . . . and the whole spectrum of constitutional guarantees of procedural rights were at least a generation away."⁷ As the rules changed (e.g., Mapp and Miranda), Judge Breitel was faithful to their new commands; still, the legacy of those formative years as a "crime fighter" can be found in such observations by the judge, made 30 years later, as: "We may prate about acquitting nine guilty men rather than risk the conviction of one



Charles D. Breitel and wife, Jeanne H. Breitel, in Ann Arbor, Michigan, at University of Michigan, 1927.

innocent but we in fact shudder at the idea of turning loose nine guilty men capable of committing crimes of violence and grave depredation."⁸

During the brief period between the termination of his service as district attorney and election as governor of New York, Dewey demonstrated his regard for his young assistant's abilities by joining him in the formation of their own law firm, Dewey & Breitel. When Dewey was elected governor, he named Judge Breitel as counsel who moved, with his family, to Albany. The Albany years gave Judge Breitel a breadth of understanding for, and appreciation

of, the legislative process that played a significant role in shaping his judicial

persona, including, perhaps, his reluctance to interfere unduly with mandates from popularly elected bodies.⁹

In any event, the trajectory of his career nearly veered to the South: It has been often assumed, quite accurately, that if Governor Dewey had been elected president in 1944 or 1948, Judge Breitel would have either become Attorney General or a Supreme Court justice. But, the Democrats prevailed, and, in 1950, Governor Dewey appointed Judge Breitel to an interim term on the Supreme Court of New York, praising his appointee for possessing "the finest legal mind in the State."¹⁰ While as a Republican he was defeated in his first bid for reelection, he was appointed to another interim term and then elected in 1951 for a 14-year term.

As a Husband and Father

Judge Breitel had a warm, full family life. He often said, cheerfully, that he had been surrounded by women all of his life (his mother, three sisters, his wife, and two daughters). His daughter, Eleanor Alter,¹¹ has become a prominent divorce lawyer, while Vivian Breitel has pursued varied and productive careers in finance and fine arts. Not surprisingly, Judge Breitel was a demanding parent: He even edited letters sent to him by his children. But he was by no



means a bookish martinet; he loved baseball games, movies, and taking pictures of his family, which he developed in his own darkroom. He seldom missed a good parade and, during World War II, kept a victory garden in Albany. An amateur carpenter, he even built a two-room doghouse for a cocker spaniel, given to the Breitels by Governor Dewey.

As for his marriage, the most startling, yet beguiling, aspect of his relationship with his wife, Jeanne, was how quickly they decided on a union that would last for 64 years. The main reason, of course, is that they were so much alike: They were both smart, sensitive, proud, blessed with a self-effacing wit, and fiercely loyal to each other. Both smoked—a lot. They even rolled their own cigarettes during the war. Perhaps in response to the rigors of the Depression, their lifestyle approached the frugal; they never took cabs, owned a television set, or went to restaurants. Instead, they played chess, read voraciously, raised their family, and supported each other in every way for a long and happy marriage.



Charles Breitel during his term as counsel to Governor Thomas E. Dewey, and at left with the Governor with bills awaiting signature, circa 1945

Early Judicial Appointments

To return to the courts: In 1952 Governor Dewey appointed Judge Breitel to a seat on the Appellate Division, First Department, certainly one of the busiest appellate courts in America. This tribunal is charged with hearing appeals from almost every type of order issued by the Supreme Court, final or interlocutory, substantive or procedural. Consequently, in his 14 years of service on this bench, Judge Breitel heard appeals in cases encompassing any controversy that fell within the broad jurisdiction of the Supreme Court. The volume was so great that, even though the Appellate Division was a panel court, each judge could count on reviewing and deciding anywhere from 25 to 35 cases a month. It was during this time that Judge Breitel spearheaded the concept of a hot bench, which meant reading the briefs and records in every case considered by his panel *before* every argument. This process, which enlivened and often shortened the oral presentations, exponentially increased

the workload of the judges, many of whom had to follow young Breitel's lead, lest they seem less assiduous by comparison.

And it was a strong court, composed of jurists who may not have had household names but whose reputations shone in the experienced and discerning New York legal community: e.g., Cohn, Botein, Steuer, Eager, Dore, Peck, Rabin, and several others. Given their extremely busy workloads, these judges specialized in the speedy, often terse delivery of results, rather than in lengthy opinions, crafted in Holmesian prose.¹²

Quite apart from his judicial burdens, Judge Breitel was immersed in numerous legal "extracurricular activities." During the decade of the 1960s, he served as an adjunct professor of law at Columbia, a member of the President's Commission on Law Enforcement and the Administration of Justice, the Federal Commission on International Rules of Judicial Procedure, and the American Law Institute Committee on the Model Penal Code. Certainly, his clerks helped to some extent on these assignments, but he alone performed the vast majority of the tasks, writing longhand, hour after hour, late into the night, on a series of yellow pads.

But, his major assignment was, of course, at 25th Street and Madison Avenue, where his work was dedicated mainly to resolving controversies and absorbing a prodigious amount of the substantive and procedural law of New York State. Thus, when Gov. Nelson Rockefeller called Judge Breitel late in the afternoon in November 1966 to offer him a seat on the New York State Court of Appeals, it is safe to say that the governor could not have selected a more qualified man.

The years in Albany started quietly: Stanley Fuld, Judge Breitel's old colleague from the "Dewey Days," was the chief judge and the new arrival tread softly, at least administratively, even though the "cold bench" procedures in Albany were not to his liking. Nevertheless, within two months of his arrival, Judge Breitel wrote the majority opinion, upholding the validity of a local ordinance banning all off-site billboards, a major goal of "aesthetic environmentalists."¹³ Even as he neared an important milestone in his career, Judge Breitel agreed to author the majority

opinion in a highly controversial case, *Byrn v New York City Health & Hospitals Corp.*,¹⁴ which struck down a constitutional challenge to a law permitting abortion within 24 weeks from commencement of pregnancy. Judge Breitel met the core issue head on when he wrote, "unborn children have never been recognized as persons in the whole sense."¹⁵ There were emotional dissents from Judges Burke and Scileppi, who claimed links between the law and principles espoused by Nazi Germany.¹⁶

As Chief Judge

In 1973, as the retirement of Chief Judge Fuld approached, the common expectation was that Judge Breitel would be nominated by both political parties, and elected, essentially unanimously, as the new chief. However, the Democratic Party, "anticipating a large turnout of their adherents in [the 1973] New York mayoral race, refused to abide by the 60-year-long precedent of cross-endorsing the senior associate [Court of Appeals judge]" as the new chief.¹⁷ A prominent negligence lawyer, Jacob Fuchsberg, secured the Democratic nomination by winning an extremely narrow primary over Judge Jack Weinstein of the United States District Court for the Eastern District of New York. Mr. Fuchsberg then went on to wage an aggressive and expensive campaign for chief judge, thereby forcing Judge Breitel into a contest that he found unseemly and demeaning. While he was proud of his record and confident that he was far more qualified for the position, Judge Breitel had no taste for self-aggrandizement, let alone the personal attacks often associated with elections.

Nevertheless, the judge was no shrinking violet and, of course, he wanted the job. Reluctantly then, he hit the hustings (to the extent a judge could), obtained the endorsement of the Republican and Liberal Parties, made speeches, debated, gave as good as he got, and eventually defeated Mr. Fuchsberg and Judge James Leff (the Conservative Party nominee who openly preferred Judge Breitel) by 300,000 votes.¹⁸

So, Charles Breitel was the chief, and while he only had four years until retirement to enjoy the job, he went to work with a will. The first order of business was to call upon the Socratic method, so familiar to law students and dear to the chief's heart.

Thus, almost immediately after his election, the Court of Appeals became a “hot bench.” Emulating the Appellate Division system, the new chief decreed that each judge had to be fully prepared on all cases before the oral argument. As a result, spirited and informed interchanges between counsel and court sharpened the issues, often shortened the presentations, and usually stimulated meaningful discussions on the points that the court found most significant. Equally important, the judges’ familiarity with all the cases in an early stage of the appellate process helped expedite their resolution, diminishing materially the time between oral argument and decision.

On a broader front, the chief judge moved with equal dispatch. In 1974, he appointed Richard Bartlett as the first chief administrator of the state court system. Next, he vigorously supported constitutional amendments, passed shortly thereafter, which created the central administration of the New York courts, as well as the Commission on Judicial Conduct.

But, reaching a goal even more important to him—abolition of the election process he had been forced to endure—required the support and leadership of a most unlikely ally: Gov. Hugh Carey, a Democrat from Brooklyn. To achieve that end, a constitutional provision in force since 1846, requiring the election of Court of Appeals judges, had to be repealed and new legislation passed. Nevertheless, a quadrumvirate was formed: Governor Carey, his counsel, Judah Gribetz, Judge Bartlett, and, of course Chief Judge Breitel. Party divisions were surmounted, and the voters approved the required constitutional amendment in 1977, thanks, primarily, to a large favorable vote from New York City. Popular elections were replaced by gubernatorial nominations, selected from a list furnished by the Commission on Judicial Nomination, with the governor’s choice subject to approval by the State Senate.

One of the failings of the New York system, as opposed to the federal courts, is the arbitrary retirement age of 70. In the five years prior to 1978, Chief Judge Breitel authored a series of significant opinions on important issues that illuminate, in a perverse way, the wastefulness of losing a judge who was, in point of fact, probably in his “judicial prime.”

Significant Court of Appeals Opinions

In any event, as the chief is said to have told his wife, “his opinions were his biography.”¹⁹ If so, 1975 to 1978 was a truly busy period, as the court was confronted with a series of major controversies that required judicial resolution:

- During the depths of New York City’s fiscal crisis, the legislature enacted a three-year moratorium to stay actions brought to enforce payment of the city’s short-term obligations. The court held that the law violated the full faith and credit provision of the New York Constitution. As the chief judge wrote: “But it is a Constitution that is being interpreted and as a Constitution it would serve little of its purpose if all that it promised, like the elegantly phrased Constitutions of some totalitarian or dictatorial Nations, was an ideal to be worshipped when not needed and debased when crucial.”²⁰
- The court, per Chief Judge Breitel, upheld the Rockefeller drug laws against an Eighth Amendment challenge.²¹
- In a decision that pitted the principles of private property rights and legislative deference against each other, the court (per the chief judge) ruled against the owners of the Grand Central Terminal who sought to overturn the city’s landmark preservation regulation prohibiting construction of an office building on top of the terminal.²²
- Finally, the court upheld a constitutional challenge to New York’s death penalty. Writing for the dissent that contended that the legislature had acted within the constitutional bounds, Chief Judge Breitel included this revealing footnote in his opinion:

Speaking for myself alone among the dissenters I find capital punishment repulsive, unproven to be an effective deterrent (of which the [instant] case itself is illustrative), unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values as to what are mitigating circumstances, and the brutalizing of all those who participate directly

or indirectly in its infliction.”²³

While those who have sought to capsule Charles Breitel’s judicial philosophy often fasten on the “conservative” label, the foregoing examples demonstrate that no such pat generalization can validly be made. And, in language as relevant as today’s headlines, the Judge himself dismissed such attempts as mischievous:

It is customary these days, to a tiresome degree, and most often fruitlessly, to classify judges categorically by conclusory and all too-encompassing labels: conservative-liberal-activist-restrained, pro-this-anti-that and the like. The stretching for facile labels to achieve the nomenclature but not necessarily the substance of analysis is an obvious temptation. Often a flight from thinking, it results inevitably in oversimplification and superficiality. Most judges, indeed most people, do not classify so simply. Certainly, that should be true of persons engaged in an analytical profession in a very complicated world, and all the more of those who serve in judicial roles.²⁴

Pursuant to the inflexible statutory command, the judge’s 44 years of active public service ended on December 20, 1978. For 13 years thereafter, he resigned himself to a far quieter, yet still productive, phase of his life, practicing law at Proskauer Rose, serving as an expert witness, writing, lecturing, and enjoying time with his family. Upon his death on December 1, 1991, eulogists extolled his manifold contributions to law and society; since then, it is fair to say that his stature among the great jurists of the 20th century places him at or near the top.

While these professional encomia would have pleased the judge, they would not have come as a



Marrying a couple, as an Appellate Division justice

complete shock. What would have surprised him was the warmth and sincerity of the expressions of affection he engendered from those who knew him best. After all, this was a man who had declared at his retirement: “I know that I am not an easy man to live

with. . . . I have to struggle with my character. . . . I have a temper that sometimes rages uncontrolled.”²⁵ Nevertheless, his colleagues, among many others, registered firm dissents and spoke warmly and publicly about his depth of character and generosity of spirit. No one said it better than Joseph W. Bellacosa, commenting on his beloved mentor:

I would like to share with your readers, our professional colleagues, a personal characteristic not well known about Judge Breitel—his sage sensitivity. He shielded his compassionate and caring side from the world, so few were privileged to see behind his stern exterior, hardened by the Depression, by the demanding responsibilities of high public service over five decades and by the jurisprudence of realism which he espoused. . . . The Official New York Reports are a permanent testament to his greatness as a judge. My grateful heart, however, will correspondingly bear witness for all time to the memory of a sweet and good person.²⁶

Progeny

On Apr. 9, 1927, Judge Breitel married Jeanne Hollander, with whom he had three children, Eleanor (1938-), Vivian (1945-), and Sharon, who died in infancy. Judge Breitel passed away in 1991, and his wife died four years later. ♪

SOURCES CONSULTED

- Beeching, *Charles D. Breitel—Self-Conscious Jurisprudence*, 29 Syracuse L. Rev. 1, 6 (1978).
- Bellacosa, *A Remembrance: Chief Judge Breitel*, N.Y.L.J., Dec. 12, 1991, at 2.
- Berger and Zundel, *Reflections of Two Clerks*, New York State Court of Appeals.
- Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 Alb. L. Rev. 339, 345 (1996).
- Breitel, *The Lawyer as Fiduciary*, Address to the Am. Bar Assn. (May 31, 1975), in 31 Bus. Law. 3, 1975-76, at 3.
- Breitel, *Criminal Law and Equal Justice*, Sixth Annual William H. Leary Lecture (Apr. 19, 1966), in 1966 Utah L. Rev. 1, 11 (1966).
- Breitel, *The Lawmakers*, 22nd Annual Benjamin N. Cardozo Lecture Before the Association of the Bar of the City of New York (Mar. 23, 1965), in 65 Colum. L. Rev. 749, 777 (1965).
- Breitel, *A Tribute to Judge Matthew J. Jasen*, 35 Buffalo Law Rev. 5 (1986).
- Conversations with Eleanor Alter, Vivian Breitel, Richard Zabel, and former colleagues of Judge Breitel.
- Fried, *Chief Judge Breitel and Judicial Legislation*, 45 Brook. L. Rev. 231 (1979).
- Mayo, *Charles D. Breitel—Judging in the Grand Style*, 47 Fordham L. Rev. 5 (1978).
- McLaughlin, *Chief Judge Charles D. Breitel*, 47 Fordham L. Rev. 1 (1978); Wachtler, *supra*.
- Owen Philip, Cynthia, Paul Njelski, *Where Do Judges Come From?* (Institute of Judicial Administration, 1999).
- Pace, *Charles D. Breitel, Chief Appeals Judge in the 1970's*, N.Y. Times, Dec. 3, 1991, at B12.
- Remarks of Chief Judge Charles D. Breitel, Ceremony Marking Retirement of Chief Judge Charles D. Breitel (Dec. 20, 1978), in 45 N.Y.2d vii, xi.
- Remarks of Chief Judge Sol Wachtler, Memorial for Former Chief Judge Charles D. Breitel (Jan. 7, 1992), in 78 N.Y.2d vii, vii.
- Remarks of Judge Matthew J. Jasen, Ceremony Marking Retirement of Chief Judge Charles D. Breitel (Dec. 20, 1978), in 45 N.Y.2d vii.
- There Shall Be a Court of Appeals, 150th Anniversary of the Court of Appeals of the State of New York*, (1997) (booklet on file with the Court).

PUBLISHED WRITINGS

- A Tribute to Judge Matthew J. Jasen*, 35 Buff. L. Rev. 1 (1986).
- Tribute to Shirley M. Hufstedler*, 1982 Ann. Surv. Am. L. xxiii (1982).
- A Tribute to Adolf Homburger*, 1 Pace L. Rev. 7 (1980).
- Foreword to *Historic Courthouses of New York State*, by Herbert Alan Johnson and Ralph K. Andrist, Columbia University Press, New York (1977).
- Adrian P. Burke*, 48 St. John's L. Rev. 435 (1974).
- Chief Judge Stanley H. Fuld*, 25 Syracuse L. Rev. 1 (1974).
- Llewellyn: Realist and Rationalist*, 18 Rutgers L. Rev. 745 (1964).
- Controls in Criminal Law Enforcement*, Speech at the Third Dedicatory Conference on Criminal Law (Jan. 1960), in 27 U. Chi. L. Rev. 427 (1960); Breitel, *supra* 7; Breitel, *supra* 4.
- The Quandary in Litigation*, Earl F. Nelson Memorial Lecture (Mar. 4, 1960), in 25 Mo. L. Rev. 225 (1960).
- A Commentary on the Legislative Process*, 1, Syracuse L. Rev. 59 (1949-50).

ENDNOTES

1. Judge Charles Breitel was associate justice of the Appellate Division, First Department.
2. Remarks of Chief Judge Charles D. Breitel, Ceremony Marking Retirement of Chief Judge Charles D. Breitel (Dec. 20, 1978), in 45 N.Y.2d vii, xi.
3. *Id.* at ix.
4. *Penn Cent. Transp. Co. v City of New York*, 42 N.Y.2d 324, 331 (1976).
5. The author is most grateful to Eleanor Alter and Vivian Breitel, the daughters of Judge Breitel, who were the sources for most of the vignettes from the nonpublic life of their father. In addition, Michael Scheinkamp of Davis Polk and Wardwell provided invaluable research services in the preparation of this biography.
6. As he later revealed, his “ambition was to become a corporate or a banking lawyer. [But] I got out of law school in 1932. That was the end of that ambition.” Charles D. Breitel, *The Lawyer as Fiduciary*, Address to the Am. Bar Assn. (May 31, 1975), in 31 Bus. Law 3, 1975-76, at 3.
7. Charles T. Beeching Jr., *Charles D. Breitel—Self-Conscious Jurisprudence*, 29 Syracuse L. Rev. 1, 6 (1978).
8. Charles D. Breitel, *Criminal Law and Equal Justice*, Sixth Annual William H. Leary Lecture (Apr. 19, 1966), in 1966 Utah L. Rev. 1, 11 (1966).
9. His most celebrated iteration of this philosophy may be found in the concluding sentence of his 1965 Benjamin N. Cardozo Lecture: “The power of the courts is great indeed, but it is not a power to be confused with evangelic illusions of legislative or political primacy. If this is true, then self-restraint by the courts in lawmaking must be their greatest contribution to the democratic society.” Charles D. Breitel, *The Lawmakers*, 22d Annual Benjamin N. Cardozo Lecture Before the Association of the Bar of the City of New York (Mar. 23, 1965), in 65 Colum. L. Rev. 749, 777 (1965). Judge Breitel was also a prolific writer. For other examples of his published work, see Charles D. Breitel, *Adrian P. Burke*, 48 St. John’s L. Rev. 435 (1974); Charles D. Breitel, *Chief Judge Stanley H. Fuld*, 25 Syracuse L. Rev. 1 (1974); Charles D. Breitel, *A Commentary on the Legislative Process*, 1. Syracuse L. Rev. 59 (1949-50); Charles D. Breitel, *Controls in Criminal Law Enforcement, Speech at the Third Dedicatory Conference on Criminal Law* (Jan. 1960), in 27 U. Chi. L. Rev. 427 (1960); Breitel, *supra* 7; Breitel, *supra* 4; Charles D. Breitel, *Llewellyn: Realist and Rationalist*, 18 Rutgers L. Rev. 745 (1964); Charles D. Breitel, *The Quandary in Litigation*, Earl F. Nelson Memorial Lecture (Mar. 4, 1960), in 25 Mo. L. Rev. 225 (1960); Charles D. Breitel, *A Tribute to Judge Matthew J. Jasen*, 35 Buff. L. Rev. 1 (1986); Charles D. Breitel, *A Tribute to Adolf Homburger*, 1 Pace L. Rev. 7 (1980); Charles D. Breitel, *Tribute to Shirley M. Hufstедler*, 1982 Ann. Surv. Am. L. xxiii (1982).
10. Eric Pace, *Charles D. Breitel, Chief Appeals Judge in the 1970’s*, N.Y. Times, Dec. 3, 1991, at B12.
11. Eleanor did, in fact, produce two grandsons to give the judge some male company: Richard Zabel (who served as an assistant United States attorney and is now a partner at Akin, Gump Strauss, Hauer & Feld); and David Zabel, who is the executive producer of the long-running television show “E.R.”
12. Of course, there were exceptions. Notably, Judge Breitel authored the majority decision in *Rockwell v Morris*, 211 N.Y.S.2d 25 (App. Div. 1961). Holding that New York City’s denial of a park permit to the prominent American Nazi George Rockwell amounted to a prior restraint, Judge Breitel warned: “So, the unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in ‘restricted’ areas; and one who asks that public

schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where persuasion is needed most." *Id.* at 35-36.

13. *Matter of Cromwell v Ferrier*, 19 N.Y.2d 263 (1967). In so doing, Judge Breitel convinced a majority of his new colleagues to overrule one of the court's own decisions, a case that specifically forbade such restrictions, *Matter of Mid-State Adv. Corp. v. Bond*, 274 N.Y. 82 (1937).
14. 31 N.Y.2d 194 (1972).
15. *Id.* at 200.
16. *Id.* at 211 (Burke, J., dissenting).
17. Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 Alb. L. Rev. 339, 345 (1996).
18. Cynthia Owen Philip, Paul Njelski, *Where Do Judges Come From?* (Institute of Judicial Administration, 1999).
19. Remarks of Chief Judge Sol Wachtler, Memorial for Former Chief Judge Charles D. Breitel (Jan. 7, 1992), in 78 N.Y.2d vii, vii. This short biography does not presume to offer a scholarly analysis of Judge Breitel's prodigious output during his service on the bench. For an in-depth treatment of various aspects of his work, authored by erudite commentators, see Beeching, *supra* 6; Bernard J. Fried, *Chief Judge Breitel and Judicial Legislation*, 45 Brook. L. Rev. 231 (1979); Remarks of Judge Matthew J. Jasen, Ceremony Marking Retirement of Chief Judge Charles D. Breitel (Dec. 20, 1978), in 45 N.Y.2d vii; Thomas W. Mayo, *Charles D. Breitel—Judging in the Grand Style*, 47 Fordham L. Rev. 5 (1978); Joseph M. McLaughlin, *Chief Judge Charles D. Breitel*, 47 Fordham L. Rev. 1 (1978); Wachtler, *supra*.
20. *Flushing Nat'l Bank v Mun. Assistance Corp.*, 40 N.Y.2d 731, 739 (1976).
21. *People v Broadie*, 37 N.Y.2d 100 (1975).
22. *Penn Cent. Transp. Co. v City of New York*, 42 N.Y.2d 324 (1977).
23. *People v Davis*, 43 N.Y.2d 17, 39 n.1 (1977) (Breitel, C.J., dissenting).
24. Charles D. Breitel, *A Tribute to Judge Matthew J. Jasen*, 35 Buffalo Law Rev. 5 (1986).
25. Breitel, *supra* n. 1, at x.
26. Joseph Bellacosa, *A Remembrance: Chief Judge Breitel*, N.Y.L.J., Dec. 12, 1991, at 2.



THE DAVID A. GARFINKEL ESSAY CONTEST WINNERS

2009

Dawar Jamal
THE NEW NETHERLAND LEGAL SYSTEM AND THE LAW OF 21ST CENTURY NEW YORK

2010

Leah Marie Reino
THE EVOLUTION OF JUSTICE ALONG THE ERIE CANAL

IN 2008, GLORIA AND BARRY GARFINKEL GENEROUSLY OFFERED TO SUPPORT a Society essay contest in memory of their son David, and The David A. Garfinkel Essay was launched that year. The Garfinkel Essay offers a competition open to community college students across New York State, inviting students to submit essays on topics about the State's legal history for prize money. In 2008, the topic was *The Courts and Human Right in New York: The Legacy of the Lemmon Slave Case*. In 2009, it was *The New Netherland Legal System and the Law of 21st Century New York*, and in 2010 our subject was *The Evolution of Justice Along the Erie Canal*. Our prize winners have all been terrific young men and women of great promise. We decided to target community college students as a group that we felt would especially benefit from the prize money. Many of these students are working to earn tuition money. In 2010, the Society offered \$1,500 to the contest winner and \$1,000 to the runner-up.

Our inaugural 2008 essay winner was **Elijah Fagan-Solis**. In 2008 Elijah was a senior at Hudson Valley Community College's Criminal Justice program. Since then, Elijah transferred with all his credits, and a *Phi Theta Kappa* Honor Society transfer scholarship, to the Sage College of Albany where he went on quite spectacularly to receive his four-year degree from Sage College, graduating with a B.S. in Law and Society, *magna cum laude*, and with program excellence. He was also inducted into the *Phi Kappa Phi* Honor Society. Elijah is now beginning the process of applying to law school. We keep in touch with Elijah who recently noted his experience and ongoing relationship with the Society as inspirational.

Dawar Jamal, our 2009 First Prize winner, is a student at Queensborough Community College. Dawar emigrated to New York with his family from India when he was four years old. He attended public school in New York City, graduating from Hillcrest High School. He has a deep attachment to the history of New York since this is where his family chose to call home when coming to the United States. Last we heard from Dawar, he was completing his degree in Business Administration at Queensborough (with a 3.6 GPA), and planned to transfer to Baruch College. Dawar expressed an interest in pursuing a career in law after graduating from Baruch.

Leah Marie Reino is our 2010 First Prize winner. She is a student at Genesee Community College (located in Batavia between Rochester and Buffalo). Leah entered Genesee at the age of 15 in the fall of 2007. She was home-schooled through middle school and then completed her high school requirements through Genesee in the spring of 2008. She is now working on her associate's degree with plans to graduate in the spring of 2011. She is currently studying Biotechnology but is now considering law as a possible career avenue.

"I've always been interested in the law," Leah said. "I'm now considering a career in law instead of science. (The essay project) has been very eye-opening." ~



LAW DAY 2009: TOP L-R: FRANCES MURRAY, ELIJAH FAGAN-SOLIS, COURTNEY MALEWICZ (2ND PRIZE), DAWAR JAMAL (1ST PRIZE), MARILYN MARCUS SEATED: CHIEF JUDGE JONATHAN LIPPMAN, CHIEF ADMINISTRATIVE JUDGE ANNE PFAU



LAW DAY 2010
CHIEF ADMINISTRATIVE JUDGE ANN PFAU & LEAH MARIE-REINO

THE NEW NETHERLAND LEGAL SYSTEM AND THE LAW OF 21ST CENTURY NEW YORK

DAWAR JAMAL



The United States takes great pride in its tradition of freedoms and rights, stemming back to the Bill of Rights, adopted shortly after our founding. New York State also has a proud tradition of rights granted to its citizens. New York City's continuing commitment to diversity has made for a history where tolerance and freedom were always important issues. Indeed, these rights and privileges have a history that precedes the beginning of the United States or even of New York as we know it. Even in the earliest days of Dutch rule when the colony of New Netherlands had its capital in the city of New Amsterdam on Manhattan Island, the issues of freedom and equality for women, religious tolerance, and the general rights of citizens to participate in their government were tested and debated. By tracing the developments in these major areas, we can learn to better appreciate our own freedoms and rights.

Women's rights did not become a major issue in the United States until the early twentieth century. For example, President Woodrow Wilson did not urge the Congress to pass the 19th Amendment, which granted the franchise to women, until 1920. But during the period of Dutch colonialism, women had a greater number of rights than those granted under English law. In New Netherlands, the level of women's education and literacy was high. Women were encouraged to be active members of the society, to work businesses and own property (A Legal History of New Netherland [hereinafter Legal History], 5). Their rights to hold property were upheld by laws governing both marriages and inheritances. Under the Roman-Dutch law that was in effect in Holland at this time, women had the right to choose between marrying a man, *manus* or *usus*. The *manus* marriage made a woman "subject to her husband," whereas a *usus* marriage allowed her to have "substantial legal independence from her husband" (Mays, 229). Women in *usus* marriages were able to own property in their own

names, and they were also allowed to inherit property from their husbands. As a result of the marriage and inheritance laws in the Dutch colonies, women often became business owners and played a substantial role in the society and its economy.

Women under English rule, on the other hand, did not have any rights. The English *femme couvert* law allowed only for marriages of the *manus* type mentioned above, so women were not able to own businesses or to inherit from their husbands. This, and similar laws, removed women from the economy of the society and prevented them from having any rights or autonomy (Mays, 295). This system held true in English-governed Long Island, so at the same time as women in New Amsterdam could do just about everything except hold public office, women in Long Island could not (Legal History, 5-6). The differences in the rights granted to women caused tension when the English took over New Amsterdam from the Dutch. The English did say that they would uphold the rights of women business owners (Mays, 230). However, eventually the English laws did come into play. Ironically, the Dutch laws more closely mirror today's laws concerning the rights of women than the English laws that formed the basis of the New York and United States Constitutions.

Religious freedom was also a cornerstone of Dutch law. The Netherlands was known worldwide for its tolerance: "According to Dutch law, you could not be harassed because of your religious beliefs" (Shorto, 9). However, the Dutch governor Pieter Stuyvesant was one of those Dutch who did not believe in religious freedom or tolerance. Since only the Dutch Reformed Church, a Protestant church, was officially allowed in New Netherlands, Stuyvesant persecuted anyone who tried to practice a different religion. Although his superiors in the Netherlands often overruled him, Stuyvesant wanted to make sure only the Reform religion was practiced (Legal



History, 17-18). As a result, early on, citizens of New Netherlands did not experience the religious freedom so common back in Holland.

Stuyvesant's first major battle came with a group of Jews who landed in New Amsterdam from Brazil and whom he tried (unsuccessfully) to force out (Shorto, 9). However, his biggest fight was with many English immigrants, especially Lutherans and Quakers, whose practice of Christianity he attempted to ban. These actions led to the writing of the all-important Flushing Remonstrance (Legal History, 18-19).

The Flushing Remonstrance was an open letter addressed to Pieter Stuyvesant, written and signed in Vissingen, an area which is now known as Flushing, Queens. The Remonstrance called upon "the law of love, peace and liberty" and stated that its authors "desire . . . not to judge least we be judged, neither to condemn least we be condemned, but rather let every man stand or fall to his own Master." The open-minded tolerance of the document was extraordinary, asking Stuyvesant to allow the free public and private practice of any religion. Although these principles did defend English colonists living under Dutch rule, the philosophy behind the Remonstrance was definitely Dutch in nature, calling upon the ideals recognized in the Netherlands, and certainly not held up in Britain, where religious intolerance was helping to create the massive colonization of North America (Shorto, 10). As a result, the Dutch back in Europe sided with the writers of the Remonstrance and against Stuyvesant, forcing him to take up a formal policy of religious tolerance in New Netherlands. Many believe that this episode was a major inspiration both for Article 1, Section 3 of the New York Constitution, which guarantees religious freedom, and of course, for the First Amendment to the United States Constitution, guaranteeing the free exercise of, and prohibiting the establishment of, any religion (Legal History, 10).

In addition to these important freedoms, the Dutch colony of New Netherlands, and New Amsterdam in particular, played a major role in developing the representative government structure still in practice in New York and in the United States. At first, although Holland was a pioneer in representative democracy back in Europe, they gave

"complete administrative and judicial power in New Netherlands" to the Dutch West India Company (Legal History, 3). To enforce this, the Company would call together councils based on which ships were in port at that time, following the principle of the Dutch "collective decision making process" even if there was no actual representation of the citizens of New Amsterdam (Legal History, 4). As the colony grew, these councils alone could not handle all the legal and judicial issues that arose in the governing of a city and a territory. So, in 1626, Pieter Minuit was appointed Civil Director. Decisions would still have to be approved by the Company back in the Netherlands, but this new Civil Director governed the day-to-day legislative and judicial business in the colony. Minuit convened a civil council of five men who also served as judges. This body can be viewed as the oldest ancestor of the current New York City Council (Legal History, 6-7).

For the next few decades, the Company struggled with how to continue to enforce the absolute power it had been granted despite growing populations of non-Company citizens and judges convinced of their independent power. The position of *Scout Fiscal* was particularly difficult for the Company and the Dutch, because the Company created the position as an independent agent to uphold the law even over the Council or the Director (Legal History, 1011). Civil Director William Kieft tried to reduce both the size and the power of the Council, in an effort to return to the Company more control over the laws of New Amsterdam, but Native American attacks forced him to actually expand the Council to eight. These "Eight Men" ended up turning against Kieft's authoritarian nature and encouraged the Dutch to replace him as Director and to thus give this Council greater power in the future (Legal History, 12).

Stuyvesant continued this Council, increasing its size to nine, and granting it authority over a broad range of issues both legislative and judicial in nature. The government of the Netherlands and the Dutch West India Company faced continual conflict with this Council. However, a compromise ensued which folded the Council into a "burgher government," providing for local power but allowing for control on larger issues back in Holland (Legal History, 14).

The English, of course, tried to undo the power of this new burgher government which was loyal neither to the King nor to Parliament. But even the Duke of York could not undo the power Stuyvesant assisted the Council to gain. As a result, the English made a change in the names, a move that was “merely altering the burgomaster into a mayor” in terms of the title (Daly, 26). This was the beginning of the proud tradition of the Mayor of New York City. Through this patchwork history, the Dutch and the English succeeded in establishing a City Council, a body that was not autonomous but also not forced to uphold the rules of the Company, and the position of Mayor, a leader who was also independent without being a rogue.

Thus, certain rights and privileges first recognized or developed in the Dutch colonial period survive

to twenty-first century New York City. The rights of women to own property and to freely practice one’s religion were recognized by the Dutch and actually resisted by English colonists as well as early Americans after the Revolution. New York City, and perhaps the United States, owes these ideals to the laws of the Dutch legal period. Also, the struggle to make a representative, democratic government with an executive branch (the mayor) and a legislative branch (the Council) began during this Dutch period. Although the specifics of these positions in those days did not survive, the spirit of representative democracy has blossomed and continues to flourish in New York City to this day. 🌿

WORKS CITED

Daly, Charles Patrick. *Historical Sketch of the Judicial Tribunals of New York from 1623 to*
New York: John W. Amerman, 1855.

Mays, Dorothy A., *Women in Early America; Struggle, Survival, and Freedom in a New World*.
Santa Barbara, CA: ABC-CLIO, 2004.

Historical Society of the Courts of the State of New York, The. *A Legal History of New Netherland*. <<http://www.courts.state.ny.us/history/essay/Illustrated%20Essay%20with%20edits%20and%20endnotes.pdf>>.

Shorto, Russell. “The Importance of Flushing.” *New York Archives* (Winter 2008): 8-11. *The Historical Society of the Courts of the State of New York*. <<http://www.courts.state.ny.us/history/essay/Flushing%20Remonstrance%20Shorto%20w%20credit.pdf>>.

“Remonstrance of the Inhabitants of the Town of Flushing to Governor Stuyvesant, December 27, 1657.” *Flushing Monthly Meeting of the Religious Society of Friends (Quakers)*. <<http://www.nyym.org/flushing/remons.html>>.



MORE THAN A CANAL: ERIE'S ROLE IN CHANGING THE LAW

LEAH MARIE REINO



The year is 1817. Construction has just begun on the greatest project New York State has ever undertaken: "Clinton's Ditch" or the Erie Canal. The sound of shovels, men shouting and swearing, horses neighing and working resounds through the valley. Most of the men are lower-class immigrants struggling to make their way in the young nation, all of them working and sweating alongside each other.

The Erie Canal was one of the greatest undertakings in the history of the young nation, something that would be remembered long after its completion. It linked the Great Lakes to the Atlantic Ocean, and transported not only goods but also ideas, information and culture. It was the "Gateway to the West" that permitted pioneers to venture forth and allowed farmers to build homesteads farther and farther away from the densely populated eastern coast. Grains and farm products that would have had to be taken by trains could now be transported through the Great Lakes into the Erie Canal and out to New York and the Atlantic on paddleboats and ships in only a fraction of the time.

But one very important role, if not the most, that the Erie Canal played in America's history was how it irrevocably changed the laws that governed the state and ultimately the nation.

EMINENT DOMAIN

In order for the Erie Canal to be built, many laws previously put in place by the founding fathers had to be re-examined, changed, even eradicated. One issue that quickly arose when the canal was first being constructed was the issue of eminent domain--the state's right to take private property from individuals for the greater good of the population of the state.

The changes to the state's view of "private property" and individual holdings dramatically changed in a

comparatively short span of time, and in many ways. New laws were formed, among them the condemnation theory. The creation of this important concept allowed private companies, which had been contracted by the state to build the canal, to legally take private property to continue construction. The state expanded further on this idea, broadening the meaning of terms such as "just compensation" and "public use and domain," as well as restricting an individual's right to sue for lost property.

One case that illustrates the changes that occurred during this period is *Jerome v. Ross*, which came before the Chancery Court of New York very shortly after construction of the canal had commenced. The defendant, a private construction company hired by the state, took stones and rocks from the plaintiff's property to use in the construction of the canal. Although the plaintiff sought an injunction, Chancellor James Kent found that the land owner was eligible to receive only monetary compensation. Furthermore, he ruled that since the defendant was under the jurisdiction of the state, the state was completely justified to enter and take what was needed from the plaintiff's property. The plaintiff was denied any compensation and the injunction he sought.

Going back to the Constitution of the United States, created only thirty years before, we see a clear contradiction. A primary focus of this document was the protection of private property: "... nor shall any State deprive any person of life, liberty, or property, without due process of law." The interpretation of "due process of law" was altered dramatically by the Erie Canal court cases, meaning that, should they need to, states could seize a person's property with little or no time spent in court. The changes that occurred during the Erie Canal era were among the first of a long series of modifications that have dramatically altered the way we interpret the Constitution today.



Chancellor Kent, backed by New York State statutes, reasoned that, since the individual in question had suffered no damage to himself or his property, the good that the canal would do to the private citizen far outweighed any minimal injury the plaintiff might have sustained. He realized that a balance must be struck between private interest and property rights and works in the public interest such as the Erie Canal. While the plaintiff would leave the court without compensation, there was no damage actually done to him or to the canal. Chancellor Kent reasoned that the dam constructed from the stones would benefit hundreds, if not thousands of people, and thus he concluded that he would deny the injunction the plaintiff sought. His reasoning illustrates how lawmakers and judges of the time were in a groundbreaking new era, in which every decision they made had a vital impact on the future of law in our state.

Another example of the erosion of property rights of individuals during the construction of the Erie Canal is detailed in two cases that occurred only several years apart. They both dealt with issues regarding the term “public use.” In the first case, it was determined that land condemned by the state, if it were no longer useful to the state for the purpose it had been appropriated, would then be returned to its original owner. However, the second case’s ruling was completely different. The court ruled that land, once taken by the state through eminent domain, would be held regardless of whether it was still serving the purpose for which it had been taken.

These two cases highlight, yet again, the shifting landscape of law from 1817 on, as new laws were created and original laws were dramatically changed, if not in letter then in interpretation. The Erie Canal was something that the courts and government of New York were bound and determined was going to be built, even if it meant sacrificing private interests at the time. Just a few years separated the two cases that concerned the meaning of “public use,” but, in that short period of time, the views of the courts had changed completely. They had decided that should something be for the good of all the people, then sacrifices would have to be made.

TORT LAW

Another area of law that was monumentally changed by the Erie Canal legal issues was tort law. In this instance, in contradiction to the eminent domain cases, the courts did not change to a wider interpretation of the pre-existing laws and terms. On the contrary, they narrowed their definitions, severely restricting the compensation an individual who had been hurt by the canal could seek.

One of the best examples of the new changes in tort law was *Fish vs. Dodge*. The government had hired a canal commissioner, who in turn hired an independent contractor, the defendant, who was supposed to repair a section of the canal. When he failed to do so, the plaintiff suffered considerable property damage—one of his horses died, and others were severely injured.

The court’s decision was almost extreme. They stated that the commissioner wasn’t liable for the contractor’s actions, which was a fairly well established precedent at the time. However, they argued that the contractor was also blameless in this instance. The contractor was a private entity, not a public servant, and could only be held for breach of contract by the state, not by the plaintiff. The plaintiff was thus left without compensation, and the commissioner and the contractor were both unscathed.

This, perhaps more than the eminent domain laws that emerged at the same time, shows how far the state was willing to go to protect the interests of the canal. They denied a man whose property was directly hurt by the canal any relief whatsoever, and also completely blocked action against the responsible parties.

However, that being said, such a radical position was necessary in order for the canal to be constructed without constant delay. It can be said with certainty that many cases similar to *Fish vs. Dodge* were never even brought to trial. If the guilty commissioner and contractors were constantly being brought to justice, the construction of the canal would have been laborious and slow, and the court system would been flooded with these types of cases. The ruling of *Fish vs. Dodge* discouraged countless others with similar cases from bringing their issues to court, and the

construction of the canal and the execution of justice were expedited. So we can see that it was certainly advantageous, and perhaps critical, that the interpretation of tort law be drastically changed in order to facilitate the smooth and swift construction of this great public work.

A NEW TWIST ON TORT LAW

Fast forwarding the clock to the year 2010, we again face a similar issue as to the interpretation of tort law. This time, however, the interpretation does not need to be narrowed, but rather broadened. This new threat that the American public now faces often slips through loopholes in traditional tort law, and the culprits are nefariously hard to locate, let alone hold responsible. What are these new monstrosities? Cyber criminals. Online fraud, "phishing," and identity theft, which jumped in incidence by 66% from 2003 to 2004, are steadily becoming more and more of an issue that courts are struggling to handle. A drastic change must take place as to how to handle the thorny issues of cyber torts, and the path is long and treacherous.

The author of "Civil Liability On the Internet" suggests pursuing a negligence claim to regain lost property from Internet Service Providers (ISPs). Demanding that service providers keep a closer watch on the websites that they host in their domains is an important step in catching online criminals. The authors also suggest aggressively pursuing Duty of Care and Standard of Care. This could be, for example, a case of a credit card company, entrusted with a plaintiff's personal information, "allowing" confidential data to be stolen. In other words, there must be a certain standard that the company promises to uphold, and a clear failing of the company to uphold that standard.

One of the most outstanding problems is that in order to prove negligence, an actual injury must have occurred beyond that of economic harm. No matter how much money was lost by the plaintiff, they must show personal or property injury. This is often impossible in the case of online fraud. However, this problem can be overcome by trying to prove a breach of contract by the ISP instead.

But yet another barrier exists in this direction. Once a plaintiff agrees to a number of contracts by clicking the "I Agree" button on a webpage, they have probably forsaken any ability to pursue a breach of contract claim. It is usually impossible to use an ISP without agreeing to these kind of online contracts.

We can see now that it is extremely difficult for a plaintiff who lost a significant amount of money from identity theft to receive any sort of compensation. So do a brand new set of laws need to be designed to deal with the menace of cybercrime? I would argue yes. Expanding existing laws would be treacherous and difficult to do without compromising traditional tort law cases. Creating a brand new set of laws and regulation for those cases which can be classified as "online" might be difficult, but whether we want it or not, our world is now entering a digital age. More and more people are using the Internet as a tool to do everything from Christmas shopping to car rental to banking and, as a result, cybercrime is becoming a major threat. With more and more people online, identity theft is only going to become more and more of a problem, and we must attack it with as much vehemence as those cases which occur in the physical world.

Again examining how law has evolved from the time of the Erie Canal to modern day, we see that the rights of private citizens who have been wronged by the state or a state agency have changed dramatically. A court exists to handle these specific cases, namely, the New York State Court of Claims. The New York State Thruway Authority, the City University of New York, and the Power Authority of the State of New York (for appropriations claims only) are all under its jurisdiction.

Eminent domain law has changed since the time of the Erie Canal, as shown in a particular case from the New York State Court of Claims. In *Universal vs. The State of New York*, the claimant, Universal Instruments, owned a considerable amount of land that was damaged economically by the appropriation of .77 acres by the state. The taking of the claimant's land cut off any access to the property and its industrial facilities from surrounding streets and roads. Because of this, the claimant had to construct a semi-circular driveway in order to access its fac-

tory. Universal sought economic compensation for this inconvenience and harm to the value of their industrial property. Total damages were estimated at \$1,627,337, and the claimant was awarded \$504,155 in temporary easements and fees.

Comparing this to the cases during the Erie Canal time, such as *Jerome v. Ross*, we can see that eminent domain law has changed. While nothing was awarded to the plaintiff in the earlier cases, in *Universal v. State of New York*, there was a settlement that did include payment to the injured party. Even though the state was fully justified under eminent domain, it acknowledged that it had damaged the economic status of the claimant's property, and consequently provided compensation. Still, the principle of eminent domain remains the same, in that, should a public work by the state benefit more people than it harms, the state has every right to take an individual's property for the construction of said public work.

Another example of the evolution of eminent domain law is the case of the Atlantic Yards. The defendant, the Empire State Development Corporation (ESDC), stated that it intended to take a dilapidated part of Brooklyn and turn it into a luxury living area, complete with new housing, an expanded rail yard, and a sports arena. In its brief, the defendant stated that the building project would "... eradicate blight at a central, transit-accessible location in Brooklyn and redevelop the area with the construction of civic facilities ..." (an undertaking henceforth referred to as the Project).

However, the plaintiff argues that the Project proposed by the ESDC is unconstitutional and goes against all precedent of eminent domain law in New York State. In the public use clause of the New York State Constitution, it is stated that "private property shall not be taken for public use without just compensation." The appellants argue that one must read the term "public use" strictly--that is, something is public use if all can access it, without fee or requirement on the part of those who wish to access it. The new housing would charge rent, and the new arena would charge admission, and therefore be selective in who could make use of them. This, the appellant argues, goes against the New York State public use eminent domain laws. The appellant also cites a

second instance of unconstitutional use of eminent domain. According to Article XVIII, section 6 of the New York State Constitution, any state-funded housing project whose objective is to remove blight "must be restricted to displaced low-income residents."

Reviewing this case, however, I find that the appellants are more at fault than the defendants. The two arguments that the appellants rely on are heavily flawed, as the respondent's brief states. First and foremost, the term "public use" has been changed and modified throughout the years, but the interpretation that the appellants are using was not even applicable in the Erie Canal era. There were taxes to use the Erie Canal; therefore, according to the appellant's brief it was not "public use." However, eminent domain was still employed for the acquisition of the property for the Canal. No precedent exists for their interpretation, and indeed, all precedent states to the contrary.

Secondly, while the appellant did quote Article XVIII, Section 6 correctly, they did not quote it nor apply it in its entirety. The entire section from which they were quoting hinges on the fact that a project eliminating blight would be solely a low-income housing project. The Project is not solely a low-income housing project; rather, it is merely a piece of a larger whole. Thus, the appellant's arguments are invalid.

I can conclude from the Atlantic Yards cases that eminent domain has changed over the years, but the core concepts realized at the time of the Erie Canal are still in place today. They still guide the hand of the court system and the laws of New York State.

The Erie Canal was the anvil upon which the hammer of the courts changed the shape of the laws of New York State and the nation forever, setting precedents that still stand in our court systems today. The Erie Canal had to be constructed, and would be constructed. Laws were created, destroyed and bent in the forge of the controversy that swirled through our state, laws that are still upholding justice in our state today. Through the sweat of the immigrant and the deliberation of the courts, we created a shining example, proud and more prosperous than ever, that would march through much of the 19th century as the envy and wonder of all. 🌿

WORKS CITED

Green, Leah, *The Erie Canal and the American Imagination: The Erie Canal's Effect on American Legal Development, 1817-1869*, *Commentary* 56 Ala. L. Rev. 1167 (2005).

Carle, Jay and Perritt, Henry. *Civil Liability on the Internet*. GP Solo Magazine, A.B.A. (2006). <<http://www.abanet.org/genpractice/magazine/2006/janfeb/civilliability.html>>

Frequently Asked Questions, NYS Ct. Cl. (2006). <<http://www.nyscourtofclaims.state.ny.us/faq.shtml>>

Universal v. The State of New York, #2009-009-205, Claim No. 100363. NYS Ct. Cl. (2009). <<http://vertumnus.courts.state.ny.us/claims/search/display.html?terms'&url'/claims.html/2009-009-205.html>>

Emery Celli Brinckerhoff & Abady LLP, South Brooklyn Legal Services Inc, *Brief for Petitioners Appellants*. July 31st, 2009. Brief. Appellate Division Second Department Docket No. 2008-07064.

Philip E. Karmel, J. Kevin Healy, L. Margaret Barry, Ronald Joshua Bliss, *Revised Brief For Respondent*. Court of Appeals of State of New York, September 8th, 2009. Brief. Appellate Division Second Department Docket No. 2008-07064.



A look back

The Society has had an exciting round of events since our last publication. I hope many of you were able to participate.

Our website now offers videocasts of several of these programs.

Please take a moment to look back with us on past events.

Marilyn Marcus, Executive Director



CEREMONY AND RECEPTION HONORING SONIA SOTOMAYOR, JUSTICE OF THE U.S. SUPREME COURT *September 24, 2009 The New York County Courthouse Rotunda*

The Society was proud to sponsor this special evening presented by Chief Judge Jonathan Lippman and the Judges of the New York Court of Appeals. The evening honored one of New York's own legal luminaries upon her remarkable achievement of rising to the bench of the U.S. Supreme Court as the first Hispanic Justice. Governor David A. Paterson made a special presentation.



2009 STEPHEN R. KAYE MEMORIAL PROGRAM *November 13, 2009 The New York City Bar Before New York There Was New Netherland: Our Dutch Heritage 1609-2009*

The Society participated in the remarkable quadricentennial celebration of Dutch-American heritage that took place in New York City in the fall of 2009 by presenting its annual Stephen R. Kaye Memorial Program on New York State's Dutch legal heritage. The program featured a roundtable discussion with distinguished writers and scholars, including Russell Shorto, author of the best-selling book *The Island at the Center of the World*; Dr. Charles Gehring, noted director of the New Netherland Project at the New York State Library where the archives of the Dutch colony centered on Manhattan are being translated; and Jean Zimmerman, author of *The Women of the House: How a Colonial She-Merchant Built a Mansion, a Fortune, and a Dynasty*. The discussion was moderated by Former Chief Judge Judith S. Kaye and Hon. Albert M. Rosenblatt. The evening began with a welcome by NYS Chief Judge Jonathan Lippman. The Society of Daughters of Holland Dames arranged for a performance by the U.S. Merchant Academy's Fanfare Trumpets, and The Holland Society was a distinguished sponsor. There was also a reading by Henry G. Miller, Esq. of the 1657 Flushing Remonstrance, a plea for religious freedom. We are grateful for the support of Proskauer Rose LLP which helps make this annual program possible, honoring the memory of the firm's former partner and Trustee of the Society, Stephen R. Kaye.



2010 ANNUAL LECTURE *May 11, 2010 The New York City Bar*
Law, Justice, and the Holocaust: Lessons for the Courts Today

We were very privileged in the past spring of 2010 to present for our annual lecture an important program partnering with the United States Holocaust Memorial Museum, National Institute for Holocaust Education. The program was conceived by Chief Judge Jonathan Lippman who, along with Lauren Kanfer, Chief Judge Lippman's Assistant Deputy Counsel and our Trustee, worked closely with us to develop the program. The evening began with a film presentation offered by the Holocaust Museum, *The Nazi Rise to Power*, and remarks by William F. Meinecke, Jr., Historian, National Institute for Holocaust Education of the Holocaust Museum. Professor Meinecke revealed in chilling detail the gradual process by which the Nazi leadership, with the support of judges and lawyers, moved the nation from democracy to dictatorship, and the series of legal steps that left millions vulnerable to the racist and antisemitic ideology of the Nazi state. This was followed by a provocative discussion lead by Chief Judge Lippman, as moderator, with Professor Meinecke, John Barrett, Professor of Law, St. John's University, & Elizabeth S. Lenna Fellow, Robert H. Jackson Center, and the Society's President, Hon. Albert M. Rosenblatt. The panel engaged in a conversation on the vulnerabilities in our present-day legal system, emphasizing the vigilance that must always be exercised to maintain true justice in the system. The evening also included a stirring reading by Henry G. Miller of the December 17, 1985 remarks by Senior Associate Judge Matthew J. Jasen on his retirement from the Court of Appeals recounting how his service in the military impressed upon him the importance of the rule of law.



REVISITING THE 1970S COURT REFORMS: WHAT MADE IT HAPPEN THEN? WHAT ARE THE LESSONS FOR TODAY?

September 16, 2010 New York State Bar Association, Albany

In the fall of 2010, we hosted an event in partnership with the New York State Bar Association and its then current President and our Trustee, Stephen P. Younger, along with The Fund for Modern Courts. The program opened with an introduction by the Society's President, Hon. Albert M. Rosenblatt, and remarks by Chief Judge Jonathan Lippman, who stressed the need to continue the efforts to reform the courts that began in the 1970s. Stephen P. Younger moderated the panel: former Chief Administrative Judge Richard J. Bartlett, Marc Bloustein, who worked in the Office of Court Administration as counsel for many years, Michael A. Cardozo, Corporation Counsel, NYC Law Dept., who helped create the 1977 court reform amendments as counsel to the Vance Task Force, and Hon. John R. Dunne, a former State Senator who served as chairman of the Judiciary Committee. With their unique insights, the panel offered a fascinating discussion of the process of reforming the courts in the 1970s.



THE 2010 STEPHEN R. KAYE MEMORIAL PROGRAM

NOVEMBER 2, 2010 *THE NEW YORK CITY BAR*

ROBERT H. JACKSON: LAWYER, JUSTICE, NUREMBERGER...NEW YORKER

John Q. Barrett, Professor of Law, St. John's University, & Elizabeth S. Lenna Fellow, The Robert Jackson Center, renowned scholar of Robert H. Jackson, talked about Justice Jackson's strong New York roots in his career culminating as a Justice of the U.S. Supreme Court and Chief U.S. prosecutor of Nazi war criminals at the Nuremberg Trials. Henry G. Miller brought Jackson's words to life with his moving readings from Jackson's arguments. We once again thank Proskauer Rose LLP for underwriting the evening, honoring the memory of Stephen R. Kaye.



2009 & 2010 DAVID A. GARFINKEL ESSAY COMPETITION CELEBRATED AT THE NY COURT OF APPEALS ON LAW DAY

May 1, 2009, May 3, 2010

With the generous backing of Gloria and Barry Garfinkel, in memory of their son David, the Society offers an essay competition each year inviting community college students across the State to submit an essay on a selected topic of New

York legal history. The winning essays of 2009 and 2010 are presented in this publication. The winners, Dawar Jamal (2009), Queensborough Community College, and Leah Marie Reino (2010), Genesee Community College, each received a cash prize (as do second place winners), and are recognized at the Law Day ceremonies held at the New York Court of Appeals.



ORAL HISTORY PROJECT

Since history can be just as important when spoken as when written, we have embarked on an initiative to record the oral history of legal luminaries in this State. Each of these interviews has proved to be an intimate and informative exploration of our legal history by those who have lived it. To date, we have interviewed Judges Richard J. Bartlett, Joseph W. Bellacosa, Matthew J. Jasen, Milton Mollen, Albert M. Rosenblatt, Richard D. Simons, George Bundy Smith, and William Thompson, as well as Hazard Gillespie, Norman Goodman, and Michael McEneney.



GRANT TO BARD HIGH SCHOOL EARLY COLLEGE

As part of our mission to educate youth on the role of the courts and the rule of law, the Trustees of the Society approved a grant to Bard High School Early College in 2010. We sponsored a one-week workshop in September, 2010 on the theme of justice and the courts, involving all students from the 9th through 12th grades at two campuses (approximately 1,100 students). Students visited courthouses and met with judges and court staff to learn about the operation of the courts from the inside.

Part of the grant funded curriculum development, and the teachers developed units of study exploring the role of the courts in adjudicating various public policy issues, such as the institution of marriage and same sex-marriage. Our aim is to have students gain a better understanding of the role of the courts through this deliberative process. We are now exploring with Bard an expansion of the curriculum development process to create flexible curriculum that can be taught to at-risk students throughout the State, and at the middle school level.

The Historical Society of the Courts of the State of New York

FOUNDER

Judith S. Kaye

EXECUTIVE DIRECTOR

Marilyn Marcus
mamarcus@nycourts.gov

OFFICERS

Albert M. Rosenblatt
President

Roy L. Reardon
Executive Vice President

Henry M. Greenberg
Vice President

Frances Murray
Secretary

John J. Halloran, Jr.
Treasurer

A. Thomas Levin
Counsel

TRUSTEES

Helaine M. Barnett

Barbara A. Brinkley

Penelope D. Clute

Barry H. Garfinkel

Norman Goodman

Barry Kamins

Lauren B. Kanfer

Judith S. Kaye

Robert G. M. Keating

Henry J. Kennedy

A. Thomas Levin

Troy McKenzie

E. Leo Milonas

Michael B. Powers

Susan Phillips Read

John S. Siffert

Edward O. Spain

Stephen P. Younger

Ex Officio Trustee

Christine W. Ward
N.Y.S. Archivist

Trustees Emeritus

Richard J. Bartlett

Jonathan Lippman

Leon B. Polsky

Leon Silverman

M E M B E R S 2 0 1 1

GRANTS

The William Nelson Cromwell Foundation

Gloria and Barry H. Garfinkel Fund

Proskauer Rose LLP

BENEFACTOR

Allen & Overy LLP

Alston & Bird LLP

Baker & Hostetler LLP

Cravath Swaine & Moore LLP

Davis Polk & Wardwell LLP

Fitzpatrick Cella Harper Scinto

Gregory P. Joseph Law Offices LLC

Historical Records of the
NY County Clerk Inc.

Kelley Drye & Warren LLP

Kramer Dillof Livingston & Moore

Lankler Siffert & Wohl LLP

Patricia M. Hynes & Roy L. Reardon
Foundation

Simpson Thacher & Bartlett LLP

Skadden Arps Slate Meagher &
Flom LLP

Speiser Krause Nolan & Granito PC
Sullivan & Cromwell LLP

SUSTAINING

Berger & Webb LLP

Boies Schiller & Flexner LLP

Cahill Gordon & Reindel LLP

Vito A. Cannavo

Clark Gagliardi & Miller PC

Cleary Gottlieb Steen &
Hamilton LLP

Cohen & Gresser LLP

Con Edison Inc.

Cooley LLP

Debevoise & Plimpton LLP

Dewey & LeBoeuf LLP

DLA Piper LLP (US)

Philip R. Forlenza

Fried Frank Harris Shriver &
Jacobson LLP

Gibson Dunn & Crutcher LLP

Godosky & Gentile PC

John D. Gordan, III &

The Humanist Trust

Greenberg Traurig LLP

Hughes Hubbard & Reed LLP

The Jacob D. Fuchsberg Law Firm LLP

Kasowitz Benson Torres &
Friedman LLP

Charlotte & John J. Kenney

Kopff Nardelli & Dopf LLP

Kramer Levin Naftalis & Frankel LLP

Martin Clearwater & Bell LLP

Mayer Brown LLP

Morvillo Abramowitz Grand Iason

Anello Bohrer PC

Nixon Peabody LLP

Patterson Belknap Webb & Tyler LLP

Paul Weiss Rifkind Wharton &
Garrison LLP

Phillips Lytle LLP

Pillsbury Winthrop Shaw Pittman LLP

Ropes & Gray LLP

Shearman & Sterling LLP

Stroock & Stroock & Lavan LLP

Wachtell Lipton Rosen & Katz

Weil Gotshall & Manges LLP

Weitz & Luxenberg PC

Willkie Farr & Gallagher LLP



INSTITUTIONAL

John P. Coffey	Jones Day
Kantor Davidoff Wolfe MandelkerTwomey & Gallanty PC	LexisNexis
Sullivan Papain Block McGrath & Cannavo PC	Milbank Tweed Hadley & McCoy LLP
Bernstein Litowitz Berger & Grossmann LLP	Rivkin Radler LLP
Cadwalader Wickersham & Taft LLP	Vladeck Waldman Elias & Engelhard PC
Feinberg Rozen LLP	

PATRON

Andrew L. Weitz & Associates PC	Herrick Feinstein LLP	NYS Bar Association
Helaine M. Barnett	Robert M. Kaufman	NYS Trial Lawyers Association
Stuart J. Baskin	Kornstein Veisz Wexler & Pollard LLP	Leon B. Polsky
Barbara A. Brinkley	Andrew J. Levander	Michael B. Powers
Kenneth A. Caruso	Marc J. Goldstein Litigation &	Sonnenschein Nath & Rosenthal LLP
Collazo Florentino & Keil LLP	Arbitration	The Robert H. Jackson Center
Gair Gair Conason Steigman	Martin & Obermaier LLC	William C. Thompson
Mackauf Bloom & Rubinowitz	McAloon & Friedman PC	Warner Partners PC
John J. Halloran, Jr.		

CONTRIBUTING

Nina M. Beattie	Kanter Kallman	Joseph McLaughlin	Paul C. Saunders
David M. Brodsky	Foundation	E. Leo Milonas	Michael A. Simons
CourtAlert.Com Inc.	Sandra Katz	Milton Mollen	Pamela Sloan
Davis Wright	Judith S. Kaye	Susan Phillips Read	St. John's University
Termaine LLP	Henry J. Kennedy	Hillary Richard	School of Law
Myrna Felder	Alfreida B. Kenny	Albert M. Rosenblatt	Charles Stillman
Martin R. Gold	Alan Kornberg	Cynthia Rubin	Steven Wolfe
Margaret M. Hill	Robert MacCrate	Herbert Rubin	Stephen P. Younger

SPONSOR

Mitchell Auslander	Stewart F. Hancock, Jr.	Frederic S. Nathan	Jacqueline W. Silbermann
Philip J. Bergan	Jonathan Herman	Bernard Nussbaum	George Bundy Smith
Seymour Boyers	Barry Kamins	Alan J. Pierce	Edward O. Spain
Henry Christensen III	Edward S. Kornreich	Barbara Paul &	Olga Statz
John D. Feerick	Evan Krinick	Charles Raskob	Franklin Velie
Henry M. Greenberg	Howard B. Levi	Robinson Fund	Mark C. Zauderer
Stephen Greiner	Jay Mayesh	E. Joshua Rosenkranz	

FRIEND

Cardozo School of	Fordham Law School	Carol F. Lee	Paul D. Rhiengold
Law Library	Library	A. Thomas Levin	Arthur Savage
Richard & Suzanne	Ian Goldrich	Howard A. Levine	Harold Lee Schwab
Clary	William Hooks	Lou Lewis	Robert Smith
Penelope D. Clute	Mark Hughes	David McCraw	Walter Stahr
Michael A. Cooper	Michael J. Hutter	James Moore	Christine Ward
Norman Dachs	Henry L. King	Malvina Nathanson	Robert Weigel
Richard Dollinger	Greta Kolcon	Barbara I. Panepinto	Sarah Zgliniec
Ellen Fishman	James Lagios	Mary Redmond	



INDIVIDUAL

Bruce Abrams
Louis G. Adolfsen
Thomas J. Aquilino
John Q. Barrett
Richard Bartlett
Saul Benowitz
Marc Bloustein
Erik Jonathan Blum
Laurence G. Bodkin, Jr.
Dave Buckhout
Joseph P.J. Burke III
Anthony Cannataro
Linda Cantoni
Jennifer Capani
Anthony V. Cardona
David M. Cherubin
Ariel Chesler
Alan Childress
Carmen Beauchamp
Ciparick
Peter V. Coffey
Harold Cohen
Michael Marks Cohen
Charles Dewey Cole, Jr.
Jonathan A. Dachs
Susan J. Deith
Alan O. Dixler
Bernard D'Orazio
John R. Dunne
Pamela Ehrenkranz
Betty Weinberg Ellerin
Ted Ermansons
Linda Fairstein
Paul Finkelman
Sallie Fried
Antonio Galvao
James Garbus
Elizabeth Garry
Caryn S. Gartenberg
Charles Gehring
Frank Glaser
Victoria A. Graffeo

Frank A. Gulotta, Jr.
Claire Gutekunst
Luisa Hagemeyer
David B. Hamm
Conrad K. Harper
Christopher Hemphill
David V. Hines
John Hogrogian
Jean Huff
Timothy Hughes
Kenneth Kanfer
Lauren B. Kanfer
Andrew Kaplan
Bentley Kassal
Peter J. Kenny
Jean M. Kestel
Gary Klein
Daniel Kornstein
Abraham B. Kreiger
Craig A. Landy
Pierre Leval
Jonathan Lippman
Burton Lipshie
Gordon W. Lyon
Rachael MacVean
Robert G. Main, Jr.
Kenneth Manning
William H. Manz
Peter Marcus
George D. Marlow
George W. Martin
Andrea Masley
Christopher McCarthy
Robert McGreevy
John T. McManus
Robert Meade
Demetrios Melis
Muffie Meyer &
Ronald Blumer
Meredith R. Miller
Agatha Modugno
Christine Mooney

Michael Moran
Jeffrey B. Morris
Timothy Murphy
Frances Murray
Gregory Murray
Sue Nadel
Edgar J. Nathan
Dan Norber
Brian O'Connor
Steven Obus
Martha Olson
Lauren Cooke Opie
Michael Orticelle
Barry Ostrager
Patricia Pancoe
James Peltz
Erin M. Peradotto
Gregory Peterson
Ann Pfau
Mark Platt
Bettina Plevan
Mildred Randle
Aaron Richman
Nathan Robfogel
Susan S. Robfogel
Nicholas A. Robinson
James A. Rosetti
Ashley Rowe
Barbara Rowin
Marc Rowin
Israel Rubin
Jason Rubinstein
R. Anthony Rupp III
Jorge A. Sastoque
Beverly Schlesinger
Samuel Seymour
Charles E. Shields III
Kathleen Shurtleff
Andrew J. Simons
Peter B. Skelos
Andrea Smith
Merril Sobie

Sonia Sotumayor
Donald I. Strauber
Guy Miller Struve
Sharon Townsend
Michael Trainor
Lonn Trost
Barbara Underwood
Joseph VanNostrand
Maria T. Vullo
John J. Wadlin
Jack B. Weinstein
John Werner
Karen Wicka
David Wilkes
Frank Wohl
Catherine O'Hagan Wolfe
Michael R. Wolford
Milton Wolson
Jean Zimmerman

PUBLIC SERVICE / RETIREE / STUDENT

Joyce Adolfsen
Howard M. Aison
Richard T. Andrias
Daniel D. Angiolillo
Raquel Aracena
Steven Banks
Lawrence Baron
Joy Beane
Susan L. Beberfall
Aaron Ben-Merre
David Boehm
Elizabeth Candreva
Michael A. Cardozo
Zainab Chaudhry
Richard Clarino
Peter D. Coddington
Stuart Cohen
John P. Collins
Louise G. Conway
Alfred D. Cooper, Sr.



Raymond E. Cornelius
 Mary Lou Crowley
 Thomas Dickerson
 William Donnino
 William F. Eberle
 Manette Eddy
 Inna Erlikh
 Jeremy R. Feinberg
 Frank R. Fioramonti
 Rosemarie Fitzpatrick
 Steven Flanders
 Mark D. Fox
 Helen Freedman
 Phyllis Gangel-Jacob
 Sidney Gribetz
 Stephen Guarneri
 Jacqueline Guidarelli-Wu
 H. Glen Hall
 James W. Harbison, Jr.
 David Hasso
 Gerald V. Hayes
 Robyn Henzel
 Shirley A. Houck
 Theodore T. Jones, Jr.
 Bradley T. King
 Alice F. La Brie
 Judy A. Lauer
 Tiffany H. Lee
 Jack Lehnert
 Joan Levenson
 Rose Lowe
 Duncan S. MacAffer
 Charles Major
 Robert M. Mandelbaum
 Martin Marcus
 Lawrence K. Marks
 Angela M. Mazzairelli
 Marjorie S. McCoy
 Michael F. McEneney
 Michael McGourty
 Joseph D. McGuire
 Joseph Kevin McKay

Thomas E. Mercure
 Abel Montez
 Karla Moskowitz
 Eileen N. Nadelson
 Juanita Newton
 Jennifer A. O'Friel
 Robert W. Olivari
 James E. Pelzer
 Joseph Perry
 Karen Peters
 Eugene F. Pigott, Jr.
 Eugene A. Preudhomme
 Gail Prudenti
 Michael J. Pulizotto
 Jed S. Rakoff
 Thomas M. Ross
 Allen H. Saperstein
 Jack E. Schachner
 Arthur M. Schack
 Edward Shaughnessy
 Jonathan J. Silberman
 Richard D. Simons
 Richard E. Sise
 Stanley L. Sklar
 Gary Spivey
 Inez M. Tierney
 Jonah Triebwasser
 Matthew Urtz
 JoAnn Wahl
 Laura Weigley
 Alfred J. Weiner
 Jay Weiner
 William L. Weinstock
 Richard C. Wesley
 Ron YOUNKINS
 Phillip Yow
 Donald H. Zuckerman

IN MEMORIAM
 Charles L. Briant, Jr.
 Stephen R. Kaye
 Henry Murray
 Donald Powers

The Historical Society of the Courts of the State of New York

Yes, I want to help
I want to preserve and promote
the legal history of New York

NAME: _____

FIRM/ORGANIZATION: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

TELEPHONE: _____

E-MAIL ADDRESS: _____

BUSINESS/PROFESSIONAL POSITION _____

- ☐ **INDIVIDUAL**\$50
☐ **PUBLIC SERVICE / RETIREE / STUDENT**\$25
☐ **FRIEND**\$100
☐ **SPONSOR**\$250
☐ **CONTRIBUTING**\$500
☐ **PATRON**\$1000
☐ **OTHER**\$_____

PAYMENT METHOD:

- ☐ **CREDIT CARD:** Visit:
www.nycourts.gov/history

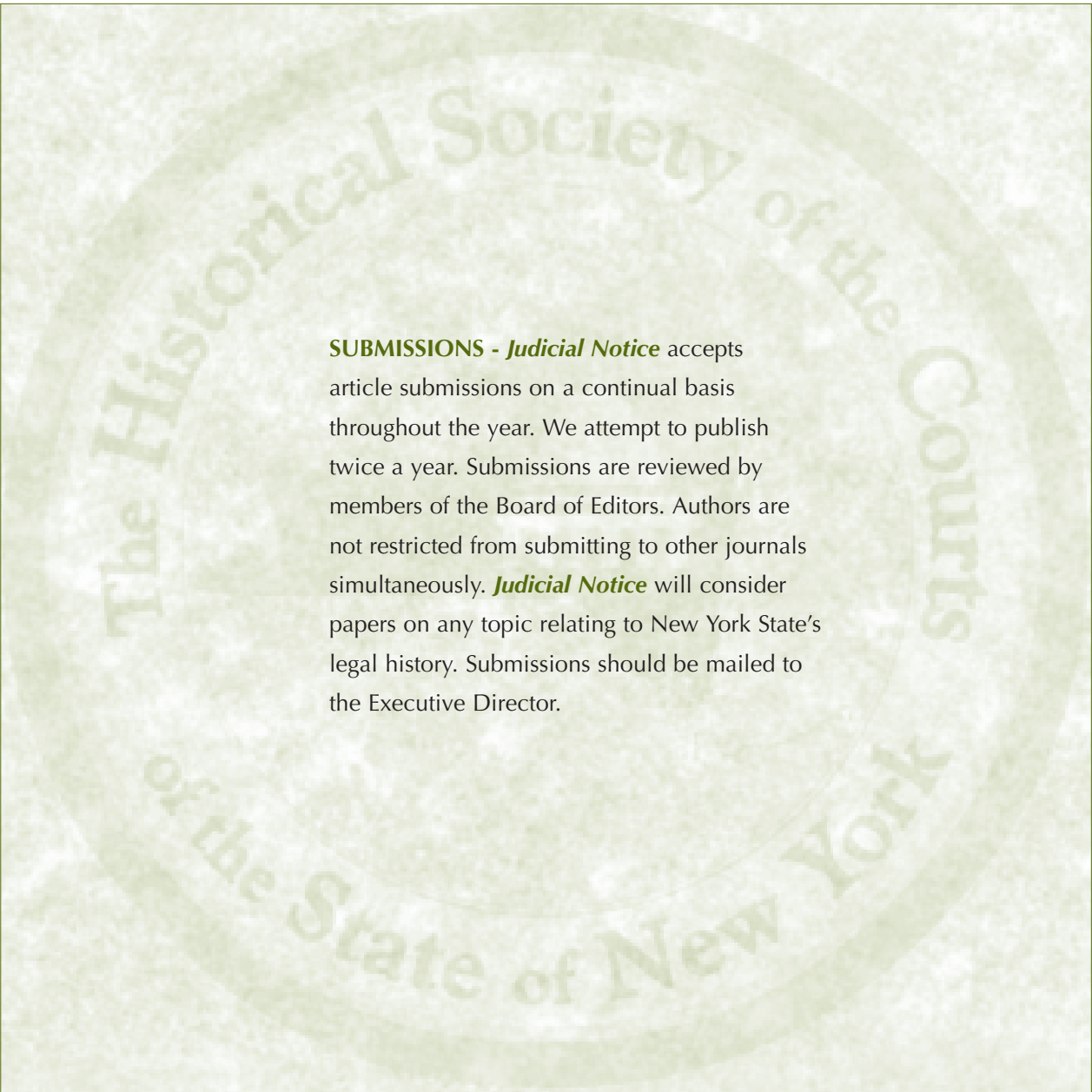
- ☐ **CHECK:** Please make payable to:
 The Historical Society of the Courts of the State of New York

**THE HISTORICAL SOCIETY OF THE COURTS
 OF THE STATE OF NEW YORK
 140 GRAND STREET, SUITE 701
 WHITE PLAINS, NEW YORK 10601**

For gift memberships or more information,
 please call 914-824-5717 or e-mail:

The_Historical_Society@nycourts.gov





SUBMISSIONS - *Judicial Notice* accepts article submissions on a continual basis throughout the year. We attempt to publish twice a year. Submissions are reviewed by members of the Board of Editors. Authors are not restricted from submitting to other journals simultaneously. ***Judicial Notice*** will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.

Courthouse Art



ALBANY COUNTY, ALBANY, THE NEW YORK COURT OF APPEALS

In conjunction with the 1958 renovation of Court of Appeals Hall, artist Eugene F. Savage was commissioned to design and paint a mural in the dome over the rotunda. His work depicts “the romance of the skies” emblematic of the three seasons in which the Court sits: Autumn, Winter and Spring. He also rendered the Great Seal of New York and the seal of the New York Court of Appeals. This image of Lady Justice is part of Savage’s depiction of the Great Seal of New York.

